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May 13, 2005

Ms. Mary Jo Kunkle
Michigan Public Service Commission
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Re: Case No. U-14148

Dear Ms. Kunkle:

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

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

Thank you for your assistance in this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETTLLP

Eric J. Schneidewind

EJS/mrr

cc: ALJ
parties

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

****

In the matter of the application of	)	
CONSUMERS ENERGY COMPANY	)	
for approval of recovery of costs pursuant	)	
to MCL 460.10d(4).	)	Case No. U-14148
______________________________________	)	

INITIAL BRIEF OF ENERGY MICHIGAN, INC.

May 13, 2005

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STATE OF MICHIGAN

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INITIAL BRIEF OF ENERGY MICHIGAN, INC.

I. Introduction and Summary of Position

A. Introduction.

This Initial Brief of Energy Michigan, Inc. ("Energy Michigan") is filed by Varnum Riddering Schmidt & Howlett LLP pursuant to the schedule established by presiding Administrative Law Judge Barbara Stump ("ALJ").

B. Summary of Position.

1. Appropriate Allocation Of Costs.

Energy Michigan supports the proposal of MPSC Staff that the costs authorized for recovery in this proceeding be allocated among classes based upon Consumers' 2003 historical cost of service study filed in Case U-14347. Consumers has stated that it also supports this proposal.

The proposal is reasonable because it allocates costs based upon known sales figures rather than on projected sales. Energy Michigan testimony shows that Consumers' projections of sales by class are demonstrably inaccurate due to overestimation of ROA sales in the commercial and industrial class.

2. Return Of And On Non-Clean Air Act Generation Capital Investment 2000-2003.

This is a complex subject. PA 141 mandates that annual return of and on all utility capital expenditures in excess of depreciation incurred during the PA 141 rate freeze (2000-2003) be accrued and deferred and then recovered in a special 10d(4) proceeding such as the instant case. This provision is not voluntary.

The Consumers U-14148 filing follows this mandate with one glaring exception. Non-Clean Air Act generation costs above depreciation levels for 2000-2003 were not accrued and deferred for recovery in this case. Thus, retail customers are not asked to pay one penny of over $43 million of such costs. Rather, Consumers elected to include $42 million of these costs in stranded cost cases covering the years 2000 through 2003.

Energy Michigan strenuously objects to this approach because it results in recovery of 100% of Consumers above depreciation generation related costs from Retail Access customers from 2000 through 2003 and allows retail customers to pay nothing for the above depreciation cost of the generation facilities which they utilize. The Commission included these 2000-2003 above depreciation generation costs in the calculation of stranded costs in Cases U-14720, U-13380 and U-14098 but did not prohibit ultimate recovery of these costs from retail customers. To the extent that these non-Clean Air Act generation above depreciation costs are recovered from retail customers in this case they would properly be deducted from any stranded cost liability of Choice customers for the years 2000-2003.

In this case Energy Michigan urges the Commission to confirm its decisions in Case U-13808 (November 23, 2004, p. 63) and U-13715 (October 14, 2004, p. 10) that the costs of generation recoverable under PA 141 § 10d(4) and particularly such costs during the 10d(4) period of 2000-2003 are properly recoverable from retail customers. If this course is adopted, $42 million of such costs would be added to Consumers' recovery in this case to pay for non-Clean Air Act generation costs above depreciation.

DETAILED DISCUSSION

II. Treatment Regarding Return Of and On Non-Clean Air Act Generation Capital Investment In Excess Of Depreciation from 2000-2003

A. Background.

Under PA 141 two categories of expenditures are required to be subject to the 10d(4) process of recovery: 1) annual return of and on capital expenditures in excess of depreciation levels incurred during and before the time period described in subsection (2); and 2) expenses incurred as a result of changes in taxes, laws or other state or federal governmental actions incurred by electric utilities during the period described in subsection (2). PA 141 § 10d(4).

Pursuant to this authority, Consumers' Application U-14148 proposes to recover the following expenditures for the period 2000-2005:

1. Non-generation capital expenditures in excess of depreciation for the period 2000 through 2005. Exhibit A-1 referencing WP-DSA-2.

2. Clean Air Act expenditures for the period 2000 through 2005. WP-DSA-10.

3. Other O&M investment for the period 2000 through 2005. Exhibit A-1 referencing WP-DSA-11;

4. MISO costs for the period 2000 through 2005. WP-DSA-12.

5. However: Non-Clean Air Act generation related capital expenditures in excess of depreciation are only recovered for the period 2004 through 2005. WP-DSA-5. Polich Direct, 2 Tr 95 and Exhibit EM-2.

Of all the 10d(4) expenses listed above, only non-Clean Air Act generation expenses above depreciation were recovered for just 2004-2005. All other generation and non-generation 10d(4) expenses are recovered for the period 2000-2005.

Consumers' lead witness Daniel Alfred testified that in his development of costs for ROA customers he did not include any of the generation or MISO related expenses. Alfred Direct Testimony, 2 Tr 39. Therefore, the surcharge for ROA customers was limited by Mr. Alfred to 2000-2005 non-generation (largely distribution) costs above depreciation.

Position of Staff and Attorney General

Both MPSC Staff and the Attorney General also agreed that ROA customers should not be charged for generation related costs. See Exhibits EM-8 and EM-9.

MPSC Precedent

This position that ROA customers should not pay generation costs is supported by Commission case precedent. See for example the most recent Detroit Edison rate case in which the Commission ordered that Detroit Edison be allowed to recover PA 141 § 10d(4) generation expenses including non-Clean Air Act generation expenses, capital in excess of book depreciation amounts through a Regulatory Asset Recovery Surcharge ("RARS") which was not billed to Electric Choice customers. See Order U-13808, November 23, 2004, p. 62-65. See specifically p. 63 noting the agreement of Detroit Edison to the Staff, Energy Michigan and Kroger proposal that the RARS would not be collected from Electric Choice customers.

Also see the Commission's Order in Case U-13720 in which the Commission stated that it would be inappropriate to collect securitization charges related to Clean Air Act equipment from ROA customers because these costs were generation related and had not been shown to be stranded. The Commission concluded that such assets should not be recovered from ROA customers. U-13715, October 14, 2004, p. 10.

B. Consumers' Position Requires ROA Customers To Pay 100% Of 2000-2003 10d(4) Non-Clean Air Act Generation Costs Above Depreciation Generating Costs.

The Consumers position in this case has the effect of requiring ROA customers to pay 100% of Consumers' non-Clean Air Act expenditures for generation equipment above depreciation during the years 2000 though 2003. Polich, 2 Tr 97. Mr. Alfred's workpapers show that Consumers incurred $138.68 million of non-Clean Air Act generation capital costs in excess of depreciation since 2000. Exhibit EM-2. The Company's presentation in this case requests recovery from retail customers of the return of and on those capital costs for years 2004 through 2005 but not for the period 2000 through 2003. Polich Direct, 2 Tr 95.

In fact, Consumers included the year 2000 through 2003 return of and on non-Clean Air Act capital investments for generation in excess of depreciation in the calculation of stranded costs in three cases: Case U-13380, U-13720 and U-14098. Consumers' presentation in these stranded cost cases had the effect of including approximately $42 million of non-Clean Air Act generation related capital investment in the cost charged to ROA customers but none of these costs is included in the U-14148 calculation of costs to be passed on to current retail customers. Thus under the Consumers proposal in this case, ROA customers pay 100% of a Consumers non-Clean Air Act generation expenses above depreciation as a stranded cost and retail customers pay nothing despite the fact that PA 141 § 10d(4) mandates collection of these expenses from retail customers. 2 Tr 95-97.

By charging 100% of the 2000 through 2003 non-Clean Air Act generating expenses above depreciation to ROA customers, Consumers has in effect determined that none of these generation related costs should be charged to retail customers. Polich, Id., p. 96-97. Note also that discovery responses confirm that Consumers included these non-Clean Air Act generation costs in its 2000-2003 stranded cost calculations but not in its request in this case. See Exhibit EM-3.

C. Energy Michigan Position.

1 The Consumers position unfairly subsidizes retail customers.

Energy Michigan Witness Polich demonstrated that Consumers' failure to include recovery from retail customers of $42 million of generation related expenditures in this case has the effect of requiring ROA customers to subsidize bundled service customers. By forcing ROA customers to pay a significant generation related cost for generation which they do not use, Consumers is attempting to create a competitive advantage by artificially reducing bundled rates which compete with Choice rates. 2 Tr 97.

The Consumers approach also penalizes ROA customers because it assigns 100% of the recovery of pre-2004 generation related costs to ROA customers instead of distributing these costs across all customers. Id.

Mr. Polich proposed that the Commission resolve this issue by including $42.086 million of generation related capital expenditures in excess of depreciation for the period 2000 through 2003 in the cost to be recovered from bundled service customers. Polich, 2 Tr 97-98. By including these costs in the cost to be recovered from retail bundled customers in this case the Commission will ensure that all customers pay their fair share of these costs and that revenue from bundled customers to pay such costs is properly considered in the calculation of 2000-2003 stranded costs to be assessed to ROA customers.

As noted above, the discovery responses indicate that MPSC Staff and the Attorney General do not believe that generation related costs should be recovered from ROA customers. See Exhibits EM-8 and 9.

The rebuttal testimony of Consumers Energy also indicates that their lead witness Daniel Alfred read the Case U-13808 final decision. 2 Tr 46. If so, he should have been aware that the recovery of return on and of excess generation capital investment above depreciation was limited exclusively to retail customers in Case U-13808. U-13808, November 23, 2004. See p. 63. Mr. Alfred also conceded that in this U-14148 case only the 2004 and 2005 return on and of excess generation capital costs were proposed for recovery from retail customers whereas the 2000 through 2003 return of and on the same

expenditure from ROA customers had been proposed in the U-13720 and U-14098 stranded cost cases. Energy Michigan Exhibit EM-3.

2. The Consumers position violates PA 141 § 10d(4).

The provisions of PA 141 § 10d(4) are mandatory, not voluntary. Section 10d(4) provides,

> Beginning January 1, 2004, annual return of and on capital expenditures in excess of depreciation levels incurred during and before the time period described in (2)…shall be accrued and deferred for recovery. After notice and hearing the Commission shall determine the amount of reasonable and prudent costs if any to be recovered and the recovery period, which shall not exceed five years… (Emphasis supplied).

Thus, any annual return of and on capital expenditures such as non-Clean Air Act generation costs which are in excess of depreciation levels must be collected through the procedures described in 10d(4). This mandatory requirement applies to such expenditures which were incurred during and before the time period described in PA 141 § 10d(2).

a. Period "during" the 10d(2) timeframe.

Subsection (2) of PA 141 § 10d describes a period starting December 31, 2003 and ending the earlier of December 31, 2013 or January 1, 2006, the date when all the rate freezes described in the section are terminated.

b. Period "before" the 10d(2) timeframe.

The period before the timeframe described in (2) must go back to the date which PA 141 became effective: June 5, 2000.

Thus, any 10d(4) capital expenditures incurred on or after June 5, 2000 through December 31, 2005 must be treated as prescribed by Section 10d(4). In Application U-

14148, Consumers violated this provision by attempting to collect above depreciation non-Clean Air Act generation expenditures for the years 2000 through 2003 only from ROA customers in a separate proceeding and not through 10d(4) in this proceeding. The Commission can correct this oversight by providing 10d(4) treatment for these expenditures for approximately $42 million of these expenditures in this case and then revising the results in stranded cost cases for the years 2000 through 2003 (U-13720, U-13380 and U-14098) to conform with these results.

D. Reply to Consumers Rebuttal of Energy Michigan

Consumers' Witness Daniel Alfred attempted to rebut three specific points raised by Energy Michigan Witness Polich. Following is a response to each of Mr. Alfred's rebuttal arguments:

1. Mr. Alfred claims that Mr. Polich's recommendation would increase the amount of costs recoverable in this case.

Mr. Alfred claims that Witness Polich's position would add the expenses associated with recovery of and on non-Clean Air Act generation costs above depreciation for the years 2000 through 2003 to this case and therefore would increase recoverable costs. 2 Tr 45.

Mr. Alfred is correct. PA 141 § 10d(4) prescribes the method for recovery of costs incurred above depreciation levels. As discussed above, the 10d(4) method of recovery is <u>mandatory</u>, not permissive. Consumers, through discovery, has agreed that it did not include such costs for the years 2000 through 2003 in this case but rather included these costs in various stranded cost cases U-13720, U-13380 and U-14098. See Exhibit EM-3, p. 1-6. While it may be argued that such costs were not being collected at the time of the stranded cost cases, collection through a 10d(4) case was clearly available. Now that this case has been filed, Consumers is required by law and Commission precedent to attempt to recover 10d(4) costs related to non-Clean Air Act costs above depreciation from retail customers as well as open access customers. Such collections could not take place before expiration of the PA 141 rate freeze.

Energy Michigan has cited precedent from Case U-13808 in which the Commission determined that such 10d(4) cases specifically including non-Clean Air Act generation costs above depreciation for the years 2000 going forward were collectible only from retail customers and should not be collectible from Choice customers since Choice customers do not use generation. Moreover, Case U-13715 cited above constitutes another precedent from the Commission that such generation related costs are not collectible from ROA customers. U-13808, November 23, 2004, p. 63; U-13715, October 14, 2004, p. 10. Based upon both of these precedents, Consumers should collect such 10d(4) non-Clean Air generation costs above depreciation from retail customers.

2. Consumers claims that recovery of non-Clean Air Act generation costs above depreciation from retail customers would conflict with prior Commission decisions.

Mr. Alfred claims that Mr. Polich's position is inconsistent with the Commission's prior stranded cost orders in Cases U-13380, U-13720 and U-14098. 2 Tr 46.

The citations to Case U-13808 and U-13715 discussed above demonstrate a clear Commission statement of policy regarding recovery of non-Clean Air Act generation costs above depreciation incurred from during 2000 through 2003 and through 2005. The stranded cost cases referenced by Mr. Alfred, at most, stand for the proposition that the calculation of stranded costs can reflect generation revenue obtained <u>at the time of calculation</u>. Such revenue did not include recovery of non-Clean Air Act generation costs above deprecation. However, these cases do not prevent the Commission from properly billing Consumers' retail customers in a 10d(4) case for such costs. Nor do the stranded cost cases prevent the Commission from attributing the revenue from this case to the recalculation of stranded costs for the years 2000 through 2003 and thus using the revenue collected in this case as a legitimate deduction from any found stranded costs relating to the period 2000-2003.

Energy Michigan has petitioned for rehearing of Cases U-13380 and U-14098, which apply to 2002 and 2003, on this very point. See Energy Michigan Petition for Rehearing, December 27, 2004. It is incontrovertible that the Commission has stated fully and fairly

in Cases U-13808 and U-13715 that ROA customers should not pay generation costs unless such costs have been determined to be stranded. U-13808, November 23, 2004, p. 63. U-13720, October 14, 2004. Consumers can not claim that non-Clean Air Act generation costs above depreciation incurred from 2000 through 2003 are stranded until it has used the available 10d(4) process to collect such costs from retail customers. If this process authorizes recovery, the investment will not be stranded.

3. Consumers' claims that MPSC Case U-13808 is inconsistent with Mr. Polich's recommendations.

Consumers Witness Alfred attempts to rebut Mr. Polich by stating that his "…position is inconsistent with…(ii) with the treatment of the same types of expenditures granted by the Commission in Detroit Edison's Electric Rate Case U-13808 Interim and Final Orders." 2 Tr 46.

Mr. Alfred is absolutely wrong.

In Case U-13808 the Commission adopted treatment of the Edison Regulatory Asset Recovery Surcharge ("RARS") which billed, among other things, generation expense above depreciation incurred after the year 2000 (during the PA 141 rate freeze) only to retail customers and not to Electric Choice customers. The Commission stated, "Initially Detroit Edison suggested that the RARS applied to all customers, bundled and Choice. However, after removal of Choice implementation costs from the RARS Detroit Edison agreed with the Staff, Energy Michigan and Kroger that the surcharge should be applied only to bundled customers." See p. 63. This was the Commission decision which was adopted to collect the RARS. See U-13808, November 23, 2004, p. 62-65. Thus there is clear Commission precedent that non-Clean Air Act generation costs above depreciation should be billed only to retail customers and not to ROA customers. Moreover, this position is reinforced by the Case U-13715 decision discussed above.

III. Sales Levels Used Calculate the Proposed Regulatory Adjustment Asset Recovery Surcharge ("RARS") and To Allocate Costs Between Customer Groups

A. Consumers' Position On The Sales Levels Used To Calculate Charges.

1. Consumers' initial position.

The initial position of Consumers Energy Company ("Consumers") regarding jurisdictional factors and allocation of 10d(4) costs between classes used projected 2006 sales. For example, the figures in Mr. Alfred's Exhibit A-1, lines 3 and 10 used 2006 ROA sales levels projected at 10,403,911 MWh, a 257% increase over the actual 4,000,000 MWh of 2004 ROA cycle billed sales. Polich, 2 Tr 93. Consumers then used these projected ROA sales to reduce the total amount of commercial and industrial sales for 2006. Since most of the costs in this case are allocated by class of customer, Consumers' over estimate of ROA sales (and hence under estimation of the retail commercial and industrial sales) has a significant impact on the amount of generation and distribution costs allocated to the commercial, industrial and residential customer classes.

2. Revised Consumers position.

Several parties to this case, including Staff and Energy Michigan used a different basis than Consumers to allocate costs between customer classes.

The MPSC Staff Witness Alan Droz used the 2003 historical cost of service study contained in the Consumers general rate Case U-14347 filing as a basis for allocating costs between customer classes. Sales data supporting these cost studies was year 2003 historical data. Droz Direct Testimony, 2 Tr 140. As will be more fully described below, Energy Michigan Witness Richard Polich proposed that the Commission use actual historical cycle billed sales for the calculation of the RARS. At a minimum, he proposed that historic cycle billed sales for ROA sales be used because there was no solid basis for Consumers' projected 2006 ROA sales. Polich, 2 Tr 94. The Attorney General did not

calculate specific surcharges to recover costs that he identified as recoverable. Attorney General Direct, 2 Tr 111.

Based upon the testimony of Staff, Consumers stated that it would not contest Staff's proposal to use allocation factors from the Consumers 2003 cost of service study contained in Case U-14347. Alfred Rebuttal, 2 Tr 39.

B. Energy Michigan Position.

Energy Michigan Witness Polich opposed Consumers' initial allocation of costs in this case based on projected 2006 sales. Mr. Polich noted that, for example, Consumers used a projected 2006 ROA sales level of about 10.4 million MWh which was a 257% increase over the actual 4 million Mwh of 2004 ROA cycle billed ROA sales. Mr. Polich claimed that this assumption as well as other Consumers' assumptions were not supported by evidence. Mr. Polich also noted that a Consumers proposal to continue offering below cost industrial rates in their pending U-14347 general rate case Application tended to cast doubt upon the assumptions underlying greatly increased ROA sales such as migration of industrial customers from retail service to Choice service. Polich Direct, 2 Tr 93.

In view of the large potential for error in Consumers' 2006 projections, Mr. Polich recommended that actual historical sales including sales of Retail Open Access service be used as a basis for allocating costs between classes rather than projections which did not appear to be reliable. Polich, Id., 93-94.

Based upon Mr. Polich's testimony, Energy Michigan supports the Staff's proposal to allocate costs among the classes using the Consumers historical 2003 Cost of Service Study which uses actual, rather than projected, sales levels.

It should also be noted that the data on this record and other contested cases demonstrate a huge variation in the projections of ROA sales. The exhibits and workpapers used by Mr. Alfred to allocate 10d(4) costs incorporate the projections of ROA sales criticized by Mr. Polich as escalating 257% over 2004 data. Polich, Id. Also Exhibit EM-6 dated March 23, 2005 shows

that Consumers adjusted its U-14347 projection of ROA growth from 1600 MW to 1,184 MW. See Exhibit EM-6, p. 2 of 3. Note that in a recent summer capacity filing, the Consumers ROA peak capacity for 2005 is now projected at 900 MW. Consumers U-14414 filing, April 15, 2005, Exhibit 2. Thus, Consumers' projections of ROA capacity have dropped from 1600 MW to 900 MW in less than a year. This track record hardly inspires confidence in Consumers' projections.

Sales Recommendation

Based on the foregoing, Energy Michigan recommends that the MPSC base its jurisdictional factors and its allocation of costs between rate classes on the 2003 historical data filed as part of the historical cost of service study contained in Case U-14347. This position satisfies the criteria set forth by Energy Michigan, MPSC Staff and Consumers Energy. The author does not believe this position is inconsistent with the testimony of the Attorney General's witness.

Reconciliation

Mr. Polich also recommended that future RARS surcharges be capped at the total dollar amount to be collected. Once that cap was reached there would be a form of reconciliation which would prevent over collection of costs by means of fixed charges per kWh. Polich, 2 Tr 93.

Energy Michigan therefore urges adoption of Mr. Polich's proposal that the total amount collected be capped at the totals found in this case and reconciled periodically to ensure that sales growth will not result in over collection of costs.

IV. Conclusion and Prayer for Relief

WHEREFORE, Energy Michigan respectfully requests that the Commission:

1. Allocate costs between customer classes based upon the 2003 historic cost of service study contained in U-14347; and

2. Cap the total collected in each category at the amounts determined in this proceeding and reconcile collections on a periodic basis; and

3. Order that retail customers bear the costs of return of and on non-Clean Air Act generation related capital expenditures above depreciation incurred during the period 2000 through 2003.

Respectfully submitted,

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

May 13, 2005 By: ________________________________

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of CONSUMERS ENERGY COMPANY for approval of recovery of costs pursuant to MCL 460.10d(4).	)))))	Case No. U-14148

PROOF OF SERVICE

Monica Robinson, duly sworn, deposes and says that on this 13th day of May, 2005 she served a copy of Energy Michigan, Inc.'s Initial Brief upon the individuals listed on the attached service list by e-mail and regular mail at their last known addresses.

____
Monica Robinson

Subscribed and sworn to before me
this 13th day of May, 2005.

____
Eric J. Schneidewind, Notary Public
Eaton County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: April 24, 2006

<u>U-14148 SERVICE LIST</u>

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