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July 9, 2009

Ms. Mary Jo Kunkle  
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Re: Case No. U-15645

Dear Ms. Kunkle:

Attached for paperless electronic filing the Initial Brief of Energy Michigan, Inc.. Also attached is the original Proof of Service indicating service on counsel.

Thank you for your assistance in this matter.

Very truly yours,

VARNUM

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 authority to increase its rates for )  
the generation and distribution of )  
electricity and for other relief. )  
\_\_\_\_\_ )

Case No. U-15645

ENERGY MICHIGAN, INC. INITIAL BRIEF

July 9, 2009

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Case No. U-15645

ENERGY MICHIGAN, INC. INITIAL BRIEF

I. Introduction and Summary of Position

A. Introduction.

This Initial Brief is filed on behalf of Energy Michigan, Inc. ("Energy Michigan") by Varnum Riddering Schmidt & Howlett LLP pursuant to the schedule adopted by Administrative Law Judge Sharon Feldman ("ALJ"). Failure to discuss or contest any issues or positions presented by a party may not be construed as agreement with such issues or positions.

B. Summary of Position.

1. Cost of Service Issues.

The rates and tariffs filed by Consumers Energy Company ("Consumers" or "Consumers Energy") are based upon a clear violation of 2008 PA 286 ("PA 286") § 11(1) and a potential violation of Section (2) which mandate that cost of service changes required by Sections 11(1) be phased in over five years and not impact certain customer rates by more than 2.5% per year. By its own admission, the tariffs filed by Consumers Energy implement the 50-25-25 cost allocation method mandated in Section 11(1) in one year

rather than in five years and it is impossible to tell if the 2.5% per year overall limit on cost of service rate impact is violated. The Commission should order Consumers Energy to file tariffs which comply with PA 286 § 11(1) and (2).

2. New Skewing Charges For ROA Customers Proposed By Consumers Energy.

Consumers Energy proposes to charge Retail Open Access ("ROA") customers for remaining interclass "skewing" subsidies to residential customers related to distribution service. The Michigan Public Service Commission ("Commission") considered similar proposals by Consumers and Detroit Edison to charge both distribution and generation subsidies to ROA customers and rejected such proposals on at least four occasions.<sup>1</sup> The reasoning used by the Commission to reject proposals assessing skewing costs to ROA customers applies to the Consumers position in this case: ROA customers have finally been brought to cost of service for their distribution rates therefore the Commission rejects any attempt to move ROA rates away from cost of service. Even if the referenced Commission Opinions rejecting ROA skewing charges had not been issued, the clear direction of PA 286 § 11(1) is that utility rates are to move to cost of service, not away from cost of service. In view of Commission precedent and the provisions of PA 286, the Consumers proposal to impose distribution "skewing" charges on ROA customers should be rejected.

3. Sales Tracking / Revenue Decoupling.

The initial Consumers Energy proposal regarding a sales tracker mechanism did not clearly state that recovery of revenue related to lost sales should differentiate between lost generation revenue and lost distribution revenue. Without such a distinction, ROA customers might be forced to pay for lost utility generation sales even though ROA customers do not take generation service from Consumers Energy. The MPSC Staff proposed a sales tracker mechanism that among other things calculates separate sales

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<sup>1</sup> U-14346, December 22, 2005; U-15245, June 10, 2008; U-14399, December 2, 2005; U-15244, December 23, 2008.

tracker adjustments for generation and distribution. Moreover, Staff recommended that ROA customers only be billed for distribution related sales losses. On Rebuttal, Consumers Energy agreed with the Staff position that would limit ROA sales tracker charges to only those revenue charges related associated with changes in distribution sales. If the Commission adopts a "sales tracker" or "decoupling" mechanism, it should calculate separate factors or adjustments for distribution service and generation service. ROA customer sales tracker charges (or credits) should be limited to distribution related adjustments.

#### 4. Extension of Residential Cancellation Periods to 14 Days.

Staff has recommended that the period during which residential customers may cancel an enrollment in Electric Choice be extended from three days to 14 days. Consumers initially recommended a 30 day cancellation period but, according to Staff, responded on Discovery that it would accept the Staff proposal for a 14 day cancellation period. Energy Michigan urges the Commission to limit the period during which a residential customer can cancel an ROA contract to five days. A 14 day cancellation period is both unnecessary and adds significant cost to AESs due to the need to hold open an offer to a customer in a volatile market while the customer potentially shops for a better deal and is free to abandon their contract.

## II. Cost of Service Issues: The Rates Filed By Consumers Do Not Comply With 2008 PA 286 Section 11(1) And May Not Comply With Section 11(2)

### A. The Statutory Cost of Service Requirements.

2008 PA 286 contains two basic requirements regarding cost of service issues.

This subsection applies beginning January 1, 2009. Except as otherwise provided in this subsection, the Commission shall phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years from the effective date of the amendatory act that added this section... The cost of

providing service to each customer class shall be based on the allocation of production related and transmission costs based on using the 50-25-25 method of cost allocation.... Section 11(1) (Emphasis supplied).

The Commission shall ensure that the impact on residential and industrial metal melting rates due to the cost of service requirement in subsection (1) is no more than 2.5% per year. Section 11(2) (Emphasis supplied).

The plain meaning of these statutory provisions is:

1. The cost of providing service shall be calculated using the 50-25-25 method of cost allocation. Section 11(1); and
2. Cost of service rates based on the 50-25-25 allocation method shall be phased in over five years. Section 11(1); and
3. The phase in of requirements 1 and 2 above cannot increase residential or metal melting rates more than 2.5% per year. Section 11(2).

B. The Consumers Position.

In response to Discovery Question 15645-MEC-CE-13 Consumers admitted that the 50-25-25 method of allocation was fully implemented in this case and not phased in over a period of five years. In that same response, Consumers said that in order to determine if the 2.5% limit on rate increases has been violated, a separate cost of service study would have had to be performed using previously selected 25-50-25 method of allocation. See Exhibit EM-2. While Consumers said that such a study had not been prepared, the Company did submit 2007 and 2009 test year cost of service summaries in response to an Order from the ALJ on April 14, 2009. Consumers did not provide tariffs or specific customer rates or rate class revenues that would have been applicable using the 25-50-25 method. Carrier, 7 Tr 286.

On Rebuttal, Consumers Witness Stephen Stubleski appears to disagree with the contention that Consumers did not phase in the change from the 25-50-25 method to the 50-25-25- method over

fives years. However, Mr. Stubleski's statement does not quite rise to the level of outright denial. "The change in cost method may move costs from one rate class to another but this does not change the amount of residential subsidy in existing rates. The amount of subsidy was ultimately determined by the Commission in U-15245 and it is that amount that is subject to the 2.5% increase specified in the act." Stubleski Rebuttal, 7 Tr 721. This statement does not clearly deny that Consumers implemented the 50-25-25 method without a phase in. Rather, Mr. Stubleski appears to discuss residential subsidies determined by the Commission in Case U-15245 claiming that these residential "subsidies" are subject to the 2.5% per year limit while not denying outright that the switch to the 50-25-25 method is also subject to the 2.5% limit and the five year phase in requirement. Mr. Stubleski confuses "phasing out" of a previously determined subsidy from case U-15245 with "phasing in" of new cost of service rates. However, the clear language of 2008 PA 286 directs the five year phasing in of new cost of service rates and the conditions that must be met by the phase in.

In summary, both Mr. Stubleski's Direct Testimony and his Rebuttal Testimony dance around the issue of whether the implementation of the 50-25-25 cost allocation method is subject to both a five year phase in requirement and a 2.5% limit on rate impact as regards residential and industrial metal melting customers.

C. Energy Michigan Position: The Rates And Tariffs Filed By Consumers Energy Violate 2008 PA 286 § 11(1) and 11(2).

Consumers' failure to phase in the 50-25-25 method over five years is a clear violation of PA 286 § 11(1).

Energy Michigan Witness Ron Carrier clearly stated that Consumers Energy implemented the 50-25-25 cost allocation method in this case without a five year phase in. Carrier, 7 Tr 288. Mr. Carrier also clearly stated that without rates and tariffs based on a 25-50-25 allocation it is impossible to tell if the rates filed in this case violate the 2.5% limit regarding allowable impact on residential and metal melting customers as stated in PA 286 § 11(2). Id.



PA 286 § 11(1) in clear and unambiguous terms requires a phase in of cost of service rates over a period of five years. Section 11(1). That section also clearly refers to implementation of the 50-25-25 method of allocation as a "cost of providing service" issue. Finally the requirements of Section 11(2) are made applicable to impacts caused by the "cost of service requirement" stated in Section 11(1).

The cardinal rule of statutory construction and a court's foremost duty is to discern and give effect to the Legislature's intent. Murphy v Michigan Bell Telephone Co, 447 Mich 93, 98; 523 NW2d 310 (1994). All other rules of construction and operation are subservient to this principle. Frank W. Lynch & Co v Flex Technologies, Inc, 463 Mich 578; 624 NW2d 180 (2001). Statutory analyses must begin with the wording of the statute. Robinson v Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000). When statutory language is unambiguous, courts presume that the Legislature intended the meaning clearly expressed and no further judicial construction is required or permitted. Only where statutory language is ambiguous may courts look outside a statute to ascertain the Legislature's intent. DiBenedetto v West Shore Hospital, 461 Mich 394, 402; 605 NW2d 300 (2000). Whenever sections of a statute could be intention or conflict then if possible courts construe an act as a whole to harmonize its provisions, carry out the purpose of the Legislature and give meaning to each provision. Nowell v Titan Ins Co, 466 Mich 478, 483; 648 NW2d 157 (2002). Also, when different statutes address the same subject, courts must endeavor to read them harmoniously. House Speaker v State Administrative Board, 441 Mich 547, 568; 495 NW2d 539 (1993). This is particularly the case when such an inference is in direct conflict with the stated intent of the Legislature to encourage use of ROA service.

The clear and unambiguous meaning of Sections 11(1) and 11(2) is that the implementation of the 50-25-25 method is both subject to the five year phase in requirement and the 2.5% limitation on impact as regards residential and industrial metal melting customers. Both Sections 11(1) and 11(2) apply to cost of service requirements and language in Section 11(1) clearly identifies the switch to the 50-25-25 method as a cost of service issue. The Commission will seldom see statutory language that is less ambiguous than Sections 11(1) and 11(2).

In view of the Consumers violation of Section 11(1) and likely violation of Section 11(2), Mr. Carrier recommended that Consumers Energy be required to file tariffs and rate class revenues that would result from a lawful implementation of PA 286 § 11(1) and (2). Carrier, 7 Tr 289. The Commission should adopt this recommendation.

### III. New ROA Skewing Charges Should Be Rejected

#### A. Consumers Proposal To Charge ROA Customers For Distribution Related Residential Interclass Subsidies.

Consumers Energy Witness Stephen Stubleski testified that if only full service customers pay residential interclass subsidies, it creates a competitive advantage for ROA service. Mr. Stubleski proposed that ROA customers pay the distribution portion of residential interclass subsidies, thus avoiding problems with previous Consumers proposals that ROA customers pay generation and distribution related residential interclass subsidies. Stubleski Direct, 7 Tr 701-02.

Mr. Stubleski proposed to calculate the ROA portion of interclass distribution subsidies by dividing the distribution revenue by total revenue to yield a percent and then applying that percent to the total amount of interclass subsidies for each class yielding the charge that should be added to ROA distribution rates. Id. In response to opposing Testimony from Staff, Energy Michigan and Constellation NewEnergy, Mr. Stubleski claimed in his Rebuttal that the Consumers proposal is fair because it does not assess generation related costs to ROA customers and that the Commission has said that ROA charges should be brought to parity with retail bundled service charges. Stubleski Rebuttal, 7 Tr 726.

#### B. Position of MPSC Staff and Constellation NewEnergy.

MPSC Staff Witness Daniel Blair testified in opposition to Consumers' proposal. Blair, 19 Tr 1372. Constellation NewEnergy Witness David I. Fein also opposed the Consumers proposal. 7 Tr 490-92. Both witnesses cited the fact that the Commission has rejected similar proposals on

several occasions. Mr. Fein also stated that the Consumers proposal would damage the Customer Choice Program. Id.

### C. Energy Michigan Position: ROA Customers Should Not Pay Skewing Charges

There are three reasons to reject the Consumers proposal:

1. The Commission has repeatedly rejected the Consumers and Detroit Edison proposals to impose interclass subsidy charges on ROA customers.

Mr. Carrier testified that on four separate occasions the MPSC has specifically rejected electric utility proposals to require that ROA customers pay interclass "skewing" subsidies applicable to bundled retail customers. Carrier Direct, 7 Tr 283-84. The MPSC has rejected the same proposal in recent Consumers Energy Cases U-14347 and in Case U-15245. In the latter case the Commission stated that "The Commission rejects the proposal to include ROA customers in the payment of the [interclass] subsidy. These customers have, after several years of subsidization themselves, been brought to cost of service based distribution rates. Rates based on the cost to serve each customer class are the Commission's goal and the Commission finds that the ROA distribution charges should remain cost based." Case U-14347, issued December 22, 2005, p. 71; Also see Opinion and Order U-15245, issued June 10, 2008, p. 72.

In the two most recent Detroit Edison rate cases the Commission also rejected imposition of interclass subsidy charges on ROA customers for virtually the same reasons stated above relative to Consumers Energy namely that ROA/Choice distribution rates should remain cost based. Order U-14399, December 2, 2005, p. 33. Also see Order U-15244, December 23, 2008, p. 83-4. Carrier, 7 Tr 283-85

2. ROA customers already subsidize full service customers.

ROA customers currently subsidize all full service customers through securitization bond and securitization tax charges associated with the Palisades nuclear plant and stranded costs associated with all Consumers generating plants. These generating plants serve Consumers retail bundled service customers, not ROA customers. At current levels of ROA service, the securitization bond, tax and stranded cost charges paid by ROA customers are almost \$4.6 million per year. Exhibit EM-1. ROA securitization and stranded cost payments for generation facilities serving only retail full service customers actually offset costs related to the Consumers generating plants thereby lowering the cost for retail bundled customers at no benefit whatsoever to ROA customers. Carrier, 7 Tr 284.

The status quo under which ROA customers pay Consumers' generating costs but not interclass subsidies has not given a competitive benefit to ROA service as alleged by Mr. Stubleski. According to the most recent Michigan Public Service Commission reports, ROA service comprises only about 3%-4% of the total DTE Mwh sales.<sup>2</sup> It is clear that burdening ROA with the additional interclass subsidy charges proposed by DTE would further reduce ROA sales. If failure to pay interclass subsidies gives the ROA program such a competitive advantage, why does ROA service have only 4% of the market?

3. The Consumers proposal is unnecessary.

If the Commission wishes to ensure that ROA customers gradually adjust to competing with cost of service rates, this goal will be accomplished by the gradual implementation of rate deskewing which was commenced for Consumers Energy customers in Case U-15245 and will continue in this case. As so-called skewing charges are reduced for bundled commercial and industrial customers any alleged advantage enjoyed by ROA business customers will be eliminated. Sudden rate changes can be avoided for all customers if "deskewing" is accomplished through a gradual reduction of subsidies as

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<sup>2</sup> January 30, 2009 Annual Report on the Status of Electric Competition in Michigan, MPSC, Appendix 1, Charts 3 and 4.

regards retail bundled customers rather than driving ROA distribution rates away from cost of service while driving bundled customer rates toward cost of service.

#### IV. Revenue Decoupling

##### A. Position of Consumers and MPSC Staff.

###### 1. Consumers Energy Direct Case.

Consumers Energy Witness Stephen Stubleski presented Testimony recommending a form of sales tracker mechanism. This mechanism would calculate changes in Consumers' sales levels and calculate the surcharges necessary to recover revenue losses or gains due to changes in the non-PSCR sales revenue of Consumers. Consumers proposes to recover any losses or refund any gains by means of surcharges which would be calculated and applied by customer class. Mr. Stubleski recommended that these adjustments apply to all customer classes without an exclusion for ROA or recommendation that ROA sales be treated in a different manner. Stubleski Direct, 7 Tr 711.

###### 2. MPSC Staff.

MPSC Staff Witness Robert Ozar recommended a sales tracker that would focus on changes in sales level related to the Energy Optimization Program recently adopted by the Commission in Case U-15805. Ozar Direct, 10 Tr 1569-80 **[is 10 correct?]**. Unlike Mr. Stubleski, Mr. Ozar did not propose adjustments that would track or recognize changes in sales level due to factors other than the Energy Optimization Program adopted by the Commission for Consumers Energy. However, Mr. Ozar did recommend that separate factors be calculated for bundled service customers and for ROA customers. In the case of ROA service Mr. Ozar recommended that the lost revenue surcharge only reflect lost distribution revenue. Ozar Direct, 7 Tr 1570.

3. Consumers Energy Rebuttal.

Consumers Rebuttal Witness Stephen Stubleski testified that MPSC Witness Ozar's proposal did not track lost revenue but only sales losses related to the Energy Optimization Program. Mr. Stubleski opined that Staff's recommended adjustment would not be sufficient. Mr. Stubleski recommended that any lost sales tracker adopted relate to all Consumers Energy sales. Mr. Stubleski also agreed with Staff that Consumers would support a plan that limited ROA customer charges to lost revenues related to reductions in distribution sales. Stubleski Rebuttal, 7 Tr 729-30.

B. Energy Michigan Position.

Energy Michigan opposes implementation of any sales change tracking mechanism which bills ROA customers for generation related costs or sales losses that reflect generation related costs. ROA customers do not use system generation and should not benefit or be hurt by adjustment mechanisms which offset the financial consequences of changes in utility energy sales. With the filing of Rebuttal, it appears that both Consumers Energy and MPSC Staff agree with Energy Michigan that their proposed sales adjustment mechanism should not charge ROA customers for generation related costs.

Should the Commission wish to adopt a sales "tracker" mechanism, that mechanism should charge or credit ROA customers only for sales charges related to distribution costs. There is no record support for any other position.

V. Extension of Three Day Cancellation Period to 14 Days  
For Residential Choice Customers

A. Consumers and Staff Proposal.

Consumers initially proposed to extend from three days to 30 days the period during which residential customers may cancel an enrollment in Electric Choice service. Hirsch, p. 5 [Tr #?].

Staff based the proposal on consistency with the gas customer Choice program which Mr. Hirsch noted includes participation by some of the AESs as gas providers. Id.

Staff Witness Cornfield proposed that the residential cancellation period be no less than 14 calendar days rather than the Consumers 30 day proposal. Cornfield, 10 Tr 1345. On Rebuttal, Consumers supported the Staff position. Hirsch Rebuttal, 7 Tr 550.

#### B. Energy Michigan Position.

Energy Michigan Witness Carrier gave two reasons to oppose the Consumers cancellation extension. First, AESs are required to "lock in" or hedge any long term offers of electric service at a fixed price. This is an expensive commitment which would be largely unnecessary if the commitment were limited to three days instead of the 30 proposed by Staff. Second, the Staff proposal is unfair to AESs because the potential residential customer is given a 30 day fixed price commitment but the customer may use this commitment to shop around, obtain a lower price and then cancel the commitment for service with the AES. This is unfair and imposes unreasonable expense on the AES. Carrier Direct, 7 Tr 285-87.

Mr. Carrier proposed that a five business day commitment be utilized instead of the 30 day commitment proposed by Consumers. Id., 7 Tr 287.

Energy Michigan believes that a five business day cancellation period will allow residential customers to cancel an AES contract that was signed in error. While five business days might not be enough time to allow a residential customer to lock in an AES price, shop for a better price among other AESs, lock into those prices and then cancel the initial AES contract, legitimate mistakes or misgivings can be recognized and corrected within five business days. Fourteen calendar days are not required.

#### VI. Prayer for Relief

WHEREFORE, Energy Michigan requests that the Commission:

- A. Order Consumers Energy to file tariffs which comply with PA 286 § 11(1) and (2) regarding the phase in and allowable annual rate increase impact of the 50-25-25 cost allocation mechanism.
- B. Reject Consumers proposal to charge ROA customers distribution related skewing costs.
- C. Require that any sales "tracker" mechanism adopted separate generation from distribution related charges or credits and subject ROA customers to only those credits or charges related to distribution service.
- D. Reject the MPSC Staff proposal to extend customer cancellation periods from three days to 14 days but rather adopt a five day cancellation period.

Respectfully submitted,

**V**ARNUM

Attorneys for Energy Michigan, Inc.

July 9, 2009

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\_\_\_\_\_ )

Case No. U-15645

PROOF OF SERVICE

Monica Robinson, duly sworn, deposes and says that on this 9th day of July, 2009 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 9th day of July, 2009.

\_\_\_\_\_  
Eric J. Schneidewind, Notary Public  
Eaton County, Michigan  
Acting in Ingham County, Michigan  
My Commission Expires: April 24, 2012.

CASE NO. U-15645 SERVICE LIST

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