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July 10, 2009

Ms. Mary Jo Kunkle  
Michigan Public Service Commission  
6545 Mercantile Way  
P.O. Box 30221  
Lansing, MI 48909

Re: Case No. U-15744

Dear Ms. Kunkle:

Attached for paperless electronic filing is the Exceptions 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, RIDDERING, SCHMIDT & HOWLETTLLP

Eric J. Schneidewind

EJS/mrr

c. ALJ  
Parties

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of )  
CONSUMERS ENERGY COMPANY )  
pursuant to Section 10a(16) of )  
Public Act 286 of 2008 for Revisions )  
to Stranded Cost Recovery Surcharges )  
\_\_\_\_\_ )

Case No. U-15744

EXCEPTION OF ENERGY MICHIGAN, INC.

I. Introduction and Summary of Position

A. Introduction and Background.

Introduction

On June 8, 2009, Administrative Law Judge Mark D. Eyster ("ALJ") issued a Proposal For Decision in this matter (the "PFD"). Judge Eyster provided that Exceptions, if any, may be filed on or before July 10, 2009 and Replies to those Exceptions may be filed on or before July 21, 2009. These Exceptions to the PFD are filed on behalf of Energy Michigan, Inc. ("Energy Michigan") by Varnum. The failure of Energy Michigan to reply to any position or issue contained or discussed in the PFD may not be taken as agreement with that issue or position.

The case in this matter was filed by Consumers Energy Company ("Consumers" or "Consumers Energy") on January 16, 2009 to implement Section 10a(16) of Act 286 of the Public Acts of 2009 ("Act 286") which provides that

The commission shall authorize rates that will ensure that an electric utility that offered retail open access service from 2002 through the effective date of the amendatory act that added this subsection fully recovers its restructuring costs and any associated accrued regulatory assets. This includes, but is not limited to, implementation costs, stranded costs, and costs authorized pursuant to section 10d(4) as it existed prior to the effective date of the amendatory act that added

this subsection that have been authorized for recovery by the commission in orders issued prior to the effective date of the amendatory act that added this subsection. The commission shall approve surcharges that will ensure full recovery of all such costs within 5 years of the effect date of the amendatory act that added this subsection.

The referenced stranded costs were established in Case U-13720/U-14098 by Order of the Michigan Public Service Commission dated November 23, 2004 (the "Stranded Cost Orders"). The Stranded Cost Orders provided that, "Consumers Energy Company is authorized to collect its 2002 and 2003 stranded costs of \$63,214,364 plus interest through the recovery period through use of a stranded cost recovery charge of 1.2 mills/kWh commencing with the Company's next billing period and running until 2002 and 2003 stranded costs are fully collected." Opinion and Order, U-13720/U-14098, p. 14-15, November 23, 2004.

### Background

This case addressed three specific issues:

1. The timing for collection of surcharges necessary to retire the stranded costs established in the Stranded Cost cases;
2. The customers classes to be assessed such surcharges; and
3. The amount of the surcharge to be assessed from each customer class.

The parties actively briefing this case include PSC Staff ("Staff" or "MPSC Staff"), Energy Michigan and Consumers Energy. These parties agreed that the schedule should commence collection of stranded costs as soon as possible with a reconciliation at least three months prior to October 6, 2013, the deadline for collections of all outstanding stranded costs. The parties also agreed with, or at least did not oppose, the Staff position that stranded costs should be collected from ROA customers and those commercial and industrial customers who have the opportunity to use Choice excluding wholesale customers and E-1 customers.

The parties did not reach agreement on the structure of stranded cost charges. Consumers Energy proposed stranded cost recovery charges of \$0.000803/kWh for commercial and industrial customers and \$0.00203/kWh for ROA customers. MPSC Staff advocated charges of \$0.000873/kWh for commercial and industrial customers and \$0.0012/kWh for ROA customers. Energy Michigan initially proposed an equal surcharge for all commercial, industrial and residential customers including ROA customers but then stated that it could support the Staff position.

The PFD issued on June 8 recommended that:

1. Collections and surcharges be reviewed within one year and annually thereafter.
2. That wholesale Rate E-1, residential and street lighting bundled customers be excluded from any surcharge.
3. Consumers be granted authority to implement a bundled service stranded cost charge of \$0.000803/kWh and an ROA stranded cost surcharge of \$0.002003/kWh, essentially the position advocated by Consumers Energy

As will be more fully described below, Energy Michigan Excepts to the surcharge levels proposed by the ALJ.

B. Summary of Energy Michigan Exception: The Consumers Energy Proposed Surcharges To Collect Stranded Costs Should Be Rejected And Those Proposed By MPSC Staff Should Be Adopted.

The surcharges proposed by Consumers to collect stranded costs are more than twice as high for ROA customers (\$0.00203/kWh) as for bundled retail commercial and industrial customers (\$0.000803/kWh). The ROA surcharge proposed by MPSC Staff (\$0.0012/kWh) is higher than those proposed for bundled customers (\$0.000873/kWh) but not significantly higher. Energy Michigan supports the Staff's proposed charges.

Energy Michigan presented Testimony demonstrating that the Stranded Cost Orders issued by the Commission established surcharges of \$0.0012/kWh as the "fair share" of stranded costs to be paid by ROA customers. This position is supported by the fact that the Commission knew, at the time of its Order, that collection of these costs would take a minimum of six years based upon projected levels of ROA sales.<sup>1</sup> The projected length of collection confirms the reluctance of the Commission to adopt higher surcharges that might have resulted in full collection over a shorter period of time.

This sensitivity to the level of stranded cost charges is in marked contrast to the assertions by Consumers Energy that the Commission wanted ROA customers to always pay \$0.0012/kWh more than bundled customers regardless of the level of charge involved. Rather, the fact that stranded cost recovery is spread over six years or longer suggests that the Commission viewed \$0.0012/kWh as a reasonable cap on stranded cost charges or, at the very least, the Commission demonstrated concern that stranded cost charges be held to reasonable levels.

Act 286 contains two provisions which impact the collection of stranded costs. First, there is Section 10a(16) which has been quoted above and mandates collection of stranded costs over a five year period. However, PA 286 also contains Sections 10(2)(a) and (b) which provide that the purpose, among others, of Sections 10a through 10bb is (a) "To ensure that all retail customers in the state of electric power have a choice of electric suppliers" as well as (b) "to allow and encourage the Michigan Public Service Commission to foster competition in this state in the provision of electric supply..."

Nearly doubling the stranded cost surcharge to ROA customers clearly places a significant additional burden on ROA customers and just as clearly does nothing to encourage ROA service.

Also, there is absolutely no evidence that Section 10a(16) was intended to establish or perpetuate any sort of price signal to electric consumers deciding between retail service and ROA service.

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<sup>1</sup> See Order U-13720/U-14098, p. 13-14, footnote 5.

The plain meaning, indeed the only meaning, of Section 10a(16) is that a certain amount of money must be collected within a certain amount of time leaving the Commission complete latitude, consistent with the other purposes of PA 286, on how to accomplish that task.

Compare the Consumers stranded cost surcharges which almost double ROA levels but still charge bundled business customers \$0.000803/kWh with the Staff proposal which maintains the ROA surcharge at current levels and only charges business customers 7/1000 ¢ or \$0.00007 more per kilowatt hour than the Consumers proposal. The Staff proposal fulfills the mandate of Section 10a(16) and avoids an increase to ROA customers while charging business customers a negligible 7/1000 ¢/kWh more than the Consumers proposal. The Consumers proposal is built on assumptions about the purpose of 10a(16) that cannot be found in the meaning of the statute while the MPSC Staff proposal complies with the plain meaning of 10a(16) and the plain meaning of 10(2)(a) and (b). The Staff's proposed surcharges should be adopted instead of the Consumers surcharges.

II. Energy Michigan Exception: The Surcharges Proposed By Consumers Energy  
To Collect Stranded Costs Should Be Rejected And Those  
Proposed By MPSC Staff Should Be Adopted

A. The PFD.

The PFD adopted the Consumers Energy proposal that ROA customers pay increased stranded cost surcharges of \$0.00203 and that bundled commercial and industrial customers excepting wholesale, street lighting and E-1 pay \$0.000803/kWh. The ALJ rejected the Staff proposal, supported by Energy Michigan for surcharges on ROA customers of \$0.0012/kWh and on bundled business customers of \$0.000803/kWh.

The PFD quotes an argument of Consumers Energy and concludes that "In [the] light of the various arguments presented for and against the three proposals [of Staff, Consumers and Energy Michigan] I find Consumers' most persuasive". PFD, p. 7.

The ALJ also noted the Energy Michigan argument that the Consumers position should be rejected because "the charges used to collect outstanding stranded costs should if at all encourage, not discourage, Electric Choice." PFD, p. 7. The ALJ concluded that the Energy Michigan argument might have merit and had "a certain common sense appeal" but he found insufficient evidence to support the argument. *Id.*, p. 7.

**B. Energy Michigan Exception: The Surcharges Proposed By Consumers Energy To Collect Stranded Costs Should Be Rejected And Those Proposed By MPSC Staff Should Be Adopted**

The Consumers position adopted by the ALJ is based on the argument that stranded cost charges paid by ROA customers should always be \$0.0012/kWh greater than the charges paid by bundled commercial and industrial customers as described above. If only bundled business customers and ROA customers pay stranded costs, the Consumers position results in surcharges of \$0.00203/kWh for ROA service and \$0.000803/kWh for bundled commercial and industrial customers. Consumers Brief, p. 11. Consumers advanced three reasons for this position in the portion of their Initial Brief cited by the ALJ::

1. Consumers claimed that a 1.2 mill differential between ROA and bundled customers is consistent with the Commission's conclusions in The Stranded Cost Orders U-13720 and U-14098 dated November 23, 2004 ("Stranded Cost Orders") in designing original surcharges that ROA customers should bear a larger burden in paying stranded costs than non-ROA customers.
2. Consumers said that it is consistent with the determination made by the Commission in designing the initial surcharges that the surcharges paid by ROA customers should incrementally be \$0.001200/kWh higher than non-ROA customers; and
3. Consumers argued that their proposed rate design maintains the current price signals to customers who are determining whether to choose ROA or bundled service. Consumers Brief, p. 10.

These issues are dealt with individually below.

Consumers Arguments 1 & 2: A \$0.0012/kWh charge differential between bundled and ROA service is consistent with the conclusions in the Stranded Cost Orders.

#### MPSC Precedent

The Stranded Cost Orders found that, "The combined stranded cost for 2002 and 2003...should be collected [from ROA customers] through a stranded cost charge of 1.2 mills per kilowatt-hour (kWh). In setting this stranded cost charge the Commission considered Retail Open Access forecasted volumes set forth in the five year forecast presented by Consumers in its 2005 PSCR proceeding in Case U-14274<sup>5</sup>. This stranded cost charge should be applied until Consumers' 2002 and 2003 stranded costs plus interest at 7% are fully collected". Stranded Cost Orders, p. 14.

Footnote 5 referenced the Consumers projected ROA volumes for the years 2005-2009 which total approximately 52.3 million kWh over the five year period. Assuming collection of 1.2 mills/kWh and a 7% interest rate, the MPSC Stranded Cost Orders could not achieve full collection of the \$63 million of stranded costs in less than six years.

The clear meaning of the Stranded Cost Orders is simply that the \$63 million of stranded costs should be collected by means of a fixed charge of \$0.0012/kWh on ROA service which would take a minimum of six years, and perhaps more, to recover the contemplated amounts. The Stranded Cost Orders contain utterly no language regarding the desire of the Commission to establish any specific rate "differential" between retail customers and ROA customers.

The Stranded Cost Order language quoted above is consistent with the Testimony of Energy Michigan Witness Alexander Zakem to the effect that the Stranded Cost Orders merely determined the "fair share" to be paid by ROA customers toward stranded costs,



nothing more, nothing less. 2 Tr 49-50. There is no evidence whatsoever of a desire on the part of the Commission to do anything in the Stranded Cost Orders other than set a charge which, in its view, would collect a fixed amount of money over quite a lengthy timeframe.

One may infer, however, that given the length of the collection period the Commission did not favor stranded cost charges higher than 1.2 mills. Had the Commission desired to emphasize rapid collection of stranded costs or collection in a time certain, it could have adopted significantly higher stranded cost charges or compressed the collection schedule. That it chose to stretch the collection over a *minimum* of six years creates the inference that the 1.2 mill charge was viewed by the Commission as the *maximum* that could be collected from ROA customers without adverse consequences.

The statutory language governing collection of stranded costs in this case (MCL 460.10a(16)) supports this interpretation of the Stranded Cost Orders. That statutory language, like the Stranded Cost Orders, simply mandates collection of unrecovered stranded costs plus interest over a five year timeframe through a surcharge mechanism. Energy Michigan Witness Zakem testified that this language gives the Commission virtually complete latitude regarding the charges by which stranded costs are recovered and only mandates that collection be completed within a five year period. 2 Tr 47.

#### Applicable 2008 PA 286 Provisions Favor the Staff and Energy Michigan Positions

Consumers' argument that Section 10a(16) mandates ROA customers to always be charged 1.2 mills more than bundled customers is inconsistent with provisions of 2008 PA 286 other than Section 10a(16). Specifically, PA 286 § 10(2)(a) provides that the purpose of Sections 10a through 10bb (which include 10a(16)) is "To ensure that all retail customers in this state of electric power have a choice of electric suppliers". Section 10(2)(b) provides that another purpose of Section 10a through 10bb is "To allow and encourage the Michigan Public Service Commission to foster competition in this state in the provision of electric supply..."

The Section 10(2)(a) and (b) statutory purposes of encouraging ROA service and fostering competition are in direct conflict with the Consumers theory that the Legislature meant to always mandate higher charges for ROA service with PA 286 § 10a(16). Absent specific language in 2008 PA 286 regarding the intent of the Commission or Legislature to mandate a 1.2 mill *differential* between ROA service and retail service, no such intent may be inferred.

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.

A harmonious and consistent reading of 2008 PA 286 § 10(2)(a) and (b) and 10a(16) is that the charges used to collect outstanding stranded costs should if at all possible encourage, not discourage, electric choice. The Staff position does not increase ROA stranded cost charges and therefore encourages competitive service.

In summary, the Stranded Cost Orders and 2008 PA 286 § 10(2)(a) and (b) and 10(a)(16) do not support Consumers' argument that the Commission meant to establish some fixed differential of 1.2 mills between ROA service and bundled service regardless of subsequent rate changes. In fact, the language of the Stranded Cost Orders seems to indicate an extreme reluctance on the part of the Commission to exceed a 1.2 mill charge for stranded costs to ROA customers. This reading is supported by the Testimony of Energy Michigan Witness Zakem that the Commission in fact decided to establish a "fair share" of 1.2 mill/kWh to be paid by ROA customers toward stranded cost recovery. 2 Tr 49-50.

Mr. Zakem testified that the situation is one of recovery of past stranded costs, where there is no relationship between the collection of money and any service currently being rendered to customers. 2 Tr 26 This reasoning is consistent with the statutory language of Section 10a(16), which simply mandates recovery of past stranded costs over a five-year time period. As Mr. Zakem said, ". . . in the absence of any basis to allocate costs or to design price signals the remaining concern is only the equitable apportionment of monies to be collected." Id.

Mr. Zakem testified that the Commission could determine that the 1.2 mill/kWh "fair share" for ROA customers should be continued to pay toward stranded costs and that collection of outstanding stranded costs should be accomplished by maintaining that "fair share" for ROA customers and collecting the balance by means of a lesser charge to those unbundled customers who had the opportunity to participate in ROA service. 2 Tr 49-50.

Consumers Argument 3: Should the rate design collecting stranded costs maintain "current price signals"?

Consumers argued that ROA customers must always be charged 1.2 mills more than bundled customers in order to maintain the price signals inherent in such a differential

between the cost of Choice service and the cost of bundled service. Consumers Initial Brief, p. 10. However, Energy Michigan Witness Zakem testified that when the mandate is merely to collect a certain sum of dollars that cannot otherwise be collected, there are no price signals to be maintained since the charges relate to services that are not currently being rendered. 2 Tr 46. In this case, the statutory purpose behind Section 10a(16) is quite clear: It is a mandate to collect a fixed amount of money in a fixed amount of time without any guidance whatsoever regarding rate design or any other purpose involved.

There are many reasons to think that the rate design proposed by Consumers is contrary to the intent of the Legislature. Evidence in this case demonstrates that the level of ROA stranded cost charges will affect ROA enrollment. 2 Tr 20; Consumers Brief, p. 8. Consumers' own Exhibit supports this conclusion. Consumers Exhibit A-1 documents an 87.9% drop in ROA service subsequent to the adoption of the charges in the Stranded Cost Orders.

Also see attached Exhibit 1, a chart from the MPSC 2008 Annual Report on Competition which documents the decline of Electric Choice on the Consumers system commencing with the year 2005 immediately after imposition of the stranded cost surcharges approved in the Stranded Cost Orders.<sup>2</sup>

The intent of the Legislature as stated in Section 10(2)(a) and (b) was to ensure that all retail customers in this state of electric power have a choice of electric suppliers and to allow and encourage the Commission to foster competition. Note that PA 286 § 10(2)(a) and (b) are made directly applicable to Section 10a(16) the stranded cost recovery provision. Thus, if Section 10(2)(a) and (b) and 10a(16) are read together in harmony, the Commission should recover stranded costs consistent with the mandate of Section 102(a) and (b) that such costs be collected in a way that encourages electric choice and fosters competition. The Staff's rate design accomplishes this goal by leaving ROA rates at the "fair share" of \$0.0012/kWh established by the Commission in the Stranded

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<sup>2</sup> Status of Electric Competition in Michigan, Michigan Public Service Commission, January 30, 2008, Chart 4.

Cost Orders and only surcharging bundled customers the minimum amount necessary to achieve full collection of stranded costs over five years.

4. The Staff position complies with statutory mandates

In rejecting the Energy Michigan argument that the specific Staff surcharge proposal would accomplish the legislative mandate to encourage not discourage Electric Choice, the ALJ stated that there was "insufficient, if any, evidence to support [that surmise]." PFD, p. 7-8.

However, the MPSC Staff surcharge proposal preserves a modest premium of about 3/10 of a mill between Choice service and bundled service thereby ensuring that Choice volumes will not be reduced due to implementation of Section 10a(16). The Consumers proposal, on the other hand, almost doubles the stranded cost surcharge assessed to ROA customers.

### Conclusion

There is no evidence whatsoever that the Commission's Stranded Cost Orders or the PA 286 § 10a(16) mandate, encourage, imply, or suggest in any way the maintenance of a 1.2 mill "differential" between ROA stranded cost charges and retail bundled stranded cost charges. Quite the contrary, the history of the Stranded Cost Orders and specific provisions of PA 286 appear to mandate that the existing \$0.0012/kWh charge to ROA service be maintained if at all possible to encourage ROA service and prevent migration to bundled service which would be self-defeating from an overall collection standpoint. The Staff rate design accomplishes this purpose with minimum impact on all rates affected.

It is worth noting that Staff's rate design for bundled customers which does not raise the ROA charge is \$0.000873/kWh which is less than \$0.00007/kWh or seven thousandths of a cent higher than the proposed Consumers rate for bundled customers of \$0.000803. However, the Consumers proposal almost doubles ROA stranded cost charges from \$0.0012 to \$0.00203.

From the perspective of legal interpretation and practical outcome, the Staff proposal to continue collection of \$0.0012/kWh in stranded cost recovery charges from ROA customers should be maintained and the balance should be collected from bundled commercial and industrial customers as proposed by Staff.

### III. Prayer for Relief

WHEREFORE, Energy Michigan respectfully requests that the Commission:

A. Assess a stranded cost recovery surcharge of \$0.0012/kWh to ROA customers and collect the balance as an equal surcharge of \$0.000873/kWh to the categories of commercial and industrial customers as recommended by Staff.

Respectfully submitted,

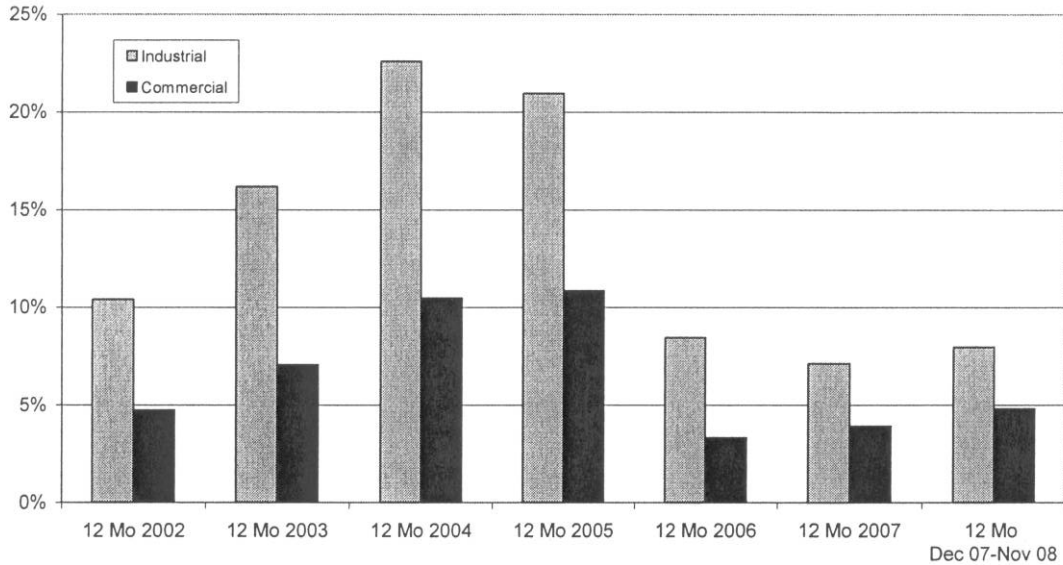
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July 10, 2009

By: \_\_\_\_\_  
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## Chart 4

**Consumers Energy Average Monthly ROA Sales  
 as a Percentage of Total (ROA + Non-ROA Sales), by Customer Class**



**Consumers Energy Average Sales Per Month  
 by Customer Class, ROA & Full Service (MWh)**

	2002	2003	2004	2005	2006	2007	Dec '07 – Nov '08
Residential ROA	0	0	0	0	0	0	0
Residential	1,058,170	1,038,530	1,028,850	1,120,670	1,080,990	1,092,450	1,574,590
Commercial ROA	47,230	70,600	107,250	116,090	35,630	42,640	51,320
Commercial	948,330	930,120	917,680	954,780	1,035,320	1,049,790	1,016,300
Industrial ROA	110,560	166,870	235,540	213,930	85,640	71,020	76,220
Industrial	952,920	865,230	806,750	806,870	928,190	926,660	882,090

Source: Consumers Energy Company data for U.S. Department of Energy, Energy Information Administration, Form EIA-826, 2002-2008.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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CONSUMERS ENERGY COMPANY )  
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to Stranded Cost Recovery Surcharges )  
\_\_\_\_\_ )

Case No. U-15744

PROOF OF SERVICE

Monica Robinson, being first duly sworn, deposes and says that on this 10th day of July, 2009 she served a copy of the Exceptions of Energy Michigan, Inc. upon those individuals by email and regular mail to those listed on the attached Service List.

\_\_\_\_\_  
Monica Robinson

Subscribed and sworn to before me  
this 10th day of July, 2009.

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



SERVICE LIST U-15744

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