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May 28, 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 Reply 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, RIDDERING, SCHMIDT & HOWLETTLLP

Eric J. Schneidewind

EJS/mrr

c. ALJ
Parties

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

REPLY BRIEF OF ENERGY MICHIGAN, INC.

I. Introduction and Statement of Position

A. Introduction

This Reply Brief is filed by Varnum Riddering Schmidt & Howlett LLP on behalf of Energy Michigan, Inc. ("Energy Michigan") in response to the Initial Briefs of the Consumers Energy Company ("Consumers" or "Consumers Energy") and the Michigan Public Service Commission Staff ("MPSC Staff" or "Staff"). Failure to respond to any positions or issues raised by Consumers Energy or MPSC Staff should not be construed as agreement with those issues or positions.

B. Statement of Position

Energy Michigan, Staff and Consumers Energy appear to agree that new charges to recover outstanding amounts of stranded costs should begin as soon as possible, continue through June 2013 and be subject to reconciliation between June 2013 and October 2013.

Energy Michigan and Staff can agree that the surcharges authorized in this proceeding apply to ROA customers and customers who had the opportunity to participate in ROA service. Consumers does not object to this position. Consumers Energy instead proposes charges of

\$0.00203/kWh for ROA customers and \$0.000803/kWh for other customers who had the opportunity to participate in Choice.

Energy Michigan, while preferring an equal surcharge for all stranded costs recovered, can agree with the Staff proposal that ROA customers continue to pay a surcharge of \$0.0012/kWh and the other customers who had the opportunity to participate in ROA service pay a surcharge of \$0.000873/kWh.

II. Reply to Consumers Energy

A. Issues Not In Dispute

1. Timing of charges.

As stated in its Initial Brief, Energy Michigan believes that the parties are in substantial agreement that the surcharges resulting from this case should be started as soon as possible and continue at least through June 2013 with a reconciliation in July 2013. Energy Michigan Brief, p. 6; Consumers Brief, p. 12-13; Staff Brief, p. 2.

2. Customer classes that should pay surcharges.

Staff's proposal that the stranded cost surcharges be collected from ROA customers and customers who at least had the opportunity to utilize ROA service has not drawn opposition from Consumers Energy. Consumers states that it is content to let the Commission decide the issue. Energy Michigan takes the position that the Staff proposal is an acceptable alternative to charging all customers. Consumers Brief, p.13; Energy Michigan Brief, p. 7.

B. Surcharge Differential Between Classes

1. Staff and Energy Michigan position.

Staff proposes that bundled commercial and industrial customers except wholesale, E1 and street lighting pay a surcharge equivalent to \$0.000873/kWh and ROA customers would pay \$0.0012/kWh. Staff Brief, p. 2-3. Energy Michigan prefers that all customers pay an equal surcharge but can accept the position of MPSC Staff on this issue.

2. Consumers position.

Consumers Energy argues that charges paid by ROA customers should always be \$0.00012/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 would result in surcharges of \$0.00203/kWh for ROA service and \$0.000803/kWh for bundled commercial and industrial customers. Consumers Brief, p. 11. Consumers advances three reasons for this position:

- Consumers claims 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.
- 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
- This 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.

- A \$0.0012/kWh charge differential 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 ⁵. 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 calculated stranded cost 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 record contains utterly no language regarding the desire of the Commission to establish any "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 other than set a charge which, in their 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 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 is "To ensure that all retail customers in this state of electric power have a choice of electric suppliers".

Consumers Energy has admitted that higher stranded cost charges discourage ROA customer service and prompt ROA customers to migrate back to bundled service. Consumers Brief, p. 8; Miller, 2 Tr 20. The Section 10(2)(a) statutory purpose of encouraging ROA service is in direct conflict with the Consumers theory that the Legislature meant to always mandate higher charges for ROA service with PA 286 § 10a(16), knowing that higher charges would tend to discourage use of ROA service. 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 10a(16) is that the charges used to collect outstanding stranded costs should if at all possible encourage, not discourage, electric choice. Increased charges to ROA customers will discourage Choice but the Staff and Energy Michigan positions do not.

In summary, the Stranded Cost Orders and 2008 PA 286 § 10(2)(a) 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 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. Therefore, an equal surcharge spread over all of Consumers customers is the most logical, if not the only reasonable, approach." Id.

However, as stated above, Mr. Zakem also 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.

- Should the rate design collecting stranded costs maintain "current price signals"?

Consumers has 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 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 Commission in the Stranded Cost Orders. Consumers itself has testified that significant increases to ROA stranded cost charges would be self-defeating because ROA costs would cause ROA customers to migrate to bundled service. 2 Tr 20; Consumers Brief, p. 8. This migration in turn would reduce the population of ROA customers required to pay even a \$0.0012/kWh mill charge and amounts not collected from ROA customers at \$0.0012/kWh would have to be paid by bundled customers who otherwise would pay a lower rate. *Id.* Consumers own Testimony and Exhibits support 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. That precipitous drop together with Consumers own admission that higher stranded cost charges would cause further ROA migration lead to the conclusion that the Consumers rate design is self-defeating in the extreme. Consumers Brief, p. 8; 2 Tr 20.

The Consumers rate proposal threatens to force existing ROA customers back to bundled service and thereby lose even the modest premium paid by ROA customers compared to bundled customers under the Staff proposal. Consumers' proposed rate design is directly contrary to the intent of the Legislature as stated in Section 10(2)(a) to ensure that all retail customers in this state of electric power have a choice of electric suppliers. Note that PA 286 § 10(2)(a) is made directly applicable to Section 10a(16) the stranded cost recovery provision. Thus, if Section 10(2)(a) and 10a(16) are read together in harmony, the Commission should recover stranded costs per the mandate of Section 10a(16) in a way that encourages the electric choice options. See p. 5-6 above regarding statutory interpretation. 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 Cost Orders and only surcharging bundled customers the minimum amount necessary to achieve full collection of stranded costs over five years.

Conclusion

There is no evidence whatsoever that the Commission's Stranded Cost Orders or PA 286 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 a 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 and certainly would cause a drop off in ROA participation that would be self-defeating from an overall collection standpoint.

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. Reply to Staff

For the reasons stated above, Energy Michigan supports the Staff proposal regarding timing and reconciliation of stranded cost collections, to determination of the classes of customer that should pay stranded cost charges. While Energy Michigan prefers that outstanding stranded cost amounts covered by Section 10a(16) be recovered through an equal surcharge on all customers, it can accept Staff's proposal to collect those charges from ROA customers and bundled commercial and industrial customers who had an opportunity to participate in ROA service.

IV. Prayer for Relief

WHEREFORE, Energy Michigan respectfully requests:

A. Establish a schedule to collect required surcharges commencing as soon as possible and concluding June 2013 with three months time to implement adjustments which will prevent over or under collection of statutorily required amounts; and

B. Assess the surcharges necessary to collect stranded cost within the period described in A above to ROA customers and commercial and industrial customers excluding wholesale, street lighting and E-1 customers; and

C. Assess the required surcharges equally to all the categories described in B above or assess a surcharge of 1.2 mills/kWh to ROA customers and the balance as an equal surcharge to the categories of commercial and industrial customers as recommended by Staff.

Respectfully submitted,

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Attorneys for Energy Michigan, Inc.

May 28, 2009

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STATE OF MICHIGAN

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PROOF OF SERVICE

Monica Robinson, being first duly sworn, deposes and says that on this 28th day of May, 2009 she served a copy of Energy Michigan, Inc.'s Reply Brief 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 28th day of May, 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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