STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of
ENBRIDGE ENERGY, LIMITED PARTNERSHIP against
UPPER PENINSULA POWER COMPANY.
./

Case No. **U-17077**
(e-file/paperless)

THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
MOTION FOR SUMMARY DISPOSITION

Consistent with MCR 2.116(C)(8) and MCR 2.116(C)(10) as well as Rules 323 and 335 of the Rules of Practice and Procedure before the Commission, the Michigan Public Service Commission Staff (Staff) moves for summary disposition of Enbridge Energy, Limited Partnership's (Enbridge) complaint in this case. In support, Staff states the following:

1. In the Upper Peninsula Power Company's (UPPCo) 2009–2010 rate case (Case No. U-15988), the parties entered into a settlement agreement establishing, among other things, a pilot Revenue Decoupling Mechanism (RDM).

2. Consistent with the settlement agreement, UPPCo filed an application in Case No. U-16568 to reconcile its actual electric revenue with the base level established in Case No. U-15988.

3. Before Case No. U-16568 was concluded, the Court of Appeals released an opinion that overturned a Commission order approving an electric RDM in a different contested case. *In re Detroit Edison Co Application*, 296 Mich App 101; 817 NW2d 630 (2012).

4. The parties in Case No. U-16568 addressed the significance of the Court of Appeals' decision in Exceptions and Replies to Exceptions.

5. On August 14, 2012, the Commission issued an order approving UPPCo's application in Case No. U-16568.

6. Although Enbridge was not a party to Case Nos. U-15988 or U-16568, it filed a petition for rehearing in Case No. U-16568.

7. The Commission denied Enbridge's petition on September 25, 2012 because it was not a party to the case.

8. Enbridge's complaint in this case mirrors its petition in Case No. U-16568.

9. Rule 323 of the Commission's Rules of Practice and Procedure governs motions for summary disposition. It allows an Administrative Law Judge to grant summary disposition if "there is no genuine issue of material fact or [if] there has been a failure to state a claim for which relief can be granted." 2012 AC; R 460.15323.

10. Enbridge's complaint should be dismissed on procedural grounds. It is a thinly veiled motion to reconsider the Commission's orders in Case No. U-16568, and the Commission already denied a similar motion because Enbridge was not a party to the case.

11. Enbridge's complaint should also be dismissed on substantive legal grounds because Enbridge has not stated a claim on which relief can be granted. It

would be inconsistent with Michigan precedent to use the decision in *In re Detroit Edison Co Application* as a basis to upset the compromise in Case No. U-15988.

12. Even setting aside Michigan precedent, Enbridge's complaint fails because it has not demonstrated that the Commission approved or directed the use of an RDM for electric providers in violation of *In re Detroit Edison Co Application*.

WHEREFORE, for the reasons set forth above and further explained in Staff's supporting brief, Staff moves for summary disposition of this proceeding in its entirety.

Respectfully Submitted,

MICHIGAN PUBLIC SERVICE COMMISSION STAFF

Spencer A. Sattler (P70524)
Assistant Attorney General
Public Service Division
6520 Mercantile Way, Ste. 1
Lansing, MI 48911
Telephone: (517) 241-6680

Dated: December 11, 2012

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of
ENBRIDGE ENERGY, LIMITED PARTNERSHIP against
UPPER PENINSULA POWER COMPANY.
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Case No. **U-17077**
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BRIEF IN SUPPORT OF STAFF'S
MOTION FOR SUMMARY DISPOSITION

Introduction

The Michigan Public Service Commission Staff (Staff) moves for summary disposition of Enbridge Energy, Limited Partnership's (Enbridge) complaint against the Upper Peninsula Power Company (UPPCo). This case is well suited to be resolved through summary disposition. There are no disputed issues of material facts; the question before this ALJ and the Commission is purely a legal one. Indeed, Enbridge's complaint is a thinly veiled motion to reconsider the Commission's orders in Case No. U-16568 — a motion the Commission has already denied.

Statement of Facts

The facts are undisputed. In UPPCo's 2009–2010 rate case (Case No. U-15988), the parties entered into a settlement agreement establishing, among other things, a pilot Revenue Decoupling Mechanism (RDM). Enbridge chose not to intervene in the case and did not take part in the settlement. Consistent with the settlement agreement, UPPCo filed an application in Case No. U-16568 to reconcile

actual electric revenue with the base level established in Case No. U-15988. Enbridge did not intervene in Case No. U-16568 either.

After the parties had presented evidence in Case No. U-16568 and the Administrative Law Judge had issued a Proposal for Decision, the Court of Appeals released its opinion in *In re Detroit Edison Co Application*, 296 Mich App 101; 817 NW2d 630 (2012) overturning a Commission order approving an electric RDM in a different contested case. The parties in Case No. U-16568 addressed the significance of the Court of Appeals' decision in Exceptions and Replies to Exceptions. Still, Enbridge did not petition to intervene.

Not until after the Commission issued a final order in Case No. U-16568 did Enbridge offer input. Enbridge filed a joint petition for rehearing and a complaint asking the Commission to reconsider its order in light of *In re Detroit Edison Co Application*. The Commission denied the petition, holding that Enbridge lacked standing, as a nonparty, to file a petition for rehearing. The Commission also declined to treat the petition as a complaint: "[I]f processed as a complaint, the resulting Commission order, if favorable to Enbridge, would only operate on a prospective basis, which is inconsistent with the relief sought by Enbridge." *In re Upper Peninsula Power Co Application,* MPSC Case No. U-16568, Order, September 25, 2012, p 2, n2.

Despite the Commission's September order in Case No. U-16568, Enbridge re-filed its complaint in this case seeking essentially the same relief. Enbridge does not claim that the parties miscalculated UPPCo's RDM surcharges in any way.

Rather, Enbridge argues that the Court's opinion *In re Detroit Edison Co Application* renders the surcharges unlawful.

Standard of Review

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A movant must demonstrate that "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). When considering a subrule (C)(8) motion, a court may only consider the pleadings. MCR 2.116(G)(5). "All well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162–163; 483 NW2d 26 (1992) (citation omitted).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich at 120. In a subrule (C)(10) motion, the moving party must show that "there is no genuine issue as to any material facts, and the moving party is entitled to judgment or partial judgment as a matter of law."[1] MCR 2.116(C)(10). Unlike a subrule (C)(8) motion, which is restricted to the pleadings, a subrule (C)(10) motion encompasses "affidavits . . . pleadings, depositions, admissions, and documentary evidence then filed in the action." MCR 2.116(G)(5). "Where the proffered evidence fails to establish a genuine issue

[1] Rule 323 of the Commission's Rules of Practice and Procedure is modeled after both MCR 2.116(C)(8) and MCR 2.116(C)(10). It says, "If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted." 2012 AC; R. 460.17323.

regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120.

Rule 323 of the Commission's Rules of Practice and Procedure is modeled after MCR 2.116(C)(8) and MCR 2.116(C)(10). Rule 323 says, "If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend, to the commission, summary disposition of all or part of the proceeding." 2012 AC; R. 460.17323.

Argument

I. As a nonparty to Case Nos. U-15988 and U-16568, Enbridge's petition for rehearing is not properly before the Commission.

Enbridge's complaint challenges the legality of the Commission's orders in Case Nos. U-15988 and U-16568, but Enbridge relinquished the right to challenge these orders when it failed to intervene. If Enbridge objected to the RDM or its reconciliation, it should have intervened in the cases approving and reconciling the RDM. ABATE took this approach in Case Nos. U-15768 and U-15645 and was successful. Enbridge, on the other hand, waited until the parties had reached a settlement agreement in Case No. U-15988 and collaterally attacked the settlement agreement in Case No. U-16568 and in this proceeding.[2]

[2] Collateral estoppel does not apply to settlement agreements. *American Mutual Liability Ins Co v. Michigan Mutual Liability Co,* 64 Mich App 315, 327; 235 NW2d 769 (1975). Still, in Commission proceedings, "[I]ssues fully decided in earlier PSC proceedings need not be 'completely relitigated' in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable." *In re Consumers Energy*, 291 Mich App 106, 122; 804 NW2d 574 (2010).

A similar situation arose in Case Nos. U-14882, U-15129, and U-15130. The parties in those cases entered into settlement agreements resolving all issues. After the Commission had issued an order approving the settlement agreements, Battle Creek Natural Gas Customers United, Inc. (Battle Creek United) filed a complaint challenging the order's legality even though it had not intervened in the cases or taken part in the settlements. *In re Battle Creek*, Case Nos. U-14882, U-15129, and U-15130, Order Denying Rehearing, August 21, 2007.

The Commission treated Battle Creek United's complaint as a petition for rehearing and found that the petition was not properly before it since Battle Creek United had not intervened in the proceedings:

> The Commission Staff (Staff) determined that the complaint should be treated as a request for rehearing in the cases at issue, and the Commission agrees.
>
> * * *
>
> MCL 24.287(1) provides, "An agency may order a rehearing in a contested case on its own motion or on request of a party.". . . Because Battle Creek United was not a party to the captioned cases, it may not petition for rehearing. Because this finding is dispositive, the Commission need not provide extensive discussion of the other arguments in favor of denying the petition raised by the Staff, SEMCO, and Battle Creek. [Id. at 2–3 (emphasis added).]

Enbridge committed the same error when it filed this complaint. Enbridge's complaint is essentially a petition for rehearing. It is asking the Commission to invalidate the Commission's order in Case No. U-16568 just like it did in the petition for rehearing that it filed in that case. Indeed, its complaint in this case mirrors the petition for rehearing that it filed in Case No. U-16568. The Commission should treat its complaint like a second attempt to petition for

rehearing and reject the complaint for the same reason that it rejected the first petition for rehearing.

II. The Court of Appeals decision in *In re Detroit Edison Co Application* did not invalidate prior settlement agreements establishing RDMs.

Enbridge's petition fails on substantive grounds as well. Enbridge relies on the Court of Appeals' decision in *In re Detroit Edison Co Application* for the proposition that the Commission may not approve "any rates or surcharges related to an RDM," (Enbridge's Compl, ¶ 13), but *In re Detroit Edison Co Application* does not stand for that proposition.

In *In re Detroit Edison Co Application*, the Court reviewed a Commission order approving an RDM that several parties opposed. The Court found that because Act 295 required gas utilities to implement RDMs but only required a report with respect to electric decoupling, the Commission lacked authority to approve RDMs for electric utilities:

> It is our judgment that a plain reading of MCL 460.1097(4) does not empower the PSC to approve or direct the use of an RDM for electric providers. If the Michigan Legislature had wanted to do so, it is plain from the language applicable to gas utilities in MCL 460.1089(6) that it could and would have made its intention clear. [*In re Detroit Edison Co Application*, 817 NW2d at 634.]

The Court did not suggest that RDMs already established through uncontested agreements were invalid or that the Commission was precluded from approving rates or surcharges in accordance with such agreements. If it had invalidated previously approved settlement agreements, it would have broken a long line of cases upholding settlement agreements absent evidence of a mistake,

fraud, duress, or unconscionable conduct. E.g., *Plamondon v Plamondon*, 230 Mich App 54, 56 (1998).

Michigan Courts have even honored agreements between parties resolving disputes about applicable law. *Dodge v Detroit Trust Co*, 300 Mich 575, 614 (1942); accord *Detroit Trust Co v Neubauer*, 325 Mich 319, 342–343 (1949). In *Dodge*, the Supreme Court acknowledged that there are "a host of decisions which recognize that, where a doubt as to what the law is has been settled by a compromise, a subsequent judicial decision by the highest court of the jurisdiction upholding the view adhered to by one of the parties affords no basis for a suit by him to upset the compromise." 300 Mich at 614.

At the time the parties to Case Nos. U-15988 entered into a settlement agreement, there was a dispute about Act 295 and whether it permitted electric utilities to implement RDMs.[3] By agreeing to allow UPPCo to establish an electric RDM in Case No. U-15988, the parties agreed that Act 295 allowed for electric RDMs — if they had not agreed that electric RDMs were legal ratemaking mechanisms, they presumably would not have entered into an agreement creating one. This compromise cannot be upset by a Court of Appeals' decision overturning another utility's electric RDM as Enbridge suggests. See *Dodge*, 300 Mich at 614. For this reason, Enbridge has not stated a claim on which relief can be granted.

[3] As early as July 9, 2009, the Attorney General was arguing that the Commission lacked statutory authority to implement an electric RDM. See *In re Consumers Energy Co Application*, Case No. U-15645, the Attorney General's Initial Br, July 9, 2009, pp 28–29. The parties did not enter into a settlement in Case No. U-15988 until December 11, 2009.

III. The Commission's order in Case No. U-16568 did not violate the Court's order preventing the Commission from approving or directing the use of an RDM for electric providers.

No one disputes that the Court of Appeals prevented the Commission from "approv[ing] or direct[ing] the use of an RDM for electric providers." *In re Detroit Edison Co Application*, 817 NW2d at 634. The Commission explicitly acknowledged this in its final order in this case and was careful to follow the Court's directive. But the Commission also recognized that "this RDM was adopted pursuant to a settlement agreement, which constitutes a binding contract between the signatories to that agreement," and the Commission ensured that this "RDM reconciliation . . . comport[ed] with the language of the settlement agreement." *In re Upper Peninsula Power Co Application*, Case No. U-16568, Order, August 14, 2012, p 4.[4] Enbridge, itself, quotes this segment of the Commission's order. (Enbridge's Comp, ¶ 14.) It must acknowledge, therefore, that the Commission did not approve or direct the use of an RDM for electric providers in this case; the Commission merely ensured that the reconciliation was consistent with the settlement agreement. So even if the Commission accepts the statement of facts in Enbridge's complaint, Staff is still entitled to judgment as a matter of law.

IV. The Commission has subject-matter jurisdiction.

Enbridge misapprehends the source of the Commission's subject-matter jurisdiction in this case. Enbridge appears to acknowledge that the Commission was interpreting the settlement agreement through its order and was not approving

[4] The Commission also approved a surcharge consistent with the settlement agreement to allow UPPCo to collect its under recovery. *Id.* at 4–5.

an electric RDM, but it goes on to argue that parties may not confer subject-matter jurisdiction by consent. (Enbridge's Comp, ¶ 13.) This is beside the point. The Commission did not derive its subject-matter jurisdiction from the parties' consent in the settlement; it has always had jurisdiction to interpret settlement agreements and orders approving agreements that set rates.

Michigan courts have long recognized that the Commission has broad regulatory authority over public utilities. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 118 (2006); accord *Attorney General v Public Service Comm,* 118 Mich App 311, 315–316 (1982); accord *Attorney General v Public Service Comm*, 189 Mich App 138, 145 (1991). This includes "the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities." MCL 460.6; see also MCL 460.557. Consistent with this legislative intent to vest the Commission with broad ratemaking authority, the Commission has subject-matter jurisdiction to interpret and enforce settlement agreements that set rates. This jurisdiction encompasses the settlement agreement in Case No. U-15988 that established the RDM being reconciled in this case.

In re Detroit Edison Co Application is immaterial to the Commission's subject-matter jurisdiction in this case. Enbridge cannot seriously dispute the Commission's authority to interpret and enforce settlement agreements that set rates. And in *In re Detroit Edison Co Application*, the Court said nothing to undermine this authority. Enbridge's argument, therefore, is without merit.

V. Conclusion and Request for Relief

Enbridge's complaint fails on procedural and substantive grounds. Enbridge's complaint should be dismissed on procedural grounds because Enbridge was not a party to the underlying proceedings. Enbridge's complaint should be dismissed on substantive grounds because the facts are undisputed and the law requires dismissal. For all these reasons, Staff moves to dismiss this proceeding in its entirety.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION STAFF

Spencer A. Sattler (P70524)
Assistant Attorney General
Public Service Division
6520 Mercantile Way, Ste. 1
Lansing, MI 48911
Telephone: (517) 241-6680

Dated: December 11, 2012

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Linda Andreas, being first duly sworn, deposes and says that on **December 11, 2012,** she served a true copy of **The Michigan Public Service Commission Staff's Motion for Summary Disposition** and **Brief in Support of Motion for Summary Disposition** upon the following parties **VIA E-MAIL** as follows:

Enbridge Energy, Limited Partnership
Robert A.W. Strong
Clark Hill PLC
151 S. Old Woodward Ave.
Ste. 200
Birmingham, MI 48009
rstrong@clarkhill.com

Upper Peninsula Power Company
Sherri A. Wellman
Miller Canfield Paddock & Stone, PLC
One Michigan Ave., Ste. 900
Lansing, MI 48933
wellmans@millercanfield.com

Administrative Law Judge
Hon. Thomas E. Maier
Administrative Law Judge
Michigan Public Service Comm.
6545 Mercantile Way, Ste. 14
P.O. Box 30221
Lansing, MI 48909
maiert@michigan.gov

Linda A. Andreas

Linda Andreas

Subscribed and sworn to before me
this 11th day of December, 2012.

Pamela A. Pung

Pamela A. Pung, Notary Public
State of Michigan, County of Clinton
Acting in County of Ingham
My Commission Expires: 05/07/2018