



August 11, 1999

MICHIGAN PUBLIC SERVICE
COMMISSION

AUG 11 1999

FILED

Dorothy Wideman
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Via First Class Mail

Re: In the matter, on the Commission's own motion, to consider the
restructuring of the electric utility industry.
Case No. U-11290, et al

Dear Ms. Wideman:

Enclosed for filing regarding the above-captioned matter please find the original
and four copies of the **Reply Brief of Unicorn Energy, Inc.** Also enclosed is the original **Proof
of Service.**

If you have any questions, please contact me. Thank you for your assistance.

Very truly yours,

John M. Dempsey

JMD/mds
Enclosure
cc: Counsel of Record, w/enc.

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C o u n s e l l o r s A t L a w

DETROIT BLOOMFIELD HILLS LANSING GRAND RAPIDS WASHINGTON, D. C.

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MICHIGAN PUBLIC SERVICE
COMMISSION

STATE OF MICHIGAN

AUGUST 1999

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

ED

In the matter, on the Commission's own motion,)
to consider the restructuring of the electric) Case No. U- 11290
utility industry.)
_____)

In the matter of the application of)
THE DETROIT EDISON COMPANY for) Case No. U- 11449
authority to suspend implementation of its power)
supply cost recovery clause and related relief.)
_____)

In the matter of the request of)
CONSUMERS ENERGY COMPANY for) Case No. U-l 1451
approval of a retail open access tariff.)
_____)

In the matter of the request of)
THE DETROIT EDISON COMPANY for) Case No. U-l 1452
approval of a direct access tariff.)
_____)

In the matter of the request of)
CONSUMERS ENERGY COMPANY for) Case No. U-l 1453
authority to suspend its power supply cost)
recovery clause and related relief.)
_____)

In the matter of the request of)
CONSUMERS ENERGY COMPANY and) Case No. U-l 1454
THE DETROIT EDISON COMPANY for)
approval of a true-up mechanism in connection)
with the recovery of stranded costs.)
_____)

In the matter of the request of)
CONSUMERS ENERGY COMPANY for) Case No. U-l 1456
approval of a performance-based ratemaking)
mechanism and changes in standby rates.)
_____)

AUG 11 1999

REPLY BRIEF OF UNICOM ENERGY, INC. FILED

Unicom Energy, Inc., by its counsel, hereby respectfully submits its Reply Brief in this proceeding in accordance with the "Scheduling Order" issued on June 30, 1999, providing for the filing of briefs on July 28 and reply briefs on August 11, 1999.

In response to the Commission's invitation to discuss the implications of the recent Michigan Supreme Court decision invalidating the experimental retail wheeling program in Consumers Power Co v Public Service Commission, Docket Nos. 111482 et al (June 29, 1999), initial briefs were filed by the following parties in addition to Unicom:

Indiana Michigan Power Company
Michigan Electric and Gas Association
North American Natural Resources, et al
Michigan United Conservation Clubs
Attorney General
MIPPA
Energy Michigan
Michigan Petro. Assoc. and Michigan Association of Convenience Stores
ABATE
Detroit Edison Company
Michigan Power Limited Partnership and Ada Cogeneration
Consumers Energy Company
Michigan Independent Power Producers Association

One common theme pervades all of the briefs that respond to the question posed by the Commission.¹ They all are in agreement that the Court's decision is not limited in principle to the experimental program and that, in fact and in law, the case is a precedent that likely invalidates the Commission's ability to order a full-blown open access program. All agree

¹ The MUCC takes no position on the main question posed by the Scheduling Order and instead directs its attention to environmental issues. Certain other parties merely cite MCR 7.208(A) as depriving the Commission of authority to modify its orders without addressing the question presented.

that the **Court** has interpreted the Commission's governing statutes as failing to **provide the** statutory authority for the agency to compel a utility to open up its market. All demonstrate that it is all but certain that the current open access policy will be reversed on appeal.

This is a highly significant development that cannot be overemphasized. The universal agreement that the Commission lacks statutory authority to compel participation by utilities in open access does two things: it makes clear that open access can only proceed under current law if the utilities agree with the policies set forth by the Commission; and it rests everything having to do with open access on the Commission's ratemaking power. Both demonstrate that the current open access program has fatal flaws. In the one case, the Commission's power has to rely on agreement of those who maintain the current monopoly and who can effectively veto policies on introducing competition with which they disagree. And in the other, the Commission's ratemaking power has not been held by either the Courts or the Commission to extend to many competitive areas and actions that are necessary for a truly open marketplace to flourish in Michigan.

Although agreeing that such compulsory regulatory authority does not exist under current law, the briefs of several parties attempt to preserve the current regime by arguing that the Commission can proceed with a "voluntary" program. A voluntary program is, of course, one requested by and concurred in without disagreement by the incumbent utility. The principal proponents of this theory, as might be expected, are Detroit Edison and Consumers **Energy**². As stated in Unicorn's initial brief, and as echoed in numerous of the other briefs, a voluntary program has too many defects to justify robust investment in the steps precedent to achieving a

² They express this view undoubtedly because of the control they maintain under the current system.

truly competitive market. There is no assurance that a utility currently proceeding with open access might not renege on its “voluntary” agreement, whether or not a change in circumstances justifies doing so. The cards are all in the possession of the incumbent utility. If it disagrees with a determination, it simply declines to proceed. This is the very kind of key uncertainty that inhibits investment, as pointed out in Unicorn’s initial brief and as cited by Commissioner Svanda in his remarks to Congress cited therein.

This ability to block important policies is not a theoretical problem. The March 8, 1999 order in these proceedings directed the Staff to work with interested parties to refine a code of conduct that would ensure an effectively functioning market. As demonstrated in the Staffs report, filed June 4, 1999, an agreement has not been **achievable**³. The matter thus currently stands in limbo, with the Commission being in a position of not having the clear legal authority to approve a code that is objected to by the utilities. In the current proceeding reviewing changes to the affiliate transaction guidelines, Case No. U-1 1916, one utility has essentially taken the position that it will comply with these **“requirements”**⁴ so long as they are satisfactory to it. (4 Tr 293). This kind of veto is hardly in the public interest.

Moreover, the Commission’s ratemaking authority is an insufficient basis upon which to construct a permanent open access structure. Although the Commission’s ratemaking authority is not insignificant, it clearly does not encompass a number of necessary elements for a competitive marketplace. There is no meaningful policing of cross-subsidy; there are no rules

³ Unicorn learned of these negotiations and their outcome (and lack of progress) when the report was posted on the Commission **website**.

⁴ Since guidelines only bind the Commission under the Administrative Procedures Act, the enforceability of these affiliated interest protections, so necessary for a truly competitive market to function properly, is open to question. This is a further demonstration of the legal and policy infirmities inherent in the current status quo.

that govern affiliate transactions; and there are no enforcement tools outside of rate cases, which in the current environment are rarely filed by the utilities. The Commission needs to have the ability to approve actions that are not necessarily agreed to by the incumbents. It needs to have the power to enforce those actions. And it needs to have the cloud of uncertainty over its authority dispelled. Only legislative action can produce these results.

The Commission should note an important admission – albeit through their silence – in the briefs of Detroit Edison and Consumers Energy. Both utilities argue that the Commission can lawfully undertake certain specified actions under a “voluntary” **ratemaking-**based regime. But neither brief argues that other competitive steps that must be taken for a viable market to exist are permissible. Absent these other steps, competition will not be preserved.

Energy Michigan seeks to fill the void in the Commission’s authority, proposing that a voluntary program can be converted into a mandatory one by treating the utility’s participation as if it were under a consent decree. This is a creative but, at best, untested theory. The cases Energy Michigan cites are not necessarily on all fours with the situation in this proceeding. Also, it is black letter law that jurisdiction cannot be voluntarily conferred and that the Commission cannot create its own authority. In other words, a commitment by Detroit Edison or Consumers Energy that it will proceed with an aspect of an order on open access that is beyond the Commission’s jurisdiction and authority cannot insulate that order from reversal on appeal. It is notable that Indiana Michigan Power Company submits that a voluntary program is too questionable since the determination as to what is voluntary will inevitably end up in the courts.

Several parties state that the Commission's authority to act further in this docket to make any substantive changes is questionable since the matter is on appeal, citing MCR 7.208(A). Regardless, this does not preclude the Commission from issuing an order indicating it believes legislation is necessary and appropriate.

It is, therefore, abundantly clear that the Commission should seek legislative authorization to proceed any **further** with open access rather than attempting to implement a voluntary program under statutes that date from another era and do not provide the requisite authority. Relying on a voluntary program is poor public policy. It will not engender the level of investment and competitive entry as will a program based on settled authority. The Commission can use the extensive work that has occurred post - March 8, 1999 in the various implementation dockets and other **fora** (e.g., the code of conduct discussions) to help formulate input to the Legislature. This input can provide invaluable insights on the kind of legislation that will foster a competitive market and promote Commission actions that are not legally suspect.

Unicorn stands ready to work with the Commission on appropriate legislation that will truly produce a competitive energy market in Michigan.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

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