

433 ✓

HOWARD & HOWARD

ATTORNEYS
Established 1869

The Pinehurst Office Center
Suite 101
1400 North Woodward Avenue
Bloomfield Hills, MI 48304-2856

Telephone (248) 645-1483
Fax (248) 645-1568

The Michigan Building
Suite 200
100 Portage street
Kalamazoo, MI 49007-4802

Telephone (616) 382-1483
Fax (616) 382-1568

The Phoenix Building
Suite 500
222 Washington Square, North
Lansing, MI 48933-1817

Telephone (517) 485-1483
Fax (517) 485-1568

The Creve Coeur Building
Suite 200
321 Liberty Street
Peoria, IL 61602-1403

Telephone (309) 672-1483
Fax (309) 672-1568

**MICHIGAN PUBLIC SERVICE
COMMISSION**

Michael J. Brown

Lansing Office

AUG 11 1999

(517) 377-0609

August 11, 1999

FILED

Ms. Dorothy Wideman

Executive Secretary

Michigan Public Service Commission

6545 Mercantile Way

Lansing, Michigan 48909

Via Hand Delivery

**RE: In the Matter, on the Commission's Own Motion, to Consider the
Restructuring of the Electric Utility Industry, et al
MPSC Case Nos. U-11290; U-11449; U-11451; U-11452; U-11453 and U-11454**

Dear Ms. Wideman:

Enclosed for filing in the above matter are an original and 16 copies of **Midland Cogeneration Venture Limited Partnership Response Brief**.

Also attached is the original Proof of Service with Service List. Please contact me if you have any questions. Thank you for your assistance.

Very truly yours,

HOWARD & HOWARD



Michael J. Brown

Enclosures

cc: Service List

g:\m\midland\cogener\cor\wideman2.wpd

AUG 11 1999

STATE OF MICHIGAN

FILED

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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 authority) Case No. U-1 1449
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-1 1451
approval of a retail open access tariff.)

In the matter of the request of)
THE DETROIT EDISON COMPANY for approval) Case No. U-1 1452
of a direct access tariff.)

In the matter of the request of)
CONSUMERS ENERGY COMPANY for authority) Case No. U-1 1453
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-1 1454
THE DETROIT EDISON COMPANY for)
approval of a true-up mechanism in connection)
with the recovery of stranded costs.)

MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP'S RESPONSE BRIEF

Midland Cogeneration Venture Limited Partnership ("MCV"), through its attorneys
Howard & Howard, submits this Response Brief pursuant to the Michigan Public Service

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

Commission's (the "Commission") June 30, 1999 Scheduling Order in the above dockets. Although MCV will only be responding to a few of the positions taken by some of the interested parties in these dockets, its silence or lack of comment on other matters raised by those and other parties should not be interpreted as agreement with comments not addressed here.

MCV'S RESPONSE TO ATTORNEY GENERAL
JENNIFER M. GRANHOLM

In her brief, Attorney General Jennifer M. Granholm ("the Attorney General") argues in Section V "that the MPSC lacks subject matter jurisdiction to approve recovery of so-called stranded costs," (Attorney General Initial Brief, p 15) The Attorney General states without support, "Since the Supreme Court has now ruled that the MPSC cannot force CECo and DECo to give up sales by allowing wheeling or direct access service for third-party suppliers or their customers, the Supreme Court's Order means that the MPSC lacks jurisdiction to allow recovery of so-called stranded costs. (Attorney General Initial Brief, p 15) MCV submits the Attorney General is wrong and has taken too narrow a focus in defining "stranded costs" for purposes of determining the MPSC's jurisdiction. The Attorney General's Brief apparently defines "stranded costs" as "costs incurred during the regulated era that will be above market prices and those cost (sic) necessary to facilitate the transition to competitive markets." The Attorney General's brief references the Commission's June 5, 1997, Opinion and Order, at page 7 for this definition. Using this definition, the Attorney General's brief fails to account for the "stranded costs" associated with PURPA mandated purchases from Qualifying Facilities ("QFs"). Under PURPA, 16 USC § 824 – 824K, and specifically §210(b), utilities must purchase electricity from a QF at the utilities "avoided cost." 18 CFR § 292.304(a)(2). The MPSC, as the state regulatory authority, is required to implement PURPA pursuant to the rules and regulations promulgated by FERC. See, 16 USC § 824a-3(f). Furthermore, once the MPSC has established the "avoided

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

cost” rate to be paid to a QF, and the State has approved an avoided cost rate in the QF contract with the utility, the State cannot later review the contract to reconsider avoided costs. *Smith Cogeneration Management v Corporation Commission*, 863 P2d 1227 1240 (OIUA. 1993).

The United States District Court for the Western District of Michigan recently held, in an opinion by Judge Gordon J. Quist issued on July 7, 1999 in consolidated Cases Nos. 5: 98-CV-21 through 5:98-CV-24, that the MPSC must set rates which ensure full recovery of PURPA approved contracts. Thus, contrary to the Attorney General’s assertion, the MPSC not only has subject matter jurisdiction to approve recovery of the “stranded costs” associated with approved PURPA contracts, it has a duty under federal law to provide for that recovery. Thus, in any scenario where the MPSC must set rates for utilities with approved PURPA avoided cost rates, the MPSC must allow utilities to recover those rates in accordance with PURPA even if those rates are called “stranded costs”. As a result, the Attorney General’s assertion that the MPSC cannot allow recovery of “stranded costs” simply because the MPSC lacks statutory jurisdiction to mandate retail wheeling is in error. Under federal law, the MPSC must allow recovery of some “stranded costs” regardless of the reason or method by which those costs became “stranded”.

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

MCV’S RESPONSE TO ENERGY MICHIGAN

After briefly commenting on the impact of the Michigan Supreme Court’s June 29, 1999 Opinion and Order in MPSC Case Nos. U-1 143 and U-1 176, Energy Michigan uses the bulk of its comments to assert that the Commission orders in these dockets “constitute a series of consent orders which are binding upon the Commission, Detroit Edison and Consumers Energy.” (Energy Michigan Initial Brief, p 5) Energy Michigan then characterizes the activities of

Consumers Energy and Detroit Edison over the past two years as “voluntary” compliance, or perhaps complicity, with the MPSC in developing and implementing those orders. Yet, throughout its discussion of the issues, Energy Michigan acknowledges that Consumers Energy and Detroit Edison made filings and took other actions in response to Commission orders and directives. MCV is troubled by the notion Energy Michigan is suggesting, *i.e.* that in complying with an order from a regulatory agency one has “consented” to those orders or directives. Energy Michigan’s notion of “consent” is particularly troubling in light of the many appeals and challenges put forth by Detroit Edison and Consumers Energy in these several cases while also attempting to implement the orders. Energy Michigan’s position appears to be that one must totally disregard and ignore orders of a regulatory agency, even while challenging them, otherwise one may be deemed to have “consented” to those orders. MCV believes Energy Michigan’s position is short-sided and legally incorrect. Certainly it would be bad public policy to require regulated utilities or any party to totally ignore and not implement orders they disagree with or sought to challenge simply to avoid any appearance of “consenting” to those orders. For these reasons, MCV submits Energy Michigan’s comments in the nature of treating the orders in these cases as “consent orders” should be disregarded by the Commission.

**MCV’S RESPONSE TO BRIEFS OF MICHIGAN INDEPENDENT POWER
PRODUCERS ASSOCIATION AND MICHIGAN PETROLEUM
ASSOCIATION/MICHIGAN ASSOCIATION OF CONVENIENT STORES**

MCV concurs with the statements made in separate briefs filed by interested parties Michigan Independent Power Producers Association (“MIPPA”) and the consolidated brief of the Michigan Petroleum Association/Michigan Association of Convenient Stores (“MPA/MACS”). The MIPPA brief and the MPA/MACS briefs both conclude that the July 7, 1999 Opinion and Order from United States District Court Judge Gordon J. Quist in consolidated

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

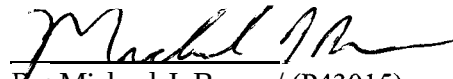
Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

Case Nos. 5:98-CV-21 through 5:98-CV-24 (USDC WDMI) is pertinent to any action the Commission may take in implementing retail wheeling or "open access," whether mandatory or voluntary. The MIPPA and MPA/MACS briefs cogently discuss Judge Quist's findings and the clear holding of the federal court as it relates to limitations on the MPSC's authority due to preemption of rates under PURPA and the Supremacy Clause of the United States Constitution. MCV concurs with the comments made in those briefs with respect to the preemption arguments and the requirements of PURPA on this Commission.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.
Attorneys for Midland Cogeneration Venture
Limited Partnership

Dated: August 11, 1999


By: Michael J. Brown/ (P43015)

Business Address:

The Phoenix Building, Suite 500
222 N. Washington Square
Lansing, MI 48933-1817
(5 17) 377-0609

Gary B. Pasek (P54099)
Vice President, General Counsel and Secretary
Midland Cogeneration Venture Limited Partnership
100 Progress Place
Midland, MI 48640
(517) 839-6716

g:\m\midland\cogener\misc\pld\resbrief.doc

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage street
Kalamazoo, MI 49007-4802
(616) 382-1483

suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Budding
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion,)
to consider the restructuring of the electric)
utility industry.) Case No. U-I 1290
)
)

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

In the matter of the request of)
CONSUMERS ENERGY COMPANY for) Case No. U- 1145 1
approval of a retail open access tariff.)
)
)

In the matter of the request of)
THE DETROIT EDISON COMPANY for approval) Case No. U- 11452
of a direct access tariff.)
)
)

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

In the matter of the request of)
CONSUMERS ENERGY COMPANY and)
THE DETROIT EDISON COMPANY for) Case No. U- 11454
approval of a true-up mechanism in connection)
with the recovery of stranded costs.)
)
)

PROOF OF SERVICE

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

433

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

The undersigned, being duly sworn, deposes and says that on **August 11, 1999**, she served:

Midland Cogeneration Venture Limited Partnership's Response Brief
upon the attached Service List via first class mail to the individuals at the addresses indicated.

Carolyn Ann Priest
Carolyn Ann Priest

Subscribed and sworn to before me on the above date.

Valerie J. Nonn
Valerie J. Nonn, Notary Public
Clinton County, State of Michigan
My Commission Expires: 0 1/1 6/2003

g:\m\midland\cogener\pld\ps081199.wpd

MICHIGAN PUBLIC SERVICE
COMMISSION

AUG 11 1999

FILED

HOWARD & HOWARD
ATTORNEYS

suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Budding
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square. North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

SERVICE LIST

MPSC Case Nos. U-11290; U-11449; U-11451; U-11452; U-11453 and U-11454

Administrative Law Judges

Honorable Daniel E. Nickerson, Jr.
Honorable George Schankler
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

Michigan Electric and Gas Association

George M. Can-, Esq.
Michigan Electric and Gas Association
636 Michigan National Tower
Lansing, MI 48933

Attys for American Electric Power Company

James A. Ault, Esq.
Loomis, Ewert, Parsley, Davis & Gotting,
P.C.
232 South Capitol Avenue
Suite 1000
Lansing, MI 48933

Marc E. Lewis, Esq.
One Summit Square
P.O. Box 60
Fort Wayne, IN 46801

Attys for Michigan Electric Cooperative Association, Fruit Belt Electric Cooperative and Edison Sault Electric Company

Albert Ernst, Esq.
Dykema Gossett PLLC
800 Michigan National Tower
Lansing, MI 48933-1707

Attys for Attorney General

Donald E. Erickson, Esq.
Robert L. Mol, Esq.
Assistant Attorneys General
Special Litigation Division
630 G. Mennen Williams Building
P.O. Box 30212
Lansing, MI 48909

Attorney for The Detroit Edison Company

Thomas A. Hughes, Esq.
Jon P. Christinidis, Esq.
Raymond O. Sturdy, Esq.
Bruce R. Maters, Esq.
The Detroit Edison Company
2000 Second Avenue
Room 688 WCB
Detroit, MI 48226

Mr. William K. Fahey, Esq.
Stephen J. Rhodes, Esq.
Foster, Swift, Collins & Smith, P.C.
3 13 South Washington Square
Lansing, MI 48933-2193

Attys for Midland Cogeneration Venture, L.P.

Stephen O. Schultz, Esq.
Mark J. Burzych, Esq.
Foster, Swift, Collins & Smith, P.C.
3 13 South Washington Square
Lansing, MI 48933

Gary Pasek
General Counsel
Midland Cogeneration Venture
100 Progress Place
Midland, MI 48640

Attys for Energy Michigan and Nordic Power

Eric J. Schneidewind, Esq.
Varnum, Riddering, Schmidt & Howlett,
LLP
The Victor Center
201 North Washington Square
Suite 8 10
Lansing, MI 48933

HOWARD & HOWARD ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

Attys for Residential Ratepayer Consortium

Diane R. Royal, Esq.
David L. Shaltz, Esq.
Shaltz & Royal
3303 West Saginaw
Suite C-1
Lansing, MI 489 17

Atty for Consumers Energy Company

Jon R. Robinson, Esq.
H. Richard Chambers, Esq.
Kelly M. Hall, Esq.
2 12 West Michigan Avenue
Jackson, MI 49201

Attys for The Dow Chemical Company, DowElanco, The Michigan Power Limited Partnership, S.D. Warren Co., et al

David E. S. Marvin, Esq.
Michael S. Ashton, Esq.
Fraser, Trebilcock, Davis & Foster, PC
1000 Michigan National Tower
Lansing, MI 48933

Attys for the Michigan Independent Power Producers Association

Ronald E. Russell, Esq.
H. Richard Winters, Esq.
Russell & Russell, P.C.
525 Okemos Street
Suite B
Mason, MI 48854

Attys for Michigan Community Action Agency Association

Clifford A. Knaggs, Esq.
Brian W. Coyer, Esq.
Christopher S. Ammerman, Esq.
Knaggs, Harter, King & Brake, P.C.
1375 South Washington Avenue
Suite 300
Lansing, MI 489 10

Attys for Tenneco Packaging, Inc.

Mark J. McGuire, Esq.
Ronald N. Carroll, Esq.
Jenner & Block
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, DC 20005

Attys for Alpena Power Company

James D. Florip, Esq.
Gillard, Bauer, Mazrum, Florip
Smigelski and Gulden
109 East Chisholm Street
Alpena, MI 49707

Atty for Wolverine Power Supply Cooperative, Inc.

Stephen Videto
10 125 West Watergate Road
P.O. Box 229
Cadillac, MI 49601

Attys for Michigan Consolidated Gas Company

Dennis O'Connell, Esq.
David C. Champion, Esq.
Michigan Consolidated Gas
500 Griswold Street
Detroit, MI 48226-370 1

Hallwood Commercial Real Estate, Inc.

Randy Doran
Regional Manager
Three Parkland Boulevard
Suite 900 West
Dearborn, MI 48 126

Atty for Charter Township of Ypsilanti, Michigan Association of School Boards and Michigan School Business Officials

Robert C. Evans, Esq.
4 12 1 Okemos Road
Suite 23
Okemos, MI 48864

HOWARD & HOWARD
ATTORNEYS

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) MS-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, Nonh
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

**Attys for Competitive Utility Tariffs Inc.
First Power, L.L.C. and Regents of
University of Michigan**

Butzel Long
118 West Ottawa Street
Lansing, MI 48933

Richard F. VanderVeen III, Esq.
Co-Counsel
Miller, Johnson, Snell & Cumiskey, P.L.C.
Calder Plaza Building
250 Monroe Avenue, NW
Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306

Attorneys for Shell Western E & P Inc.

Glen A. Schmiede, Esq.
Webb A. Smith, Esq.
Foster, Swift, Collins & Smith PC
3 13 South Washington Square
Lansing, MI 48933

**Attys for Northern States Power Co-
Wisconsin and Wisconsin Public Service
Corporation**

Harvey J. Messing, Esq.
Sherri A. Wellman, Esq.
Loomis, Ewert, Parsley, Davis & Gotting,
P.C.
232 South Capitol Avenue
Suite 1000
Lansing, MI 48933

**Attys for Michigan Public Power Agency,
Michigan South Central Power Agency,
the City of Detroit and its Public Lighting
Department**

Peter H. Ellsworth, Esq.
Kester K. So, Esq.
Edward R. Becker, Esq.
Dickinson, Wright, Moon
Van Dusen & Freeman
2 15 South Washington Square
Suite 200
Lansing, MI 48933

**Attys for Michigan Public Service
Commission**

Hem-y J. Boynton, Esq.
Tonatzin M. Alfaro Garcia, Esq.
Larry G. Watterworth, Esq.
Assistant Attorneys General
Michigan Public Service Commission
Public Service Division
6545 Mercantile Way
Suite 15
Lansing, MI 48911

**Attys for Shell Energy Services Company
L.L.C.**

Stephen L. Teichler, Esq.
Duane, Morris & Heckscher LLP
1667 K Street, N.W.
Suite 700
Washington, DC 20006

Kathy T. Puckett, Esq.
Senior Counsel
Shell Oil Company
200 North Dairy Ashford
Houston, TX 77079

Andrew N. Chau, Esq.
Shell Energy Services Company, L.L.C.
1221 Lamar
Suite 1000
Houston, TX 77010

Dr. Donald W. Johns
President
Enstar Energy Group, Inc.
525 Okemos Street
Suite B
Mason, MI 48854

Ms. Janine Migden
Director of Governmental Affairs
Enron Corporation
400 Metro Plaza
Dublin, OH 430 17

**HOWARD & HOWARD
ATTORNEYS**

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Street
Peoria, IL 61602-1403
(309) 672-1483

Ms. Alice Hurd
6677 Summit View
Holland, MI 49423

Mr. Peter Kuhnmuench
Vice President, Governmental Affairs
Michigan Retailers Association
221 North Pine
Lansing, MI 48933

**HOWARD & HOWARD
ATTORNEYS**

Suite 101
The Pinehurst Office Center
1400 N. Woodward Avenue
Bloomfield Hills, MI 48304-2856
(248) 645-1483

Suite 200
The Michigan Building
100 Portage Street
Kalamazoo, MI 49007-4802
(616) 382-1483

Suite 500
The Phoenix Building
222 Washington Square, North
Lansing, MI 48933-1817
(517) 485-1483

Suite 200
The Creve Coeur Building
321 Liberty Sweet
Peoria, IL 61602-1403
(309) 672-1483