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August 11, 1999

Hand Delivered

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909

**MICHIGAN PUBLIC SERVICE
COMMISSION**

AUG 11 1999

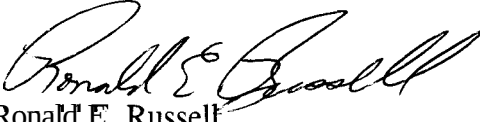
FILED

Re: **In the matter, on the Commission's own motion)
 to consider the restructuring of the electric) U-11290 et. al.
 utility industry.)**

Dear Ms. Wideman:

Enclosed please find the original Reply Brief and four copies along with the Proof of Service for the above caption on behalf of the Michigan Independent Power Producers Association.

Very truly yours,


Ronald E. Russell
Russell & Russell, P.C.
Attorney for Michigan Independent
Power Producers Association

Enclosure(s)
RER/hjl

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION; 10 11 1999

* * * *

FILED

In the matter, on the Commission's own motion
to consider the restructuring of the electric
utility industry.

Case No. U- 11290

In the matter of the application of
THE DETROIT EDISON COMPANY for authority
to suspend implementation of its power supply cost
recovery clause and related relief.

Case No. U-1 1449

In the matter of the request of
CONSUMERS ENERGY COMPANY for
approval of a retail open access tariff.

Case No. U- 1145 1

In the matter of the request of
THE DETROIT EDISON COMPANY for approval
of a direct access tariff.

Case No. U- 11452

In the matter of the request of
CONSUMERS ENERGY COMPANY for authority
to suspend its power supply cost recovery clause
and related relief.

Case No. U-1 1453

In the matter of the request of
CONSUMERS ENERGY COMPANY and
THE DETROIT EDISON COMPANY for
approval of a true-up mechanism in connection
with the recovery of stranded costs.

Case No. U- 11454

In the matter of the request of
CONSUMERS ENERGY COMPANY for
approval of a performance-based ratemaking
mechanism and changes in standby rates.

Case No. U-1 1456

PROOF OF SERVICE

Ronald E. Russell, being first duly sworn, deposes and says that he is employed by the law firm Russell & Russell, P.C., attorneys for Michigan Independent Power Producers Association in the above entitled case, and that on August 11, 1999, he served true and correct copies of:

1. **Reply-Brief Of The *Michigan Independent Power Producers Association* Concerning The Effect Of The Supreme Court's And The United States District Court, Western District Of Michigan's Decisions On The Commission's Orders Using The Above-Captioned Cases.**

2. Proof of Service.

Directed to Parties along with this Proof of Service upon:

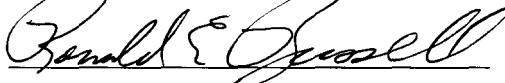
(see list of parties)

by sending by electronic mail and enclosing an original and 4 copies addressed to the Michigan Public Service Commission in properly addressed envelope with postage fully paid and depositing it in the U.S. Mail at Mason, Michigan.

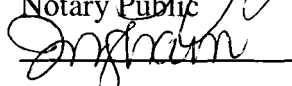
Respectfully submitted,

RUSSELL & RUSSELL, P.C.

By:


RONALD E. RUSSELL (P-41595)
525 Okemos Road, Suite B
Mason, Michigan 48854

SUBSCRIBED AND SWORN to before me August 11, 1999.


Notary Public
 County, Michigan
My Commission Expires: 9/10/00

CASE NOS. U-I 1290¹
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¹ Electronic mail list from U11955 and U11956

STATE OF MICHIGAN

1999

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

FILED

* * * *

In the matter of the Commission's own motion
to consider the restructuring of the electric
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Case No. U-1 1290

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In the matter of the request of
CONSUMERS ENERGY COMPANY for
approval of a performance-based ratemaking
mechanism and changes in standby rates.

Case No. U- 11456

**REPLY BRIEF OF THE
MICHIGAN INDEPENDENT POWER PRODUCERS ASSOCIATION**

On July 27, 28 and 29, 1999 several parties to this case filed briefs with the Michigan Public Service Commission (MPSC), at its request, on the effect of the Michigan Supreme Court's June 29th decision' on the MPSC's Experimental Retail Wheeling programs* and thereby, its Open Access Restructuring Orders".

Briefs were filed by Association of Businesses Advocating Tariff Equity (ABATE), Michigan Public Power Association et al. (MPPA), Energy Michigan (EM), Unicorn Energy, Inc. (Unicorn), Michigan Petroleum Association (MPA) and Michigan Association of Convenience Stores (MACS), Michigan Power Limited Partnership & Ada Cogeneration (MPLP & Ada), The Detroit Edison Co. (DECO), Consumers Energy (CECO) the Attorney General (AG), Michigan Electric and Gas Association (MEGA), Midland Cogeneration Venture Limited Partnership (MCV) and Indiana Michigan (IM), MIPPA files this reply brief to generally address the issues raised by the parties in their initial briefs. The Michigan Independent Power Producers Association (MIPPA) will rely on its July 27, 1999 brief submitted in this proceeding. MIPPA's position and recommendations as set forth in those filings will not be repeated here.

A number of parties, however have raised issues and suggested the existence of facts that tend to cloud and confuse the issues before this Commission and must be rectified. However, the absence of any comment by MIPPA on an issue should not be construed as acquiescence by MIPPA.

In those briefs, several parties⁴, including the Michigan Independent Power Producers Association referenced the July 7th Order of the U.S. District Court, Western District of Michigan.' MIPPA disagrees

¹ Michigan Supreme Court, Docket Nos. 111482,111483,111486,111487,111719-111726. Argued March 11, 1999 (Calendar No. 11). Decided June 29,1999.

² MPSC Cases U-10143 and U-10176

³ MPSC Cases U- 11290 ET. al.

⁴ (1) Brief Of The *Michigan Independent Power Producers Association* Concerning The Effect Of The Supreme Court's And The United States District Court, Western District Of Michigan's Decisions On The Commission's Orders Using The Above-Captioned Cases (At Page 2); (2) Brief Of Michigan Petroleum Association/ Michigan Association Of Convenience Stores (at page 4); (3) The Detroit Edison Company's Brief Regarding The Effect Of The Supreme Court's Decision In Consumers

with the interpretation offered by several parties on the significance of the Federal Court's Order and the recommendations proposed by the parties.

ABATE

Specifically, MIPPA disagrees with ABATE on their interpretation at page 6 of their Initial Brief where it States:

. . . Two events have occurred which require reversal of the PSC's Order in that case. First, the Michigan Supreme Court reversed and remanded the PSC's Order in the Retail Wheeling case in Consumers, supra. and second, the U.S. District Court effectively held that stranded cost recovery can extend beyond December 31, 2007 in North American National Resources, Inc., et al. v Michigan Public Service Commission, et al., Order and Opinion in Case No. 5:98-CV-21 consolidated with 5:98-CV-22, 23 and 24 (W.D. Mich., 1999) Emphasis Added.

The U. S. District Court ruling did not effectively hold that stranded cost recovery could or could not extend beyond December 31, 2007. What the ruling did effectively was to require this Commission to redefine its mechanism for recovery of stranded cost that it adopted in U-1 1290, in pages 7 - 14 in its June 5, Order. The Court found that PURPA contract costs, including those cost that extend beyond 2007, must be recovered. The Court states at page six of the Order:

The FERC regulations permit a QF to either provide energy as the QF determines energy to be available for purchases, or to enter into an enforceable contract for the delivery of energy over a specified term. See 18 C.F.R. §292.304(d). If a QF chooses the latter option, the QF may elect to set the rates based upon the utility's avoided costs either at the time of delivery or at the time the QF incurs its obligation to deliver energy, i.e., up-front. See id. §292.304(d)(2); Independent Energy Producers v California Pub. Utils. Comm'n, 36 F.3d 848, 851-52 (9th Cir. 1994). Where a QF elects to set the contract rate up front, it is entitled to receive that rate, even if the utility's future avoided costs turn out to be lower than estimated at the time the purchase contract is signed. See id. At 858 (stating that "the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right to unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed") Emphasis Added.

Power Co v Public Service Commission On Edison's Voluntary Open Access Program (at page 10): Midland Cogeneration Limited Partnership's Initial Brief (at page 3)

⁵ United States District Court, Western District of Michigan, Case No. 5:98-CV-21, Consolidated with: 5:98-CV-22, 23, and 24. Decided July 7, 1999. Plaintiff are North American Natural Resources, Inc., et al., Midland Cogeneration Venture Limited Partnership, Michigan Power Limited Partnership and ADA Cogeneration Limited Partnership, Central Wayne Energy Recovery Limited Partnership

The Federal District Court found the Commission's Retail Wheeling Experiment and the concomitant "Restructuring Orders" were preempted by the Public Utility Regulatory Policy Act (PURPA) and the Supremacy Clause of the United States Constitution to the extent that they prohibited any utility from recovering from its customers any charge for stranded costs to be paid to qualifying facilities under PURPA pursuant to power purchase agreements (PPA) between such utilities and qualifying facilities. The U.S. District Court also held that the Commission's prior orders approving "avoided costs" rates set forth in the Plaintiff's PPAs take precedence over the Restructuring Orders, and the utilities are entitled to collect their avoided costs set forth in the PPAs from their customers. Emphasis added.

Lastly, the Federal Court permanently enjoined the Commission from enforcing the Restructuring Orders in any manner which denies any utility from recovering its avoided costs, as set forth in Plaintiff's PPAs or which precludes Plaintiffs from recovering the full avoided costs rate, as set forth in their PPAs, including but not limited to interpreting or enforcing the Restructuring Orders to preclude any utility from recovering all or any portion of its avoided costs previously approved by the MPSC from its customers, whether before, during, or after the year 2007. Emphasis added.

The MPSC in its June 5, 1997 Order at page 47, adopted a limitation on the collection of stranded costs. The MPSC stated:

Accordingly, the following implementation schedule will be utilized, unless otherwise amended:

June 19, 1997 Consumers and Detroit Edison file revised tariff sheets.

July 7, 1997 Objections to filed tariff sheets due. Consumers and Detroit Edison file proposals for annual true-up mechanism.

July 31, 1997 Michigan electric utilities other than Consumers and Detroit Edison file implementation proposals, tariff sheets, and proposed true-up mechanisms.

November 1 Initial day for submitting bids for direct access for each of the years 1998 through 2001.

November 20 Final day for submitting bids for direct access for each of the years 1998 through 2001.

January 1 Direct access phase-in blocks begin in 1998, 1999, 2000, and 2001.

January 1, 2002 All customers become eligible for direct access.

December 31, 2007 Last day for collecting stranded costs.

Following submission of revised tariff sheets, the Commission will issue an order setting dates and prescribing a procedure for the submission of bids for the 1997 phase-in block. Emphasis added.

After review the Federal Court responded at page 12 of the Order,

Based upon its review of the Restructuring Orders, the Court agrees with Plaintiffs that the limitation on recovery of "stranded costs" beyond the year 2007 in the Restructuring Orders can be interpreted in a manner that violates Plaintiff's rights under PURPA to receive the full avoided cost rate from the utilities as set forth in their PPAs. Plaintiffs have shown that if the utilities are precluded from recovering their avoided costs, the utilities have the right to reduce their avoided costs payments to plaintiffs pursuant to the "regulatory out" provisions in the PPAs. Thus, the Restructuring Orders can be interpreted in a manner that will deprive Plaintiffs of the full avoided costs rate which they are entitled to receive under PURPA.. . .

. . . With regard to Defendant's argument that the limitation on recovery of stranded costs only applies to customers who elect to obtain an alternate supplier of electricity, the Court does not glean such a limitation from the Restructuring Orders and, in light of Defendants' refusal to admit that the Restructuring Orders do not prohibit the utilities from recovering their stranded costs beyond 2007, the Court cannot accept Defendants' argument.

The Federal Court's decision effectively redefined stranded costs recovery mechanism and excluded PURPA authorized and MPSC approved purchase power contracts from any consideration other than,

" . . . recovering the full avoided cost rate set forth in their PPAs, including but not limited to [prohibiting the MPSC from] interpreting or enforcing the Restructuring Orders to preclude any utility from recovering all or any portion of its avoided costs previously approved by the MPSC from its customers, whether before, during or after the year 2007." Order United States District Court, Western Division at page 3.

MIPPA asserts that the Federal District Court gives proper deference to PURPA QF contracts and those contracts shall not be impaired by any MPSC restructuring order, " whether before, during or after the year 2007." If the MPSC wishes to do nothing regarding restructuring or if it goes forward on a voluntary basis or if the MPSC seeks legislative authorization for restructuring, PURPA contracts between QFs and the utilities take preference over restructuring. QFs with PURPA contracts need not do anything more, other than perform under the agreement to expect full recovery.

Energy Michigan

Whether voluntary or legislatively instituted retail open access programs, the MPSC must abide by the U.S. District Court Order.

Unicorn Energy, Inc.

Whether voluntary or legislatively instituted retail open access programs, the MPSC must abide by the U.S. District Court Order

Michigan Petroleum Association and Michigan Association of Convenience Stores

MIPPA agrees with Michigan Petroleum Association and Michigan Association of Convenience Stores when they state in their brief at page 5,

In essence, the U.S. District Court has preempted and voided the Commission's limitation of stranded cost recoveries to the period of 2007.

The Court did not address whether stranded QF payments had to be recovered prior to 2007. It was this Commission which established that requirement.

MIPPA *disagrees* with MPA / MACS as to whether QF contracts are stranded.

The U.S. District Court also mandates that the Commission ensure that the QFs recover in full for their avoided costs in accordance with their PPAs, or in accordance with previous approvals by the MPSC, for the entire period of their PPA contracts, which may be as long as 35 years. Since the U.S. District Court arguably has ensured that the QFs will receive their full avoided costs for the entirety of their contracts, there can be no stranded costs that relate to these QFs. Thus, any stranded costs claims of CECo or DECO related to QF capacity and energy are nonexistent. .. (Brief at page 5)

There is ample evidence in this record in this proceeding that show capacity payments to QFs under long term contracts are likely to be stranded well beyond 2007. The Michigan Independent Power Producers Association asserts that QFs may in fact have their contracts stranded if any host utility's customers leave after transition and before the QF purchase power contracts terms have run. A real possibility. If the Commission initiates a restructuring scheme that does not allow for full recovery, it will be in violation of U.S. District Court Order.

The Michigan Independent Power Producers Association asserts the U.S. District Court has preempted and voided the Commission's limitation to 2007 for stranded cost recoveries associated with

purchase power contracts, if the recovery calculation and method do not result in a QF receiving the full value of its contract.

MIPPA asserts that the MPSC's options are clear. The MPSC can (a) halt retail open access and continue with rate-of-return / revenue deficiency monopoly regulation, thus allowing QF contracts to run their term; (b) wait until it has been granted the necessary legislative authority and attendant powers to continue implementing retail open access; or (c) go forward with a voluntary open access tariff upon application of the investor owned utilities. Either way, because of the U.S. District Court's ruling, purchase power contracts with a basis in PURPA take precedent over restructuring orders. As such, to avoid a violation of the Court's Order, the Commission must allow full recovery of previously approved purchase power agreements and the attendant avoided cost rates and it must accelerate the recovery of those costs if it intends to end stranded cost recovery in the year 2007 or anytime before contracts have run.

The Commission has but one alternative if it goes forward with restructuring which is to allow full recovery of QF contracts. In that regard, MIPPA directs the Commission to its Order in U-I 1726. The Commission clearly established the basis for accelerated recovery its ruling regarding recovery of Fermi 2 capital costs in U-I 1726. The issues in that case involved whether the utility should be allowed to implement accelerated amortization in an effort to ensure that, with the advent of open access in Detroit Edison's service territory, the utility will have a reasonable opportunity to recover its investment in Fermi 2. MIPPA asserts that its purchase power contracts are comparable to Detroit Edison's claim for Fermi 2. In U-I 1726 the Commission said,

[Detroit Edison] claim [s] this ([inability to abide] by the open access program described in the Commission's prior orders. 4 Tr. 254.) is due to the fact that, as currently designed, the Commission's program "does not provide Detroit Edison a reasonable opportunity for full recovery of approved Fermi 2 assets" by the December 31, 2007 stranded cost recovery deadline. Id.

Specifically, Detroit Edison's witnesses note that the Commission's prior orders regarding open access authorized recovery of Fermi 2's net asset balance in two ways. First, customers electing to remain full-service customers of Detroit Edison would continue to pay the bundled rates set by the Commission, which include a component for recovery of the utility's investment in Fermi 2. Second, customers opting for open access

service would, until January 1, 2008, pay a transition charge that includes a component for the recovery of their share of the Fermi 2 assets. However, these witnesses go on to note, the utility's "current bundled rates presume that all of its [full-service] customers will continue to pay rates reflecting Fermi 2 cost components" through the expiration of the plant's operating license in 2025. 5 Tr. 353. Detroit Edison contends that this structure makes it highly unlikely that all of its Commission-approved investment in Fermi 2 can be recovered, thus resulting in a significant amount of stranded investment. This conclusion follows because any full-service customers that wait until the end of the transition period on December 31, 2007 before opting for open access will escape payment for their full share of the Fermi 2 cost recovery. 4 Tr. 260; 5 Tr. 353-354.

Detroit Edison claims that such a result would be inequitable and in conflict with the Commission's prior orders regarding restructuring the electric industry. To avoid this, the utility seeks authority to increase its annual amortization of the Fermi 2 net plant investment by \$144.2 million starting January 1, 1999. According to Richard C. Viinikainen, Manager of Rates and Financial Evaluation for Detroit Edison, "this will ensure that both customers going [to open access] and customers staying with the Company pay for the 'return of' investment" in Fermi 2 before the stranded cost recovery deadline of December 31, 2007. 5 Tr. 357.. . .

The Commission continued,

The Commission finds adequate justification for granting Detroit Edison's request to accelerate the amortization of its Fermi 2 assets if certain conditions are met and if the accelerated amortization is implemented in the context of the utility's move to a competitive market. The June 5 order (1) held that stranded costs will include "nuclear capital costs and regulatory assets that are currently reflected in rates," and (2) set December 31, 2007 as the "last day for collecting stranded costs." June 5 order, pp. 13 and 47. Moreover, the Commission's October 29, 1997 order in Case No. U-1 1454 stated that customers who choose to remain full-service customers during the transition to a competitive market will pay those costs as part of their bundled rates. In light of those orders, the issue is simply whether the open access program established by the Commission will provide a reasonable opportunity for Detroit Edison to recover its investment in Fermi 2. The Commission concludes that, due to the significant differential between the length of the transition period established by these orders and the projected operating life of Fermi 2, it will not. Emphasis added.

The stranded cost recovery structure adopted by the Commission assumed that any customer electing to take open access service would pay its share of Detroit Edison's Fermi 2 investment by the time the transition charge expires on December 31, 2007. It further assumed that customers remaining on Detroit Edison's full-service rates would pay their share of that investment (due to the existence of a Fermi 2 cost recovery component in the utility's base rates) over the remainder of the plant's operating life, which may extend until 2025. It did not account for the fact that a full-service customer could avoid paying (and the utility could be precluded from collecting) its full share of the Fermi 2 cost recovery by switching to open access after the transition charge expires but before the plant is removed from rate base. As noted by Detroit Edison's Chief Financial Officer, Larry G. Garberding, expiration of the transition charge will create a substantial economic incentive for fullservice customers to switch to open access after the transition period ends. 4 Tr. 260. Thus, he continued, "there may be very few customers remaining on bundled service in the

post-transition period, and the Company will be left with a significant amount of unrecovered Fermi 2 assets.” Id. Emphasis added.

The Commission therefore concludes that, consistent with its previously expressed intent to provide full recovery of the utility’s nuclear capital costs, it should authorize Detroit Edison to make the accounting entries set forth in Paragraph 13 of the application,⁽⁸⁾ as well as any other entries necessary to reflect the tax effects of implementing accelerated amortization. This action should also provide more economic incentive for full-service customers to switch to open access even before the transition period ends by reducing the amount of Detroit Edison’s stranded costs that are to be recovered through its transition charge. Emphasis added.

Detroit Edison Co.

MIPPA agrees with Detroit Edison when at page 9 of its brief it says:

The Commission has necessary discretion to determine a just and reasonable rate and, within the exercise of that discretion, to determine which factors are relevant. ABATE v Public Service Comm., supra, 208 Mich App at 259; Attorney General v Public Service Comm., supra, 189 Mich App at 147-48.

Controlling case law establishes that the Commission can and must consider the recovery of stranded costs in setting rates. The Commission’s jurisdiction and authority to set rates is well established, and was recently confirmed by the Court of Appeals in Detroit Edison Co, supra (setting rates for Edison’s DSM program), which is closely analogous.

The recovery of qualifying facility (“QF”) avoided (or stranded costs) has now been further established, since July 7, 1999, the United States District Court for the Western District of Michigan issued an opinion and order in North American Natural Resources v Public Service Comm’n (Case Nos. 5:98-CV-21, 22, 23 and 24). The Court held that the Commission’s restructuring orders are preempted by the Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 USC §§ 824-824k, and the Supremacy Clause of the United States Constitution, US Const, Art VI, § 2, to the extent that they prohibit any utility from recovery from its customers any avoided costs (or “stranded costs”) to be paid to the plaintiffs as QFs under PURPA pursuant to power purchase agreements (“PPA”) between such utilities and the plaintiffs. The utilities are entitled to collect their avoided costs set forth in their PPAs from their customers. The Commission is permanently enjoined from enforcing the restructuring orders in any manner that denies any utility from recovering its avoided costs as set forth in the plaintiffs’ PPAs or that precludes the plaintiffs from recovering the full avoided cost rates as set forth in their PPAs, “including but not limited to interpreting or enforcing the restructuring orders to preclude any utility from recovering all or a portion of its avoided costs previously approved by the MPSC from its customers, whether before, during, or after the year 2007.” (Order, p 3).

The Detroit Edison continues.

On March 8, 1999, the Commission issued a series of orders in Case No. U-8789, U-10840, U-1 1290, U-1 1449, U-1 1451-54, and U-1 1726, modifying, clarifying and reaffirming orders issued by the Commission in those cases on December 28,

1998.. .The Commission's March 8, 1998 orders established rates, terms, conditions and services of a retail open access program that is acceptable to Edison. Therefore, in accordance with the fifth condition set forth in the Commission's December 28, 1998 Opinion and Order in Case No. U-1 1726, Edison moved to dismiss its appeals regarding the open access program.

MIPPA disagrees with DECO on the whether the March 8, 1998 orders established rates, terms, conditions and services of a retail open access program that are acceptable and argues that the March 8, 1998 orders were defective because of the Commission's failure to establish a proper mechanism for the recovery of the full purchase power contract costs in its determination of the stranded cost.

Specifically, MIPPA argues that the Commission should treat purchase power contracts in a same fashion and manner as it treated Detroit Edison's claim regarding Fermi 2 in Case No. U-1 1726 as stated in DECO's initial brief (at page 16 - 18) where it stated:

Edison's Voluntary Open Access Program

On July 1, 1998, Edison applied to the Commission for accounting authority to accelerate the amortization of the remaining net book balance of the Fermi 2 nuclear power plant and its related regulatory assets (collectively, the "Fermi assets") in Case No. U-1 1726. Edison explained that its proposal was directed toward resolving the most significant restructuring financial issues. i.e.. the recovery of Commission-identified stranded costs.. . .

In the December 28, 1998 Opinion and Order in Case No. U-1 1726, the Commission recognized that its assumptions did not account for the fact that a full service customer could avoid paying (and Edison could be precluded from collecting) its full share of the Fermi 2 cost recovery by switching to open access after the transition charge expires but before the plant is removed from rate base. (Opinion and Order, p 23). The Commission therefore concluded that, consistent with its previously expressed intent to provide full recovery of Edison's nuclear costs, it should authorize Edison to make accounting entries as requested. (Id., p 24).

In U- 11726 the Commission said,

[Detroit Edison] claim[s] this ([inability to abide] by the open access program described in the Commission's prior orders. 4 Tr. 254.) is due to the fact that, as currently designed, the Commission's program "does not provide Detroit Edison a reasonable opportunity for full recovery of approved Fermi 2 assets" by the December 31, 2007 stranded cost recovery deadline. Id.

Specifically, Detroit Edison's witnesses note that the Commission's prior orders regarding open access authorized recovery of Fermi 2's net asset balance in two ways. First, customers electing to remain full-service customers of Detroit Edison would continue to pay the bundled rates set by

the Commission, which include a component for recovery of the utility's investment in Fermi 2. Second, customers opting for open access service would, until January 1, 2008, pay a transition charge that includes a component for the recovery of their share of the Fermi 2 assets. However, these witnesses go on to note, the utility's "current bundled rates presume that all of its [full-service] customers will continue to pay rates reflecting Fermi 2 cost components" through the expiration of the plant's operating license in 2025. 5 Tr. 353. Detroit Edison contends that this structure makes it highly unlikely that all of its Commission-approved investment in Fermi 2 can be recovered, thus resulting in a significant amount of stranded investment. This conclusion follows because any full-service customers that wait until the end of the transition period on December 31, 2007 before opting for open access will escape payment for their full share of the Fermi 2 cost recovery. 4 Tr. 260; 5 Tr. 353-354.

Detroit Edison claims that such a result would be inequitable and in conflict with the Commission's prior orders regarding restructuring the electric industry. To avoid this, the utility seeks authority to increase its annual amortization of the Fermi 2 net plant investment by \$144.2 million starting January 1, 1999. According to Richard C. Viinikainen, Manager of Rates and Financial Evaluation for Detroit Edison, "this will ensure that both customers going [to open access] and customers staying with the Company pay for the 'return of' investment" in Fermi 2 before the stranded cost recovery deadline of December 31, 2007. 5 Tr. 357.. .

The Commission finds adequate justification for granting Detroit Edison's request to accelerate the amortization of its Fermi 2 assets if certain conditions are met and if the accelerated amortization is implemented in the context of the utility's move to a competitive market. The June 5 order (1) held that stranded costs will include "nuclear capital costs and regulatory assets that are currently reflected in rates," and (2) set December 31, 2007 as the "last day for collecting stranded costs." June 5 order, pp. 13 and 47. Moreover, the Commission's October 29, 1997 order in Case No. U-1 1454 stated that customers who choose to remain full-service customers during the transition to a competitive market will pay those costs as part of their bundled rates. In light of those orders, the issue is simply whether the open access program established by the Commission will provide a reasonable opportunity for Detroit Edison to recover its investment in Fermi 2. The Commission concludes that, due to the significant differential between the length of the transition period established by these orders and the projected operating life of Fermi 2, it will not. Emphasis added.

The stranded cost recovery structure adopted by the Commission assumed that any customer electing to take open access service would pay its share of Detroit Edison's Fermi 2 investment by the time the transition charge expires on December 31, 2007. It further assumed that customers remaining on Detroit Edison's full-service rates would pay their share of that investment (due to the existence of a Fermi 2 cost recovery component in the utility's base rates) over the remainder of the plant's operating life, which may extend until 2025. It did not account for the fact that a full-

service customer could avoid paying (and the utility could be precluded from collecting) its full share of the Fermi 2 cost recovery by switching to open access after the transition charge expires but before the plant is removed from rate base. As noted by Detroit Edison's Chief Financial Officer, Larry G. Garberding, expiration of the transition charge will create a substantial economic incentive for full-service customers to switch to open access after the transition period ends. 4 Tr. 260. Thus, he continued, "there may be very few customers remaining on bundled service in the post-transition period, and the Company will be left with a significant amount of unrecovered Fermi 2 assets." Id.

The Commission therefore concludes that, consistent with its previously expressed intent to provide full recovery of the utility's nuclear capital costs, it should authorize Detroit Edison to make the accounting entries set forth in Paragraph 13 of the application,⁽⁸⁾ as well as any other entries necessary to reflect the tax effects of implementing accelerated amortization. This action should also provide more economic incentive for full-service customers to switch to open access even before the transition period ends by reducing the amount of Detroit Edison's stranded costs that are to be recovered through its transition charge.

MIPPA argues that the stranded cost recovery structure adopted by the Commission assumed that any customer electing to take open access service would pay its share of purchase power contracts obligations by the time the transition charge expires on December 31, 2007. The Commission further assumed that customers remaining on a utility's full-service rates would pay their share of that obligation (due to the existence of a power supply cost recovery component in the utility's base rates) over the remainder of the contract term, which may extend past 2025. The Commission did not account for the fact that a full-service customer could avoid paying (and the utility could be precluded from collecting) its full share of the power supply cost recovery by switching to open access after the transition charge expires but before the contract term has run.

MIPPA argues that Edison makes the point very well that ratepayers can avoid paying nuclear stranded costs if they time their leaving DECO's system sometime after transition is completed and before retirement of nuclear facilities. This premise is applicable to MIPPA. If the Commission allows a utility customer to leave before the life of the QF contract has run, that customer can escape paying their fair share of the purchase power costs entered into on their behalf. Additionally, at some point sufficient customers will have left, so that there will not be enough customers from whom the utilities can collect

“avoided costs” payments. This exemplifies MIPPA’s concern regarding the honoring of their contracts.

The Commission must create a funding mechanism that will not jeopardize existing PURPA contracts.

The Federal District Court said:

Lastly, the Federal Court permanently enjoined the Commission from enforcing the Restructuring Orders in any manner which denies any utility from recovering its avoided costs, as set forth in Plaintiffs PPAs or which precludes Plaintiffs from recovering the full avoided costs rate, as set forth in their PPAs, including but not limited to interpreting or enforcing the Restructuring Orders to preclude any utility from recovering all or any portion of its avoided costs previously approved by the MPSC from its customers, whether before, during, or after the year 2007.

Even if the Retail Open Access Program is voluntary, the Commission has to approve such a tariff. However, the Commission is permanently enjoined from enforcing Restructuring Orders which preclude QFs from all or any portion of its avoided costs previously approved by the MPSC from its customers, whether before, during, or after the year 2007. If the Commission establishes a date for termination of collection of stranded costs and to assure that funds will be available in out-years for QF payments, the commission must raise sufficient funds today. It must accelerate the collection of contract payments (similar to U-1 1276), as well as a necessary mechanism that recovers sufficient funds to reflect the tax effects of implementing accelerated amortization to assure that adequate ratepayer funds are available to meet the PPA requirements and to assure that current ratepayers pay their fair share. Because upon approval of a voluntary tariff, the Commission will be responsible for initiating a “manner” which denies any utility from recovering its avoided costs, as set forth in Plaintiffs PPAs

Consumers Energy

Whether voluntary or legislatively instituted retail open access programs, the MPSC must abide by the U.S. District Court Order.

Attorney General

Whether voluntary or legislatively instituted retail open access programs, the MPSC must abide by the U.S. District Court Order.

Michigan Gas and Electric Association

Whether voluntary or legislatively instituted retail open access programs, the MPSC must abide by the U.S. District Court Order.

Midland Cogeneration Venture Limited Partnership

MIPPA agrees with MCV

Conclusion

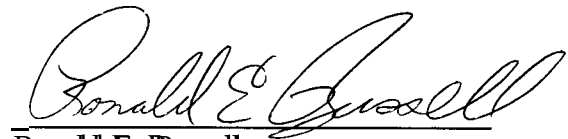
1. The Supreme Court vacated the Experimental Wheeling Program and thereby implicated the Commission's Mandatory Restructuring Orders.
2. Some parties to this case argue that the Commission can go forward with a voluntary program.
3. Others argue a legislative fix is the only remedy.
4. Regardless, if the MPSC intends to go forward with either a voluntary utility program or a legislatively authorized program, it must abide by the U.S. District Court's ruling.
5. If the Commission goes forward with either a voluntary program or a legislatively authorized program, the Commission must change its present calculation of stranded costs to reflect the full life of QF PURPA purchase power contracts,
6. If the Commission goes forward with either a voluntary program or a legislatively authorized program, the Commission must recalculate QF PURPA purchase power contract "avoided cost" payments to account for the life of the contract in a manner that generates an amount sufficient to encourage qualifying facilities to voluntarily terminate their contract.
7. If the Commission goes forward with either a voluntary program or a legislatively authorized program, to avoid a full-service customer not paying (and the utility being precluded from collecting) its full share of the power supply "avoided " cost recovery by switching to open access after the transition charge expires but before the contract term has run, it must create, fund and place into escrow sufficient dollars to reflect the full life of PURPA purchase power contracts in order to avoid being responsible for initiating a "manner" which denies any utility from recovering its avoided costs, as set forth in Plaintiffs PPAs.
8. If the Commission goes forward with either a voluntary program or a legislatively authorized program it must create, fund and place into escrow sufficient dollars to reflect the tax effects of implementing accelerated amortization.
9. If the Commission goes forward either with a voluntary program or a legislatively authorized program, it must create a fund administered by an independent fiduciary, not associated with a utility, to assure investment and oversight and against unfair advantage.
10. The independent fiduciary must be authorized to negotiate up-front payments paid to project owners. at their election or he / she must be authorized to disperse funds in accordance with existing power purchase agreements for the life of the contract, also at the election of project owners.

11. Funds escrowed for future power purchase "avoided cost" payments must receive sufficient interest to meet discounted present value of contract cost calculations.
12. If the MPSC recalculates the total amount of "avoided costs" associated with purchase power contracts and utilities wants to encourage QFs with PURPA contracts to end those contracts prematurely (read 2007), they can. So long as both abide by the U.S. District Court's Order.

Relief Demanded

MIPPA respectfully demands that the Michigan Public Service Commission honor existing Public Utility Regulatory Policy Act Qualifying Facility purchase power contracts and refrain from impairing those agreements in anyway.

Respectfully submitted,
Russell & Russell, P.C.

A handwritten signature in cursive script, reading "Ronald E. Russell". The signature is written in dark ink and is positioned above a horizontal line.

Ronald E. Russell
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