STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY for authority to recover implementation costs, for approval of stranded cost true-up methodology, and for other relief	))))))	Case No. U-11955
In the matter of the approval of THE DETROIT EDISON COMPANY for authority to recover retail access program implementation costs and for approval of a true-up mechanism in connection with the recovery of stranded costs.	))))))))	Case No. U-11956

REPLY BRIEF OF THE ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

The Association of Businesses Advocating Tariff Equity ("ABATE"), by its attorneys, Clark Hill, P.L.C., files its Reply Brief with the Michigan Public Service Commission ("MPSC" or "Commission") in these proceedings.

I.

INTRODUCTION

ABATE addressed the substantive issues which are the subject of these proceedings in its Initial Brief filed January 28, 2000. The Initial Briefs filed by the other parties in this case, by and large, summarize the positions of those parties with regard to the same issues and encapsulate the testimony presented on behalf of those parties in this matter. ABATE will not revisit each of these issues, as they have been previously addressed; however, this Reply Brief will focus on a few of the more blatant examples of the folly of this purported "voluntary" yet "irrevocable" program of open access to which the management of The Detroit Edison Company ("Edison") and Consumers Energy Company ("Consumers") have "committed."

II.

THE MPSC LACKS THE AUTHORITY TO CONDUCT OR OVERSEE THIS PROGRAM

In its Initial Brief, ABATE argued that the MPSC lacks the authority to conduct or oversee the proposed open access program. ABATE will not repeat those arguments here. Nevertheless, as the Commission Staff has addressed the issue of the Commission's authority in its Initial Brief, ABATE will briefly revisit this issue.

As ABATE previously argued, the Michigan Supreme Court's Decision in Consumers v Public Service Commission, 460 Mich 148; 596 NW2d 126 (1999), clearly determined that the Commission lacks statutory authority to implement this open access program. The Commission Staff's attempt to distinguish between the imposition of an open access program and the "voluntary" management decision by Consumers and Edison to engage in open access and thus somehow grant authority to the Commission falls short of the mark. As the utilities (and ABATE) have argued in the past, if a utility enters into a new line of business, that does not automatically grant the Commission the authority to regulate the same. It is quite clear that what is contemplated by this open access program includes a new line(s) of business for the utilities. Edison's Initial Brief is quite explicit on this point. Section I.A.2 of Edison's Initial Brief is labeled "Edison is undertaking a new and complex line of business." (Edison's Initial Brief, p 7). The point could not be made more strongly. Nevertheless, Edison goes on to reiterate that is entering a new line of business at several points throughout its Brief. (See, e.g., Edison's Initial Brief, pp 7-9, 10, 15, 18).

This new line of business is different from the regulated services previously overseen by the Commission. Under these circumstances, the Commission has recognized that it lacks jurisdiction to regulate services in an unregulated market. (See, June 26, 1998 Opinion and Order in MPSC Case Nos. U-11210, U-11216 and U-11221, p 9). The Commission should likewise recognize its lack of jurisdiction in this case.

The Commission's failure to recognize its lack of jurisdiction will result in the Commission's efforts at open access becoming a farce. As pointed out below, despite the utilities' purported voluntary management decision to participate in open access as defined by previous Commission Orders, and the purported "irrevocability" of that voluntary decision, it is clear from the positions taken by the utilities in this case that where prior (and presumably future) Commission Orders relating to open access do not meet with their approval, they do not hesitate to state that they cannot agree to the terms of those Orders in connection with this "voluntary and irrevocable" program. This critical defect in the Commission's proposed open access program has become apparent in the very first case at which policy decisions relating to the implementation of open access are to be addressed. The Commission should recognize now that this situation will not get any better, only worse, and that the Commission does not, and will not, have the power to regulate the utilities or their conduct under open access under this purported "voluntary yet irrevocable" approach. If the Commission hopes to oversee and regulate an open access program that, as suggested in its prior Orders, will result in real savings to utility customers (see, June 5, 1997 Opinion and Order in MPSC Case No. U-11290, p 6), the Commission must be granted the authority by the Legislature to regulate the utilities' conduct so that these real savings will materialize, and so that the open access program will not serve as a windfall to the utilities at the expense of Michigan's ratepayers.

III.

IMPLEMENTATION COSTS

A. The Utilities Contend that Any Implementation Expenses They Claim Must be Paid by Ratepayers.

Both Consumers and Edison claim that they made expenditures relating to implementation in reliance upon the MPSC's commitment to allow recovery of those costs. (See, e.g., Consumers' Initial Brief, p 3; Edison's Initial Brief, p 5). Consumers claims that because MPSC Staff did not identify any imprudent expenditures, all expenditures must be recovered. (Consumers' Initial Brief, p 14). This is true even though Staff's investigation identified expenses which were not incremental costs, and thus are not costs that would not have been incurred absent the direct access program. (See, June 5, 1997 Opinion and Order in Case No. U-11290, p 12; see also, Staff's Initial Brief, pp 10 - 12).

Likewise, the utilities' argument that costs of making plants efficient should be recovered as implementation costs also misses the mark. Running plants inefficiently is not prudent, and costs associated therewith should not be recoverable. Just because the utilities now want to make plants efficient as open access approaches, they should not be allowed to pass these costs on to ratepayers who have already been bearing the costs of inefficient operations.

These arguments by the utilities show the dire need for a full, thorough, and complete audit by MPSC Staff, and an appropriate rate case for each utility, to set rates at an appropriate level now, at the onset of competition, so that costs claimed as implementation costs can be truly and fairly examined against a backdrop of full and accurate information, not based only upon the claims by the utilities and a minimal investigation by Staff. If this is not done, the utilities will attempt to claim any and all costs and expenses which can even remotely be related to implementation of direct access as "implementation costs", and will expect ratepayers to pick up the tab for these expenses. Staff and the Commission will be left in the position of trying to measure these claims in a virtual vacuum because of the lack of a full and thorough Staff audit, while Consumers and Edison continue earning record excessive profits, all at the expense of Michigan's ratepayers. The Commission cannot allow this situation to continue, and should not accept the utilities' arguments that the millions of dollars they have spent (and the hundreds of millions of dollars that they intend to spend) should blindly be approved by the Commission and passed on to Michigan's ratepayers.

Consumers also argues that there should be no offset to these implementation costs (or stranded costs) as result of their excess earnings over the past several years, despite Staff's suggestion of such an offset. (See, Consumers' Initial Brief, p 17). Again, Consumers is only concerned about collecting every possible dollar for its shareholders despite giving lip service to the idea of protecting ratepayers or the "program."

Further, despite the "voluntary" and "irrevocable" nature of the utilities' participation in the open access program, veiled threats appear with regard to the recovery of implementation costs. The utilities do not want to make management decisions as to what implementation costs are appropriate or prudent; they simply want the Commission to approve all previously expended costs, and all future expenses, to prepare for a retail open access program in which the full customer base of the utilities would choose open access, a situation no one legitimately expects to occur. (See, Consumers' Initial Brief, pp 22 - 24). Thus, the utilities want to assure that all of their costs will be recovered, as in a regulated environment, and that they will continue to reap the excessive profits they have been earning over the past several years, without any attendant risk that is normally associated with competition and an open environment. Under these circumstances, where will the savings come from? The answer is quite simple: there will be no savings at all.

B. Only Retail Open Access Customers Should Bear Implementation Costs.

Both utilities suggest that these implementation costs should be borne by all ratepayers. (See, e.g., Consumers' Initial Brief, p 19; Edison's Initial Brief, p 69). The purported arguments for passing these charges along to all customers are that the open access program is available to all customers; doing so would reduce the impact on any single customer; and it would avoid the possibility that imposing this charge only on customers selecting open access would inhibit the ability of customers to economically participate in the open access program. (See, e.g., Consumers' Initial Brief, pp 19 - 20; Edison's Initial Brief, p 69). In reality, charging all customers for these charges assures that customers not choosing open access will see a **rate increase** (their current rates plus implementation charges), contrary to the philosophy that there should be no harm to non-participants in open access. (See, Edison's Initial Brief, p 39).

Moreover, spreading the implementation charges over all customers is not meant to benefit the program, but to hide the extent of these claimed implementation costs and assure their recovery by Edison and Consumers. If recovery of the implementation costs is limited to open access customers, and if these costs do indeed make the open access uneconomical, how will the costs be recovered? It would be as if somebody threw a party and nobody came.

The Commission must keep this in mind when reviewing implementation costs, because it was the Commission's alleged purpose in fostering open access to promote savings to utility customers. If current customers remain at bundled rates, and if the open access program, when including implementation costs (and stranded costs) is uneconomical, who will benefit? The utilities are not concerned with who will benefit, but only want to assure that every dollar they spend will be recovered from someone. That is the purpose behind their request to assess implementation costs against all customers, a practice that would thwart the Commission's original purpose in considering open access. The Commission should not allow its intended purpose to be so easily defeated, and should refuse to assess implementation costs against any customers other than retail open access customers.

IV.

THE UTILITIES' ATTEMPTS TO INCREASE STRANDED COST RECOVERY SHOULD BE DENIED

As with implementation costs, both utilities want to assure maximum recovery of purported stranded costs by any means possible. Moreover, they fail to recognize that stranded benefits are even possible. For example, Consumers posits that stranded costs could not be less than zero. (Consumers' Initial Brief, p 30). Edison goes through convoluted calculations to attempt to recover its "lost margins" (read: lost profits), and also attempts to assure that the definition of stranded costs is modified to include "any **new** prudent costs that are incurred while implementing the [open access] program."(Edison's Initial Brief, p 40 (emphasis added)). This is despite the fact that the Commission has defined stranded costs as "costs that the Commission has **previously** reviewed and incorporated into the utilities' rates." (October 29, 1997 Order in MPSC Case No. U-11454, p 6).

Edison also goes on to state that "this may include costs beyond those identified by the Commission as the five basic categories in the June 5, 1997 Order in Case U-11290." (Id.).

Moreover, these past and future costs must be such that the utilities can serve their entire current load of bundled customers. (See, e.g., Edison's Initial Brief, p 44). Under this scenario, the utilities will incur all costs necessary to serve their entire load as if no competition or open access existed, plus implementation costs. These costs will then be passed on to consumers at rates that will guarantee their full recovery.

Consumers suggests that these costs be passed on through a uniform charge,[1] while Edison suggests that class-specific rate charges be adopted. Although ABATE does not agree with Edison's specific approach, ABATE agrees that class-specific rate charges should be applied and that **appropriate** stranded costs be passed on only to retail open access customers. ABATE's proposal for class-specific charges was outlined in its Initial Brief and is based upon the Commission's most recent rate case determinations. Nevertheless, ABATE continues to urge the Commission to order a full, thorough and complete audit of both utilities and rate cases for both utilities to set fair and reasonable rates prior to the onset of the open access program and to obtain information vital to the Commission's ability to analyze the implementation costs as well as the stranded costs and stranded benefits that will necessarily result as retail open access becomes a reality.

[1]Energy Michigan also argues for a uniform charge. This is not surprising, as the commercial customers represented by Energy Michigan would obtain a windfall if this approach were adopted. (See, Edison's Initial Brief, pp 74 - 75).

V.

THE COMMISSION SHOULD NOT CHANGE ITS DEFINITION OF MARKET CLEARING PRICE

The Commission's prior Orders have made it abundantly clear that the market clearing price should be determined based upon actual prices being paid by direct access customers determined from contracts filed with the Commission. (See, October 29, 1997 Order in Case No. U-11454, p 14). Yet, even though this "voluntary" open access program is purportedly "irrevocable", neither utility hesitates to argue that this clear definition must be changed to their benefit. (See, Edison's Initial Brief, p 51; Consumers' Initial Brief, p 27). Edison states point blank that it cannot support use of the formula discussed in the Commission's January 14, 1998 Order in Case. U-11290. (Edison's Initial Brief, p 51). Again, here in the first case to test the utilities' commitment to the "voluntary, yet irrevocable" retail open access program as defined by prior Commission Orders, the utilities cannot support those prior Orders, but rather state that the same must be changed (for the benefit of the utilities) to provide more funds to the utilities and more costs to the ratepayers.

CONCLUSION

The "voluntary" retail open access program, as envisioned by Edison and Consumers, is a mockery. The utilities have shown no compunction in challenging any provisions of the Commission's prior Orders with which they no longer agree. They have suggested that recovery of all costs associated with preparing to serve their entire bundled load, plus all costs which they claim (but which remain unverified) are associated with preparing to serve an open access market in which their entire customer base selects open access, must be guaranteed by the Commission (including profits and carrying costs).

Nearly three years ago, the Commission stated that it wanted to implement a "workable [open access] program for providing real savings to utility customers." (June 5, 1997 Opinion and Order in Case No. U-11290, p 6). As envisioned by Consumers and Edison, Michigan's customers are **guaranteed to lose.** Permitting recovery of all costs which Consumers or Edison are requesting is untenable. This would assume that all costs to serve a full bundled load would be incurred as if there were no open access market (recognizing the severe lack of capacity and the necessity for purchasing power through contracts at higher prices - prices to be passed on to Michigan's ratepayers). Presumably, if other entities even attempt to enter the Michigan market, they will have their own costs which must be borne by someone. Adding these costs to the costs claimed by Edison and Consumers, and adding, on top of these combined costs, the costs claimed by Consumers and Edison to implement a system capable of 100% retail open access, will result in total costs that are guaranteed to be much higher than current levels. Moreover, Consumers' and Edison's unwillingness to recognize the stranded benefits that will occur as a result of retail open access provides them with a windfall, again at the expense of Michigan consumers.

The Commission must recognize that, without authority from the legislature, it simply does not have the jurisdiction to implement or oversee this program. It must also recognize that if it attempts to do so, Consumers and Edison will constantly request modifications to past (and future) Commission Orders to benefit their respective bottom lines, and that the Commission will be hard pressed to deal with these ongoing requests amid suggestions that the utilities cannot support or abide by anything less than their vision of a "voluntary" open access program.

If the Commission does continue down this road, it must take a hard line from the outset with regard to the "irrevocability" of this program and must hold to its prior definition of market price, and enforce its prior commitment that netting, mitigation, and recognition of stranded benefits, as well as stranded costs, are all part of the retail open access program. In doing so, ABATE requests that the Commission implement its suggestions as set forth in its Initial Brief, including ordering a full audit by Staff so that full, current, accurate and verified numbers are available at the outset of the open access program. Otherwise, the program is doomed to fail before it even gets started.

Respectfully submitted,

CLARK HILL PLC

By: ______________________________

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