

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-	)	Case No. U-11955
up methodology, and for other relief	)	
_____	)	

In the Matter of the Application of	)	
THE DETROIT EDISON COMPANY	)	
for Authority to Recover Retail Access	)	
Program Implementation Costs and for	)	
Approval of a True-Up mechanism in	)	Case No. U-11956
Connection with the Recovery of Stranded	)	
Costs	)	
_____	)	

MOTION TO STRIKE BRIEFS OF ENERGY MICHIGAN

NOW COMES The Detroit Edison Company, (“Applicant” or “Detroit Edison” or the “Company”) by and through its attorneys and pursuant to Rule 335, MAC R 460.17335 of the Commission’s Rules of Practice and Procedure, the Michigan Court Rules [in particular MCR 2.115(B)] and the Michigan Administrative Procedures Act (MCL 24.201 et. seq.) files this Motion to Strike Briefs of Energy Michigan and in

support thereof says as follows:

1. Energy Michigan fully participated in the hearings in this proceeding, which took place on December 14-15, 1999. Counsel for Energy Michigan engaged in significant cross examination of Detroit Edison witnesses, which is reflected in over 50 transcript pages (4T 195-203, 233-239, 377-386; 5T 648-674, 889-894). In addition, Energy Michigan sponsored the testimony of two witnesses whose testimony covers more than 60 transcript pages (4T 90-146; 5T 791-806). Energy Michigan also sponsored or moved for the admission of several exhibits (e.g., I-1, I-2, I-7, I-52).

2. Subsequently, on January 28, 2000, Energy Michigan filed the "Initial Brief of Energy Michigan," which made a number of ill-conceived and inaccurate assertions regarding Detroit Edison's earnings and power production costs, and sought to support these assertions with extra record references to a news report and the testimony of a Detroit Edison employee from another proceeding (Initial Brief of Energy Michigan pp.10, 12, 29, Energy Michigan Initial Brief Exhibit 1). These references were not made part of the record in this proceeding.

3. The record in this matter closed on December 15, 1999 (5T 937). R 460.17329(5) provides: "Documentary evidence may be submitted after the close of the record by stipulation of the parties and with approval of the presiding officer." The parties have not stipulated to the submission of this information and the Administrative Law Judge has not admitted the information. Likewise, MCL 24.276

provides: “Evidence in a contested case...shall be offered and made part of the record. Other factual information or evidence *shall not be considered in determination of the case...*”

4. R 460.17103 of the Rules of Practice and Procedure Before the Commission provides that “[t]hese rules govern practice and procedure in all proceedings before the commission, except as otherwise provided by statute or these rules. In areas not addressed by these rules, the presiding officer may rely on appropriate provisions of the currently effective Michigan court rules.” The Commission’s Rules of Practice and Procedure do not specifically address the instant situation where a party to a contested case hearing unilaterally inserts extra-record documents, information and argument into the record in an Initial Brief without making an offer of evidence at hearing and without the parties having an opportunity to cross-examine *and submit evidence regarding the context and relevance of the information*. Therefore, the Commission should rely on the Michigan Court Rules for guidance.

5. Michigan Court Rule 2.115(B) provides:

“On motion by a party or on the court’s own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous or indecent matter, or may strike *all or part of a pleading not drawn in conformance with these rules.*”

6. In addition, the Michigan Rules of Evidence provide the following:

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801c

Hearsay is not admissible except as provided by these rules. MRE 802

7. In its Initial Brief, Energy Michigan's attorney is essentially "testifying" without even establishing that he has the expert qualifications to reach the earnings and plant operation/ economics conclusions he asserts (and those conclusions are inaccurate). Thus, the parties will be denied their procedural due process rights if the Commission considers this information in its determination in this case.

8. In *Beeler v. General Motors Corporation* 32 Mich App 661, 663 (1971), the Michigan Court of Appeals held that where the plaintiff in a Workers Compensation hearing was not allowed to cross-examine the physician selected by the referee to review plaintiff's medical records, he was denied his due process rights.

9. In *Bohannon v. Sheraton-Cadillac Hotel, Inc.* 3 Mich App 81, 82 (1966), the Michigan Court of Appeals held that “[w]hen an administrative agency promulgates a rule for the benefit of litigants and then deprives a litigant of this right, it is a violation of the due process clauses of both the 1908 and 1963 Michigan Constitutions.”

10. The Michigan Constitution of 1963, Article 1, Section 17 provides:

“The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.”

11. Detroit Edison and all of the other parties to this case were denied the opportunity to submit opposing evidence and dispute the context, admissibility and relevance of the information submitted by Energy Michigan in its Initial Brief in this matter. If the Commission considers this information, submitted after the close of the record, and the Energy Michigan proposal based upon it, Detroit Edison will be denied the “fair and just treatment” guaranteed by the Michigan Constitution.

12. In addition, consideration of Energy Michigan’s extra-record information and proposal will deny Detroit Edison the benefit of the rules created by this Commission which prohibit the submission of evidence after the close of the record without agreement of the parties and the presiding officer. Further, consideration of the information submitted by Energy Michigan would be directly contrary to the dictates of the Michigan Administrative Procedures Act which precludes consideration of extra-record information in reaching a determination in a contested case.

WHEREFORE, The Detroit Edison Company respectfully requests that this Commission Strike the Initial Brief of Energy Michigan (and the Reply Brief of Energy Michigan to the extent it utilizes the same information) to the extent not supported by the record in this case, and particularly Energy Michigan’s Initial Brief Exhibit 1 and the reference thereto in Section III. A. page 10, the hearsay testimony references

to MPSC Case No. U-12121 in Section IV. B. at page 12 and Section V. B. 3. page 29 and any rate proposal based upon those references.

Respectfully submitted,

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