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 _________________________________	))))))	 MPSC Case No. U-11955
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 connection with the recovery of stranded costs _________________________________	))))))))	 MPSC Case No. U-11956

REPLY BRIEF OF THE MICHIGAN POWER LIMITED PARTNERSHIP, CADILLAC RENEWABLE ENERGY LLC AND CENTRAL WAYNE ENERGY RECOVERY LTD. PARTNERSHIP

Dated: February 11, 2000

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I. INTRODUCTION

The Michigan Power Limited Partnership, Cadillac Renewable Energy LLC and Central Wayne Energy Recovery Ltd. Partnership ("MPLP, Cadillac and Central Wayne") file this reply brief in response to various parties' statements in their initial brief relating to stranded cost recovery of the avoided costs contained in power purchase agreements ("PPA") between qualifying facilities ("QFs") and electric utilities. Any true-up procedure adopted by the Michigan Public Service Commission ("Commission") in these cases should be consistent with, and not conflict with, the federal court order issued in North American Natural Resources, Inc. v Michigan Public Service Commission, 73 F Supp 2nd 804 (WD Mich, 1999). In that order, the federal court concluded that the Commission's electric restructuring orders must not be interpreted and enforced in a manner that precludes electric utilities from recovering all or any portion of the avoided costs previously approved by the Commission from their customers before, during or after the year 2007.

II. BACKGROUND TO THIS PROCEEDING

On June 5, 1997, October 29, 1997, January 14, 1998 and February 11, 1998 in MPSC Case Nos. U-11290, U-11451, U-11452, U-11453, U-11454 and U-11456, the Commission issued a series of orders to restructure the electric industry (collectively the "Restructuring Orders"). Among other things, the Restructuring Orders defined certain above-market costs contained in PPAs between qualifying facilities and electric utilities to be stranded costs. The Commission also stated that the last day for collecting stranded costs would be December 31, 2007. In addition, the Commission ordered parties to initiate this true-up proceeding to establish an appropriate mechanism to insure stranded costs were not overcollected or undercollected.

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Since the PPAs between qualifying facilities and the utilities extend well beyond the year 2007 and a portion of the avoided costs rates to be paid to qualifying facilities were defined as stranded costs and the last day to collect stranded costs is December 31, 2007, MPLP, Cadillac, Central Wayne and other qualifying facilities brought a suit in federal court to protect their rights established under the Public Utility Regulatory Polices Act ("PURPA") of 1978. In North American Natural Resources, Inc. v Michigan Public Service Commission, 73 F Supp 2nd 804 (WD Mich, 1999), the federal court granted MPLP, Cadillac, Central Wayne and other qualifying facilities declaratory and injunctive relief and concluded the Commission's Restructuring Orders were preempted by PURPA to the extent that "they prohibit[ed] any utility from recovering from its customers any charge for avoided costs (or 'stranded costs') to be paid to qualifying facilities under PURPA pursuant to the [PPAs]" and "issued a permanent injunction preventing the Restructuring Orders from being interpreted or enforced "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." (See Attachment A.)

III. REPLY TO POSITIONS OF OTHER PARTIES

A. Utilities' True-Up Proposals

In its initial brief, Consumers Energy urged the adoption of its true-up proposal presented by its witnesses. Consumers Energy's true-up proposal did not directly address the issue of recovery of avoided costs to be paid to qualifying facilities after the year 2007, which the Commission previously defined as stranded costs. Likewise, Detroit Edison's initial brief urged adoption of its proposal which did not specifically address this issue. Instead, Detroit Edison's witnesses testified that the Commission should address the issue of

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recovery of any stranded costs associated with qualifying facilities' PPAs in future proceedings.

B. Position Of The Michigan Independent Power Producers Association And The Attorney General

The Michigan Independent Power Producers Association ("MIPPA") argued that the true-up proposals presented in these cases do not address recovery of above-market prices contained in QF PPAs after the year 2007. As set forth in its initial brief and testimony of Mr. Donald Johns, MIPPA urged the Commission to treat PPAs in a similar manner as the MPSC has provided treatment for Fermi 2 in MPSC Case No. U-11726. (4 Tr 547.) Presenting counter-arguments to MIPPA, the Attorney General's initial brief denies that above-market rates for PPA contracts will be stranded. In relevant part, the Attorney General states:

> "On the other hand, if a qualifying facility does deliver the required capacity and energy in future years, then under PURPA CECo or DECo must take it and must pay the avoided cost determined under the applicable statutes and regulations, and if that happens, the utility will recover the mandated costs via its PSCR clause or base rates. PURPA costs will not be stranded after 2007. Furthermore, they may not exceed market prices by then. In other words, there is no current basis for including such stranded costs in the true-up process." (Brief of Attorney General at p 48.)

The Attorney General stated this position even though the Commission's Restructuring Orders had defined stranded costs to include certain avoided costs in PPAs and the Commission stated that the last day to collect stranded costs is December 31, 2007.

IV. REPLY OF THE MPLP, CADILLAC AND CENTRAL WAYNE

To the extent that the Commission adopts any true-up procedure, it must be consistent with, and not conflict with, the federal court's order. This order, in full stated:

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> "A. The Michigan Public Service Commission's ("MPSC") orders of June 5, 1997, October 29, 1997, January 14, 1998, and February 11, 1998 (collectively the "Restructuring Orders"), are preempted by PURPA and the Supremacy Clause of the United States Constitution to the extent that they prohibit any utility from recovering from its customers any charge for avoided costs (or "stranded costs") to be paid to Plaintiffs as qualifying facilities under PURPA pursuant to power purchase agreements ("PPA") between such utilities and Plaintiffs;
>
> "B. The MPSC's prior orders approving that avoided cost rates set forth in Plaintiffs' 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.
>
> "C. Defendants are permanently enjoined 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 cost 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."

As a result, any true-up procedure adopted in this case must not deny or interfere with the utilities' and qualifying facilities' rights to recover all avoided costs previously approved in their PPAs whether before, during, or after the year 2007.

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V. RELIEF REQUESTED

WHEREFORE, The Michigan Power Limited Partnership, Cadillac Renewable Energy LLC and Central Wayne Energy Recovery Ltd. Partnership requests that any true-up procedure adopted by the Commission be consistent and not conflict with the federal court order issued in <u>North American Natural Resources, Inc</u> v <u>Michigan Public Service Commission</u>, 73 F Supp 2nd 804 (WD Mich, 1999).

Respectfully submitted,

Fraser Trebilcock Davis & Foster, P.C.
Attorneys for Michigan Power Limited Partnership, Cadillac Renewable Energy LLC and Central Wayne Energy Recovery Ltd. Partnership

Dated: February 11, 2000

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

FILED (GR)
U.S. District Court Clerk
Ronald C. Weston, Sr.
JUL - 7 1998
Western Michigan

NORTH AMERICAN NATURAL RESOURCES, INC., et al.,

Plaintiffs,

v.

MICHIGAN PUBLIC SERVICE COMM'N, et al.,

Defendants.

Case No. 5:98-CV-21
Consolidated with:
5:98-CV-22, 23, and 24

HON. GORDON J. QUIST

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,

Plaintiffs,

v.

MICHIGAN PUBLIC SERVICE COMM'N, et al.,

Defendants.

Case No. 5:98-CV-22

MICHIGAN POWER LIMITED PARTNERSHIP and ADA COGENERATION LIMITED PARTNERSHIP,

Plaintiff,

v.

MICHIGAN PUBLIC SERVICE COMM'N, et al.,

Defendants.

Case No. 5:98-CV-23

CENTRAL WAYNE ENERGY RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

MICHIGAN PUBLIC SERVICE COMM'N, et al.

Defendants.

Case No. 5:98-CV-24

ORDER

In accordance with the Opinion filed this date,

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IT IS HEREBY ORDERED that Plaintiffs' Motions for Summary Judgment in case nos. 5:98-CV-22 and 5:98-CV-24 (docket nos. 27 and 28) are **GRANTED**, and Plaintiffs' Motions for summary judgment in case nos. 5:98-CV-21 and 5:98-CV-23 (docket no. 30) are **GRANTED IN PART AND DENIED IN PART**. The motions in case nos. 5:98-CV-21 and 5:98-CV-23 are **GRANTED** with respect to Plaintiffs' claims for declaratory and injunctive relief with respect to their rights under PURPA and are **DENIED** with respect to Plaintiffs' claims under 42 U.S.C. § 1983 and requests for attorneys fees under 42 U.S.C. § 1988.

IT IS FURTHER ORDERED, DECLARED AND ADJUDGED that:

A. The Michigan Public Service Commission's ("MPSC") orders of June 5, 1997, October 29, 1997, January 14, 1998, and February 11, 1998 (collectively the "Restructuring Orders"), are preempted by PURPA and the Supremacy Clause of the United States Constitution to the extent that they prohibit any utility from recovering from its customers any charge for avoided costs (or "stranded costs") to be paid to Plaintiffs as qualifying facilities under PURPA pursuant to power purchase agreements ("PPA") between such utilities and Plaintiffs;

B. The MPSC's prior orders approving that avoided cost rates set forth in Plaintiffs' 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;

C. Defendants are permanently enjoined 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 cost 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.

Dated: JUL - 7 1999

GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

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	))))))	 MPSC Case No. U-11955
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 connection with the recovery of stranded costs	))))))))	 MPSC Case No. U-11956

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Proof of Service

Marcia A. Fogarty, being first duly sworn, deposes and says that on this 11th day of February, 2000 she served a copy of the Reply Brief of the Michigan Power Limited Partnership, Cadillac Renewable Energy LLC and Central Wayne Enrergy Recovery Ltd. Partnership upon the following individual(s):

See attached Service List

by placing the same in an envelope(s) addressed to said individual(s) at the aforesaid business address(es) and depositing same in the U.S. mails.

Marcia A. Fogarty

Marcia A. Fogarty

Subscribed and sworn to before
me, a Notary Public, on the above date

Sonmi Carvalho

Sonmi Carvalho
Notary Public, Ingham County
Expires on 10/11/2000

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