

DCN L. KESKEY

direct telephone 517-483-6672

KNAGGS, HARTER, BRAKE & SCHNEIDER P.C.

1375 S. Washington Ave.
Suite 300
Lansing, MI 48910
telephone 517-482-1659
facsimile 517-482-2689
Email khblaw@voyager.net

August 16, 2000

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, Michigan 48909

Re: The Detroit Edison Company, PSCR Plan, Case No. U-12121

Dear Ms. Wideman:

Please find enclosed for tiling, the original and four (4) copies of the Motion of Michigan Environmental Council and the Public Interest Research Group in Michigan to Strike Portions of DECo's Brief in Answer to Motion for Rehearing and Reconsideration and Brief in Support of Motion to Strike and Reply Brief of Michigan Environmental Council and the Public Interest Research Group in Michigan to DECo's Brief in Answer to Motion for Rehearing and Reconsideration. In accordance with the Notice of Hearing, this document has been filed electronically on the Commission's website. A Proof of Service is also enclosed.

If you have any questions regarding this tiling, please do not hesitate to contact me. Thank you.

Very truly yours,

KNAGGS, HARTER, BRAKE & SCHNEIDER, P.C.


Don L. Keskey

DLK/blr
Enclosure

cc: Parties of Record

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of THE
DETROIT EDISON COMPANY for a Power
Supply Cost Recovery Plan Factor for the Year

Case No. U-12121

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

I, Laura J. Riley, being duly sworn, depose and say that on August 16, 2000, I served a copy of Motion of Michigan Environmental Council and the Public Interest Research Group in Michigan to Strike Portions of DECo's Brief in Answer to Motion for Rehearing and Reconsideration and Brief in Support of Motion to Strike and Reply Brief of Michigan Environmental Council and the Public Interest Research Group in Michigan to DECo's Brief in Answer to Motion for Rehearing and Reconsideration upon:

Bruce R. Maters
Jon P. Christinidis
The Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226

ALJ James N. Rigas
Michigan Public Service Commission
6545 Mercantile Way, Suite 16
P.O. Box 30221
Lansing, Michigan 48909-772 1

Patricia S. Barone
Assistant Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, Michigan 489 11

Robert A.W. Strong
Clark Hill, P.L.C.
255 South Old Woodward Avenue, Suite 301
Birmingham, Michigan 48009

Diane Royal
Shaltz & Royal, P.C.
3303 West Saginaw, Suite C-1
Lansing, Michigan 489 17

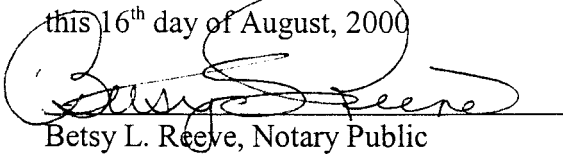
Eric J. Schneidewind
Varnum, Riddering, Schmidt & Howlett, L.L.P.
The Victor Center, Suite 810
201 North Washington Square
Lansing, Michigan 48933

Donald E. Erickson
Assistant Attorney General
P.O. Box 30212
Lansing, Michigan 48909

Stewart A. Binke
Howard & Howard
The Phoenix Building
222 North Washington Square, Suite 500
Lansing, Michigan 48933- 18 17

Service was accomplished via electronic mail by placing same in a United States mail depository,
enclosed in envelopes bearing postage fully prepaid and addressed properly.

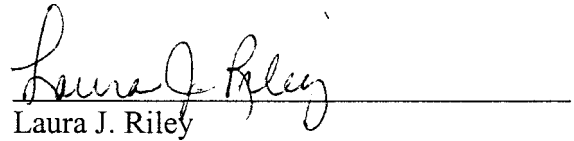
Subscribed and sworn to before me
this 16th day of August, 2000

A handwritten signature in cursive script, appearing to read "Betsy L. Reeve", written over a horizontal line.

Betsy L. Reeve, Notary Public

Eaton County, Michigan Acting in Ingham County, Michigan

My Commission Expires: November 24, 2003

A handwritten signature in cursive script, appearing to read "Laura J. Riley", written over a horizontal line.
Laura J. Riley

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of THE
DETROIT EDISON COMPANY for a Power
Supply Cost Recovery Plan Factor for the Year
2000.

Case No. U-12121

**MOTION OF MICHIGAN ENVIRONMENTAL COUNCIL AND
THE PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN
TO STRIKE PORTIONS OF DECO'S BRIEF IN ANSWER TO
MOTION FOR REHEARING AND RECONSIDERATION**

The Michigan Environmental Council ("MEC") and the Public Interest Research Group in Michigan ("PIRGIM"), by and through their attorneys, Knaggs, Harter, Brake & Schneider, P.C., file this Motion to Strike Portions of The Detroit Edison Company's ("DECo") August 9, 2000, Brief in Answer to the Motion for Rehearing and Reconsideration filed by MEC and PIRGIM on June 19, 2000. In support of this Motion, MEC and PIRGIM state:

1. Portions of DECo's Brief, filed August 9, 2000, (pp 7-8), attempt to argue the merits of evidence or prefiled testimony going to the merits of legal and evidentiary issues which remain to be litigated and briefed in this case before the Administrative Law Judge ("ALJ"), and which must await completion of the evidentiary phase of this case. DECo's attempt to brief the merits of legal and factual issues not yet before the MPSC is inappropriate and premature.

2. DECo's Brief arguing the legal and factual merits of witness Kushler's evidence concerning energy efficiency programs is inappropriate as the Commission's review of these issues should be dealt with by the MPSC by reviewing and ruling upon MEC and PIRGIM's May 1, 2000, Appeal of the ALJ's Ruling Striking Witness Kushler's Testimony and Exhibits in

their entirety. MEC and PIRGIM incorporate by reference all of the arguments made in its May 1, 2000, appeal to the Commission from ALJ's April 17, 2000 ruling.

3. DECo's attempt to argue the legal and factual issues concerning MEC and PIRGIM's witness Callen regarding nuclear waste fee issues is premature and inappropriate at this time because the case has been interrupted, and the testimony of witness Callen has been prefiled but not yet received into evidence. The briefing of factual and legal issues on the merits with respect to nuclear waste and fee issues may not be appropriately done until the record is closed and the briefing is presented to the ALJ, and eventually to the Commission. Moreover, DECo's attempt to insert erroneous legal and factual arguments regarding the nuclear waste and fee issues is an attempt to file a late appeal of the ALJ's April 17, 2000 ruling denying DECo's Motion to Strike Witness Callen's testimony in its entirety (T448). DECo may not now file an interlocutory appeal of the ALJ's ruling at this time in this manner.

4. DECo's Brief dealing with the merits of legal and factual issues remaining before the ALJ in this case would violate the statutory notice and hearing provisions established by the Administrative Procedures Act, MCL 24.201 *et seq.*, Act 304, MCL 460.6j *et seq.*, Section 6a; MCL 460.6a *et seq.*, Act 304, MCL 460.6j *et seq.*, and the Commission's Rules of Practice and Procedure Before the Commission, R 460.170101 *et seq.*, and also Due Process principles, as more fully discussed in the accompanying Brief. Intervenor, MEC and PIRGIM, have statutory and constitutional rights to receive fair treatment and adherence to the statutory notice and hearing procedures which provide for the briefing of all legal and factual issues based upon a complete evidentiary record following the close of the record, and the right to an ALJ proposed decision, and to file exceptions thereto, and to receive a final Commission order based upon the entire record and

all briefing. DECo's Brief (pp 7-8) attempts to short-circuit these procedures and to place before the Commission ultimate legal and factual issues which are not right for Commission consideration until the case is completed. DECo attempts to sandbag MEC and PIRGIM with respect to these arguments on the merits, and to bypass the established deliberative process.

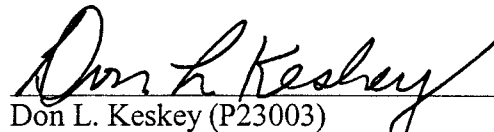
5. DECo's Brief (pp 7-8) is beyond the scope of MEC and PIRGIM's Motion for Rehearing, and is unnecessary and irrelevant to the issues presented on rehearing.

WHEREFORE, MEC and PIRGIM move to strike that portion of DECo's Brief and Answer to MEC and PIRGIM's Motion for Rehearing and Reconsideration, including specifically pages 7 through 8, which improperly discuss the merits of legal and factual issues. MEC and PIRGIM request such further and consistent relief which is lawful and reasonable.

Respectfully submitted,

MICHIGAN ENVIRONMENTAL COUNCIL and
the PUBLIC INTEREST RESEARCH GROUP
IN MICHIGAN

By Their Attorneys,
Knaggs, Harter, Brake & Schneider, P.C.

A handwritten signature in black ink, appearing to read "Don L. Keskey", is written over a horizontal line.

Don L. Keskey (P23003)
Knaggs, Harter, Brake & Schneider, P.C.
1375 South Washington Avenue, Suite 300
Lansing, Michigan 48910
5 17-482- 1659/FAX 5 17-482-2689

DATED: August 16, 2000

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of THE
DETROIT EDISON COMPANY for a Power
Supply Cost Recovery Plan Factor for the Year
2000.

Case No. U-12121

**BRIEF IN SUPPORT OF MOTION TO STRIKE AND REPLY BRIEF
OF MICHIGAN ENVIRONMENTAL COUNCIL AND THE PUBLIC
INTEREST RESEARCH GROUP IN MICHIGAN TO DECO'S BRIEF
IN ANSWER TO MOTION FOR REHEARING AND RECONSIDERATION**

The Michigan Environmental Council ("MEC") and the Public Interest Research Group in Michigan ("PIRGIM"), by and through their attorneys, Knaggs, Harter, Brake & Schneider, P.C., file this Reply to The Detroit Edison Company's ("DECo") August 9, 2000, Brief in Answer to MEC and PIRGIM's Motion for Rehearing and Reconsideration filed in this case on June 19, 2000.

**I. THE LEGISLATURE IN 2000 PA 141 HAS NOT REPEALED EITHER
EXPRESSLY OR BY IMPLICATION THE SEVERAL ENABLING AND
OTHER STATUTES APPLICABLE TO THE COMMISSION, INCLUDING
1982 PA 304**

DECo's Brief (pp 2-3) erroneously argues that the "plain language" of 2000 PA 141 ("Act 141") leads to the conclusion that DECo's rates are frozen, and that Act 304 and other statutes are effectively repealed either expressly or by implication. As explained in MEC and PIRGIM's Brief in Support of Rehearing, filed June 19, 2000, there is no plain language in Act 141 which indicates legislative intent to repeal Act 304 or any other statute. Moreover, utilizing long held judicial precedent regarding statutory construction, Act 141 can be interpreted and construed to give full meaning and applicability to Act 141 and to all of the other statutes including Act 304. MEC and PIRGIM presented several of these interpretations in its Brief in Support of Rehearing.

MEC and PIRGIM in its Rehearing Motion and Brief also indicated that Act 304 contains planning and review functions applicable to the utility and the Commission which operate wholly apart from the mathematical calculation of precise PSCR factors. Act 304 also establishes a reasonableness and prudence standard applicable to DECo's management concerning its acquisition of energy supplies whether by generation or by purchase. Thus, even if the legislature intended to freeze to PSCR factors, (which the legislature did not indicate or direct in Act 141), this result would still not repeal all of the other operating provisions of Act 304.

DECo also ignores the plain fact that MEC and PIRGIM's evidentiary proceeding in this Act 304 case did not seek or depend upon a downward rate adjustment to any PSCR factor. Rather, MEC and PIRGIM requested the Commission to consider optional remedies to protect the portion of rates being collected under Act 304 to reimburse DECo for its payments of fees to the federal Nuclear Waste Fund. The applicability and justification for these remedies is heightened by the fact that the federal government has defaulted on its contract with DECo, and DECo has done nothing about this situation since the default occurred on January 31, 1998. DECo's arguments therefore are inapplicable to MEC and PIRGIM's Motion for Rehearing because a rate freeze is irrelevant to the review sought, and the remedies proposed, by MEC and PIRGIM in this case.

II. THIS CASE IS NOT MOOT AS A RESULT OF 2000 PA 141

DECo's various arguments (pp 3-5) concerning the mootness of this case are also erroneous. The various remedies sought by MEC and PIRGIM in this case are fully applicable and may be effective, despite any provision of Act 141. Moreover, the relief sought by MEC and PIRGIM do not involve abstract questions or theoretical remedies. The review and relief sought by MEC and PIRGIM in this case is real, and not abstract.

DECo (p 5) also misses the point with respect to its assertion that MEC and PIRGIM's Due Process rights have not been violated because the establishment of rates does not

affect ratepayer property interests protected by Due Process. MEC and PIRGIM had clearly argued in their Rehearing Motion and Brief that MEC and PIRGIM were granted clear notice and hearing, and other participation rights, by the Administrative Procedures Act, MCL 24.201 *et seq.*,² by Act 304, MCL 460.6j *et seq.*, and by several other enabling acts applicable to the Commission,³ as well as pursuant to the MPSC's Rules of Practice and Procedure, R 460.17101 *et seq.*³ Even more directly, the provision of Act 304, under which this case arose, also contains numerous references to a notice and hearing requirement and establishes in Section 6 *et seq.*, MCL 460.6j *et seq.*, an exhaustive procedure for utilizing the hearing process to set temporary rates subject to reconciliation, to review utility plans and forecasts and to hold a utility to reasonable and prudent management, relative to a utility's acquisition and generation of energy supplies. Act 304 is a remedial statute which grants the MPSC powers fully consistent with its duty and authority to protect ratepayers. The Michigan Supreme Court in *City of Detroit v MPSC*, 380 Mich 706, 716-717 (1994) reversed a Commission rate order stating that the MPSC cannot declare itself impotent with respect to rate complaint matters. In *C&O Railroad v PSC*, 59 Mich App 88 (1975) found that the Commission was established to be the "watch dog" and protector of utility customers. Section 6a(2), MCL 460.6a(2),

²The Administrative Procedures Act, chapter 4, MCL 24.271 *et seq.*, grants to parties extensive notice and hearing rights, and the right to a fair and unbiased final agency decision based upon a complete record (e.g., Section 85, MCL 24.285). Section 3(3) of the APA, MCL 24.203(3) also specifically defines a contested case subject to the APA, as "a proceeding including ratemaking, price-fixing and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."

³Statutory rights to notice and hearing are also set forth in several enabling statutes governing the Commission's authority and duties, including Section 6 and 6a, MCL 460.6 and 6a; Section 8, MCL 460.58, Section 22, MCL 462.22; and Section 6, MCL 460.556.

³The MPSC's Rules, including 101(f) and (g) clearly provides for a broad definition of an intervenor. MEC and PIRGIM met this definition of a party and were granted intervention in this case. Rule 103(2), R 460.17103, also states:

(2) These rules shall be liberally construed to serve a just, economical, and expeditious determination of the issues presented.

The MPSC Rules of Practice and Procedure, R -160.17101 *et seq.*, contain extensive provisions regarding intervention, formal discovery hearings, briefings, etc., and even incorporate the Michigan Court Rules where necessary.

makes it clear that the Commission can review a number of issues in a rate case as part of conducting a “full and complete hearing” by stating as follows:

As used in this section, a “full and complete hearing” means a hearing which provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to specific element or elements of such request which are the subject of the hearing.

In addition, Section 6h(1)(d) states as follows in defining a general rate case:

(d) “General rate case” means a proceeding before the commission in which interested parties are given notice and a reasonable opportunity for a full and complete hearing on a utility’s total cost of service and all other lawful elements properly to be considered in determining just and reasonable rates.

Act 304 also contains several sections indicating a number of factors to be considered in setting rates and regulatory rate tariff matters. For example, the statute overall requires the utility to generate or purchase power in a manner that minimizes costs and to undertake such transactions on a reasonable and prudent basis. Section 6j(6), MCL 460.6j(6) states that “the Commission shall consider the cost and availability of the electric generation available to the utility” and “whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors.”

Thus, the nature of MEC and PIRGIM’s notice and hearing rights are substantive procedural rights which must be observed by statute. However, because these procedural notice and hearing rights are statutorily provided, the arbitrary and unfair denial of these rights also then constitutes a violation of Due Process as a substantive procedural matter. DECo misdirects its Due Process arguments to a separate and different concept concerning whether rate levels in themselves are either confiscatory, or excessive, or constitutes property from a ratepayer’s perspective. MEC and PIRGIM’s Due Process rights which have been violated flow from the denial of MEC and PIRGIM’s

procedural rights guaranteed by statute, and therefore, also guaranteed by Due Process principles of fundamental fairness.⁴ Thus, DECo's arguments are inapplicable.

DECo's argument (p 5) that the Court of Appeals has already upheld the Commission's authority to suspend the PSCR clause is also inapplicable. This case did not involve a request by DECo to suspend its PSCR clause, followed by a ruling after notice and hearing, involving participation by all parties. Rather, this was a case in which DECo requested relief under its PSCR clause, and continues to collect revenues thereunder, and wherein the Commission arbitrarily ruled, (without review of the record and following briefing by the parties), that the legislature in Act 141 has suspended the PSCR clause, repealed Act 304 procedures and review, has overridden other statutes concerning notice and hearing rights, and has dismissed this and other cases. This across-the-board interpretation by the Commission of Act 141's impact upon other statutes and cases, and in suddenly cutting off all hearing rights of the parties in this and other cases, was erroneous and unnecessary.⁵ Thus, DECo's citation of other cases where the Court's have upheld suspension of the PSCR clause are simply not legal or factually applicable to this case and situation.

III. MEC AND PIRGIM DO NOT ATTEMPT TO EXPAND OR MISINTERPRET THE SCOPE OF PSCR PROCEEDINGS UNDER ACT 304

DECo's Brief (pp 6-9) erroneously argues that MEC and PIRGIM are erroneously attempting to expand the scope of Act 304. DECo's Brief also improperly attempts to argue the merits of MEC and PIRGIM's testimony outside of the context of MEC and PIRGIM's Motion for Rehearing. DECo's arguments regarding MEC and PIRGIM's testimony concerning energy

⁴Due Process principles involve concepts of fair play and fundamental fairness. *Building Owners and Managers Ass'n of Metropolitan Detroit v Public Service Commission*, 131 Mich App 504; 346 NW2d 581 (1984). Failure to observe the fundamental fairness essential to the very concepts of justice is a denial of due process of law. *Dodge v Detroit Trust Co*, 300 Mich 565; 2 NW2d 509 (1942).

⁵"The Commission could have simply implemented the 5 percent rate reduction directed in Act 141, and allowed the parties in the respective cases to include in their briefs a discussion of all impacts of Act 141 upon other statutes, and this and other cases, which the Commission could then rule upon in due course.

efficiency issues should be reviewed by the MPSC based upon MEC and PIRGIM's May 1, 2000, Motion for Immediate Consideration and for Order to Receive Witness Evidence and Emergency Application for Leave to Appeal and Brief in Support of MEC and PIRGIM. The Commission has never ruled upon MEC and PIRGIM's appeal.⁶

MEC and PIRGIM have not misinterpreted Act 304 or attempted to expand the scope of Act 304. Act 304 goes much beyond merely mathematically calculating energy costs. Rather, it provides extensive provisions requiring a utility to conduct, and the MPSC to review utility plans regarding the acquisition of energy, including five year forecasts, to ensure least cost planning and reasonableness and prudence with respect to a utility's energy acquisition or generation practices. MEC and PIRGIM have relied upon the plain language of these extensive Act 304 statutory provisions, which remain intact.

Moreover, several statutes applicable to the Commission, including Act 304, expressly reinforce the Commission's authority to review and undertake actions to promote energy conservation, and energy efficiency. The MPSC has so found in previous Orders. The courts have, contrary to DECo's argument, upheld this authority.⁷

DECo also erroneously argues that MEC and PIRGIM's witness concerning the nuclear waste issues (and protection of NWF fee collections in rates) is inappropriate here because DECo lost its motion to strike the testimony of MEC and PIRGIM's witness on these issues, by an April 17, 2000 ruling of the Administrative Law Judge ("ALJ") (T448), which was never appealed by DECo. Moreover, the ALJ in this case, on June 14, 2000, set another prehearing conference for

⁶MEC and PIRGIM incorporate by reference its May 1, 2000 "Motion for Immediate Consideration *and for* Order to Receive Witness Evidence and Emergency Application for Leave to Appeal and Supporting Brief of the Michigan Environmental Council and the Public Interest Research Group in Michigan."

⁷The Commission's authority to adopt regulation which promotes energy conservation and efficiency is securely established. Act 304, MCL 460.6j *et seq.*, Section 6c(1), MCL 460.6c(1) *et seq.*, Sections 6m(12) and (13), MCL 460.6m(12) and (13), Section 6n, MCL 460.6n, MPSC Order, March 29, 1990, U-91 72; MPSC Order, Case U- 10574, October 12, 1994. *Detroit Edison v MPSC*, 221 Mich App 370, 383-386, 389 (1997); *ABATE v PSC*, 205 Mich App 383, 388-389 (1994).

September 13, 2000 to schedule the receipt of MEC and PIRGIM's testimony, which schedule should be adhered to. DECo's attempt to argue the merits of the legal issues involving the nuclear waste fee is wholly premature and inappropriate, and is nonresponsive to MEC and PIRGIM's rehearing motion, which did not relate to the merits of the nuclear waste issues. Since DECo never appealed the ALJ's ruling to receive this MEC and PIRGIM testimony, this portion of DECo's Brief should be stricken pursuant to MEC and PIRGIM's accompanying Motion. Under statutory procedures, the merits of the legal issues remain to be briefed in this case after the record is closed.

Further, DECo's attempt to cite its witnesses' testimony (Dr. Hsieh) regarding nuclear waste issues is wholly inappropriate because this is a matter for briefing before the ALJ, which has not yet occurred on the merits. Moreover, since MEC and PIRGIM's testimony has yet to be received into evidence, it is grossly unfair for DECo to be citing its witness' testimony as grounds for a ruling before MEC and PIRGIM's evidence is even placed into the record. Fundamental fairness requires the balanced receipt of testimony by both parties, followed by briefing, as guaranteed by statutory procedures and due process. This is just another example of how DECo would seek to insert fundamental unfairness in violation of MEC and PIRGIM's statutory and due process rights. The Commission should reject and strike these arguments by DECo.

DECo's argument that the federal fee payable by it to the Nuclear Waste Fund under its contract with the Department of Energy ("DOE") is **mandated**, is both irrelevant and misleading. Nowhere in Mr. Callen's testimony does Mr. Callen recommend that collections from ratepayers not include recognition of the 1 .0 mil per kilowatt-hour fee. Rather, Mr. Callen recommends a menu of nonexclusive options for the MPSC to consider, which will be further addressed in briefing. These potential remedies range from a declaratory ruling, establishment of an escrow to receive all or a part of the fee, the requirement for DECo to fund a performance bond, among other remedies. None of these remedies provide for non-collection from ratepayers, who will continue to pay the 1 .0 mil fee

to fund SNF disposal. Directing the ratepayer collections to an escrow fund so as to better protect everyone's rights, does not equate to non-collection of the costs of the fee. Similarly, requiring shareholders to start funding a performance bond would also represent a reasonable term and condition which the Commission could impose attendant with authorizing continued collection of the fee in rates. Mr. Callen's recommendation that the Commission require DECo to report its efforts to enforce its contract with DOE, and to ultimately achieve SNF disposal, also does not affect the continued collection of the fee.

DECo's reference to the federal fee being "mandated" is also inadequately explained and simplistic at this point, in view of the federal government's default in complying with its part of the statutory bargain. DECo's argument is based upon only one provision of the NWPA (Section 222(2), 42 USC 10222(2)), outside of the context of the NWPA as a whole, and of the current legal context including relevant court decisions. The NWPA established an essential mutual bargain between the payment of the fee and performance by the DOE in commencing to accept SNF for storage or disposal. This essential bargain was incorporated in both the NWPA and the standard contract which DECo entered into with the DOE. The United States' Court of Appeals in an unappealed final decision issued in *Indiana Michigan Power Company, et al., v DOE*, 88 F2d 1272 (1996) stated (p 1274):

Section 302(a)(5)(B) states that "in return for the payment of fees. . . [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]. . . ."

The court ultimately held (p 1277):

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998. The

decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

Thus, there is an essential bargain or mutuality between the payment of the fees and performance by the federal government. Federal law involves both statutory law and case law. Avenues exist to ensure that the mutual bargain is enforced. DECo cites no authority for its assumption that the continued payment of the fees to the DOE continues indefinitely, regardless whether the DOE ever performs. DECo's statement not only over-simplifies this issue, but its statement may, in fact, be legally erroneous.

Moreover, DECo's argument that the fee is "mandated," and that therefore, this ends the issue as a regulatory ratemaking matter is also legally presumptive and erroneous. Even if it were determined upon final briefing in this case that federal law continues to require DECo to pay the fee, this itself does not resolve the question whether the fee should be passed through to ratepayers, or if so, whether the pass-through should be subject to certain terms and conditions to ensure that DECo will reasonably and prudently administer and enforce its contract with the DOE. DECo, and not the ratepayers, entered into a contract with DOE. DECo has not acted since the federal default to adequately protect itself, or to enforce its contract with DOE, or to protect the amount of funds it currently continues to pay to the federal government.' Mr. Callen has not presented an opinion whether DECo should continue to pay the fee, and DECo may do so. However, the rate treatment to be accorded DECo's payments are entirely a different matter. Unlike other federal statutes, the NWPA does not mandate that state regulatory agencies authorize a pass-through of the fee payments to ratepayers.⁹ Moreover, the MPSC is the regulatory agency which has the authority and duty to set just and reasonable rates, and to scrutinize management decisions (including contracts) under Act

⁹These arguments will be further made in final briefing in this case.

⁹When Congress intends to pre-empt state authority to require flow-through of fees to rates subject to state regulatory authority, it has expressly so stated. Congress in the NWPA has not included such a mandate.

304 to ensure that the utility is observing reasonable and prudent management principles. The ratemaking issue in this case is thus governed four-square with the Michigan Supreme Court's holding in *City of Detroit v Michigan Public Service Commission*, 308 Mich 206 (1944). In that case, the Commission had authorized in rates the costs of "excess profit taxes" that DECo was required by federal statute to pay during a period in World War II. The Commission had authorized this cost in rates based upon an analysis that the cost to be included in rates because it was a lawful expense, and, in fact, mandated by federal statute. The Michigan Supreme Court reversed the Commission decision, holding that the Commission's ratemaking duties extend beyond simply determining whether a utility expense was lawful, but also involves determining in the circumstances whether the expense was reasonable for inclusion in the cost of service for ratemaking purposes, or whether, in the overall context of rates, other offsetting factors should be considered in setting the rates. In a similar fashion, the Commission should consider the facts and law relating to the funds collected from ratepayers, equivalent to the 1.0 mil fee, and determine what rate offsets, escrows, or other protections should be invoked to protect ratepayers and the public interest. The Commission under Act 304 should also evaluate the reasonableness and prudence of DECo's actions, and establish terms and conditions to ensure DECo's adherence to this standard as well as ensuring just and reasonable rates."

Mr. Callen's testimony is directly relevant to this case, as it involves issues concerning the ratemaking treatment of the funds (or equivalent thereof) that DECo seeks to continue to collect in its PSQR plans, and whether DECo has been reasonable and prudent in its management and enforcement of its contract with DOE, or whether additional ratepayer protections are necessary. DECo has included in its plan over \$7 million in rates to cover its federal fee for SNF storage or

¹⁰The Commission should act in this case to ensure that DECo aggressively enforces its contract with DOE, and that, in the meantime, ratepayers are protected from merely funding millions in fees, while DOE never performs, resulting in DECo asking for duplicative rate charges to cover costs resulting from DOE's default.

disposal (See 2 T 34-36 and Exhibits STH-lp 1, of DECo witness Simon Tso-Cheng Hsieh). The issues also involve nuclear fuel costs, and also of nuclear fuel disposal cost, and therefore, are properly within this case in accordance with Section 6j(a), Section 6j(b)(6), and 6j(13)(j), among others.

Moreover, it is now an open and unsettled question whether DECo must continue to pay the fee or whether it should itself seek enforcement remedies under its contract to protect the fee, or seek damages, specific performance, or other potential remedies. Other questions involve whether DECo has been reasonable or prudent, or is unreasonably and imprudently failing to protect itself and ratepayers following the federal default.

DECo's inherent argument that Mr. Callen's testimony is not probative because DECo witness Hsieh has already been cross-examined on certain issues, is also erroneous. DECo's witness Hsieh's answers on cross-examination do not equate to, nor can they reasonably foreclose, MEC and PIRGIM's direct case presented by Mr. Callen. Moreover, Mr. Callen refutes any DECo argument that DECo's actions have been adequate."

DECo's argument (DECo Brief, p 9) that MEC and PIRGIM may present certain issues (such as energy efficiency) in alternative forums, and that MEC and PIRGIM have exercised their right to intervene in U-12478, misses the mark entirely. It remains to be seen whether U-12478 or any other docket will provide MEC and PIRGIM an effective forum to present energy efficiency testimony and issues for Commission consideration. Moreover, this argument is wholly inapplicable to the nuclear waste issues which are the subject of MEC and PIRGIM's presentation in this Act 304 case, and properly so.

¹¹DECo has not adequately explained its lack of action relative to the failures in the federal program, and its non-enforcement of its contract with DOE. DECo's actions, particularly in recent years, have been minimalist, and far less adequate than many other utilities.

IV. DECO HAS FAILED TO RESPOND TO MEC and PIRGIM'S CLAIMS THAT RATE REVIEWS UNDER OTHER STATUTES, INCLUDING ACT 304, CAN IDENTIFY COST REDUCTIONS WHICH CAN BE CONSIDERED IN STRANDED COST AND TRUE UP PROCEEDINGS

DECo (pp 9-10) has failed to respond adequately to MEC and PIRGIM's claim that the Act 304 cases, and the rate complaint cases in U-I 1495 and U-I 1560, remain fully relevant and should be completed because these cases demonstrate that excessive rates have been (and are being) collected, which should be considered as offsets in stranded cost or true-up dockets. In other words, even if rates were frozen, the Commission should consider clear and known cost reductions at the same time that it provides for claimed cost increases, including stranded costs and the costs of implementing restructuring. The Commission can appropriately net all increases and reductions in costs to come up with appropriate cost true up figures.

Moreover, the Commission may not reasonably ignore cost reductions, while granting all claimed cost increases, merely on the basis that the cost decreases may be identified in separate dockets under separate statutes, compared to the dockets and statutes under which the cost increases are identified or claimed. This illogical creation of separate boxes to provide for selective ratemaking, to the disadvantage of ratepayers, would be unjust, unreasonable and arbitrary. The Commission has proceeded with the restructuring process in a multiple number of dockets, and there is no need for the Commission to act selectively instead of on an overall reasonable basis.

V. CONCLUSION AND RELIEF

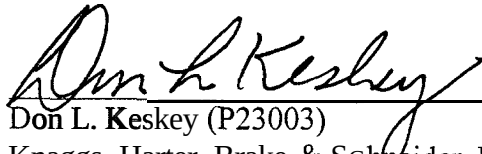
MEC and PIRGIM respectfully requests the Commission to grant their June 19, 2000 Motion for Rehearing and Reconsideration, and to reject DECo's arguments in their entirety. MEC and PIRGIM also request the Commission to strike pages 7 through 8 of DECo's Brief in Answer to MEC and PIRGIM's Motion for Rehearing and Reconsideration. MEC and PIRGIM also request the Commission to promptly restart the case schedule in this case, prior to the scheduled September

prehearing conference. MEC and PIRGIM request that they be granted such further and consistent relief which is lawful and reasonable.

Respectfully submitted,

MICHIGAN ENVIRONMENTAL COUNCIL and
the PUBLIC INTEREST RESEARCH GROUP
IN MICHIGAN

By Their Attorneys,
Knaggs, Harter, Brake & Schneider, P.C.

A handwritten signature in black ink, appearing to read "Don L. Keskey", is written over a horizontal line.

Don L. Keskey (P23003)
Knaggs, Harter, Brake & Schneider, P.C.
1375 South Washington Avenue, Suite 300
Lansing, Michigan 489 10
5 17-482- 1659/FAX 5 17-482-2689

DATED: August 16, 2000