STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of **WISCONSIN ELECTRIC POWER COMPANY** and **EDISON SAULT ELECTRIC COMPANY** For Approval of its Plan to Implement 2000 PA 141 _____/	Case No. U-12649
In the Matter of the Application of **WISCONSIN PUBLIC SERVICE CORPORATION** and **UPPER PENINSULA POWER COMPANY** For Approval of its Plan to Implement 2000 PA 141 _____/	Case No. U-12650
In the Matter of the Application of **NORTHERN STATES POWER COMPANY - WISCONSIN,** doing business as Xcel Energy, For Approval of its Plan to Implement 2000 PA 141 _____/	Case No. U-12651
In the Matter of the Application of **INDIANA MICHIGAN POWER COMPANY d/b/a AMERICAN ELECTRIC POWER**, for Approval of its Plan to Implement 2000 PA 141. _____/	Case No. U-12652
In the Matter of the Application of **ALPENA POWER COMPANY** for Approval of its Plan to Implement 2000 PA 141. _____/	Case No. U-12655

MICHIGAN ENVIRONMENTAL COUNCIL AND THE PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN'S RESPONSE IN OPPOSITION TO MPSC STAFF'S MOTION TO STRIKE THE TESTIMONY AND EXHIBITS OF INTERVENOR WITNESSES

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., files this Response in Opposition to the MPSC Staff's March 23, 2001 Motion to Strike the

Testimony and Exhibits of Intervenor Witnesses including Martin G. Kushler, Geoffrey C. Crandall and portions of the testimony of Ronald C. Callen.

1. The MPSC Staff's Motion in part is based upon the claim that this case is very narrow in scope. However, as Staff's Motion (¶ 1) itself states, this case involves the review of the utility restructuring implementation plans to permit retail customers to choose an alternative electric supplier no later than January 31, 2002 as required by 2000 PA 141 ("Act 141"). These cases are also commenced pursuant to the Commission's June 19, 2000 order in case U-12464, establishing contested case proceedings to review the implementation plans and carry out the purposes and provisions of Act 141. Thus, the scope of this proceeding is determined by the provisions of Act 141, and the Commission's order in U-12464. The testimony filed in this case by intervenors is within the scope of Act 141 and the Commission's order in U-12464, and within the scope of the notices of hearing issued in these cases. The testimony filed by witnesses Kushler and Crandall, which are to be viewed as complementary and coordinated, related to issues identified in Act 141 regarding the establishment of an energy efficiency and low-income protection fund [Section 10d(6)], among other provisions.[1]

2. Intervenors' testimony is directly relevant to, and within the scope, of these proceedings for additional reasons. The testimony filed by the intervenor witnesses provide necessary foundational and background analysis and evidentiary support for intervenor tariff proposals which will be filed in response to the utilities' June 5, 2001 filings. Witness Callen's testimony in support of issues regarding nuclear decommissioning and the disposal of spent nuclear fuel ("SNF")

[1]Act 141 establishes a number of specific provisions applicable to the two largest Michigan utilities, CECo and DECo. This may be described as Phase I of Act 141's implementation. Act 141 grants wide discretion to the MPSC to then implement what may be described as Phase II of Act 141 — to implement electric restructuring and open access for Michigan's smaller electric utilities. The various provisions of Act 141 establish legislative intent relative to the energy efficiency and low-income protection fund in Section 10d(6) and to otherwise protect low-income customers (Sections 10s and 10t). These provisions can be implemented by the MPSC for these utilities.

(including the SNF fee"), is also directly relevant to these proceedings. All present rates of these utilities, with the exception of Alpena Power Company, include substantial ratepayer collections for nuclear plant decommissioning, as well as for the SNF fee.[2] Moreover, a major element of nuclear plant decommission funding relates to and is affected by SNF storage and disposal costs and projections. Therefore, the SNF issues are directly related to and integral to nuclear plant decommissioning issues. Therefore, all of witness Callen's testimony must be received.

3. The Staff's Motion is extemely premature. The utilities' implementation plans filed on October 2, 2000 are all incomplete. Moreover, the utilities' filings of February 19, 2001 are incomplete and are preliminary to the more significant tariff filings to be made on June 5, 2001.[3] The intervenors plan on responding fully to the June 5, 2001 filings, and where possible, to recommend specific tariff provisions, terms and conditions, and further proposals to appropirately implement Act 141. Nevertheless, the intervenors, in good faith, and in accordance with the case schedule, filed their testimony on March 19, 2001, including the testimony of witnesses Kushler, Crandall and Callen, to present the necessary factual and conceptual foundation to support their positions in these cases. This testimony also includes as much discussion regarding tariff recommendations as is possible at this time. The March 19, 2001 evidentiary filings are aimed at educating the Commission regarding the overall issues, to be supplemented by the specific tariff filings in response to the utilities June 5, 2001 filings. None of the testimony, which provides necessary discussion of the issues, along with foundational background regarding said issues, should be stricken since it all relates to the scope and purpose of this proceeding, which is to implement Act 141.

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[2]The testimony and exhibits of witness Callen was not filed in the Alpena Power Company docket.

[3]For instance, Indiana Michigan Power Company's ("I&M") February 19, 2001 filing consists of a scant five pages, with the most important substantive comment being that they promised to make their filing on June 5, 2001 to disclose the necessary information.

4. The MPSC Staff's Motion should also be rejected because it fails to recognize that this proceeding in many ways is accomplishing a legislative function, namely, to implement Act 141 as applied to the smaller electric utilities in Michigan. While it is important to note that this administrative proceeding is subject to all of the statutory and constitutional rights to notice and hearing,[4] the legislative nature of this proceeding must also be recognized. In such a proceeding, no parties' rights are prejudiced by a full exploration of the foundational background and information, and issues, discussed in the testimony, all in support of specific tariff proposals and provisions which will be presented by intervenors in response to the utilities June 5, 2001 filings. The Staff's Motion (¶ 3) refers to the Michigan Rules of Evidence ("MRE"), MCR 401, 402, and 403 in support of its Motion. While intervenors' evidence clearly meets the test of these Rules, it should also be noted that this is not a proceeding, such as a complaint proceeding, involving two parties having specific claims, or a case involving a claim against a utility where judicial-type rules of procedures are tightly followed. Rather, this is undertaking a legislative function of implementing Act 141, wherein all parties should be permitted some latitude to present relevant information in support of their specific proposals. Intervenors urge the Administrative Law Judge ("ALJ") not to upset this important function by unnecessarily intruding into the presentations, or "over-judicializing" this proceeding.

5. The MPSC Staff also states that intervenor issues are outside the scope or subject matter of these cases and that it would be waste of time, would confuse the issues, and would cause undue delay to allow presentation of intervenors' challenged evidence. The Motion also states that the evidence does not relate to the creation of tariffs and unbundling of rates to allow customers to choose an alternative electric supplier. The MPSC Staff Motion is obviously incorrect. The issues

[4] As established in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq*., the various statutes governing Commission ratemaking, such as Sections 6 and 6a, MCL 460.6 and 460.6a, the Commission's Rules of Practice and Procedure, R 460.17101 *et seq*., and constitutional due process and equal protection, as well as pursuant to the provisions of Act 141 itself.

presented by the intervenors are within the scope of implementing Act 141. Moreover, all of the evidence is foundational support regarding issues which are incorporated into present rates, or should be incorporated in unbundled rates encouraging open access and the ability of customers to choose alternative electric suppliers. Moreover, it will not confuse the issues, as the filings to be made in these proceedings will increasingly focus upon specific tariff provisions, terms and conditions. Nor will intervenor participation cause undue delay because all of the proceedings are set according to a schedule which can easily be met, and which has been met by intervenors. The only delay in this proceeding is the unnecessary work required to respond to the MPSC Staff's Motion.

6. MPSC Staff's Motion (¶ 4) states Staff's view that this case involves "a very narrow issue" and that intervenors are attempting to expand the scope of the proceedings and to introduce irrelevant evidence. This is incorrect. All of the issues presented by intervenors are within the scope of the policies and purposes of Act 141, and are supported by analogous provisions in Act 141, such as Section 10d6 regarding the energy efficiency and low-income protection fund. Moreover, several of the subject utilities are charging in rates for some energy efficiency, demand-side management, or conservation programs in the states of Wisconsin and Minnesota (or in other states of The American Electric Power ("AEP") system). Since the utility systems of most of these applicant utilities are dispatched on a centralized basis, and allocate their expenses to each state's customers under a uniform formula, it would appear that Michigan's ratepayers are paying for some of the administrative costs of these programs but not receiving the benefit of these programs. At the very least, some tariff provision or adjustment should be made to reflect this fact, such as a tariff credit to rates or an analogous program in Michigan in accordance with the intent of the legislature as stated in Section 10d6. Moreover, as noted, the existing rates already include substantial sums collected from ratepayers for nuclear plant decommissioning and SNF storage and disposal. The rates also include the SNF fee. Therefore, the new tariff should also adopt appropriate policies, tariff

provisions, and terms and conditions, to deal with these issues. All of intervenor testimony goes to these issues, which fall within the scope of Act 141, the Commission's order in U-12464, and within the notices of hearing issued in these cases. They also deal with issues that are either expressly dealt with in the utility implementation plans (such as decommissioning), or are inherently incorporated in the cost and tariffs of each utility, which is the subject of these proceedings.

7. The MPSC Staff also states in its Motion (¶ 5) that the receipt of intervenor evidence "will cause unnecessary extra work for all parties and will delay the proceedings." This is wholly unexplained in the Staff's Motion. The schedule in this case has been set, the intervenors have abided by the schedule and have exerted constructive efforts in a conscientious manner to respond to the utilities' implementation plans, and the scant testimony and exhibits filed by the utilities so far. The schedule provides for the utilities to file their major filings on June 5, 2001, followed by a date for all parties to respond thereto. As noted, these are contested case proceedings. Any Commission decision should be rendered upon a proper record, following full briefing by the parties, and a proposed decision by the ALJ. The work involved is the same as is normally accorded in contested cases, and no more. Moreover, the future filings and proceedings in this case will further sharpen the issues. Thus, it is premature to judge the nature of the filings at this stage. Also, the post-hearing briefs will further sharpen the issues, legal arguments, and remedies or other provisions being advocated by the parties. Staff does not explain what unnecessary extra work is involved. Moreover, it is noted that the Staff did not file any testimony or exhibits in accordance with the March 19, 2001 deadline, and therefore, the Staff is not affected by unnecessary extra work since its participation in this process appears to be quite minimal.

8. The MPSC Staff's Motion (¶ 6) also presents inadequate or erroneous grounds for striking the testimony and exhibits of witness Kushler. Witness Kushler's testimony is presented in conjunction with witness Crandall's testimony [filed on behalf of Michigan Community Action

Agency Association ("MCAAA")] to persuade the Commission to adopt appropriate tariffs, and terms and conditions, in unbundling rates and restructuring these utilities' services, to meet some of the policies encouraged by the legislature in Act 141. This includes the Section 10d6 concept of an energy efficiency or low-income protection fund or related services, along with the provisions aimed at encouraging the protection of low-income customers. Witness Kushler presents important supporting evidence as to why the Commission should consider these policies consistent with Act 141 by pointing to the broad benefits of said programs, the broad public support for these programs, and the fact that most states who have adopted electric restructuring have included such programs as part of their restructuring requirements. Later testimony to be filed in response to the utility tariff filings will suggest specific tariff provisions, or terms and conditions.

9. The Staff's Motion erroneously states that witness Kushler's testimony is aimed at providing information in support of funding "new energy efficiency programs." The Staff's Motion also states that "existing rates which have no component for energy efficiency programs are to be unbundled." It may be incorrect to state that existing rates have no component dealing either with energy efficiency or with low-income protection or at least low-income problems. For several of these utilities, these programs are not new energy efficiency programs, but are similar to programs already provided by these same utilities in the major part of their service territories, as noted. While Michigan ratepayers share in paying for these programs, it is not receiving the benefit of said programs, and this inequity can be corrected in the tariff filing to be approved by the Commission. Intervenors are not aware of any rate credit reducing Michigan rates to reflect the fact that they are paying for but not receiving the benefits of these programs already engaged in by these utilities. Moreover, the Commission in this case can determine the terms of the tariffs which will apply to unbundled services, for both utility and open access customers. The Commission has jurisdiction, authority and discretion to consider appropriate terms to deal with the issues presented by

intervenors. Staff cites no legal requirement to support its inherent theory that the Commission is without such discretion in this case.

10. The MPSC Staff's Motion (¶ 7) urging the striking of MCAAA witness Crandall should also be rejected. MEC and PIRGIM incorporate by reference the responses already made in this pleading, and in addition, the response filed by MCAAA. In addition, however, the MPSC Staff's Motion suggests that an intervenor seeking to raise demand-side management issues should proceed to do so in another docket that involves these specific issues. This argument is erroneous since this case inherently includes these issues, as noted, and because there is no legal requirement that the intervenors pursue another docket which does not exist, or to file a new docket to pursue these issues. The Commission has discretion to consider them fully in these cases. The intervenors also note that energy efficiency, conservation and DSM programs cannot only serve to reduce long-term costs, and can promote greater access to alternative competitive supplies of energy, for both open access and utility customers, by reducing system peak demands for both generating plant capacity and transmission capacity.

11. Intervenors also oppose Staff's Motion to strike portions of the testimony and exhibits of witness Callen. First, witness Callen's testimony provides important foundational evidence to support his proposed remedies and tariff recommendations. This evidentiary support is wholly appropriate, and is aimed at supporting more specific tariff provisions, terms and conditions, to be presented after the utilities' June 5, 2001 filings. Therefore, the testimony and exhibits are relevant. As noted, the issues regarding SNF, and the federal fee, are directly related to existing utility rates, and are included in all utility tariffs. Moreover, nuclear plant decommissioning and SNF issues are wholly intertwined.[5] Witness Callen's recommendations regarding the SNF fee is wholly

[5]The Staff request to sever the issues of decommissioning and SNF storage and, in fact, SNF disposal, cannot be sustained. Decommissioning and SNF storage are integrally related in having high levels of radiation, are very costly, have common operations, finances, federal regulation and

appropriate, and should not be rejected merely upon Staff's assumption that customers will obviously pay the SNF costs if they use nuclear generated electricity.[6] The Staff's Motion admits that decommissioning costs are relevant, but fails to note that decommissioning costs are directly affected by SNF storage and disposal, and that the two issues are so intertwined as to bar their separation in this case. Intervenors also seek to have the Commission adopt appropriate tariff provisions to ensure proper recognition of the SNF fee and nuclear decommissioning costs relative to standby rates, interruptible rates, and to those customers who are "swing customers," who may change back and forth from utility to open access service.

12. MEC and PIRGIM oppose Staff's Motion to strike several of witness Callen's exhibits. All of these exhibits are relevant for the purposes noted above as evidence to support the need for appropriate review and development or preservation of tariff terms, conditions, and other remedies to protect ratepayers relative to SNF storage disposal and the SNF fee. All of this is relevant to the scope of this case and to establish appropriate tariffs in implementing Act 141.

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are carried out in a common time frame. In fact, decommissioning and SNF storage planning are dealt with in common, and the financial considerations are the same. In some case, the funds are even placed in a common escrow account (See MPSC Order of November 26, 1996, in Indiana Michigan Power Company case U-11237). Both functions are costly and would be even much more costly to accomplish without the most care to assure common preparation for implementation. In addition, SNF disposal is integrally related to the other two functions (decommissioning and SNF storage) since storage will end only if the federal government completes its responsibilities for disposal. If not (as shown to be a risk in witness Callen's testimony), storage and attendant costs must be continued, whatever prior considerations and protections established by the Commission, and a wholly alternate process for disposal must be invented. So these matters must be commonly examined and treated. If not, the Commission might be led into wholly inappropriate decisions due to insufficient evidence. In short, Staff's Motion is wholly erroneous in attempting to separate these matters in these cases.

[6] In Wisconsin Electric Power Company's ("WEPCo") 2001 PSCR plan case, U-12615, none of WEPCo's witnesses could confirm that two major industrial (special contract) customers were in fact paying for the SNF fee (hearings, March 27-28, 2001).

13. MEC and PIRGIM also oppose Staff's Motion because it represents merely part of Staff's approach to limit intervenor participation, contrary to the APA, the Commission's ratemaking statutes, Act 141, the MPSC Rules, and the Commission's order in U-12464, and the Commission's notices of hearing in these cases. The Staff is repeating arguments made in their opposition to the intervention of MCAAA, MEC and PIRGIM, which motion was denied by the ALJ. The MPSC Staff seeks to use its Motion to Strike to adversely affect intervenor rights as part of a legal or procedural maneuver to limit, unnecessarily, the issues, including tariff issues, to be considered in this case. This approach is particularly unfair since the MPSC Staff itself did not file any testimony in this case on the March 19, 2001 filing date. MEC and PIRGIM urge that the ALJ should receive the testimony and exhibits, and the future filings to be made in this case, and then require the parties to brief all the issues based upon a full record, so that the Commission can properly decide the issues and proposed tariff terms and conditions. After all, the Commission is the only entity which is statutorily authorized to decide these matters, and to make the proper decisions to implement Act 141. MEC and PIRGIM therefore urge the ALJ to be fair, judicious, and restrained when reviewing the good faith efforts undertaken by the intervenors as reflected in their evidentiary filings made on March 19, 2001 in these proceedings.

14. The ALJ should also be cognizant that some of the utilities in these cases are requesting relief going beyond simply the filing of unbundled tariffs. From their incomplete filings, it appears that some of this relief includes recovery of implementation costs, recovery of "regulatory assets" and other relief. It thus appears that the grant of Staff's Motion would result in an unequal treatment of the parties to these cases, the Staff has not filed motions to strike, or event to clarify, the utilities' filings in this regard.

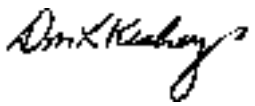
WHEREFORE, MEC and PIRGIM respectfully request the ALJ to deny in its entirety, MPSC Staff's Motion to Strike the Testimony and Exhibits of Witnesses Kushler and

Crandall, and to strike in part the testimony and exhibits of Witness Callen. 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,
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DATED: March 30, 2001

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

I, Don L. Keskey, being duly sworn, depose and say that on March 30, 2001, I served a copy of Michigan Environmental Council and Public Interest Research Group in Michigan's Response in Opposition to MPSC Staff's Motion to Strike the Testimony and Exhibits of Intervenor Witnesses upon:

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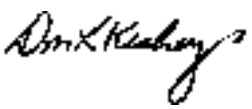
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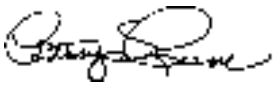
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Service was accomplished via electronic mail and by placing same in a United States mail depository, enclosed in envelopes bearing postage fully prepaid and addressed properly.



Don L. Keskey

Subscribed and sworn to before me
this 30th day of March, 2001.



Betsy L. Reeve, Notary Public
Eaton County, Michigan Acting in Ingham County, Michigan
My Commission Expires: November 24, 2003