LAW OFFICES
DYKEMA GOSSETT
PROFESSIONAL LIMITED LIABILITY COMPANY

800 MICHIGAN NATIONAL TOWER
LANSING, MICHIGAN 48933-1707

ANN ARBOR, MICHIGAN
BLOOMFIELD HILLS, MICHIGAN
CHICAGO, ILLINOIS

TELEPHONE (517) 374-9100
FACSIMILE (517) 374-9191
WWW.DYKEMA.COM

DETROIT, MICHIGAN
GRAND RAPIDS, MICHIGAN
WASHINGTON, DC

CHRISTINE MASON SONERAL

DIRECT DIAL: (517) 374-9184
E-MAIL: CMASON@DYKEMA.COM

February 16, 2001

Ms. Dorothy Wideman
Executive Secretary
Michigan Pubic Service Commission
6545 Mercantile Way, Ste. 7
Lansing, MI 48911

Re: Case No. U-12657
Midwest Restructuring Plan
Motion and Brief for Summary Disposition

Dear Ms. Wideman:

Enclosed please find original and four copies of Midwest Energy Cooperative Motion for Summary Disposition and Brief in Support thereof. Also enclosed is Proof of Service upon the Parties of Record.

If there are any questions or comments, do not hesitate to contact me.

Sincerely,

DYKEMA GOSSETT PLLC

Christine Mason Soneral/jmb

Christine Mason Soneral

CMS/jmb
Enclosures
cc: Jon Bellgowan
Michael Nickerson

LAN01\75679.1
ID\AE

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of Cloverland Electric Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)	Case No. U-12656
In the matter of Midwest Energy Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)	Case No. U-12657
In the matter of Cherryland Electric Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)	Case No. U-12658
In the matter of Great Lakes Energy Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)	Case No. U-12659
In the matter of Presque Isle Electric & Gas Co-op's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)	Case No. U-12660
In the matter of HomeWorks Tri-County Electric Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)	Case No. U-12661

MOTION FOR SUMMARY DISPOSITION

Pursuant to Rules 323 and 335 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 460.17323 and 460.17335, Cloverland Electric Cooperative in Case No. U-12656, Midwest Energy Cooperative in Case No. U-12657, Cherryland Electric Cooperative in Case No. U-12658, Great Lakes Energy Cooperative in Case No. U-12659, Presque Isle Electric & Gas Co-op in Case No. U-12660, and HomeWorks Tri-County Electric Cooperative in Case No. U-12661 *(collectively "the Cooperatives")*, by their attorneys, DYKEMA GOSSETT PLLC, respectfully submit this Motion for Summary Disposition *("motion")*. In support, the Cooperatives state as follows:

1. On October 2 and 3, 2000, the Cooperatives submitted their respective compliance filings relative to the restructuring plan required by 2000 PA 141 *('the new Act")*.

2. Section 10x(1) of the new Act provides that:

> The commission shall not require a cooperative electric utility to provide its retail customers the ability to choose an alternative electric supplier before January 1, 2005, nor unbundle its rates as required under section 10b before July 1, 2004. Any retail customer of a cooperative with a peak load of 1 megawatt or greater shall be provided the opportunity to choose an alternative electric supplier no later than January 1, 2002. [MCL 460.10x(1); MSA 22.13(10x)(1)].

3. At issue in this case is whether, under §10x(1), the electric cooperatives ***must*** permit customer aggregation (*i.e,* the combination of multiple customers' electric loads from multiple sites) so customers can collectively meet the 1 MW load threshold and attain early eligibility for customer choice, *i.e.* earlier than January 1, 2005.

4. The Cooperatives believe that the new Act's unambiguous language and prior Commission Orders establish that aggregation is permissive rather than mandatory. Specifically:

A. The first phrase of §10x(1) unambiguously states that the Commission is without authority to require a cooperative to provide its customers the opportunity to choose and alternative electric supplier (*"AES")* prior to January 1, 2005:

> The commission *shall not* require a cooperative electric utility to provide its retail customers the ability *to choose an alternative electric supplier* before January 1, 2005 . . . [emphasis added].

B. The new Act's sole reference to aggregation is in §10bb which limits aggregation to services purchased *from an AES*:

> Aggregation may be used for the purchasing of electricity and related services *from an alternative electric supplier.* [emphasis added].

C. The second phrase of §10x(1) unambiguously states that unbundling of rates may not be required before July 1, 2004:

> The commission shall not require a cooperative electric utility to . . . unbundle its rates as required under section 10b before July 1, 2004.

If cooperative customers are allowed to aggregate prior to January 1, 2005, the cooperative would be forced to have unbundled rates prepared and approved before July 1, 2004.

D. The remaining language in § 10x(1) unambiguously states that any *retail customer* (singular) with a peak load of 1 MW or greater may choose an AES:

> Any *retail customer* of a cooperative with a peak load of 1 megawatt or greater shall be provided with the opportunity to choose an alternative electric supplier no later than January 1, 2002. [emphasis added].

The use of the words "retail customer" is significant because: (1) "customer" is singular and the Legislature would have written the provision to include "any customer or customers" had it intended to permit aggregation; and (2) the language clearly indicates that choice must be offered to a cooperative's *retail* customer. An entity that aggregates multiple customers in order to meet the 1 MW requirement would have to be an AES, and by its very nature, is not a retail customer.

E. Aggregation is contrary to prior Commission Order U-12464, *In the matter, on the Commission's own motion, of the implementation of 2000 PA 141*, which directs that:

> . . . [E]ach investor owned electric utility, other than Consumers Energy Company and The Detroit Edison Company, shall file, no later than October 2, 2000, a restructuring plan in compliance with the act that permits all of its retail customers to choose an alternative electric supplier no later than January 1, 2002. Each filing shall be in a new docket, and will be subject to contested case proceedings. Each cooperative electric utility with *any customer* having a peak load of one megawatt or more shall do likewise. Any cooperative that does not have *a customer* with a peak load of one megawatt or more at this time shall file its plan within 30 days of commencing service to *a customer* with a peak load of one megawatt or more. [emphasis added].

Similar to the language used in the second sentence of §10x(1), the Commission's Order uses the word "customer" in the singular. Further, the Commission specifically exempted cooperatives without a customer having a peak load of 1 MW or more from the filing requirement. Aggregation would require all cooperatives, even those without a customer having a peak load of 1 MW or more, to submit a restructuring filing.

5. This motion is accompanied by a brief in support of this motion for summary disposition.

WHEREFORE, the Cooperatives respectfully request that the Commission grant their motion for summary disposition and determine that the Commission is without authority to mandate that electric cooperatives permit customer aggregation in order for customers to meet the 1 MW threshold.

Respectfully submitted,

CLOVERLAND ELECTRIC COOPERATIVE, MIDWEST ENERGY COOPERATIVE, CHERRYLAND ELECTRIC COOPERATIVE, GREAT LAKES ENERGY COOPERATIVE, PRESQUE ISLE ELECTRIC & GAS CO-OP, and HOMEWORKS TRI-COUNTY ELECTRIC COOPERATIVE

By: ______________________________

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
DYKEMA GOSSETT PLLC
800 Michigan National Tower
Lansing, Michigan 48933
(517) 374-9155/(517) 374-9184

Dated : February 16, 2001
LAN01\ 75536.2
ID\ CMMA

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of Cloverland Electric Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	Case No. U-12656
In the matter of Midwest Energy Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	Case No. U-12657
In the matter of Cherryland Electric Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	Case No. U-12658
In the matter of Great Lakes Energy Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	Case No. U-12659
In the matter of Presque Isle Electric & Gas Co-op's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	Case No. U-12660
In the matter of HomeWorks Tri-County Electric Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	Case No. U-12661

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Cloverland Electric Cooperative in Case No. U-12656, Midwest Energy Cooperative in Case No. U-12657, Cherryland Electric Cooperative in Case No. U-12658, Great Lakes Energy Cooperative in Case No. U-12659, Presque Isle Electric & Gas Co-op in Case No. U-12660, and HomeWorks Tri-County Electric Cooperative in Case No. U-12661, *(collectively "the Cooperatives")*, by their attorneys, DYKEMA GOSSETT PLLC, respectfully submit this brief in support of their Motion for Summary Disposition *("motion")*.

INTRODUCTION AND COOPERATIVES' POSITION

This motion is about statutory interpretation, *i.e.*, the impact of 2000 PA 141 *("the new Act")*, which became effective June 5, 2000. § 10x(1) of the new Act , MCL 460.10x(1); MSA 22.13(10x)(1), provides that:

> The commission shall not require a cooperative electric utility to provide its retail customers the ability to choose an alternative electric supplier before January 1, 2005, nor unbundle its rates as required under section 10b before July 1, 2004. Any retail customer of a cooperative with a peak load of 1 megawatt or greater shall be provided the opportunity to choose an alternative electric supplier no later than January 1, 2002.

This motion considers whether, under §10x(1), the electric cooperatives *must* permit customer aggregation (*i.e,* the combination of multiple customers' electric loads from multiple sites) so customers can collectively meet the 1 MW load threshold and attain early eligibility for customer choice, *i.e.*, earlier than January 1, 2005.

The Commission Staff ("Staff") apparently believes that the new Act *requires* that Cooperatives permit aggregation for their customers prior to January 1, 2005. The Cooperatives look forward to the Staff's brief which will attempt to highlight portions of the new Act to support its claim. The Cooperatives could find no support for the Staff's position in the new Act.

The Cooperatives believe that the new Act's unambiguous language, in conjunction with prior Commission orders, establish that *aggregation is permissive rather than mandatory.* Accordingly, the Cooperatives respectfully request that the Commission grant summary disposition on this issue in their favor.

ARGUMENT

A. Summary Disposition Standards

Before addressing the motion's substance, the applicable Michigan Public Service Commission Rules of Practice and Procedure *("Rules")* should be analyzed. Rule 323, R 460.17323, provides as follows:

> A party may make a motion for summary disposition of all or part of a proceeding. If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend, to the commission, summary disposition of all or part of the proceeding. If the entire proceeding is disposed of, the presiding officer shall issue a proposal for decision. If only part of a proceeding is disposed of, the presiding officer may issue a partial proposal for decision.

Thus, such a motion may be granted where there is no genuine issue of material fact. In Michigan, the interpretation of a statute is a question of law. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999). Since this motion involves a question of law and there is no issue of material fact, summary disposition under Rule 323 is appropriate.

B. Aggregation Is Contrary To The New Act's Plain Language

The cardinal rule of statutory interpretation is to ascertain and effectuate the Legislature's intent. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000); *Frankenmuth Mutual Insurance Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). As stated in *House Speaker v State Administrative Board*, 441 Mich 547, 567; 495 NW2d 539 (1993), the "starting point in every case involving construction of a statute is the language itself." If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *In re Approximately Forty Acres in Tallmadge Twp*, 223 Mich App 454, 460; 566 NW2d 652 (1997).

A review of the language in §10x(1) unambiguously demonstrates that the Legislature did not intend to require that Cooperatives permit customer aggregation prior to January 1, 2005. As a matter of fact, a careful review of *each phrase and sentence in §10x(1)* supports the Cooperatives' position, not the Staff's position. At this point, it is instructive to analyze §10x(1) on a phrase-by-phrase basis.

The first phrase of §10x(1) provides as follows:

> The commission shall not require a cooperative electric utility to provide its retail customers the ability *to choose an alternative electric supplier* before January 1, 2005 . . . [emphasis added].

Thus, the first phrase clearly and unambiguously states that the Commission is without authority to require a cooperative to provide its customers the opportunity to choose an alternative electric supplier ("AES") prior to January 1, 2005. The new Act's *sole reference to aggregation* is in

§10bb, MCL 460.10bb(1); MSA 22.13(10bb)(1), which limits aggregation to services *purchased from an AES*:

> Aggregation may be used for the purchasing of electricity and related services *from an alternative electric supplier*. [emphasis added].

The immediate *question which the Staff will have to answer* in its reply brief is as follows:

> "How can the Staff argue that aggregation must be permitted before January 1, 2005 when
>
> (i) the new Act's clear and unambiguous language provides that aggregation is through an AES, and
>
> (ii) the Act's clear and unambiguous language provides that the Commission is without authority to require a cooperative to provide its customers the ability to choose an AES prior to January 1, 2005?"

The Cooperatives look forward to Staff's response to the above questions. The Staff approach would require aggregation (which can only be through an AES) even though no cooperative may be required to provide access to an AES prior to January 1, 2005. The Cooperatives suggest that there is a major disconnect in Staff's analysis.

The second phrase of §10x(1) provides as follows:

> The commission shall not require a cooperative electric utility to . . . unbundle its rates as required under section 10b before July 1, 2004. . . .

Thus, the second phrase clearly and unambiguously states that unbundling of rates may not be required before July 1, 2004. If, hypothetically, 30,000 residential cooperative customers were allowed to aggregate prior to January 1, 2005, the cooperative will need to have unbundled residential rates prepared and approved. But the new Act clearly and unambiguously states that no unbundling may be required prior to July 1, 2004.

The immediate *question which the Staff will have to answer* in its reply brief is as follows:

> "How can the Staff argue that aggregation must be permitted before January 1, 2005 when
>
> (i) the new Act's clear and unambiguous language provides that no unbundling may be required before July 1, 2004, and
>
> (ii) Absent unbundling, there can be no aggregation prior to January 1, 2005?"

<u>*The remainder of §10x(1) provides as follows*</u>:

> Any retail *customer* of a cooperative with a peak load of 1 megawatt or greater shall be provided the opportunity to choose an alternative electric supplier no later than January 1, 2002. [emphasis added].

This language clearly and unambiguously states that any retail *customer* with a peak load of 1 megawatt or greater may choose an alternative electric supplier. The word "customer" is singular. An aggregation of customers would not be a single "customer." If the Legislature had intended to permit aggregation, the Legislature would have written the provision to include "any customer or customers." It is well established law that the Legislature is presumed to have intended the meaning it plainly expressed. *Amburgey v Sauder*, 238 Mich App 228, 232; 605 NW2d 84 (1999).

The statute's language also clearly states that choice must be offered to a cooperative's *retail customer* with a peak load of 1 MW or greater. As discussed above, an entity that aggregates multiple customers in order to meet the 1 MW requirement would have to be an AES, and by its very nature, *not a retail customer* of the cooperative. Although the entity may represent customers of the cooperative or it may purchase wholesale power for the cooperative's retail customers, the entity itself could not be a retail customer of the cooperative. Instead, the entity would need some legal structure in order to contract with its own customers and the cooperative.

Additional support for the proposition that the statute's plain language does not contemplate aggregation is the fact that the second sentence of §10x(1) requires the single retail customer to have "a peak load of 1 megawatt or greater." The phrase "a peak load" refers to a *single* peak load. Similar to its selection of the word "customer," if the Legislature had intended to permit aggregation prior to January 1, 2005, the Legislature would have written the provision in the plural rather than the singular. Accordingly, the statute's plain language establishes that the Legislature never intended to make aggregation mandatory under §10x(1).

C. **Aggregation Would Render The General Rule Meaningless**

A fundamental principle of statutory construction is that statutory interpretation which yields internal inconsistency or renders any part of the statue surplusage or nugatory is to be avoided. *In re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d (1999); *Piper v Pettibone Corp*, 450 Mich 565; 542 NW2d 269 (1995). In addition, the United States Supreme Court has stated that exceptions to general rules are typically narrowly construed in order to preserve the primary operation of the provision. *Commissioner of Internal Revenue Service v Clark*, 489 US 726, 738; 109 S Ct 1455 (1989).

In the instant case, inconsistency can only be avoided and the exception can only be effectuated if aggregation is not mandatory. The first sentence of §10x(1) contains the general rule that cooperatives cannot be required to provide choice to customers until January 1, 2005, or unbundle its rates before July 1, 2004:

> The commission *shall not* require a cooperative electric utility to provide its retail customers the *ability to choose* an alternative

electric supplier *before January 1, 2005, nor unbundle its rates* as required under section 10b *before July 1, 2004.* [emphasis added].

If cooperatives are required to permit aggregation, the cooperatives would essentially be forced to provide choice to *all customers* before January 1, 2005 and the general rule would be rendered meaningless.

Also, as discussed above, in order to provide service to retail customers *vis a vis* aggregation, a cooperative would be forced to unbundle its rates. Otherwise, if rates were not unbundled, it would be impossible to allocate the distribution, transmission and generation charges. Clearly this is inconsistent with the statute's plain language that no rate unbundling is required before July 1, 2004 and thus aggregation cannot be required.

D. Aggregation Is Contrary To Prior Commission Orders

On June 19, 2000, this Commission issued an Order in Case no. U-12464 which addressed §10x(1). In order to implement §10x(1), the Commission directed that:

> . . . [E]ach investor owned electric utility, other than Consumers Energy Company and The Detroit Edison Company, shall file, no later than October 2, 2000, a restructuring plan in compliance with the act that permits all of its retail customers to choose an alternative electric supplier no later than January 1, 2002. Each filing shall be in a new docket, and will be subject to contested case proceedings. Each cooperative electric utility with *any customer* having a peak load of one megawatt or more shall do likewise. Any cooperative that does not have *a customer* with a peak load of one megawatt or more at this time shall file its plan within 30 days of commencing service to *a customer* with a peak load of one megawatt or more.
>
> Order, U-12464, *In the matter, on the Commission's own motion, of the implementation of 2000 PA 141*, p 2 (emphasis added).

The above is significant for a number of reasons. *__First,__* similar to the language contained in the statute's exception, the Commission's Order uses the word "customer" in the singular.

Second, the Commission clearly limited the need to file for any "cooperative electric utility with *any customer* having a peak load of one megawatt or more" and deferred such a filing for any "cooperative that does not have *a customer* with a peak load of one megawatt or more"[1] until the time period "within 30 days of commencing service to *a customer* with a peak load of one megawatt or more." The immediate *question which the Staff will have to answer* in its reply brief is as follows:

> "How can the Staff argue that aggregation must be permitted before January 1, 2005 when
>
> (i) aggregation would require all cooperatives, *even those _without_ a customer having a peak load of 1 MW or more*, to submit restructuring filings, and
>
> (ii) the Commission's June 19, 2000 order in Case No. U-12464 specifically exempted cooperatives without a customer having a peak load of 1 MW or more from the October 2, 2000 filing requirement?"

CONCLUSION

The Cooperatives submit that the Commission is without authority to mandate that electric cooperatives permit customer aggregation in order for customers to meet the 1 MW threshold. To hold otherwise would bypass the Legislature's intent as expressed by the plain and unambiguous language of the statute, render the provision inconsistent, cause conflict with prior Commission orders, and unnecessarily complicate implementation of the new Act. Accordingly, the Cooperatives request that the Commission grant summary disposition on this issue in their favor.

---

[1] Several cooperatives, including Thumb Electric Cooperative, Alger Delta Cooperative Electric Association, and Ontonagon County Rural Electric Association advised this Commission on September 29, 2000 that they did not have a customer with a peak load of one megawatt or more and thus they were not filing a restructuring plan. *See* Exhibit A.

Respectfully submitted,

CLOVERLAND ELECTRIC COOPERATIVE, MIDWEST ENERGY COOPERATIVE CHERRYLAND ELECTRIC COOPERATIVE, GREAT LAKES ENERGY COOPERATIVE, PRESQUE ISLE ELECTRIC & GAS CO-OP, and HOMEWORKS TRI-COUNTY ELECTRIC COOPERATIVE,

By: ______________________________

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
DYKEMA GOSSETT PLLC
800 Michigan National Tower
Lansing, Michigan 48933
(517) 374-9155/(517) 374-9184

Dated: February 16, 2001

LAN01\ 75250.4
ID\ CMMA

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of Midwest Energy Cooperative's compliance filing relative to the restructuring plan required by 2000 PA 141 and the Commission's June 19, 2000 opinion and order in Case No. U-12464.	)))))	**Case No. U-12657**

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Jeanne M. Beachnau, being first duly sworn, deposes and says that on February 16, 2001, she caused to be served upon Mr. Michael Nickerson, Assistant Attorney General, 6545 Mercantile Way, Suite 15, Lansing, MI 48911 and Judge Daniel E. Nickerson Jr. Administrative Law Judge, Michigan Public Service Commission, 6545 Mercantile Way, Ste. 14, Lansing, MI 48911, copies of Motion for Summary Disposition and Brief in Support thereon of Midwest Energy Cooperative by United States First Class Mail and electronic mail.

Jeanne M. Beachnau

Jeanne M. Beachnau

Subscribed and sworn to before me
on February 16, 2001

Amy L DeBruler

Amy L DeBruler, Notary Public
Eaton, Acting in Ingham County, Michigan
My commission expires: 12/03/03