STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of **CLOVERLAND ELECTRIC COOPERATIVE** for approval of its plan to implement 2000 PA 141**.** _____________________________________/	Case No. **U-12656**
In the matter of the application of **MIDWEST ENERGY COOPERATIVE** for approval of its plan to implement 2000 PA 141**.** _____________________________________/	Case No. **U-12657**
In the matter of the application of **CHERRYLAND ELECTRIC COOPERATIVE** for approval of plans to implement 2000 PA 141**.** _____________________________________/	Case No. **U-12658**
In the matter of the application of **GREAT LAKES ENERGY COOPERATIVE** for approval of plans to implement 2000 PA 141**.** _____________________________________/	Case No. **U-12659**
In the matter of the application of **PRESQUE ISLE ELECTRIC** **& GAS CO-OP** for approval of plans to implement 2000 PA 141**.** _____________________________________/	Case No. **U-12660**
In the matter of the application of **HOMEWORKS TRI-COUNTY ELECTRIC** **COOPERATIVE** for approval of plans to implement 2000 PA 141**.** _____________________________________/	Case No. **U-12661**

BRIEF IN SUPPORT OF
THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
MOTION FOR PARTIAL SUMMARY DISPOSITION

INTRODUCTION

Cloverland Electric Cooperative, Midwest Energy Cooperative, Cherryland Electric Cooperative, Great Lakes Energy Cooperative, Presque Isle Electric and Gas Co-Op and Homeworks Tri-County Electric Cooperative filed applications for approval of their plans to implement the provisions of 2000 PA 141 on October 2, October 2, October 3, October 3, October 3, and October 3, 2000, respectfully, which were assigned docket numbers U-12656, U-12657, U-12658, U-12659, U-12660, and U-12661, again respectively. While the parties anticipate settlement of most issues relevant to the plans submitted, the parties have been unable to agree on resolution of the issue of whether the Michigan Public Service Commission may, in the context of a PA 1412 proceeding, require an electric cooperative to offer a tariff that accommodates the aggregation of loads, meters, and premises which, when combined to a peak load equal to or greater than 1 MW, would permit that customer so aggregated the opportunity, no later than January 1, 2002, to choose an alternative electric supplier and have agreed to submit cross-motions for summary disposition limited to that issue.

ARGUMENT

The introductory paragraph to the Cherryland submission is representative of the intended purpose surrounding the compliance filings of the Cooperatives involved in the instant proceedings. That paragraph states:

> This submission sets forth Cherryland Electric Cooperative's ("*Cherryland*" or "*the Cooperative*") plan to restructure the way in which it conducts its businesses in order to allow certain of its retail members the opportunity to choose their energy supplier ("*Electric Member Choice Program*"). This Restructuring Plan ("*plan*") is intended to be consistent with 2000 PA 141 and the Michigan Public Service Commission's ("*MPSC*" or "*Commission*") Opinion and Order in Case No. U-12464, dated June 19, 2000 ("*June 2000 order*").

The June 19, 2000 Opinion and Order in Case No. U-12464 provides in part:

> B. Each cooperative electric utility with any customer having a peak load of one megawatt or more shall file, no later than October 2, 2000, a restructuring plan in compliance with 2000 PA 141 that permits any customer with a peak load of one megawatt or more to choose an alternative electric supplier no later than January 1, 2002. 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.

The Michigan Public Service Commission Staff submits that compliance with the above-quoted Order requires the Cooperatives to submit to the Commission tariffs that accommodate the aggregation of loads, meters, and premises which, when combined to a peak load equal to or greater than 1 MW, would permit a customer so aggregated the opportunity, no later than January 1, 2002, to choose an alternative electric supplier.

The position advanced by Staff here is not inconsistent with the requirements of 2000 PA 141. Section 10x(1) of that act provides in part:

> 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… . 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.

The reference in Section 10x(1) to "customer", in the singular, does not preclude a Commission determination that the Cooperatives should, in their filings intended to comply with 2000 PA 141, submit tariffs which would accommodate the aggregation of loads now, to facilitate implementation of the full customer choice provisions of 2000 PA 141 by the target date mandated by the Legislature. As Great Lakes Energy Cooperative stated in its August 28, 2000 Reply Brief in Case No. U-12316:

> Finally, Staff's position ignores the realities of today's customer choice environment. The current legislative policy for the electric industry, as evidenced in recently enacted 2000 PA 141, is to accommodate customer choice when possible. The Commission is well aware that 2000 PA 141 is entitled the *Customer Choice and Electric Reliability Act*. Likewise, the Commission is actively encouraging customer choice in other industries such as the natural gas

> industry. *See* Docket No. U-12550 (*re Gas Customer Choice – The Next Step*). Consequently, and contrary to Staff's assertion that customer choice plays *no role*, any interpretation of Rule 411 must actually *favor* customer choice.

(Great Lakes Energy Cooperative brief, p 1, Attachment A)

Staff believes its position on the issue of aggregation accurately reflects the requirements of the customer choice environment for the customer/members of Michigan's electric cooperatives.

Moreover, tariffs that accommodate the aggregation recommended by Staff here would be fully consistent with both the Act and Commission Rules. First, 2000 PA 141 contemplates the concept of aggregation. Section 10bb of that Act provides:

> (1) Aggregation may be used for the purchasing of electricity and related services from an alternative electric supplier.
>
> (2) Local units of government, public and private schools, universities, and community colleges may aggregate for the purpose of purchasing electricity for themselves or for customers within their boundaries with the written consent of each customer aggregated. Customers within a local unit of government shall continue to have the right to choose their electricity supplier and are not required to purchase electricity through the aggregator.
>
> (3) As used in this section, "aggregation" means the combining of electric loads of multiple retail customers or a single customer with multiple sites to facilitate the provision of electric service to such customers.

Secondly, R. 460.3102(e) provides:

> "Customer," except as used in R460.3411, means any person, firm, association, or corporation or any agency of the federal, state, county, or municipal government that purchases electric service supplied by a utility.

Thus, under the Act and present Commission rules, given the anticipated initiation of the Cooperatives' Electric Member Choice Programs, there should be no impediment to a new customer being afforded the opportunity, within the implementation plans presently being considered by the Commission, to aggregate multiple loads, meters, and premises to achieve a combined load of 1 MW or greater and thus be eligible to obtain open access service. Similarly, there should be no impediment to pre-existing customers of the Cooperatives being afforded the opportunity to eventually discontinue their previous memberships in the Cooperatives and reorganize themselves into a new, aggregated customer with combined load of 1 MW or greater. In either case, Staff submits that the new customer qualifies for open access service no later than January 1, 2002. Also, in either of these cases, or as may be the case for any pre-existing customer, Staff submits that the Cooperatives' open access service must be available to loads being served at secondary voltage, and not only to loads served at primary voltage.

Such an approach by this Commission would be fully consistent with the position employed before the Federal Energy Regulatory Commission (FERC) in the revisions to its open access transmission tariff (OATT) submitted by the Wolverine Power Supply Cooperative in Docket No. ER01-296-000, as reflected in the December 29, 2000 FERC Order accepting those revisions. There, the Wolverine tariff provided for the "consolidation" (i.e. aggregation) of service requests at a common Point of Receipt into units of 1 MWH for scheduling and billing purposes. (See Attachment B.)

RELIEF

WHEREFORE, for the foregoing reasons, Staff respectfully requests that the Commission enter an order:

1. Requiring the cooperatives to submit to the Commission PA 141 Implementation Plan tariffs that accommodate the aggregation of loads, meters, and premises which, when combined to a peak load equal to or greater than 1MW, would permit a customer so aggregated the opportunity, no later than January 1, 2002, to choose an alternative electric supplier; and,
2. Requiring that the Cooperatives' Electric Member Choice Program tariffs shall apply to either (or both) existing and/or new customers; and,

3. Requiring that Electric Member Choice Program tariffs be available to loads taking service at either primary or secondary voltage.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION STAFF

Michael A. Nickerson (P25138)
Assistant Attorney General
Public Service Division
6545 Mercantile Way, Ste. 15
Lansing, MI 48911
Telephone: (517) 241-6680

Dated: February 16, 2001

2000064579A

ATTACHMENT A

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of Consumers Energy Company against Great Lakes Energy Cooperative relative to the provision of electric service to Meijer, Inc. in Ludington, Michigan.)	**Case No. U-12316**

REPLY BRIEF
OF
GREAT LAKES ENERGY COOPERATIVE

In accordance with the schedule established by Administrative Law Judge Barbara A. Stump *("ALJ")*, Great Lakes Energy Cooperative *("Great Lakes")*, Consumers Energy Company *("Consumers Energy")*, and the Michigan Public Service Commission *("Commission")* Staff filed their initial briefs on August 14, 2000. Great Lakes respectfully submits this reply to the initial briefs of the Commission Staff and Consumers Energy.

<u>Overview</u>

Consumers Energy and Commission Staff make two arguments in their briefs: (i) that Consumers Energy is the appropriate provider of electric service because Meijer was either an "existing customer" of Consumers under Rule 411(11), or because Consumers Energy is the closest utility to the Meijer meter under Rule 411(7); and (ii) that Great Lakes' three-phase facilities located south of Johnson Road and east of Brye Road in Ludington, Michigan cannot be used as a measuring point for Rule 411 purposes. In order to accept their position, however, the Commission must be willing to do the following:

☞1 Ignore established Commission policy, past Commission precedent *and new Michigan law*[1] which states that Rule 411 should accommodate *customer choice* where possible;

☞2 Slight one of Michigan's largest employers' decision to tailor its land purchase in order to accommodate Rule 411 and its choice of electric providers

☞3 Disregard established Commission precedent that the date of the request for service is the key date in a Rule 411 analyses;

☞4 Reject Michigan law concerning the time at which a purchaser acquires title to real property;

☞5 Disavow Commission precedent which holds that there is no existing customer where (i) there is no active service, and (ii) the discontinuance of service was neither temporary nor related to a change in ownership or the need to facilitate construction;

☞6 Overlook Consumers Energy's admissions that it had no active service on the property owned by Meijer on the date of Meijer's request for service, August 16, 1999, and that the discontinuation of service was neither temporary nor related to a change in ownership or the need to facilitate construction;

☞7 Determine that events occurring subsequent to planning, construction and extension of distribution facilities may be *retroactively applied* through hindsight to deem a line, valid when built, to become invalid;

☞8 Even assuming the "green line" is a stub line (which it is not), *retroactively apply* the stub line concept to Great Lakes and ignore the fact that the Commission's order in Case No. U-10108 provided that past construction which had already been completed was not subject to the stub line concept; and

☞9 Cast Great Lakes' witness as a liar even though Staff's own witness admits that *Staff does not question the veracity of Great Lakes' intentions* concerning its "green line."

As set forth below, the correct result in this case is to *reject Consumers Energy's and Staff's position* and to determine that *Great Lakes is entitled to serve* the site owned by Meijer, Inc. (*"Meijer"*).

ARGUMENTS

A. Contrary To Staff's Position, Rule 411 Must Be Interpreted To Accommodate and Promote Customer Choice.

[1] As the Commission knows, the legislatively determined title for 2000 PA 141 is the ***Customer Choice** and Reliability Act*.

At pages 23-24 of its brief, Commission Staff argues that customer choice plays no role in Rule 411 cases and that customers have no right to choose their meter location. These arguments are clearly inconsistent with Commission policy and precedent which support using Rule 411 as a means to accommodate and promote, rather than impede, customer choice. They are also inconsistent with the realities of today's customer choice environment and new Michigan law.

As Great Lakes explained in its initial brief, the Director of the Electric Division, William J. Celio, issued a May 6, 1999 interoffice memorandum to Rich Whale, Supervisor of the Engineering Section, establishing a *Staff interpretation* of Rule 411 on a going forward basis (Exh C-15). Item number 3 on page 1 of the memorandum explicitly states that one of Staff's policies with respect to Rule 411 will be to "[p]romote customer choice when not otherwise prohibited." (*Id.*) When questioned about the memorandum, Staff's own witness, Stephen Paytash, agreed that the memorandum meant that Rule 411 should be interpreted to accommodate customer choice.[2]

Staff's position also flies in the face of past Commission precedent which recognizes that a customer can choose the location of its facilities, even if it results in the customer being able to choose its service provider, as long as the customer complies with Rule 411. In Case Nos. U-11015 and U-11071, (*re Indiana Michigan Power Company, Fruit Belt Electric Cooperative, K&W Properties, Die Cast Press Manufacturing*) the Commission stated:

---

[2] Q: And to you does [item number 3 of the memorandum] mean that if one can interpret Rule 411 so as to accommodate customer choice, it should do so.

A: Yes, I . . . I believe that's what I answered in response to your previous questions about choice. I agree . . . I'd agree with that. (Tr 268).

> "The Commission recognizes that when a new customer is located near two utilities, *there may be options for designing the layout of the buildings or facilities on the property that allow the customer to effectively choose which utility will serve. As long as the customer complies with the language of Rule 411, the customer may exercise that choice.*" (Order, p10)(emphasis added).

Finally, Staff's position ignores the realities of today's customer choice environment. The current legislative policy for the electric industry, as evidenced in recently enacted 2000 PA 141, is to accommodate customer choice when possible. The Commission is well aware that 2000 PA 141 is entitled the <u>*Customer Choice*</u> *and Electric Reliability Act.* Likewise, the Commission is actively encouraging customer choice in other industries such as the natural gas industry. *See* Docket No. U-12550 (*re Gas Customer Choice –The Next Step).* Consequently, and contrary to Staff's assertion that customer choice plays *no role*, any interpretation of Rule 411 must actually *favor* customer choice.

B. Consumers Energy's And Commission Staff's Characterization of Meijer As An Existing Customer Is Erroneous.

Consumers Energy's and Staff's briefs demonstrate a complete lack of understanding of Rule 411 and the prospective vs. existing customer analysis.

1. *The August 16, 1999 Request For Service Is the Key Date In A Rule 411 Analysis*

The Commission definitively stated in Case No. U-11622 (*Re Hillman Community Schools*) that the key date in determining a utility's right to serve is *the date of the request for service:*

> "Rule 411 can be fairly applied only if there is an established time after which any changes in circumstance will not alter the rights of the competing utilities. *Accordingly, the Commission held that "the appropriate time to determine whether a utility has the right or obligation to serve is the time the utility receives the request for*

service." (*quoting* Case No. U-10116, Order, at p 7; Case No. U-11622, p 8; emphasis added).

Consumers Energy's witness, Mr. Roger Cody, and Staff's witness, Mr. Stephen Paytash, both agreed on cross-examination that the date of the request for service is controlling (Tr 76, 87, 100-101).

Despite the Commission precedent holding that the key date is the date of the request for service, Staff inexplicably argues on page 16 of its brief that "Great Lakes assertion that the Meijer's August 16, 1999 request for service should be determinative of Meijer's existing customer status must be rejected" and "the request for service date had no bearing on who serves Meijer or when Meijer became an existing customer of Consumers Energy." Staff's arguments obviously conflict with past Commission precedent and must be rejected.

Likewise, Consumers Energy suggests on pages 4, 7, and 16 of its brief that a Rule 411 analysis is somehow dependant on the state of affairs on the date that the site plans are submitted. Again, the Commission has made it abundantly clear that there is only one date of significance in a Rule 411 analysis: the date of the request for service.

2. ***Meijer Owned Only Two Parcels Of Property As Of The August 16, 1999 Request For Service And The Parties Admit That There Was No Active Service On Those Two Parcels***

Under prior Commission precedent, a Rule 411analysis requires a determination as to whether Consumers Energy was providing *active* service to any of the parcels of property owned by Meijer as of the August 16, 1999 request for service. In Case No. U-11622, *Re Hillman Schools*, the Commission's determination that Rule 411 permitted Alpena Power Company to serve the load focused on the fact that Alpena was *actively serving* the site at the time the request for service was made. (Order, p 9).

At the time of the August 16, 1999 request for service, Meijer only owned two parcels of property: the FHPPSY parcel and the Nels Nelson Lund, Jr. and Marjorie Lund parcel (Exh C-3). At the time of the August 16, 1999 request for service, Meijer *did not own* the 1.5 acre Finishing Touch/yellow parcel (*Id*).

In their initial briefs, both Consumers Energy and Staff attempt to muddy the waters concerning the property Meijer owned on August 16, 1999 by emphasizing the fact that, although the Finishing Touch parcel deed was signed on August 17, 1999, it was not recorded until August 24, 1999 and that it was the first out of three deeds to be recorded. This argument is *completely irrelevant*, however.

To begin with, Meijer acquired legal title to the Finishing Touch parcel on August 17, 1999. It is well established under Michigan law that title to real property is conveyed by executing and delivering a deed. *See Resh v Fox*, 365 Mich 288, 291; 112 NW2d 486 (1961); *McMahon v Dorsy*, 353 Mich 623, 626; 91 NW2d 893 (1958). Contrary to Consumer Energy's statement at page 16 of its brief, the validity of a conveyance is not dependent upon the recording of a deed with the local Register of Deeds office. Instead, the act of recording a deed only serves to protect the *priority* of the conveyance. A review of the statute cited by Consumers shows that an unrecorded deed is void only against any *bona fide purchaser* who records its deed first:

> "Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion

thereof, whose conveyance shall be first duly recorded. (MCL 565.29; MSA 26.547).

Moreover, the fact that the deed transferring the Finishing Touch parcel may have been recorded first is meaningless to the instant case. There is no Commission precedent which attaches significance to the order in which deeds are recorded.

Consumers Energy's witness Cody admitted that the warranty deed conveying the property from Finishing Touch, Inc. to Meijer was not signed until August 17, 1999, *i.e.*, after the request for service (Tr 68). Consumers Energy also admits that, at the time of Meijer's August 16, 1999 request for service, it was not actively serving any building or facility on the property owned by Meijer:

> Q: With respect to all except for the Finishing Touch parcel, you were not providing active service to any customer on the south 40; correct? As of August 16, 1999?
>
> A: The only . . . The only customer we had active service and actively selling were on the Finishing Touch's. (Tr 85).

Accordingly, Great Lakes was entitled to serve Meijer as a *prospective customer* because Consumers ***admits*** that it had no active service to any of the property owned by Meijer on August 16, 1999.

3. ***The Applicable Test Is Not Whether Service Has Been Abandoned But Whether Discontinuance Of Service Was Related To A Change In Ownership Or The Need To Facilitate The Construction Of The New Meijer Store.***

Consumers Energy and Staff both argue that Consumers Energy is entitled to serve the Meijer store as an existing customer because Consumers Energy did not *abandon* service on any of the three parcels of property eventually acquired by Meijer. Abandonment is not the test for determining whether a utility is entitled to serve under Rule 411. Again, Case No. U-11622, *re*

Hillman Schools, focuses on whether there is *active* service to a parcel of property. As Great Lakes mentioned in its initial brief, rather than drawing arbitrary lines for determining precisely how many years, weeks, or days a utility can go without providing service to a customer and still retain its "active service status", the Commission established a tangible two part standard: (i) whether the discontinuance of service to the site was directly related to the change in ownership and (ii) whether the discontinuance of service was temporary and directly related to the necessity of the new owner to demolish buildings in order to facilitate new construction. (Order, p 8). *See also* Case No. U-11564 (*In Consumers Energy Company against Presque Isle Electric Gas Co-Op)*(Commission determined that there was an existing customer where service was *temporarily* discontinued during construction in order to facilitate the construction (Tr 274, 275)).

Consumers Energy acknowledges that its 1992/1994 discontinuances of service to the two parcels making up the Meijer property on August 16, 1999 were *not directly related, let alone even rationally related*, to a change in ownership and/or the necessity to demolish buildings in order to facilitate new construction. Consumers Energy testified that as follows:

> Q: Is it Consumers Energy's position that the discontinuance of service to the sign at 3870 was a temporary discontinuance of service to facilitate the new Meijer facility five, six years later?
>
> A: No.
>
> Q: Thank you. Is it Consumer's Energy's position that these buildings were torn down to make room for the new Meijer facility?
>
> A: No.
>
> * * *
>
> Q: Is it Consumers Energy's position that the discontinuance of active service to these sites four to eight years later, depending on your math, or six to eight years later, depending on your math, was directly related to the change of ownership to Meijer and the necessity to demolish the old buildings so that we could construct the new Meijer facility.

A: If you're referring to 3958 and 3870, I would say that it's correct, that they were not intended as a part of the Meijer project. (Tr 81, lines 2-10, 23-25; Tr 82, lines 1-7).

Staff witness Paytash also admitted that Consumers Energy cannot satisfy the two part standard:

Q: With respect to the Commission's quote which states that the discontinuance of service was directly related to the change of ownership, is it your testimony in this case that with respect to the parcels, except for the yellow parcel, the discontinuance of service in 1992 and 1994 were directly related to the change of ownership to Meijer in 1999?

A: Excluding the yellow parcel, no.

Q: Thank you. The second part of that quote which states that discontinuance of service to the site was related to the necessity of the new owner to demolish the old buildings on the property in order to facility [sic] construction of the new facility, is it your testimony - - again, excluding the yellow parcel - - that Consumers Energy's discontinuance of service in 1992 and 1994 were directly related to the necessity of the new owner to demolish the old building in order to facilitate construction of the new Meijer facility in 1999?

A: I thought that's what I answered. Didn't I just answer --

Q: No, the first question went to the - -

A: Sorry.

Q: - - change of ownership. This one goes to razing or demolishing the old buildings. With respect to both of them, it's not your position that this was done in 1992 and 1994 to accommodate the Meijer facility, is it?

A: That's correct . . . . (Tr 289-291).

Furthermore, Consumers and Staff also acknowledged that the discontinuances of service were not temporary. Mr. Cody testified the following:

Q: . . . . Now, is it Consumers Energy's position that the buildings and facilities served by Consumers Energy up to 1992, that this discontinuance was a temporary discontinuance of service to facilitate the new Meijer facility in 1999?

A: The service at 3958?

Q: Yes. The termination of that, the discontinuance. Is that a temporary discontinuance to facilitate the new Meijer facility seven or eight years later?

A: No.

Q: Thank you. Now, you've got the sign east of the original farm house at 3870. And this is one where you haven't had active service for a number of years; is that correct?

A: Since 1994.

Q: So this one is either five, six or seven years, depending on our math; right?

A: Since it was last active.

Q: Is it Consumers Energy's position that the discontinuance of service to the sign at 3870 was a temporary discontinuance of service to facilitate the new Meijer facility five, six years later?

A: No. (Tr 80, lines 9-25; Tr 81, lines 1-6).

Mr. Paytash similarly testified to the following:

Q: . . . . Would you describe the disconnection of service by Consumers Energy in 1992 and 1994 as a temporary disconnection to facilitate the new Meijer load?

A: I wouldn't characterize it as temporary, no. (Tr 292, lines 13-19).

Neither Consumers Energy's or Staff's briefs refute Great Lakes' argument that, unlike Case Nos. U-11622 (*Re Hillman Schools*) and U-11564 *(Re Stone Bay Fishery)*, there is *no direct or rational relationship* between Consumers Energy's 1992/1994 discontinuances of service and the change in ownership and new construction. Nor do the briefs refute Mr. Paytash's and Mr. Cody's admissions that the discontinuances were not temporary. Accordingly, any attempt to characterize Meijer as an existing customer must fail.

C. Great Lakes' Three-Phase Line South Of Johnson Road And East Of Brye Road Is A Legitimate Measuring Point For Rule 411 Purposes.

Consumers Energy and Staff attempt to cast Great Lakes' three-phase line south of Johnson Road and east of Brye Road, the so-called green line, as a "stub line" which cannot be used as a measuring point for Rule 411 purposes.

As set forth in Great Lakes' initial brief, however, the competent, material and substantial evidence of record (Const 1963, art 6, §28) does not support a conclusion that the so-called green line is a stub line. Great Lakes' witness, Larry Phillips, testified that the upgrade in facilities was part of a comprehensive plan to serve then-existing load, to meet anticipated load growth, to improve system reliability, and for quality of service enhancements (Tr 136-137; 142-143). Great Lakes' goal was to eventually complete a loop from the Scottville substation (Tr 152). The completed loop would have permitted the company to "backfeed" electricity to customers in the event that service on one section of the circuit was lost, a common practice among utilities (*Id*). Mr. Phillips testified that the company's incentive for completing the loop diminished when one of its large customers on the Scottville substation line, Weinert Well, discontinued service and another large customer, Nelson's Packing, substantially reduced its usage to a minimum level (Tr 154).

Both Consumers Energy's and Staff's briefs attempt to attack the credibility of Great Lakes' testimony by arguing that Great Lakes could not provide any drawings or studies relating to the proposed loop during discovery. As Mr. Phillips explained, however, the photos and supporting documentation relating to the plan were destroyed by rain when the roof was blown off of Great Lakes' building (Tr 154). Interestingly enough, *Staff witness Paytash testified on cross-examination that he does not question the veracity of Mr. Phillips' testimony concerning the company's plan to complete the loop, the fact that customers discontinued service, and the fact that the company's records were destroyed by a storm* (Tr 228-229).

Moreover, the briefs of Consumers Energy and Commission Staff ignore four critical points. First, Consumers Energy and Staff admitted on cross-examination that there is nothing in Rule 411 itself which even addresses "stub lines" or states that stub lines cannot be used as legitimate measuring points (Tr 96, 293). Second, Great Lakes' installation of the so-called green line pre-dated, by almost five years, the 1993 case *In re Cherryland Electric Cooperative Against Consumers Power Company* (Case No. U-10108) which addressed the "stub line" concept (Tr 92, 137). Third, the Commission's order in *Cherryland* specifically approved language providing that past construction which had already been completed was not subject to the policy decisions inherent in the order:

> E. By this settlement agreement, the parties have not resolved whether the standards set forth in [Staff's] presentation should apply to past construction which has already been completed. (Order, p 4).

Finally, Consumers Energy itself has consistently previously constructed three-phase facilities solely to better place it in a competitive position. Mr. Phillips testified as to several prior examples:

- the extension of a three-phase line to a billboard on the west side of I-75 and Old 27 South in Gaylord, Michigan to serve a new development project;
- the extension of a three-phase line to a meter at a location remote from a grocery store in Newaygo, Michigan to serve the Newaygo Shopping Center; and

- the underbuilding of a transmission line with distribution to serve Zeeland Farm Services in Zeeland, Michigan. (Tr 13).

Consumers Energy did not even attempt to refute Mr. Phillip's list. Consumers Energy's own witness admitted on cross-examination that, when a Newaygo store indicated that it preferred Consumers Energy over Great Lakes, Consumers Energy intentionally extended the meter an additional 300 feet so that Consumers Energy's distribution facilities would be closer (Tr 73, 75). Based on the above, there can be no escaping the conclusion that Great Lakes' three-phase line south of Johnson Road and east of Brye road is a legitimate measuring point for Rule 411 purposes. Consumers Energy's Mr. Cody concedes that, if the green line is a valid measuring point, then Great Lakes is the closest utility to the Meijer meter (Tr 89-90).

D. Staff's Position Should Not Be Accorded Deference.

Both Staff and Consumers Energy argue that Staff's position should be accorded deference. Staff's position in this case should not be accorded deference because it is wrong. In the end, the Commission will have to interpret Rule 411. Let's review what Rule 411 really says and what the Staff says it says:

First, the Staff argues that Rule 411(11) entitles Rule 411(11) to serve the Meijer facility. Here is what Rule 411(11) *actually says*:

> The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises *of that customer* even if another utility is closer to a portion of the customer's load. [emphasis added].

Clearly, Rule 411(11) entitles the first utility serving to serve the entire electric load *of that customer*. Yet, at page 3, Staff suggests that the phrase "that customer" means "any customer".

> Consumers Energy, as the first utility server of the property, is entitled to serve *any customer* who comes into possession of the farm premises. [emphasis added, Staff brief, p 3].

The phrase "*that customer*" is actually in Rule 411(11). The phrase "*any customer*" is not in Rule 411(11).

Another significant misinterpretation by the Staff is evident in its discussion of Rule 411 and the definition of "*customer*" at pages 10 and 11 of its brief. In supporting its claim that the Meijer facility was an existing *customer* of Consumers Energy, the Staff cites Rule 102(e) and (k) at page 10 as follows:

> Definitions which apply to these rules are set forth at R 460.3102. The definition of premises is relevant and states:
>
> (e) "Customer", except as used in R 460.3411, means any person, firm, association, or corporation or any agency of the federal, state, county, or municipal government that purchases electric service supplied by a utility.
>
> (k) "Premises" means an undivided piece of land that is not separated by public roads, streets or allies.

The Staff then weaves the above excerpted Rule 102(e) and (k) to support its position at page 11 of its brief in interpreting Rule 411:

> Under the framework of Rule 411 and Rule 102 the customer here was the building, facilities or premises served rather than the individual, association, partnership, or corporation served. See Rule 411(1)(a) and Rule 102(e) and (k).]

The obvious problem with the Staff's manipulation of Rule 102(e) and (k) is that they do not apply in Rule 411 interpretation cases. The Staff's analysis relies on definitions which are specifically not applicable to Rule 411 contests:

(e) "Customer", *except as used in R 460.3411*, means . . ." (emphasis added).

The Staff's analysis then proceeds assuming that Rule 411(11) does not include the phrase "that customer"; that the Rule 102 definitions of "customer" and premises are important, *etc.*

In effect, the Staff is asking the Commission to reinterpret or amend Rule 411(11) as follows:

> The first utility serving ~~a~~ ANY customer pursuant to these rules is entitled to serve the entire electric load on the premises of ~~that~~ ANY customer even if another utility is closer to a portion of the customer's load, EVEN IF THE FIRST UTILITY HAS PERMANENTLY DISCONTINUED ACTIVE SERVICE TO THE PREMISES, EVEN IF THERE IS NO RATIONAL RELATIONSHIP BETWEEN THE FIRST UTILITY'S TERMINATION OF SERVICE TO THE PREMISES AND ELECTRIC SERVICE TO THE BUILDINGS AND FACILITIES TO BE SERVED, EVEN IF SAID TERMINATION OF SERVICES WAS NOT SPECIFICALLY INTENDED TO ACCOMMODATE THE NEW SERVICE TO THE BUILDINGS AND FACILITIES TO BE SERVED, AND EVEN IF THE DIFFERENT BUILDINGS AND FACILITIES PREFER THE SECOND UTILITY.

The Commission should not allow Staff's position to force a reinterpretation of Rule 411 so inconsistent with the actual verbiage of Rule 411 and emerging Commission precedent.

Staff's analysis in this case contains several shortcomings including its (i) failure to acknowledge its own Director's written policy stating that customer choice should be accommodated in Rule 411 cases where possible; (ii) failure to acknowledge longstanding Commission precedent which explicitly states that the request for service is the controlling date in Rule 411 cases; (iii) failure to acknowledge that, in Michigan, title to real property is conveyed upon the delivery, *and not recording*, of a signed deed; (iv) failure to apply the Commission's articulated tests for determining whether a customer is a prospective or existing customer; (v) failure to acknowledge that its own witness concedes that Consumers Energy was not providing any active service to the parcels of property owned by Meijer on the date of the request for service; (vi) failure to acknowledge that its own witness concedes that Consumers Energy's 1992/1994 discontinuances of service were neither temporary nor related to a change in ownership and new construction; (vii) failure to acknowledge that its own witness does not question the veracity of Great Lakes' intentions concerning the green line; (viii) failure to acknowledge that Great Lakes installed its three-phase green line five years before any of the stub line cases ever occurred; and (ix) failure to acknowledge that the Commission's order in the *Cherryland* case, No. U-10108, specifically incorporated language providing that past construction which has already been completed was not subject to the policy decisions inherent in the order. Given all the shortcomings in its analysis, the ALJ and the Commission should not adopt Staff's position in this case.

CONCLUSION

As Great Lakes' indicated in its initial brief, the Commission should do three things: (i) interpret Rule 411 so that it accommodates customer choice; (2) to accommodate customer choice, find that a three-phase line found reasonable by the RUS, designed to improve system reliability (when constructed), and installed prior to the 1993 "stub line" ruling is a valid measuring point; and (3) to accommodate customer, find that the Meijer facility is not an "existing customer" when there has no been no active service to the property by Consumers Energy for years and years, there is *no rational relationship* between the 1992/1994 discontinuances of service and the new construction, there is *no rational relationship* between the 1992/1994 discontinuances of service and the change of ownership, and the 1992/1994 discontinuances of service were not temporary.

Respectfully submitted,

GREAT LAKES ENERGY COOPERATIVE

By: ______________________________

Albert Ernst (P24059)
e mail: *aernst@dykema.com*
Christine Mason Soneral (P58820)
e mail: cmason@dykema.com
800 Michigan National Tower
Lansing, MI 48933
Telephone: (517) 374-9155
Fax: (517) 374-9191

Date: August 28, 2000

LAN01\ 69068.1
ID\ CMMA

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of Consumers Energy Company against Great Lakes Energy Cooperative relative to the provision of electric service to Meijer, Inc. in Ludington, Michigan.	))))))	**Case No. U-12316**

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Jeanne M. Beachnau, being first duly sworn, deposes and says that on the 28th day of August, 2000, she caused to be served upon the persons listed in the attached Service List, copies of Reply Brief of Great Lakes Energy Coooperative in the above-captioned matter by United States first class and electronic mail.

Jeanne M. Beachnau

Subscribed and sworn to before
me this 28th day of August, 2000.

H. Sharyl Stofer, Notary Public
Ingham County, Michigan
My Commission Expires: 12/17/03

SERVICE LIST

MR. RAYMOND MCQUILLAN
CONSUMERS ENERGY COMPANY
212 WEST MICHIGAN AVENUE
JACKSON, MI 49201

LARRY G. WATTERWORTH
ASSISTANT ATTORNEY GENERAL
6545 MERCANTILE WAY, STE. 15
LANSING, MI 48911

BARBARA A. STUMP
ADMINISTRATIVE LAW JUDGE
MICHIGAN PUBLIC SERVICE COMMISISON
6545 MERCANTILE WAY, #14
LANSING, MI 48911

ATTACHMENT B

93 FERC ¶ 61,330
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
William L. Massey, Linda Breathitt,
and Curt Hébert, Jr.

Wolverine Power Supply Cooperative, Inc. Docket No. ER01-286-000

ORDER ACCEPTING FOR FILING REVISIONS TO OPEN ACCESS TARIFF AS MODIFIED, AND DIRECTING COMPLIANCE FILING

(Issued December 29, 2000)

In this order, we accept for filing as modified the proposed revisions to Wolverine Power Supply Cooperative, Inc.'s (Wolverine) open access transmission tariff (OATT), which were filed to accommodate the introduction of retail access in the State of Michigan and to add a new Delivery Scheduling and Balancing Service. As detailed below we will require modifications to the proposal to make it consistent with Wolverine's OATT, the Michigan retail choice program or Commission precedent.

Background

The State of Michigan has enacted the Customer Choice and Electricity Reliability Act, [1] which provides for retail choice for all customers of investor-owned utilities by January 1, 2002. Under PA 141, electric cooperatives are not required to provide general retail customer choice until January 1, 2005. However, all retail customers of cooperatives with a peak load of 1 MW or greater (large retail customers) are given the opportunity to choose an Alternative Electric Supplier (AES) beginning on January 1, 2002. The Michigan Public Service Commission (Michigan Commission) has required each investor-owned electric utility (other than Consumers Energy Company and The Detroit Edison Company) and each cooperative electric utility to file by October 2, 2000

[1] 2000 Public Act (PA) 141 (PA 141).

a restructuring plan in compliance with PA 141 that permits all of its large retail customers to choose an alternative electric supplier no later that January 1, 2002. [2]

Wolverine is a Michigan generation and transmission electric cooperative providing wholesale service under long-term, all requirements contracts to its four member cooperatives: Cherryland Electric Cooperative, Great Lakes Energy Cooperative, Presque Isle Electric & Gas Co-op, and Homeworks Tri-County Electric Cooperative. Wolverine is preparing to offer its large retail customers the ability to switch to an alternative supplier one year earlier than necessary. [3]

On October 31, 2000, Wolverine filed a new Schedule 4A, Delivery Scheduling and Balancing Service, under its OATT. Wolverine also filed revisions to its OATT to add Attachment J, Retail Access Service, to set forth the conditions under which Wolverine will provide transmission access to large retail customers who have chosen an alternative supplier. Wolverine requests a January 1, 2001 effective date for the proposed OATT revisions.

Notice of Filing and Interventions and Protests

Notice of Wolverine's filing was published in the Federal Register, with comments, protests or interventions due on or before November 21, 2000.[4]

A timely motion to intervene was filed by CMS Marketing, Services and Trading Company (CMS) raising no substantive issues.

Discussion

Procedural Matters

---

[2]Michigan Public Service Commission Case No. U-12464, June 19, 2000.

[3]PA 141 also requires the Michigan Commission to issue orders by January 1, 2002 establishing rates, terms and conditions of service that allow all retail customers of an electric utility or provider to choose an AES. Wolverine's cooperative members filed their restructuring plans voluntarily agreeing to provide an electric member choice program commencing on January 1, 2001 conditioned on Wolverine being eligible to participate in retail sales as a licensed AES. These restructuring plans are pending with the Michigan Commission.

[4] 65 Fed. Reg. 67,732 (November 13, 2000).

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1999), the timely, unopposed motion to intervene of CMS serves to make it a party to this proceeding.

Amendments to the Open Access Tariff

Delivery Scheduling and Balancing Service

Wolverine proposes to amend its OATT by including a new delivery scheduling and balancing (DSB) service that applies to the transmission of electricity from generators that are connected to Wolverine's system, but not under Wolverine's control, to either a load on Wolverine's system or Wolverine's connection to another transmission system. The new service will account for any discrepancies between the amount of electricity scheduled for transmission and the amount actually received at the interconnection with the generator.

In support of its proposal Wolverine cites a number of cases where the Commission recognized the need for generator imbalance services that may be included in open access tariffs. DSB service is not applicable where there is an existing agreement between Wolverine and the generator or where a Wolverine wholesale customer is located on the transmission system of Consumers Energy Company. This schedule is intended to address imbalances between the amount of energy that a generator is scheduled to deliver to Wolverine in a given hour and the amount of electricity actually received at the Wolverine interconnection with the generator in that hour.

Wolverine indicates that its proposal follows the Commission's rulings regarding generator imbalance service in Niagara Mohawk Power Corporation, [5] Tampa Electric Co., [6] and Florida Power Corp. [7] Wolverine is requiring transmission customers to purchase DSB service or make alternative comparable arrangements to satisfy their DSB obligations. It proposes to charge transmission customers 110 percent of Wolverine's incremental cost where deliveries from the generator in any hour were less than scheduled for that hour and to pay transmission customers 90 percent of Wolverine's decremental cost where deliveries from the generator in any hour were more than

---

[5] 86 FERC ¶ 61,009 (1999) (Niagara Mohawk).

[6] 90 FERC ¶ 61,330 (2000).

[7] 89 FERC ¶ 61,263 (1999).

scheduled for that hour; and to limit DSB service to situations where generator imbalances are not already addressed in an existing interconnection agreement. However, in Niagara Mohawk, we stated that it was not appropriate for Niagara to assess two charges against what is essentially the same deviation amount by charging both an energy imbalance charge and a generator imbalance charge. [8] Therefore, as in Niagara Mohawk, we will require Wolverine to revise Schedule 4A to provide that a customer who is billed for energy imbalance service is not also charged for DSB.

Attachment J - Retail Access Service

Wolverine proposes to amend its OATT by adding Attachment J - Retail Access Service. Large retail customers of Wolverine's member distribution cooperatives, who are interconnected to the systems of those distribution cooperatives and who choose to purchase capacity and energy from new suppliers, will need to take transmission service for that capacity and energy from Wolverine under its OATT. Attachment J provides the terms and conditions under which Wolverine will accommodate such retail choice.

Section 3.2 of Attachment J provides for the use of estimates to determine network load which must be trued up when actual data is available, since the data for prior periods used to calculate the twelve-month rolling average billing determinants for network customers is not available. The Commission will accept this as reasonable.

The Commission will not, however, accept other restrictions in Attachment J as filed. Section 13.8 and 14.6 of Wolverine's OATT, dealing with firm and non-firm point-to-point service, provide that transmission customers must schedule in 1 MW per hour increments, but that transmission customers within Wolverine's service area with multiple requests for service at one point of receipt, each of which is under 1 MW, may consolidate their requests at a common receipt point for scheduling purposes so that the consolidated requests meet the 1 MW standard. Sections 3.1 and 4.1 of Attachment J, by contrast, simply provide for a minimum 1 MW scheduling amount, without providing the customers the option of consolidation. The Commission will require Wolverine to add the option of consolidating requests to Sections 3.1 and 4.1 of Attachment J so that they are consistent with the OATT provisions.

Section 2.3 of Attachment J provides for a nine-month notice period prior to the start of Retail Access Service. Wolverine contends that this notice period is needed because of complications arising from the fact that Wolverine does not operate a control

---

[8] Niagara Mohawk, 86 FERC at 61,028.

area, and also because arranging for retail access service for a departing customer requires coordination between Wolverine, the distribution cooperative that actually serves that customer, and the customer's new AES. Because Wolverine has not explained why such coordination would require a notice period as long as nine months, we will direct Wolverine to amend Section 2.3 of Attachment J by providing that it will attempt to provide Retail Access Service earlier than nine months from the date of notice, to the extent practicable.

Section 2.2 of Wolverine's OATT provides that existing firm service customers (wholesale requirements and transmission-only, with a contract term of one-year or more) have the right to continue to take transmission service from the transmission provider when the contract expires, rolls over or is renewed, and that this transmission reservation priority is independent of whether the existing customer continues to purchase capacity and energy from the transmission provider or elects to purchase capacity and energy from another supplier. In Section 2.4 of Attachment J, Wolverine proposes to eliminate this rollover right for the large retail customers who switch to new suppliers under the state retail choice program, claiming that the Commission approved the termination of such rights in Virginia Electric and Power Company.[9] Wolverine's citation to VEPCO is not apposite. In VEPCO, the Commission stated that participants in a state retail choice pilot program could not exercise their rollover rights to claim a priority to use the particular import interfaces made available under the pilot program, in a situation where there was insufficient capacity at those interfaces to satisfy all demand. The Commission also stated that it was reasonable that "Retail Choice Pilot customers and non-pilot customers be placed on the same footing in exercising their rollover rights when full retail choice is established."[10] The intent of Order No. 888[11] is to allow all

---

[9] 91 FERC ¶ 61,209 (2000) (VEPCO).

[10] VEPCO, 91 FERC at 61,757,

[11] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, FERC Stats. & Reg. ¶ 31,036 at 31,656-57 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274, FERC Stats. & Reg. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), afield in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000).

transmission customers of a transmission provider to have equivalent rollover rights. [12] This should include former retail customers of Wolverine's member cooperatives who are now transmission customers of Wolverine. Therefore, we will direct Wolverine to remove Section 2.4 from Attachment J.

Also, Section 2.10 of Attachment J prohibits a retail customer who has terminated its Retail Access Service from applying to take new retail access service under Attachment J until one year after the customer returns to bundled service. Wolverine alleges that this provision is intended to prevent a customer from switching back and forth between suppliers on a month-to-month basis, which would prevent Wolverine and its member cooperatives from recovering all the costs of providing bundled requirements service. A rule that seeks to control how frequently customers may leave or return to bundled service is a term or condition of retail power sales, not transmission service within this Commission's jurisdiction. We therefore direct Wolverine to delete Section 2.10 of Attachment J.

Finally, Attachment J provides at Section 2.3 that "[o]n behalf of the Retail End Use Customer, the AES must [complete contractual agreements and] must apply for the appropriate transmission service and arrange for necessary ancillary services and loss service." Section 6.1 of Attachment J provides that Wolverine "will maintain a contractual relationship with the AES, not the Retail End-Use Customer. The AES is responsible for payment of Transmission Provider charges for all services provided pursuant to this Attachment J." By these provisions, Wolverine is in essence preventing retail customers from dealing with it directly, and compelling them to obtain transmission service only indirectly through their AESs. No evidence has been presented to us that the State of Michigan intended to place such a restriction on retail customers. We will therefore require Wolverine to revise Sections 2.3 and 6.1 so as to allow retail customers to deal directly with and contract with Wolverine to obtain retail access service.

<u>The Commission orders</u>:

(A) CMS' motion to intervene is hereby granted.

---

[12]<u>See</u> Order No. 888 at 31,665 ("We have concluded that all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the right to continue to take transmission service from their existing transmission provider").

(B) Wolverine is hereby directed to submit a compliance filing as discussed in the body of this order, within 30 days of the date of this order.

(C) Wolverine's proposed tariff revisions are hereby accepted for filing to become effective January 1, 2001, as requested, as modified pursuant to Ordering Paragraph (B) above.

(D) Wolverine is hereby informed of the rate schedule designations and the effective dates on the Attachment.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

Attachment

Wolverine Power Supply Cooperative, Inc.
Docket No. ER01-286-000
Rate Schedule Designation

Designation	Description/ Effective Date
FERC Electric Tariff, First Revised Volume No. 1 (Supercedes FERC Electric Tariff, Original Volume No. 1)	Revised open Access Transmission Tariff with Unbundled Retail Transmission Service in Michigan and a Generation Imbalance Service/ January 1, 2001