Detroit Edison

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November 15, 2001

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909-7721

Re: MPSC Case No. U-12892

Dear Ms. Wideman:

Please find enclosed for filing with the Commission an original and four copies of Exceptions of The Detroit Edison Company along with proof of service.

Very truly yours,

Jon P. Christinidis

JPC/dj
Enclosures

cc: Service List

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application Of THE DETROIT EDISON COMPANY to Recover Implementation Costs for its Direct Access Program for the period January 1, 2000 through December 31, 2000.	))))))))	Case No. U-12892

EXCEPTIONS OF THE DETROIT EDISON COMPANY

I.

INTRODUCTION

The November 1, 2001 Proposal for Decision ("PFD") in this matter correctly concluded:

> "that the Staff's adjustments to Detroit Edison's 2000 implementation costs should be adopted, and that the company should be permitted to recover its year 2000 incremental direct access implementation expenses in the amount of $27,225,289. None of the parties presented any evidence contesting the reasonableness of those costs." (MPSC Case No. U-12892 pp. 4-5)

The PFD, however, errs in concluding that the Commission can, and should, condition the recovery of Detroit Edison's $27,225,289 in prudent and reasonable 2000 Direct Access implementation expenditures on some *undefined, future, backward-looking evaluation of the "effectiveness" of Detroit Edison's Direct Access program.* (MPSC Case No. U-12892 PFD pp. 5-6) The Administrative Law Judge based her conclusion solely on certain prior Commission orders claiming the right to conduct such a future review, notwithstanding the substantial law and policy to the contrary. (MPSC Case No. U-12892 PFD pp. 5-6) Detroit Edison excepts to the imposition of such retroactive "rearview regulation" as unlawful, unreasonable and inequitable for the reasons set forth below.

II.

The Future Review of 2000 Direct Access Implementation Costs for Purposes of Permitting Future Disallowances is Inequitable and Contrary to Commission Policy

Making recovery of prudently incurred implementation costs conditional on some amorphous standard of Direct Access "effectiveness" is inequitable. Clearly, there are many factors outside of the control of Detroit Edison that might cause Direct Access to be less attractive to electric customers and therefore reduce participation in the program. Among the possible reasons for lower-than-anticipated Direct Access participation could be (a) high market costs for power, (b) customer apathy, (c) levels of customer education, (d) poor supplier marketing, (e) supplier apathy, (f) market forces outside the control of Detroit Edison and the Michigan Public Service Commission, and (g) low customer savings.

Furthermore, there is no evidence in the record that supports any conclusion other than that Detroit Edison's 2000 Direct Access expenditures were reasonable and prudent. Detroit Edison made those expenditures in good faith, with Commission oversight and with the understanding that its prudently incurred expenses would be recovered. The conclusion in the PFD that Detroit Edison should recover its 2000 Direct Access implementation costs is hollow indeed if not accompanied by an order that provides for reasonable and timely recovery of those expenses. Fairness requires that the Commission consider the extraordinary nature of these expenses, which were incurred primarily for the benefit of third parties to whom Detroit Edison would owe no obligation whatsoever absent the enactment of 2000 PA 141 ("the Act") and the restructuring of the electric utility industry in Michigan.

Furthermore, the Commission has recognized, from the nascence of electric utility restructuring, that a reasoned approach to addressing Direct Access implementation costs was essential. The Commission explained that, with respect to implementation costs:

> "These are costs that would not be incurred absent a direct access program…If the costs were prudently incurred, it would…be inappropriate to disallow recovery by the utility. (MPSC Case No. U-11290, Order dated June 5, 1997 pp. 12-13)

To now impose a hindsight review of Direct Access implementation costs would clearly be inequitable, unreasonable and an abuse of discretion.

III.

The Future Review of 2000 Direct Access Implementation
<u>Costs for Purposes of Permitting Future Disallowances is Illegal</u>

Electric utility regulation is guided by certain well-established principles. One of those well-established principles is that the prudency of decisions and expenditures are evaluated based on what was known at the time the decision to make the expenditures was made. <u>ABATE v. Public Service Commission</u>, 208 Mich App 248 (1994)[1]

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[1]"The Attorney General's argument is inconsistent with the prudent investment test under which the end result of a utility's efforts do not determine how much is recoverable. Rather, utilities are compensated for prudent investments at their actual costs when made regardless of whether the investments are deemed necessary or beneficial in hindsight." <u>Id.</u> at 260; See also MPSC Case No. U-8020-R, Order dated July 9, 1987, p. 11 which provided: "The Commission agrees with the ALJ that comparison of the prices in Detroit Edison's long-term contracts with subsequent spot-market coal prices and the long-term Jacksonville utility contracts are inappropriate to determine what the proper prices would have been for long-term coal contracts entered into at the time these contracts were negotiated."

Furthermore, 2000 PA 141 makes mandatory Detroit Edison's recovery of its Direct Access implementation costs. The Act provides:

> "No later than January 1, 2002, the commission shall issue orders establishing the rates, terms and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier. *The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission."* MCL 460.10a(1)(emphasis added)

Clearly, the Commission is statutorily required by the Act to approve the recovery of Detroit Edison's 2000 Direct Access implementation costs. In fact, at least one other Administrative Law Judge has concluded that:

> "The most appropriate definition the ALJ recognizes, defines stranded cost as 'costs incurred during the regulated era that will be above market prices *and those costs necessary to facilitate the transition to competitive markets."*' (MPSC Case No. U-12639 PFD dated November 8, 2001, p. 29)(emphasis added)

That same Administrative Law Judge correctly interpreted Michigan's electric utility restructuring law as follows:

> "The ALJ finds that a plain reading of Act 141 provides the Commission with almost complete latitude in the calculation of stranded costs *provided the costs are netted and the utility is afforded full recovery of its stranded costs and implementation costs…"* (emphasis added)
>
> "The Commission must, on one hand, *afford full recovery of stranded costs and implementation costs,* and on the other hand ensure safe, reliable power at reasonable rates *and promote financially healthy and competitive utilities."* (MPSC Case No. U-12639 PFD dated November 8, 2001 pp. 27-28)(emphasis added)

In addition*, the Commission's pre-Act orders* making the determination that utilities are rightfully entitled to recovery of implementation costs are also supported by the Act. (See Section II. above; MCL 460.10a(5))

Finally, it is beyond reasonable dispute that Detroit Edison has federal[2] and state[3] constitutional rights to substantive and procedural due process, fair treatment and just and reasonable rates. Similarly, Detroit Edison has constitutional protections against "takings" and confiscatory rates. U.S. Const. Amends V, XIV; Michigan Const. Art 1, Sec. 17, Art 10 Sec. 2; Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Comm. of Missouri, 262 U.S. 276; 43 S. Ct. 544; 67 L. Ed. 981 (1923), Federal Power Commission v. Natural Gas Pipeline, 315 U.S. 575; 62 S. Ct. 736; 86 L.Ed. 1037 (1942), Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591; 64 S. Ct. 281; 88 L. Ed. 333 (1944), Permian Basin Area Rate Cases, 390 U.S. 747; 88 S. Ct. 1344; 20 L. Ed. 2d 312 (1968), Duquesne Light Co. v. Barasch, 488 U.S. 299; 102 L. Ed. 2d 646; 109 S. Ct. 609 (1989) See also Northern Michigan Water Co. v. Public Service Commission, 381 Mich 340 (1968), Michigan Consolidated Gas Company v. Public Service Commission, 389 Mich 624 (1973), Consumers Power Company v. Public Service Commission 415 Mich 134 (1982), ABATE v. Public Service Commission, 430 Mich 33 (1988),

Were the Commission to accept the recommendation set forth in the PFD and further condition recovery of the $27,225,289 that Detroit Edison prudently and

[2]The Fifth Amendment to the U.S. Constitution, applicable to the states through the 14th Amendment prohibits the taking of private property for public use without just compensation. The 14th Amendment also assures substantive and procedural due process.

[3]Article 1 Section 17 of the Michigan Constitution ensures due process, as well as fair treatment in the course of legislative and executive investigations and hearings. Article 10 Section 2 prohibits the taking of private property for public use without just compensation.

reasonably spent in 2000 to implement Direct Access, the Commission would clearly be acting outside its statutory authority and unlawfully depriving the Company recovery of its prudently incurred Direct Access implementation expenses. See Consumers Power v PSC, 460 Mich 148 (1999); Union Carbide v PSC 431 Mich 135 (1988) In sum, the recommendation to further condition the recovery of Detroit Edison's $27,225,289 of 2000 Direct Access implementation costs is unlawful and must be rejected, notwithstanding the existence of prior unlawful Commission orders proposing that course of action.

IV.

CONCLUSION AND REQUEST FOR RELIEF

All of the parties and the PFD agree that $27,225,289 of the $28,269,326 spent by Detroit Edison in 2000 to implement Direct Access was reasonable and prudent. Detroit Edison, in a show of reasonableness and good faith, accepted the lower $27,225,289 amount as its recoverable Direct Access implementation costs for 2000. There was no evidence in the record to support the approval of an amount lower than $27,225,289. Conditioning the recovery of that amount on some hindsight evaluation of the success of Direct Access would be inequitable and illegal. Thus, Detroit Edison respectfully requests that the Commission unconditionally approve $27,225,289 as its 2000 Direct Access implementation costs and approve recovery of that amount through the residual savings associated with the issuance of Detroit Edison's securitization bonds, as further described and recommended in MPSC Case No. U-12639, or in some other expeditious, unconditioned, reasonable, equitable and lawful manner.

Respectfully submitted:

THE DETROIT EDISON COMPANY

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Dated: November 15, 2001

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter, on the Commission's)
own motion, to implement the)
provisions of Section 10a(10))
of 2000 PA 141.)
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MPSC Case No. U-12892

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

DORIS J. HILL-SHAVERS, being duly sworn deposes and says that on the 15th day of November, 2001 she served a copy of Exceptions of The Detroit Edison Company upon the parties listed on the attached Service List, a copy of which is attached, by electronic mail and by depositing properly addressed sealed and stamped envelopes into the United States mail by first class.

Doris J. Hill Shavers
DORIS J. HILL-SHAVERS

Subscribed and sworn to before
me this 15th day of November, 2001

Christina Jacobson
CHRISTINA R. JACOBSON
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Mar 10, 2006

MPSC Case No. U-12892
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(*As of October 10, 2001*)

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