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November 27, 2001

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

Dear Ms. Wideman:

Re: MPSC Case No. U-12892

I am enclosing for filing an original and 4 copies of the Attorney General's Replies to Exceptions. I am also enclosing a proof of service. In addition, I am submitting a copy of this brief in PDF electronic format.

Sincerely,

Donald E. Erickson

Donald E. Erickson
Assistant Attorney General

c All Parties
sld/cases/U-12892

PROOF OF SERVICE - U-12892

The undersigned certifies that a copy of the Attorney General's Replies to Exceptions was served upon the parties listed below by mailing the same to them at their respective addresses with first class postage fully prepaid thereon, or by State Interdepartmental mail as indicated, on the 27th day of November 2001

Kimberly Harris
Kimberly K. Harris

Administrative Law Judge:
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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 the period ended December 31, 2000

MPSC No. U-12892

/

Attorney General's Replies to Exceptions

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November 27, 2001

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Replies

On November 1, 2001, Administrative Law Judge (ALJ) Barbara A. Stump issued a proposal for decision (PFD) for this case. Pages 6-7 of the PFD conclude:

> The ALJ recommends that the Commission issue an order authorizing Detroit Edison to recover up to $27,225,289 of its incremental direct access implementation costs incurred during the 12-month period ended December 31, 2000, subject to all conditions set forth in the Commission's October 24, 2000 order in Case Nos. U-11955 and U-11956, and its November 2, 2000 order in Case No. U-12478.

On November 15, 2001, The Detroit Edison Company (DECo or the Company) filed written exceptions. DECo's exceptions accept the amount recommended by the PFD, but DECo argues that the PFD err in concluding that the Commission can, and should, condition the recovery. Pages 1 and 2 of DECo's exceptions acknowledge that the PFD's recommendations are based upon prior Commission orders, but the remainder of DECo's exceptions argue that the recovery conditions previously adopted by the Commission are unlawful, unreasonable, and inequitable.

DECo incorrectly characterizes the conditional approach to implementation cost recovery previously adopted by the MPSC as "hindsight." The MPSC's conditional approach is not truly hindsight. On October 24, 2000, the MPSC issued its Opinion and Order in Case Nos. U-11955 and U-11956. On pages 4-5 of that order, the Commission stated:

> Prior to discussing the implementation costs actually incurred during and before 1998, **the Commission would emphasize that simply incurring costs to implement Michigan's retail open access program is not a sufficient justification for their recovery.** Expenditures associated with the implementation of the retail open access programs must produce results. Procedures, policies, methods, or electronic data interfaces that prove to be ineffective, inefficient, or unworkable may not entitle the company to recover the costs of those systems.
>
> Because very little retail open access load is currently being served, it is difficult for the Commission to judge the effectiveness of Consumers' and Detroit Edison's implementation programs at this time. The Commission notes, however,

> that it expects Consumers and Detroit Edison to file information in their 2000 and 2001 true-up cases from which the Commission can determine the effectiveness of the implementation costs that the companies seek to recover.
>
> **For purposes of the present case, the Commission has reviewed the expenditures on the record and has granted deferred recovery as appropriate. However, it would caution the parties that these findings are conditional. If subsequent events reveal that costs were incurred for projects or systems that ultimately prove to be ineffective, inefficient, or unworkable or otherwise impede the progress to retail open access, the Commission reserves the right to undertake another review of those costs and may foreclose their recovery.** (emphasis added)

The point is this. In this case as well as in previous implementation cost cases (U-11956 and U-12359), DECo has not described why its expenditures were <u>necessary</u> to facilitate a transition to competitive markets or how its expenditures will facilitate such a transition. The Commission has approved only conditional, deferral and recovery of these costs because this aspect of reasonableness and prudence remains open. The conditions are not based upon hindsight; they are related to the incompleteness of the evidence submitted thus far.

DECo's exceptions claim that the Company has constitutional protections against "takings" and confiscatory rates. Whatever may be the merits of those abstract principles in other contexts, a utility is not guaranteed a profit or return on its investment, *Detroit Edison Co v PSC,* 127 Mich App 499, 517; 342 NW2d 273 (1983). DECo has cited no authority that precludes the MPSC from determining, as it did in U-11955/U-11956, that simply incurring costs to implement Michigan's retail open access program is not a sufficient justification for their recovery. In U-12359, the MPSC affirmed this ruling. In U-12478, the MPSC adopted a similar approach.

Page 4 of DECo's exceptions argues that MCL 460.10a(1) makes DECo's recovery of implementation costs mandatory. That statute does provide for full recovery of a utility's implementation costs, but this recovery is <u>"as determined by the commission."</u> In other words, the Commission's previous decisions (that implementation costs should be deferred and conditionally recovered) are within the scope of the statutory discretion created by MCL 460.10a(1).

Page 6 of DECo's exceptions requests the MPSC to unconditionally approve recovery of $27,225,289 through residual savings associated with the issuance of DECo's securitization bonds. If DECo's securitization charges result in excess revenues for the Year 2001 or other years, then 2000 PA 142, § 10k(3); MCL 460.10k(3) requires true-up reductions to DECo's securitization charges. That statute does not permit the addition of more costs to the previously approved level of qualified costs in order to absorb or offset excess savings.

Relief Requested

For the reasons stated above, Attorney General Jennifer M. Granholm requests the Michigan Public Service Commission to adopt the recommendations contained in the proposal for decision in this case.

Respectfully submitted,

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