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October 18, 2001

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

Re: MPSC Case No. U-12970
BOH Docket No. 2001-1173

Dear Ms. Wideman:

Enclosed for filing, please find the original and four copies of the Application for Leave to Appeal the Denial of ABATE's Motion to Compel Complete Answers to Its First Set of Interrogatories and Requests for Production of Documents to Consumers Energy Company in the above-entitled matter. Proof of Service upon the parties of record is also enclosed. Thank you.

Sincerely,

CLARK HILL PLC



Michael P. Calabrese

MPC/kag
Enclosures

cc: Parties of Record

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-12970
BOH Case No. 2001-1173

The Association of Businesses Advocating Tariff Equity (“ABATE”), by its attorneys, Clark Hill P.L.C., pursuant to Rule 337 of the Commission’s Rules of Practice and Procedure, 1992 AACR, R 460.17337, hereby requests that the Commission grant it leave to appeal from the denial of its “Motion to Compel Complete Answers to its First Set of Interrogatories and Requests for Production of Documents to Consumers Energy Company” (the “Motion”) and further, that upon granting leave to appeal, the Commission reverse the decision of the Administrative Law Judge (“ALJ”) and order Consumers to provide the information requested in the Motion. Pursuant the Rule 337(4), ABATE offers the following Brief in support of this Application:

On August 28, 2001, ABATE served upon Consumers its “First Set of Interrogatories and Requests for Production of Documents” (hereinafter “Discovery Requests”). The Discovery Requests consisted of six (6) interrogatories, each of which requested information about Consumers’ actual unit costs of providing specified, discrete components of its bundled electric service. In particular, ABATE requested information to quantify those costs for not only the year 1996, but also

the year 2000, as this is the most recently completed full calendar year and thus the most recent year for which Consumers is able to quantify its actual costs.¹ In addition, the Discovery Requests contained two (2) requests for productions of documents, which asked for any and all documents supporting Consumers' answers to the interrogatories.

With these requests, ABATE sought data that would enable the parties to determine the cost contribution of various types of service for Consumers' various classes of customers, and thus the proper proportion of those types of service to one another as components of Consumers' overall rates. ABATE sought this information for the year 2000 because, without the most recent available data, it will be impossible to determine in this proceeding whether rates are being unbundled in a manner that reflects, as accurately as possible, Consumers' current costs.

Consumers refused to provide the requested data for 2000 on the basis that "there was no cost of service study completed for that year." See Answer of Consumers Energy Company to ABATE's First Set of Interrogatories and Requests for Production of Documents (attached to ABATE's Motion). ABATE, therefore, moved to compel the production of the requested 2000 year data, on the basis that, even if no year 2000 cost study has previously been completed by Consumers, the production of the historical data is not only relevant (and thus a proper subject of an interrogatory under MCR 2.302(b) and MCR 2.309), but necessary to the proper conduct of this statutorily mandated proceeding. Thus, if Consumers has in fact not completed a year 2000 cost study, and if such a study is necessary to produce the requested data, then Consumers should be ordered to perform one. ABATE's Motion therefore requested an order that such a study be completed.

Consumers responded with two arguments. First, it claimed that 2000 PA 141 does not

1 Specifically, ABATE asked Consumers the costs for transmission, distribution, and generation services, broken down according the voltage level at which the customer takes service, for not only the year 1996 (for which Consumers had produced its most recent cost study) but also for the most recently completed calendar year, 2000.

require it to perform an unbundled cost study because its current frozen rates were set pursuant to a 1996 cost study, and therefore unbundling should proceed utilizing 1996 data, regardless of whether that data accurately reflects the current proportion of the various components of Consumers' rates to the overall rates. Second, Consumers claimed, through the affidavit of Susan E. Coste, that it was absolutely incapable of producing an unbundled cost of service study at this time, because, while all of the data necessary to produce that study exists, the computer program that it would formerly have utilized in manipulating that data to produce such a study "went away" in October of 1999, 2 TR 22, and the replacement program will not be available until the first quarter of 2002.

The ALJ denied ABATE's Motion at a hearing held on October 4, 2001. After declining to rule on whether the production of the requested data was consistent with or compelled by PA 141, the ALJ based his ruling on two grounds. First, he was persuaded by Ms. Coste's claim that Consumers is incapable of producing the requested data. Second, he ruled that Consumers could not, in any event, be required to perform a cost of service study for the purposes of this proceeding, because the creation of such a study is a burden not contemplated by the rules of discovery.

The ALJ's ruling was in error as a matter of law, fact, and procedure. It must be reversed on an interlocutory basis so that this proceeding can be conducted in the manner contemplated by the Legislature. To require the parties to proceed without the proper data renders unbundling a sham exercise incapable of sending accurate price signals to Michigan's electric market, which will become competitive on January 1, 2002. Thus, the Commission should reverse the ALJ's ruling and order that Consumers immediately produce a comprehensive unbundled cost of service study.

II. ARGUMENT

A. ABATE's Request is Consistent with PA 141.

It is essential to an accurate result in this proceeding, which seeks to unbundle the various components of Consumers' current bundled rates pursuant to MCL 460.10b, that current, accurate information regarding Consumers' costs be made available to the Commission and the parties. Only then will the resulting unbundled rates accurately reflect the cost-based contributions of various component services to Consumers' current bundled rates.

The purpose of this proceeding is to "separately identify and charge for [Consumers'] discrete services." MCL 460.10b(2). By providing for such separation of discrete charges on customers' bills, 2000 PA 141 seeks to accomplish its principal goal, which is "to ensure that all retail customers in this state of electric power have a choice of electric suppliers." MCL 460.10(2)(a). This choice can only be meaningfully exercised if electric customers have accurate information about the true cost of purchasing generation services from Consumers, so that they may compare that cost to the price at which they can purchase generation services on the competitive market.

And this, in turn, requires that Consumers be compelled in this proceeding to price all of its services to reflect costs as accurately as possible. If Consumers is permitted to unbundle rates in a manner that allows it to attribute an inordinately large portion of its overall costs to transmission and distribution services (which will not be available on a competitive basis), and consequently an inordinately small portion of its overall costs to generation services (thereby producing artificially low unbundled generation charges), Consumers will have an unfair advantage over alternative electric suppliers in the newly competitive market. If this proceeding is allowed to produce such inaccurate price signals, the market will not perform as designed by the Legislature. By refusing to provide current cost data, Consumers would deny the parties and the Commission the ability to

evaluate whether its unbundled charges were being set accurately, so as to avoid such pitfalls.

Consumers argued to the ALJ that the production of 2000 cost data is not appropriate in this proceeding, because its current rates were set pursuant to a 1996 cost study, and those rates are now “frozen” pursuant to §10d of PA 141. Thus, according to Consumers, because this proceeding is not and cannot be a rate case, a new cost study is not needed. Rather, Consumers argues, since rates will continue to be based upon 1996 data, the proportional contribution of the various components to those overall rates should also be based upon 1996 data.

As noted above, the ALJ did not rule in favor of Consumers on this point. Instead, he declined to decide it, stating, “I am not going to get into the merits of the methodology inherent in that request, that is, whether it’s appropriate to apply percentages for a 2000 cost study to 1996 rates in the process of unbundling those rates.” 2 TR 38. The ALJ then went on to base his denial of ABATE’s Motion on other grounds.

The ALJ was mistaken to think that he could properly rule on ABATE’s Motion without deciding whether 2000 data might be relevant to this case. If it is even possible that the use 2000 data to attribute percentages to the various components of Consumers’ rates might be the most accurate way to unbundle, then that data must be produced. By refusing to order that data’s production, the ALJ not only declined to “get into the merits” of this methodological question, he ensured that the merits of the competing methodologies can never be addressed.

Certainly, this was not what the Legislature had in mind in crafting §10b(2). First, the Legislature in that section required utilities to file an “application” to unbundle existing rates. The Commission has correctly interpreted this to require a contested case proceeding, in which parties such as the intervenors in this case would be permitted to scrutinize Consumers’ filing, point out flaws in its methodology, and propose alternatives. Yet, by refusing to allow ABATE access to the

data necessary to support a possible alternative methodology, the ALJ's ruling effectively negates the contested nature of this case.

Second, the Legislature provided in §10b(2) that the utility should be permitted to recover "all just and reasonable costs incurred by electric utilities to implement and administer the provisions of this subsection." In providing explicitly for cost recovery, the Legislature clearly had in mind that the utilities would be required to perform some substantial work in the course of unbundling. Simply rehashing a five-year-old cost of service study is not likely to have prompted such a concern. Thus, the Legislature appears to have specifically contemplated that utilities would do what is necessary to accurately unbundle rates -- i.e. produce a current unbundled cost of service study so that different unbundling methodologies could be discussed. The ALJ's ruling is contrary to this legislative intent.

Consumers' argument that §10d of PA 141 prohibits the Commission from ordering it to produce current data is without merit. According to Consumers, the fact that current rates were set in 1996, and are now "frozen" by §10d, precludes any duty on its part to allow its current cost structure to be examined.

Consumer's argument would have the Commission misconstrue the nature of this proceeding. It is true that it is typical for a utility to produce a cost of service study in a rate case, and that this is not a rate case. It does not follow, however, that a current cost of service study is not necessary in this case. The Legislature in §10b(2) required not that new rates be set, but that existing rates be "unbundled," that is, broken down into their various components according to the proportional contribution of each component to the heretofore "bundled" rate of which it is a part. Thus, the purpose of this case is to determine the proper proportional relationship of the various components of bundled rates to one another. And, it cannot be gainsaid that it is relevant to such a proceeding to know what those proportions currently are, in addition to knowing what they were in 1996. This

does not mean that overall rates will be changed in violation of the rate freeze, only that their components will be accurately known, and that the percentages that will determine rate components will be capable of being assigned based on today's data, which may or may not be similar to the 1996 data. Armed with this knowledge, the Commission will be able to "get into the merits" and determine the best method of unbundling rates, taking into consideration all of the various provisions of PA 141. But without the requested data, the Commission will be flying in the dark.

The Legislature undoubtedly understood when it enacted PA 141 that choice, as a practical matter, would not become fully available for several years. Competitive providers obviously will need time to develop the products and services that they will ultimately need to compete in Michigan's restructured market. However, in order to even begin to develop those products and services, they need current, accurate information about the market in which they will ultimately be competing. Thus, while Consumers' next rate case, several years hence, will presumably set unbundled rates on the basis of then-current data, waiting until that time to develop an accurate picture of the Michigan market will not serve the goals of PA 141. It is important that the best information be made available to potential market entrants now, so that the way may be prepared for choice to fully flourish in future years.

B. Consumers Can Produce the Requested Data.

Apparently realizing that it would be obvious that the requested year 2000 data was relevant to this proceeding, Consumers produced an incredible additional rationale for its refusal to produce the data. In response to the Motion, Consumers produced the Affidavit of Susan E. Coste, an employee in Consumers' Cost Analysis Section, who claimed that the Company was utterly incapable of producing an unbundled cost of service study at this time. At ¶4 of her Affidavit, Ms.

Coste explained that this was because Consumers had, as a part of its implementation of its Electric Restructuring Implementation Project, eliminated the so-called “WR-4” computer program that it would previously have used to sort the data and produce a cost of service study. Further, Ms. Coste continued at ¶5, Consumers had eliminated the WR-4 nearly three years prior to the availability of a replacement program, which, she claimed may be available during the first quarter of 2002. Thus, despite that fact that it has known, or should have known, since June 5, 2000 that it would be required to present unbundled cost data to the Commission in this proceeding, which it was required to commence on June 5, 2001, Consumers has, according to Ms. Coste, allowed itself to remain incapable of producing that data.

Ms. Coste’s claims cannot be accepted. Upon being cross-examined at the hearing on the instant Motion, Ms. Coste admitted that Consumers knows, and annually reports to both this Commission and to the Federal Energy Regulatory Commission, the total quantities that this proceeding seeks to allocate among services and rate classes. 2 TR 17. Further, Ms. Coste admitted that the “main categories” of allocators required to perform unbundling in this proceeding are 1) the number of customers by class; 2) the energy consumed by each class, and 3) the contribution of each rate class to each of Consumers’ twelve monthly peak demands. 2 TR 17-18. Further, Ms. Coste admitted that Consumers already knows first two allocators for the year 2000, despite the claimed unavailability of the WR-4 program. 2 TR 17. Ms. Coste claimed that the third main allocator, the contribution of each class to the monthly peaks could not be known, but admitted that Consumers uses load data to determine each class’s monthly peak for non-demand-metered classes, 2 TR 20, and has always been required to perform mathematical manipulation of its data for those classes to determine their contribution to peak demand. 2 TR 24. Thus, the alleged unavailability of the WR-4 program has not created a unique problem to which Consumers has never faced anything similar.

Ms. Coste did not explain why the same manipulation of data could not be done for metered classes, in lieu of using the allegedly unavailable WR-4 program, to produce the last major allocator.

Moreover, it became clear upon cross-examination that Ms. Coste did not have firsthand knowledge of the WR-4 program's alleged unavailability. Ms. Coste claimed that "they eliminated that piece," 2 TR 21, without explaining who "they" were or what "eliminated" meant. Asked if the program might still be stored within the company, Ms. Coste admitted that she "didn't know for a fact if it's sitting somewhere." 2 TR 22. However, she claimed that "it's not functional after October of '99," 2 TR 22-23, and that eliminating the WR-4 "also meant we got rid of our costing determinants" which are necessary to determine, in the necessary detail, the data that comprises the third major allocator in an unbundled cost of service study. 2 TR 22.

Thus, Ms. Coste testified that, at most, Consumers lacks the computer functionality that would allow it to easily manipulate its existing data to produce the last major allocator. It has the data from which that allocator must be produced. It can produce an unbundled cost of service study by whatever methodology it can, whether by bringing back the WR-4 program and altering its billing data to make it compatible with that program, by paying a premium to bring its new computer program on line sooner than previously planned, or by manipulating some of the data manually if necessary. While it might find such requirements burdensome, Consumers should not be allowed to benefit, and to hamstring the ability of this Commission to produce a proper result in this proceeding, by its own failure to maintain software capable of easily and quickly manipulating the data as necessary to do what the statute requires of it.

C. ABATE's Request Was Proper Under the Rules of Discovery.

ABATE did not request the disputed information through a request for the production of

documents under MCR 2.310. Rather, ABATE requested that Consumers provide the information through interrogatories submitted under MCR 2.309, and separately requested any supporting documents. Under MCR 2.309, Consumers is obligated to provide “such information as is available to the party served or that the party could obtain from his or her employees, agents, representatives, sureties, or indemnitors.” MCR 2.309(B)(1).

The ALJ ruled that, despite the fact that ABATE’s requests were made as interrogatories, they would in fact require Consumers to produce an unbundled cost of service study,² and that “the discovery rules to not require a party to produce a study, which requires calculations and judgments and a good deal of work product, in order to serve another party’s construction of their own case.” 2 TR 39-40. In fact, in this case that is exactly what the discovery rules require.

The Commission has ruled that, because its proceedings require compliance, to the extent permissible, with the Michigan Rules of Civil Procedure, and because those rules are in turn often derived from their federal counterparts, the Commission may look to cases decided under the federal rules for guidance in procedural matters. See MPSC Case No. U-9322, Order dated July 18, 1990, pp 6-7. The federal authorities clearly indicate that ABATE’s request was proper under the present circumstances. Consumers’ objection to the interrogatories is, in essence, the objection that answering would place an “undue burden” on it, in that it would be required to expend significant time and expense to supply the requested data. The federal courts have found, under FRCP 26(b), that such an objection is not sufficient to defeat such requests:

Cases dealing with an "undue burden" objection often concern interrogatories that require the party to engage in extensive research and compile substantial amounts of data and information. This sort of interrogatory is not automatically impermissible; rather, the court must decide whether requiring the responding party to provide the

² ABATE concurs on this point, and in fact specifically requested in its Motion that such a study be produced, as it is the most practical way of producing the data that the interrogatories sought.

information requested is reasonable after considering the facts and circumstances of the particular case. The court must balance the degree of need shown by the interrogator against the claims of burden asserted by the interrogated party....[A]nswers to interrogatories may be required in many circumstances, even though they require extensive research. One district court has held that a court may require an interrogatory answer, despite difficult research requirements, if the information sought is particularly crucial to the propounding party and solely within the responding party's control. Moore's Federal Practice, 3d Ed, §33.173(3)(b) (emphasis supplied).

In this case, there can be little doubt that that the information sought is “crucial to” ABATE’s case, as without it ABATE cannot even begin to show a proper unbundling based on 2000 data, which is unquestionably “solely within the responding party’s control.”

Moreover, the complexity of litigation may justify requiring a party to bear a greater burden in responding to discovery:

Initially, it should be noted that this joint set of interrogatories is indeed burdensome to Plaintiffs and there is little doubt that Plaintiffs have had to expend a great deal of time and energy in preparing their answers. But as was pointed out at the time of the prior hearing, Plaintiffs have brought a massive and complex class action and Defendants are entitled to know the factual basis for the claims which have been brought against them. Roberts v Heim, 130 FRD 424, 426 (ND Cal 1989).

Like the plaintiffs in Roberts, Consumers is the applicant (albeit by statutory mandate) in a case that is complex, as the Legislature clearly contemplated that it would be. It may not avoid its duty to provide the information necessary to allow the parties to sort through those complexities on the basis of “undue burden.”

Finally, the federal courts have held that, where a respondent to interrogatories has through its own action rendered itself less than optimally able to efficiently respond to interrogatories, it may not cite that situation as a basis for objection. Where a defendant cited limitations in its own record keeping as a basis of an “undue burden” objection, that objection was summarily rejected:

The mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden. It is reasonable to expect defendants to have the information plaintiffs seek and for the information to be accessible in defendants' files. Plaintiffs should not suffer if the information is not easily accessible because defendants have an inefficient filing system. Fagan v Dist of Columbia, 136 FRD 5, 7 (D DC 1991).

Likewise, Consumers' claim that it has left itself for nearly three years without the computer software that would allow it to easily manipulate the data that it admits it has, even if true, should not allow it to avoid the burden of providing information that is crucial to a proper decision in this case.

Thus, the instant case presents a perfect example of why these rules hold sway in the federal courts. The information sought is essential to the proper adjudication of this complex case. Only Consumers is in a position to produce that information; to suggest that ABATE or any intervenor do so would be to ask the impossible, given that only Consumers has access to the data necessary to produce the required study, or the technical and human resources necessary to manipulate that data. Consumers must produce the required study if this case is to produce an accurate result.

D. The Requirements of Rule 337 Have Been Met.

Finally, this case presents a perfect situation for interlocutory relief under Rule 337. Under that rule, interlocutory relief may be granted by the Commission from an ALJ's erroneous ruling if such relief will either a) "materially advance a timely resolution of the proceeding;" or b) "prevent substantial harm to the appellant of the public at large." 1992 AACS R 460.17337(2).³ Both criteria are implicated here. If the ALJ's erroneous ruling is allowed to stand for the time being, only to be overturned when this case is presented to the Commission for decision, the parties will have developed their cases without the data necessary to produce properly unbundled rates. Thus, the only

³ The Commission may also grant interlocutory relief, under Rule 337(2)(c), on the basis of "other criteria that the commission may establish by order."

practicable alternative at that time would be to require that new evidentiary hearings be held once the study has been produced. This would delay unbundling for several months. The current case schedule already makes it a near certainty that unbundled rates will not be in place by January 1, 2002, when choice becomes nominally effective. Any further delays will prevent meaningful choice from existing on a time frame that even vaguely resembles the time frame that the Legislature specifically dictated.

Moreover, such delays will cause harm to both the appellant, ABATE, and the public-at-large. Because ABATE is an organization of large industrial users of electric power, any delays in the full implementation of choice will deprive ABATE's members of any potential benefits that choice might bring. Likewise, if the public-at-large is not timely enabled to evaluate the potential benefits of choice through properly unbundled rates, even those electric customers that are not ABATE members will be deprived of the possibility of saving money by choosing an alternative electric supplier.

Thus, both of Rule 337's enumerated criteria for interlocutory relief have been met, and the Commission should grant that relief.

III. CONCLUSION

Consumers has known since the passage of 2000 PA 141 in June of 2000 that it would be required, under MCL 460.10b(2), to provide cost information regarding the various components of its bundled rates. Moreover, Consumers was aware on September 10, 2001, when it submitted its incomplete and improper discovery responses to ABATE, that the Commission's policy was to require in unbundling proceedings a current cost of service study that showed the allocation of costs among the services to be unbundled. This is because the Commission issued an order, on July 11,

2001, in a case in which Consumers had participated, where it required gas utilities to create and submit “a detailed and comprehensive unbundled gas cost of service allocation study” so that unbundling of gas rates could be properly accomplished. See MPSC Case No. U-12550, Order dated July 11, 2001, p 2. Thus, the Commission found that such information is essential to an accurate result in an unbundling proceeding.

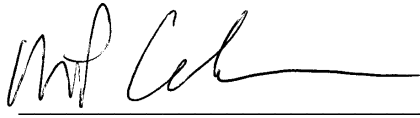
Because Consumers has long been on notice that such information would be required of it, it may not now evade a request for such information on the basis that the study necessary to produce the information has not yet been performed, nor on the basis that it has intentionally rendered itself incapable of easily manipulating the data as necessary to fulfill the statutory mandate. Consumers failed to properly prepare for this proceeding as dictated by MCL 460.10b(2), failed to update its filing when the Commission made unmistakably clear on July 11, 2001 how it intended unbundling proceedings to be conducted, and again failed to produce the information upon the receipt of a proper discovery request. It may not now complain that it would be burdensome or time-consuming to produce now the information that should have been provided with its original filing. The ALJ’s ruling to the contrary must be reversed.

IV. RELIEF REQUESTED

WHEREFORE, ABATE respectfully requests that Consumers be ordered to provide, at the earliest practicable time, complete answers to all of ABATE's "First Set of Interrogatories and Requests for Production of Documents" in the form of a comprehensive unbundled electric cost of service allocation study showing the allocation of such costs by type of service and by customers' voltage levels.

Respectfully submitted,

CLARK HILL P.L.C.

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Dated: October 18, 2001

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
CONSUMERS ENERGY COMPANY)
for approval of the unbundling of its)
commercial and industrial rate schedules.)
_____)

Case No. U-12970
BOH Docket No. 2001-1173

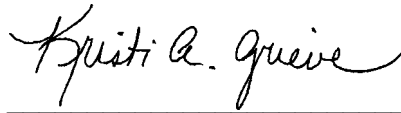
PROOF OF SERVICE

STATE OF MICHIGAN)
) SS:
COUNTY OF INGHAM)

Kristi A. Grieve, being duly sworn, deposes and says that she is an employee of Clark Hill P.L.C., and that on October 18, 2001, a copy of an Application for Leave to Appeal the Denial of ABATE's Motion to Compel Complete Answers to Its First Set of Interrogatories and Requests for Production of Documents to Consumers Energy Company was served upon:

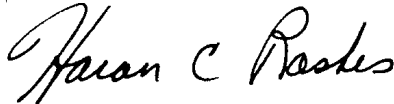
See attached service list

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



Kristi A. Grieve

Subscribed and sworn to before me
this 18th day of October, 2001.



Haran C. Rashes, Notary Public
Washtenaw County, Michigan acting in
Ingham County, Michigan
My Commission Expires: September 18, 2003

SERVICE LIST
U-12970

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