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November 1, 2001

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

**Re: Case No. U-12970; Response of Consumers Energy Company in Opposition
To Application For Leave to Appeal of ABATE**

Dear Ms. Wideman:

Enclosed for filing in the above-referenced matter are an original and four copies of the **"Response of Consumers Energy Company in Opposition to Application for Leave to Appeal of ABATE"**. In addition, this document is being filed electronically with the Commission in the portable document format (PDF). I have also enclosed a Proof of Service.

Sincerely,



John C. Shea

CC: Honorable George Schankler, ALJ
Parties Per Attachment 1
To Proof of Service

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

**RESPONSE OF CONSUMERS ENERGY COMPANY IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL OF ABATE**

PROCEDURAL HISTORY

On September 24, 2001 ABATE served on Consumers Energy Company (“Consumers Energy”) its “Motion to Compel Complete Answers to Its First Set of Interrogatories and Requests for Production of Documents to Consumers Energy Company” (the “Motion to Compel”). On October 1, 2001 Consumers Energy responded to the Motion to Compel.

In the Motion to Compel, ABATE requested the Administrative Law Judge (“ALJ”) to order Consumers Energy to provide “a comprehensive unbundled electric cost of service allocation study showing the allocation of such costs by type of service and by customers’ voltage levels” for the year 2000. Motion to Compel at 5.

On October 1, 2001, Consumers Energy responded to the Motion to Compel¹, and on October 4, 2001, at the conclusion of oral argument, the ALJ denied ABATE’s Motion to Compel, ruling as follows:

First of all what is involved in answering the interrogatories is a request to in essence, if not in fact, perform a cost-of-service study, and indeed ABATE’s request for relief in their motion requests a comprehensive unbundled electric cost-of-service allocation study.

¹For the convenience of the Commission, a copy of Consumers Energy’s Reply to the Motion to Compel is attached.

* * *

Addressing next the cited gas case wherein the Commission required the provision of a cost, a new cost study for gas rates, that has no applicability whatsoever to this case. I am not persuaded by any argument by ABATE that that even puts Consumers Energy on notice that they should have been ready to produce such a study.

The fact that they specifically ordered it in that case and they have not done so in this case really I think cuts the other way. If the Commission wished to have such a study they certainly could have ordered it [as] part of this process, but they have not done so.

On the question whether or not Consumers is in a position to produce such a study at this point in time, I am persuaded by the affidavit and questioning that they are not in a position to do so at this time due to the lack of data and software to produce such a study.

Also, I think given the time frames we are looking at here and listening to what's involved in producing this kind of a study, I don't see that it can be done in this short of a period of time even if they had the data and the software available. Finally, as to whether or not they can be required under the rules of discovery to produce the cost-of-service study, I think to me that's the most clear and salient point here, that the discovery rules do 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. They are only required to provide existing information they may have to retrieve from their database, but if it requires substantial manipulation, the use of programs and making judgments, they are clearly not required to do that in response to an interrogatory.

Now, if they were testifying regarding 2000 costs, then obviously if there was an underlying cost-of-service study, they would have to produce it, but they don't have to create one for the purposes of this case, in my view.

So, for the reasons I have stated, that I don't believe that that's required under the rules of discovery, and that I don't believe that Consumers is in a position to produce such a study at this point in time, under these time parameters in particular, I am going to deny the motion.

On October 18, 2001, ABATE filed its “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” (the “Application for Leave”).

For all of the reasons set forth herein , Consumers Energy respectfully urges the Michigan Public Service Commission (the “Commission”) to reject ABATE’s Application for Leave and to affirm the ruling of the ALJ.

ARGUMENT

I.

2000 PA 141 Does not Require the Creation of a New Cost of Service Study in Order for the Commission to Reach a Lawful and Appropriate Result in this Case.

ABATE first tries to conjure up an argument out of 2000 PA 141 (“Act 141”) that somehow that statute **requires** a brand new cost of service study be formulated by Consumers Energy for this proceeding. That requirement, however, is nowhere to be found in the words of Section 10b which provides in pertinent part as follows:

Sec. 10b.

* * *

(2) No later than 1 year from the effective date of the amendatory act that added this section, each electric utility shall file an application with the commission to **unbundle its existing commercial and industrial rate schedules and separately identify and charge for their discrete services**. No earlier than 1 year from the effective date of the amendatory act that added this section, the commission may order the electric utility to file an application to **unbundle existing residential rate schedules**. The commission may allow the unbundled rates to be expressed on residential billings in terms of percentages in order to simplify residential billing. The commission shall allow recovery by electric utilities of all just and reasonable costs incurred by electric

utilities to implement and administer the provisions of this subsection.

MCL 460.10b [emphasis added].

Consumers Energy asserts that the meaning of this statutory section is clear and not open to doubt or ambiguity. Rate schedules are to be unbundled and the discrete charges that go into those rate schedules are to be separately identified. This unbundling activity does not require the Commission to address the reasonableness of the rates, the reasonableness of the costs that make up the rates, the nature of the revenue requirement or the manner in which costs are to be recovered. None of these ratemaking activities are present in this statutory section nor in this proceeding.

In order to invent a requirement that Section 10b(2) requires Consumers Energy to perform a brand new cost of service study, it would be necessary for the statute to say something that it does not say. The statute would need to say that Consumers Energy shall “unbundle its existing commercial and industrial rate schedules and separately identify and charge for their discrete services **based on an updated cost of service study.**” But the statute does not say this. The actions required by this statutory section do not involve an inquiry into the reasonableness of rates or the prudence of operating expense, the quality of the data that supports the rates that Consumers Energy charges to its customers, nor any other exercise of Commission ratemaking authority. It requires that **existing** rates be broken down into **their existing** constituent parts.

Because the statute does not say what ABATE would like it to say, ABATE finds it necessary to argue that the Michigan Legislature must have “meant” that Consumers Energy has to perform a brand new cost of service study. According to ABATE, the Michigan Legislature must have meant this because “the Legislature clearly had in mind that the utilities would be required to perform some substantial work in the course of unbundling. . . . 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 the different unbundling methodologies could be discussed.” Application for Leave at 6. This argument falls flat, however, when one considers the ease with which the Michigan Legislature **actually did** impose the obligation on the Commission and electric utilities to address ratemaking concerns in Act 141. In Section 10v of Act 141, the Michigan Legislature required electric utilities to file a joint plan to expand transmission capacity. In that section, the Legislature **specifically** addressed the costs of such an expansion, requiring the affected electric utilities to detail “the proposed ratemaking treatment for the costs” of such expansion. Sec. 10v(2). And in the very next subsection, Sec. 10v(3), the Legislature required the Commission to address cost allocation/rate design by mandating recovery of approved transmission expansion costs from “benefitting customers.” If ABATE’s argument concerning legislative intent is to be credited, the Legislature must have decided to **expressly provide** for cost allocation activity in Section 10v, but preferred to **imply** a requirement for such cost allocation activity in Section 10b(2). This is simply beyond the scope of reasonable expectations.

II.

It is not a Sufficient Argument to Call a Witness of Consumers Energy Untruthful Simply because ABATE Does not Like her Testimony

ABATE’s second argument in its Application for Leave to Appeal is simply that ABATE’s attorney does not wish to believe Consumers Energy’s witness concerning the existence of certain software. The short answer to this argument is that the decision-maker charged by law with viewing the witness’ testimony and demeanor, the ALJ, heard Ms. Coste’s testimony, observed her demeanor, and concluded that Ms. Coste’s affidavit and testimony

should be credited and, based in part, on her testimony, decided that Motion to Compel should be denied.

It is not a sufficient argument on appeal to the Commission to say that since ABATE is dissatisfied with this result, the Commission should change the result.

III.

The ALJ Correctly Ruled that the Michigan Court Rules Do not Require the Creation of Nonexistent Documents

As noted above, 2 TR 39-40, the ALJ based his ruling on a longstanding interpretation of the Michigan Court Rules that parties subject to discovery “are only required to provide existing information they may have to retrieve from their database, but if it requires substantial manipulation, the use of programs and making judgments, they are clearly not required to do that in response to an interrogatory.” This ruling is completely consistent with the Michigan Court Rules governing the production of documents:

(B) Scope.

(1) A party may serve on another party a request

(a) to produce and permit the requesting party, or someone acting for that party,

(i) to inspect and copy designated documents or

(ii) to inspect and copy, test, or sample other tangible things that constitute or contain matters within the scope of MCR 2.302(B) and **that are in the possession, custody, or control of the party on who the request is served.**

MCR 2.310 [emphasis added].

The general court rule governing discovery also addresses the necessity that tangible things, including documents, be in existence before they can be made subject to discovery. MCR 2.302(B) provides in pertinent part as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defenses of another party, **including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things** and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discover of admissible evidence.

[emphasis added].

When the court rule describes documents as “tangible things,” it is clearly relying on their **existence** as a necessary condition to their discoverability.

As the Commission is aware, the Michigan Court Rules have been incorporated into the Commission’s Rules of Practice and Procedure at 1999 MAC R 460.17317. The very next Commission procedural rule, R 460.1739 incorporates the same requirement that documents must exist in order to be produced: “[A] commissioner or the presiding officer may issue a subpoena . . . to produce **specified notes, records, documents, photographs, or other tangible things**” [emphasis added]. A thing cannot be “tangible” if it does not exist, Further, this procedural rule does **not** authorize a commissioner or presiding officer to order that studies be conducted, computer runs be undertaken with variables requested by opposing parties.

This dispute does not center around a discovery dispute over whether data should be provided even though it would be difficult to do so. As ABATE itself concedes, this dispute centers around ABATE’s request for Consumers Energy “to produce an unbundled cost of service study,” Application for Leave at 10, and not the collection of preexisting data. The ALJ correctly understood and ruled that, under the rules of discovery, ABATE is not entitled to

require Consumers Energy to create documents to suit ABATE's litigation strategy where no such documents exist.

IV.

Conclusion

In conclusion, ABATE has requested a cost of service study that is not required by either Act 141 nor the Michigan Court Rules, nor any Commission order or regulation. Testimony from Consumers Energy demonstrates without contradiction that the study ABATE seeks does not exist. Since ABATE has not met its burden of persuading the Commission to reverse the ALJ, Consumers Energy respectfully requests that the Commission **DENY** ABATE's Application for Leave to Appeal, or, in the alternative, **GRANT** the Application and **DENY** the relief requested therein and **AFFIRM** the Administrative Law Judge.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jon R. Robinson", is written over a solid horizontal line.

Jon R. Robinson
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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

REPLY OF CONSUMERS ENERGY COMPANY
TO ABATE’S MOTION TO COMPEL

Consumers Energy Company (“Consumers Energy” or the “Company”) submits this reply to “Abate’s Motion to Compel Complete Answers to its First Set of Interrogatories and Requests for Production of Documents to Consumers Energy Company” (ABATE’s Motion”). ABATE’s Motion should be denied because (i) it seeks data that is not necessary or helpful to the task of unbundling Consumers Energy’s existing retail electric rates, (ii) it seeks data that, if used in the manner suggested by ABATE, would violate the rate freeze provisions of 2000 PA 141 (“PA141”), and (iii) it seeks data that is not available.

1. Section 10b(2) of PA 141, MCL 460.10b(2); MSA 22.13(10b)(2), provides in relevant part as follows:

“(2) No later than 1 year from the effective date of the amendatory act that added this section, each electric utility shall file an application with the commission to unbundle its existing commercial and industrial rate schedules and separately identify and charge for their discrete services.” Emphasis added.

As explained in the pre-filed direct testimony filed by Consumers Energy in this proceeding, its existing retail electric rates are those that were established in a November 1996 order issued in Case No. U-10685. Pursuant to Section 10d of PA 141, MCL 460.10d; MSA 22.13(10d), these rates are frozen until December 31, 2003, and are subject to rate caps of various indefinite

lengths thereafter. Therefore, consistent with PA 141, Consumers Energy has, in this case, unbundled its existing electric rates using the 1996 cost of service study that formed the basis for the rates that were approved in the U-10685 order, and that remain frozen currently.

2. The interrogatories submitted to Consumers Energy by ABATE asked the Company to provide information regarding both 1996 costs and 2000 costs. Consumers Energy provided full answers with respect to the 1996 costs. ABATE's Motion seeks an order directing Consumers Energy to provide answers with respect to 2000 costs. See page 5 of ABATE Motion which asks that Consumers Energy be required to answer the interrogatories "in the form of a comprehensive unbundled electric cost of service allocation study showing the allocation of costs by type of service and by customers' voltage levels." Such a study, and the underlying data, is simply not necessary or helpful to the task that PA 141 indicates should be performed in this proceeding; i.e., the unbundling of "existing" rates.

3. ABATE argues that using 2000 costs is "essential to an accurate result in this proceeding." See ABATE Motion, paragraph 2. Such is clearly not the case. Since PA 141 requires the unbundling of the utility's "existing" rates, and those existing rates are based upon a 1996 cost of service study, the greatest level of accuracy can be obtained through use of the 1996 study. Indeed, using a different years set of costs, sales and revenues to unbundle these existing rates would be far more likely to introduce inaccuracy into the process since the individual costs of the various components as well as the total cost of the combined components might well be different from those costs and cost relationships that form the basis for the existing rates. If PA 141 had been written to require that a utility's rates and rate structure first be updated to reflect current costs, and then unbundled, ABATE's argument concerning accuracy might make

sense. That is not, however, the manner in which PA 141 was drafted. For Consumers Energy, PA 141 froze rates at 1996 levels, and then required the unbundling of those “existing” rates.

4. ABATE argues that Consumers Energy must “be compelled in this proceeding to price all of its services to accurately reflect costs.” See ABATE Motion, paragraph 3. As ABATE must surely realize, the rate freeze provisions of PA 141 prevent affected electric utilities such as Consumers Energy from “pric[ing] all of its services to accurately reflect costs.” Indeed, that is the whole point of a rate freeze. During the period of the rate freeze, rates are divorced from costs, and the utility’s actual costs effectively become irrelevant. As much as Consumers Energy might welcome the opportunity to increase its rates to reflect various cost increases, PA 141 prevents that from happening, at least through the end of the rate freeze period. Thus, to the extent ABATE wishes to use 2000 costs to alter any of the Company’s existing frozen rates, that is clearly prohibited by PA 141.

5. In paragraph 7 of its Motion, ABATE argues that the order issued by the Commission in Case No. U-12550 regarding a gas unbundling cost of service study is somehow relevant to this proceeding. Consumers Energy believes that the gas order simply illustrates why ABATE’s Motion should be denied. The U-12550 order required Consumers Energy and other gas utilities to, in conjunction with the filing of each company’s next general gas rate case, to prepare an unbundling cost of service study to accompany that filing. The important distinctions are (i) Consumers Energy’s gas utility business is not subject to a rate freeze, and (ii) Consumers Energy’s gas utility business is not subject to a statutory requirement that its “existing” gas rates be unbundled, and (iii) the cost of service study filed by Consumers Energy in response to the U-12550 order was filed in conjunction with a general review of the Company’s jurisdictional

gas rates. Thus, the Commission's actions in U-12550 are not helpful to a resolution of ABATE's Motion in this proceeding.

6. For the foregoing reasons, 2000 costs are irrelevant to the unbundling required by PA 141 that is the subject of this proceeding. Consumers Energy has unbundled its existing commercial and industrial rates based upon the same 1996 cost of service study that forms the basis for those existing rates. ABATE's Motion should be denied.

7. Furthermore, as a practical matter, Consumers Energy is simply unable at this time to provide answers to the ABATE interrogatories concerning year 2000 costs. As explained in more detail in the affidavit of Susan E. Coste, which accompanies this Reply, the 2000 cost data sought by ABATE is not currently available. A redesign of the Company's billing system has been underway since 1998 to accommodate the revised billing terms and procedures that are required due to the implementation of retail open access. One of the consequences of that effort has been the temporary unavailability of cost, sales and revenue data that is needed in order to perform cost of service studies. Once the necessary billing, computer and programming systems are completed, this information will again be accessible in a manner that will allow such studies to be performed. As explained in Ms. Coste's affidavit, the information is currently anticipated to be available sometime during the first quarter of 2002. Once it is available, a revised cost of service study could be performed by approximately July-August 2002. Thus, Consumers Energy is simply unable to provide the answers sought by ABATE until that time. The company does not believe it would be appropriate to delay this case for that period of time.

8. In paragraph 5 of its motion, ABATE seeks to make a distinction between a request for document production under MCR 2.310, which it implicitly acknowledges is limited to documents that exist, and written interrogatories under MCR 2.309, which it apparently asserts

can be used to require the creation of documents or information that does not exist. The language of the Court Rule does not support such an interpretation. MCR 2.309 states: "the answers must include 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." In this instance, the information is simply not available from any source. This rule does not require the creation of non-existent documents or information. Furthermore, even under ABATE's strained interpretation, the study need not be provided since ABATE concedes that the Company would only be required to "endeavor to provide an answer if it is reasonably able to do so." As explained above, Consumers Energy is currently not able to do so.

WHEREFORE, Consumers Energy Company respectfully requests that ABATE's Motion to Compel be denied in its entirety.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: October 1, 2001

By:


Jon R. Robinson
212 West Michigan Avenue
Jackson, Michigan 49201
Attorney for Consumers Energy Company
(517) 788-0698

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of)
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_____)

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

AFFIDAVIT OF SUSAN E. COSTE

Susan E. Coste, being first duly sworn, says as follows:

1. I am employed by Consumers Energy Company (“Consumers Energy”) as a Senior Rate Analyst. I am the Supervisor of the Cost Analysis Section of the Rates and Electric Strategic Business Unit Planning Department of Consumers Energy. Among my responsibilities in this position are preparing and overseeing the preparation of cost of service studies for Consumers Energy’s electric utility business.

2. The most recent complete retail electric cost of service study performed by Consumers Energy was the 1996 retail electric cost of service study presented in Case No. U-10685 and described in the pre-filed direct testimony in this case. Consumers Energy has not filed any general electric rate cases since the Case No. U-10685 proceeding, and typically complete retail electric cost of service studies have been prepared in conjunction with general rate cases.

3. The preparation of a retail electric cost of service study has historically been a complex and time-consuming process for Consumers Energy. The approximate time for compiling the necessary costing data along with billing determinant, sales and revenue data and completing such a study has typically been 6 months.

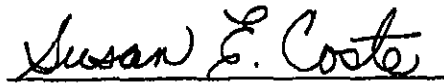
4. Much of the data necessary to prepare such a study must be obtained from computer systems that are directly connected with Consumers Energy's billing system. As part of the Company's Electric Restructuring Implementation Project ("ERIP") that has been underway since 1998, these systems have been replaced to facilitate billing of retail open access customers. New systems were developed to replace those systems considered to be inadequate or obsolete. One aspect was the elimination of a computer program (called the "WR-4") that converted metered data (e.g., hourly demands for time-of-use customers) into costing determinants (e.g., coincident demands) that are used to develop cost allocation methods. A redesigned process, consistent with the MPSC cost allocation requirements, has recently been tested and is expected to be functional early in the first quarter of 2002, which will effectively replace the "WR-4" system.

5. In order to access the billing determinant data that is needed to prepare a cost of service study, a computer program is required to extract that data from the Company's billing records database, and which then allows that data to be organized by rate schedules and by functions (e.g., distribution, transmission, generation). This is a very complex computer program that, with respect to the new alternative billing system described above, has not yet been finalized. It is currently anticipated that this program will be written, tested and made available for use by my department sometime during the first quarter of 2002. Once this system is available, a cost of service study and associated rate unbundling for the historical year 2001 could be prepared within several months; i.e., approximately by July-August of 2002.

6. The year 2000 data needed to prepare a cost of service study is not currently available in any usable form, and will not be available until early in 2002. This is due to the fact that the initial focus of the redesigned billing process was to accomplish the billing of customers,

by accommodating the revised billing terms and procedures made necessary by the commencement of retail open access. Thus, the data needed to prepare an electric cost of service study simply does not currently exist in the form and quality required to do such a study. In addition, and as noted above, the computer program needed to acquire that data from the billing database is still in the process of being written and tested.

7. If called to testify in this matter, I would testify as set forth above.


Susan E. Coste

Subscribed and sworn before me this 1st day of October, 2001.


Sammie B. Dalton
Notary Public, Jackson County, Michigan
My Commission Expires: 01/04/04

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)
_____)

MPSC Case No. U-12970

PROOF OF SERVICE

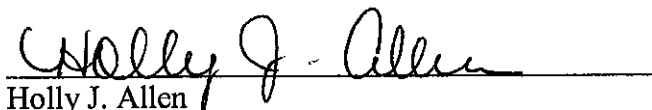
STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

Carolyn S. Hinton, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on November 1, 2001 she served an electronic copy of the "**Response of Consumers Energy Company In Opposition to Application for Leave to Appeal of ABATE**" upon the persons listed in Attachment 1 hereto, at the e-mail addresses listed therein and she also served a hard copy of the same documents to the addresses listed therein by depositing the same on November 1, 2001, in the United States mail in the City of Jackson, Michigan with first-class postage thereon fully paid.



Carolyn S. Hinton

Subscribed and sworn to before me this 1st day of November, 2001.



Holly J. Allen
Notary Public, Jackson County, Michigan
My Commission Expires: 05/01/06

ATTACHMENT 1 -- TO CASE NO. U-12970 BOH Docket No. 2001-1173

Administrative Law Judge

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