

CLARK HILL  
PLC  
ATTORNEYS AT LAW

**Michael P. Calabrese**  
E-mail: mcalabrese@clarkhill.com  
Direct Dial 517-381-2142

*Lansing, Michigan Office:*  
2455 Woodlake Circle  
Okemos, Michigan 48864-5941  
Tel. (517) 381-9193 ■ Fax (517) 381-0268  
www.clarkhill.com

January 29, 2002

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

Dear Ms. Wideman:

Enclosed for filing, please find the original and 4 copies of ABTAE'S EXCEPTIONS TO PROPOSAL FOR DECISION. Proof of Service upon the parties of record is also enclosed. Thank you.

Sincerely,

CLARK HILL PLC



Michael P. Calabrese

MPC/pgs  
Enclosures

cc: Parties of Record

3129718-1  
DETROIT 3146483v1  
07411/083894

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

PROOF OF SERVICE

STATE OF MICHIGAN )  
 ) SS:  
COUNTY OF INGHAM )

Patricia G. Sass, being duly sworn, deposes and says that she is an employee of Clark Hill P.L.C., and that on January 29, 2002, a copy of the ABATE'S EXCEPTIONS TO PROPOSAL FOR DECISION was served upon:

See attached service list

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



\_\_\_\_\_  
Patricia G. Sass

Subscribed and sworn to before me  
this 29<sup>th</sup> day of January, 2002.



\_\_\_\_\_  
Haran C. Rashes, Notary Public  
Washtenaw County, Michigan acting in  
Ingham County, Michigan

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My Commission Expires: September 18, 2003

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**SERVICE LIST**  
**U-12970**

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**Attorneys for National Energy**

Marketers Association

John M. Dempsey  
Dan Oginsky  
215 S. Washington Square, Suite 200  
Lansing, MI 48933  
E-mail: [jdempsey@dickinson-wright.com](mailto:jdempsey@dickinson-wright.com)

Donald E. Erickson  
Assistant Attorney General  
6520 Mercantile Way, Suite 2  
PO Box 30218  
Lansing, MI 48909  
E-mail: [ericksond@ag.state.mi.us](mailto:ericksond@ag.state.mi.us)

**Administrative Law Judge**

Mr. George Schankler  
Michigan Department of Consumer &  
Industry Services  
611 West Ottawa Street  
Ottawa State Office Building, 2<sup>nd</sup> Floor  
PO Box 30695  
Lansing, MI 48909-8195  
E-mail: [george.schankler@cis.state.mi.us](mailto:george.schankler@cis.state.mi.us)

**MPSC Staff**

Mr. Stephen D. Hughey  
Assistant Attorney General  
Public Service Division  
6545 Mercantile Way, Suite 15  
Lansing, MI 48911  
E-mail: [hugheys@ag.state.mi.us](mailto:hugheys@ag.state.mi.us)

**Energy Michigan**

Mr. Eric J. Schneidewind  
Varnum, Riddering, Schmidt & Howlett, LLP  
The Victor Center, Suite 810  
201 N. Washington Square  
Lansing, MI 48933  
E-mail: [ejschneidewind@vrsh.com](mailto:ejschneidewind@vrsh.com)

**Consumers Energy Company**

Mr. Jon R. Robinson  
Consumers Energy Company  
212 W. Michigan Avenue  
Jackson, MI 49201  
E-mail: [jrobinson@cmsenergy.com](mailto:jrobinson@cmsenergy.com)

**STATE OF MICHIGAN**

**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

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CONSUMERS ENERGY COMPANY )  
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Case No. U-12970

**ABATE’S EXCEPTIONS TO PROPOSAL FOR DECISION**

The Association of Businesses Advocating Tariff Equity (“ABATE”), by its attorneys, Clark Hill P.L.C., pursuant to the schedule set in this proceeding by the Administrative Law Judge (“ALJ”), hereby files its Exceptions for the ALJ’s January 15, 2002 Proposal for Decision (“PFD”).

**I. INTRODUCTION**

On June 5, 2001, pursuant to the requirements of §10b(2) of 2000 PA 141, Consumers Energy Company (“Consumers”) filed its Application in the instant matter to unbundle its existing commercial and industrial rate schedules and separately charge for its discrete services. On September 24, 2001, ABATE, which had been admitted in this case as an intervenor, filed a motion to require Consumers to support its Application with an unbundled cost-of-service study based on the most recent available data.<sup>1</sup> ABATE reasoned that an accurate unbundling of rates could not proceed on the basis of a cost-of-service study that

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<sup>1</sup> ABATE had requested in discovery that Consumers provide current cost-of-service data, which Consumers refused to do, objecting that it had not performed any cost-of-service studies more recent than the one it submitted with its Application. ABATE argued that, in the context of this case, Consumers was required to produce that data

had been performed in the mid-1990's, and that new data was required to show the current cost contribution of various services to Consumers' current bundled rates. The ALJ denied the motion at an October 4, 2001 hearing. ABATE appealed that denial under Rule 337 of the Commission's Rules of Practice and Procedure on October 18, 2001, which appeal is now pending before the Commission. Meanwhile, the case proceeded to hearing on November 28, 2001, and Consumers filed its Initial Brief on December 19, 2001. The ALJ issued a PFD on January 15, 2002, approving Consumers' Application as submitted.

## **II. ARGUMENT**

### **A. The ALJ Erred in Failing to Consider ABATE's Reply Brief.**

ABATE did not file an Initial Brief in this case. In its Reply Brief, ABATE raised two issues. First, it was concerned that Consumers had argued in its Initial Brief that the Commission had no choice but to approve its Application because "there is no evidentiary basis for the Commission to do otherwise." In direct response to this statement, ABATE had observed that, in spite of the fact that no witness had testified against approving the Application, the Commission was not bound to reject it. It could reject the Application if it found Consumers' evidence inadequate or unpersuasive, or if based upon legal grounds. As ABATE observed, Consumers' failure to provide a current unbundled costs of service study was a fatal flaw in the Application. In ABATE's view, this flaw requires no evidentiary exploration; rather it is a legal

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upon a proper discovery request even though it might entail a significant undertaking for Consumers. Thus, ABATE's motion was cast as a motion to compel discovery.

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issue that is currently before the Commission in ABATE's Rule 337 Appeal. These observations were made in direct response to Consumers' contention that the Commission had no choice but to approve the Application.

Second, ABATE had noted that Consumers Initial Brief had raised an ambiguity regarding an issue that had previously been reasonably clear. Although Consumers' witness Thomas Yehl had testified that Consumers did not intend to include in its customers' bills the same level of detail that it proposed to include in its tariff, it was not apparent from Mr. Yehl's testimony that Consumers might not intend to include in its bills any greater detail than a separately stated generation amount.<sup>2</sup> This possibility arose when Consumers stated to the ALJ in its Initial Brief that "Identifying the average cost of generation for each rate schedule *provides the customer with the basic information needed* to evaluate the relative attractiveness of a switch to ROA service." Consumers Initial Brief, p 4 (emphasis supplied). Mr. Yehl had testified that generation amounts were "the most valuable information that the Company could provide," but had not suggested that such amounts, by themselves, would be sufficient to allow a meaningful exercise of choice. 3 TR 66. Thus, Consumers' Initial Brief raised for the first time the possibility that Consumers "unbundled" bills would reflect only generation amounts, and not transmission, distribution, or customer charges or any regulatory adjustment.

In the PFD, the ALJ, after summarizing the issues discussed in ABATE's Reply Brief, stated:

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<sup>2</sup> Indeed, as stated in ABATE's Reply Brief, this may not be Consumers' intent; the statements about which ABATE is concerned are admittedly ambiguous. Thus, ABATE's discussion of this issue was more a request for a clarifying ruling, necessitated by the increased ambiguity resulting from Consumers' Initial Brief, than an argument in opposition to a "proposal" that ABATE believes Consumers may not have even intended.

The issues raised in the reply brief should properly have been raised through testimony on the record or, at the very least, in ABATE's initial brief. Consumers and Staff now have no opportunity to rebut ABATE's arguments. For this reason, the Administrative Law Judge will not discuss the issues raised by ABATE. PFD, p 4.

The ALJ is incorrect in stating that the issues discussed in ABATE's Reply brief should have been raised in testimony or in an Initial Brief. Indeed, they could not have been so raised, because they did not arise until Consumers filed its Initial Brief. ABATE's Reply Brief was a legitimate reply thereto.

As noted above, ABATE has argued throughout this proceeding that proper unbundling can only be accomplished if Consumers completes and submits an updated unbundled cost of service study. The ALJ disagreed at an October 4, 2001 motion hearing, and the issue is now before the Commission by way of a Rule 337 Appeal, which ABATE filed on October 18, 2001. Given that such a study had not been completed, there was no basis for ABATE to present at the November 28, 2001 hearing the evidence that it had planned to present (i.e. the requested study and an analysis thereof), as that evidence did not exist, the ALJ having declined to order its production. And, given that the ALJ had already passed upon this issue, and that it was already before the Commission, ABATE saw no need to file an Initial Brief that would merely duplicate its prior arguments. It was only when Consumers contended in its Initial Brief that there was "no basis" for the Commission to reject the Application that the need for ABATE to again discuss the issue arose.

The issue of what charges will be presented on customers' bills is similar. ABATE would have had no basis for presenting testimony on this issue, because Mr. Yehl's testimony did not seem to argue for presentation only of generation charges. It was not until Consumers' Initial Brief, which seemed to state

clearly (though perhaps inadvertently) that Consumers did not intend to reflect all charges on its bills, that this issue came to be a concern.

ABATE should not be penalized for failing to argue issues that had not yet arisen. Thus, the ALJ's failure to consider ABATE's Reply Brief was error, and that error led to further error as explained below, when he 1) recommended the approval of Consumers' Application; and 2) failed to recommend clarifying language regarding what charges should be reflected on Consumers' bills.

#### **B. The Commission is Not Bound to Grant Consumers' Requested Relief.**

Consumers' Initial Brief, after summarizing the history of this proceeding and the evidence, concludes, "Since the Company's unbundling presentation is the only evidence of record on the subject, it should be approved by the Commission. Indeed, there is no evidentiary basis for the Commission to do otherwise." Consumers' Initial Brief, p 4. This conclusion stems from a fundamental misunderstanding of the law.

Indeed, ABATE believes that Consumers' Application should be denied. Because Consumers has not presented to the Commission an unbundling presentation based on the most current available data, Consumers' has not supported its Application with "competent, material and substantial evidence," as it must to receive relief under MCL 24.306(1)(d). MCL 460.10b(2), the statute under which this proceeding was initiated, requires that Consumers "unbundle its existing commercial and industrial rate schedules and separately identify and charge for their discrete services." §10b(2) does not require that the rates themselves be changed, and indeed those rates are currently frozen under §10d of 2000 PA 141 and thus

will remain based upon Consumers' mid-1990's cost-of-service study.<sup>3</sup> Nonetheless, there is no warrant for basing the unbundling of rates, which seeks not to set the rates but to allocate the proportional contribution to those rates of various component services, on long-obsolete data. Yet Consumers has presented the Commission with "evidence" to support this allocation that is so old that there is no basis for inferring that it bears any relationship to the current cost contribution to overall rates of various component services. Tellingly, Consumers' witnesses did not even purport to claim that there is any such relationship.<sup>4</sup>

Consumers' claim that "there is no evidentiary basis" for the Commission to deny it the relief it seeks does not, as Consumers would have the Commission believe, box the Commission into a corner. Although it is true that no party presented evidence supporting a different form of relief than what Consumers' sought, this does not mean that Consumers necessarily met its burden of providing adequate support for its requested relief. The fact that there is evidence on the record and that evidence is un rebutted does not alone make that evidence "competent, material and substantial" under MCL 24.306(1)(d). Rather, it is entirely possible for a party to make a presentation to the Commission that is flawed in any number of ways that will be apparent to the Commission despite the fact that those flaws are not discussed in an evidentiary presentation made by another party. For example, the evidence may be based upon an erroneous understanding of the law, unacceptably sparse on one or more crucial points, or simply not credible. In such a case, the Commission may not grant the requested relief. Consumers' suggestion to the contrary is without merit.

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<sup>3</sup> The study upon which Consumers has based its Application was approved by the Commission on November 14, 1996, in Case No. U-10685. 3 TR 52.

This is such a case. Consumers has sought to support its Application with ancient data that reflects not the current costs of various components of its bundled rates, but rather what those costs might have been approximately seven years ago. The tenuousness of the relationship between Consumers' evidence and its requested relief is apparent *prima facie*. There is nothing in the Administrative Procedures Act or anywhere else that would require the Commission to ignore what it can see for itself.

Moreover, the function in which the Commission is engaged in this case is a ratemaking function.<sup>5</sup> Ratemaking, as this Commission and the Michigan courts have long recognized, is essentially a legislative function, and thus requires not only an examination of the evidence and application of the law, but also important policy choices. See Attorney General v Michigan Public Service Commission, 463 Mich 911, 913 (2000); City of Niles v Michigan Gas & Electric Co, 273 Mich 255, 263 (1935); In the Matter of the Restructuring of the Electric Utility Industry, MPSC Case No U-11290 et al, Order dated August 17, 1999, p 36. If the Commission believes, as ABATE does, that the legislatively dictated priority of effective choice can best be served by sending the newly competitive market accurate price signals through unbundling, then the Commission is free to exercise its legislative authority to require that §10b(2) be implemented in a manner consistent with that policy. Indeed, the Commission itself in a recent order recognized and forcefully stated the need to implement §10b(2) in a manner that will give electric customers

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<sup>4</sup> Because these issues largely track those presented in its Motion to Compel, which has already been decided by the ALJ and is currently before the Commission, ABATE will not belabor them in this Reply Brief.

<sup>5</sup> While ABATE recognizes, as stated above, that Consumers' overall rates are frozen and will not be changed in this case, it is nonetheless true that this case involves an investigation by the Commission of the costs of various services in order to authorize charges for those services on utility customers' bills. This is quintessential ratemaking. DETROIT 3146483v1

accurate, complete information so that they can have “meaningful choice.” As the Commission stated, “Act 141 was enacted to, among other things, ensure that affected customers ‘have a choice of electric suppliers.’ Section 10(2)(a). *Meaningful choice will be thwarted if the provisions of Act 141, specifically Section 10b, are ignored.*” In the Matter of the Application of the Detroit Edison Company to Unbundle its Retail Electric Rates, MPSC Case No. U-12966, Order dated December 20, 2001, p 6 (emphasis supplied). Thus, the Commission rightly rejected the unbundling application of a utility where granting that application would have “thwart[ed] the development of a competitive market by depriving customers of essential information.” *Id.*, p 4. To effectuate the Legislature’s and the Commission’s policy of giving electric customers “meaningful choice,” by allowing them to make decisions in light of all “essential information,” it is imperative that customers be sent price signals that reflect reality as it stands today, not as it stood seven years ago. And, since Consumers’ has proposed an unbundling scheme that is not consistent with that policy, the Commission should exercise the discretion inherent in its legislative authority by denying Consumers’ Application.

### **C. Customers’ Bills Must Fully Reflect Unbundled Rates.**

Finally, Consumers’ presentation contains an ambiguity that must be rectified. As Mr. Yehl testified at 3 TR 66, Consumers has not proposed “that the level of detail contained in the unbundled rate sheets be incorporated into the bill format now utilized by the Company.” The omitted information would include “the billing demand charge, maximum demand charge, and kilowatt-hour charge.” Rather, Mr. Yehl has suggested that “the most valuable information that the Company could provide to its commercial and

industrial customers would be each customer's average rate for generation." Consumers reiterates this point at page 4 of its Initial Brief, and takes it a step further, stating that Consumers' intent is to "add to customer bills the average rate for generation costs that is reflected in each rate schedule, but not to include on those bills the same level of detail that is included in the tariff sheets," and that "identifying the average cost of generation for each rate schedule provides the customer with the basis information needed" to exercise choice.<sup>6</sup>

These statements could be construed to mean that Consumers intends to add information to customers' bills that would "separately identify and charge for" generation service, but would not delineate amounts for transmission service, distribution service, customer charges, or Consumers' proposed "regulatory adjustment." Such a method of "unbundling" would be fundamentally inconsistent with the requirement of §10b(2) that all of a utility's "discrete services," not just one, be unbundled. The Commission has previously ruled, in the context of guiding the unbundling of gas rates, that each discrete component service must be separately identified. See In the Matter of Voluntary Gas Customer Choice Programs, MPSC Case No U-12550, Order dated July 11, 2001, p 7 (identifying seven different services to be studied for possible unbundling).

Indeed, ABATE doubts that it was Consumers' intent to identify only generation charges on customers' bills. Rather, ABATE believes that Consumers intended to present fully unbundled bills reflecting charges for each service (generation, transmission, distribution, customer, and regulatory adjustment), and that the quoted passages merely reflect that Consumers did not intend to have bills break

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<sup>6</sup> As noted above, it was these statements in Consumers' Initial Brief, rather than Mr. Yehl's testimony, that created DETROIT 3146483v1

down “subcomponents” of those discrete services. However, because Consumers’ testimony, as elucidated by its Initial Brief, is ambiguous on this point, ABATE believes that the Commission’s order should make clear that all customers’ bills should identify, at a minimum, generation charges, transmission charges, distribution charges, customer charges, and any regulatory adjustment.

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true ambiguity as to Consumers’ intention whether to truly unbundle customer bills.

### III. RELIEF REQUESTED

WHEREFORE, ABATE respectfully requests that the Commission issue an order rejecting Consumers' Application unless and until Consumers provides adequate evidentiary support through the presentation of a current, unbundled cost of service study, as set forth more fully in ABATE's Appeal which is currently pending before the Commission in this case, or, if the Commission approves Consumers' Application, that it do so with clarifying language stating that all customer bills should separately reflect not only generation charges but also transmission, distribution, and customer charges and any regulatory adjustment.

Respectfully submitted,

CLARK HILL P.L.C.

By:



Robert A. W. Strong (P27724)  
Michael P. Calabrese (P60199)  
255 South Old Woodward Avenue, 3<sup>rd</sup> Floor  
Birmingham, Michigan 48009  
(248) 642-9692  
Attorneys for the Association of Businesses  
Advocating Tariff Equity

Dated: January 29, 2002