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June 22, 2006

VIA ELECTRONIC CASE FILING

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, Michigan 48909-7721

Re: MPSC Case No. U-14561

Dear Ms. Kunkle:

Enclosed for filing is the Initial Brief of the Association of Businesses Advocating Tariff Equity and a Proof of Service in the above matter.

Very truly yours,

CLARK HILL PLC
Robert A.
W. Strong
Robert A. W. Strong

Digitally signed by Robert A.
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Enclosures

cc w/enc: Parties of Record
ALJ Mark E. Cummins

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to investigate
the appropriateness of instituting a surcharge to assist in the
funding of the Gas Technology Institute

Case No. U-14561

INITIAL BRIEF OF THE
ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

The Association of Businesses Advocating Tariff Equity ("ABATE") by its attorneys,
Clark Hill PLC, files this Initial Brief with the Michigan Public Service Commission
("Commission") in accordance with the established schedule.

I.

INTRODUCTION

This proceeding was begun on the Commission's own motion to determine whether it was appropriate for implementing a surcharge to assist in the funding of the Gas Technology Institute ("GTI"). Following the evidentiary hearings, it is now plainly apparent that it would be inappropriate to implement a surcharge to assist in the funding of the GTI both as a matter of law and as a matter of public policy. It makes no sense to further increase the cost of natural gas for residents of the state of Michigan at a time when gas prices have become much more volatile and definitely much higher than they were during the 1990's. There is no empirical data in this proceeding to support that it would be beneficial for customers to pay increased rates for RD&D performed by GTI. GTI's position that there should be statewide mandatory funding is based upon speculation that some of its RD&D efforts will result in unnamed and unquantified benefits beginning at some undefined period in the future. Gas customers have not been asked whether they would like to pay higher gas rates and the customers represented in this case have

emphatically stated that they are uninterested and do not support the funding of GTI through mandatory surcharges. Finally, the GTI's R&D efforts are unrelated to regulated gas utility service in Michigan.

II.

ARGUMENT

A. Procedural History.

On June 30, 2005, the Commission issued its Order Initiating Generic Proceeding And Notice Of Hearing in this case. June 30, 2005 Order in MPSC Case No. U-14561. That Order established this proceeding for the purposes examining the appropriate state-wide level of future support and funding for the GTI. *Id.* That Order also indicated that the purpose of the proceeding was to consider a mechanism for the recovery of GTI-related support and funding. *Id.* The Order made clear that this proceeding was not begun to review the present existing rates or cost levels of Commission-jurisdictional natural gas companies. *Id.* Nevertheless, all of the mechanisms discussed in the Order involve a mandatory recovery procedure. *Id.* Finally, the Order required all Commission-jurisdictional natural gas companies to participate in the proceedings. *Id.*

In response to this Order, ABATE intervened in these proceedings and filed a motion to dismiss the proceeding. In its motion, which was supported by the Attorney General, ABATE argued that the Commission lacks jurisdiction in this matter. ABATE's motion was heard at the time of the prehearing conference held on August 29, 2005, at which time ABATE's motion was denied by the ALJ. 1 TR 33.

The Commission, by its order dated October 18, 2005, granted ABATE's application for leave to appeal, but denied the requested relief. The Commission found that it had jurisdiction to

hear the proceeding to consider funding GTI based upon two statutory provisions: MCL 460.6 and MCL 460.54. The Commission pointed to no other statutory authority conferring upon it the power to raise rates to fund an organization's efforts that were not directly tied to gas utility service to the customers of regulated utilities. In addition, the Commission held that ABATE's reliance on a 1998 Settlement Agreement was misplaced and that LDC's could make a request to impose a surcharge. The Commission did not discuss the argument that GTI was bound by the Settlement Agreement, and that was reason enough to dismiss the Application. The matter then proceeded to the hearing phase. Testimony and exhibits were filed by Mr. Edelstein on behalf of GTI, by Ms. Polich on behalf of Consumers Energy Company, by Mr. King on behalf of the Attorney General, and by Ms. Devon on behalf of the MPSC Staff. In addition, Mr. Edelstein filed rebuttal testimony.

The parties waived cross-examination of Ms. Polich and the other three witnesses were cross-examined on June 1, 2006. The record consists of 185 transcript pages and two exhibits.

B. GTI Is Bound By The Settlement Agreement.

The reason behind GTI's efforts to impose a mandatory surcharge upon Michigan gas consumers is that the mandatory funding which GTI and its predecessor, the Gas Research Institute ("GRI"), received pursuant to FERC surcharges expired at the end of 2004. The reason that the FERC-approved mandatory surcharges expired was the result of a settlement agreement (the "Settlement Agreement") entered into by GRI and numerous other parties in 1998. See, *Gas Research Institute*, 83 FERC ¶61,093 (1998).

The Settlement Agreement, a legally binding contract, provided for discountable, uniform surcharges for a period of seven years ending December 31, 2004, and the establishment and requirement that all funding of GRI be on a voluntary basis effective no later than January 1,

2005. *Id.* GTI agreed that as of January 1, 2005, its funding is purely voluntary, so it should not be allowed to participate in a proceeding where the Commission's perceived outcome is an involuntary "surcharge." See Order Initiating Generic Proceeding and Notice of Hearing.

In 2004, GTI approached the FERC asking for mandatory funding for the five year period beginning January 1, 2005. The FERC found that GTI was the successor company to GRI and, therefore, was bound by the Settlement Agreement. *Gas Technology Institute*, 109 FERC ¶61,164 (2004).

Having been rebuffed by the FERC in its attempt to breach its obligations under the Settlement Agreement and request further mandatory funding, GTI has now approached the Commission in an effort to make an end-run around the FERC's decision and its legally binding obligations under the Settlement Agreement. GTI's position is that it is not bound by the Settlement Agreement because the Settlement Agreement only applies to interstate pipelines and FERC. 3 TR 106.

In sum, GTI has asked that the Commission become complicit in allowing it to breach the Settlement Agreement and its legally binding obligations thereunder to obtain its funding on a purely "voluntary" basis on and after January 1, 2005. The Commission lacks jurisdiction in this matter as a matter of law, and also should not become complicit in GTI's efforts to breach the legally binding Settlement Agreement.

During cross-examination, it became clear that GTI's legal argument was based upon the following section in the April 29, 1998 FERC order approving the Settlement Agreement:

"Section 1.7 is entitled Voluntary Funding. This section provides that voluntary funding is permitted during the period 1998-2004. However, no later than January 1, 2005, all GRI funding will be on a voluntary subscription basis, as will membership in GRI.

Voluntary subscriptions by interstate pipelines for particular research and development projects benefitting consumers may be recoverable in rates, if filed for by individual pipelines, subject to challenge. The thirty-one pipelines listed on Appendix B to the Settlement agree to remain as fully voluntary collection agents for shippers who voluntarily choose to support GRI programs through a "check the box" approach on pipeline invoices. The amounts collected pursuant to the "check the box" procedure will not be part of pipeline rates, and the Commission will not review or approve any such amounts or projects.¹⁹

¹⁹ In its initial comments, the Pennsylvania Office of Consumer Advocate, a non-opposing signatory to this settlement, seeks clarification that the "check the box," or voluntary, contributions will not be considered as part of a pipeline's fixed rate and thus subject to the filed rate doctrine. As Article II, Section 1.7 makes clear, these voluntary contributions will not be part of the pipeline's rates. There is no presumption that the voluntary contributions have received any Commission approval requiring mandatory pass-through in retail rates at the state level. The filed rate doctrine will not apply to these contributions."

Gas Research Institute, 83 FERC ¶61093 (1998).

GTI agreed that on and after January 1, 2005, all GTI funding will be on a voluntary basis for all "shippers". ABATE was a party to this Settlement Agreement and its members are "shippers" and any surcharges on ABATE and its members can only be imposed if ABATE and its members voluntarily agree to pay them. ABATE and its members are not willing to pay any surcharges to support GTI.

The Natural Gas Act does not define the term "shipper" anywhere in the statute. See Natural Gas Act, 15 U.S.C. 717-717z. Nor is the term listed on FERC's website glossary of terms. The term "shipper" is used in Order No. 636: "The first goal [of the order] is to ensure that all shippers have meaningful access to the pipeline transportation grids so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible." Order No. 636, 57 Fed. Reg. at ¶13,269. In addition to the access, "pipelines will be

required to provide a variety of transportation services to their shippers." This includes "a new bundled 'no notice', firm transportation service, firm transportation service that is unbundled and improved in quality, unbundled storage services, and interruptible transportation services among others." *Id.*, at ¶13,270.

ABATE members are transportation customers of the LDC's and interstate pipelines and, as such, are "shippers" as that term is used by FERC. Accordingly, ABATE members are covered by the FERC language in the Settlement Agreement that they can only be voluntary contributors to the financing of GTI.

GTI's argument that voluntary does not apply to consumers simply does not make sense. During cross-examination, Mr. Edelstein admitted that gas consumers provided the funding for GTI under the old mandatory funding system. 3 TR 102-103. He is further aware that ABATE opposed the mandatory nature of the funding and that ABATE was a signatory to the Settlement Agreement. 3 TR 103. He also admitted that a number of other industrial organizations were also signatories to the Settlement Agreement. 3 TR 108. He agreed that the Settlement Agreement was put together by the parties and that FERC approved the Settlement Agreement with no changes. 3 TR 111.

If ABATE and other large industrial groups were parties to the settlement and helped craft the Settlement Agreement, then they certainly thought that voluntary applied to them as end use retail customers. To arbitrarily say that voluntary does not apply to customers fundamentally changes the Settlement Agreement in that the industrial customers are deprived of the benefit of their bargain.

Mr. Edelstein also testified that he is relying on the following passage from the November FERC order:

"We do not agree that continued reliance on mandatory funding for RD&D is necessary. If the industry and consumers demand a form of cooperative effort in RD&D, they will be accommodated without the mandatory funding GTI seeks here. Market-based RD&D would better serve the consuming public than the acrimony that has accompanied each and every GRI application since the onset of the program for mandatory funding of cooperative RD&D projects."

3 TR 117.

This passage does not support GTI's position. The "acrimony" referenced by FERC was caused by industrial customer groups representing customers who had to pay the mandatory surcharges used to fund GTI's operations. For the LDC's, the pipeline charges were a pass through item to retail customers, so they had no reason to complain. It defies logic for GTI to argue that "voluntary" does not apply to *all* of the drafters and signatories to the Settlement Agreement. GTI's position simply is not logical and should be rejected by the Commissions.

C. **The Commission Lacks The Necessary Authority And Therefore Subject Matter Jurisdiction To Approve of Surcharges To Fund A "Voluntary " Contribution To GTI.**

Whether or not the Commission has jurisdiction in this case is a matter of law. Courts review conclusions of law *de novo*. See *Omnicom of Michigan v Giannetti Investment Co.*, 221 Mich App. 341, 348 (1997). The Commission must review its jurisdiction to approve any surcharge to support a non-utility expense.

The Commission cited MCL 460.6 and MCL 460.54, *et seq.*, as the statutory basis for this proceeding. Nowhere in the cited statutes is there any provision that requires or even permits the Commission to approve rate increases in the form of "surcharges" to pay for "voluntary" contributions to organizations such as GTI. In *People v McIntire* 461 Mich 147, 153 (1999) the Michigan Supreme Court held that the Court cannot interpret a statute to include

additional language that did not exist in the plain language of the statute. Likewise, this Commission cannot interpret the cited statutes to include authority to impose mandatory surcharges on Michigan gas customers in order to support “voluntary funding” of GTI. *See also Consumers Power Co v PSC*, 460 Mich 148 (1999); *Union Carbide Corp v PSC*, 431 Mich 135 (1998); and *Huron Portland Cement Co v PSC*, 351 Mich 255 (1958).

There is simply no showing that this Commission has subject matter jurisdiction to raise rates for “voluntary funding” of GTI. Subject matter jurisdiction is an absolute requirement for this Commission to proceed. *Kita v Matuszak*, 190 Mich App 220 (1991). There is no statute or regulation authorizing this Commission to levy mandatory rate increases on customers for “voluntary funding” of GTI. Moreover, there is no reason to require customers and utilities to expend the resources to defend against increased rates to pay for “voluntary funding.” Michigan utilities and customers do not need to spend resources on expenses not directly related to the cost of providing gas service in Michigan.

These vague references and reliance upon Section 6 and Section 54 are inadequate to confer jurisdiction upon the Commission. The Commission must have authority and power to act and to impose the proposed surcharge. The Michigan Supreme Court has explained this issue of the Commission’s powers as follows:

“The Public Service Commission possesses no ‘common law’ powers. *See Huron Portland Cement Co v Public Service Comm*, 351 Mich 255, 262; 88 NW2d 492 (1958). As a creature of the Legislature, the commission possesses only that authority bestowed upon it by statute.

The Michigan public utilities commission¹

¹ The Public Service Commission was created by statutory enactment. Dissatisfied with the performance of the Public Utilities Commission, the Michigan Legislature enacted the Public Service Commission act, 1939 PA 3, MCL 460.1 *et seq.*; MSA 22.13(1) *et seq.*, abolishing the Public Utilities Commission and establishing the Public Service Commission. The Public Service Commission acquired all the rights, powers, and duties vested in its predecessor, the

[now the Commission] is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments. [*Sparta Foundry Co v Public Utilities Comm*, 275 Mich 562, 564; 267 NW 736 (1936).]

See also *G & A Truck Line, Inc v Public Service Comm*, 337 Mich 300, 305; 60 NW2d 285 (1953); *Kirkby v Public Service Comm*, 320 Mich 608, 612; 32 NW2d 1 (1948). Thus, a determination of the commission's powers requires an examination of the various statutory enactments pertaining to its authority.

1. THE PUBLIC SERVICE COMMISSION ACT

Section 6 of the Public Service Commission act, MCL 460.1 *et seq.*; MSA 22.13(1) *et seq.*, which outlines the commission's power and jurisdiction, provides in pertinent part:

The Public Service Commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. *The Public Service Commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.* The Public Service Commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies. [MCL 460.6(1); MSA 22.13(6)(1). Emphasis added.]

Public Utilities Commission. See *Detroit & T S L R Co v Public Service Comm*, 324 Mich 195, 199; 36 NW2d 896 (1949).

Although its language is broad, § 6 merely serves as an outline of the commission's jurisdiction, not as a grant of specific authority or powers." *Union Carbide v PSC*, 431 Mich 135, 146-147 (1988).

Similarly, the Michigan Supreme Court stated:

"This Court has consistently held, however, that the broad language of § 6 serves as an outline of the PSC's jurisdiction, not a grant of specific powers.

The broad language [of § 6] furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards . . . , but there would have been no need whatever for the many statutes enacted (both before and after the effective date of PA 1939, No 3) vesting specific powers in the commission. [*Huron Portland Cement, supra* at 263.]

We adhered to this construction of § 6 in *Union Carbide, supra* at 147. Since the PSC has only those powers granted by statute and § 6 furnishes no grant of specific powers, § 6 provides no support for the PSC's order in this case." *Consumers Power v PSC*, 460 Mich 148, 160-161 (1999) (footnote omitted).

In *Attorney General v PSC, et al.*, 269 Mich App 473 (2006), at issue was whether the Commission had statutory authority to impose a surcharge to subsidize the cost of green power projects. The Court of Appeals held that the Commission lacked the statutory authority to authorize Consumers Energy Company ("Consumers") to impose a per meter charge on all customers, including customers who had not agreed to pay a premium to receive green power, to finance the development of renewable resource power programs. The Court also found that the statute cited by the Commission did not contain "clear and unambiguous language" authorizing the Commission to allow a utility to impose a charge on a customer for a program not utilized by that customer. *Id.*, at 481-482.

The Commission possesses only that authority granted to it by the Legislature. Any authority must be granted by clear and unmistakable language. A doubtful power does not exist. *Attorney General v Public Service Commission*, 231 Mich App 76, 78 (1998). Under the appropriate legal standard, there is no power conferred upon the Commission that would allow it to impose a mandatory surcharge on customers to fund RD&D to be carried out by a non-regulated entity such as GTI. The Commission simply does not have the power or authority to impose the surcharge sought in this case to fund GTI's RD&D programs. Therefore, this proceeding should be dismissed.

D. The Commission Should Not Adopt A Mandatory Surcharge To Fund GTI's R&D Efforts.

Consumers was the only utility to file testimony in this proceeding. Consumers opposes state-by-state funding for GTI:

"The Company does not support state-by-state funding for GTI. Such a funding mechanism will result in some states subsidizing others that choose not to participate. The Company also does not support GTI's proposal to create a rate mechanism with a presumption of reasonableness for the recovery of expenditures on behalf of GTI to gas utilities that arrange for GTI research. This sort of mechanism continues to place the burden of proof for reasonable use of research funds on the individual utilities."

3 TR 130.

The Attorney General sponsored the testimony of Mr. King who also was not in favor of mandatory surcharges to support GTI:

"I recommend that the Michigan Public Service Commission follow the policy adopted by FERC, which is to make support of GTI purely voluntary on the part of both the gas distribution companies and ratepayers."

3 TR 139.

The Staff also opposed mandatory surcharges and that any voluntary program has to be justified upon the "benefits" to the ratepayers:

"Staff recommends that the Commission not require mandatory GTI funding through a fixed surcharge, but rather, support voluntary funding through inclusion of these amounts in each utility's revenue requirements in a general rate proceeding. . . . Continued support for funding should be based on benefits to the ratepayers and the amounts included in rates should be ordered by the Commission to be contributed to GTI for utility selected projects."

3 TR 172.

Mr. Edelstein testified that GRI has collected literally hundreds of millions of dollars from pipelines which have been passed through to end use retail customers. 3 TR 94. He testified that there was a definite conservation trend and that gas utility customers were reducing the amount of gas that they were consuming. 3 TR 98. Mr. Edelstein testified during cross-examination that, due to high commodity prices, there has been a tremendous amount of "demand destruction" at fertilizer plants, the chemical industry and, he presumed, the paper industry as well. 3 TR 99. He estimated that the demand destruction reduced gas usage by one to three trillion cubic feet per year. 3 TR 100. Ms. Devon also agreed with Mr. Edelstein's assessment that there had been a large amount of conservation due to high natural gas costs. 3 TR 177.

In addition, end use appliance efficiency standards were increasing, and specifically, there has been an increase in the efficiency requirements for residential air conditioning. In his testimony, Mr. Edelstein noted that a 96% fuel efficient gas furnace had been available since the 1980s. He also testified that condensing furnaces with over 90% efficiency account for 25% of residential furnace sales. 3 TR 57. He agreed that current laws provide an incentive to manufacturers to make safe equipment. 3 TR 59. Finally, this is simply the wrong time to

implement a surcharge to pay for RD&D. Gas prices are high and the Michigan economy is in a slump. Ms. Devon testified that the figure asked for by GTI of 1.74¢ per Mcf will have to be applied against the through-put for both Consumers and MichCon if the Commission adopts GTI's position. She estimated that the through-put for Consumers was between 200 and 250 Bcf and the through-put for MichCon was 300 Bcf. Multiplying the surcharge times the 200 Bcf results in a burden on Consumers' customers of \$3,480,000. That burden increases to \$4,350,000 if the higher through-put is used. The burden on MichCon's customers will be \$5,220,000 based on Ms. Devon's estimate.

These charges relate to research which is not a traditional utility service. Any benefits are so speculative that the related charges cannot be deemed reasonable. Moreover, this Commission should not voluntarily order that this money should be mandatorily collected from Michigan customers and sent to an organization located in Chicago, Illinois. A tax is an involuntary fee paid by an individual or a business to the state or the functional equivalent of a state. Does this Commission want to impose a tax on the citizens of Michigan? Does this Commission have the power to order a tax on the citizens of Michigan?

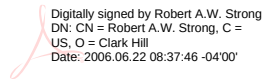
III.

RELIEF

Wherefore, ABATE requests the Commission deny GTI's request to implement a statewide 1.74¢ per Mcf surcharge, find that by reason of the FERC approved Settlement Agreement that non-voluntary surcharges cannot be placed on ABATE members, and close this docket.

Respectfully submitted,

CLARK HILL PLC

By: **Robert A.W.
Strong**

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Dated: June 22, 2006

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to investigate
the appropriateness of instituting a surcharge to assist in the
funding of the Gas Technology Institute

Case No. U-14561

PROOF OF SERVICE

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

Robert A.W. Strong, being first duly sworn, deposes and says that he did cause to be filed electronically the Initial Brief of the Association of Businesses Advocating Tariff Equity and Proof of Service in the above docket on the persons identified on the attached service list on June 22, 2006.

Robert A.
W. Strong

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Robert A.W. Strong

Subscribed and sworn to before me
this 22nd day of June, 2006.

Audrey L. Gilliatt

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Audrey Gilliatt, Notary Public
Oakland County, MI, acting in Oakland County, MI
My Commission expires: 7/06/06

SERVICE LIST
MPSC Case No. U-14561

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