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June 22, 2006

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911

Dear Ms. Kunkle:

RE: MPSC Case No. 14561

Enclosed for filing in the above captioned case please find the **Attorney General's Initial Brief**, together with a Proof of Service. This filing is being submitted electronically pursuant to the Commission's Paperless Electronic Filings Program.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Moody".

Michael E. Moody
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MEM/jas
Enc.
c: All parties
U-14561 Cover Letter

PROOF OF SERVICE - U-14561

The undersigned certifies that a copy of the **Attorney General's Initial Brief** was served upon the parties listed below by mailing the same to them at their respective addresses with first class postage fully prepaid thereon as indicated, on the 22nd day of June, 2006.

**Janet
Schafer**

Janet A. Schafer

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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

ATTORNEY GENERAL'S INITIAL BRIEF

I. INTRODUCTION

On June 30, 2005, the Michigan Public Service Commission (MPSC or Commission) issued an order initiating a generic proceeding in order to explore the appropriate state-wide level of future support and funding for the Gas Technology Institute (GTI). Two prehearings were held before Administrative Law Judge (ALJ) Mark E. Cummins. On January 31, 2006, GTI filed the testimony of Ronald B. Edelstein and filed rebuttal on April 25, 2006. On March 7, 2006, Consumers Energy Company (Consumers Energy) filed testimony of Jill Mills Polich and the Attorney General filed testimony of Charles W. King. On March 21, 2006, the MPSC Staff filed testimony of Susan Crimmins Devon. Cross examination was held on June 1, 2006 and all testimony was bound into the record.

In accordance with the schedule set by the ALJ, the Attorney General submits the following Initial Brief.

II. STATEMENT OF FACTS

A. GTI.

GTI filed direct and rebuttal testimony of Ronald Edelstein. (Tr 54-92). In direct testimony Mr. Edelstein described the purpose of his testimony as follows:

The purpose of my testimony is to summarize the history of GTI and its predecessor, GRI, to describe the benefits that consumers receive from GTI and its gas consumer benefits research and development (R&D) program, to propose criteria that the Commission can establish to be used by gas utilities in Michigan seeking to recover R&D expenses and to identify various mechanisms for recovering R&D expenses.

(Tr 56).

Mr. Edelstein testified that it was seeking an order from the Commission that would create a rebuttal presumption that LDCs who meet the criteria listed in his testimony will be able to recover the R&D expenses in subsequent rate proceedings. (Tr 83).

On rebuttal, Mr. Edelstein testified that it supports the Staff's approach for a voluntary program where the utility would request the R&D through a rate case (Tr 89).

B. Consumers Energy.

Consumers Energy filed the direct testimony of Jill Mills Polich. Ms. Polich summarized the utility's position as follows:

The Company does not support state-by-state funding for GTI. Such a funding mechanism would 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. The Company prefers a national surcharge for research funding that would be administered with industry partnership and oversight provided via AGA.

(Tr 130).

C. Staff.

Staff submitted direct testimony of Susan Crimmins Devon. Ms. Devon summarized the Staff's position as follows:

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 upon benefits to the ratepayers and amounts included in rates should be ordered by the Commission to be contributed to GTI for utility selected projects.

(Tr 172).

On cross examination, Ms. Devon admitted that the specifics of the R&D projects and what class of customer is funding the projects will be determined on a case-by-case basis where the "utility will come forward with a level of funding, they'd have to provide information as to the benefits that they believe would be provided, and they'd make a recommendation on who should pay for it, and then that would be subject to the contested case proceedings." (Tr 177). Ms. Devon also explained that the burden of proving these things would be on the utility, and thus no rebuttal presumption as proposed by Mr. Edelstein. (Tr 175).

D. Attorney General.

The Attorney General filed testimony of Charles W. King. Mr. King summarized his recommendation as follows:

I recommend that the Michigan Public Service Commission follow the policy adopted by the FERC, which is to make support of GTI purely voluntary on the part of both the gas distribution companies and ratepayers. The reasons for this recommendation are largely pragmatic. Ratepayers are not in a position to assess the propriety and likely cost-effectiveness of GTI's research projects. Only the utilities are. But the

utilities need an incentive to make that assessment. If the utilities are merely the conduit for money collected from ratepayers and earmarked for GTI, then that incentive is missing. GTI responds to no one who has an economic stake in the success of its efforts.

Mr. Edelstein is correct that it is overly simplistic to argue, as did the Georgia Adversary Staff, that GTI's research is self-funding. That view implies that each dollar of research generates more than a dollar's worth of return. The reality is as Mr. Edelstein describes it: GTI conducts a research program consisting of some projects that succeed, others that do not, but the aggregate effect of GTI's overall research benefits the gas industry. Ultimately, both the gas distribution companies and their customers benefit from the R&D activities of GTI.

The issue is who among the beneficiaries should pay for the programs. The answer is that the financial support should come from the entities that are able to exert influence, if not direct control, over GTI. These are the gas distribution companies. For this reason, the gas distribution companies should be responsible for supporting GTI with no guarantee that their support will be reimbursed by ratepayers.

It is therefore incumbent on the gas utilities to make an independent analysis and evaluation of each of GTI's R&D projects. If the objective of those projects is to benefit ratepayers through improved end-use efficiency, then the utilities can present the results of their evaluation to the Commission and seek reimbursement for their financial support. In no case, however, should that reimbursement be awarded without going through the filters of the gas distribution company's evaluation and the Commission's approval in a contested rate case.

(Tr 139-140).

As further explained in cross examination, Mr. King stated that "I think the gas distribution companies would voluntarily support GTI, but in doing so, they would have to justify in each rate case their contribution to GTI as an element of expense just like they would have to justify every other element of expense. The burden would be on the LDC to demonstrate that this support is beneficial to ratepayers." (Tr 155). He further noted:

If you just have a surcharge that is a conduit to GTI with no requirement, no burden on the utility to make that defense on a project-by-project basis,

then there is no incentive to look closely at those projects. The utilities must be held accountable for every penny they spend on GTI.

(Tr 156).

Mr. King agreed that there is no assurance of cost recovery for a utility that seeks to recover costs for a GTI R&D project and that the utility bears the burden to justify the cost in a rate case. (Tr 156-157).

III. ARGUMENT

A. The Commission Lacks Statutory Authority to Impose a Mandatory Surcharge on all Natural Gas Utilities to Fund GTI R&D.

The Michigan Supreme Court has ruled on the issue of the Commission's statutory powers as follows:

The Public Service Commission possesses no 'common law' powers. As a creature of the Legislature, the commission possesses only that authority bestowed upon it by statute.

'The Michigan public utilities 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.'

Thus, a determination of the commission's powers requires an examination of the various enactments pertaining to its authority.

Union Carbide Corp v Public Service Commission, 431 Mich 135, 147 (1988) (citations omitted) See also *Consumers Power v PSC*, 460 Mich 148, 160-161 (1999).

In this case, the Commission cites generally to the statutes that create the Commission as well as the Administrative Procedures Act. These statutes, however, do not confer upon the Commission the authority to impose a surcharge for all natural gas customers in order to fund a non-profit organization to research natural gas issues. Absent such statutory

authority, the Commission lacks the authority to impose such a surcharge for the benefit of a non-profit organization.

There is no precedent for such jurisdiction nor should there be. If the Commission is permitted to impose a mandatory charge on ratepayers to support GTI, then what prevents the Commission from imposing a mandatory charge on ratepayers to support almost any non-profit entity if it has any relationship to natural gas issues? Clearly, logic and the specific language of the statutes creating the Commission support the argument that the Commission cannot create a power where none is provided for by the Legislature.

The only case cited by GTI to support the Commission's jurisdiction is *Ford Motor Co v PSC*, 221 Mich App 370 (1997). *Ford Motor* is an electric case dealing with demand side management (DSM). The instant case is neither an electric case nor a case dealing with demand side management. The statutory sections cited by the Court of Appeals in *Ford Motor* to support its decision that the Commission had the authority to approve a utility requested DSM program, MCL 450.551 (dealing with electric transmission); MCL 460.557 (dealing with the filing of complaints and creation of rules in electric cases); MCL 460.6a (2) (dealing with hearings), do not confer the authority on the Commission to impose a mandatory charge on ratepayers to support a non-profit organization conducting research and development of natural gas issues.

In its October 18, 2005 order denying ABATE's appeal of this issue, the Commission relies on MCL 460.6 and MCL 460.54 as the basis for its jurisdiction in this case. As stated by the Supreme Court, MCL 460.6 "merely serves as an outline of the commission's jurisdiction, not as a grant of specific authority or powers." *Union*

Carbide, supra at 147. In addition, the Supreme Court noted that the "only power granted with any specificity in [MCL 460.54] § 4 is the power to fix utility rates and charges. . . . and that the language of § 4 is no more specific than is the language of § 6 of the Public Service Commission act, which this Court, in *Huron Portland Cement, supra*, construed as merely an outline of the commission's jurisdiction, not a grant of specific powers." *Union Carbide, supra* at 151. In fact, the Court in *Union Carbide* stated that "the mere recital of the power to control and regulate public utilities does not, of necessity, entail the power to order a utility to follow particular principles or economic management." *Union Carbide, supra* at 151. Similarly, in this case, the mere recital of the power to control and regulate public utilities does not, of necessity, entail the power to order utilities to use GTI as a source of R&D or the power to order utility customers to pay a surcharge to fund GTI R&D on behalf of utilities. Accordingly, the Commission lacks the statutory authority to order a mandatory surcharge or order utilities to use GTI for its R&D.

Not only is a mandatory surcharge unlawful, but it is also bad policy. As stated by Attorney General expert witness Charles W. King:

If you just have a surcharge that is a conduit to GTI with no requirement, no burden on the utility to make that defense on a project-by-project basis, then there is no incentive to look closely at those projects. The utilities must be held accountable for every penny they spend on GTI.

(Tr 156).

Accordingly, the Commission should not adopt any type of mandatory surcharge or any type of requirement where a utility must use GTI in order to conduct R&D.

B. A Utility Must Carry the Burden of Proving that the Benefits Outweigh the Costs When Seeking to Include an R&D project in a Rate Case.

It appears from Mr. Edelstein's rebuttal testimony and Staff's direct testimony that both are in agreement that the utility carries the burden of proving the benefits to ratepayers of an R&D project in a rate case. (Tr 89, 172, 175, 177). The Attorney General also submitted testimony stating that the burden of showing the benefits to ratepayers of an R&D project should rest with the utility that seeks to recover the project through a rate case. (Tr 139-140, 155-157). In fact, Mr. King aptly summarized his recommendation as follows:

I recommend that the Michigan Public Service Commission follow the policy adopted by the FERC, which is to make support of GTI purely voluntary on the part of both the gas distribution companies and ratepayers. The reasons for this recommendation are largely pragmatic. Ratepayers are not in a position to assess the propriety and likely cost-effectiveness of GTI's research projects. Only the utilities are. But the utilities need an incentive to make that assessment. If the utilities are merely the conduit for money collected from ratepayers and earmarked for GTI, then that incentive is missing. GTI responds to no one who has an economic stake in the success of its efforts.

Mr. Edelstein is correct that it is overly simplistic to argue, as did the Georgia Adversary Staff, that GTI's research is self-funding. That view implies that each dollar of research generates more than a dollar's worth of return. The reality is as Mr. Edelstein describes it: GTI conducts a research program consisting of some projects that succeed, others that do not, but the aggregate effect of GTI's overall research benefits the gas industry. Ultimately, both the gas distribution companies and their customers benefit from the R&D activities of GTI.

The issue is who among the beneficiaries should pay for the programs. The answer is that the financial support should come from the entities that are able to exert influence, if not direct control, over GTI. These are the gas distribution companies. For this reason, the gas distribution companies should be responsible for supporting GTI with no guarantee that their support will be reimbursed by ratepayers.

It is therefore incumbent on the gas utilities to make an independent analysis and evaluation of each of GTI's R&D projects. If the objective of those projects is to benefit ratepayers through improved end-use efficiency, then the utilities can present the results of their evaluation to the Commission and seek reimbursement for their financial support. In no case, however, should that reimbursement be awarded without going through the filters of the gas distribution company's evaluation and the Commission's approval in a contested rate case.

(TR 139-140).

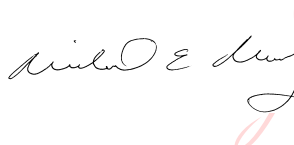
In addition, Mr. King explained that "the gas distribution companies [could] voluntarily support GTI, but in doing so, they would have to justify in each rate case their contribution to GTI as an element of expense just like they would have to justify every other element of expense. The burden would be on the LDC to demonstrate that this support is beneficial to ratepayers." (Tr 155). Mr. King further reiterated that there should be no assurance of cost recovery for a utility that seeks to recover costs for a GTI R&D project and that the utility bears the burden to justify the cost in a rate case. (Tr 156-157).

VI. RELIEF REQUESTED

For the reasons stated above, Attorney General Michael A. Cox requests the Commission grant the relief requested in his Initial Brief.

Respectfully submitted,

Michael A. Cox
Attorney General

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