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June 23, 2006

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
PO Box 30221
Lansing, MI 48909

Re: In the matter of the complaint of **GREAT WOLF LODGE** against
CHERRYLAND ELECTRIC COOPERATIVE regarding the charging of an
unauthorized rate and the terms of a proposed electric service contract.
MPSC Case No. U-14593
(Paperless)

Dear Ms. Kunkle:

Enclosed for filing please find the **PETITION FOR REHEARING BY GREAT WOLF LODGE OF TRAVERSE CITY, LLC**, in the above-captioned proceeding. Proof of Service upon the Parties of Record is also enclosed. These documents have been filed electronically with the Michigan Public Service Commission's Electronic Case Filing System.

Sincerely,

CLARK HILL PLC

 Digitally signed by Leland R.
Rosier
DN: CN = Leland R. Rosier, C =
US, O = Clark Hill PLC
Date: 2006.06.23 14:50:15 -04'00'

Leland R. Rosier

LRR:met
Enclosures

cc: Parties of Record

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of GREAT WOLF)	
LODGE against CHERRYLAND ELECTRIC)	
COOPERATIVE regarding the charging of an)	Case No. U-14593
unauthorized rate and the terms of a proposed electric)	(Paperless)
<u>service contract.</u>)	

PETITION FOR REHEARING BY GREAT WOLF LODGE OF TRAVERSE CITY, LLC

Complainant Great Wolf Lodge of Traverse City, LLC (the “Lodge” or “GWL”), by its attorneys, Clark Hill PLC, brings this Petition for Rehearing of the Commission’s Order in this proceeding of May 25, 2006, pursuant to Rule 403 of the Commission’s Rules of Practice and Procedure, 1999 MAC, R 460.17403. In support of its Petition, the Lodge states as follows:

I. INTRODUCTION

On July 13, 2005, the Lodge filed a two-count complaint against the Cherryland Electric Cooperative (“Cherryland”). Count I of the complaint dealt with Cherryland’s unilateral decision to disregard the Commission’s order of July 22, 2004 to continue to charge the Lodge the then “current rate” (i.e., the LRS rate) and to begin charging under the much higher Large Commercial and Industrial tariff. Count II sought a hearing to resolve differences over the terms of a proposed special contract consistent with this Commission’s holdings in Case Nos. U-13716 and U-14240.

Following briefs, a proposal for decision, exceptions, and replies to exceptions, the Commission issued its Opinion and Order on May 25, 2006. The Opinion and Order affirmed a dismissal, without a hearing, of Count II to the complaint, granted damages to the Lodge on Count I, but refused to award interest to the Lodge despite Cherryland having what amounted to

an interest-free loan on overcollected rates, refused to continue the LRS rate for service to the Lodge pending a special contract despite the documented bad faith of Cherryland, and reversed the fine recommended by the ALJ after a careful review of the facts that found bad faith on the part of Cherryland.

The Lodge seeks rehearing of those portions of the Commission's Opinion and Order that:

- Failed to allow the Lodge a hearing on the disputed provisions of the special contract;
- Erroneously concluded that Rule 411 was applicable at all and precludes relief to the Lodge;
- Erroneously concluded that it was "undisputed" that the GWL premises was an existing customer of Cherryland under rule 411 in 2001;
- Has the unintended consequence of ratifying the documented illegal behavior of the utility to force the customer to stay with the utility;
- Ignores the well-reasoned findings by the ALJ as to the heavy-handed motives of Cherryland;
- Erroneously failed to compensate GWL for its loss of use of the money which it was intentionally overcharged; and
- Erroneously applied the LCI rate on a continuing basis after July 22, 2005.

II. STANDARD OF REVIEW FOR PETITIONS FOR REHEARING

The standard of review for petitions for rehearing is set forth in Rule 403 of the Rules of Practice and Procedure Before the Commission, and the rule includes, among other things, that the petition must be filed within thirty (30) days of the original order and that the petition should

be based upon claims of error, newly discovered evidence, or unintended consequences from compliance with the order. In pertinent part, Rule 403 provides:

A petition for rehearing after a decision or order of the Commission shall be filed with the Commission within thirty (30) days after service of the decision or order of the Commission unless otherwise specified by statute. A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with a decision or order shall specifically set forth the matters relied upon

2000 AACR 460.17403.

This Petition for Rehearing is timely filed pursuant to Rule 403. As demonstrated below, GWL has properly set forth the claims of error relating to the Order which include an error of law and unintended consequences that will result from the Order. In summary, GWL's Petition for Rehearing meets the standard of review, and the appropriate relief requested herein should be granted.

III. ARGUMENT

A. The Opinion And Order Erred In Not Allowing The Lodge A Hearing On The Disputed Provisions Of The Special Contract Attached To Its Complaint

This Commission, in its Order of October 14, 2004 in Case No. U-14240, dismissed Cherryland's application to approve a special contract to which GWL had never agreed. However, the Commission specifically stated:

Cherryland and GWL are free to petition the Commission, if necessary, to seek resolution of any underlying dispute to the extent that the subject matter of the dispute falls within the Commission's jurisdiction.¹

In Count II of the complaint in this case, that is precisely what the Lodge did; it teed up a dispute over the language to be used in the proposed special contract. This Commission's Order

¹ Opinion and Order, Case No. U-14240, October 14, 2004, at p. 2.

affirmed the ALJ's granting of summary disposition over the entire count based on the Commission's interpretation of whether the Lodge would be forced to continue using Cherryland's distribution services if the Lodge later chooses to become a choice customer.

But that is only one issue with the wording. As part of the complaint, GWL attached a redlined version of the special contract. GWL had proposed this special contract. Cherryland then sent it back with redlined changes. That redlined version was attached as Exhibit A to GWL's complaint. A copy is attached to this Petition as Exhibit A for convenience.

A review of the redlined agreement shows several changes not related to the issue of choice in distribution providers. For example, ¶ 3.5 requires GWL, by contract, to remain a member of the cooperative beyond the term of the agreement. Paragraph 5.3 imposes an outlandish 5% per month late payment charge on past due amounts, rather than the more standard 1.5% proposed by GWL. In ¶ 6.1, Cherryland does not simply remove GWL's language allowing for choice in distribution providers, Cherryland adds language that a return to service on tariff will have to be at tariffed service "generally available to other customers of CUSTOMER's class with comparable electric consumption." There is no definition of what that service is; instead, the language leaves it open-ended so as to allow Cherryland total discretion. In ¶ 11, Cherryland removed language indemnifying GWL against a potential lawsuit by TCLP for the breach of its agreement that Cherryland forced it to breach in 2001.²

Despite these and other issues in the contract, the ALJ had granted summary disposition as to the entire count based on the choice for distribution issue alone, and the Commission affirmed the summary disposition in its ruling without addressing GWL's exceptions. While GWL continues to dispute the choice for distribution issue, it is clear that the decision to grant

² The issues between Cherryland and TCLP were resolved in Circuit Court, but the statute of limitations has not yet run on the agreement between GWL and TCLP.

summary disposition was erroneous, as a matter of law, as to these other issues with respect to the special contract. The Lodge was seeking, and still seeks, a resolution of the terms of the special contract and, if necessary, a hearing to resolve those specific differences over terms in the special contract. GWL had every right to expect that the Commission would review and correct the bad faith and illegal behavior of the utility, not ratify it without a hearing.

Under Rule 323,³ which was relied upon in granting summary disposition, the Commission can grant summary disposition on the same grounds upon which a court may grant summary disposition under the Michigan Court Rules, including failure to state a claim or where there is no issue of material fact. However, it is not appropriate to grant such a summary disposition where there are outstanding issues of fact. Here there were, and are, issues of fact beyond the issue of choice for distribution. Only one area of dispute relates to the issue addressed by the Commission in its grant of summary disposition in favor of Cherryland, the issue of customer perpetuity. By inappropriately granting summary disposition, the Commission has left all of the remaining special contract issues undecided. Consequently, GWL was entitled to a hearing on those issues, and it was clear legal error for the Commission to grant summary disposition of these issues without a hearing.

B. The Opinion and Order Erroneously Concluded That Rule 411 Precluded The Relief Requested. Rule 411 Has No Application To This Proceeding.

The Commission erred in relying on Rule 411 in holding that GWL is and was a customer of Cherryland for all purposes. The Commission's Order, at p. 16, states in pertinent part:

The definition of "customer" in Rule 411 distinguishes between the parent corporation that may own a facility or property at a site, and the site itself. Rule 411(1)(a) provides that the site itself is the "customer," not the corporation or individual who owns the site nor a particular building on

³ MAC R 460.17323.

the site. Thus, a change in ownership does not create a new customer, nor does the loss or addition of a building, as the customer is also the “facilities.” Furthermore, once a utility has extended service to a customer, the utility then has the right to serve the entire premises, even if a portion of the load is closer to another utility’s distribution facilities. *See*, June 7, 2005 order in Case No. U-14193, pp. 17-18.

Rule 411 merely provides that existing customers “shall not transfer from one utility to another.”⁴ It does not prevent a choice of provider where there is no existing customer or where a customer transfers to a non-utility, such as a municipal electric provider. As is demonstrated in part D below, GWL was not an existing customer because service had long been abandoned at the site, and because GWL could have lawfully chosen the municipal provider in 2001 and was wrongfully prevented from doing so by Cherryland. However, even assuming GWL or the site was an existing customer, Rule 411 still would not apply because GWL could transfer service to a non-utility, e.g., the municipal provider. Thus, even assuming that the “customer” was “transferred” from Cherryland to a municipal provider, Rule 411 would address this situation only if both Cherryland and the municipality are “utilities.” They are not.

The Rules on “Service Supplied by Electric Utilities” make clear that, while Cherryland is a “utility” as that term appears in the Rules, a municipal provider is not. A “utility,” under Rule 102(m),⁵ includes only “an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission.” A municipal electric provider does not operate “under the jurisdiction or the commission” – in fact it is exempt therefrom. Moreover, it is not a “private, corporate, or cooperative” electric company. Thus, a transfer of a “customer” from Cherryland to a municipal provider, in 2001 or in the future, would not be a transfer “from

⁴ MAC R 460.3411(2).

⁵ MAC R 460.3102(m) (Emphasis added).

one utility to another,” and thus not prohibited by Rule 411. Rule 411 simply does not apply to prevent the relief sought by the Lodge.⁶

Another problem presented by Cherryland’s proposed contract, however, is that Cherryland’s language would provide that, at the conclusion of the contract, the Lodge would have choice only for generation service, and not for distribution and transmission, regardless of whether the Lodge should elect to take service from a non-utility such as a municipal provider. And, arguably, if the Lodge were to accept such terms, it might then be deemed to have become a willing “customer” of Cherryland (after the fact, since this clearly was **not** the case in late 2001 and early 2002, when it had been illegally coerced to take service from Cherryland), such that MCL 124.3 might also prevent service by the municipality on a forward-looking basis. The Lodge has **never** been willing to accept this, and should not be forced to accept a contract that would have this result.

As the Commission notes, the “purpose of Rule 411 is to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service.”⁷ In other words, it is a defensive rule to prevent duplicative moves from one utility to another. However, as the Commission construes it, it is an offensive rule used to illicitly “capture” a free agent customer such that that customer loses its freedom of choice, even to choose a municipal provider, in the future. Such a result could not be intended by the Commission, yet it is an unintended consequence of the Commission’s Order in this case.

⁶ Curiously, the ALJ and the Commission do consider it important whether the transfer is to a municipal provider in interpreting Rule 411 as not authorizing the Commission to approve a contractual provision providing for a transfer of service to a municipality. Rather, the proper finding is that Rule 411 does not prevent a transfer to a municipal provider, and it is silent as to provisions in future special contracts. There is nothing in Rule 411 to prevent a special contract from allowing a future transfer to a municipal provider. Rule 411 is simply inapplicable in the sense used by the ALJ and the Commission.

⁷ Opinion and Order, at p. 16.

C. The Opinion And Order Erroneously Concluded That It Was “Undisputed” That The GWL Premises Was An Existing Customer Of Cherryland Under Rule 411 In 2001. The Issue Was Hotly Contested Between The Parties, And Is Another Reason Why A Hearing Should Be Allowed For Count II.

Another unintended consequence of the Commission adopting the improper summary disposition of Count II is that facts are presumed to be non-controverted when they are in fact hotly disputed. For example, the Commission’s Order finds:

It is undisputed that the GWL premises was an existing customer of Cherryland under Rule 411 in 2001. Cherryland had provided service to a farmhouse located on the GWL premises for many years before GWL purchased the property. GWL now argues that the Commission should declare that GWL is free to select a different service provider for all aspects of electric service after the March 31, 2003 agreement ends.⁸

That “fact” is most assuredly NOT undisputed. In fact it is hotly disputed. The record shows that there was no customer on the premises in 2001. As has been previously noted to the Commission, all three local providers (Cherryland, TCL&P, and Consumers Energy) had lines on the property prior to construction of the Lodge. Thus, all three had a right to serve the Lodge in 2001 if, and only if, it chose to take service from them. GWL openly sought proposals from service providers, and Cherryland submitted a bid in open competition. Then, after losing the open bid process, Cherryland resorted to illegal strong arm tactics to obtain a new customer. Although Cherryland had previously served a vacant building on the site, this service had been discontinued years before, and the removal of the line had been requested. The presence of a utility service drop, absent an explicit grant of right to occupy the land, is a revocable easement, which under Michigan law is **revocable at will** and does not run with the land.⁹ Thus, when

⁸ Opinion and Order, at p. 16 (Emphasis added).

⁹ *McCastle v Scanlon*, 337 Mich 122 (1953).

Cherryland was ordered to remove the line, Cherryland's refusal to remove it amounted to a trespass.¹⁰

Consequently, Cherryland was not serving the property in 2001 and does not qualify as being served under Rule 411, which only provides that the property rather than the owner of the property is the customer. In this case the property itself was not being served because the service drop had been abandoned and its removal demanded. Nothing in Rule 411 dictates that once a property has been serviced, the property itself remains a customer for all time regardless of whether service itself is discontinued. Rather, Rule 411 merely provides that an existing customer cannot transfer service. But, once service is discontinued to a property, as it had been in this case for several years, the property does not remain a customer into perpetuity. That is simply an erroneous reading of Rule 411. Moreover, if it were a correct reading, Rule 411 would itself be an illegal, unconscionable, and unconstitutional regulation.

Given the facts as presented in the exhibits to the motion for summary disposition and the responses to the motion, it is clear that Cherryland had abandoned service to the premises before 2001, and used the threat of delaying construction of the Lodge in an attempt to resurrect that which was abandoned. However, even if the Commission accepted the facts as presented by Cherryland and Cherryland's interpretation of those facts, there remained, at a minimum, a factual dispute as to whether Cherryland had abandoned service to the premises in 2001 under any interpretation of Rule 411. Yet, despite the existence of this potential factual issue, the ALJ and the Commission decided the matter on a summary basis. The abandonment of service to the

¹⁰ *Ward v Rapp*, 79 Mich 469, 470 (1890) (Where the right to be present on land exists pursuant to a revocable license, continued presence on the land after the revocation of that license is a trespass).

premises is not so easily disposed of by the Commission. It was error to decide the issue without a factual hearing if the Commission was to rely on Rule 411.

D. It Was Error For The MPSC To Try To Ratify Illegal Behavior Of The Utility To Force The Customer To Stay With The Utility

Another unintended consequence of the Commission's Order is that, by ruling in Cherryland's favor as to the Lodge being a customer in 2001, the Commission has attempted to ratify illegal behavior on behalf of Cherryland, behavior taken in a purposeful fashion to force an unwilling customer to be perpetually tied to Cherryland for service.

If the Commission's Order is allowed to stand and the Commission ignores Cherryland's wrongful actions in stealing the Lodge from TCL&P, the effect will be that, now that Cherryland has succeeded in coercing the Lodge to take service from it, the Lodge can never again have the complete choice of providers that it had in 2001 when the development was first conceived. Neither the law, the facts, nor the Commission's actions and pronouncements with respect to this dispute support this claim.

In 2001, GWL solicited bids from TCL&P, Cherryland, and Consumers to provide electric service to the planned lodge. As noted above, all three had lines already traversing the property. No matter which was chosen, all three would have to move some of their existing lines to accommodate the Lodge, and Cherryland's existing, abandoned line to the Oleson farmhouse would need to be removed. The winning bidder would need to extend service from its existing distribution lines to the Lodge, once it was built.

All of the providers submitted bids, ***including Cherryland.*** Cherryland gave no indication at this time that it claimed or would claim an exclusive right to serve the property. TCL&P was the winning bidder. ***On December 18, 2001, Great Wolf Lodge and TCL&P executed an electric service contract. Cherryland was simply a losing bidder.***

Shortly thereafter, the Olesons (acting through Jack Smith, an employee of a family company), who still owned the land, contacted Cherryland to order the removal of the long-inactive service drop that still ran to the vacant farmhouse, so that the building could be demolished. Cherryland's unlawful response is what set in motion the dispute that is now before the Commission. Through a January 10, 2002 letter from Tom Kovalak (Exhibit A to GWL's Appeal, located at <http://efile.mpsc.cis.state.mi.us/efile/docs/14593/0026.pdf>), **Cherryland refused to remove the service drop** unless Great Wolf Lodge terminated its contract with TCL&P, and instead selected Cherryland as its service provider. This was the first indication to the Lodge that Cherryland would attempt to thwart the Lodge's right to select the provider of its choice.

At this point, as Cherryland had intended, the Lodge faced a Hobson's choice. It could not raze the old Oleson buildings and commence construction of the lodge unless the service drop was removed. And it had only two means to achieve removal of the line – it could accede to Cherryland's improper demand, or sue. To bring suit would bring uncertainty and inevitable delay. Such a course would do untold damage to the financial viability of the Lodge, as it would be unable to open on schedule. As J. Michael Schroeder, GWL's general counsel, explained in a deposition in a lawsuit between TCL&P and Cherryland,¹¹

- A. ...Cherryland came to us and through a combination of threats to be unwilling to cooperate and enticements to make their offer more attractive than it had been originally, put us in a position where due – primarily due to the possible delays to the project arising out of the threats not to remove the lines and that sort of thing, that we felt we had no choice but to go with Cherryland as our electric

¹¹ TCL&P sued Cherryland in civil court for tortious interference with contract and business expectancies, alleging the Cherryland's forcing GWL to terminate its contract with TCL&P was tortiously wrongful vis a vis TCL&P. The case was settled when both parties accepted a mediation award of \$275,000 from Cherryland to TCL&P.

power supplier. It was our view that anything that was going to stall the project was unacceptable for financial reasons.

Q (by Cherryland's counsel): Did you believe that you were coerced by Cherryland to switch providers to Cherryland?

A. That's your word, but that's a decent characterization.

Having unlawfully stolen the Lodge (which should have been able to take service from the provider of its choice) from TCL&P in the first place, Cherryland now seeks to have the Commission cement the result of that wrongdoing by forcing the Lodge, against its will, to accept a contract that would force it to remain a Cherryland customer indefinitely. The Commission's Order, as written, would appear to countenance Cherryland's wrongful actions. The Commission has no such legal authority. The Commission should refuse to make a ruling that rewards wrongdoing by a utility under its jurisdiction, as the Order in this case would try to do.

E. The Opinion And Order Ignores The Well-Reasoned Findings By The ALJ That Cherryland Improperly Changed The Rate, Not Because Of Uncertainty, But Because Cherryland Improperly Sought To Coerce The Lodge Into Signing A Special Contract Containing Provisions With Which It Disagreed.

In declining to assess fines against Cherryland, the Commission apparently agreed with Staff and Cherryland that arbitrarily changing the rate in November 2005 was simply due to Cherryland's misinterpretation of the Commission's Order in Case No. U-13716. The Commission correctly notes that the proper approach by Cherryland would have been to seek clarification of the July 22 order, but then proceeds to exonerate Cherryland from its folly without further explanation, finding that "Cherryland's interpretation of the July 22 order was

not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to GWL.”¹².

The problem with the Commission’s finding, and Cherryland’s claims on which the finding is based, is that there is no support for such a finding. Rather, the only way this finding can be reached is if the Commission completely ignores the ALJ’s comprehensive and compelling discussion of the issue in the PFD:¹³

Throughout this case, Cherryland has defended the rate change by arguing that, pursuant to the Commission’s July 22, 2004 Order, it was required to do so because GWL was not meeting the 1,500 kW minimum load requirement in the proposed, and rejected, LRS tariff. However, when Cherryland changed the rate, GWL had met the 1,500 kW requirement only once since April of 2002. See *Affidavit of Tony Anderson*, para 3 (September 7, 2005). In over two and one half years, Cherryland had never before seen fit to enforce the 1,500 kW requirement. Even after the Commission’s July 22, 2004 Order, it was nearly four months before Cherryland suddenly found it necessary to change the rate it applied to GWL’s service. This begs the question of what circumstances had changed so as to prompt Cherryland to begin enforcing the 1,500 kW requirement. The most obvious change was that GWL had refused to sign the special contract and, as a result, the Commission dismissed Cherryland’s application for the special contract. The timing of GWL’s refusal to sign the special contract and Cherryland’s decision to raise GWL’s rate certainly looks suspicious and suggests that the two events were connected. However, without more, it would be necessary to dismiss any suspicions and conclude that the events were unrelated and innocently coincidental.

Unfortunately for Cherryland, there is more evidence upon which to judge its motives. Quite revealing are Cherryland’s own admissions. Exhibit G of Cherryland’s Motion for Summary Disposition is a January 10, 2005 e-mail from Cherryland’s General Manager, Tony Anderson, to GWL’s Ms. MacDonald. In the e-mail, Mr. Anderson states that the purported reason for the rate change was GWL never meeting the 1500 kW requirement, and, shortly thereafter, adds that “we have the special contract addendum ready for signature.” Mot Summ Disp, Exh G. Additionally, he adds:

We do recognize the increase to your monthly bill and take no pleasure in having to follow *the letter of the law as we see it*. I hope your company will remember that we did previously pay a substantial fine to the MPSC for not doing so in the past. We

¹² Opinion and Order, at p. 15.

¹³ PFD, at pp. 10-13 (Emphasis added).

simply will not take such a risk again when *the solution is in the hands and control of your corporate headquarters*. Mot Summ Disp, Exh G. (emphasis added).

From Exhibit G, it appears clear that, while Cherryland justified its actions on a desire to follow the “law as [it] see[s] it,” it had expressly connected and mixed together what should have been two unrelated issues; its application of the LCI rate and GWL’s refusal to sign the proposed special contract. In fact, it appears quite clear that Cherryland was identifying GWL’s refusal to sign the proposed special contract as the reason for its decision to change rates. However, Cherryland’s duty and ability to comply with Commission Orders was unrelated to GWL’s refusal to sign the proposed special contract. By linking the two issues, Cherryland was using the higher rate to punish GWL for its refusal to sign the special contract and, at the same time, to pressure GWL into signing a contract it opposed. This type of behavior is impermissible.

Additionally suggestive of Cherryland’s malfeasance is the illogic underlying Mr. Anderson’s explanation of the purported reason for applying the LCI. On its surface, Mr. Anderson’s explanation seems worthy of consideration. However, upon closer examination, it becomes nonsensical and suggests other motives for changing the rate. Mr. Anderson explains the decision as “having to follow the letter of the law *as we see it*” and reminds GWL “that [Cherryland] did previously pay a substantial fine . . .for not doing so” Mot Summ Disp, Exh G. (emphasis added). First, Cherryland was not fined for failing “to follow the letter of the law as [it saw] it.” Rather, Cherryland was fined because it violated MCL 460.552 by charging GWL a rate that the Commission had not approved for use. See *In re Application of Cherryland Electric Co-op*, U-13716, Order (July 22, 2004). This earlier statutory violation and fine are completely unrelated to the issue at hand. This matter does not involve application of an unapproved rate, but, instead, involves which of two Commission approved rates Cherryland was to charge GWL; the rate the Commission specifically ordered it to charge or a higher rate under its rate schedule. Quite simply, it does not follow from the fact that Cherryland was fined for charging an unapproved rate that it would then be fined for applying a rate that the Commission had ordered it to apply. I find Mr. Anderson’s rationale unconvincing and suggestive of the existence of other, unspoken, motives for Cherryland’s rate hike. The only other readily apparent motive is that of encouraging GWL to sign the special contract. It is possible that Cherryland honestly believed its position was sound and that by raising GWL’s rate it was following the Commission’s mandates. However, as found in the Ruling on Motion for Summary Disposition, Cherryland’s actions violated the Commission’s Order. Had Cherryland gotten it right, the added benefit that the rate hike placed pressure on GWL to sign the special contract would be inconsequential. However, Cherryland did not get it right and they compounded there misdeed by impermissibly using the rate hike to pressure GWL.

As the ALJ says, in light of the evidence, Cherryland's claims that it was concerned about a fine if it did not suddenly begin enforcing the [non-existent] load requirement cannot be taken seriously, and are "nonsensical" under the circumstances. The Commission should take a second look at the ALJ's reasoning, the evidence, and to Cherryland's improper motives, and should assess a fine in this proceeding.

F. The Opinion And Order Improperly Combined The Request For Interest As Related To The Request For Fines As A Penalty Upon Cherryland. Rather, Interest Is Appropriate To Compensate GWL For Its Loss Of Use Of The Money Which It Was Overcharged, And To Prevent Cherryland From Having The Benefit Of An Interest Free Loan Of The Amounts By Which It Overcharged GWL.

With respect to interest, the Commission's Order states, without addressing the specific arguments about interest:

Nevertheless, because the issue of additional terms and conditions of the proposed tariff and special agreement were not before the Commission in Case No. U-13716, the Commission agrees with the Staff that Cherryland's interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to GWL.¹⁴

The interest sought by the Lodge in this case was not in the nature of a penalty to be lumped in together with fines. Instead, the Lodge sought interest simply as a matter of fairness to recover its loss as well as to assure that Cherryland did not benefit from the overcharge by way of having an interest-free loan. See GWL's Reply Brief of January 20, 2006, at pp. 6-9. Instead, the Commission's Order rewarded the utility for the overcharge.

As the Lodge has indicated, and the ALJ accepted, the law in Michigan grants this Commission the authority to grant interest as an element of damages for overcharges, and to set

¹⁴ Opinion and Order, at p. 15.

the rate for such interest. In *Detroit Edison Company v Public Service Commission*,¹⁵ the Michigan Court of Appeals held that the authority to regulate rates in MCL 460.6 encompassed the ability to refund when a higher rate (in that case an interim rate) was charged, and the ability to determine what that rate should be. The Court of Appeals stated:

We believe that the determination of the rate of interest to be applied to customer refunds falls within this broad grant of authority [MCL 460.6(1)]. The selected rate of interest has a direct impact on the fees and charges that a utility's customers ultimately pay for service.¹⁶

The Court of Appeals goes on to cite to the overall monetary impact of interest in that case, and concludes that the rate of interest is “at least incident to the regulation of a public utility.”¹⁷ Here there is no question that Cherryland's rates are subject to the Commission's jurisdiction. Charging interest on an overcharge, and determining the rate of interest to apply, is incident to that authority to set rates.

The Commission, in its Order, agrees that the Lodge was overcharged by Cherryland, but lumps the interest issue in with the issue of whether a fine is appropriate. This is an erroneous interpretation of the law of interest as a part of damages. This law is well stated in *Michigan Law of Damages and Other Remedies*:¹⁸

A discussion of interest must begin with the distinction between interest as an element of damages and interest on a money judgment. For more than 100 years, courts have recognized that complete compensation of the plaintiff can only be accomplished if the plaintiff is awarded interest from the date of the injury. *Snow v Nowlin*, 43 Mich 383, 387; 5 NW 443 (1880); *McCreery v Green*, 38 Mich 172, 185 (1878). In addition, by statute, once a money judgment is entered, interest accrues on the

¹⁵ *Detroit Edison Company v Public Service Commission*, 155 Mich App 461; 400 NW2d 644 (1986), *lv den*, 428 Mich 898 (1987).

¹⁶ *Id.*, at p. 469.

¹⁷ *Id.*

¹⁸ Patek, Barbara A., McLain, Patrick, Granzotto, Mark, and Stockmeyer, N. O., Jr., *Michigan Law of Damages and Other Remedies*, Third Edition, The Institute of Continuing Legal Education, pp. 28.2 – 28.3 (2002) (Emphasis added).

judgment until it is paid. Michigan courts have, therefore, recognized a distinction between interest included as an element of damages and interest on a judgment. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 499 n9; 475 NW2d 704 (1991); *Schwartz v Piper Aircraft Corp*, 90 Mich App 324, 325 n2; 282 NW2d 306 (1979). The former has evolved judicially; the latter is purely statutory. While these two forms of interest have developed differently and cover a different time period within the course of a single case, they share a common purpose – compensating the plaintiff for the loss of the use of funds. *Gordon Sel-Way*, 438 Mich at 499 n9; *Moore v Department of Military Affairs*, 88 Mich App 657, 660; 278 NW2d 711 (1979) (citations omitted).

Interest as an element of damages is awarded by the trier of fact as part of the general verdict, whereas interest on a money judgment is computed on and added to the judgement. *Vannoy v Warren*, 26 Mich App 283; 182 NW2d 65 (1970), *aff'd*, 386 Mich 686; 194 NW2d (1972). The two forms of interest are cumulative rather than mutually exclusive. See *McGraw v Parsons*, 142 Mich App 22; 369 NW2d 251 (1985). The *McGraw* court held that awarding interest as damages in a verdict does not preclude the assessment of statutory interest on the judgment.

The Lodge sought damages for just this purpose – to be compensated for the loss of use of its funds. The Lodge has been without the use of these funds since it was forced to begin paying the higher rate in November 2004 (for October 2004 usage) and in later billings. Consequently, Cherryland has had the benefit of a forced loan from the Lodge in the amounts of the overpayments, and the Lodge has been economically damaged by that forced loan. That is part of damages, not a form of penalty to be lumped together with the issue of fines. To treat it as such was error.

Cherryland's most recent rate case, MPSC Case No. U-14516, indicates a proposed interest rate on new loans on Schedule F, Adjustment to Long Term Interest Expense. This document indicates a cost of borrowing at a composite rate of 5.61%.¹⁹ This represents Cherryland's current cost of obtaining capital, which represents the benefit of the effective interest free loan that Cherryland has had since it began overcharging the Lodge.

¹⁹ Case No. U-14516, Exhibit JCL-3, page 26 of 30.

This rate does not represent a penalty, but is a reasonable approximation of GWL's damages (if Cherryland is willing to pay that rate to obtain money in a loan, then the Lodge should also have been able to get that rate if it had extended a loan to Cherryland).

Contrast this with the Commission's grant of summary disposition as to Count II, which leaves Cherryland's demand for a 5% per month late payment charge intact. If the Commission's ruling stands, it will have the unintended consequence of denying the Lodge reasonable interest at a rate of 5.61% annualized on what was clearly a loss in the form of an overcharge, while essentially approving without hearing a 60% annualized late payment fee if GWL is late with any payments. Such a result is clearly unconscionable.

The Lodge therefore requests that the Commission reconsider its erroneous bundling of the issues of interest and penalties, and order that the refund from Cherryland be paid with interest at the composite rate of 5.61% annualized, as had been recommended by the ALJ.

G. The Commission Should Apply The LRS Rate On A Continuing Basis After July 22, 2005, And Require That, On A Going-Forward Basis, Cherryland Must Continue To Charge The Lodge At The LRS Rate Until A Special Contract Is Approved And In Effect.

The Commission's Order appropriately grants relief to the Lodge in the amount of the difference between the LRS rate that should have been applied and the LCI rate that Cherryland wrongfully applied, but stops that relief as of July 22, 2005, one year after this Commission's Order in Case No. U-13716. The Commission's ruling is based on the language in the Commission's order in Case No. U-13716 that, while the LRS tariff was disapproved, the LRS rate "is approved on a temporary basis for one year from the date of this order or the date that a special contract becomes effective, whichever occurs first."²⁰

²⁰ MPSC Case No. U-13716, Order dated July 22, 2004, p 12, Ordering ¶A.

The ALJ's ruling was understandable based on the literal reading of the Commission's Order. The ALJ apparently believed he could not grant further relief after July 22, 2005 because he was strictly limited by the wording in the Commission's Order.

The Commission, however, is not so limited. The Commission's Order, by relying on the same literal reading, will have the unintended consequence of rewarding Cherryland for its wrongdoing. The Commission, unlike the ALJ, can make interpretations of its intent and go beyond a literal reading of its orders.

The Commission's Order in Case U-13716 had no anticipation that Cherryland would stop charging the LRS rate or a comparable special contract rate during the one-year period. Rather, the Commission's Order anticipated only that the LRS rate, which it had already found was a reasonable rate to apply to the Lodge, would be implemented in a special contract. The Commission's one-year limit was not intended to benefit Cherryland by allowing Cherryland to unilaterally force a higher rate on the Lodge than that which the Commission had found to be reasonable if Cherryland failed to present a reasonable special contract or dragged its feet, as it did. Nor was the one-year limitation an invitation to Cherryland to drag its feet for a year and refuse reasonable contract terms in order to apply the much higher LCI rate after the year had ended, as it did. In other words, the one-year period was designed to protect the Lodge, not to provide a windfall to Cherryland and its wrong doings if an agreement was not reached. Consequently, the LRS rate should be continued (i) "until a special contract is approved" in order to grant an incentive for Cherryland to put forward reasonable terms in the special contract, or (ii) until the Commission holds a hearing on the unreasonable terms and renders a decision.

In Case No. U-13716, the Commission was clear as to the reasons for imposing the LRS rate. The Commission expressly found the rate to be just and reasonable, and expressly found that it would protect the Lodge's interests by approving the LRS rate. The Commission stated:

The Commission finds that the LRS rate promotes competition. The Commission also adopts the ALJ's finding that the LRS rate protects Cherryland's customers because it contributes to the margin above the incremental costs, which represents contribution towards Cherryland's fixed costs in a form that would otherwise not be available.²¹

Thus, the Commission approved the specific rate to be applied to the special situation of the Lodge, and found it to be just and reasonable, to promote competition, and to protect Cherryland's customers.

Had the Commission thought the proper rate to apply was the Large Commercial and Industrial rate, which is the default rate that GWL is stuck with under the Commission's Order, the Commission would have rejected the LRS rate and told Cherryland to apply the LCI rate in the first place. The tariff that contained the approved rate was itself rejected because the Commission was concerned that other large resorts may become eligible for the rate, and it was not clear that the incremental costs of serving the Lodge would be typical of others that might become eligible for the rate. But, the rate was clearly applicable to suit the incremental costs of serving the Lodge. Clearly, the Commission intended that the LRS rate would be applied in any special contract ultimately approved between Cherryland and the Lodge.

Moreover, the LRS rate is the only rate specifically approved for service to the Lodge. Because the Commission found that the LRS rate is just and reasonable for the Lodge's special circumstances, that means the much higher LCI rate is NOT just and reasonable, but is considerably higher than, a just and reasonable rate as applied to the Lodge.

²¹ *In The Matter Of The Application Of Cherryland Electric Cooperative For Authority To Implement A Large Resort Service Rate*, MPSC Case No. U-13716, Order of July 22, 2004, at p. 7.

The LRS rate was adopted precisely to protect the Lodge's interest in being charged a just and reasonable rate, a rate that was specifically approved as being the correct rate to apply to the Lodge. Applying a higher rate would constitute a windfall to Cherryland since it would be a rate higher than the rate specifically approved. The Commission intended to protect the Lodge from having to pay a higher than authorized rate, and thus ordered the LRS rate to apply for one year or until a special contract was approved, tacitly assuming that a special contract implementing the LRS rate would be approved within one year.

The Commission's one-year limit should not be used to provide a windfall to Cherryland due to an agreement not being reached, which is precisely the result of the Commission's Order in this case. Consequently, the LRS rate should be continued "until a special contract is approved" after resolution of the issues presented in this proceeding. The Commission has authority to continue the rate, and there is no prejudice to Cherryland since, as the Commission has already found, the LRS rate provides a return to Cherryland.

H. This Decision Sends A Terrible Policy Message For The State Of Michigan Which Discourages Economic Development Or Expansion.

The policy implications of this decision, and the way a new investor in Michigan's resort industry has been treated, cannot be underestimated.

GWL came to Michigan to open a resort facility and requested bids to provide utility service. GWL entered into a contract with the winning bidder only to have a disgruntled, losing bidder extort from it the utility service to the resort by saying: either take service from the disgruntled bidder (Cherryland) or that disgruntled bidder would delay the construction of its resort and cost it hundreds of thousands of dollars of losses. Then Cherryland demands unreasonable terms and conditions in a special contract. When GWL refuses to agree to these terms and conditions, Cherryland, as the ALJ explicitly found, again tries to extort unreasonable

terms and conditions by unilaterally increasing the rate being charged to GWL from the rate specifically ordered by the Commission.

When all this is presented to the Commission, the Commission sweeps aside the repeated and overwhelming wrongdoing by the utility, rewards the utility with an interest-free loan, and attempts to force the customer to be a captive customer of the wrongdoing utility in perpetuity. The Commission cannot intend these consequences, and it should correct this wrong promptly if it hopes for Michigan to be viewed as a place which actually encourages economic development and new investment.

IV. RELIEF

For the reasons set forth above, the Lodge respectfully requests that the Commission rule as follows:

1. Grant the Petition for Rehearing to correct the legal errors and to prevent the unintended consequences that will follow if the Opinion and Order is left undisturbed, as set forth in this Petition.
2. Find that it was error to dismiss Count II, and find that the Lodge is entitled to a hearing on the disputed provisions of the special contract attached to its complaint.
3. Determine that the Lodge should be entitled to interest on what amounts to an interest free loan for the amounts overpaid.
4. Apply the LRS rate on a continuing basis after July 22, 2005, and require that, on a going-forward basis, Cherryland must continue to charge the Lodge at the LRS rate until a special contract is approved and in effect.
5. Assess the fines as recommended by the Lodge in its Exceptions to the PFD, based on the factual findings made by the ALJ.
6. Grant to the Lodge its attorney fees and costs for this proceeding; and

7. Grant to the Lodge such other relief as may be just and reasonable.

Respectfully submitted,

CLARK HILL PLC

By:



Digitally signed by Leland R. Rosier
DN: CN = Leland R. Rosier, C =
US, O = Clark Hill PLC
Date: 2006.06.23 14:53:05 -04'00'

Roderick S. Coy (P12290)
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Attorneys For Great Wolf Lodge of
Traverse City, LLC

Date: June 23, 2006

EXHIBIT A

**SPECIAL CUSTOMER
ELECTRIC SERVICE AGREEMENT**

Agreement made ~~March 31, 2003,~~⁶ June 1, 2005,⁷ by and between Cherryland Electric Cooperative of Grawn, Michigan ("COOPERATIVE") and Great Wolf Lodge of Traverse City, LLC, of Madison, Wisconsin, ("CUSTOMER"). Collectively the COOPERATIVE and the CUSTOMER are referred to as ("the PARTIES").

The CUSTOMER ~~plans to construct and operate~~⁸ operates⁹ a resort, ~~presently planned to be~~¹⁰ called The Great Wolf Lodge at the Buffalo Ranch, and related facilities, ~~to be~~¹¹ located at US 31/37 and Frankie Road in Traverse City, Michigan ("the SITE"); and the COOPERATIVE ~~proposes to extend~~¹² has extended¹³ electric distribution facilities and provides¹⁴ electric service to the SITE; and the PARTIES desire to enter into this Special Customer Electric Service Agreement ("Agreement") for the term indicated herein. Therefore, in consideration of the mutual promises, covenants and conditions contained herein, the PARTIES agree as follows:

1.0 Agreement to Sell and Purchase

The COOPERATIVE hereby agrees to sell and deliver to the CUSTOMER and the CUSTOMER agrees to purchase and receive from the COOPERATIVE electric power and energy for use at the SITE upon the terms and conditions hereinafter provided.

2.0 Service Characteristics

2.1 Service Delivery. Service hereunder shall be three phase four wire wye, 60 hertz, 277/480 volts.

2.2 Location of Delivery Point. Service shall be taken by the CUSTOMER at the 277/480 volt terminals of the service transformer(s) owned, operated and maintained by the COOPERATIVE.

2.3 Capacity. Electrical service to the SITE under this Agreement shall be limited to a nominal 5000 kVA. Service to additional load above 5000 kVA shall be provided by the COOPERATIVE under an amendment to this Agreement to be negotiated.

2.4 Firm Service. The CUSTOMER will be provided FIRM LOAD. FIRM LOAD is defined as load that is intended to be supplied at all times, except under conditions of *force majeure* outside the control of the COOPERATIVE as defined in paragraph ~~11.0~~¹⁵10.0¹⁶ herein.

3.0 Service Conditions and Requirements

3.1 Cooperative Owned Facilities. The COOPERATIVE will furnish, install and maintain all COOPERATIVE owned electric equipment and facilities required to deliver electric power and energy to the CUSTOMER for the SITE. The COOPERATIVE shall be solely responsible for the design, installation, maintenance and safety of this equipment. However, in the event CUSTOMER tampers with this equipment, CUSTOMER may be responsible therefore.

3.2 Customer Owned Facilities. The CUSTOMER shall be solely responsible for the design, installation, maintenance and safety of any and all CUSTOMER supplied electric facilities or equipment. The COOPERATIVE does not undertake or assume any responsibility to assist or advise the CUSTOMER concerning the design, installation or maintenance of CUSTOMER supplied electric facilities or equipment. However, in the event the COOPERATIVE tampers with this equipment, COOPERATIVE may be responsible therefore.

3.3 Location of Cooperative Facilities. ~~During the term of this agreement~~
the¹⁷The¹⁸ CUSTOMER will provide and maintain at no cost to the COOPERATIVE suitable locations for the installation of the COOPERATIVE's facilities on the property of the

CUSTOMER. COOPERATIVE's facilities shall be located as ~~shown on bid drawing C5, dated January 21, 2002 as issued in the February 1, 2002 bid set drawings.~~¹⁹ they currently reside at the SITE. Attachment A hereto provides a depiction of the location of such facilities.²⁰

3.4 Cooperative Facility Ownership. Electric service equipment owned, furnished, installed operated and maintained by the COOPERATIVE on the property of the CUSTOMER shall remain the property of the COOPERATIVE and ~~SHALL~~²¹ may²² be removed upon termination of this Agreement. CUSTOMER understands that the COOPERATIVE is not obligated to remove or transfer its distribution facilities.²³

3.5 Cooperative Membership. The CUSTOMER shall remain a member of the COOPERATIVE ~~during the term of this Agreement~~²⁴.

3.6 Accessibility. Duly authorized representatives of the COOPERATIVE shall be permitted to enter on the property of the CUSTOMER to the extent necessary to maintain and service the COOPERATIVE's facilities at all reasonable times in order to carry out the provisions of this Agreement.

3.7 Operation of Cooperative Equipment. The CUSTOMER will not interfere with the operation of any COOPERATIVE owned electric equipment or facilities, including any metering or switching equipment. The CUSTOMER shall advise the COOPERATIVE as soon as possible if the CUSTOMER discovers any apparent problem with the condition or functioning of the COOPERATIVE's equipment or facilities. The CUSTOMER shall notify the COOPERATIVE immediately if the CUSTOMER discovers that the condition or operation of any of the CUSTOMER-supplied equipment or facilities may pose a risk to any persons or property.

on the first day of each month for service furnished during the preceding monthly billing period. If CUSTOMER disputes the billing, such dispute shall be raised promptly with the COOPERATIVE. If the CUSTOMER shall fail to pay any undisputed amount within twenty (20) days after such payment is due, the COOPERATIVE may discontinue service to the CUSTOMER upon giving eight (8) days' written notice to the CUSTOMER of its intention so to do, provided, however, that such discontinuance of service shall not relieve CUSTOMER of any obligation under this Agreement.

5.3 Late Payment Charge. The COOPERATIVE will apply and the CUSTOMER will pay a one and one-half²⁵ ~~five~~²⁶ percent (1.5²⁷ ~~5.0~~²⁸%) per month late payment charge on all amounts past due.

6.0 Agreement Term and Termination

6.1 Effective Date, Term and Renewal. This Agreement shall become effective on the date the Michigan Public Service Commission issues its order approving same, and shall continue to be in effect through March 31, 2006.²⁹ for 24 full months following the date of such approval.³⁰ This Agreement shall automatically renew annually unless either party gives 90 days' written notice of termination before the expiration of the then-current term of the Agreement.

Termination of this Agreement will allow CUSTOMER to choose its³¹ either (i) choose an alternative electric supplier as available under then current Michigan Public Service Commission procedures with respect to customer choice or (ii) return to tariffed service, as generally available to other customers of CUSTOMER'S class with comparable electric consumption. If CUSTOMER chooses to obtain its electric³² power supply from an alternative electric³³ supplier. ~~In such event, COOPERATIVE will, upon request, sell to CUSTOMER'S new power supplier~~

~~any distribution lines or facilities used to serve CUSTOMER at the COOPERATIVE net depreciated cost.~~³⁴ COOPERATIVE will continue to deliver electricity to CUSTOMER pursuant to applicable Michigan Public Service Commission tariffs.³⁵

6.2 Default and Termination. The CUSTOMER shall be in default if it fails to timely pay for service under this Agreement, if it breaches any other of its obligations to the COOPERATIVE, including but not limited to the timely repayment of all loan agreements, or if it becomes the subject of bankruptcy or insolvency proceedings. The COOPERATIVE shall be in default if it fails to perform any of its obligations under this agreement. If defaulting PARTY fails to cure that default within thirty (30) days after receiving written notice of default from the OTHER PARTY, the OTHER PARTY may, at its sole option, suspend or terminate its further performance under this Agreement, discontinue electric service, terminate this Agreement, or take other action to address the default. This provision shall not limit the COOPERATIVE's right to take immediate action to suspend service if the CUSTOMER's act or omission interferes with the safe and efficient operation of the COOPERATIVE's electric system, nor shall it limit the either PARTIES' right to pursue any other or further remedy available to it by law.

6.3 Survival of Obligations. Upon termination of this Agreement in accordance with its terms, all rights and obligations of the parties shall cease without further liability, effective as of the date of termination, except that this Agreement shall remain in effect as to any prior obligation still owed by either party. In particular, the CUSTOMER shall pay the COOPERATIVE for all obligations incurred per Section 5.1 of this Agreement while this Agreement was in effect.

7.0 Security Agreement for Customer Obligations

To secure the CUSTOMER's performance of its obligations to the COOPERATIVE under this Agreement, the CUSTOMER hereby grants the COOPERATIVE a security interest in any of the COOPERATIVE's patronage capital credits owned by the CUSTOMER (see paragraph 8.0 for explanation of capital credits). The CUSTOMER agrees to sign and deliver a Universal Commercial Code (UCC) financing statement and such other and further documents as the COOPERATIVE shall reasonably request to perfect and continue this security interest.

8.0 Patronage Capital Credits

The COOPERATIVE's Board of Directors may classify its patrons and business and allocate the excess, if any, of its receipts over expenses in any year as patronage capital credits to the various patronage classifications. Allocations of patronage capital credits may consider a variety of relevant factors such as the cost of rendering service, the margins produced by such service, the terms of the agreements with patrons, and the obligations of the parties involved. The COOPERATIVE has created a separate classification of business applicable to its patrons receiving service under the rate schedule applicable to the CUSTOMER, and patronage capital credits may accrue at a different rate for that classification of members, compared to other member classes, resulting in some classifications producing no margins and thus receiving no allocation of capital credits in years when other classifications produce margins and receive allocations of capital credits. CUSTOMER hereby agrees to such separate classification. This provision in no way impacts obligations under this Agreement with respect to price or delivery of electric power.

9.0 Disclaimer of Warranty and Limitation of Liability

TO THE EXTENT PERMITTED UNDER LAW, IN PROVIDING ELECTRIC SERVICE UNDER THIS AGREEMENT, THE COOPERATIVE DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE ELECTRIC POWER SUPPLIED HEREUNDER. Each party shall be responsible for its own facilities and personnel provided or used in the performance of this Agreement. Neither COOPERATIVE nor CUSTOMER shall be responsible to the other party for damage to or loss of any property, wherever located, or bodily injury unless the damage or loss is caused by its own negligence or intentional conduct or by the negligence or intentional conduct of that party's officers, employees, or agents, in which case the damage or loss shall be borne by the responsible party. The COOPERATIVE shall not be responsible or liable to the CUSTOMER or to any other party for any indirect, special or consequential damages, or for loss of revenues from any cause.

10.0 Force Majeure

Neither COOPERATIVE nor CUSTOMER will be liable to the other for any failure or delay in the performance of any obligation under this Agreement due, to events beyond its, reasonable control, including but not limited to, fire, storm, flood, earthquake, explosion, act of the public enemy, riots, civil disorders, sabotage, strikes, lockouts, labor disputes, labor shortages, war stoppages or slowdowns initiated by labor, transportation embargoes, failure or shortage of materials, acts of God, or acts or regulations or priorities of the Federal, State or local government or branches or agencies thereof:

11.0 Indemnification and Insurance

Subject to the limitations contained in paragraph 11³⁶10³⁷ above, the CUSTOMER agrees to indemnify and hold the COOPERATIVE and its affiliates, and COOPERATIVE's power

supplier(s) and affiliates, harmless from and against any liability for any claims or demands arising out of property damage, bodily injury, or interruptions to the CUSTOMER's electric services caused by electric equipment or facilities owned by the CUSTOMER, or in the CUSTOMER's possession, or by the CUSTOMER's operation of electric equipment or facilities, except for such property damage, bodily injury or interruptions caused by the actions or negligence of the COOPERATIVE or its power supplier(s) or their employees or property. The CUSTOMER shall maintain and provide proof of insurance for such indemnification obligation provided by an insurance carrier acceptable to COOPERATIVE, with single limits of not less than \$5,000,000 (Five Million Dollars).

Subject to the limitations contained in paragraph 11³⁸ 10³⁹ above, the COOPERATIVE agrees to indemnify and hold the CUSTOMER harmless from and against any liability for any claim or demands arising out of property damages or bodily injury caused by electric equipment or facilities owned by the COOPERATIVE or the operations of the COOPERATIVE or its employees or agents on the CUSTOMER's property unless property damage or bodily injury is a result of action or negligence of the CUSTOMER.

~~In addition, the COOPERATIVE agrees to defend, indemnify and hold harmless CUSTOMER against, without limitation, any and all rights, claims, demands, obligations, liabilities, costs, expenses, attorney fees, causes of action, or judgments based thereon which may be brought or asserted against the CUSTOMER by Traverse City Light & Power, or any assignee or affiliate (TCLP), based upon or related to the provision of electric service to the SITE, including any claim by TCLP for breach of any Electric Service Agreement executed by CUSTOMER on or about December 18, 2001. In meeting its obligations under this indemnity, COOPERATIVE has the right to designate counsel to represent CUSTOMER in any dispute~~

~~with TGLP, with CUSTOMER having the right to approve the COOPERATIVE's designation, which approval shall not be unreasonably withheld.~~⁴⁰

12.0 Prudent Utility Practices

Prudent Utility Practices are those practices, methods and equipment which, at any particular time, are commonly used in prudent electrical engineering and utility operations to operate electric equipment lawfully and with safety, dependability and efficiency, and are in accordance with the National Electric Safety Code or any other applicable government code in effect. Prudent Utility Practices are not intended to be limited to the optimum practice, method or act to the omission of all others, but rather include a spectrum of possible practices, methods or acts which could have been expected to accomplish the desired result consistent with reliability, safety and expediency. Prudent Utility Practices include due regard for manufacturers' warranties and the requirements of governmental agencies which have jurisdiction.

13.0 General

13.1 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with and shall be governed by the laws of the State of Michigan. The parties agree that all litigation relating to this contract shall be before courts in the State of Michigan.

13.2 Attorney's Fees. The non-prevailing party shall reimburse the prevailing party for all costs and all out-of-pocket expenses (including reasonable attorney's fees and disbursements) incurred with respect to any legal proceedings to enforce either party's obligations under this Agreement.

13.3 Notices. All notices under this Agreement shall be given in writing and shall be delivered personally or mailed by first class U.S. mail to the respective parties as follows:

- (a) To CUSTOMER
Great Wolf Lodge of Traverse City, LLC
c/o The Great Lakes Companies, Inc.
122 West Washington Avenue, 10th Floor
Madison, WI 53703
Attention: J. Michael J. Schroeder
- (b) To COOPERATIVE:
Cherryland Electric Cooperative
5930 U.S. 31 South
P.O. Box 298
Grawn, Michigan 49637
Attention: Anthony Anderson

13.4 No Waiver. No course of dealing nor any failure or delay on the part of a party in exercising any right, power or privilege under this Agreement shall operate as a waiver of any such right, power or privilege. The rights and remedies herein expressly provided are cumulative and not exclusive of any rights or remedies which a party would otherwise have.

13.5 Entire Agreement/Amendment. Except as provided in COOPERATIVES by-laws, rules and regulations applicable to similarly situated customers, which are incorporated herein, this Agreement represents the entire Agreement between the parties with respect to the matters addressed in this Agreement. This Agreement may be changed, waived, or terminated only by written agreement signed by both parties as set forth herein.

13.6 Assignments/Benefit of Agreement. Any assignment of this agreement by the CUSTOMER in whole or in part, or any other interest hereunder without the COOPERATIVE's written consent, which shall not be unreasonably withheld, shall be void. The COOPERATIVE may assign without the consent of the CUSTOMER this Agreement to an

affiliate or affiliates of the COOPERATIVE, to a partnership(s) in which the COOPERATIVE or an affiliate has an interest, or to any entity which succeeds to all or substantially all the COOPERATIVE's assets by sale, merger or operation of law. Otherwise, the COOPERATIVE may assign this Agreement subject to the CUSTOMER's written approval, which shall not be unreasonably withheld. To the extent not prohibited hereby, this Agreement shall be binding upon and inure to the benefit of the CUSTOMER and its successors and assigns.

13.7 Severability. If any provision of this Agreement is held invalid under any applicable laws, that invalidity shall not affect any other provision of this Agreement that can be given an effect without the invalid provision, and to this end the provisions are severable. If any term or condition of this Agreement is unenforceable under applicable law, such term or condition shall nevertheless be deemed enforceable to the fullest extent permissible and the applicable court is requested to reform the offending term or condition.

14.0 Availability of Alternative Electric Suppliers. Pursuant to the Michigan Electric Choice and Reliability Act, 2001 PA 141 and the Michigan Public Service Commission's September 11, 2003 order in Case No. U-13698, effective January 1, 2005, commercial and industrial member-consumers with a peak load of 200 kW or greater may terminate the power supply portion of their agreement with the Cooperative. In the event the CUSTOMER qualifies for power supply choice and the CUSTOMER wishes to terminate this Agreement as to power supply, it may do so upon 90 days' written notice to the COOPERATIVE.

In the event CUSTOMER elects to purchase power supply from an Alternative Electric Supplier, electric distribution services will be offered by the COOPERATIVE pursuant to the ~~rates, terms and conditions set forth in the COOPERATIVE'S Large Power Service Rate Choice~~

~~(LP C), if CUSTOMER elects to purchase electric distribution services from~~
~~COOPERATIVE,~~ ⁴¹ applicable Michigan Public Service Commission tariff, as generally available
to other customers of CUSTOMER'S class with comparable electric consumption. ⁴²

15.0 Effectiveness of this Agreement Relative to Prior Agreements

This Agreement supersedes any and all other agreements between these parties including the Special Customer Electric Service Agreement executed by the parties on or about May 30, 2002.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives, all as of the day and year first above written.

Attest:

CHERRYLAND ELECTRIC COOPERATIVE

By: _____

President

Witness:

GREAT WOLF LODGE OF TRAVERSE CITY, LLC

By: The Great Lakes Companies, Inc., Managing Member

By: _____

Bruce D. Neviaser, Chairman

SPECIAL CUSTOMER ELECTRIC SERVICE AGREEMENT

Contract Rate Schedule – Appendix A

1.0 Availability

Available to the Great Wolf Great Wolf Lodge of Traverse City, LLC, of Madison, Wisconsin for the resort known as the Great Wolf Lodge at the Buffalo Ranch, and related facilities, located at US 31/37 and Frankie Road in Traverse City.

2.0 Type of Service

Alternating current, 60 hertz, three phase, metered at primary voltage of 7.200/12,470 volts and delivered at 277/480 volts.

3.0 Monthly Rate

(a) ⁴³For all usage other than outside lighting⁴⁴: Energy charge of \$0.0496/kWh⁴⁵

~~(b) Four outside lighting: If included in primary metering, the CUSTOMER shall pay the following rates for that outside lighting:⁴⁶~~

~~| | |
|---------------|--|
| 50 watt lamp | \$5.00 per month per lamp ⁴⁷ |
| 75 watt lamp | \$7.00 per month per lamp ⁴⁸ |
| 100 watt lamp | \$10.05 per month per lamp ⁴⁹ |
| 175 watt lamp | \$10.30 per month per lamp ⁵⁰ |
| 250 watt lamp | \$16.00 per month per lamp ⁵¹ |
| 400 watt lamp | \$20.00 per month per lamp ⁵² |~~

4.0 Special Terms and Conditions

Initial minimum term is until March 31, 2006.⁵³ 24 full months following the date of the Michigan Public Service Commission order approving this Agreement.⁵⁴ Service shall automatically renew at the end of the initial term and annually thereafter for a 12 month term unless the CUSTOMER or the COOPERATIVE gives notice of cancellation 90 days prior to the end of the service term. Cancellation of service, however, will allow CUSTOMER to enter into choice for its power supplier and distribution line services.⁵⁵ either (i) choose an alternative electric supplier as available under then current Michigan Public Service Commission procedures with respect to customer choice or (ii) return to tariffed service, as generally available to other customers of CUSTOMER'S class with comparable electric consumption. If CUSTOMER chooses to obtain its electric power supply from an alternative electric supplier, COOPERATIVE will continue to deliver electricity to CUSTOMER pursuant to applicable Michigan Public Service Commission tariffs.⁵⁶

5.0 Terms of Service

1-AN011146003-1¹

DEAR²

During this special contract, terms and conditions of service shall be governed by the COOPERATIVE's Standard Rules and Regulations, which are on file with the Michigan Public Service Commission and which are incorporated herein by reference.

LAN011140294.1⁵⁷
58

LAN011140093.1¹
58²

14	Insertion	and provides
15-16	Change	"in paragraph 11.0 herein." changed to "in paragraph 10.0 herein."
17-18	Change	"Facilities. During the...the CUSTOMER will" changed to "Facilities. The CUSTOMER will"
19-20	Change	"located as shown on bid...2002 bid set drawings." changed to "located as they currently...of such facilities."
21-22	Change	"COOPERATIVE and SHALL be removed" changed to "COOPERATIVE and may be removed"
23	Insertion	this Agreement. CUSTOMER...distribution facilities.
24	Change	"COOPERATIVE during the term of this Agreement." changed to "COOPERATIVE."
25-26	Change	"CUSTOMER will pay a one and one-half percent (" changed to "CUSTOMER will pay five percent ("
27-28	Change	"percent (1.5%) per month" changed to "percent (5.0%) per month"
29-30	Change	"shall continue to be in...2006. This Agreement" changed to "shall continue for 24...approval. This Agreement"
31-32	Change	"CUSTOMER to choose its power" changed to "CUSTOMER to either (i)...its electric power"
33	Change	"power supplier" changed to "power supply from an...electric supplier"
34-35	Change	"supplier. In such event,...net depreciated cost." changed to "supplier, COOPERATIVE...Commission tariffs."
36-37	Change	"in paragraph 11 above, the" changed to "in paragraph 10 above, the"
38-39	Change	"in paragraph 11 above, the" changed to "in paragraph 10 above, the"
40	Deletion	In addition, the...unreasonably withheld.
41-42	Change	"pursuant to the rates,...from COOPERATIVE." changed to "pursuant to the...electric consumption."

43	Change	"(a) For all usage" changed to "For all usage"
44	Change	"For all usage other than... Enrgy charge" changed to "For all usage: Energy charge"
45	Insertion	\$0.0496/kWh.
46	Deletion	(b) Four outside...that outside lighting:
47	Deletion	50 watt lamp \$5.00 per month per lamp
48	Deletion	75 watt lamp \$7.00 per month per lamp
49	Deletion	100 watt lamp \$10.05 per month per lamp
50	Deletion	175 watt lamp \$10.30 per month per lamp
51	Deletion	250 watt lamp \$16.00 per month per lamp
52	Deletion	400 watt lamp \$20.00 per month per lamp
53-54	Change	"minimum term is until...31, 2006. Service shall" changed to "minimum term is 24 full... Service shall"
55-56	Change	"CUSTOMER to enter into...line services." changed to "CUSTOMER to either (i)...Commission tariffs."
57	Insertion	LAN01\140294.1
58	Insertion	ID\CMMA

Document comparison done by DeltaView on Tuesday, May 31, 2005 7:49:39 AM

Input	
Document 1	PowerDocs://LAN01/140093/1
Document 2	PowerDocs://LAN01/140294/1
Rendering set	Dykema

Legend	
Insertion	
Deletion	
Moved from	
Moved to	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Redline Summary		
No.	Change	Text
1	Deletion	LAN01\140093.1
2	Deletion	IDVAE
3	Insertion	1
4-5	Change	"LAN01\140093.1" changed to "LAN01\140093.2"
6-7	Change	"Agreement made March 31, 2003, by and between" changed to "Agreement made June __, 2005, by and between"
8-9	Change	"The CUSTOMER plans to...and operate a resort," changed to "The CUSTOMER operates a resort,"
10	Change	"a resort, presently...to be called The Great" changed to "a resort, called The Great"
11	Change	"facilities, to be located at US" changed to "facilities, located at US"
12-13	Change	"COOPERATIVE proposes to...electric distribution" changed to "COOPERATIVE has extended electric distribution"

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **GREAT**)
WOLF LODGE against **CHERRYLAND**)
ELECTRIC COOPERATIVE regarding the)
charging of an unauthorized rate and the terms)
of a proposed electric service contract.)
)
_____)

Case No. U-14593
(Paperless)

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

Mary E. Turney, being duly sworn, deposes and says that she is an employee of Clark Hill PLC, and that on June 23, 2006, she served a copy of the **PETITION FOR REHEARING BY GREAT WOLF LODGE OF TRAVERSE CITY, LLC** along with Proof of Service upon:
SEE ATTACHED SERVICE LIST

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

 Digitally signed by Mary E. Turney
DN: CN = Mary E. Turney, C =
US, O = Clark Hill
Date: 2006.06.23 14:53:59 -04'00'

Mary E. Turney

Subscribed and sworn to before me
this 23rd day of June, 2006.

 Digitally signed by Tema L. Crowell
DN: CN = Tema L. Crowell, C =
US, O = Clark Hill PLC
Date: 2006.06.23 14:54:48 -04'00'

Tema L. Crowell, Notary Public
State of Michigan County of Gratiot
My Commission Expires: November 16, 2012
Acting in Ingham County, Michigan

SERVICE LIST
MPSC CASE NO. U-14593

MPSC

Hon. Mark D. Eyster
Administrative Law Judge
Michigan Public Service Commission
6545 Mercantile Way, Ste. 14
Lansing, MI 48911

E-Mail: mdeyste@michigan.gov

Emmanuel B. Odunlami
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GREAT WOLF LODGE

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