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June 16, 2006

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

Re: Dominion Midwest Energy and Dominion Reserves, Inc. v. MichCon Gathering Company and Michigan Consolidated Gas Company, MPSC Case No. U-14754

Dear Ms. Kunkle:

Enclosed for electronic filing on behalf of Complainants in the above-captioned case is the Complainants' Response to Respondents' Motions to Strike. Also enclosed is a Proof of Service

Should you have any questions, please kindly advise.

Very truly yours,

LOOMIS, EWERT, PARSLEY,
DAVIS & GOTTING, P.C.

 Michael G. Oliva

Michael G. Oliva

MGO:kmc
Enclosures
cc w/ enc.: Parties of Record
Mark D. Eyster, A.L.J.

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of

DOMINION MIDWEST ENERGY, INC
and DOMINION RESERVES, INC.
Complainants

vs.

MPSC NO. U- 14754

MICHCON GATHERING COMPANY and
MICHIGAN CONSOLIDATED GAS COMPANY
Respondents

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
INGHAM COUNTY)

Karen Culton, being duly sworn, deposes and says that on June 16, 2006, she served a copy of **Complainants' Response to Respondents' Motions to Strike** upon the attached service list by electronic mail.

 **Karen Culton**
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Karen M. Culton

Subscribed and sworn to before me on
the 16th day of June, 2006.

 **Jennifer Ottney**
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Jennifer L. Ottney
Ingham County, Michigan
Acting in the County of Ingham
My commission expires: 10/02/10

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

DOMINION MIDWEST ENERGY, INC. and
DOMINION RESERVES, INC.,
Complainants,

vs

Case No. U-14754

MICHCON GATHERING COMPANY and
MICHIGAN CONSOLIDATED GAS COMPANY
Respondents.

**COMPLAINANTS' RESPONSE TO
RESPONDENTS' MOTIONS TO STRIKE**

DOMINION MIDWEST ENERGY, INC. and DOMINION RESERVES, INC.,
Complainants, respond to Respondents' Motions to Strike, as follows:

A. Response to Motion to Strike Prefiled Direct Testimony of Ray A. Barnhart

1. Page 4, lines 10-17

The testimony which Respondents seek to strike describes in general that MichCon entered into a number of ASATT and ASAT agreements with producers other than Dominion, characterizes them as being substantially similar, and identifies in particular ASAT #62500 between MichCon and Mercury Exploration Company dated January 1, 1998. (Proposed Exhibit DOM-5) Respondents argue that there has been no foundation laid for the basis of Mr. Barnhart's knowledge, and no foundation for the authenticity of ASATT #62500. The argument is puzzling. Mr. Barnhart's qualifications indicate that he has worked in the oil and gas industry in Michigan since 1982 for various companies, that he is responsible for all aspects of Dominion's Michigan operations, and that he is a director of the Michigan Oil & Gas Association and a member of the Oil and Gas

Advisory Committee of the Michigan Department of Environmental Quality. (Barnhart, p 1) Further, all of the agreements in question have been furnished by Respondents to Complainants on discovery. Respondents' motion seems to suggest that they will not agree to the authenticity of the very documents that they have furnished on discover!. Finally, the testimony sought to be stricken is basically identical to the allegations in Paragraphs 20 and 26 of the Complaint in this case, each of which were admitted in Respondents' Answer. (See Complaint, pp 4,5; Answer, pp 5-6).

2. Page 5, lines 15-16

The testimony which Respondents seek to strike relates to the profit which MichCon is realizing based on treating volumes of gas above the MDEQ. Respondents assert that the same is hearsay and lacks foundation. On the face of the statement sought to be stricken, the statement relates to Mr. Barnhart's personal knowledge, and not hearsay. Respondents are free to cross-examine Mr. Barnhart on the basis for his knowledge. What Respondents fail to advise the Commission is that Respondents asked Complainants on discovery the basis for those statements, and Respondents answered that the statements were based at least in part on admissions by MichCon's employee, Mr. Rowlings communicated directly to Mr. Barnhart in person. These fall within the party-opponent exception to the Hearsay Rule. MRE 801(d)(2). Clearly the testimony is relevant, because it shows the motivation for Respondents' discrimination against Complainants with respect to CO₂ processing standards.

3. Page 11, Lines 6-7

The testimony which Respondents seek to strike relates to statements made by MichCon's own employee in connection with the negotiations between Dominion and MichCon relating to the

dispute over processing, the insistence of Respondents that Complainants enter into a new ASAT or ASATT at a 0.75%, rather than 2% CO₂ level, and the retaliatory actions of MichCon in barring Complainants from nominating gas for delivery on the ConQuest EBB. Clearly, the same is relevant to the discriminatory and retaliatory actions of Respondents. That the same may be embarrassing to MichCon is immaterial. The purpose of the rule excluding inflammatory and prejudicial statements is related to the risk that a jury may be improperly swayed to base its decision on emotion, rather than on the evidence. See *People v Vasher*, 449 Mich 494 (1995) Whether to exclude such evidence is a matter for the sound discretion of the judge, and is not an absolute requirement. *People v Peterson*, 450 Mich 349 (1995) There is no basis to conclude that the Commission would be subject to being swayed by its emotions in a case like this.

B. Response to Motion to Strike Prefiled Direct Testimony of Bryan R. Bilderback

1. The Entire Direct Testimony

Respondents seek to strike all of the testimony of Mr. Bilderback because it is allegedly irrelevant and immaterial as being policy-oriented. The objection is without merit. Respondents cite no authority whatsoever to support the proposition that policy-oriented testimony is irrelevant. Complainants contend that Respondent Mich Con, and then Respondent MichCon Gathering unlawfully failed to file tariffs covering the rates, terms and conditions of service for transportation on the Antrim Expansion Pipeline. The Commission's Rules applicable to Act 9 pipelines clearly and unequivocally require that MichCon Gathering do so. (Rule 460.875) Respondents have offered testimony purporting to show that other pipelines have not filed such tariffs. If so, the Commission has apparently failed to enforce the requirements of its own rules on a consistent basis.

Clearly, it is relevant to the case to receive evidence as to why, from a policy standpoint, it is important for the Commission to enforce the rules which it has promulgated requiring the filing of such tariffs. It is also relevant to show the circumstances under which Respondents' discrimination against Complainants was able to take place, and the unlawful unilateral action of Respondents to attempt to change the quality specification standards mandated by the Commission because of the absence of tariffs clearly setting forth, on a non-discriminatory basis, all of the rates, terms and conditions of service for transportation of gas on the AEP.

C. Response to Motion to Strike Prefiled Direct Testimony of Sidney J. Jansma Jr

1. The Entire Direct Testimony

Respondents seek to strike all of Mr. Jansma's testimony on the basis that it constitutes parol evidence as to the meaning of ASATT #1 and the Dedication executed in connection therewith. Respondents claim that there is no evidence that the dedication is incomplete or ambiguous, or that there is a need to resort to extrinsic evidence to aid in its interpretation. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 315 (6th Cir. 1998) ("[I]n Michigan, where the contract is clear and unambiguous on its face, the parol evidence rule operates to preclude the introduction of evidence *dehors* the contract that would vary or contradict the contract's unambiguous terms.") (citing *Salzman v. Maldaver*, 315 Mich. 403, 412 (1946)); *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 422 (6th Cir. 1984) ("Michigan recognizes the parol evidence rule to the extent of not permitting extrinsic evidence to contradict or vary the terms of a written contract."); *Reed v. Reed*, 265 Mich. App. 131, 148 (2005) ("[A] party to a written contract that is clear and unambiguous may not vary its terms with parol evidence."); *Burkhardt v. Bailey*, 260 Mich. App. 636, 656-57,

appeal denied, 471 Mich. 920 (2004) (“[W]hen the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent.”); *Wausau Underwriters Ins. Co. v. Ajax Paving Indus., Inc.*, 256 Mich. App. 646, 650, *appeal denied*, 469 Mich. 970 (2003) (“Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent.”); *UAW-GM Human Resource Center v. KSL Recreation Corp.*, 228 Mich. App. 486, 491 (1998) (“[C]ourt[s] do[] not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.”) (citing *Sheldon-Seatz, Inc. v. Coles*, 319 Mich. 401, 406-07 (1947)); *Meagher v. Wayne State Univ.*, 222 Mich. App. 700, 722 (1997) (“Parol evidence is not admissible to vary a contract that is clear and unambiguous”); *In re Skotzke Estate*, 216 Mich. App. 247, 251 (1996) (“Where a contract is clear and unambiguous, parol evidence cannot be admitted to vary it.”).

Respondents contend that there is no ambiguity in the Dedication, and point out that there is an integration clause in the Dedication. This, they argue, bars all parol evidence. In one sense, this is merely a rehashing of the same arguments that Respondents made in connection with their motion to dismiss at the outset of the case, which motion was denied. There, Respondents contended that the Dedication for ASATT #1 was separate and apart from ASATT#1, notwithstanding that ASATT #1 expressly referenced and required that the Dedication be made in Article II thereof, and that the Dedication recites that the dedication is to confirm the transportation and treating of gas, which are defined in the ASATT, not in the Dedication.. Respondents contended that the Dedication was unambiguous, notwithstanding that in litigation before the Court of Appeals

and Michigan Supreme Court, they took precisely the opposite position as to the very same contracts, contending that the Dedications were inherently ambiguous, and could only be understood in reference to the ASATTs to which they relate. See *Dominion Resources v. Michigan Consolidated Gas Company*, Supreme Court No. 116616, MichCon Brief Opposing Application for Leave to Appeal (Attachment A to Dominion Response Opposing Motion for Summary Disposition).

And, as Complainants set forth in their Response opposing the Motion for Summary Disposition, it is clear that the Dedication executed in relationship to ASATT#1 is, on its face, silent as to the term of the dedication. Dominion contends that this is because ASATT#1 has an express term of 10 years, and that is the intended term of the dedication. Mr. Jansma's testimony goes to that intent. It does not seek to vary the terms of the Dedication; rather it explains a missing term. Complainants will show, based on the various ASAT and ASATT agreements and their associated dedications, that where MichCon and the producer intended a perpetual dedication, they said so explicitly in their agreements - even going so far as to amend prior dedications which, like that associated with ASATT #1, were silent as to term, so as to expressly provide for a "life of reserves" term. MichCon, on the other hand, has proffered testimony in which it seeks to explain why it would have wanted a "life of reserves" term for the dedication, and contends that the silence as to terms implies that there was an agreement to that effect. Clearly, there is an ambiguity created by the silence as to term, given the differing positions of the parties on the meaning of that silence, for which parol evidence is necessary. Accordingly, Mr. Jansma's testimony is clearly proper, and is not barred by the parol evidence rule.

D. Response to Motion to Strike Prefiled Amended Direct Testimony and Rebuttal

Testimony of Frank M. Murray

Prefiled Amended Direct:

1. Page 1, Line 1 through Page 7, Line 30

Respondents seek to strike all of Mr. Murray's Prefiled Amended Direct Testimony based on purported irrelevance. Respondents contend that Mr. Murray's discussion of treating services, CO₂ standards in the industry, and the process by which treated gas is blended with untreated gas is not material to any issue in the case. This is an astounding proposition. The testimony of Mr. Murray provides the necessary background information for the Commission to understand the context in which Respondents' are discriminating against Dominion with respect to CO₂ treating, and further explains the motivation for Respondents to do so, and to attempt to unilaterally impose more stringent quality standards on Dominion than it is imposing on other producers. These relate to the fact that MichCon is blending treated Antrim Gas with untreated Antrim Gas in order to meet the 2% CO₂ specification, as well as blending Antrim Gas with non-Antrim Gas, that MichCon lacks sufficient blending capacity, and that producers contracting directly with CMS Antrim for treatment has an adverse financial impact on MichCon. Clearly these are relevant to the case. Further, it is clear that Mr. Murray, as Commercial Director of CMS Enterprises, is responsible for CMS Enterprises natural gas business in Michigan, including the CO₂ treating operations of CMS Antrim Gas. He clearly has a basis for testifying as to such matters, as they are within the scope of his responsibilities in that capacity.

Prefiled Rebuttal Testimony

1. Page 1, Lines 15 though Page 3, Line 17.

The testimony sought to be stricken relates to the reasons for withdrawal of portions of Mr. Murray's initial testimony. Contrary to Respondent's argument, the reason for the withdrawal was not known at the time the original testimony was filed. Rather, as pointed out in the testimony sought to be stricken, Mr. Murray believed it necessary to revise his original testimony in light of efforts by Respondents in their own prefiled testimony and exhibits to inject into the case issues between CMS Antrim and MichCon not properly at issue in this case. As such, the testimony is entirely proper and relevant.

2. Page 4 Lines 1-22

The testimony which Respondents seek to strike is directly responsive to the statements of Respondents' witness, Mr. Percells. It shows that one of the premises of Mr. Percells' testimony as to the requirements of the MichCon gas transportation tariff and the practice thereunder is inaccurate, and directly contradicts the direct testimony of Mr Percells in that regard. As such it is appropriate rebuttal.

3. Page 4, Lines 23-30 and Page 5, Lines 1-6

The testimony which Respondents seek to strike is again directly responsive to the statements of Respondents' witness Mr. Percells. It shows that Mr. Percells' testimony is inaccurate as to the alternatives to blending and is proper rebuttal.

4. Page 5. Lines 7-18

The motion to strike contends that the testimony which is sought to be stricken relates to a

pipeline other than AEP. On the face of the testimony, it is directly about the AEP, not another pipeline.

5. Page 5, Lines 19-28

The testimony which Respondents seek to strike relates to Respondents having released a dedication for transportation and treatment. On the face of the testimony, it relates to a matter as to which Mr. Murray has personal knowledge, since it relates to a release directly affecting CMS Antrim's treating plant. It is also relevant, in that it shows that Respondents are discriminating against Complainants in maintaining that the dedication under ASATT #1 is perpetual, and refusing to release such alleged dedication, when Respondents have in the past released dedications when it served their interest - that is, allowing gas to be treated by their affiliates rather than by a third party.

6. Page 6, Lines 1-7

Respondents mischaracterize the testimony which they seek to strike. Mr Murray is not merely agreeing with Mr. Lyle. Rather, his testimony is proper rebuttal in that it further explains and clarifies the ownership situation with respect to the South Chester treating facilities.

7. Page 6, Lines 8-18

Respondents again mischaracterize Mr. Murray's testimony. It is proper rebuttal in that it clarifies the overall flow of gas into Kalkaska from not only the AEP, but also the Wet Header.

8. Page 8. Lines 5-16

The statements which Respondents seek to strike is directly responsive to Mr. Lyle's testimony regarding the alleged right of Respondents to impose a different treating requirement on Dominion than on other shippers. The testimony also relates to the actions of MichCon Gathering discriminating against Dominion in permitting amendments to other ASAT agreements for other shippers without imposing a more stringent treating standard that it seeks to impose on Dominion

9. Page 8, Line 20

Complainants rely on their response to Paragraph No. 5 above.

10 Page 8. Lines 19-30 and Page 9, lines 1-4

Complainants rely on their response to Paragraph No. 8 above.

Respectfully submitted
DOMINION RESERVES, INC.
DOMINION MIDWEST ENERGY

Dated: June 16, 2006

By:

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