

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of
CONSUMERS ENERGY COMPANY
for a Financing Order Approving the Securitization
of its Regulatory Assets and other Qualified Costs.

Case No. U-12505 (efile)

**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
MOTION TO STRIKE REBUTTAL TESTIMONY OF NICHOLAS PHILLIPS, JR.**

The Michigan Public Service Commission Staff (Staff), pursuant to MCR 2.115(B) and the Rules of Practice and Procedure Before the Michigan Public Service Commission (MPSC) moves to strike portions of the Association of Businesses Advocating Tariff Equity's (ABATE) witness, Nicholas Phillips, Jr.'s rebuttal testimony.

1. The Staff moves to strike page 2, line 10 through page 9, line 20, of Nicholas Phillip's rebuttal testimony as this proposed rebuttal testimony is improper rebuttal testimony.
2. Significant portions of Mr. Phillips' broad-sweeping testimony are offered not in an effort to contradict, explain or disprove, specific evidence produced by the Staff with an intention to directly weaken or impeach that evidence. Rather, the testimony is offered in an effort to present supplemental and/or to rehabilitate the direct testimony of Mr. Phillips relating to the method of recovering securitization costs. Large portions of this claimed rebuttal is a repeat of the original testimony of Mr. Phillips. This is improper rebuttal, it is testimony which was or could have been reasonably presented in ABATE's direct case, the testimony should be stricken.
3. The Commission has repeatedly held that rebuttal evidence is evidence given by one party to contradict, explain or disprove evidence produced by another party intending to

directly weaken or impeach that evidence. In *In Re Midland Cogeneration Venture Limited Partnership*, Case No. U-887 1; 99 PUR 4th 349 (January 31, 1989), the Commission defined rebuttal evidence as follows:

The Michigan Court of Appeals defined rebuttal evidence as that evidence **given by one party to contradict, explain or disprove evidence produced by the other party and tending to directly weaken or impeach that evidence. Further, weather evidence that could have been offered in a party's case in chief may be given in rebuttal is a matter within the discretion of the trial court. *Kirk v Ford Motor Co.*, 147 Mich App 337 (1985), *app lv den* 426 Mich 866 (1986). 99 PUR 4th at 399.**

The Commission also favorably cited the ALJ's comments relating to the appropriate scope of rebuttal testimony. The ALJ had stated:

First of all, I would advise the parties to consider what rebuttal is and what it means, and if necessary, go back to the legal statements as to what rebuttal is and to confine their rebuttal to just that. **It should not be for the purpose of rehabilitating someone's direct case. It should be very clear in that rebuttal testimony what is being rebutted in someone else's case so that we can easily determine that it is in the nature of rebuttal. Rebuttal should also be – in my mind should be concise and to the point. It should not be broad, sweeping-type testimony like we've seen in the initial phase of the case. In other words, it's for the purpose of rebutting specific facts, judgments of the other parties that could not have been reasonably done with your direct case. 99 PUR 4th at 300. (Emphasis supplied).**

Thus, to be appropriate rebuttal evidence, the evidence must contradict, explain or disprove evidence produced by another party **and tend to directly weaken or impeach that** evidence. It should not be for the purpose of rehabilitating ABATE's direct case. It should also be concise and to the point and should not contain evidence which reasonably could have been presented in the direct case.

While authority exists for the proposition that the ALJ has discretion to allow rebuttal evidence that could have been offered in a party's direct case in chief, this discretion should not be exercised in favor of the ABATE under the circumstances of this case.

4. The Staff testimony in support of Consumers Energy's proposal to use a "per kWh charge" to recover securitization amounts was brief:

Staff also supports Consumers' proposal to use a per kWh charge to recover securitization amounts. (Ballinger Direct Testimony, p. 2).

Q Does Staff agree with Consumers witness Ernst proposed use of a per kWh charge for securitization recovery?

A Yes, it does. Staff favors use of a per kWh charge because it should aid in the reconciliation of the securitization charges in the periodic true-ups that are required in Act 142 under Section 10k. (3).

(Ballinger Direct Testimony, pp. 15-16).

5. Staff testimony is brief and supports the use of a "per kWh charge" because it should aid in the reconciliation of the securitization charge.

6. The rebuttal testimony offered by Mr. Phillips reinforces and supplements the testimony of Mr. Phillips at page 8, line 27 to page 14, line 4 of his direct testimony. This direct testimony addresses Consumers Energy's position of using a uniform securitization charge for all rate classes and sets forth reasons why it is not appropriate. The rebuttal testimony does not specifically address the only comment of Staff, that use of a uniform charge should aid in reconciliation of the securitization charge. Ignoring Staff's one comment shows that the purpose of this testimony is to rehabilitate and supplement ABATE's direct testimony in opposition to a per kWh charge.

7. ABATE has used the limited Staff comment in support of a uniform charge to supplement the original testimony of Mr. Phillips by adding seven pages of additional reasons in the form of testimony why it opposes the Consumers Energy proposal.

8. Proper rebuttal would have addressed the benefits of using a per kWh charge in reconciliation matters.

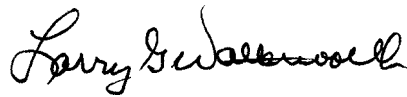
9. There has been no testimony presented which rebuts specific facts or judgments of Staff. Further, no testimony is presented which weakens or impeaches Staff's comments.

Relief

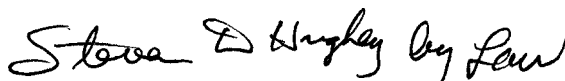
Staff respectfully requests the above-mentioned rebuttal testimony be stricken.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**



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DATED: August 22, 2000
u12505/Motto Strike

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**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
BRIEF IN SUPPORT OF
MOTION TO STRIKE REBUTTAL TESTIMONY OF NICHOLAS PHILLIPS, JR.**

Facts

Consumers Energy filed testimony which advocates a uniform kWh charge to recover securitization amounts.

In reply to this position, Nicholas Phillips, Jr., on behalf of ABATE, filed direct testimony opposed to a uniform energy charge. This testimony is contained at pages 8-14 of Mr. Phillips' direct testimony.

Staff filed testimony indicating that it supported Consumers Energy's use of a uniform kWh charge to recover securitization costs. Staff believes and indicated use of a uniform charge should aid in the reconciliation of the securitization charges in periodic true-ups required by Act 142 under section 10k(3). (Ballinger Direct Testimony, pp. 15-16).

Rebuttal testimony was filed by Mr. Phillips on August 4, 2000 to rebut the Staff position. Staff does not believe the testimony offered by Mr. Phillips is proper rebuttal of the Staff's testimony. Mr. Phillips' rebuttal testimony is not proper rebuttal testimony and should be stricken.

Argument

It has been established in Michigan that to constitute proper rebuttal evidence, the testimony offered must rebut specific facts or judgments of other parties and tend to weaken or

impeach the other parties' evidence. In *Kirk v Ford Motor Co*, 147 Mich App 337,345; 383 NW2d 193 (1985) *lv den* 426 Mich 866 (1986), the Court stated:

The rule of rebuttal evidence is stated in *People v Utter*, 217 Mich 74, 83; 185 NW 830, 833-834 (1921):

Rebuttal evidence is broadly defined as that given by one party to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. In **paractical** [sic] application the line of demarcation between rebuttal evidence and that which should properly be given in chief before the prosecution rests is frequently more or less obscure, and it is a general rule that whether evidence which could have been offered before resting may be given in rebuttal is a matter within the discretion of the trial court.

Similarly, the Court in *Gonzales v Hoffman*, 9 Mich App 522,530; 157 NW2d 498 (1968) defined rebuttal testimony as:

Rebuttal evidence is that which explains, contradicts, or otherwise refutes defendant's evidence. Its purpose is to cut down defendant's case and not merely to confirm that of plaintiff. *Van Tassel v Patterson*, 235 Minn 152, 160; 50 NW2d 113,117 (1951).

At 75 American Jurisprudence 2d, §§ 365,373 and 374, rebuttal is discussed:

§ 365. Generally; impeachment distinguished

Rebuttal is evidence given to prove, disprove, explain, repel, or contradict the evidence of the adversary party.

* * *

§ 373. Evidence in chief on rebuttal

Generally, a party holding the affirmative of an issue is bound to present all of the evidence on the case in chief, before the close of the proof, and may not add to it by the device of rebuttal. Thus, rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and consist of nothing which could have been offered in chief.

* * *

§ 374. Rebuttal to bolster evidence in chief

Rebuttal is not intended to give a party an opportunity to tell his story twice or to present evidence that was proper in the case in chief. Thus, rebuttal should not be used as a corroboration, reiteration, or repetition of the plaintiffs case in chief. Thus, evidence which is merely cumulative, adding nothing further to the position

taken by previous witnesses, which merely bolsters or supplements that already adduced by the plaintiff, is not admissible as rebuttal. (Footnotes omitted.)

Staff moves to strike the portions of the rebuttal testimony of Mr. Phillips as outlined in the motion. The basis for this motion is the proposed testimony does not rebut the testimony presented by Mr. Ballinger. To the contrary, Mr. Phillips' testimony simply attempts to provide the substance to his direct presentation. This testimony is a mere confirmation or supplementation of his earlier testimony and should not be permitted to stand.

Staff witness Ballinger agreed with a uniform charge as he believed a uniform charge would make aid in a reconciliation proceeding. The proposed rebuttal ignores this position and therefore does not rebut any of the Staff testimony.

Relief

WHEREFORE, the Michigan Public Service Commission Staff respectfully requests page 2, line 10 through page 9, line 20 of Mr. Phillips' rebuttal testimony be stricken.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
S T A F F**



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DATED: August 22, 2000
u12505/Brf in Supt of Mot

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

TINA L. BIBBS, being first duly sworn, deposes and says that on August 22, 2000, she served a true copy of **MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S MOTION TO STRIKE REBUTTAL TESTIMONY OF NICHOLAS PHILLIPS, JR. and MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S BRIEF IN SUPPORT OF MOTION TO STRIKE REBUTTAL TESTIMONY OF NICHOLAS PHILLIPS, JR.** upon the parties listed on the attached Service List by depositing the same in a United States postal depository enclosed in an envelope bearing postage fully prepaid, **AND VIA E-MAIL** plainly addressed as follows:

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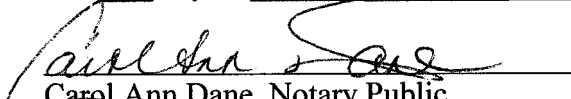
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TINA BIBBS

Subscribed and sworn to before me

this 22nd day of August, 2000.


Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 07-23-2004