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March 2, 2001

Ms. Dorothy Wideman  
Executive Secretary  
Michigan Public Service Commission  
6545 Mercantile Way, Ste. 7  
Lansing, MI 48911

Re: Case No. U-12656, et al  
Restructuring Plans  
Cooperatives' Reply to Staff's Brief

Dear Ms. Wideman:

Enclosed please find three originals (for each of the dockets U-12656, U-12657 and U-12658) and four copies of Cooperatives' Reply to Staff's Brief Re Partial Summary Disposition on Aggregation Issue in the above-referenced matter. Also enclosed is Proof of Service upon the Parties of Record.

If there are any questions or comments, do not hesitate to contact me.

Sincerely,

DYKEMA GOSSETT PLLC

*Christine Mason Soneral*  
Christine Mason Soneral

CMS/jmb  
Enclosures

cc: Don Wozniak, Tom Anderson  
Jon Bellgowan  
Bruce King  
Steve Boeckman  
Scott Braeger  
Marty Thomson  
Michael Nickerson

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of Cloverland Electric Cooperative's )  
compliance filing relative to the restructuring plan )  
required by 2000 PA 141 and the Commission's ) Case No. U-12656  
June 19, 2000 opinion and order in Case No. U-12464. )  
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In the matter of Presque Isle Electric & Gas Co-op's )  
compliance filing relative to the restructuring plan )  
required by 2000 PA 141 and the Commission's ) Case No. U-12660  
June 19, 2000 opinion and order in Case No. U-12464. )  
\_\_\_\_\_ )

In the matter of HomeWorks Tri-County Electric )  
Cooperative's compliance filing relative to the )  
restructuring plan required by 2000 PA 141 and ) Case No. U-12661  
the Commission's June 19, 2000 opinion and order )  
in Case No. U-12464. )  
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COOPERATIVES' REPLY TO STAFF'S BRIEF  
RE PARTIAL SUMMARY DISPOSITION ON AGGREGATION ISSUE

Cloverland Electric Cooperative in Case No. U-12656, Midwest Energy Cooperative in Case No. U-12657, Cherryland Electric Cooperative in Case No. U-12658, Great Lakes Energy Cooperative in Case No. U-12659, Presque Isle Electric & Gas Co-op in Case No. U-12660, and HomeWorks Tri-County Electric Cooperative in Case No. U-12661, (*collectively "the Cooperatives"*), by their attorneys, DYKEMA GOSSETT PLLC, respectfully submit this brief in reply to Staff's Motion for Partial Summary Disposition ("*Staff's motion*").

### **INTRODUCTION**

As the Cooperatives stated in their initial brief, this motion concerns the statutory interpretation of 2000 PA 141 ("*the new Act*"). Section 10x(1) of the new Act, MCL 460.10x(1); MSA 22.13(10x)(1), provides:

The commission shall not require a cooperative electric utility to provide its retail customers the ability to choose an alternative electric supplier before January 1, 2005, nor unbundle its rates as required under section 10b before July 1, 2004. Any retail customer of a cooperative with a peak load of 1 megawatt or greater shall be provided the opportunity to choose an alternative electric supplier no later than January 1, 2002.

The motions consider whether, under §10x(1), the electric cooperatives *must* permit customer aggregation (*i.e.*, the combination of multiple customers' electric loads from multiple sites) so customers can collectively meet the 1 MW load threshold and attain early eligibility for customer choice, *i.e.*, earlier than January 1, 2005.

As articulated in its initial brief, Commission Staff ("*Staff*") believes the new Act *requires* the Cooperatives to permit aggregation of their customers prior to January 1, 2005. Noticeably absent from Staff's brief, however, is any statutory language which supports this position. Instead, Staff seeks to rely upon definitions contained in Commission promulgated rules

and the fact that this Commission previously considered the customer choice environment when interpreting its own rules.

Staff's analysis fails to acknowledge the new Act's *unambiguous language* which unequivocally establishes that *aggregation is permissive rather than mandatory*. Furthermore, Staff's analysis ignores fundamental rules of statutory construction which obligate the Commission to apply the statute as written. Accordingly, the Commission must reject Staff's position and grant summary disposition in the Cooperative's favor.

### ARGUMENT

#### A. The New Act's Language Establishes That Aggregation Is Not Mandatory

Staff's brief ignores a fundamental rule of statutory interpretation -- if a statute's plain and ordinary language is clear, judicial construction is neither necessary nor permitted. *In re Approximately Forty Acres in Tallmadge Twp*, 223 Mich App 454, 460; 566 NW2d 652 (1997). Consequently, to the extent that §10x(1)'s language is unambiguous, this Commission is *obligated* to effectuate legislative intent and apply the statute as written.

A review of the language in §10x(1) on a phrase-by phrase basis unambiguously demonstrates that the Legislature did not intend to *require*<sup>1</sup> that Cooperatives permit customer aggregation prior to January 1, 2005. To begin with, the first phrase of §10x(1) provides:

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<sup>1</sup> The Cooperatives submit that aggregation is permissive and thus, to the extent that any cooperative chooses to have a tariff providing for the "consolidation" of service requests, there is no inconsistency with §10x(1). At page 4 of its brief, Staff argues that aggregation would be consistent with Wolverine Power Supply Cooperative's ("*Wolverine*") open access transmission tariff which was submitted in Docket No. ER01-296-000, as reflected in the December 29, 2000 FERC Order. This argument is completely irrelevant, however, since (1) Wolverine is regulated by FERC and is not under this Commission's jurisdiction, and (2) as a result of its regulation by FERC, different statutes are applied to Wolverine.

The commission shall not require a cooperative electric utility to provide its retail customers the ability to *choose an alternative electric supplier* before January 1, 2005 . . . [emphasis added].

Thus, under the first phrase, the Commission is explicitly prohibited from requiring a cooperative to provide its customers the opportunity to choose an alternative electric supplier (“AES”) prior to January 1, 2005.

With respect to aggregation, the new Act’s *sole reference* is in §10bb, MCL 460.10bb(1); MSA 22.13(10bb)(1), which limits aggregation to services *purchased from an AES*<sup>2</sup>:

Aggregation may be used for the purchasing of electricity and related services *from an alternative electric supplier*. [emphasis added].

Taken together, the first phrase of §10x(1) and §10bb make it crystal clear that this Commission must reject Staff’s position. Staff’s approach would require aggregation (which can only be through an AES) even though no cooperative may be required to provide access to an AES prior to January 1, 2005.

A review of the second phrase of §10x(1) also demonstrates that the Legislature did not intend to *require* that Cooperatives permit customer aggregation prior to January 1, 2005. The second phrase of §10x(1) declares that the unbundling of rates may not be required before July 1, 2004:

The commission shall not require a cooperative electric utility to . . . *unbundle its rates as required under section 10b* before July 1, 2004. . . .

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<sup>2</sup> Staff references §10bb at page 3 in support of the proposition that the new Act contemplates the concept of aggregation. Staff fails to mention that the statute expressly limits aggregation to services “purchased from an AES.”

As noted in the Cooperatives' initial brief, if, hypothetically, 30,000 residential cooperative customers were allowed to aggregate prior to January 1, 2005, the cooperative would need unbundled residential rates prepared and approved. This is clearly contrary to the new Act.

Finally, the last sentence of §10x(1) provides another example of how aggregation cannot possibly be mandatory:

Any retail *customer* of a cooperative with a peak load of 1 megawatt or greater shall be provided the opportunity to choose an alternative electric supplier no later than January 1, 2002. [emphasis added].

First, the word "customer" is singular. An aggregation of customers would not be a single "customer." If the Legislature had intended to permit aggregation, the Legislature would have written the provision to include "any customer or customers." Staff attempts to argue that the Commission is not precluded from requiring the Cooperatives to permit aggregation simply because the reference in §10x(1) is to "customer" in the singular. In support of this argument, Staff urges the Commission to consider the current customer choice environment when interpreting this phrase - -similar to the Commission's approach in U-12316 when it interpreted its own Rule 411, R 460.3411- - and to consider the phrase in light of the Commission's definition of "customer" in R 460.3102(2). What Staff fails to recognize, however, is that this case deals with *statutory interpretation* as opposed to the *interpretation of the Commission's own rules*. Consequently, it is neither necessary nor appropriate to look to Commission promulgated rules and/or their interpretations for guidance in determining the meaning of §10x(1). Instead, this Commission is *obligated* to apply the statute's plain language as written.<sup>3</sup> As the Michigan

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<sup>3</sup> The Cooperatives submit that the Commission has previously recognized and applied the statute's plain language. As the Cooperatives set forth in their initial brief, the Commission's Order in Case U-12464 was notable in two respects. First, similar to the language contained in the statute's exception, the Commission's Order uses the word "customer" in the singular. Second, the Commission clearly limited the need

Supreme Court recently stated in *Chandler v Dowell Schlumberger*, 456 Mich 395, 398; 572 NW2d 210 (1998), “where the legislative intent is clearly expressed, it is entitled to the utmost respect.”

Second, the language in the last phrase of §10x(1) explicitly states that choice must be offered to a cooperative’s *retail customer* with a peak load of 1 MW or greater. This language further confirms that aggregation is not mandatory since, and as discussed above, an entity that aggregates multiple customers in order to meet the 1 MW requirement would have to be an AES, and by its very nature, *not a retail customer* of the cooperative. Although the entity may represent customers of the cooperative or it may purchase wholesale power for the cooperative’s retail customers, the entity itself could not be a retail customer of the cooperative. Instead, the entity would need some legal structure in order to contract with its own customers and the cooperative.

Additional support for the proposition that the statute’s plain language does not contemplate aggregation is the fact that last sentence of §10x(1) requires the single retail customer to have “a peak load of 1 megawatt or greater.” The phrase “a peak load” refers to a *single* peak load. Similar to its selection of the word “customer,” if the Legislature had intended to permit aggregation prior to January 1, 2005, the Legislature would have written the provision in the plural rather than the singular. As such, this language establishes that the Legislature never intended to make aggregation mandatory under §10x(1).

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to file for any “cooperative electric utility with *any customer* having a peak load of one megawatt or more” and deferred such a filing for any “cooperative that does not have *a customer* with a peak load of one megawatt or more.” June 19, 2000 Order, U-12464, *In the matter, on the Commission’s own motion, of the implementation of 2000 PA 141*, p 2.

**B. Staff's Position Would Render The Statute's General Rule Meaningless**

As discussed in the Cooperative's initial brief, rules of statutory construction dictate that one must avoid statutory interpretation which yields internal inconsistency or renders any part of the statute surplusage or nugatory. *In re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d (1999); *Piper v Pettibone Corp*, 450 Mich 565; 542 NW2d 269 (1995). In addition, exceptions to general rules are typically narrowly construed in order to preserve the primary operation of the provision. *Commissioner of Internal Revenue Service v Clark*, 489 US 726, 738; 109 S Ct 1455 (1989).

In order to accept Staff's position, this Commission would have to violate these two fundamental rules of statutory construction. For example, the first sentence of §10x(1) contains the general rule that cooperatives cannot be required to provide choice to customers until January 1, 2005, or unbundle its rates before July 1, 2004:

The commission *shall not* require a cooperative electric utility to provide its retail customers the *ability to choose* an alternative electric supplier *before January 1, 2005, nor unbundle its rates* as required under section 10b *before July 1, 2004*. [emphasis added].

If cooperatives are required to permit aggregation, the cooperatives would essentially be forced to provide choice to *all customers* before January 1, 2005 and the general rule would be rendered meaningless.

Further, in order to provide service to retail customers *vis a vis* aggregation, a cooperative would be forced to unbundle its rates. Otherwise, if rates were not unbundled, it would be impossible to allocate the distribution, transmission and generation charges. As this is patently inconsistent with the statute's plain language that no rate unbundling is required before July 1, 2004, aggregation cannot possibly be a mandatory requirement.

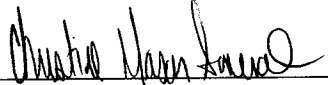
## CONCLUSION

The Cooperatives submit that the Commission cannot *mandate* that electric cooperatives permit customer aggregation in order for customers to meet the 1 MW threshold. To hold otherwise, and adopt Staff's position, would bypass the Legislature's intent as expressed by statute's plain and unambiguous language, render the provision inconsistent, conflict with prior Commission orders, and unnecessarily complicate implementation of the new Act. Accordingly, the Cooperatives request that the Commission grant summary disposition on this issue in their favor.

Respectfully submitted,

CLOVERLAND ELECTRIC COOPERATIVE,  
MIDWEST ENERGY COOPERATIVE  
CHERRYLAND ELECTRIC COOPERATIVE,  
GREAT LAKES ENERGY COOPERATIVE,  
PRESQUE ISLE ELECTRIC & GAS CO-OP, and  
HOMEWORKS TRI-COUNTY ELECTRIC  
COOPERATIVE,

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Dated: March 2, 2001

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PROOF OF SERVICE

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