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Via Electronic Mail and
Overnight Mail

May 12, 2003

Ms. Dorothy Wideman, Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, Michigan 48909-7721

Re: MPSC Case No U-13715

Dear Ms. Wideman:

Please find enclosed the Reply Brief of The Kroger Company and the Proof of Service filed in the above captioned matter.

Please place this document of file. Thank you for your assistance in this matter.

Very truly yours,

Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Enclosure

cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by regular mail (unless otherwise noted), and electronic mail this 12th day of May 2003.

Hon. James N. Rigas Administrative law Judge 6545 Mercantile Way, Suite 14 P.O. Box 30221 Lansing, MI 48909	Mr. Eric J. Schneidewind Varnum, Riddering, Schmidt & Howlett, The Victor Center, Suite 810 201 N. Washington Square Lansing, MI 48933 (Via Overnight Mail and E-Mail)	Richard Polich Energy Options & Solutions P.O. Box 3522 Ann Arbor, MI 48106-3522
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Michael L. Kurtz, Esq.

**STATE OF MICHIGAN
BEFORE THE PUBLIC UTILITIES COMMISSION**

In The Matter Of Application Of The Consumers Energy Company for : **Case No. U-13715**
A Financing Order Approving the Securitization of Certain of its :
Qualified Costs :

PROOF OF SERVICE

Michael L. Kurtz, Esq. duly sworn, deposes and says that on this 12th day of May, 2003 he served a paper copy by regular mail of the Reply Brief of The Kroger Company and a copy of this proof of service upon those individuals listed on the attached service list.

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Subscribed to and sworn before me
this 12th day of May, 2003.

Notary Public

**STATE OF MICHIGAN
BEFORE THE PUBLIC UTILITIES COMMISSION**

**In The Matter Of Application Of The Consumers Energy Company for : Case No. U-13715
A Financing Order Approving the Securitization of Certain of its :
Qualified Costs :**

**REPLY BRIEF OF
THE KROGER CO.**

I ARGUMENT

1. Consumers Financial Condition Has Recently Improved So Much That Securitized Financing May Provide No Advantage Over Conventional Financing.

In its Main Brief the Kroger Company (“Kroger”) informed the Michigan Public Service Commission (“Commission”) of important new financial information learned at the hearing. That is:

- At the time the securitization case was filed Consumers Energy’s (“Consumers”) conventional borrowing costs for five to ten years was 7 - 8%. (T.E. 846);
- At the hearing the Executive Director of Corporate Finance for CMS Enterprises Company, Mr. Murphy, testified that Consumers could now borrow conventionally for 4.5% - 5.5%. (T.E. 845-6).
- The interest rate assumed in the Securitization II filing for a 14 year term beginning January 2004 was 5.06% - 5.08%. The interest rate for securitization for a 14 year term beginning April 2003 would be about 4.5%. (T.E. 853-4).

Therefore, at the hearing it was learned that conventional financing costs were expected to be about equal to securitized financing costs. This was confirmed after the hearing. On May 1, 2003, Consumers put out the following press release:

“CMS Energy (NYSE-CMS) announced today that its principal subsidiary, Consumers Energy, has issued \$625 million of first mortgage bonds in a private offering to institutional investors in two separate series. Net proceeds to Consumers Energy were approximately \$619 million and were used today to redeem \$250 million of senior notes due in 2008. The remaining proceeds will be used for general corporate purposes that may include paying down additional debt. Series A was \$250 million of 4.25 percent coupon bonds due in April 2008. Series B was \$375 million of 5.375 percent coupon bonds due in April 2013. Lead managers were Banc One Capital Markets, Inc. and Barclays Capital. Co-managers included JPMorgan, Comerica Securities and Wachovia Securities.

‘We are pleased with the strong response to this bond offering. The high level of interest indicates that investors are beginning to recognize the progress we are making with our back-to-basics strategy.’ said Thomas J. Webb, CMS Energy’s executive vice president and chief financial officer.”

Securitized financing requires an irrevocable regulatory pledge for 14 years, tens of millions of dollars in investment banking and legal fees, substantially complicates the ratemaking process, and could be detrimental to the ROA program. Securitized financing should only be used if it is clearly less expensive than conventional financing. That is not now the case. Therefore, the Commission needs to very closely examine whether securitized financing is desirable.

2. The Consumers’ Proposal To Force ROA Customers To Pay For Generation Costs Twice Is Anti-Competitive And Could Kill The ROA Program

According to the Direct Testimony and Briefs of Kroger, Energy Michigan, and the Michigan Attorney General securitization could kill ROA if ROA customers are required to pay for the cost of generation twice: once from their alternative energy suppliers and again from Consumers through a securitization charge. (T.E. 517, 524, 525, 527-8, 771-75, 37, 42 and 45).

Consumers did not deny this very serious charge in its Rebuttal Testimony. Nor did the Company address this allegation in its Main Brief.

The Company's hostility to the ROA program is understandable. But the Commission's charge is to "*foster competition*". MCL 460.10(2) states that the purpose of Acts 141 and 142 is: "*(b) To allow and encourage the Michigan Public Service Commission to foster competition in this state in the provision of electric supply and maintain regulation of electric supply for customers who continue to choose supply from incumbent electric utilities.*"

It would be ironic and perverse if securitization, which is a tool to be used to help promote the development of a competitive market, were instead used as a weapon to kill it.

3. **The Commission Should Order A Securitization Offset For Current ROA Customers In This Case.**

At pages 8-11 of its Main Brief, Kroger described its securitization offset proposal which would:

- 1) allow bundled ratepayers to receive the benefits (if any) of cost effective securitization projects; and
- 2) prevent current ROA customers from being double charged for new generation costs, thus maintaining the viability of the ROA program.

At page 34 of its Brief, Consumers argued that it was premature to address this issue now and that it should be taken up in the next rate case. This suggestion should be rejected.

The Company's suggestion to defer the ROA securitization offset issue until some undefined future date is unreasonable. This is the very type of uncertainty which will have a chilling effect on competition. ROA customers have a right to know today whether they face a generation double charge through securitization as this will affect shopping decisions. The record is set. Everything that needs to be known is known. There is no reason to delay.

The Company's proposal is also unreasonable because it is indefinite. The Company has requested an offset for Securitization II for all customers through December 31, 2005 and has implied that new base rates will be effective on January 1, 2006. But the Company would not commit to filing a base rate case in 2005 for new rates to be effective in 2006. (T.E. at 882-83). Therefore, under its "*deal with it later*" approach, the Company may win by default.

While Kroger does not object to the securitization offset being applied to both current and future ROA customers, we hasten to point out that there are valid reasons for distinguishing between the two. Our proposal would have the securitization offset apply only to current ROA customers.

In the case of current bundled service customers who become tomorrow's ROA customers, Consumers can more credibly claim that its recent generation expenditures are akin to historic stranded cost. That is, the expenditures were incurred and securitization requested prior to these customers taking ROA service. Indeed, Consumers can rightfully claim that the costs have been incurred to serve these customers' needs as bundled customers. Requiring these customers to share in the securitization costs would be consistent with the Commission's past policy to allow recovery from ROA customers of historic stranded cost. However, any securitization charges to be paid by future ROA customers should be subject to mitigation. Mitigation can occur through native load growth, increased margin from third party (off-system) sales, and otherwise. Mitigation can be incorporated by recognizing any negative stranded cost as a credit toward the securitization charge for future ROA customers.

Because the Kroger proposal differentiates between current ROA customers and some unknown number of future ROA customers the magnitude of the proposal is not open ended and is relatively modest. Therefore, the Kroger proposal should not affect the marketability of the securitized bonds. (T.E. at 399).

II CONCLUSION

WHEREFORE, for the reasons set forth herein, Kroger requests that this Honorable Commission order that:

- 1) The securitization offset proposed by Kroger be adopted so that current ROA customers are not double charged for generation; and

- 2) If the securitization offset proposal cannot be implemented, then the entire securitization application should be rejected.

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May 12, 2003