CLARK HILL
PLC
ATTORNEYS AT LAW

212 East Grand River Avenue
Lansing, Michigan 48906-4328
Tel. (517) 318-3100 ▪ Fax (517) 318-3099
www.clarkhill.com

Don L. Keskey
Phone: (517) 318-3014
E-Mail: dkeskey@clarkhill.com

January 18, 2005

Ms. Mary Jo Kunkle, Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911

Re: **Detroit Edison Company, MPSC Case No. U-13808**

Dear Ms. Kunkle:

Enclosed please find the **RESPONSE of MICHIGAN ENVIRONMENTAL COUNCIL AND THE PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN IN OPPOSITION TO PETITION FOR REHEARING OF THE DETROIT EDISON COMPANY** along with a Proof of Service showing service on all parties in the above case. These documents have been filed electronically with the Michigan Public Service Commission's Electronic Case Filing System.

Very truly yours,

CLARK HILL PLC

Don L. Keskey

DLK:pat
Enclosures

cc: Parties of Record

3353479v1
21483/094567

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of the Application of THE DETROIT EDISON COMPANY to increase rates, amend its rate schedules governing the distribution and supply of electric energy, implement Power Supply Cost Recovery plans, factors and reconciliations in its rate schedules for jurisdictional sales of electricity and for miscellaneous accounting authority and regulatory asset recovery.	)))))))))	Case No. U-13808

RESPONSE OF MICHIGAN ENVIRONMENTAL COUNCIL AND THE PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN IN OPPOSITION TO PETITION FOR REHEARING OF THE DETROIT EDISON COMPANY

The Michigan Environmental Council ("MEC") and the Public Interest Research Group In Michigan ("PIRGIM") file this response in opposition to the December 27, 2004 Petition for Rehearing filed in this case by the Detroit Edison Company ("DECo"). DECo's petition seeks rehearing of the November 23, 2004 order of the Michigan Public Service Commission ("MPSC or Commission") in this case. MEC and PIRGIM will focus on one issue in this response.

MEC and PIRGIM supports as lawful and reasonable the Commission's order rejecting the entirety of DECo's request to include in regulated electric rates any portion of the "control premium" that its parent, DTE, paid for the acquisition of the Michigan Consolidated Gas Company ("MichCon") over book value. MEC and PIRGIM first assert that the Commission is without jurisdiction to include in DECo's regulated electric rates any amount of the control premium incurred by the separate actions and decision-making of DTE, the parent company, in making its corporate acquisition of MichCon. *Consumers Power v PSC*, 460 Mich 148 (1999);

Union Carbide v PSC, 431 Mich 135 (1988); *Detroit Edison v PSC*, 221 Mich App 370 (1997). DTE made its acquisition decisions wholly on its own, as a corporate entity separate from DECo, and received no advance indication or contemplation that any portion of its premium paid for MichCon would be includable in electric rates. The Commission should not now retroactively grant the parent company this unwarranted bonus, which has nothing to do with the provision of electric service by DECo.

Neither the statutes outlining the cost elements to be considered in the Commission's cost of the service ratemaking process, such as Section 7, MCL 460.557, nor judicial precedent cited above, supports the inclusion of a "control premium" paid by an unregulated parent company in the electric rates of a regulated utility such as DECo.

Moreover, DECo has no independent control over this decision by DTE, its parent company, to attempt to foist upon DECo or its ratepayers this unwarranted addition to rates. If DECo were a separate independent entity, DECo would not allow such a result. In situations where no arms-length bargaining can occur, the Court in *Mich Bell v Public Service Comm,* 185 Mich App 163 (1978) observed:

> Even though centralized development may be a very good bargain, it does not necessarily follow that the commission is wrong in its treatment of BIS payments. Because the BIS contract is among affiliated companies, it is not necessarily a result of arms-length bargaining, and the commission need not assume the cost allocation under the contract is fair. See *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich 7; 50 NW2d 826 (1952).

DECo attempts to claim that a different standard applies, by citing indirect or non-applicable dicta from a previous Commission case, to the effect that an acquisition premium may be recognized if "net benefits" accrue to ratepayers. MEC and PIRGIM challenge this as a reasonable standard in lieu of the statutes and judicial precedent noted above. Second, there is no rational nexus between DTE's incurrence of a substantial control premium to acquire

MichCon, and any claimed "cost synergies" that DECo claims (i.e. less cost than would otherwise be incurred). If there were any temporary cost synergies obtained relative to the combination of DECo and MichCon, these synergies would have similarly been realized if MichCon had been acquired without a control premium. They would similarly be realized if DTE assumed all responsibility for any control premium since ratepayers are not responsible to reimburse DTE for the control premium. Nor is there any basis to assume that the amount of the control premium is reasonable or rational. Moreover, MEC and PIRGIM assert that it would be unlawful and unreasonable to grant in DECo's forward looking rates any amounts which exceed actual expenses (or reasonable projections of said expenses). In effect, DECo seeks to recover a non-expense (i.e. an expense <u>not</u> incurred, or "cost savings synergies") over and above the cost of service normally utilized for ratemaking. This is wholly unreasonable and unlawful. This would be contrary to the duties of the Commission to be the watchdog and representative of the ratepayer. *C & O Railroad Co v Public Service Commission*, 59 Mich App 88 (1975); this would also be contrary to the duty of the Commission to establish rates that reasonably balance the interest of utility and the ratepayer, *City of Detroit v Michigan Public Service Commission*, 308 Mich 706 (1944). The reason that DTE apparently paid such a substantial control premium to acquire MichCon was on the premise that it would render some benefits to management or to stockholders, and not out of an interest to protect ratepayers.

The recognition of a control premium would also represent poor precedent, and in fact would be reckless regulation. Having ratepayers pay in regulated electric rates for additional payments made by unregulated parent companies to acquire other companies (let alone other regulated companies), and by incurring substantial control premiums above book value, should not be rewarded in any manner. Nor is DECo's claim that the Commission should promote

mergers and acquisitions either rational or reasonable. Since mergers and acquisitions are solely a management prerogative, and have been exercised by unregulated parent companies, it is beyond the concern of the Commission that the parent companies be reimbursed for or encouraged to undertake mergers or acquisitions. Moreover, large scale acquisitions and mergers are often failures. Often times they lead to a loss of expertise from the acquired company, and to a loss of focus of the previously acquired company in their core business.

For all of the reasons previously asserted by MEC and PIRGIM in there initial brief (p 2-5), dated May 14, 2004, its reply brief (p1-3), dated May 28, 2004, and in its exceptions (p 1-4), dated September 16, 2004, and replies to exceptions (p 1-3), dated October 7, 2004, the MEC and PIRGIM fully supports the lawfulness and reasonableness of the Commission's order on this issue.

The MEC and PIRGIM therefore request the Commission to reject DECo's Petition for Rehearing on this issue in its entirety. MEC and PIRGIM requests such further and consistent relief which is lawful, reasonable, and appropriate.

Respectfully submitted,

MICHIGAN ENVIRONMENTAL COUNCIL,
PUBLIC INTEREST RESEARCH GROUP IN
MICHIGAN

By Their Counsel:
CLARK HILL PLC

____
Don L. Keskey (P23003)
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100
(517) 318-3099 Fax

DATED: January 18, 2005

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of the Application of THE DETROIT EDISON COMPANY to increase rates, amend its rate schedules governing the distribution and supply of electric energy, implement Power Supply Cost Recovery plans, factors and reconciliations in its rate schedules for jurisdictional sales of electricity and for miscellaneous accounting authority and regulatory asset recovery.	)))))))))	Case No. U-13808

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Kinneitha Thomas, being duly sworn, deposes and says that she is an employee of Clark Hill PLC, and that on **January 18, 2005**, a copy of the **RESPONSE of MICHIGAN ENVIRONMENTAL COUNCIL AND THE PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN IN OPPOSITION TO PETITION FOR REHEARING OF THE DETROIT EDISON COMPANY** in the above-captioned proceeding was served upon:

SEE ATTACHED SERVICE LIST

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

____
Kinneitha Thomas

Subscribed and sworn to before me
this 18th day of January, 2005.

____
Patricia A. Tooker, Notary Public
Eaton County, Michigan
Acting in Ingham, Michigan
My Commission Expires: April 5, 2005

MPSC Case No. U-13808
SERVICE LIST

Mr. Daniel Nickerson
Administrative Law Judge
Michigan Public Service Commission
6545 Mercantile Way, Suite 14
Lansing, MI 48911
denicke@michigan.gov

Mr. Robert A.W. Strong
Clark Hill PLC
255 S. Old Woodward Avenue
Birmingham, MI 48009-6179
rstrong@clarkhill.com

Mr. John Dempsey
Dickinson Wright PLLC
215 South Washington Square, #200
Lansing, MI 48933
jdempsey @dickinsonwright.com

Mr. Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, #2110
Cincinnati, OH 45202
mkurtzlaw@aol.com

Ms. Patricia Barone
Ms. Kristine Smith
Asst Attorneys General
Public Service Division
6545 Mercantile Way, #15
Lansing, MI 48911
baronep@michigan.gov
smithkm@Michigan.gov

Mr. Bruce R. Maters
Ms. Susan Beale
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, MI 48226
matersb@dteenergy.com
beales@dteenergy.com

Mr. Donald Erickson
Assistant Attorney General
Special Litigation Division
525 W. Ottawa Street
Lansing, MI 48933
erickson@Michigan.gov

Mr. Eric J. Schneidewind
Varnum Riddering Schmidt & Howlett LLP
201 North Washington Square, #810
Lansing, MI 48933
ejschneidewind@varnumlaw.com

Mr. Robert C. Evans
4121 Okemos Road
Suite 17
Okemos, MI 48864
rce2@comcast.net

Mr. Samuel McKnight
Mr. David R. Radtke
Klimist, McKnight, Sale & McClow
400 Galleria Office Center Ste 117
Southfield, MI 48034
smcknight@kmsmc.com
dradtke@kmsmc.com

Ms. Joni M. Fixel
Nordic Marketing LLC
2010 Hogback Road, #4
Ann Arbor, MI 48105
jfixel@baardpower.com

Ms. Diane R. Royal
Shaltz and Royal, P.C.
3303 W. Saginaw Ste C-1
Lansing, MI 48917
shalroy@voyager.net