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January 12, 2005

via Electronic Filing and Hand Delivery

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

Dear Ms. Kunkle:

RE: 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 (MPSC Case No. U-13808)

Enclosed for filing are an original and four copies of The Detroit Edison Company's Answer Opposing the Petition for Rehearing and Reconsideration of the Michigan Environmental Council and the Public Interest Research Group in Michigan, along with a Certificate of Service. Also enclosed is an extra copy of the document to be stamped and returned with our courier.

Please contact me if you have any questions.

Very truly yours,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Stephen J. Rhodes

/mkr

Enclosures

cc: Hon. Daniel E. Nickerson, Jr.
Parties of Record

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) Case No. U-13808
electric energy, implement Power Supply)
Cost Recovery plans, factors and reconciliation)
in its rate schedules for jurisdictional)
sales of electricity and for miscellaneous)
accounting authority and regulatory asset)
recovery.)

THE DETROIT EDISON COMPANY'S ANSWER
OPPOSING THE PETITION FOR REHEARING
AND RECONSIDERATION OF THE MICHIGAN
ENVIRONMENTAL COUNCIL AND THE PUBLIC
INTEREST RESEARCH GROUP IN MICHIGAN

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Dated: January 12, 2005

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INTRODUCTION

On November 23, 2004, the Commission issued an Opinion and Order in this Case No. U-13808. On December 22, 2004, the Michigan Environmental Council and the Public Interest Research Group in Michigan (“MEC/PIRGIM”) filed a petition for rehearing and reconsideration. In response, The Detroit Edison Company (“Edison”) now files this answer explaining that the petition should be denied.

STANDARD OF REVIEW

Rule 403 of the Commission’s Rules of Practice and Procedure, R 460.17403 provides:

“(1) A petition for rehearing after a decision or order of the commission shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. The petition shall be accompanied by proof of service on all other parties to the proceeding.”

The Commission stated at page 2 of its December 18, 2003 Order Denying Rehearing in Case No. U-13350:

“Rule 403 of the Commission’s Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. **A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission’s decision.** Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing” (emphasis added).

Further guidance is provided by MCR 2.119(F)(3), which states:

“Generally, and without restricting the discretion of the court, a **motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.** The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error” (emphasis added).

See also, Cason v Auto Owners Ins Co, 181 Mich App 600, 609-10; 450 NW2d 6 (1989);

“**A motion which merely presents the same issues as ruled on by the Court, either expressly or by reasonable implication, will not be granted**”); Sargent v AM Eckhouse, DO, PC, 171 Mich App 703, 706; 430 NW2d 763 (1988).

I. MEC/PIRGIM MERELY RESTATE THEIR PRIOR ARGUMENTS, AND EXPRESS DISAGREEMENT WITH THE COMMISSION’S REJECTION OF THOSE FLAWED ARGUMENTS.

MEC/PIRGIM’s petition restates their arguments, from this case and others, concerning spent nuclear fuel (“SNF”).¹ The Commission addressed MEC/PIRGIM’s arguments as follows:

“MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of spent nuclear fuel (SNF) fees by finding that the matter should not be considered in this proceeding.

“The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. See, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771.” (November 23, 2004 Opinion and Order in Case No. U-13808, p 120).

¹ In light of the voluminous submissions presented and considered in this proceeding and Case No. U-13771, MEC/PIRGIM’s assertions that they have been denied due process are frivolous and without any basis in reality (petition, pp 2-8). MEC/PIRGIM also, curiously, attempts to minimize the fact that the Commission is considering their concerns in a proceeding involving every electric utility in Michigan with a nuclear plant (petition, p 34).

MEC/PIRGIM's petition for rehearing simply restates their arguments and expresses disagreement with the Commission's decision, so rehearing should be denied under the Commission's and the Courts' standards for considering rehearing requests.

Edison previously explained (Initial Brief, pp 138-60; Reply Brief, p 144; Replies to Exceptions, pp 74-95) that MEC/PIRGIM's arguments regarding SNF lack merit, and have been repeatedly rejected. MEC/PIRGIM's arguments, although lengthy, do not raise any meritorious point.² No law requires what MEC/PIRGIM demands. Edison's PSCR and base rate evidentiary presentation has met any reasonable standard of completeness and demonstrates prudent Company strategies and actions. MEC/PIRGIM simply rehash their failed appellate attacks on the Commission's rejection of their arguments. Michigan Environmental Council v Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided December 9, 2003 (Docket Nos. 240403 and 240406; affirming the Commission in Case Nos. U-12613 and U-12615); Michigan Environmental Council v Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided May 11, 2004 (Docket Nos. 244354 and 246744; affirming the Commission in Case No. U-12725).³

More specifically, MEC/PIRGIM attempts to challenge Edison's recovery, in its rates, of the Nuclear Waste Fund fees for SNF that Edison must pay to the Department of Energy ("DOE") pursuant to 42 USC § 10222(2). MEC/PIRGIM further advocates the imposition of new financial and reporting requirements on Edison for the disposal of SNF. MEC/PIRGIM has

² In fact, MEC/PIRGIM appears to wrongly conclude that sheer volume is the test for what constitutes a meritorious argument (petition, pp 3, 4, 5, 7).

³ Indeed, MEC/PIRGIM's repeated references to themselves as "Appellants" (petition, pp 10, 13, and n8), and to other cases, and parties other than Edison (petition, pp 9, 20) indicates that MEC/PIRGIM simply reprinted and filed their previous failed arguments, without even bothering to read them. Such practices not only lack merit, but also waste the Commission's time and resources.

repeatedly raised these same issues in past cases, and the Commission has consistently rejected their arguments. The Commission appropriately addressed MEC/PIRGIM's arguments in this case (November 23, 2004 Opinion and Order in Case No. U-13808, p 120). For the sake of completeness, Edison will again explain the lack of merit in MEC/PIRGIM's positions.

A. The Commission Has Consistently Rejected MEC/PIRGIM'S SNF Arguments in Past Cases.

The Commission and Edison have appropriately addressed the costs of SNF disposal and storage in a number of Commission cases over the last several years.⁴ Edison's SNF costs became an issue in Edison's 1995 PSCR Plan Case, Case No. U-10703. Through the settlement and order in that case, Edison agreed to and did provide the Commission a comprehensive report addressing Edison's SNF costs, as well as semi-annual reports on those issues. Edison continued the reporting in 1995, 1996 and 1997.

In Case No. U-11314, the Commission initiated its own inquiry on January 28, 1997, into issues concerning payment for SNF storage and disposal. After receiving substantial comments from interested parties, including Edison, the Commission concluded that inquiry on December 4, 2000, without granting any of the relief that MEC/PIRGIM now requests.

MEC/PIRGIM have been parties to several other Commission cases in which they have unsuccessfully raised the identical SNF issues that they present in this case. MEC/PIRGIM were parties to In re Application of ABATE Formal Complaint for the Reduction of The Detroit Edison Company's Rates for the Sale of Electricity, Case No. U-11495, a rate complaint proceeding initiated by ABATE. During that case there was direct testimony and cross-

⁴ MEC/PIRGIM, on the other hand, in this and other proceedings, seeks to impose undeserved penalties on Michigan utilities for the actions of the federal government based on rank speculation.

examination concerning the DOE's delay in acceptance of SNF and its impact on Edison (MPSC Case No. U-11495, 6 T 469, 532-545). At the conclusion of the case, the ALJ recommended rejection of various claims for disallowance of Edison's SNF costs, similar to the claims now made by MEC/PIRGIM in this case (PFD, Case No. U-11495, March 17, 2000, pp 37-44). The Commission ultimately dismissed ABATE's rate complaint case in its entirety due to the effect of Act 141. (Case No. U-11495, June 19, 2000).

MEC/PIRGIM also intervened in Edison's 2000 PSCR case (Case No. U-12121), where they cross-examined Dr. Tso-Cheng Hsieh extensively on the same SNF issues they now present here, even though that cross-examination clearly exceeded the scope of Dr. Hsieh's direct testimony. (MPSC Case No. U-12121, 2 T 33-68). MEC/PIRGIM also filed more than 40 pages of testimony to recommend that Edison be denied recovery of its federally-mandated SNF disposal fees. After the effective date of Act 141, the Commission dismissed that case. (U-12121, June 19, 2000).

The Commission's June 19, 2000 Opinions and Orders dismissing the proceedings in Case Nos. U-11495 and U-12121 encouraged MEC/PIRGIM to participate in Case No. U-12487 (customer information and environmental notice requirements of Act 141) and any subsequent cases involving the Energy Efficiency Fund. On July 21, 2000, MEC/PIGRIM filed a petition to intervene in U-12487, but their September 20, 2000 testimony and subsequent briefs in that case contained no mention of SNF costs.

In In re Application of Wisconsin Public Service Corp for Approval of a PSCR Plan for the 12-month Period Ending December 31, 2001, Case No. U-12613 (November 20, 2001), another PSCR case, MEC/PIRGIM challenged the reasonableness of WPS Corporation's recovery of SNF fees paid to the Nuclear Waste Fund, and argued that the Commission should

require WPS Corporation to make escrow payments equal to the 1 mill SNF fee. MEC/PIRGIM contended that the escrow would provide a contingent funding source for disposal of SNF in the event that the DOE defaults on its obligation to take utilities' SNF. They further argued that WPS Corporation should recover only the escrow payments with its PSCR clause, and not the fees that it paid to the DOE. In the alternative, MEC/PIRGIM argued, the Commission should require WPS Corporation to post a performance bond or purchase liability insurance to guarantee SNF disposal. The Commission rejected the merits of their claims.

“[T]he MEC/PIRGIM’s proposals are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of WPS Corp’s management that adversely affects the rates paid by PSCR customers. **The problem is larger than WPS Corp’s nuclear operation, feasible alternatives to the DOE’s construction of a permanent repository are not readily apparent**, and the Commission is unable to find that WPS Corp has been imprudent.” [Id. at 8-9 (emphasis added; citation omitted).]⁵

MEC/PIRGIM raised the identical arguments again in In re Application of Wisconsin Electric Power Co for Approval of a PSCR Plan for the 12-month Period Ending December 31, 2001, Case No. U-12615 (November 20, 2001). Using the same analysis as in U-12613, the Commission rejected MEC/PIRGIM’s contentions. (Id. at 14-16).

The Michigan Court of Appeals affirmed the Commission’s rejection of MEC/PIRGIM’s arguments in Case Nos. U-12613 and U-12615. Michigan Environmental Council v Public

⁵ Apparently to counter such reasonable observations by the Commission, MEC/PIRGIM now boldly concludes that “[t]he fact that SNF disposal is a national issue is also irrelevant” (petition, p 31). Such refusal to accept indisputable, salient and material facts has been the hallmark of MEC/PIRGIM’s voluminous attacks.

Service Comm, unpublished opinion per curiam of the Court of Appeals, decided December 9, 2003 (Docket Nos. 240403 and 240406).⁶

MEC/PIRGIM intervened in five consolidated cases to implement Act 141 (U-12649, U-12650, U-12651, U-12652, and U-12655), and filed testimony relating to SNF issues on March 19, 2001. On the motion of the MPSC Staff, the ALJ struck this testimony from the record as irrelevant on April 10, 2001. MEC/PIRGIM initially filed an emergency appeal to the Commission on April 18, 2001, but then mooted their appeal by filing a Statement of Non-Objection to the Settlement Agreement on July 25, 2001.⁷

Despite the consistent and repeated rejection of their arguments, MEC/PIRGIM nevertheless persisted in making the same arguments in the context of WEPCo's recent rate case. In In re Application of Wisconsin Electric Power Co for Authority to Increase its Rates for the Sale of Electricity in Michigan, Case No. U-12725 (September 16, 2002), they urged the Commission to require WEPCo to establish an escrow account, to post a bond or obtain

⁶ MEC/PIRGIM's weak attempt to distinguish the present case from the Wisconsin cases merely serves to highlight the fragility of their arguments (petition, pp 34-35). The plain fact of the matter is that the Commission rejected MEC/PIRGIM's contentions, and the Court of Appeals affirmed. MEC/PIRGIM do not improve their position by making even more extreme contentions in this Case No. U-13808, or by mischaracterizing or belittling the decisions of the Commission and Court of Appeals.

⁷ The Settlement Agreement provided, in part:

“14. SNF Disposal Fee: Issues concerning spent nuclear fuel were excluded from this case by the Administrative Law Judge's ruling. The nuclear utilities represent that they are collecting the 1 mill/kWh SNF surcharge from retail and wholesale customers using nuclear power. The imposition of the SNF disposal costs on nuclear utilities is governed by federal law and the recovery of the costs from customers is the subject of state or federal rate proceedings. Any consideration of issues regarding collection and/or allocation of SNF disposal costs among nuclear utility customers may be a matter for future rate or other proceedings.” (emphasis added).

insurance to cover alternative means of SNF disposal, or to impose monitoring and reporting requirements on WEPCo. The Commission again rejected MEC/PIRGIM's arguments, citing its reasoning in its November 20, 2001 Order in Case No. U-12615. (*Id.* at 30). The Court of Appeals affirmed the Commission's rejection of MEC/PIRGIM's arguments in that rate case. Michigan Environmental Council v Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided May 11, 2004 (Docket Nos. 244354 and 246744).

MEC/PIRGIM have repeatedly failed in their challenges to the reasonableness of utility recovery of SNF disposal fees. MEC/PIRGIM have repeatedly failed to prevail on their arguments for additional utility financial requirements with respect to the disposal of SNF. MEC/PIRGIM rehashed the same failed arguments in this case, and now rehash those arguments again in their petition for rehearing.

As further explained below, MEC/PIRGIM's arguments are defective as a matter of law. The Commission has repeatedly recognized these fatal defects, rejected MEC/PIRGIM's arguments, and declined to disallow the recovery of SNF fees and costs.⁸

B. As a Matter of Federal Preemption, The Commission is Required to Allow Edison to Recover its SNF Fees and Costs.

1. Federal Law Requires Edison to Pay SNF Fees and Costs.

Federal law requires Edison to pay a 1.0 mill per kilowatthour ("kWh") charge on electricity generated and sold by Fermi 2. 42 USC § 10222(2). The Nuclear Waste Policy Act of 1982 ("NWPA") assigned to the DOE the responsibility of building and placing into operation a permanent geologic repository for commercially-generated SNF. MEC/PIRGIM unlawfully

⁸ The Commission's repeated rejection of MEC/PIRGIM's arguments is not surprising because the reasons there has not been successful acceptance of SNF all lie outside of the utilities' control. Even MEC/PIRGIM lists the reasons as including "intervening Court decisions, lack of appropriations from Congress, failure in the DOE program, failure of NRC license applications, changes in administrations and DOE secretaries, among a host of other causes." (petition, p 22)

and unreasonably propose that, notwithstanding the controlling federal law, the Commission should hold Edison responsible in the event the DOE does not construct the contemplated facility. There is no merit in MEC/PIRGIM's proposal to place SNF fees in escrow (13 T 2498). Edison has no option, short of violating federal law (and jeopardizing its Fermi 2 license), but to pay the federally-mandated charge (13 T 2634).

The NWPA represents a "comprehensive scheme" for the disposal of SNF and establishes specific duties and responsibilities for the federal government, the States and the civilian nuclear power industry. General Electric v Dep't of Energy, 764 F2d 896, 898 (CA DC, 1985). Among the many important responsibilities delegated by the NWPA to the federal government are express responsibility for the long-term storage and permanent disposal of SNF and high-level nuclear wastes (42 USC § 10143), the process of siting storage and disposal facilities for nuclear waste (42 USC § 10121-10175) and the establishment of a funding mechanism to pay for these activities, i.e., the Nuclear Waste Fund (42 USC § 10222).

The NWPA requires civilian nuclear power generators to contract to pay the U.S. Treasury 1 mill/kWh on electricity generated and sold from nuclear generating plants. As conditions for federal acceptance of SNF and the avoidance of any further financial obligation for long-term storage and disposal, nuclear power generators must pay the 1 mill/kWh SNF disposal surcharge and execute the DOE contract (42 USC § 10222(a)(2)).

The NWPA further directs the Nuclear Regulatory Commission to require that its nuclear power licensees enter into the DOE contract. The law also directs the DOE not to accept SNF unless the fuel owner is under contract with DOE (42 USC § 10222(b)). There is not authority under the Act for a state regulatory agency to substitute its judgment or require a utility to alter

the federally-mandated relationship between the utility, the DOE and the Nuclear Regulatory Commission.

Edison entered into a contract with the DOE pursuant to 42 USC § 10222. There is no element of discretion involved – if you own a nuclear plant, the NWPA specifies what must be done. The collection of the 1 mill/kWh surcharge is required by the federal Act. If Edison desires to ultimately send its SNF to the DOE and avoid any further financial obligation for long-term SNF storage and disposal, it must pay the 1 mill surcharge and execute the DOE contract.

As shown in the above argument, the Commission has properly allowed Edison to recover its SNF costs and fees from its retail electric customers through retail electric rates. Other commissions and courts that have considered the issue have agreed that SNF fees and costs should properly be passed through to the utility customers who benefited from the use and enjoyment of the power generated by the nuclear facilities. Re Northern States Power Co, 1982 WL 175332 (NDPSC, 1982); Town of Concord v FERC, 729 F2d 824, 828-830 (CA DC, 1984); Florida Power & Light Co v Westinghouse Electric Corp, 826 F2d 239, 279 (CA 4, 1987); Re Florida Power & Light Co, 2002 WL 192104 (Fla PSC, 2002); Re Entergy Gulf States, Inc., 2002 WL 32077784 (Tex PUC, 2002).

Although Edison shares the frustration of many others regarding the DOE's progress in developing a facility for the disposal of SNF, the Commission cannot prevent Edison from receiving full and timely recovery of the mandatory SNF fees and costs from its customers. The utility financial reporting and other remedies advocated by MEC/PIRGIM would not accelerate developing a safe, cost-effective and timely federal facility for disposing of SNF. Rather, they would simply penalize Edison, without any legal or rational basis for such a penalty. The Commission should find, as it did in Case No. U-12613, supra, that MEC/PIGRIM's "proposals

are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of [utility] management . . . and the commission is unable to find that [the utility] has been imprudent.” U-12613, pp 8-9.

The use of the mechanisms advocated by MEC/PIRGIM also would not further the goal of obtaining contract performance by DOE. If DOE repudiates its contractual obligations entirely, the appropriate protection for electric ratepayers would be for Edison to seek relief from DOE under the contract, including refund of all amounts previously paid to DOE under the contract, in addition to other available relief against DOE.

Further, it should be noted that the funds paid to DOE by Michigan utilities are already protected by the federal government. The Nuclear Waste Policy Act provides that all fees paid to DOE by utilities be deposited in the Nuclear Waste Fund. The NWPA specifically states that the fund may be used only for radioactive waste disposal expenses. Alabama Power Co v Dep’t of Energy, 307 F3d 1300, 1312-16 (CA 11, 2002). Thus, monies collected from utilities around the nation by DOE are already earmarked for the purposes specifically identified by NWPA.

MEC/PIRGIM incorrectly assert that Edison and its shareholders should be required to guarantee the actions of the federal government, or else face a disallowance of the pass-through of these federally-mandated costs in the event that DOE defaults on its SNF obligations. This proposition lacks merit and should be rejected.

2. Federal Preemption Prohibits State Utility Regulators From Denying Utility Pass-Through of Federally Mandated SNF Fees and Costs.

Edison respectfully submits that federal preemption requires the Commission to allow Edison to recover its federally-required SNF fees and costs. Both state and federal courts have consistently held that a state utility commission setting retail rates must allow, as reasonable operating expenses, any costs incurred by a utility pursuant to federal mandate. In the leading

case, Narragansett Electric Co v Burke, 119 RI 559; 381 A2d 1358 (1977), cert den 435 US 972 (1978), the Supreme Court of Rhode Island held that the state utility commission could not prevent a utility from recovering amounts it paid under federally-authorized wholesale rates. Recovery of those amounts from the utility's retail customers could not be denied on the grounds that those costs, for whatever reason, were "unreasonable."

The Michigan Court of Appeals, as well as other state courts that have considered the question, have uniformly agreed that a utility's costs based upon federally-established charges must be treated as reasonably-incurred operating expenses for the purposes of setting appropriate utility rates. ABATE v Public Service Comm, 192 Mich App 19, 22-27; 480 NW2d 585 (1991); Attorney General v Public Service Comm #2, 171 Mich App 700, 702; 431 NW2d 49 (1988); Public Service Comm of Colorado v Public Utilities Comm, 644 P2d 933 (Colo, 1982); United Gas Corp v Mississippi Public Service Comm, 240 Miss 405; 127 So2d 404 (1961); General Motors Corp v Illinois Commerce Comm, 143 Ill 2d 407; 574 NE2d 650 (1991); Citizens Gas Users Ass'n v Public Utility Comm, 165 Ohio State 536, 138 NE2d 383 (1956); Washington Gas Light Co, v Public Service Comm, 508 A2d 930 (DC App, 1986); and Eastern Edison Co v Dep't of Public Utilities, 388 Mass 292; 446 NE2d 694 (1983).

This principle has been recognized by the United States Supreme Court to be a matter of federal supremacy. Nantahala Power and Light Co v Thornburg, 476 US 953 963; 90 L Ed 2d 943, 952; 106 S Ct 2349 (1986). In Nantahala, the Court held that a state utility commission exercising jurisdiction over retail utility rates may not prevent a utility from passing through to its retail customers the costs the utility has incurred through payment of federally-authorized wholesale rates. The Court explained that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined

wholesale price. . . “ 476 US at 965; 90 L Ed 2d at 955. The Court adopted and applied the Narragansett line of cases:

“[F]or a state ratemaking agency to disregard a FERC-filed rate would clearly be inconsistent with the exclusive federal regulatory scheme over interstate wholesale power prices. The FERC-approved rate at which the middleman purchased power would not be fully recognized as a cost in the retail market, thereby forcing the middleman to sell power at less than its reasonable cost as determined by the federal agency. . . .

“When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. [Citing Narragansett line of cases]. Such a ‘trapping’ of costs is prohibited. Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if the state commission’s order is allowed to stand.” 476 US at 969-70; 90 L Ed 2d at 956.

In Mississippi Power & Light Co v Moore, 487 US 354; 108 S Ct 2428; 101 L Ed 2d 322 (1988), the United States Supreme Court again applied this principle to bar a state public utility commission’s attempt to prohibit a utility’s recovery of FERC-mandated payments through local retail utility rates. The Court stated:

“In this case as in Nantahala we hold that ‘a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.’ Nantahala, 476 US at 965, 966; 106 S Ct 2349; 90 L Ed 2d 943. Thus we conclude that the Supremacy Clause compelled the MPSC to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power.” 487 US at 373; 101 L Ed 2d at 339-340.

This principle of federal preemption, first articulated in Narragansett and other state court decisions and later recognized by the United States Supreme Court in Nantahala and Mississippi Power & Light, precludes the Commission from disallowing Edison's federally-mandated SNF fees and costs. Moreover, the federal rates at issue here were not just set by a federal agency pursuant to Congressional delegation - - they were set by Congress itself.⁹ In the NWPA, Congress created a comprehensive scheme for the interim storage and ultimate disposal of SNF generated by civilian nuclear power plants. Congress has expressly mandated Edison's payment of SNF fees to the DOE pursuant to 42 USC § 10222. The Supremacy Clause (US Const, art VI, § 2) and the cases cited above therefore require the Commission to allow Edison to recover from its customers all such federally-mandated charges through Act 304, or through its general rates.

3. Edison Has Been Reasonable and Prudent With Respect to the Incurrence of SNF Costs, and The Relief Requested by MEC/PIRGIM Would Result in an Unconstitutional "Taking."

Edison has constitutional protections against "takings" and confiscatory rates under the Fifth Amendment to the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment. Similarly, Mich Const 1963, art 10, § 2 provides in part, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." These constitutional protections have been recognized and applied to public utility rates in well-established case law. See generally, Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm of Missouri, 262 US 276; 43 S Ct 544; 67 L Ed 981 (1923); Federal Power Comm v Natural Gas Pipeline, 315 US 575; 62 S Ct 736; 86 L Ed 1037 (1942); Federal Power Comm v Hope Natural Gas Co, 320 US 591; 64 S Ct 281; 88

⁹ MEC/PIRGIM, again, makes a weak attempt to distinguish the present circumstances in this proceeding from those addressed in a long line of cases prohibiting "cost trapping." (petition, pp 26-27). The differences are either immaterial or weigh strongly in favor of Edison's position, not the unreasonable positions of MEC/PIRGIM.

L Ed 333 (1944); Permian Basin Area Rate Cases, 390 US 747; 88 S Ct 1344; 20 L Ed 2d 312 (1968); Duquesne Light Co v Barasch, 488 US 299; 109 S Ct 609; 102 L Ed 2d 646 (1989). See also, Northern Michigan Water Co v Public Service Comm, 381 Mich 340; 161 NW2d 584 (1968); Michigan Consolidated Gas Co v Public Service Comm, 389 Mich 624; 209 NW2d 210 (1973); Consumers Power Co v Public Service Comm, 415 Mich 134; 327 NW2d 875 (1982); ABATE v Public Service Comm, 430 Mich 33; 420 NW2d 81 (1988).

Edison's SNF-related costs,¹⁰ as well as similar future costs, unquestionably constitute a multi-million dollar property interest that Edison is entitled to recover under its retail electric rates. The Commission has, to date, properly allowed Edison to recover these costs through PSCR factors, decommissioning charges and base rates.

As in Case Nos. U-12613 and U-12615 (rejecting similar arguments by MEC/PIRGIM), there is no basis to find that Edison has been imprudent. Instead, it is beyond credible dispute that Edison reasonably and prudently built Fermi 2 years before the present SNF issues emerged.¹¹ Edison's power purchase and generation decisions (with brief exceptions) have been subject to annual review and reconciliation by the Commission under Act 304 since 1983 (the same year Congress enacted the NWPA) and under the Commission's general ratemaking authority prior to and since that time. Under these circumstances, Edison cannot be denied full

¹⁰ Mr. Colonnello confirmed that Fermi 2's SNF fee is based on "net generation delivered to customers" and explained the errors in Mr. Callen's SNF fee calculations (13 T 2638-40).

¹¹ For a review of the shifts in federal policy that caused SNF to be converted from an asset for reprocessing to a liability for storage and disposal, see, Town of Concord, supra, 729 F2d at 825-26; Florida Power & Light Co, supra, 826 F2d at 243-53.

recovery of these reasonable and prudently incurred SNF costs.¹² As the Illinois Supreme Court found under similar circumstances:

“ . . . [I]t would be difficult to say in what respect distributors have been imprudent in incurring these particular costs. The distributors did not know and could not have foreseen at the time that those purchasing decisions would lead to the imposition of direct-billed take-or-pay costs years later. Until 1985, when FERC issued Order No. 436 establishing the open-access policy, no one knew that the long-term take-or-pay contracts between pipelines and producers would create multi-billion dollar liabilities for the pipelines. And it was not until FERC issued Order No. 500 in 1987 that distributors had any idea that pipeline take-or-pay liabilities would be passed on to them. [Citation omitted]. By that time, the purchasing decisions that led to the long-term contracts had long since been made.

“As the distributors point out in their briefs to this court, unless clairvoyance has become an element of prudence, there simply is no basis on which the ICC could conduct a meaningful prudence review.” 574 NE2d at 658-659. (emphasis added)

The same is true under Michigan law. The reasonableness and prudence of a utility’s purchasing decisions must be determined in the light of the conditions faced by the utility when it made the purchases. ABATE v Public Service Comm, 208 Mich App 248, 260; 527 NW2d 533 (1994) (“ . . . utilities are compensated for their actual costs when made regardless of whether the investments are deemed necessary and beneficial in hindsight.”); Attorney General v Public Service Comm, 161 Mich App 506, 517; 411 NW2d 469 (1987), lv den 429 Mich 879 (1987) (utility’s decision to enter into long-term contracts for liquefied natural gas was found to be reasonable and prudent, even though the market for liquefied natural gas later changed dramatically, resulting in the utility having booked gas costs exceeding current market prices);

¹² The Fermi 2 plant continues to be used and useful providing electric energy to Edison customers, as demonstrated in this and other rate proceedings and Edison’s annual Summer Capacity Plan and Electric Supply Reliability Plan filings (e.g., Case Nos. U-11889, U-12292, U-13283, U-13695 and U-14005).

Ohio Power Co v FERC, 668 F2d 880, 896-7 (CA 6, 1982) (“while hindsight may indicate that [the utility] would have been better served from a capacity cost standpoint by the construction of a non-nuclear generating plant, there is no suggestion that the decision to undertake this plant was in any way imprudent.”); Re Consumers Power Co, 106 PUR 4th 45, 54 (MPSC, 1989) (“in judging what was reasonable and prudent planning in this situation, we must look at the circumstances under which the utility made its decision”); and Re Consumers Power Co, 14 PUR 4th 1, 16 (MPSC, 1976) (decision to build a synthetic gas plant was not “imprudent . . . in light of the circumstances that existed at the time that the decision was made”).

As discussed above, Edison has no choice but to pay the federal SNF fees and to incur SNF-related costs, because of the requirements of federal law. The federal law leaves Edison no option to withhold the required payments based on the possibility that the DOE will “default” in its SNF obligations. Conditioning Edison’s recovery of these costs on the DOE’s future success (which will be driven by factors outside of Edison’s control) would be unreasonable, confiscatory and contrary to the fundamental ratemaking law.¹³

Further, MEC/PIRGIM’s allegations regarding the DOE’s future conduct are speculative, and the DOE’s construction of an SNF repository is beyond Edison’s control. Thus, there is no sound basis for Edison to pay the DOE and escrow an additional amount. Such action would unreasonably increase Edison’s costs and be contrary to the interests of Edison and its ratepayers. Although the DOE is behind schedule, there is no reason to believe that the federal government

¹³ See Bluefield Waterworks Improvement Co v Public Service Commission of West Virginia, 262 US 679, 690-694; 43 S Ct 675; 67 L Ed 1176 (1923); Federal Power Comm v Hope Natural Gas Co, 320 US 591, 603; 64 S Ct 281; 88 L Ed 333 (1944). See also Permian Basin Area Rate Cases, 390 US 747, 769-70; 88 S Ct 1344; 20 L Ed 2d 312 (1968); FPC v Memphis Light, Gas and Water Division, 411 US 458; 43 S Ct 1723; 36 L Ed 2d 426 (1973); General Telephone Co v Public Service Comm, 341 Mich 620; 67 NW2d 882 (1954); Michigan Consolidated Gas Co v Public Service Comm, 389 Mich 624; 209 NW2d 210 (1973).

will “permanently fail” to accept SNF for disposal, particularly in light of the federal government’s recommendation of the Yucca Mountain Site in 2002, and the importance of SNF disposal to national security (13 T 2634-35).

Similarly, it is unreasonable for Mr. Callen to conclude that “substantial risks exist that the federal government may never perform its SNF duties”. (13 T 2502) The NRC found in 1990 and reconfirmed in 1999 that there is reasonable assurance that a SNF repository will be developed and operational during the first quarter of this century (13 T 2636-38).¹⁴

It would also be unreasonable for the Commission to re-evaluate the prudence of Edison’s SNF costs based on the Commission’s future and subjective evaluation of the DOE’s future success, because any review of prudence properly considers only historical costs and the knowledge that existed when those costs were incurred, without regard to whether the expenditures prove to be necessary or beneficial in hindsight. See ABATE, supra, 208 Mich App at 256-58. See also Duquesne Light Co., supra, 488 US at 309.¹⁵

Under well-established ratemaking law, rates for utility service must be set so that the utility provides service and its customers receive service at rates, which are based on the estimated costs of providing that service, plus a reasonable return on the utility’s investment. This is part of the “regulatory compact” of the regulatory regime, under which the utility

¹⁴ In any event, Fermi 2 SNF is not likely to be removed from the site until later in the first quarter of this century because of its place in the queue for such services. (4 T 217).

¹⁵ In this regard, MEC/PIRGIM states “Nothing in MEC/PIRGIM’s case challenges the building or operation of the Fermi plant. Nor do any of MEC/PIRGIM’s claims or remedies involve a ‘hind sight review’” (petition, p 29). However, just a few pages earlier MEC/PIRGIM makes a request of the Commission to “. . . similarly escrow in separate external trusts all funds collected from Michigan ratepayers, both past and future for the SNF fee . . .” (petition, pp 16-17; emphasis in original).

dedicates its private property to serve the public, and correspondingly receives a reasonable return on the value of its private property.

In Board of Public Utility Comm'rs v New York Telephone Co, 271 US 23; 46 S Ct 363; 70 L Ed 808 (1926), the United States Supreme Court explained that the Just Compensation clause of the Fourteenth Amendment guarantees a utility a reasonable return on the value of the property used at the time that the property is being used for the public service. Rates not sufficient to yield that present return are confiscatory. 271 US at 31.¹⁶ MEC/PIRGIM's proposed relief, which would expose Edison to present or future forfeitures based on factors beyond Edison's control, cannot withstand constitutional scrutiny, and must be rejected.¹⁷

C. MEC/PIRGIM Have Failed to Allege or Demonstrate Any Credible Basis for Finding that SNF Costs Are Unreasonable or Imprudent.

1. Edison's Costs are Presumed to be Reasonable and Prudent.

MEC/PIRGIM attack Edison's recovery of SNF costs as unreasonable or imprudent, but they failed to carry their burden to (1) allege specific unreasonable and imprudent conduct, and (2) establish that claim before the Commission. A utility's expenses must be presumed reasonable and prudent, absent a clear showing of bad faith or abuse of discretion. Public Utilities Comm v Michigan State Tel Co, 228 Mich 658; 200 NW 749 (1924). To attack a utility's expenses, "waste or negligence . . . must be established by evidence." West Ohio Gas Co

¹⁶ By contrast, utility customers have no property interest in their utility rates. Therefore, as the Court held in Roedler v Dep't of Energy, 255 F3d 1347, 1354 -56 (CA Fed, 2001) utility customers have no viable "takings" claim against the DOE in connection with the mandatory SNF fees that are passed through to utility customers in their rates.

¹⁷ MEC/PIRGIM makes the incredible statement that Edison failed to demonstrate any "taking" notwithstanding MEC/PIRGIM's proposal to escrow tens of millions of dollars Edison has already paid to the federal government as well as all future amounts collected from the 1 mill per kWh surcharge (petition, pp 16-17, 29). The record is abundantly clear that Edison would be required to pay tens of millions of dollars under this proposal (13 T 2634, 2638-39).

v Public Utilities Comm of Ohio, 294 US 63, 68; 79 L Ed 761, 767; 55 S Ct 316 (1934). Further, “good faith is to be presumed on the part of the managers of a [utility].” 294 US at 72; 79 L Ed at 769.

The United States Supreme Court has long honored the principle that utility costs must be presumed to be reasonable and prudent. In Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm of Missouri, 262 US 276, 288-289; 67 L Ed 981, 985; 43 S Ct 544 (1922), the Court established the controlling principle:

“[W]hile the state may regulate, with a view to enforcing reasonable rates and charges, . . . ‘it is not empowered to substitute its judgment for that of the [utility]; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the [utility].” (Emphasis added)

The Michigan Supreme Court reiterated this same principle in Union Carbide Corp v Public Service Comm, 431 Mich 135, 148; 428 NW2d 322 (1988). Also see Ohio Power Co v FERC, 880 F2d 1400, 1413 (CA DC, 1989) (Mikva, J., concurring) (“[I]t has been long-settled that a utility’s costs are presumed [subject to rebuttal] to be prudently incurred.”)¹⁸

MEC/PIRGIM have failed to demonstrate that Edison’s response has been materially different than the responses of numerous other utilities, and they make no credible criticism of the way Edison has managed its SNF (13 T 2631). MEC/PIRGIM have failed to carry their burden of pleading and proof, just as they have repeatedly failed in the past.¹⁹ As the

¹⁸ MEC/PIRGIM have, however, unreasonably exploited the luxury they have as intervenors to continually assert the vague claim that Edison should somehow have produced additional or different evidence. MEC/PIRGIM simply ignore or misconstrue Edison’s record evidence, and the controlling law that provides the context for that evidence, in favor of MEC/PIRGIM’s extreme contentions that the Commission should violate the law based on speculation and hyperbole.

¹⁹ Furthermore, they have never demonstrated that any of their proposed solutions would be effective.

Commission well knows, SNF disposal is a national issue, which is far bigger than Edison and beyond Edison's control. Thus, the Commission will be "unable to find that [Edison] has been imprudent." (Case No. U-12613, pp 8-9, rejecting MEC/PIRGIM's identical arguments.)

2. Edison Has Taken Reasonable and Prudent Actions Regarding its SNF Costs.

It is beyond credible dispute that Edison was reasonable and prudent in paying federally-mandated SNF fees, instead of risking the loss of its Fermi 2 license. Past proceedings at the Commission have already established that Edison has taken substantial action over the years regarding its SNF costs.

On this record, Mr. Colonnello further testified that Edison has been reasonable and prudent with respect to actions and associated costs for storing SNF at the Fermi 2 plant. Edison has also taken actions to protect its rights under the Standard Contract with the DOE, and to protect itself and ratepayers regarding the DOE's delays (13 T 2631).

In 1994, Edison anticipated the loss of storage capability in the spent fuel pool, and evaluated options for expanding the capacity to store SNF onsite. Edison's current SNF storage strategy provides balance between establishing timely capacity and preserving capital expenditures. Edison's approach is consistent with industry experience, and reasonable and prudent for minimizing the costs of storing SNF onsite (13 T 2631-32).

Edison has also taken ongoing actions for almost a decade to protect itself and its ratepayers regarding the DOE's delays. In September, 1995, Edison and other utilities sued the DOE, arguing that it had a legal responsibility to begin taking SNF by the 1998 Contract date. In January 1997, Edison and 35 other nuclear utilities filed suit to attempt to force the federal government to meet its legal obligation to begin accepting SNF. In December 2002, Edison sued the DOE for damages under the contract associated with the DOE's failure to begin accepting

SNF (13 T 2632-33). Edison has also worked over the past 10 years to solicit public and congressional support for legislative efforts to advance the acceptance of SNF. These efforts have successfully contributed to the present progress towards construction of a SNF repository at Yucca Mountain. These actions by Edison were appropriately responsive, very reasonable, and consistent with the actions of most other U.S. nuclear utilities (13 T 2633-34).²⁰

Edison also participated as an intervenor in one of the early cases involving the disposal of SNF in the Yucca Mountain repository in the ongoing dispute between Nevada and the DOE. State of Nevada v Watkins, 914 F2d 1545 (CA 9, 1990). In that case, Edison supported the DOE's interpretation of rules and regulations in an effort to move that nuclear waste storage project forward. In other lawsuits that have evolved from the Yucca Mountain controversy, Edison has been indirectly involved by being a member of the Nuclear Energy Institute, which is an amicus curiae in those cases.

Edison joined with the MPSC as a founding member of the Nuclear Waste Strategy Coalition in 1993. The primary purpose of that organization is to lobby Congress and the DOE to move forward with the nuclear waste disposal program. In connection with this coalition, there have been communications and exchanges of information regarding SNF between Edison and the MPSC from 1993 through the present. Through the Coalition, representatives from Edison met frequently with MPSC Staff and Commission members to discuss and share information related to SNF issues. These meetings and exchanges of information are reflected in the annual reports of the Coalition, which have been provided to the MPSC.

²⁰ The Commission may similarly take administrative notice that in Case No. U-12121, where both MEC and PIRGIM were parties, Dr. Hsieh explained, through cross examination elicited by MEC/PIRGIM, that Edison has joined in filing several legal actions attempting to assist and/or require the DOE to discharge its duties with respect to SNF (U-12121, 2 T 42); Edison participated in a private SNF storage initiative (Id. at 44-45) and Edison continues to actively monitor related industry events (Id., at 45, 49, 67).

SNF costs also became an issue in Edison's 1995 PSCR Plan Case, U-10702. As part of the settlement and order in that case, Edison agreed to provide the Commission a comprehensive report addressing the SNF issues, which report was filed with the Commission on April 3, 1995. Pursuant to the settlement and order, Edison also provided the Commission semi-annual reports on SNF issues in 1995, 1996, and 1997, which updated the Commission on Edison's continuing actions with regard to SNF.

Edison also participated in the Commission's inquiry into SNF issues in Case No. U-11314, beginning in 1997 and continuing until the Commission terminated that inquiry on December 4, 2000 (Order, Case No. U-11314). In addition to its activities with the MPSC in the Nuclear Waste Strategy Coalition, Edison filed detailed comments with the MPSC in Case No. U-11314, responding to the MPSC's questions.

Edison was also involved in key SNF litigation, including Indiana Michigan Power Co v Dept of Energy, 88 F3d 1272 (DC Cir 1996) and Northern States Power Co v Dept of Energy, 128 F3d 754 (DC Cir 1997).²¹ In those cases, Edison either directly or through a utility group, cooperated and exchanged information about SNF with members of the Commission and other interested parties. There were also several strategic meetings among Edison, other utilities, and the Commission to discuss litigation strategy in those cases.

MEC/PIRGIM's own attorney surely cannot question Edison's efforts in this regard. In his former role as Assistant Attorney General in charge of the Public Service Division, he participated in meetings of the Nuclear Waste Strategy Coalition, and he personally argued the cases of Indiana Michigan Power Co, *supra*, and Northern States Power Co, *supra*, on behalf of a

²¹ MEC/PIRGIM, by contrast, failed to participate in any of these proceedings, which took place in the proper federal forum, to raise the issues they now wrongly seek to raise before the Commission in this proceeding.

large number of the affected parties. In those cases, the public service commissions of many states and many utility companies joined forces to seek relief from the DOE's progress in dealing with SNF disposal. A review of those decisions reveals that the issues in those cases are in essence the same issues MEC/PIRGIM now attempts to inject and rehash in this case.

Edison has, from the beginning, initiated and supported appropriate efforts regarding its SNF costs. These efforts have more than satisfied any objective "reasonable and prudent" standard. Under these circumstances, there is no credible basis on which to further question the reasonableness and prudence of Edison's SNF costs.²²

Finally, there is no merit to Mr. Callen's recommendation that the Commission establish annual filing and reporting requirements for Edison regarding SNF. (13 T 2503) Mr. Colonnello explained that the nuclear utility industry is one of the most highly monitored and regulated industries in the country. The Commission already receives reports every 3 years on the nuclear decommissioning fund, which includes SNF information. Additional information is available to the Commission and Staff on request. MEC/PIRGIM's proposed filing and reporting requirements would increase costs, without any benefit to the Commission (13 T 2641).

D. MEC/PIRGIM Seek Relief That is Outside The Commission's Statutory Authority and Jurisdiction.

MEC/PIRGIM essentially complains about the claimed inaction of the DOE, a federal agency outside the Commission's supervision or jurisdiction. There is also no Michigan statutory authority for the Commission to involve itself in the federally-mandated contract between the DOE and Edison. Even apart from federal preemption, Commission action is

²² MEC/PIRGIM's only attempt to "illustrate" Edison's purported "lack of action" is to make an inapt hypothetical comparison to a coal contract default (petition, p 25). Clearly, attempting to analogize a common utility fuel transaction with a party of equal bargaining power to the national SNF dilemma under the control of the federal government is not a fair comparison.

precluded because, as a legislative agency, the Commission has only those powers granted it by the Legislature. The Commission does not possess any common law powers. Union Carbide Corp v Public Service Comm, 431 Mich 135; 428 NW2d 322 (1988). Authorizing statutes must be strictly construed. Regulatory authority must be affirmatively or plainly granted because “a doubtful power does not exist.” Miller Brothers v Public Service Comm, 180 Mich 227, 232; 446 NW2d 640 (1989). Since there is no Michigan statute that authorizes the relief requested by MEC/PIRGIM, the requested relief must be denied.

RELIEF

The Detroit Edison Company respectfully requests that the Commission deny MEC/PIRGIM's petition for rehearing and reconsideration.

Respectfully submitted,

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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) Case No. U-13808
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.)
_____)

CERTIFICATE OF SERVICE

Stephen J. Rhodes, says that he is an employee of Foster, Swift, Collins & Smith, P.C., and that on January 12, 2005, a copy of The Detroit Edison Company's Answer Opposing the Petition for Rehearing and Reconsideration of the Michigan Environmental Council and the Public Interest Research Group in Michigan and Certificate of Service, were served upon:

See Attached Service List

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

Stephen J. Rhodes

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