STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY for approval of a power supply cost recovery plan and for authorization of monthly power supply cost recovery factors for calendar year 2004.	))))))	Case No. U-13917 (e-file)

Administrative Law Judge: Barbara Stump

APPLICATION FOR LEAVE TO APPEAL WITH RESPECT TO THE DENIAL OF QFS' MOTION TO STRIKE AND TO LIMIT SCOPE OF PROCEEDINGS

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

Table of Contents

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

I. INTRODUCTION

NOW COME Intervenor QFs Adrian Energy Associates, LLC, Cadillac Renewable Energy, LLC, Genesee Power Station, LP, Grayling Generating Station, LP, Hillman Power Company, LLC, T.E.S. Filer City Station, LP, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc. ("QFs"), by and through their attorneys, Fraser Trebilcock Davis & Dunlap, P.C., and request leave to appeal the Administrative Law Judge's denial of the QFs' Motion to Strike and to Limit Scope of Proceedings. This ALJ's ruling is erroneous and the grant of this Application for Leave to Appeal and/or relief requested will materially advance the timely resolution of this proceeding and prevent substantial harm to the QFs.

II. SUMMARY

In the spring and summer of 2002, the QFs notified Consumers Energy Company ("Consumers") that they believed Consumers was incorrectly calculating the energy payments it makes to the QFs under their Power Purchase Agreements ("PPAs") (Exhibit A). The issues that the QFs raised with Consumers in the spring and summer of 2002 related to matters dating back to 1997. Counsel for the QFs and Consumers had numerous communications regarding this matter during the spring and summer of 2002. In part, the QFs requested certain information from Consumers so that they could attempt to determine why their energy rates were dropping precipitously. (Exhibit B, ¶ 83) After and extraordinarily long delay, Consumers refused to provide the Qualifying Facilities with the requested information. (Exhibit B, ¶ 84)

After Consumers denied the QFs' request for information, the QFs continued to analyze the rate calculation issue as best they could given the limited information they had regarding Consumers' coal costs and generating plant modification costs. In late summer

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

2003, the QFs again contacted Consumers and informed it that they intended to file a lawsuit to resolve this dispute. Consumers requested that it be given a courtesy copy of the Circuit Court Complaint. The QFs forwarded a draft of their Circuit Court Complaint to Consumers on on October 8, 2003. After receiving it, Consumers asked the QFs not to take any action for one week so it could study the Complaint and attempt to understand the allegations in it. The QFs agreed.

On Monday, October 13, 2003 (which was Columbus Day), Consumers responded to the courtesy that the QFs had extended to it in sharing a copy of their un-filed Circuit Court Complaint by filing the Supplement to Application in this PSCR Case. In its "Supplement to Application," Consumers requested that the Commission quickly issue a declaratory ruling with regard to the energy rate dispute with the QFs and that the Commission issue the declaratory ruling in this PSCR Plan case.

The Ingham County Circuit Courts were closed on Monday, October 13, 2003 in observance of Columbus Day. The QFs filed their Circuit Court lawsuit at 8:00 a.m. on Tuesday, October 14, 2003, which for purposes of the Court Rules is the same day Consumers filed its Supplement to Application. The QFs' lawsuit is captioned: Adrian Energy Associates v Consumers Energy Company, Ingham County Circuit Court File No. 03-1799-CZ, Hon. James R. Giddings.

On October 28, 2003, Consumers filed a Motion for Summary Disposition in the Circuit Court proceedings. In its Motion, Consumers has asked the Circuit Court to grant summary disposition and refer the lawsuit to this Commission pursuant to the Primary Jurisdiction Doctrine. The QFs have opposed Consumers' request, largely because ***Consumers previously argued successfully in MPSC Case No. U-8871, et al that "the***

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

complaints the Commission is empowered to hear concern rates and service matters between a public utility and its customer; <u>not between a public utility and its supplier</u>." (Exhibit C, p 10) Consumers' Motion is still pending before that Court.

On December 12, 2003, the Qualifying Facilities filed a Motion to Strike and to Limit Scope of Proceedings in this case. Regardless of whether the Circuit Court decides that it should hear the breach of contract dispute between the QFs and Consumers or that it should be heard by this Commission, it should not be heard in this PSCR Plan case.

At a hearing on December 23, 2003, the ALJ denied the QFs' Motion to Strike. The QFs hereby seek leave to appeal to this Commission to reverse that decision. The QFs respectfully request that the Commission either (i) strike Consumers' Supplement to Application from this PSCR Plan case and take no action until the Circuit Court has issued a decision on Consumers' pending Motion for Summary Disposition under the Primary Jurisdiction Doctrine or (ii) strike Consumers' Supplement to Application from this PSCR Plan case and order that it be transferred to a separate MPSC contested case proceeding until the Circuit Court has issued a decision on Consumers' pending Motion for Summary Disposition under the Primary Jurisdiction Doctrine. The resolution of the breach of contract dispute should occur within the next year and can then be given effect in the 2004 PSCR Reconciliation case. In the meantime, Consumers should be allowed to implement the PSCR factor it has requested.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

The QFs respectfully submit that the ALJ's December 23, 2003 decision is clearly erroneous and, in some respects, outrageous. As explained more fully herein, the QFs believe that the denial of their Motion to Strike is erroneous for the following reasons:

1. It is inappropriate and unlawful for this Commission to exercise jurisdiction over the QFs' energy rate dispute as long as that matter is pending before the

Ingham County Circuit Court. Under the doctrine of primary jurisdiction, a circuit court retains jurisdiction until it rules that the administrative agency is the proper forum for the case. See generally, Rinaldo's Construction Corp v Michigan Bell Tel Co, 454 Mich 65, 77; 559 NW2d 647 (1997); Travelers Ins Co v Detroit Edison Co, 465 Mich 185, 201; 631 NW2d 733 (2001); Durcon Co v Detroit Edison Co, 250 Mich App 553, 556; 655 NW2d 304 (2002).

2. There is no need to resolve the breach of contract dispute between the QFs and Consumers in this PSCR Plan case. The breach of contract dispute should be resolved either in Circuit Court or in a separate contested case proceeding before this Commission if the Circuit Court grants Consumers' Motion for Summary Disposition. That resolution of the breach of contract dispute should occur within the next year and can be given effect in the 2004 PSCR Reconciliation case.

3. Consumers' arguments that this dispute must be resolved in this PSCR Plan case are little more than a disingenuous attempt to deprive the QFs of a fair Due Process hearing.

4. This case was noticed as a 2004 PSCR Plan case and was not noticed as a contested case hearing between Consumers and the QFs. Without Due Process notice, the ALJ wrongly transmogrified this PSCR Plan case into a contested case hearing between Consumers and the QFs and apparently intends to resolve breach of contract issues in this case which relate not only to 2004, but to 1997-2003 and 2005-2025.

5. The ALJ's ruling violates MCL 24.263, Michigan's Administrative Procedures Act, which makes clear that the declaratory ruling requested by Consumers is only binding on the agency and the company and is not binding on QFs or any third party.

6. The ALJ's decision to *sua sponte* transmogrify Consumers' PSCR Plan case and request for a declaratory ruling into a contested case hearing between Consumers and the QFs violates Due Process and is an outrage. If this Honorable Commission is to hear this dispute involving millions of dollars, the QFs are entitled to a fair Due Process hearing.

7. The ALJ violated Rule 335 of the Commissions' Rules of Practice and Procedure when she allowed the MPSC Staff and Attorney General to oppose the QFs' Motion despite the fact that they had not filed timely answers to the QFs' Motion.

8. The QFs do not have adequate time to complete discovery and properly prepare testimony by March 22, 2004.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

III. FACTUAL BACKGROUND

1. Factual Background Related to the PSCR Plan Case.

Consumers Energy Company initiated this PSCR Plan case on September 30, 2003 by filing an application which seeks to establish a monthly PSCR factor for the calendar year 2004.

On or about October 13, 2003, Consumers Energy filed a Supplement to Application in which it asked this Commission to "issue a ***declaratory ruling*** pursuant to Rule 701 of the Commission's Rules of Practice and Procedure finding that Consumers Energy Company is correctly interpreting and applying the energy charge calculation in its Power Purchase Agreements." (Paragraph (A) of Consumers' requested relief on page 8 of its Supplement to Application)

On December 12, 2003, the QFs filed a Motion to Strike and to Limit Scope of Proceedings. The QFs sought an Order denying Consumers' request for a declaratory ruling and striking Consumers' supplemental testimony in this PSCR proceeding. Specifically, the QFs requested that the Commission deny the declaratory ruling requested in paragraph (A) of Consumers' requested relief on page 8 of its Supplement to Application.

On December 16, 2003, the Administrative Law Judge sent out a notice requiring that any responses to the QFs' motion be filed by 12:00 noon on Friday, December 19, 2003. (Exhibit D) Consumers timely filed an answer to the QFs' motion. No other parties timely filed an answer.

At 3:27 p.m., December 22, 2003, the MPSC Staff filed an untimely answer to the QFs' motion. The MPSC Staff offered no explanation or excuse for not filing its answer by the deadline set by the ALJ. The QFs objected to the Staff's untimely answer. (Exhibit E)

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

The hearing on the QFs' Motion to Strike was held at 9:00 a.m. on December 23, 2003. At the hearing, the ALJ allowed the Attorney General to argue in opposition to the QFs' motion. The ALJ did so over the QFs' objections that the Attorney General had not filed an answer by the deadline set by the ALJ and had offered no explanation or excuse for not having done so. (Exhibit F, p 42)

After hearing oral argument on December 23, 2003, the ALJ denied the QFs' Motion to Strike. Moreover, the ALJ *sua sponte* converted Consumers' request for declaratory ruling (which the APA makes clear would not have been binding on the QFs) into a contested case hearing against the QFs (which the ALJ apparently intends to be binding on the QFs). Moreover, the ALJ required that the contested case proceeding between the QFs and Consumers over the calculation of the energy rate be heard as part of this 2004 PSCR Plan case.

2. Factual Background Related to Adrian Energy Associates v Consumers Energy Company, Ingham County Circuit Court File No. 03-1799-CZ, Hon. James R. Giddings.

The QFs and Consumers are currently involved in a dispute over several matters including Consumers' calculation of the energy rate it pays the QFs under their Power Purchase Agreements ("PPAs"). This dispute is the subject of a lawsuit currently pending in Ingham County Circuit Court which is captioned Adrian Energy Associates, LLC; Cadillac Renewable Energy, LLC; Genesee Power Station, LP; Grayling Generating Station, LP; Hillman Power Company, LLC; T.E.S. Filer City Station, LP; Viking Energy of Lincoln, Inc.; and Viking Energy of McBain, Inc. v Consumers Energy Company, Case No. 03-1799-CZ, Hon. Judge James R. Giddings. (Exhibit B)

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

In their Circuit Court lawsuit, the QFs claim that Consumers is incorrectly calculating the energy rate under their Power Purchase Agreements. The QFs are also claiming that Consumers has wrongfully withheld some $6,000,000.00 that it has collected from its customer ratepayers for charges under the QFs Power Purchase Agreements in 1998 through 2003 (years when Consumers' PSCR clause was suspended at the Company's request) but has refused to turn over to the QFs.

On October 28, 2003, Consumers Energy filed a Motion for Summary Disposition in the Circuit Court proceedings. Consumers' Motion for Summary Disposition requests that the Circuit Court refer the breach of contract dispute between it and the QFs to the Michigan Public Service Commission pursuant to the Primary Jurisdiction Doctrine. The QFs filed an answer to Consumers' motion on December 2, 2003. (Exhibit G) The Circuit Court heard oral argument on Consumers' motion on December 11, 2003, but has not yet ruled.

3. Factual Background Of The Underlying Breach Of Contract Dispute.

The QFs are Qualifying Facilities as that term is defined by the Public Utility Regulatory Policies Act ("PURPA"), 92 Stat 3117; 15 USC §3201 et seq; 16 USC §824(a-3) et seq. In general, a QF is a special kind of non-utility facility that generates electricity for sale to a public utility. Under federal law, a non-utility power generator qualifies as a QF if it meets certain requirements under PURPA and the rules of the Federal Energy Regulatory Commission ("FERC") implementing PURPA.

The United States Congress enacted PURPA to alleviate a national energy crisis precipitated by this country's heavy reliance upon foreign energy sources and inefficient uses of energy. See, FERC v Mississippi, 456 US 742, 745-46; 102 S Ct 2126; 72 L Ed 2d 532 (1982), rehearing denied, 458 U.S. 1131 (1982). PURPA requires utilities to purchase

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

electricity made available to them by qualifying facilities at the utility's "*avoided cost*." 18 CFR §292.304(2) The FERC regulations define a utility's avoided cost as "the cost to the electric utility of the electric energy which, but for the purchase from [the qualifying cogeneration or small power production facility] such utility would generate or purchase from another source." 16 USC §824a-3(d) and 18 CFR §292.101(b)(6).

The QFs have all entered into long term Power Purchase Agreements with Consumers Energy Company pursuant to PURPA. The Power Purchase Agreements require Consumers to pay the QFs both "capacity" payments (i.e., payments for fixed capital costs) and "energy" payments. These PPAs obligate the QFs to deliver electricity to Consumers and Consumers to pay for that electricity. The PPAs explicitly provide that "***The*** capacity and ***energy payment rates*** to be paid by Consumers ***are based on the concept of 'avoided costs'*** as now described in Section 210 of [PURPA]…." The PPAs further provide that the part of the PPAs containing ***the foregoing statement "shall govern over any conflicting provisions of this Agreement."***

In the various MPSC proceedings, Consumers Energy Company testified that the costs that it would avoid by purchasing electricity from the QFs were the costs associated with a coal fired generating plant that burned high Btu, Eastern (Ohio) coal. Consumers' witness Ashish D. Sarkar specifically testified in the proceedings in MPSC Case Nos. U-8871, *et al* and U-10127 with regard to the characteristics of the coal that would be burned in the hypothetical proxy plant:

> "Q. "What coal characteristics were specified?
>
> A. In our RFP we specified a typical high sulfur Eastern (Ohio) coal supply with the following properties:
>
> Heating Value – 11,500 Btu/lb.

Ash Content – 11.6%

Sulfur Content – 3.61%"

In approving the capacity and energy payment rates in the Power Purchase Agreements, the MPSC determined that, by purchasing electricity from the QFs, Consumers was able to avoid the cost of building and operating a coal-fired electric generating plant that would have burned high Btu, Eastern coal (i.e., the avoided unit).

The energy payments in the PPAs are calculated monthly under a formula that is based upon the Consumers' coal costs at its "Base Plants." At the time the QFs signed the Power Purchase Agreements and at the time the MPSC approved the capacity and energy rates in those contracts, Consumers' Base Plants were designed to burn, and did burn, a fuel mix that consisted of approximately 94% high Btu, bituminous Eastern coal and 6% low Btu, subbituminous Western coal (Btu percentages). This was the same type of coal that would have been burned by the generating plant that the MPSC determined Consumers would avoid building by purchasing electricity from the QFs.

In the early years of their PPAs, Consumers paid the QFs an energy payment that was calculated based upon the coal costs for an electric generating plant that burned predominantly high Btu, Eastern coal. Importantly, this Commission allowed Consumers to charge its customers energy rates based on Eastern coal.

Beginning in approximately 1998, long after the QFs signed their Power Purchase Agreements and long after the MPSC approved the avoided capacity and energy rates in those PPAs, Consumers unilaterally decided to rebuild several of its Base Plants to allow them to burn a fuel mix that consisted predominantly of low Btu, Western coal, which is far less expensive than Eastern coal. Consumers spent several hundred million dollars rebuilding its Base Plants and has admitted that those costs are not reflected in any of the capacity or energy

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

rates that it pays the QFs (Consumers' Supplement to Application). As a result, Consumers' Base Plants no longer burn the same type of coal that would have been burned by the generating plant that the MPSC determined Consumers could avoid building by purchasing electricity from the QFs.

After Consumers rebuilt its Base Plants to burn the lower cost Western coal, it began unilaterally paying the QFs energy payments that were calculated on the basis of a fuel mix that consisted predominantly of the less expensive Western coal. This had the effect of substantially reducing the energy rates that the QFs are paid under the PPAs without any consent by the QFs. By converting its Base Plants to burn Western coal, Consumers improperly breached its contractual obligation to pay the QFs an energy rate that is based upon "avoided costs," as that term is defined by PURPA. Consumers' actions violated PURPA and nullified the QFs' election under 18 CFR § 292.304(d)(ii) to choose to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to Consumers (i.e., at the time they signed their Power Purchase Agreements).[1] As a direct result, QFs have been underpaid by millions of dollars already and will be underpaid tens of millions of dollars over the remaining terms of their 35-year contracts.

[1] Under PURPA, each qualifying facility has the option to choose whether its avoided cost rate will be re-calculated every time a payment is made or is calculated "up front" for the entire term of the contract. The QFs all chose to have their avoided cost rate calculated "up front" for the entire term of their contracts. 18 CFR §292.204(d)(2). In approving the rates in the QFs' PPAs, the MPSC recognized and approved the QFs' elections pursuant to 18 CFR § 292.304(d)(ii) to choose to sell electricity for a specified term and to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to Consumers (i.e., at the time they signed their Power Purchase Agreements).

4. Factual Background Of The Jurisdictional Dispute Currently Pending Before The Ingham County Circuit Court.

The first issue which the Circuit Court has been asked to resolve is the jurisdictional question of whether it should hear the dispute between Consumers and the QFs or whether this Commission should hear that dispute. The question of whether the Circuit Court or this Commission should hear the QFs' breach of contract claim is complex. The QFs believe that jurisdiction over their breach of contract dispute against Consumers rests with the Michigan Circuit Court. A complete explanation of why the QFs believe this is true is contained in the QFs' Circuit Court Answer to Consumers' Motion for Summary Disposition which is attached to this Application as Exhibit G. In summary, the QFs believe that the Circuit Court should hear the breach of contract dispute for the following reasons:

1. Consumers successfully argued in MPSC Case No. U-8871, *et al* that the MPSC does not have jurisdiction to resolve contractual disputes between it and Qualifying Facilities. Consumers explicitly argued in Case No. U-8871 that "***the complaints the Commission is empowered to hear concern rates and service matters between a public utility and its customer; not between a public utility and its suppliers***." (Exhibit C, p 10) Because Consumers made this argument and the Commission agreed, the Qualifying Facilities respectfully submit that the collateral estoppel doctrine and judicial estoppel doctrine bar Consumers from taking a different position in this case.

2. Federal law explicitly limits the MPSC's authority and does not authorize the MPSC to resolve breach of contract disputes between utilities their QF suppliers. *See*, 16 USC § 824 a-3(e)(1) and 18 CFR § 292.602.

3. Numerous federal courts have held that disputes such as the current dispute are merely breach of contract disputes which should be "resolved pursuant to common-law contract principles and with reference to PURPA." Schuylkill Energy Resources v Pennsylvania Power and Light, 113 F3d 405 (3rd Cir 1997) Because this dispute is simply a breach of contract dispute, it would have been triable to a jury at common law and the QFs respectfully submit that they are, therefore, entitled to a jury trial in Circuit Court by virtue of the authority of Granfinanchiera SA, *et al* v Paul C Nordberg, 492 US 33, 41-43; 109 S Ct 2782; 106 L Ed 2d 26 (1989)

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

4. The MPSC does not have jurisdiction over the QFs' claim for past money damages. Muskegon Agency Inc v General Telephone Co of Michigan, 350 Mich 41, 53; 85 NW2d 170 (1957)

5. The MPSC does not have jurisdiction over the QFs' equitable claims. Electronic Data Systems Corp v Twp of Flint, 253 Mich App 538, 547-48; 656 NW2d 215 (2003) (Michigan Tax Tribunal); St.Paul Fire & Marine Ins Co v Littky, 60 Mich App 375, 378; 230 NW2d 440 (1975) (Workers Compensation Bureau)

For all of the above reasons, the QFs respectfully suggest that the Circuit Court should hear the breach of contract dispute.

IV. THE QFS' MOTION TO STRIKE

For the reasons set forth below, the QFs respectfully suggest that this Commission should either (i) strike Consumers' Supplement to Application from this PSCR Plan case and take no action until the Circuit Court has issued a decision on Consumers' pending Motion for Summary Disposition under the Primary Jurisdiction Doctrine or (ii) strike Consumers' Supplement to Application from this PSCR Plan case and order that it be transferred to a separate MPSC contested case hearing between Consumers and the QFs. In either event, the breach of contract dispute between the QFs and Consumers should not be heard as part of this 2004 PSCR Plan case. The resolution of the breach of contract dispute should occur within the next year and can then be given effect in the 2004 PSCR Reconciliation case. In the meantime, Consumers should be allowed to implement the PSCR factor it has requested.

V. ARGUMENT

1. It Is Inappropriate And Unlawful For The MPSC To Exercise Jurisdiction While This Matter Is Pending Before The Circuit Court.

The Ingham County Circuit Court presently has jurisdiction over the dispute between Consumers and the QFs regarding the calculation of the energy rate. The Circuit Court will continue to have jurisdiction unless and until it refers the dispute between the parties to this

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

Commission. Consumers has filed a motion for summary disposition with the Ingham County Circuit Court arguing that the Circuit Court should dismiss the proceedings before it and refer this matter to the MPSC pursuant to the Primary Jurisdiction Doctrine but the Circuit Court has not yet ruled on that motion. Only if the Circuit Court grants that motion and refers the dispute to this Commission will it be appropriate for the Commission to hear this case. Under the doctrine of primary jurisdiction, a circuit court retains jurisdiction until it rules that the administrative agency is the proper forum for the case. See generally, Rinaldo's Construction Corp v Michigan Bell Tel Co, 454 Mich 65, 77; 559 NW2d 647 (1997); Travelers Ins Co v Detroit Edison Co, 465 Mich 185, 201; 631 NW2d 733 (2001); Durcon Co v Detroit Edison Co, 250 Mich App 553, 556; 655 NW2d 304 (2002). In that event, the Commission should hear this dispute in a separate contested case hearing, not in a PSCR proceeding.

2. The ALJ's Ruling Violated Rule 335 Of The Commission's Rules Of Practice And Procedure.

Rule 335 of the Commission's Rules of Practice and Procedure governs motion practice before the Commission. Rule 335 requires that, unless a different time is set by the Commission or presiding officer, "***any*** response to a motion" shall be served either 3 or 5 days prior to the hearing.[2]

[2] The applicable text of Rule 335, AC R 460.17335, states:

"(3) Unless a different time is set by the commission or presiding officer, any response to a motion, including a brief or an affidavit, shall be served as follows:

(a) Not less than 5 days before the hearing, if served by mail.

(b) Not less than 3 days before the hearing, if served by delivery to the attorney or party under Michigan court rule 2.107(c)(1) or (2)."

In this case, the Administrative Law Judge required that any responses to the QFs' Motion be filed by 12:00 noon Friday, December 19, 2003. (Exhibit D) Neither the Attorney General nor the MPSC Staff filed an answer by the deadline established by the presiding officer. Despite this and despite the fact that neither MPSC Staff nor the Attorney General offered any excuse or explanation for not complying with that deadline, the ALJ allowed them to appear and oppose the QFs' Motion to Strike.

Due Process requires reasonably precise standards to be used by administrative agencies. Kopietz v Clarkston Zoning Bd, 211 Mich App 666, 670-671; 535 NW2d 910 (1995). According to then-Judge, now Justice Taylor, this requirement intends:

> "to close the door to favoritism, discrimination, and arbitrary uncontrolled discretion on the part of administrative agencies, and to provide adequate protection to the interest of those affected." [Id. at 671.]

Rule 335 satisfies this requirement by providing a reasonably precise standard for when a motion may be accepted. The Administrative Law Judge's failure to adhere to the rule, however, is exactly they type of "arbitrary uncontrolled discretion" that Justice Taylor warned about.

Administrative rules and statutes must be interpreted in a way that renders them constitutional. Saroki v City of Detroit, 73 Mich App 519, 524; 252 NW2d 234 (1977). Where administrative rules or statutes allow for the uncontrolled and arbitrary exercise of power, the constitution has been violated. Id. Moreover, regardless of the interpretation of the administrative agency, administrative rules must be interpreted according to their plain language. In re Complaint of Consumers Energy Co, 255 Mich App 496, 503-504; 660 NW2d 785 (2003). The language of Rule 335 plainly states the times for accepting answers to motions. The Administrative Law Judge, by failing to follow the plain language of Rule

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

335, violated the QFs' Due Process rights through an uncontrolled and arbitrary exercise of power. Kopietz, 211 Mich App at 670-671; Saroki, 73 Mich App at 524.

Allowing the Staff and Attorney General to oppose the QFs' Motion violated Rule 335 and deprived the QFs of a Due Process opportunity to prepare a response to their position. The QFs were clearly prejudiced. As shown below, the ALJ explicitly relied on one of the arguments made by the Attorney General in denying the QFs' Motion to Strike.

3. Contrary To The Attorney General's Arguments, MCL 460.6j(12) Explicitly Authorizes The MPSC To Take Into Account The Resolution Of The Breach Of Contract Dispute In Its PSCR *Reconciliation*.

The QFs take the position that there is no need to resolve their breach of contract dispute with Consumers in this PSCR **Plan** case. The breach of contract dispute should either be resolved in the Circuit Court or in a separate contested case proceeding before this Commission. The resolution of the breach of contract dispute should occur within the next year and can then be given effect in the 2004 PSCR Reconciliation case. In the meantime, Consumers should be allowed to implement the PSCR factor that it has requested in this Plan case.

Despite having failed to file any answer by the deadline established by the ALJ, the Attorney General argued that MCL 460.6j(12) requires that this dispute be resolved in this PSCR Plan case. The ALJ agreed with the Attorney General and cited his arguments under MCL 460.6j(12) as the primary reason for denying the QFs' Motion to Strike.

The Attorney General and the ALJ's reliance on MCL 460.6j(12) was clearly erroneous. Statutes must be interpreted according to their plain language. Consumers Power, 255 Mich App at 503-504. A cursory reading of the statute reveals that the Attorney General and the Administrative Law Judge failed to follow this rule. The last sentence of 460.6j(12)

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

clearly empowers the Commission to effectuate the resolution of the breach of contract dispute (regardless of whether that case is heard by this Commission or the Circuit Court) in the reconciliation of Consumers' 2004 Plan case.

MCL 460.6j(12) provides as follows:

> "Not less than once a year, and not later than 3 months after the end of the 12-month period covered by a utility's power supply cost recovery plan, the commission shall commence a proceeding, to be known as a power supply cost reconciliation, as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. Reasonable discovery shall be permitted before and during the reconciliation proceeding in order to assist parties and interested persons in obtaining evidence concerning reconciliation issues including, but not limited to, the reasonableness and prudence of expenditures and the amounts collected pursuant to the clause. At the power supply cost reconciliation the commission shall reconcile the revenues recorded pursuant to the power supply cost recovery factors and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility with the amounts actually expensed and included in the cost of power supply by the utility. ***The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously conducted power supply and cost review***."

The Attorney General's erroneous argument under MCL 460.6j(12) was not part of Consumers' Answer to the QFs' Motion to Strike. The Attorney General should not have been allowed to make this argument because he failed to file a timely answer to the QFs' Motion and offered no excuse or explanation for not having done so. More importantly, the Attorney General's reading of MCL 460.6j(12) is wrong.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

4. Consumers Has Known About This Dispute For More Than A Year And Should Not Be Heard To Argue That This Dispute Must Be Resolved Immediately.

Despite having known about the dispute over the calculation of the energy rate since the Summer 2002 (Exhibit A), Consumers knowingly waited until October 2003 (two weeks after its initial filing in this PSCR case) to ask the Commission to issue a declaratory ruling regarding this dispute and now insists that the dispute must be resolved immediately in this PSCR case. Consumers' arguments are little more than a disingenuous attempt to deprive the QFs of a fair Due Process hearing.

Whether Due Process demands a hearing depends on the application of the following test:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [Mathews v Eldridge, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).]

In the present case, all three requirements are met.

First, the private interest affected is significant; millions of dollars are at stake. Second, the risk of erroneous deprivation is great, as shown by the Administrative Law Judge's erroneous rulings. Third, the government would have no added administrative burden.

Moreover, as argued below, the QFs are merely asking for adherence to the Due Process requirement of fair notice. See Traxler v Ford Motor Co, 227 Mich App 276, 288; 576 NW2d 398 (1998) (holding that Due Process requires notice of the nature of the

proceedings). Additionally, requiring that this dispute be resolved immediately violates the principles of fair play and fundamental fairness which underpin Due Process. Building Owners Ass'n v PSC, 131 Mich App 504, 513; 346 NW2d 581 (1984).

5. This Proceeding Was Not Noticed As A Contested Case Hearing Against The QFs And The ALJ's Ruling Violates Due Process Notice Requirements.

As noted above, Due Process requires notice of the nature of the proceedings. Traxler, 227 Mich App at 288. Due Process also requires an opportunity to be heard at a meaningful time and in a meaningful manner. Van Slooten v Larsen, 410 Mich 21, 53; 299 NW2d 704 (1980). Moreover, notice must be reasonably calculated to inform interested parties of the pendency of the action and also afford them an opportunity to object. Dusenbery v United States, 534 US 161, 168, 170; 122 S Ct 694; 151 L Ed 2d 597 (2002). As shown below, these rights were clearly violated in the present case.

Similarly, both the Michigan Constitution and the Administrative Procedures Act, MCL 24.271 *et seq*., require that a party be given reasonable notice of an administrative hearing. Atkins v Dep't of Social Services, 92 Mich App 313, 319; 284 NW2d 794 (1979). Specifically, Due Process and the Administrative Procedures Act require that a party in a contested case be given a timely and adequate notice of the reasons for the administrative action. Hardges v Dep't of Social Services, 177 Mich App 698, 702; 442 NW2d 752 (1989).

The scenario in Hardges shows both what Due Process requires and how the Administrative Law Judge in the present case failed to adhere to those requirements. The petitioner in Hardges was given written notice informing her that her food stamps were being revoked because an investigator had determined that her brother was living with her. Id. at 701-703. After a contested hearing, however, the hearing officer determined that the

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

petitioner's food stamps were revoked because the petitioner failed to provide information about her brother to the Department. Id. The Court of Appeals held that the Department failed to give the petitioner adequate notice of the reason for the hearing, preventing her from obtaining a full and fair hearing and depriving her of Due Process. Id. at 704.

The facts in Hardges precisely correspond to those in the present case. The hearing presently at issue was noticed as a 2004 PSCR Plan case, yet the Administrative Law Judge transformed it into a contested case between Consumers and the QFs. Under Hardges, the Administrative Law Judge's decision must be reversed.

The QFs request that the Commission deny Consumers' requested declaratory ruling and strike its Supplement to Application because this is a PSCR case which Consumers noticed as a PSCR Plan case. Consumers' notice of this proceeding did not include notice of its intent to resolve any contractual dispute between it and the QFs. Moreover, a PSCR Plan case is not, by statutory definition, a forum for resolving contractual disputes.

A Power Supply Cost Recovery proceeding involves a PSCR clause which is statutorily defined as:

> "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs . . . of fuel burned by the utility for electric generation and booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a).

The description of the breach of contract dispute with the QFs contained in Consumers' Supplement to Application is grossly over-simplified. Consumers simply ignores the majority of the allegations raised in the QFs' Circuit Court Complaint in an effort to avoid serious scrutiny of those issues. (Exhibit B) The QFs' Circuit Court Complaint contains

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

three types of claims. The first is for $6,000,000 or more in damages which Consumers collected from its customer ratepayers for charges under the QFs' Power Purchase Agreements in 1998, 1999, 2000, 2001, 2002, and 2003 (years when Consumers' PSCR clause was suspended at the Company's own request) but has refused to turn over to the QFs. This claim does not relate to the calculation of the QFs energy rate. Second, the QFs allege that Consumers' unilaterally changed the calculation of their energy rate for 1997, 1998, 1999, 2000, 2001, 2002, and 2003 (years when Consumers' PSCR clause was suspended at the Company's own request) and thereby breached their PPAs. Third, the QFs seek declaratory judgment related to the calculation of their energy rate through 2025.

Consumers' Notice of this PSCR proceeding did not include notice that Consumers intended to resolve the breach of contract dispute with the QFs in this case, including the dispute as it relates to 1997, 1998, 1999, 2000, 2001, 2002, 2003 and to the QFs' request for declaratory relief through 2025. Incredibly, Consumers now seeks to resolve all of these breach of contract disputes in this 2004 PSCR case. MCL 460.6j does not authorize the MPSC to resolve a breach of contract case within a PSCR or to make that resolution binding on the QFs. It also does not authorize resolving damage claims for 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004 through 2025 in a 2004 PSCR case.

To resolve the current breach of contract dispute in this PSCR proceeding despite of the lack of notice and in spite of the lack of statutory authority would be inappropriate and unlawful. Accordingly, Consumers' request for a declaratory ruling should be denied and its supplemental testimony stricken. See e.g., Traxler, 227 Mich App at 288; Hardges, 177 Mich App at 701-704.

6. The ALJ's Ruling Violates Michigan's Administrative Procedures Act Which Makes Clear That Any Declaratory Ruling Would Not Be Binding On The QFs.

The QFs also request that the Commission deny Consumers' requested declaratory ruling and strike its Supplement to Application because Consumers' request does not fall within the scope of Michigan's Administrative Procedures Act and because the APA makes clear that any declaratory ruling which the MPSC might issue in this case would not be binding on the QFs. In this regard, Michigan's APA provides as follows:

> "**MCL 24.263 Declaratory ruling by agency as to applicability of rule.** Sec. 63. On request of an interested person, ***an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency***. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. ***A declaratory ruling is binding on the agency and the person requesting it*** unless it is altered or set aside by any court**.** An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case." (Emphasis added.)

Section 63 of the Administrative Procedures Act specifically limits the Commission's ability to issue declaratory rulings to those instances involving a question regarding the applicability of an MPSC-related statute, rule or order to an actual state of facts. Even a cursory reading of Consumers' Supplement to Application makes clear that this is not an instance in which the utility has requested a ruling regarding the applicability of an MPSC-related statute, rule or order to an actual state of facts. Rather, Consumers has requested that the Commission resolve a breach of contract dispute. The dispute between Consumers and

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

the QFs is a breach of contract dispute that does not involve the applicability of an MPSC-related statute, rule or order to an actual state of facts.

Even if Section 63 did authorize the Commission to issue the ruling requested by Consumers, Section 63 also provides that "***a declaratory ruling is binding on the agency and the person requesting it***. . . ." MCL 24.263. ***Section 63 does not provide that the declaratory ruling is binding on anyone other than the agency or the person requesting it***. Because the declaratory ruling that Consumers has requested would not be binding upon the QFs, it would be a waste of this Commission's resources to take testimony regarding this dispute and issue a declaratory ruling in this PSCR case. Michigan State Chamber of Commerce v Austin, 122 Mich App 611, 616;332 NW2d 547 (1983) (under MCL 24.263, an administrative agency's declaratory ruling is binding only on the agency and the party requesting the ruling).

The declaratory ruling provisions of the MPSC's Rules of Practice and Procedure also do not authorize the Commission to resolve the breach of contract dispute between Consumers and the QFs. In this regard, Rule 701 of the Commission's Rules of Practice and Procedure provides as follows:

> "**R 460.17701 Declaratory rulings.** Rule 701.(1) Any person may request a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the commission or of a rule or order of the commission, pursuant to the provisions of sections 33 and 63 of the Act No. 306 of the Public Acts of 1969, as amended, being SS24.233 and 24.263 of the Michigan Compiled Laws. A request for a declaratory ruling shall contain, or by attached exhibits show, all of the following:
>
> (a) A complete, accurate, and concise statement of the facts or situation upon which the request is based.
> (b) A concise statement of the issues presented.

(c) Specific reference to all statutes, rules, and orders to which the request relates.

(d) An analysis by the person's legal counsel of the issues presented and a proposed conclusion, or the person's analysis of the issues presented and a proposed conclusion.

(2) The commission may require that notice of the request for declaratory ruling be provided and may require a contested case proceeding instead of issuing a declaratory ruling.

(3) The decision to issue a declaratory ruling is within the discretion of the commission."

Rule 701 does not empower the Commission to issue a declaratory ruling resolving a breach of contract dispute such as the current dispute between Consumers and the QFs.

Even if Rule 701 did allow this breach of contract dispute to be addressed in this PSCR proceeding, Consumers has not satisfied the procedural prerequisites for requesting a declaratory ruling. Rule 701 requires a complete, accurate and concise statement of the facts or situation upon which the request is based. It also requires a concise statement of the issues presented. Consumers' recitation of the dispute between it and the QFs is not complete, accurate or concise. A complete, accurate and concise statement of the dispute between Consumers and the QFs is contained in the First Amended Complaint filed in Adrian Energy Association, et al v Consumers Energy, Circuit Court File No. 03-1799-CZ. (Exhibit B)

7. The ALJ's Decision To *Sua Sponte* Convert Consumers' Request For A Declaratory Ruling Into A Contested Case Hearing Is An Outrage.

During the December 23, 2003 hearing, the ALJ recognized on the record the substantive short-comings and procedural deficiencies of Consumers' request for declaratory ruling. (Exhibit F, 12/23/03 Transcript, pp 32, *et seq* and pp 66, *et seq*) Recognizing that declaratory rulings are not binding on anyone other than the agency and the person requesting the ruling, the ALJ *sua sponte* ordered that Consumers' request for a declaratory ruling (which

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

is not binding on the QFs) be converted into a contested case proceeding within this PSCR Plan case (which the ALJ apparently intends to be binding on the QFs). The ALJ did this without any request from Consumers.

As noted above, Due Process requires notice of the nature of the proceedings, Traxler, 227 Mich App at 288, and an opportunity to be heard at a meaningful time and in a meaningful manner. Van Slooten, 410 Mich at 53. Notice must also be reasonably calculated to inform interested parties of the pendency of the action and afford them an opportunity to object. Dusenbery, 534 US at 168, 170. Both the Michigan Constitution and the Administrative Procedures Act, MCL 24.271 *et seq*., require that a party be given reasonable notice of an administrative hearing. Atkins, 92 Mich App at 319. Specifically, a party in a contested case must be given a timely and adequate notice of the reasons for the administrative action. Hardges, 177 Mich App at 702.

The ALJ's decision to *sua sponte* convert Consumers' request for a declaratory ruling into a contested case proceeding between Consumers and the QFs was yet another violation of the QFs' right to Due Process and proper notice. Traxler, 227 Mich App at 288; Hardges, 177 Mich App at 701-704. This case was noticed as a PSCR Plan case. On October 13, 2003, Consumers transmogrified this PSCR Plan case into a declaratory ruling case. On December 23, 2003, the ALJ transmogrified this PSCR Plan case/declaratory ruling case into a contested case proceeding between Consumers and the QFs without any Due Process notice. The ALJ's decision to do so was clearly erroneous. The breach of contract dispute between Consumers and the QFs should either be heard by the Circuit Court or by this Commission in a separate contested case proceeding.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

8. The QFs Do Not Have Adequate Time To Complete Discovery And Properly Prepare Testimony.

After the ALJ *sua sponte* converted this proceeding into a contested case hearing between Consumers and the QFs, the ALJ asked (off the record) how much time the QFs would need to prepare this matter for hearing. The QFs responded that they would require an absolute minimum of 6 months. The ALJ responded that that would not be possible in this PSCR Plan case and then entered an amended Scheduling Order as was agreed to by Consumers, the Attorney General and the MPSC Staff. The ALJ indicated that this was "the best that she was going to do" in this PSCR Plan case. This Amended Scheduling Order requires that the QFs complete their discovery and file pre-filed direct testimony on or before March 22, 2004.

The ALJ's decision violated the QFs' Due Process rights. Due Process requires a meaningful hearing, Van Slooten, 410 Mich at 53, that is both full and fair. Hardges, 177 Mich App at 704. Absent adequate time to prepare, however, a meaningful hearing is not possible, nor can it be full and fair. Accordingly, the ALJ's Amended Scheduling Order must be vacated and reconsidered.

Respectfully, the QFs cannot complete discovery and prepare their case in the next 11 weeks. The fact that this dispute cannot be properly litigated in the next 11 weeks can be clearly seen in the length of time which Consumers has taken to respond to the QFs' discovery requests. The QFs served discovery requests on Consumers on October 21, 2003. Consumers requested extension after extension after extension of time to answer those discovery requests. Consumers apparently will not produce the answers to discovery requests until January 6, 2004 at the earliest. It is unreasonable to think that the QFs can complete discovery and prepare their case in the next 11 weeks if Consumers needs 10 weeks to answer discovery

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

requests. It was an abuse of discretion for the ALJ to subject the QFs to the Amended Scheduling Order.

WHEREFORE, the QFs respectfully request that this Honorable Commission grant this Application for Leave to Appeal and reverse the decision of the ALJ with regard to the QFs' Motion to Strike and to Limit Scope of Proceedings. The QFs respectfully request that this Commission either (i) strike Consumers' Supplement to Application from this PSCR Plan case and take no action until the Circuit Court has issued a decision on Consumers' pending Motion for Summary Disposition under the Primary Jurisdiction Doctrine or (ii) strike Consumers' Supplement to Application from this PSCR Plan case and order that it be transferred to a separate MPSC contested case hearing between Consumers and the QFs until the Circuit Court has issued a decision on Consumers' pending Motion for Summary Disposition under the Primary Jurisdiction Doctrine. In either event, the breach of contract dispute between the QFs and Consumers should not be heard as part of this 2004 PSCR Plan case. The resolution of the breach of contract dispute should occur within the next year and can then be given effect in the 2004 PSCR Reconciliation case. In the meantime, Consumers should be allowed to implement the PSCR factor it has requested.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for QFs

Dated: January 5, 2004

By Thomas J. Waters
Signature Not Verified
Digitally signed by Thomas J. Waters
DN: cn=Thomas J. Waters, o=Fraser Law Firm, c=US
Date: 2004.01.05 16:15:12 -05'00'

Thomas J. Waters (P37829)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
Telephone: (517) 482-5800

tjw/U-13917/MPSC/emergency appeal

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY for approval of a power supply cost recovery plan and for authorization of monthly power supply cost recovery factors for calendar year 2004.	))))))	Case No. U-13917 (e-file)

CERTIFICATE OF SERVICE

The undersigned states that he served papers as follows:

1. Document(s) served:	Application for Leave to Appeal with Respect to the Denial of QFs' Motion to Strike and to Limit Scope of Proceedings and Certificate of Service
2. Served upon:	See attached Service List
3. Method of service:	e-mail to all parties
4. Date served:	January 5, 2004

Signature Not Verified
Thomas J. Waters
Digitally signed by Thomas J. Waters
DN: cn=Thomas J. Waters, o=Fraser Law Firm, c=US
Date: 2004.01.05 16:15:43 -05'00'

Thomas J. Waters

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

SERVICE LIST
U-13917

Jon R. Robinson
John C. Shea
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201
Mpscfilings@cmsenergy.com

Patricia S. Barone
Assistant Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Baronep@michigan.gov

Robert A. W. Strong
Clark Hill PLC
255 S. Old Woodward Avenue, 3rd Floor
Birmingham, MI 48009
Rstrong@clarkhill.com

David E.S. Marvin
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, MI 48933
Dmarv@fraserlawfirm.com

Phil Forner
P.O. Box 296
Allendale, MI 49401
Phil@allendaleheating.com

Stewart Binke
Michael J. Brown
Howard & Howard
222 N. Washington Square, Suite 500
Lansing, MI 48933
Sbinke@howardandhoward.com
Mjbrown@howardandhoward.com

Donald Erickson
Assistant Attorney General
Special Litigation Division
6th Floor, G Mennen Williams Building
525 W. Ottawa Street
Lansing, MI 48933
Ericksond@michigan.gov

Diane Royal
Schaltz and Royal, P.C.
3303 West Saginaw, #C1
Lansing, MI 48917
Shalroy@voyager.net

Barbara Stump
Administrative Law Judge
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911
Bstump@michigan.gov

EXHIBIT A

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
LAWYERS

PETER L. DUNLAP+
DOUGLAS J. AUSTIN
ROBERT W. STOCKER II
MICHAEL E. CAVANAUGH
JOHN J. LOOSE
DAVID E.S. MARVIN□
STEPHEN L. BURLINGAME
DARRELL A. LINDMAN
IRIS K. LINDER
GARY C. ROGERS
MARK A. BUSH
MICHAEL H. PERRY
BRANDON W. ZUK
DAVID D. WADDELL
MICHAEL C. LEVINE
†THOMAS J. WATERS

MARK R. FOX*□
MICHAEL S. ASHTON
H. KIRBY ALBRIGHT
GRAHAM K. CRABTREE
MICHAEL P. DONNELLY
DAVID M. PLATT*
EDWARD J. CASTELLANI◊
NAN ELIZABETH CASEY
CHRISTOPHER R. ROYCE
SCOTT D. STONER
ELIZABETH H. LATCHANA
HEATHER S. MEINGAST
THADDEUS E. MORGAN
BRIAN P. MORLEY
BRETT A. GROSSMAN
JOHN D. MILLER

1000 MICHIGAN NATIONAL TOWER
124 WEST ALLEGAN STREET
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-5800
FACSIMILE (517) 482-0887
WEBSITE www.fraserlawfirm.com

DETROIT OFFICE
TELEPHONE (313) 237-7300

ARCHIE C. FRASER
(1902-1998)

RETIRED
EVERETT R. TREBILCOCK

OF COUNSEL
JAMES R. DAVIS
DONALD A. HINES
RONALD R. PENTECOST

*ALSO LICENSED IN FLORIDA
+ALSO LICENSED IN COLORADO
□ALSO LICENSED IN DISTRICT OF COLUMBIA
◊ALSO CERTIFIED PUBLIC ACCOUNTANT

October 24, 2002

Via Facsimile and Regular Mail

Jon R. Robinson, Esq.
Consumers Energy Company
212 West Michigan Avenue
Jackson, MI 49201

Re: QF Energy Rates

Dear Jon:

This letter will follow up on our recent telephone conversations. I am writing this letter on behalf of Cadillac Renewable Energy, LLC, Genessee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, Tondu Energy Systems, Viking Energy of Lincoln and Viking Energy of McBain.

My clients have asked me to look into the energy payments they receive under their Power Purchase Agreements ("PPAs") with Consumers Energy Company. Fundamentally, they question how their energy rates have remained stagnant in the face of increasing coal prices. Although Consumers has not provided the information my clients have requested, it appears that the company is improperly excluding certain costs from its calculation of the energy rate. One set of costs that Consumers appears to be excluding from its calculation of the energy rate are the costs which the company is incurring to modify the boilers at its Base Plants to allow them to burn low BTU western coal instead of high BTU eastern coal.

Whether analyzed statutorily or contractually, my clients believe that they should be paid an energy rate that is calculated in a manner that includes the boiler conversion costs or, at a minimum, is calculated based upon the cost of the high BTU eastern coal.

The PPA's explicitly provide that "the capacity and energy payment rates to be paid by Consumers . . . are based upon the concept of 'avoided costs' as now described in Section 210 of the Public Utility Regulatory Policies Act of 1978. . . ."

The PPA's also provide that the energy rates consist of an operation and maintenance component, a fuel inventory component, and an administrative and general component.

With regard to O&M, the PPA's provide that it shall consist of "the average cost per kilowatthour ... for operation and maintenance, excluding fuel, at the Base Plants during the Most Recent Calendar Year" and that O&M costs shall be determined from Consumers "total production expenses."

With regard to Fuel Inventory, the PPA's states that it shall be defined to be "the average cost per kilowatthour ... for fuel inventory at the Base Plants during the Most Recent Calendar Year" and that "the fuel inventory costs shall be equal to the product of (1) Consumers' *total fuel related expenses* at the Base Plants ...."

Excluding the boiler conversion costs from the calculation of the energy rates is inconsistent with PURPA. Neither Consumers' Base Plants nor the proxy plant upon which my clients' capacity and energy rates are based could have burned low BTU western coal without having their boilers modified. Thus, calculating energy rates on the basis of low BTU western coal, without including any of the costs that would be necessary to allow the proxy to burn that low BTU coal, violates PURPA. Doing so also violates the PPA's which provide that "the capacity and *energy payment rates* to be paid by Consumers . . . *are based upon the concept of 'avoided costs'* as now described in Section 210 of the Public Utility Regulatory Policies Act of 1978. . . ."

Excluding the boiler conversion costs from the calculation of the energy rates is also inconsistent with the PPA's. The cost of the upgrades which Consumers is incurring in order to burn low sulfur, low BTU western coal are either an operation and maintenance expense or a "total fuel related expense."

Finally, excluding the boiler conversion costs from the calculation of the energy rates is inconsistent with the orders, logic and evidence in MPSC Case Nos. U-8871 and U-10127. In both of those cases, Consumers hypothesized a proxy plant that burned high BTU eastern coal and the MPSC expressly adopted a proxy plant that burned high BTU eastern coal.

The proper calculation of the energy rate is very important to my clients. If you believe that our reading of the PPA's is incorrect, we would greatly appreciate a reasonably detailed explanation of why you think we are wrong. We would like to resolve this issue in an mutually agreeable manner but, one way or another, given its significance, my clients need to resolve the issue .

I am sending you this letter in an effort to resolve a disputed matter. Pursuant to MRE 408, this letter will be inadmissible in any proceedings should we be unable to resolve this matter amicably.

We would welcome the opportunity to discuss these matters with you and look forward to hearing from you.

Very truly yours,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

TJW

Thomas J. Waters

TJW/csp

TJW/ Energy Payments/correspondence/Robinson#1

EXHIBIT B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ADRIAN ENERGY ASSOCIATES, LLC; CADILLAC RENEWABLE ENERGY, LLC; GENESEE POWER STATION, LP; GRAYLING GENERATING STATION, LP; HILLMAN POWER COMPANY, LLC; T.E.S. FILER CITY STATION, LP; VIKING ENERGY OF LINCOLN, INC.; and VIKING ENERGY OF MCBAIN, INC.; Plaintiffs, V CONSUMERS ENERGY COMPANY, a Michigan corporation. Defendant.	Case No.: 03-1799-CZ Hon. James R. Giddings

David E. S. Marvin (P26564)
David D. Waddell (P36814)
Thomas J. Waters (P37829)
Michael S. Ashton (P40474)
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
Telephone: (517) 482-5800
Fax: (517) 482-0887
Attorneys for Plaintiffs

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this complaint.

FIRST AMENDED COMPLAINT

NOW COME Plaintiffs Adrian Energy Associates, LLC; Cadillac Renewable Energy, LLC; Genesee Power Station, LP; Grayling Generating Station, LP; Hillman Power Company, LLC; T.E.S. Filer City Station, LP; Viking Energy of Lincoln, Inc.; and Viking Energy of

McBain, Inc., by and through their attorneys, **FRASER TREBILCOCK DAVIS & DUNLAP, P.C.**, and for their Complaint against Defendant Consumers Energy Company state as follows:

JURISDICTION AND VENUE

1. Plaintiffs are corporations, limited liability companies and limited partnerships that are organized or existing under the laws of the States of Michigan, Delaware and California, as explained more fully hereinafter.

2. The Defendant Consumers Energy Company is a Michigan corporation that does business in Ingham County.

3. The amount in controversy is within the jurisdiction of this Court because Plaintiff seeks damages in excess of $25,000.00. Further, Plaintiff seeks equitable relief and the claims are therefore within the jurisdiction of this Court.

4. Venue is properly laid in this Court as Defendant Consumers Energy Company conducts business in Ingham County.

PARTIES

Plaintiff Adrian Energy Associates, LLC

5. Plaintiff Adrian Energy Associates, LLC is a Michigan limited liability company, which has its principal place of business in Adrian, Michigan.

6. Plaintiff Adrian Energy Associates, LLC owns and operates a 2.4 Megawatt ("MW") landfill gas-fired electric generating station that is a "qualifying facility" under the Public Utility Regulatory Policies Act of 1978, 16 USC 824a-3, *et seq*. ("PURPA").

7. Plaintiff Adrian Energy Associates, LLC has entered into a Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff Adrian Energy Associates.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
LAWYERS
LANSING, MICHIGAN 48933

8. Plaintiff Adrian Energy Associates, LLC's Power Purchase Agreement with Defendant Consumers Energy Company is for a term of 35 years which commenced with the commercial operation date of Plaintiff Adrian Energy Associates, LLC's project in 1994.

Plaintiff Cadillac Renewable Energy, LLC

9. Plaintiff Cadillac Renewable Energy, LLC is a Delaware limited liability company, which has its principal place of business in Cadillac, Michigan.

10. Plaintiff Cadillac Renewable Energy, LLC owns and operates a 34 Megawatt ("MW") wood-fired electric generating station that is a "qualifying facility" under the Public Utility Regulatory Policies Act of 1978, 16 USC 824a-3, *et seq*. ("PURPA").

11. Plaintiff Cadillac Renewable Energy, LLC has entered into a Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff Cadillac Renewable Energy.

12. Plaintiff Cadillac Renewable Energy, LLC's Power Purchase Agreement with Defendant Consumers Energy Company is for a term of 35 years which commenced with the commercial operation date of Plaintiff Cadillac Renewable Energy, LLC's project on July 16, 1993.

Plaintiff Genesee Power Station, LP

13. Plaintiff Genesee Power Station, LP is a Delaware limited partnership doing business in Genesee Township, Michigan.

14. Plaintiff Genesee Power Station, LP owns and operates the Genesee Power Station which is wood-fired electric generating station that is a "qualifying facility" under PURPA.

15. Plaintiff Genesee Power Station, LP has a signed Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff Genesee Power Station, LP.

16. Plaintiff Genesee Power Station, LP's Power Purchase Agreement is for a term of 35 years which commenced with the commercial operation date of Plaintiff Genesee Power Station, LP's project in approximately December 1995.

Plaintiff Grayling Generating Station, LP

17. Plaintiff Grayling Generating Station, LP is a Michigan limited partnership with its principal place of business in Grayling Township, Michigan.

18. Plaintiff Grayling Generating Station, LP owns and operates the Grayling Station which is a wood-fired electric generating station that is a "qualifying facility" under PURPA.

19. Plaintiff Grayling Generating Station, LP has a signed Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff Grayling Generating Station, LP.

20. Plaintiff Grayling Generating Station, LP's Power Purchase Agreement is for a term of 35 years which commenced with the commercial operation date of Plaintiff Grayling Generating Station, LP's project in June 1992.

Plaintiff Hillman Power Company, LLC

21. Plaintiff Hillman Power Company, LLC is a Delaware limited liability company with its principal place of business in Hillman, Michigan.

22. Plaintiff Hillman Power Company, LLC owns and operates the Hillman Generating Station which is a wood-fired electric generating station that is a "qualifying facility" under PURPA.

23. Plaintiff Hillman Power Company, LLC has a signed Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff Hillman Power Company, LLC.

24. The term of Plaintiff Hillman Power Company, LLC's Power Purchase Agreement with Defendant Consumers Energy Company extends until at least December 31, 2015.

Plaintiff T.E.S. Filer City Station, LP

25. Plaintiff T.E.S. Filer City Station, LP is a Michigan limited partnership with its principal place of business in Filer City, Michigan.

26. Plaintiff T.E.S. Filer City Station, LP owns and operates the Filer City Station Plant, a coal, waste wood and chip-tire fired electric generating plant that is a "qualifying facility" under PURPA.

27. Plaintiff T.E.S. Filer City Station, LP has entered into a Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff T.E.S. Filer City Station, LP.

28. Plaintiff T.E.S. Filer City Station, LP's Power Purchase Agreement is for a term of 35 years which commenced with the commercial operation date of Plaintiff T.E.S. Filer City Station, LP's project in approximately June 1990.

Plaintiff Viking Energy of Lincoln, Inc.

29. Plaintiff Viking Energy of Lincoln, Inc. is a California corporation, with its principal place of business in Lincoln, Michigan.

30. Plaintiff Viking Energy of Lincoln, Inc. owns and operates a 18 MW wood-fired electric generating station that is a "qualifying facility" under PURPA.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

31. Plaintiff Viking Energy of Lincoln, Inc. has signed a Power Purchase Agreement with Defendant Consumers Energy Company, pursuant to which the Defendant buys electric capacity and energy from Plaintiff Viking Energy of Lincoln, Inc.

32. The term of Plaintiff Viking Energy of Lincoln, Inc.'s Power Purchase Agreement with Defendant Consumers Energy Company extends until at least December 31, 2018.

Plaintiff Viking Energy of McBain, Inc.

33. Plaintiff Viking Energy of McBain, Inc. is a California corporation, which has its principal place of business in McBain, Michigan.

34. Plaintiff Viking Energy of McBain, Inc. owns and operates an 18 MW wood-fired electric generating station that is a "qualifying facility" under PURPA.

35. Plaintiff Viking Energy of McBain, Inc. has a signed Power Purchase Agreement with Consumers Energy Company, pursuant to which Consumers Energy buys electric capacity and energy from Plaintiff Viking Energy of McBain, Inc.

36. The term of Plaintiff Viking Energy of McBain, Inc.'s Power Purchase Agreement with Defendant Consumers Energy Company extends until at least December 31, 2018.

GENERAL ALLEGATIONS

37. Plaintiffs hereby adopt and incorporate by reference the foregoing allegations as if fully repeated verbatim herein.

38. The Defendant, Consumers Energy Company, drafted each Plaintiff's Power Purchase Agreement and any ambiguities in the Power Purchase Agreements should be strictly construed against the Defendant.

39. The Defendant is in possession of a copy of each Plaintiff's Power Purchase Agreement.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

The Defendant Is Paying Plaintiffs Less Than Is Required By Their PURPA Contracts

40. The Power Purchase Agreements between the Plaintiffs and Defendant Consumers Energy Company were entered into pursuant to the Public Utility Regulatory Policies Act ("PURPA"), 16 USC 824a-3, *et seq*., and its implementing regulations.

41. The Power Purchase Agreements between the Plaintiffs and the Defendant specifically provide that "The capacity and energy payment rates to be paid by Consumers under [the Plaintiffs' Power Purchase Agreements] . . . are based upon the concept of 'avoided costs' as now described in Section 210 of the Public Utility Regulatory Policies Act of 1978, 18 CFR Part 292 et seq, ..."

42. The Power Purchase Agreements between the Plaintiffs and the Defendant further provide that "The provisions [quoted in paragraph 41 above] . . . shall govern over any conflicting provision of this Agreement."

43. PURPA required the Defendant to purchase electricity from the Plaintiffs.

44. PURPA also required the Defendant to pay the Plaintiffs the Defendant's "avoided costs" for the electricity that it purchased from the Plaintiffs.

45. PURPA's regulations define "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR 292.101(b)(6).

46. PURPA's regulations also authorize qualifying facilities to choose to provide electric energy to utilities pursuant to legally enforceable obligations for the delivery of electricity over a specified term. 18 C.F.R. 292.304 (d).

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

47. All of the Plaintiffs chose to provide electric energy to the Defendant pursuant to legally enforceable obligations for the delivery of electricity over a specified term.

48. If a "qualifying facility" chooses to sell electricity for a specified term, the "qualifying facility" may either (i) choose to be paid the utility's avoided costs calculated at the time the electricity is delivered to the utility or (ii) it may choose to have the "avoided cost" payments calculated (for the full term of its contract) at the time it incurs the obligation to the utility (i.e., at the time it signs its power purchase agreement). 18 C.F.R. § 292.304(d).

49. All of the Plaintiffs chose to have their "avoided cost" payments calculated, for the full term of their contracts, as of the time they signed their power purchase agreements with the Defendant.

50. Avoided cost payments include both "avoided capacity" payments (i.e., payments for fixed capital costs) and "avoided energy" payments. This case involves a dispute over the calculation of the Plaintiffs' avoided energy payments.

51. The energy payments which the Plaintiffs receive from the Defendant are calculated monthly under a formula that is based upon the Defendant's coal costs at its "Base Plants."

52. At the time the Plaintiffs signed their Power Purchase Agreements, the Defendant's Base Plants were designed to burn, and did burn, a fuel mix that consisted of approximately 94% high Btu, bituminous Eastern coal and 6% low Btu, subbituminous Western coal (Btu percentages).

53. At the time the Plaintiffs signed their Power Purchase Agreements, the Plaintiffs and Defendant understood and agreed that the term Base Plants in their Power Purchase Agreements referred to the Defendant's existing generating plants which burned predominantly high Btu, Eastern coal.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

54. The Defendant promised, and led the Plaintiffs to believe, that they would be paid capacity and energy payments that were calculated based upon the cost of high Btu, Eastern coal.

55. The Plaintiffs reasonably relied upon the Defendant's promise to pay the Plaintiffs capacity and energy rates that were calculated based upon the cost of high Btu, Eastern coal and financed and built their electric generating projects in reliance on the Defendant's promise.

56. PURPA empowered the Michigan Public Service Commission ("MPSC") to determine the Defendant's avoided costs.

57. The Plaintiffs and Defendant initiated various proceedings at the MPSC requesting that the MPSC determine the Defendant's avoided costs for purposes of each Plaintiff's Power Purchase Agreement.

58. The MPSC approved the capacity and energy payment rates in Plaintiff Hillman Power Company, LLC's Power Purchase Agreement in 1984 in MPSC Case No. U-7990. The energy charge calculation methodology in Plaintiff Hillman's Power Purchase Agreement was subsequently amended to incorporate the energy charge calculation methodology approved by the MPSC in Case Nos. U-8871, *et al* and U-10127, described below.

59. The MPSC approved the capacity and energy payment rates in Plaintiffs Viking Energy of Lincoln, Inc.'s and Viking Energy of McBain, Inc.'s Power Purchase Agreements in 1984 in MPSC Case No. U-8062. The energy charge calculation methodology in Plaintiffs' Viking Energy of Lincoln, Inc. and Viking Energy of McBain, Inc. Power Purchase Agreements were subsequently amended to incorporate the energy charge calculation methodology approved by the MPSC in Case Nos. U-8871, *et al* and U-10127, described below.

60. The MPSC approved the capacity and energy payment rates in Plaintiff T.E.S. Filer City Station, LP's Power Purchase Agreement in 1987 in MPSC Case No. U-8562.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

61. The MPSC approved the capacity and energy payment rates in Plaintiffs Adrian Energy Associates, LLC's, Cadillac Renewable Energy, LLC's, Genesee Power Station, LP's, and Grayling Generating Station, L.P.'s Power Purchase Agreements in a series of Orders in 1989, 1990, 1992, 1993 in MPSC Case Nos. U-8871, *et al* and U-10127.

62. The Defendant filed testimony in the proceedings in MPSC Case Nos. U-8871, *et al* and U-10127 indicating that the costs that it was avoiding by purchasing electricity from the Plaintiffs were the costs associated with a coal fired generating plant that burned high Btu, Eastern (Ohio) coal.

63. Defendant's witness Ashish D. Sarkar specifically testified that he chose a high Btu, Eastern coal plant.

64. Mr. Sarkar further testified with regard to the characteristics of the coal that would be burned in the hypothetical proxy plant. In this regard, he testified as follows:

> "Q. What coal characteristics were specified?
>
> A. In our RFP we specified a typical high sulfur Eastern (Ohio) coal supply with the following properties:
>
> Heating Value – 11,500 Btu/lb.
>
> Ash Content – 11.6%
>
> Sulfur Content – 3.61%"

65. In approving the capacity and energy payment rates in the Plaintiffs' Power Purchase Agreements, the MPSC recognized and approved the Plaintiffs' elections pursuant to 18 C.F.R. § 292.304(d)(ii) to choose to sell electricity for a specified term and to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to the Defendant (i.e., at the time they signed their power purchase agreements).

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

66. In approving the capacity and energy payment rates in the Plaintiffs' Power Purchase Agreements, the MPSC determined that, by purchasing electricity from the Plaintiffs, the Defendant was able to avoid the cost of building and operating a coal-fired electric generating plant that would have burned high Btu, Eastern coal.

67. The MPSC approved a fixed "capacity" payment rate for each of the Plaintiffs' Power Purchase Agreements that was based upon an avoided unit that would have burned high Btu, Eastern coal.

68. The MPSC also approved an "energy" payment rate for each of the Plaintiffs' Power Purchase Agreements that was based upon an avoided unit that would have burned high Btu, Eastern coal.

69. In its orders in MPSC Case Nos. U-8871, *et al* and U-10127, the MPSC recognized that the energy payments which the Plaintiffs receive from the Defendant are calculated monthly under a formula that is based upon the Defendant's coal costs at its "Base Plants." The MPSC approved this formula, stating:

> "The Commission finds that the use of a coal plant proxy for the projects in these proceedings is appropriate. The coal plant has proved administratively simple to utilize. Additionally, Consumers relies heavily upon coal for its own generation, and avoided costs are, therefore, easy to compute."

70. At the time the MPSC approved the capacity and energy payment rates in the Plaintiffs' Power Purchase Agreements, the Plaintiffs and Defendant understood the term Base Plants in the Power Purchase Agreements to refer to the Defendant's existing generating plants that burned high Btu, Eastern coal, which was the same type of coal that would have been burned by the generating plant that the MPSC determined the Defendant did not need to build because it would be purchasing electricity from the Plaintiffs.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

71. In the early years of their contracts, the Defendant paid the Plaintiffs an energy payment that was calculated based upon the coal costs for an electric generating plant that burned predominantly high Btu, Eastern coal.

72. Upon information and belief, beginning in approximately 1998, long after the Plaintiffs signed their Power Purchase Agreements, Defendant rebuilt several of its Base Plants, at a cost of several hundred million dollars, to allow them to burn a fuel mix that consisted predominantly of low Btu, Western coal.

73. Upon information and belief, the Defendant's Base Plants burned a fuel mix in 2001 that consisted of approximately 42% high Btu, Eastern coal and 58% low Btu, Western coal (Btu percentages).

74. Western coal has a substantially lower Btu content (approximately 8,500 to 9,000 Btu/lb) than Eastern coal (approximately 11,500 to 12,500 Btu/lb).

75. The coal-fired generating plant that the MPSC determined the Defendant did not need to build because it would be purchasing electricity from the Plaintiffs (i.e., the avoided unit) could not and would not have burned a fuel mix that consisted of 58% low Btu, Western coal.

76. Low Btu, Western coal is considerably less expensive than high Btu, Eastern coal.

77. After the Defendant rebuilt its Base Plants to burn the lower cost Western coal, it began paying the Plaintiffs energy payments that were calculated on the basis of a fuel mix that predominantly included the less expensive Western coal.

78. By converting its Base Plants to burn Western coal, the Defendant unilaterally and improperly changed the parties' understanding and agreement regarding the meaning of the term Base Plants in the Plaintiffs' Power Purchase Agreements and unilaterally and improperly changed the calculation of the Plaintiffs' energy rates.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

79. By converting its Base Plants to burn Western coal, the Defendant unilaterally and improperly nullified the Plaintiffs' election under 18 C.F.R. § 292.304(d)(ii) to choose to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to the Defendant (i.e., at the time they signed their power purchase agreements).

80. The capacity rates (i.e., capital cost payments) in the Plaintiffs' Power Purchase Agreements are based upon the capital costs of an Eastern coal fired generating plant.

81. The energy costs associated with an Eastern coal fired generating plant are the costs of Eastern coal.

82. By paying the Plaintiffs an energy rate that is calculated on the basis of the cost of Western coal, the Defendant is improperly associating the capital costs of one type of generating plant (i.e., a bituminous Eastern coal fired generating plant) with the energy costs of a different type of generating plant (i.e., a subbituminous Western coal fired generating plant) in violation of PURPA and the Power Purchase Agreements.

83. The Plaintiffs requested that the Defendant give them information relating to the calculation of its energy rate so they could attempt to determine why their energy payments were declining while the coal costs for other utilities were increasing.

84. The Defendant refused to provide all of the information that the Plaintiffs requested.

85. As a result of the Defendant's recalculation of Plaintiffs' energy payments on the basis of a fuel mix that consists predominantly of the lower cost Western coal, Plaintiffs have suffered damages of more than $20,000,000.00.

86. The Plaintiffs will continue to suffer damages in the future.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

The Defendant Is Paying Plaintiffs Less Than It is Recovering From Its Customers

87. The Defendant has been allowed to recover from its customers the capacity and energy payments that it pays to the Plaintiffs for the electricity that it purchases from the Plaintiffs.

88. In part, the Defendant has been allowed to recover from its customers the capacity and energy payments that it pays to the Plaintiffs through the Power Supply Cost Recovery provisions of MCL 460.6j *et seq*.

89. A Power Supply Cost Recovery clause ("PSCR clause") means "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs . . . of fuel burned by the utility for electric generation and booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a).

90. A PSCR clause allows a utility, including the Defendant, to recover its costs for fuel and purchased power, including power purchased from the Plaintiffs, from the utility's customers.

91. In 1997, the Defendant initiated a proceeding before the MPSC, Case No. U-11453, in which the Defendant requested that it be allowed to freeze its rates and suspend its PSCR clause.

92. On February 11, 1998, the MPSC issued an order allowing the Defendant to freeze its rates and suspend its PSCR clause.

93. The Defendant's frozen rates included the Defendant's actual payments to the Plaintiffs under their Power Purchase Agreements for the year 1997.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

94. At the time the Defendant's PSCR clause was suspended, Defendant's Base Plants still burned a fuel mix that consisted predominantly of high Btu, Eastern coal (i.e., the more expensive coal).

95. After the MPSC granted the Defendant's request to freeze its rates (which frozen rates included energy costs for the Plaintiffs that were calculated on the basis of a fuel mix that included the more expensive Eastern coal), the Defendant began paying the Plaintiffs energy rates that were calculated on the basis of a fuel mix that included increasingly greater quantities of the less expensive Western coal.

96. Since 1998, the Defendant has been recovering from its customers frozen energy costs calculated predominantly on the basis of the higher cost Eastern coal.

97. Since 1998, the Defendant has been paying the Plaintiffs an energy rate calculated predominantly on the basis of the lower cost Western coal.

98. Since 1998, the Defendant has failed to pay to the Plaintiffs all of the amounts which the Defendant has collected from its customers for the electricity that it has purchased from the Plaintiffs.

99. Since 1998, Defendant Consumers Energy Company has withheld from the Plaintiffs approximately $6,000,000 that it has collected from its customers for electricity purchased from the Plaintiffs.

100. PURPA and the Power Purchase Agreements between the Plaintiffs and the Defendant require the Defendant to pay the Plaintiffs all of the avoided cost payments that the Defendant is collecting from its customers.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

101. By failing to pay the Plaintiffs all of the avoided cost payments that the Defendant is collecting from its customers, the Defendant is violating its obligations under both PURPA and under the Power Purchase Agreements with the Plaintiffs.

102. It would be inequitable to allow the Defendant to retain the approximately $6,000,000 that it has collected from its customers for electricity purchased from the Plaintiffs.

103. As a result, the Plaintiffs have suffered millions of dollars in damages to date and they will continue to suffer damages in the future as long as this practice continues.

The Defendant Is Attempting To Eliminate Some of the Plaintiffs' PURPA Projects

104. The Power Purchase Agreements between the Plaintiffs and the Defendant impose a duty of good faith and fair dealing on the Defendant.

105. Upon information and belief, the Defendant is unilaterally modifying the energy rates under Plaintiffs' Power Purchase Agreements to make the fuel supply and total cost of production for some of the Plaintiffs' projects uneconomic.

106. Upon information and belief, the Defendant has improperly reduced the energy rates that are payable to the Plaintiffs in the hope of causing some of the Plaintiffs' projects to become uneconomic and fail.

107. The Defendant's intent to cause some of the Plaintiffs' projects fail is evidenced by a June 19, 2002 letter that the Defendant sent to a qualifying facility which, in part, states as follows:

> "There exists some probability that one or more of the [Plaintiffs'] seven existing [electric generating] facilities will elect to terminate the existing contracts prior to their scheduled contract expiration date. Reasons for such an election could include *uneconomic fuel supply*, uneconomic maintenance requirements or uneconomic use of resources. By entering into the proposed contract [which would have provided for the construction of a new generating plant and the consolidation of various of the Plaintiffs' Power Purchase

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

> Agreements at that plant] *the potential for savings that might result from such an early termination will be reduced or eliminated*." (emphasis added)

108. The Defendant's intent to cause some of the Plaintiffs' projects fail is also evidenced by the fact that, upon information and belief, the Defendant or its agents have represented to individuals and entities associated with the United States securities markets that, after December 31, 2007, it may either cease paying QF's, including the Plaintiffs, under their Power Purchase Agreements or reduce the payments to them.

COUNT I – BREACH OF CONTRACT

109. The Plaintiffs incorporate Paragraphs 1 through 108 as if fully set forth herein.

110. PURPA and the Power Purchase Agreements require the Defendant to pay the Plaintiffs the Defendants' avoided costs, including energy rates that are calculated on the basis of the cost of Eastern coal.

111. The Defendant has breached its obligations under PURPA and the Power Purchase Agreements by failing to pay the Plaintiffs its avoided costs, including energy rates that are calculated on the basis of the cost of Eastern coal.

112. The Defendant has breached its obligations under PURPA and the Power Purchase Agreements, including its duty of good faith and fair dealing, by failing to pay the Plaintiffs all of the money the Defendant has collected from its customers to reimburse it for payments it makes to the Plaintiffs under their power Purchase Agreements.

113. The Defendant has breached its obligations under PURPA and the Power Purchase Agreements, including its duty of good faith and fair dealing, by improperly reducing the energy rates that are payable to the Plaintiffs in an effort to cause some of the Plaintiffs' projects to become uneconomic and fail.

114. As a direct and proximate result of the Defendant's default, the Plaintiffs have sustained monetary damages including the loss of profits, the lost use of funds, and the costs and expenses to pursue this claim.

WHEREFORE, Plaintiffs pray that this Honorable Court enter a judgment in their favor in an amount in excess of $25,000.00, plus interest from the date of filing and that the Court grant such other and different relief as the Court deems equitable and just.

COUNT II – DECLARATORY JUDGMENT

115. The Plaintiffs incorporate Paragraphs 1 through 114 as if fully set forth herein.

116. By calculating the Plaintiffs' energy charges on the basis of a fuel mix that consists predominantly of lower cost Western coal, the Defendant unilaterally and improperly changed the parties' understanding and agreement regarding the meaning of the term Base Plants in the Plaintiffs' Power Purchase Agreements and unilaterally and improperly changed the calculation and payment of the Plaintiffs' energy rates.

117. By calculating the Plaintiffs' energy charges on the basis of a fuel mix that consists predominantly of lower cost Western coal, the Defendant unilaterally and improperly nullified the Plaintiffs' election under 18 C.F.R. § 292.304(d)(ii) to choose to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to the Defendant (i.e., at the time they signed their power purchase agreements).

118. The Defendant is contractually obligated to pay the Plaintiffs its avoided costs, including energy rates that are calculated on the basis of the cost of high Btu, Eastern coal.

119. By calculating the Plaintiffs' energy charges on the basis of a fuel mix that consists predominantly of lower cost Western coal, the Defendant is failing to pay the Plaintiffs its avoided costs as required by PURPA and the Power Purchase Agreements.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

120. An actual dispute exists between the parties with regard to the Plaintiffs' Power Purchase Agreements and a ruling from this Court is necessary to resolve that dispute.

WHEREFORE, the Plaintiffs pray that this Honorable Court make a declaration of rights and determine that Defendant has an obligation to pay the Plaintiffs energy rates calculated in the manner they were calculated at the time the Power Purchase Agreements were entered into on the basis of the cost of high Btu, Eastern coal.

COUNT III – PROMISSORY ESTOPPEL

121. The Plaintiffs incorporate Paragraphs 1 through 120 as if fully set forth herein.

122. In reliance upon the Defendant's representations and promise to pay the Plaintiffs capacity and energy rates that were calculated based upon the cost of high Btu, Eastern coal, the Plaintiffs detrimentally incurred considerable expenses in preparing to perform under their Power Purchase Agreements. These expenses included financing and building their electric generating projects.

123. It would be unjust to allow the Defendant to renege upon its promise to pay the Plaintiffs capacity and energy rates that were calculated based upon the cost of high Btu, Eastern coal and the Defendant should be estopped from unilaterally changing the calculation of the amount payable to the Plaintiffs by its improper recalculation of energy rates.

WHEREFORE, Plaintiffs pray that this Honorable Court enter a judgment in their favor in an amount in excess of $25,000.00, plus interest from the date of filing and that the Court grant such other and different relief as the Court deems equitable and just.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

COUNT IV – CONSTRUCTIVE TRUST

124. The Plaintiffs incorporate Paragraphs 1 through 123 as if fully set forth herein.

125. At the Defendant's request, the MPSC froze the Defendant's electric rates, suspended the Defendant's PSCR clause, and allowed the Defendant to recover from its customers fixed rates for electricity.

126. The Defendant's frozen rates reflected energy rates paid to the Plaintiffs that were calculated on the basis of a fuel mix that consisted predominantly of the higher cost Eastern coal.

127. After the MPSC suspended the Defendant's PSCR clause, the Defendant modified its Base Plants to burn predominantly the lower cost Western coal.

128. After the MPSC suspended the Defendant's PSCR clause, the Defendant began paying the Plaintiffs energy rates that were calculated on a fuel mix that included increasingly greater amounts of Western coal.

129. Although the Defendant was charging its customers electric rates that were calculated on the basis of a fuel mix that consisted predominantly of the higher cost Eastern coal, the Defendant began paying the Plaintiffs energy rates that were calculated on the basis of a fuel mix that consisted predominantly of the lower cost Western coal.

130. As a result, the Defendant has collected amounts from its customers that are far greater than the payments it has made to the Plaintiffs.

131. The Plaintiffs have an equitable interest in the additional amounts that the Defendant has collected from its customers but not paid to the Plaintiffs.

132. The Defendant has also breached the Plaintiffs' Power Purchase Agreements by paying the Plaintiffs less than it is recovering from its customers and by keeping the multi-million dollar difference between the two.

133. Upon information and belief, this amount exceeds $6,000,000.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

WHEREFORE, Plaintiffs pray that this Honorable Court establish a constructive trust in their favor in an amount equal to the amount of money that Defendant has collected from its customers for power purchased from the Plaintiffs but has not paid to Plaintiffs, plus interest from the date of filing and that the Court grant such other and different relief as the Court deems warranted.

COUNT V – UNJUST ENRICHMENT

134. The Plaintiffs incorporate Paragraphs 1 through 133 as if fully set forth herein.

135. The Defendant will be unjustly enriched if it is allowed to retain the additional amounts that it collected from its customers but did not pay to the Plaintiffs.

136. To avoid an unjust enrichment, the Plaintiffs should be awarded damages in excess of $25,000.00.

WHEREFORE, Plaintiffs pray that this Honorable Court enter a judgment in their favor in an amount in excess of $25,000.00, plus interest from the date of filing and that the Court grant such other and different relief as the Court deems equitable and just.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.

Date: October 14, 2003

By:_____

David E. S. Marvin (P26564)
David D. Waddell (P36814)
Thomas J. Waters (P37829)
Michael S. Ashton (P40474)
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
Telephone: (517) 482-5800
Attorneys for Plaintiffs

EXHIBIT C

LEGAL DEPARTMENT

S Kinnie Smith, Jr
Vice Chairman and General Counsel

David A Mikelonis
Vice President and General Attorney

Judd L Bacon
William M Lange*
O K Peterson
William E Wiener
Assistant General Counsel

Beaondy E Hagen
Supervisory Attorney

George F Hill
Albert D McCallum
A T Udrys
Senior Attorney

Virginia P Allen
David E Barth
Francis X Berkemeier
J E Brunner
Julie A Canham Rogers
H Richard Chambers
Kimberly A Connelly
Charles D Dawson
James W Dempsey
John P Dickey
Neil R Fellows
James J Frantz
Catherine M Gleeson
Mona M Janopaul*
Deborah Ann Kile
Wayne A Kirkby
Frank R Knox
Craig A Marks
James P Mella
Paula H Mills
Mirce Nestorovski
Robert M Neustifter
David A Pandilidis
Vincent P Provenzano
David R Rood
Robert L Schroder
Denise M Sturdy
Charlotte A Wells
Michael G Wilson
Attorney

Consumers Power

POWERING MICHIGAN'S PROGRESS

General Offices: 212 West Michigan Avenue, Jackson, MI 49201 • (517) 788-0550
*Washington Office: 1016 — 16th Street, NW, Washington, DC 20036 • (202) 293-5795

Writer's Direct Dial Number • (517) 788-0017

November 28, 1988

Ms Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
PO Box 30221
Lansing, MI 48909

CASE NO U-8871, et al

Dear Ms Wideman:

Enclosed for filing are an original and 15 copies of Consumers Power Company's Reply Brief in the above-captioned case, together with a Proof of Service.

Very truly yours,

Craig A. Marks

Craig A Marks

CC: Parties of Record

OC1188-0009-LE17

S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP for approval of capacity charges contained in a Power Purchase Agreement with Consumers Power Company.	))))))	Case No. U-8871, et al

REPLY BRIEF OF CONSUMERS POWER COMPANY

Dated: November 28, 1988

SKSmith, Jr, Vice Chairman and
General Counsel
DAMikelonis, Vice President and
General Attorney
CAMarks, Attorney

Business Address:
212 West Michigan Avenue
Jackson, Michigan 49201

RJAaron, Attorney
Loomis, Ewert, Ederer, Parsley,
Davis & Gotting
232 South Capitol Avenue
Suite 1000
Lansing, MI 48933

Attorneys for Consumers Power Company

that the Commission's authority to hear complaints under the first three statutory sections cited affords the Commission the power to order the Company to negotiate and to execute a particular power supply contract, set aside amounts of capacity, or alter and amend existing negotiated power supply contracts. Just as the Commission was mistaken in Union Carbide, the parties here are also mistaken.

First, even a cursory review of all of the above sections reveals that the complaints the Commission is empowered to hear concern rates and service matters between a public utility and its customers; not between a public utility and its suppliers.

Section 8 of 1919 PA 419 provides for a complaint to review:

> ". . . any rate classification, regulation or practice charged, made or observed by any public utility . . ."

Section 22 of 1909 PA 300 provides for a complaint to review a claim that:

> ". . . any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate. . ."

Finally, Section 7 of 1929 PA 69 provides for complaints:

> ". . . relative to the price of the electricity sold and delivered in such municipality, or with reference to the service rendered or any other matter of complaint. . ."

Clearly, the complaint authority of the Commission is intended to govern the relationship between a public utility and the customers it serves. See, e.g., Union Carbide, 431 Mich 135, 156.

It cannot be successfully argued from these grants of authority to hear customer rate complaints that the Commission may now hear complaints with

the Commission cannot abrogate or modify existing contracts, signed to satisfy Consumers' purchase obligations under PURPA.

Respectfully submitted,

CONSUMERS POWER COMPANY

Dated: November 28, 1988

By _____
David A Mikelonis

By _____
Craig A Marks

By _____
Richard J Aaron

SKSmith, Jr, Vice Chairman and
General Counsel
DAMikelonis, Vice President and
General Attorney
CAMarks, Attorney

Business Address:
212 West Michigan Avenue
Jackson, Michigan 49201

RJAaron, Attorney
Loomis, Ewert, Ederer, Parsley,
Davis & Gotting
232 South Capitol Avenue
Suite 1000
Lansing, MI 48933

Attorneys for Consumers Power Company

EXHIBIT D

From: "Stump, Barbara (CIS)" <bstump@michigan.gov>
To: <jrrobinson@cmsenergy.com>, <Mpscfilings@cmsenergy.com>
Date: 12/16/03 10:41AM
Subject: U-13917

To the Parties:

I have received Mr. Waters Motion to Strike and to Limit Scope of Proceedings, which is scheduled for hearing next Tuesday, Dec. 23rd, at 9:00 a.m. I would like any responses to the motion filed by this Friday, Dec. 19th, with a copy e-mailed to me by 12:00 noon.

Thank you for your anticipated cooperation.

Barbara Stump
Administrative Law Judge

CC: <twaters@fraserlawfirm.com>, <Rstrong@clarkhill.com>, <Sbinke@howardandhoward.com>, <Mjbrown@howardandhoward.com>, <Shalroy@voyager.net>, <Phil@allendaleheating.com>, "Barone, Patricia" <BaroneP@michigan.gov>, "Erickson, Donald" <EricksonD@michigan.gov>, "Michael Ashton (E-mail)" <mashton@fraserlawfirm.com>, <Dmarv@fraserlawfirm.com>

EXHIBIT E

From: Tom Waters
To: Barbara Stump; Dave Marvin; dkeskey@clarkhill.com; Donald Erickson; gbpasek@midcogen.com; jcshea@cmsenergy.com; jrrobinson@cmsenergy.com; Linda Andreas; mpscfilings@cmsenergy.com; phil@allendaleheating.com; remcquillan@cmsenergy.com; SBinke@howardandhoward.com; shalroy@voyager.net
Date: 12/22/03 3:34PM
Subject: Re: U-13917

Ms. Barrone,

Answers to my Motion to Strike were due Friday, December 19, 2003.
Your answer was not timely filed.
I, therefore, object to it.

Thomas J. Waters

>>> "Linda Andreas" <andreasl@michigan.gov> 12/22/03 03:23PM >>>
Please find attached in PDF format the Answer of the MPSC Staff to Motion to Strike and to Limit Proceedings, along with the Proof of Service, which have also been filed electronically with the MPSC and sent out to you in hard copy.

Patricia Barone

Linda S. Andreas
Attorney General, Public Service
6545 Mercantile Way, Ste. 15
Lansing, MI 48911
Phone: (517) 241-6698
Fax: (517) 241-6678

EXHIBIT F

STATE OF MICHIGAN

THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application
of Consumers Energy Company for CASE NO: U-13917
approval of a Power Supply VOLUME II
Cost Recovery plan and authorization
of monthly Power Supply Cost Recovery
factors for the calendar year 2004.
_____/

Proceedings held in the above-entitled matter before Administrative Law Judge Barbara A. Stump, at the Michigan Public Service Commission, 6545 Mercantile Way, Hearing Room C, Lansing, Michigan, on Tuesday, December 23, 2003, commencing at or about 9:06 a.m.

APPEARANCES:

CONSUMERS ENERGY COMPANY
BY: JOHN C. SHEA, ESQUIRE (P-36854)
212 West Michigan Avenue
Jackson, Michigan 49201

Appearing on behalf of Consumers Energy,

CLARK HILL, PLC
BY: DON L. KESKEY, ESQUIRE (P-23003)
2455 Woodlake Circle
Okemos, Michigan 48864-5941

Of record on behalf of Michigan Environmental Council and Public Interest Research Group in Michigan,

APPEARANCES CONTINUED:

FRASER, TREBILCOCK, DAVIS & DUNLAP, P.C.
BY: THOMAS J. WATERS, ESQUIRE (P-32829)
124 West Allegan Street
1000 Michigan National Tower
Lansing, Michigan 48933

Appearing on behalf of Adrian Energy Associates, Cadillac Renewable Energy, Genesee Power Station, Grayling Generation Station, Hillman Power Company, EES Filer City Station, Viking Energy of Lincoln and McBane,

ASSISTANT ATTORNEY GENERAL
BY: DONALD E. ERICKSON, ESQUIRE (P-13212)
G. Mennen Williams Building, 6th Floor
525 West Ottawa
Lansing, Michigan 48909

Appearing on behalf of Attorney General Michael Cox,

SHALTZ & ROYAL, P.C.
BY: DIANE R. ROYAL, ESQUIRE (P-39965)
3303 West Saginaw, Suite C-1
Lansing, Michigan 48917

Of record on behalf of the Residential Ratepayer Consortium.

MICHIGAN PUBLIC SERVICE COMMISSION
BY: PATRICIA S. BARONE, ESQUIRE (P-29560)
6545 Mercantile Way, Suite 15
Lansing, Michigan 48911

Appearing on behalf of the Michigan Public Service Commission Staff,

FRASER, TREBILCOCK, DAVIS & DUNLAP, P.C.
BY: DAVID E.S. MARVIN, ESQUIRE (P-26564)
124 West Allegan Street
1000 Michigan National Tower
Lansing, Michigan 48933

Of record on behalf of Michigan Power, Limited Partnership and Ada Cogeneration, Limited Partnership.

APPEARANCES CONTINUED:

HOWARD & HOWARD ATTORNEYS, P.C.
BY: STEWART A. BINKE, ESQUIRE (P-47149)
222 North Washington Square
Suite 500
Lansing, Michigan 48933

Appearing on behalf of Midland Cogeneration Venture, Limited Partnership.

Lansing, Michigan

Tuesday, December 23, 2003

-o0o-

JUDGE STUMP: This is in the matter of the application of Consumers Energy Company for approval of a Power Supply Cost Recovery plan and for authorization of monthly Power Supply Cost Recovery factors for calendar year 2004, Case Number U-13917.

This is the time that has been scheduled for oral argument on a motion to strike and to limit scope of proceedings filed by the various qualifying facilities that have intervened in this case.

Could I have the appearances, please.

MR. WATERS: Thomas J. Waters from Fraser, Trebilcock, Davis & Dunlap on behalf of the qualifying facilities.

MR. BINKE: Stewart Binke on behalf of MCV.

MR. SHEA: John Shea, Consumers Energy Company.

MR. ERICKSON: Donald E. Erickson appearing on behalf of Attorney General Michael A. Cox.

MS. BARONE: Patricia S. Barone, Assistant Attorney General appearing on behalf of the Michigan

Public Service Staff.

JUDGE STUMP: Thank you. I have read the

motion and Consumers' answer to that motion. I did receive your reply to the response yesterday. And although there's no provision for filing a reply to a response, I have reviewed it because I know you'll make those arguments here today.

So I will let you go ahead, Mr. Waters, and make your arguments, keeping in mind that I have read everything, so I'm quite familiar now with the issue.

MR. WATERS: Does your Honor have any questions that I can address?

JUDGE STUMP: Well, I do.

MR. WATERS: I would like to make an argument, but I would like to start by answering your questions.

JUDGE STUMP: That's probably a good idea. Yes; I do have a question. How do you respond to Consumers' argument that even if this dispute were to

be initially litigated in some other forum, both Consumers and the qualifying facilities would eventually and inevitably end up in a PSCR case addressing the cost recovery of the energy charges at issue? So Consumers is saying since the issue will ultimately end up in a PSCR case anyway makes the most sense to deal with this issue at one time and one place. How do you respond to that?

MR. WATERS: Well, first, I think the argument is somewhat disingenuous, because what they are clearly trying to do is they're trying to prevent my clients from having a due process opportunity to have a fair hearing. And to put it in perspective, the issue that the QFs have raised in their Circuit Court complaint, over the remaining term of the lives of these contracts is going to amount to about $125 million. It is a very significant issue. And I think they're making the argument -- you need to understand their argument in the context of gee, if we can succeed

in having this issue heard in this case in what will really amount hearing it in about 60 days, because my petition to intervene was not granted until the 25th of November. I've got to have my testimony in by January 30th. They're essentially compressing a $100 million case into 60 days.

Second and more importantly, this is a PSCR plan case. We're all going to be back here in a year on the reconciliation case. This plan case involves estimating the costs that the utility intends to incur during the year 2004. We agree. Let them recover the costs, let them implement the factor that they have requested in their application. We don't dispute that.

In about a year, we're going to come back; and all of their costs -- their estimated costs will be being addressed in the context of what were their actual costs. And the actual costs will include, among other things, the costs paid to the QFs.

More importantly, in the reconciliation case, which is about a year down the road -- and it's the reconciliation of this case -- we should have resolved, between the two of us, the question of whether or not their interpretation of the contract is right, which is what they requested in their PSCR application, you know, or whether our reading of the contract is right. And that year will give us the opportunity for a full and fair, you know, due process hearing either before the Circuit Court, you know, or before this Commission.

The question that I think -- you know, when they make the argument that this issue has to be addressed in a PSCR case, the real question is, even if that is true, which PSCR case does it have to be addressed in and does it have to be addressed in this one. And I think clearly the answer to that is no. The only reason for, you know, forcing the issue in this particular case is because they are trying to deprive us of an opportunity, you know, for a full and fair hearing. And they've known about this issue for

more than a year. I mean, one of the things that I attached to my reply, you know, was a letter that I sent them more than a year ago. And we had been looking at the issue even before that and suddenly -- and, in fact, we extended them the courtesy of saying look, we've been trying to resolve this informally with you for a year, and you've been blowing us off, so you've left us no choice to file a complaint in Circuit Court. And boom, all of a sudden, there's a crisis and it has to be resolved -- a hundred million plus dollar case has to be resolved within two months. That, I submit, would be a genuine travesty of justice.

This case originally started out as a PSCR case. And then Consumers, two weeks later, files on Columbus Day a declaratory judgment case asking to do both the PSCR and the declaratory ruling case. Then they tell the Circuit Court, well, you don't need to really address these issues. They should be addressed to the Commission. Then they come back and they say, well, the PSCR case, for purposes of Mr. Waters and his

clients, is actually going to be a contested case hearing. And the decision that we reach in this 2004 PSCR case is going to resolve all of the claims from before 2004 as well as 2004 and all the potential

claims that we raise after 2004, because these contracts are really 35-year contracts.

And all I'm asking for is a fair opportunity to have this issue heard. I think it ought to be at the Circuit Court. I got the late filed objection from the Staff -- or the late filed answer. I didn't really have time to respond to it. But one of the things that strikes me about that and about Consumers' response is if you take the time to go back and look at the complaint that I've attached to my original motion, if you take the time to go back and look at my answer to Consumers' motion in Circuit Court with regard to, you know, the primary jurisdiction issue, all of these issues are far more complicated than certainly the Company or the Staff, you know, would lead you to

believe. I mean, the primary jurisdiction issues, it took me 20 pages of boiling it down to try to, you know, stay within the page limit to explain to the Circuit Court why this issue should be heard in Circuit Court.

The complaint, they get -- you know, there's been no analysis either by the Company or by anyone else as to the allegations that are contained in that complaint.

And I all I'm asking for is a fair hearing.

The Circuit Court is going to very shortly address the question of whether that hearing should occur in Circuit Court or whether it should occur before the Commission. But this issue -- it can't be addressed in the next -- what's effectively the next 30 plus days. We've got -- I know the State is off for six days this week -- pardon me -- three days this week and three days next week. And, you know, I think the demand that it be heard here outdoes even something that the Grinch

would have requested.

So if the case is as simple as the Staff and the Company seem to think it is, then they can file a motion in either the Circuit Court proceeding or in a contested case hearing before this Court; and we can go through and weed out, you know, what should and should not be heard. But it should not be heard -- and the statute does not authorize that a breach of contract case -- and that's what Mr. Robinson -- at the prehearing conference on the 25th, Mr. Robinson said, this is a breach of contract case. And your Honor looked over a little puzzled and said, well, why are you trying to address it here? And he said, well, because we think the Commission has certain expertise. The PSCR statute, Act 304, does not provide to resolve breach of contract cases within a PSCR plan case.

You know, I think what your Honor should do is let them recover -- let the utility recover the charges or let it implement the charges that it's asked

to implement. We'll spend, you know, some time, presumably the next nine months to a year, resolving the breach of contract dispute. And then we can come back, and the decision of that resolution can then be taken into account in the reconciliation case.

And I will reserve any further comments until after the Company and the --

JUDGE STUMP: Well, what's your response to the Staff arguments that the Commission does have jurisdiction here? Because the Commission issued the orders approving these contracts and the rates, so doesn't the Commission have authority to go back and clarify and interpret its orders?

MR. WATERS: Well, first of all, if you go back and look at the orders in 8871 -- and I was there for all of those hearings -- the Commission repeatedly said that it is not addressing any of the contractual terms of the power purchase agreement. They flat out refused to do it. And, indeed, when the case went from the Michigan Public Service Commission to the Court of Appeals -- the Michigan Court of Appeals, Consumers, in

that entire case, they jumped up and down -- and, in

fact, this is all set forth in my answer to their motion for summary judgment, okay, which is under tab B to my reply.

What Consumers argued in 8871 and what happened in that case is -- I'm trying to find my quote for your Honor. They took the unambiguous position that the Michigan Public Service Commission does not have the authority to resolve disputes between the utility and qualifying facilities. Now, quote -- this is Consumers itself in its own brief -- "the complaints the Commission is empowered to hear concern rates and service matters between a public utility and its customers, not between a public utility and its suppliers." That's the utility itself, you know, taking that position. In the very case in which most of these QFs received their approval -- and I think that's on page three under tab B of my reply.

The point being, the primary jurisdiction

issues -- primary jurisdiction doctrines in this particular case are incredibly complicated. They have been briefed and they have been submitted to the Circuit Court. They involve things such as not only the judicial and the equitable estoppel doctrines that are based upon the Court of Appeal's decision and Consumers' own briefs in this case, federal law.

Under PURPA, the Commission basically has a one-time opportunity to set, you know, the rates or actually to determine the utility's avoided cost is really what they have the authority to do. And under 292.602 -- this is C, and I think it's again cited in my brief -- Congress and the Federal Regulatory Commission limited, you know, very much the ability of a public -- of any State authority to exercise any type of authority, you know, over these contracts. And whatever the authority that the Commission has has to be read within the limitations of PURPA and as those are expressed within the statute and under the rules.

These issues are not simple. If your Honor -- your Honor is very smart. And if you want to take the time to go through the brief that I filed at the Circuit Court --

JUDGE STUMP: I did skim through it. I read some of it.

MR. WATERS: And I think the appropriate thing to do is wait and see what the Circuit Court says. If the Circuit Court says hear it there, you know, then we hear it there. If the Circuit Court says no, send it to the Commission, then I think what the Circuit Court's expecting in that instance is, okay, we'll send it over to the Commission but give them a

fair hearing. And doing it in 30 or 60 days, which is what's proposed here, would be a gross violation of due process particularly.

JUDGE STUMP: I know you said that this case -- these issues would require dozens of witnesses and hundreds of exhibits. Well, if this is just a legal

interpretation regarding the contract, I don't understand why it would require dozens of witnesses and hundreds of exhibits. You're saying that you have different interpretations of the agreements.

MR. WATERS: Right.

JUDGE STUMP: So it's just a matter of coming up with the proper interpretation. So why do you need dozens of witnesses and hundreds of exhibits?

MR. WATERS: Because among other things, one of the questions raised is what is meant by certain of the terms that are contained, you know, in the contract. I mean, what's happened in this particular case is the utility -- in 8871, the Commission determined that the avoided cost that Consumers was able to avoid was the cost associated with an eastern coal fire generator plant. And the Commission then calculated a capacity charge based upon that eastern coal fire generator plant. The contracts also contain an energy rate. And what happened at that point is,

you know, the base plants, okay, were burning the same eastern coal that the proxy plant would have burned.

Consumers has gone out and spent $500 million, as best I can figure out. I did ask for certain information. The Company essentially refused to give me the information that I asked for, so I had to get it elsewhere. I still do not have large parts of it. But this is a problem of utility's creation, because they have changed the way the qualifying facilities are paid, and we are no longer paid avoided costs.

And one of the relevant issues is going to be, when the contract refers to base plants, it's those base plants, which is our understanding, as those base plants existed at the time that the power purchase agreements were signed such that they burned eastern coal or can Consumers rebuild those in any manner they want and completely change the intent of the contract.

What is relevant in this particular case -- the contracts are very clear. The contracts, at least, you know, parts of them, they say these energy rates are based upon avoided costs. The last

sentence of the section that that statement occurs in
makes clear that that statement and the other
provisions of that section override all other

provisions of the power purchase agreement including the calculation of the energy rate. It flat out says, you know, these provisions supersede all other provisions and take precedence over all other provisions in the power purchase agreements.

The witnesses in this case are needed to deal with the question of what was the intent of the contract and what has the utility done to change that intent and is there a way -- and I think there is -- of calculating the energy rate in a manner that is both consistent with the contractual statement that these power purchase agreements, the energy rates are based upon avoided costs and consistent with, you know, Exhibit A.

It is -- the issues are complicated. It is not simply a question of, you know, flipping open the

contract and saying, well, gee, you know, I'm just going to read this. I'm sure the Company would love you to believe that, because what they're trying to do is they are trying to get this resolved without a due process hearing.

I think the real question to be asked is how is the Company going to be prejudiced by not having the issue heard in this PSCR plan case but rather having it heard in either a contested case before this

Commission or before Circuit Court after the Circuit Court determines that and then have that result taken into account in the reconciliation case. The answer is they won't be prejudiced. The prejudice that will occur here is if this issue is litigated in this plan case.

JUDGE STUMP: Another question I have is, you state that it would be inappropriate and unlawful for this Commission to attempt to exercise jurisdiction over this dispute as long as the Circuit Court has

jurisdiction. What authority do you have for that?

MR. WATERS: The Traveler's case, which is one that -- Traveler's --

JUDGE STUMP: Versus Detroit Edison. I have the case here.

MR. WATERS: In that case, the Supreme Court made very clear that the primary jurisdiction doctrine is a referral doctrine. It's a doctrine whereby a Circuit Court refers, you know, jurisdiction over a particular case, you know, to an administrative agency if it believes that the statute authorizes the administrative agency to resolve that particular issue.

The Staff and the Company kind of turned the primary jurisdiction doctrine on its head. You know,

they say, well, the Commission can tell the Circuit Court, you know, whether or not it has jurisdiction. The issue has been it's really -- and that's not what the primary jurisdiction doctrine is. It's a doctrine

whereby the complaint which is in the Circuit Court, you know, is referred back to the administrative agency for resolution. And the issue is currently pending before the Circuit Court, and I think it ought to be resolved there and whatever decision the Circuit Court makes be implemented, be it there or here or a combination of both.

JUDGE STUMP: So you think it would be unlawful for the Commission to essentially simultaneously address an issue that is pending before Circuit Court?

MR. WATERS: Say that again, your Honor.

JUDGE STUMP: So you believe it would be unlawful for the Commission to simultaneously address an issue that is currently pending before Circuit Court?

MR. WATERS: Yes. I don't think -- yeah. I think it would be unlawful. Pragmatically, I don't think the Commission needs to do that. I mean, the Commission can grant the utility the relief that it has requested in this PSCR case. They want to implement a

specific factor. I agree. Let them implement the factor; but give me, you know, a hearing.

And I think it's particularly unlawful for the Commission to try to -- the question of the jurisdiction of the Commission, I think, can be looked at in a vacuum. What the utility has asked for here is to have this issue resolved in this PSCR case in which there's no basis in the PSCR statute for resolving breach of contract cases. The issue is really, you know, properly before -- the breach of contract issue is properly before the Circuit Court.

I think pragmatically, at least I'm not aware of any other case, particularly of a magnitude of a hundred million dollars, that somebody says we are going to resolve that in a PSCR plan case.

JUDGE STUMP: Okay. Thank you.

MR. ERICKSON: Your Honor, as I understand it, probably Mr. Binke and Mr. Waters are on the same side of the issue. And I expect the Staff, the

Attorney General and Company are on the other side of the issue. Would you want to take comments from Mr. Binke and then from -- like the Staff has filed an answer -- and me and then leave the Company for last and then give Mr. Waters --

JUDGE STUMP: I was going to get to that.

Did you want to make any comments, Mr. Binke?

MR. BINKE: No. MCV doesn't have any comments we would make at this time.

JUDGE STUMP: Mr. Shea, let me start with a question to you since I started with one for Mr. Waters. I don't quite understand why you filed this as a request for declaratory ruling. Because the way I see this is, declaratory rulings are not part of the contested case process under either the Commission's rules or the Administrative Procedures Act. In both the rules and the APA, they are under completely different chapters. They don't even fall under the chapters for parts dealing with contested cases.

And the way I interpret requests for declaratory ruling is that you have to basically have a set of uncontested facts. I mean, they can't be contested; otherwise, you have a contested case proceeding. So I don't know. Was it a matter of just maybe mislabeling this? Because obviously if it stays in the case, it's going to be litigated.

MR. SHEA: Taking your very last comment first, I think the point was we were going to litigate the issue. So in that sense --

JUDGE STUMP: It's not really a request for a declaratory ruling?

MR. SHEA: The idea that motivated the request for a declaratory ruling was the uncertainty that we felt that would provide the QF parties more ability to argue the point in a more specific sort of segment of the PSCR case. That may be a wrong understanding.

JUDGE STUMP: Because you --

MR. SHEA: That is not the leading goal of our legal effort here. The leading goal of our legal effort here is to observe the requirements of Act 304 and to get these contracts considered by the party, namely the Commission, through this contested case proceeding that is required by law to consider and to issue an order concerning them.

So I wouldn't be entirely surprised if you might conclude that the declaratory ruling methodology might not fit. Our thought was simply that presenting to the Commission a state of facts upon which they would be required to rule would provide the Commission an opportunity to actually make a ruling.

Now, is that any different from what we're requesting in the context of PSCR case? No. It's not different. It just seemed at the time we were promulgating our legal argument, that it provided a fuller expression of the manner in which this was going

to be fought out between the parties or discussed among

the parties, if you prefer.

JUDGE STUMP: You understand it wouldn't even be binding on the qualifying facilities.

MR. SHEA: It would be binding on the Commission, though. The Commission, if it agreed, would, of course, issue an order which said this is what the PSCR factor is going to include. This is what the PSCR review case is going to have in it.

Now, we get -- in the best of circumstances for Consumers, we get exactly to the same place in the PSCR process itself.

JUDGE STUMP: Maybe that's the thing. It all doesn't really matter procedurally. If I decide this is going to stay in the case, it's going to be litigated. So regardless of what you call it --

MR. SHEA: That's where I'm at. Regardless of what you call it, I'm struggling with trying to give the right flavor to the pieces of the law that will get me where I got to go.

JUDGE STUMP: I understand. It's just I've had this happen in a couple of other cases that I've had here. And I always wonder what the attorneys are

doing and why they do it, because I've never seen it anyplace else. Declaratory rulings are usually just

filed directly with the agency. There's no involvement in any kind of contested case, no ALJ is involved and they can issue the declaratory ruling. So I've seen it here before. And to me, it's not procedurally correct. But having said that --

MR. SHEA: We'll leave that alone and let you dispose of that as you believe is appropriate.

JUDGE STUMP: Okay. Having said all that, my next question is: Why not wait until the Circuit Court issues a ruling on your motion for summary disposition? You know, what's the harm in just waiting for that? You had oral argument on this motion on December 10th?

MR. WATERS: That's correct, your Honor.

MR. SHEA: Are you saying wait for your decision?

JUDGE STUMP: No. Wait for a decision from

Judge Giddings.

MR. SHEA: Before you rule? I take it you're going to take this case -- I take it what you are proposing in your question is taking this hearing today this morning under advisement? I'm not sure that I'm understanding your question.

JUDGE STUMP: No, not necessarily. No. That's not what I was thinking. I was thinking why not

wait, just go ahead with this case, have the Circuit Court issue its ruling. And then if the Commission -- the Circuit Court does refer it to the Commission, then have a separate contested case proceeding. They would file their complaint here, and it would be a separate case.

MR. SHEA: The law seems to intrude upon that result, your Honor. As we say in our answer on page five, section 7 of Act 304 authorizes the Commission to indicate any cost items in the five-year forecast that, upon the basis of present evidence, the Commission

would be unlikely to permit the utility to recover.

In addition to that, the QFs themselves have agreed that the Commission has authority to deal with these issues. We've put that in our brief -- in this answer someplace.

The Court of Appeals is of the opinion that the Commission has authority to deal with these matters. The Court of Appeals in 189 Mich App 151, which is what you'll find in the QF's motion or brief someplace, pretty clearly says that the MPSC has authority under state law to determine whether costs incurred by public utilities like Consumers are reasonable and may be passed onto ratepayers.

It goes on to say if the utility and the QF

negotiate an agreement where the utility pays a capacity charge, et cetera, et cetera.

Then, concludes the Court, it may be reasonable and may be passed through to ratepayers. I'm changing the tense of that passage because I don't

want to -- I'm just trying to not convey a conclusion about our present -- our present discussion here. But it actually says is, because it's dealing with some other situation.

There isn't any reason not to is the short answer. We need to know. We've been putting these QF costs in our PSCR factor in a manner of Mr. Waters' understanding in the past before the PSCR phrases became -- were ordered by the Commission. That's how we did it. That's how we presented it in Mr. Palina's testimony in this case. It's already in the case.

JUDGE STUMP: But those particular proceedings in the past didn't involve a breach of contract dispute, did they?

MR. SHEA: We don't have a breach of contract to bring to your attention, your Honor. What we want you to do is to say here are the costs that I will recommend to the Commission are just and reasonable based upon the provisions of these power purchase agreements and, in particular, the contract provisions

that are set forth on page eight of our answer. If you take them both, it looks like they are about 12 lines long.

If I could dispense -- kick one of the red herrings off the road here, Mr. Waters said he's had a year to prepare this case. He told us he contacted us a year ago. And now he's telling you that 30 or 60 days won't provide him with a fair hearing. I find that remarkable. I find it remarkable that the one agency in the state of Michigan which is charged by law, as interpreted by an appellate court, to consider these matters is the very agency that Mr. Waters said couldn't possibly provide a fair hearing to his clients. I don't understand that.

JUDGE STUMP: Okay. Then why didn't you include this in your original application?

MR. SHEA: I'm sorry. Include the dispute?

JUDGE STUMP: Yes. The declaratory ruling request.

MR. SHEA: We provided our side, if you will,

of this dispute in the testimony, exhibits, and work papers of our witness, Mr. Palina. If you were to accept all of the testimony and exhibits of Mr. Palina as presented, then what you would be doing is that you would be saying that as to the 12-month rolling average

of fuel costs based on those coal plants, that would be appropriate for the Company's 2004 PSCR factor. What we've said to the QFs in the supplemental part of the case is we understand that you don't necessarily agree with the way we've provided this information to the Commission. And since your contracts very specifically say that any amount of money that the Commission disallows in the very traditional regulatory out provisions can't be put into our PSCR factor, at least in the reconciliation side, then perhaps we should adjudicate this matter now under the part of Act 304 I read you which requires the Commission to consider things that are going to apply in the future, costs that may be disallowed in the future.

On one hand, your Honor, I guess I agree with you if you were to dismiss this particular motion today and perhaps as a corollary to undo the intervention of the QFs, let's just say. Let's propose that just for a moment.

JUDGE STUMP: You mean if I grant their motion?

MR. SHEA: If you grant their motion and as a corollary to granting their motion -- thank you for correcting me -- you said, well, since your issue is dispensed, you all can leave now. They would still

have the same regulatory out problem. We would still have to litigate those contracts in the sense that we would still have to present to you and through you to the Commission evidence that these costs were just and reasonable. You would have to come to some conclusion. If you agreed with us, no dispute, if you will, between the Company and Commission. If you didn't agree with us and came up with some different number, then the

contract provisions would operate, and certain payment obligations to the QFs would change from what they would be otherwise.

We're not going to get away from this. That was the point that you started off your questions with. It's inevitable. We have to be here. State laws mandates that we be here. This isn't a question of permissive referral from a Circuit Court. No Circuit Court has said that the statutory edifice under which the Commission operates is faulty, needs to be held in abeyance. No judge said that the Commission or yourself is not permitted to consider these matters which are foursquare in your jurisdiction, if you will, your statutory authority, if you will.

I don't know where we can go if we don't do this now. If the question is, should we defer it to later? It doesn't make sense to defer it to later.

JUDGE STUMP: All right. Anything else?

MR. SHEA: No, your Honor, unless you have

any further questions.

JUDGE STUMP: I might think of some more.

Mr. Erickson.

MR. ERICKSON: Thank you, your Honor. You asked a question why was this filed as a declaratory ruling. I don't have an answer exactly to that. There has been an analogy situation, you Honor.

MR. WATERS: Your Honor, before Mr. Erickson goes, I just want to place an objection on the record. Didn't you require that answers be filed by noon on Friday?

JUDGE STUMP: Well, if parties decided to file a written answer. You don't have to file a written answer. You can make your arguments orally.

MR. ERICKSON: Your Honor, there was a parallel several years back in case U-10029. I believe in that case, Consumers Energy -- or at that time, I guess it was Consumers Power Company -- filed for declaratory ruling relative to interpretation of gas purchase agreements that it had with several Michigan gas producers. The Commission ultimately turned that into a contested case. And I believe that this case

fits into that type of a thing if you kind of morph

that in. I don't think that's a particularly important stumbling block. But just for your Honor's information, the Commission has treated a declaratory ruling as a contested case and addressed it in that context.

JUDGE STUMP: All right. Thank you.

MR. ERICKSON: You asked the question about why not include it in this case originally. I believe Mr. Shea answered that.

You also asked the question, more importantly, why would this not be something for decision by the Ingham County Circuit Court or a separate case. I believe that Mr. Waters specifically said that we should do this, if at all, in a reconciliation case. Let me suggest to your Honor that section 6J subsection 12 says that if you have an opportunity to raise an issue in a plan case, you must do so or it's binding in the reconciliation case. So I

believe Mr. Waters has the cart before the horse.

If we can address the issue of what's the proper cost recovery under the purchase power agreement inside this case, if we fail to do so, we will be barred from addressing it by the provisions of 6j(12).

Mr. Waters suggested that there would be no prejudice. I don't know whether the Company would be

prejudiced if the Ingham County Circuit Court catches up the matter or if the Commission handles this in a separate case, but I believe there's going to be prejudice to Consumers' ratepayers if you don't take it up in the PSCR context.

Take a look at what Mr. Waters has filed. Attached to his reply to Consumers' answer is a brief in the Ingham County Circuit Court that raises, among other doctrines, the doctrine of judicial estoppel, the doctrine of collateral estoppel, the doctrine of preemption. And he raises issues concerning 18 CFR part 292, which are the rules that were promulgated by

the FERC way back in 1980 under PURPA in volume 45, issue number 38 of the federal register.

The bottom line of Mr. Waters' arguments are we should be in Ingham County Circuit Court or we should be in a separate case. And he says, well, it's disingenuous and will prevent hearings. I think what he's really suggesting is he wants to go in, get an incomplete adjudication in the Ingham County Circuit Court, and then he will argue that there's judicial estoppel, collateral estoppel, or preemption against the MPSC.

In fact, I believe Mr. Waters is the one who argued case U-11290, that the Commission had to pass

the rule if purchase power agreements, and nothing it could do in restructuring could prejudice their rights.

So it seems to me that what we've got here is Mr. Waters wants to go to the forum that he wants to go to with -- the forum with the expertise, the forum with the ultimate bottom-line jurisdiction, you've got

two -- you've got love and marriage. And in this situation, the Court cannot address recovery. Mr. Waters would prefer that nobody addresses recovery from ratepayers. I'm suggesting that the prejudiced ratepayers would be substantial if we don't address what is the proper interpretation of the purchase power agreements and the Commission's prior rulings in 8871 and U-10127. If the Commission doesn't address it here, if the contract gets interpreted into Circuit Court, the Circuit Court doesn't have the kind of expertise and familiarity with the FERC rules, it doesn't have familiarity to the same degree with even PURPA itself.

It's interesting to note in PURPA, section 210, that statute describes in subsection B rates for purchase by electric utilities under PURPA. And it says the rate for purchase, one, shall be just and reasonable to the electric consumers of the electric utility and in the public interest and, two, shall not

discriminate against qualifying cogenerators or qualifying small power producers. It goes on to say, no such rule prescribed under subsection A shall provide for a rate which exceeds the incremental costs to the electric utility of alternative electric energy.

I believe that when you take a look at all of this -- and I'm not asking your Honor to address the merits of these issues. I'm just simply trying to suggest why the Commission has jurisdiction, why the case should be decided here.

What Mr. Waters is asking you to do is do two things: strike the supplemental application and testimony and limit the scope of the proceedings. The only limitation I can imagine that he's thinking of on a limitation of the scope of the proceedings is that the Commission should assume in this case that Mr. Waters' position is right and that the costs under the purchase power agreement should be calculated as Mr. Waters proposes they should be calculated.

I suppose that there might be some way of

trying to intervene in the Ingham County Circuit Court. Mr. Waters has suggested to you that under Traveler's, it would be inappropriate and unlawful. Under Traveler's, all that addresses is the primary

jurisdiction doctrine of whether or not the Ingham County Circuit Court is going to hold things up.

I think you'll also find in the Traveler's Insurance and statements by the Michigan Supreme Court that there's a concurrent jurisdiction. And the question is whether or not the Court will defer or not. And then they set up principles for that deferral. And in that particular case, there was a tort action involving Traveler's claim that Detroit Edison mishandled its steam heating system and as a result, their client lost money and they were entitled to subrogation and reimbursement. And the result of it was the Supreme Court said, most appropriately, because the steam heating system and that all fit within the expertise of the Commission, the Court order would

defer.

I'm not asking you to decide for the Ingham County Circuit Court whether it will defer. But I do believe the Traveler's Insurance does indicate there's concurrent jurisdiction. And I believe that when we start looking at the statutory scheme, that it's important to consider that the impact of all of this $125 million -- I don't know whether there's $125 million or $1.25 billion or $125. That's not the key issue. The key issue is the question of how you

interpret the contract.

I believe you asked Mr. Waters if there's a legal interpretation, why would witnesses be needed. And he said, well, we are going to have to sort all of this out with regard to damages and all of that. I think there's a threshold question.

The first question is whether or not you should perform the calculation in the manner that Mr. Waters proposes or whether or not the Commission

should perform the calculation in the manner in which Consumers proposes. I agree that the effects of either calculation will be different and might be complicated.

But the threshold issue that I believe ratepayers have an interest in is the methodology by which the calculation will be performed. Because if I read Mr. Waters' Exhibit B to his answer to Consumers' answer or his reply to Consumers' answer correctly, he's going to argue judicial estoppel. He's going to argue collateral estoppel. He's going to argue preemption. And he's going to be back here in the reconciliation or in this case arguing that the failure of the Commission to allow recovery violates PURPA.

It's the same argument he made in U-11290. And in that case, the Commission specifically ruled

that it wasn't going to deny recovery mandated by PURPA. The question is, is what, given the authorization in 8871 and 10127 and even 10685, is the

appropriate method for calculating under the power purchase agreement and under PURPA. And I suggest that there are some real legal -- the decision really turns on the application of section 210 of PURPA upon the application of 18 CFR 292.304 and related regulations. And I believe all of these are pretty much legal questions.

Are we trying to deny Mr. Waters a hearing? No, your Honor; I suggest not. If Mr. Waters can demonstrate a need for additional time, I believe under Act 304, under the Commission's Rules of Practice & Procedure, he can ask for additional time. Apparently he's had since October notice of the claims, if not before then, by virtue of Mr. Palina's approach to things in the original filing in September.

And I wouldn't presume at this time to argue that Mr. Waters doesn't need more time or he does need more time. But count it from Mr. Palina's testimony in September, we had four or five months. Mr. Waters has apparently filed this lawsuit in Ingham County Circuit Court even before that or around that time. I can't recall the date when he did it.

But the real question is, is the issue properly before the Commission, should you strike the supplemental application and testimony and should you limit the scope of the proceedings. And I believe the answer to that is you should not. Because under primary jurisdiction, although you don't decide that question, a pivotal thing is expertise in addressing the surrounding circumstances, and I believe that expertise rests with the MPSC.

Whether or not the Commission can establish contract damages ultimately is a question that wouldn't necessarily be answered in this case. But the one thing is clear. The Ingham County Circuit Court theoretically cannot address the rights of ratepayers and how much they are going to have to reimburse Consumers. And how much they are going to have to reimburse Consumers depends upon the reasonable and prudent level of costs that Consumers pays.

If they pay Mr. Waters' clients $125 million

more, Consumers is going to argue and Mr. Waters is going to argue, too, that Consumers is entitled to that additional recovery from ratepayers, and ratepayers can only get relief in this case.

I believe, your Honor, in conclusion, that to address all of the issues, the one forum for doing so

is in this case. I believe it has to be in a plan case if we knew about it and reasonably litigated it when you look at section 6j(12).

And so I suggest that you should not strike the testimony and Mr. Waters should be allowed an adequate opportunity to present his responsive testimony. We'll all have an opportunity to file briefs on the issues. And I don't believe we should limit the scope of the proceedings to either formula for calculating power purchase agreement costs without actually litigating it in this case.

JUDGE STUMP: All right. Thank you. Ms. Barone.

MS. BARONE: Thank you, your Honor. I basically concur in the comments that have been made so far by Mr. Shea and by Mr. Erickson. I believe it's impossible to limit the scope of the proceedings as suggested by counsel for the QFs.

The question of the monthly adjustment end rates for power supply purchased by the utility is a determination that has to be made in this PSCR case. And, in fact, if you look at the petition to intervene, the QFs making this motion today at paragraph eight, they indicate they will seek an order from this Commission which reaffirms Consumer Energy's Company's

rights to recover from its customers all rates and charges which it is obligated to pay to the petitioners under their power purchase agreements and the Public Utility Regulatory Policies Act of 1978.

So that's what they are seeking in this case. And in order to get such an order, they are going to have to make their arguments about how much

money they are entitled to receive.

Consumers has indicated the amount of money they will need to pay to them for power and, in turn, the QFs have made their -- will be making their suggestion. So if this testimony was stricken, all you would have is the opposing viewpoint. And as Mr. Erickson said, the question of how much the customers will pay for their power is a determination to be made in the PSCR case and should be made at this time.

As has been mentioned by Mr. Erickson, primary jurisdiction doctrine is a doctrine that recognizes concurrent jurisdiction by both the Circuit Court and an administrative agency. And here we have a situation where the question is, what was the avoided rate approved by the Commission pursuant to these contracts. The Commission issued a series of orders for various QFs approving a rate. Under PURPA, the

utility has to be allowed to recover that rate from

their customers for the power they buy from the QF. So the rate approved is something that the Commission will have to determine by looking at its prior orders.

It's Staff's suggestion that this is purely a legal argument, that you need to look at those orders, see what those words say and make a decision.

I'd also mention that, as I mentioned in my answer briefly, that this situation is analogous to a line of cases that was decided with respect to Act 9. In Act 9, the question is what rate or what amount of money would be paid to -- by the utility to producers of natural gas. Similar situation here where we have utility paying an amount of money to the QFs for their power. And these contracts were negotiated and filed with the Commission under Act 9. And then when the price would change, the utility had to come to the Commission and get approval for that new rate to pay to those producers. And the producers claim that the Commission had no authority to interpret those contracts, that that was something they could bring to court and have the Courts decide. And the Commission

said, no; we have the right to interpret these contracts because it involves the rate that will be paid by the utility to the producer.

And the Courts consistently have reaffirmed that that is within the jurisdiction of the Commission and that under Act 9, that regulatory scheme envisions that the Commission will make a determination on that rate, even considering that involves an interpretation of a written contract between those two parties. And I would submit that the situation is analogous here.

If the Commission goes ahead and makes that determination, they will inform the Circuit Court of their determination. And to the extent that QFs have other claims that don't relate to that rate, then they are free to pursue that in the Circuit Court.

But the question, as articulated by counsel for the QFs, is what is the rate under the contract. The rate is something that the Commission approves, as I think the QFs acknowledge.

With respect to your point about the declaratory ruling, the rule does permit the Commission to -- under -- it's rule 701(2). It does provide the Commission may require that notice of the request for a declaratory ruling be provided and may require a contested case proceeding instead of issuing a declaratory ruling. So that is available.

If your Honor were to grant the motion to limit this proceeding and not consider this question

about what is one of the components of the power costs of this utility, then the appearance of the QFs would have to be removed from this case. Their purpose is to dispute that amount of money. And if they're willing, as Mr. Waters said, to acquiesce in what the Company has filed, then they should not appear any further in this case.

Also, Mr. Waters made certain arguments regarding the order in U-8871. And I think that that illustrates the point that I'm trying to make. This is

a matter that can be briefed in this case. You can look at those prior orders, look at those words and argue they mean this or they mean that. But those orders are what will control the rate that is to be paid. And while Staff is not going to attempt to oppose testimony which would provide some background regarding the overall regulatory scheme or the history between the parties, Staff maintains that the Commission orders speak for themselves. And the only thing that can be offered in a definitive way to illustrate what they mean might be record evidence that shows what one party advocated and then argued. That's what this sentence in the order means. But other than that, the record evidence, what was admitted as evidence, the words of the orders and any settlement

agreements they might approve are what will control the question of how much the QFs should be paid.

And also Mr. Waters made some comments regarding claiming that there would not be a due

process hearing. The statutory scheme for approving QF rates is a statutory scheme. It's not a constitutional scheme. It involves a rate-making process set forth by the statute. Those rates were approved in contested cases where parties appeared and put forth their positions.

Now, there's a question as to interpretation of those contracts. That too can be -- is being conducted with a contested case proceeding; and both the representatives of ratepayers, the Company, and the QFs are here to set forth their positions. And as Mr. Erickson noted, to the extent that the QFs need more time to put together their testimony if they have a reasonable problem, that can be requested and granted. And as noted, apparently this dispute has been simmering for some time, so I would imagine the information they want to present will be available to them in a reasonable amount of time.

I also think it's important to note while Mr. Waters notes the amount of money that is at issue over the life of the contract, we are dealing with one

year of the contracts here, one year of payments. And we're dealing with utility companies whose cost of power is extremely large. My Staff person here informs me it's in the billions or over a billion. It's a lot of money for everyone. And so I don't think the mere size of the amount of money at issue should control your decision.

I think it's very important to note that this really is not a breach of contract case. This is a case that says there was a rate approved in a contract. There's a rate and there's a methodology to set the rate in the contract, and that is what is being presented to your Honor and the Commission in this PSCR case, what is the rate for this particular power supply source for the Company that will be paid and recovered by ratepayers.

It's important to note that under PURPA, the utility is allowed to recover, is required to be allowed to recover from their ratepayers this money. And so it's important to determine what is the amount

of money they should recover.

Also, I think it would further judicial economy for the Commission to endeavor to address this issue sooner rather than later in a reconciliation case and be in a position to inform the Court of its

decision.

I have nothing further. Thank you.

JUDGE STUMP: Thank you.

Mr. Waters, I'll let you respond.

MR. WATERS: Thank you, your Honor. I don't even know where to begin. I am not trying to pull the wool over the Commission's eyes on any of this. I think that's what Mr. Erickson suggested. In the battalion [phonetic] case, it makes clear that the Commission must allow pass-through of federally-mandated wholesale rates. That argument is set forth on page 12 of my answer in the Circuit Court, which I have attached to the reply that I gave to your Honor.

I've been very consistent in my analysis of what needs to be done all the way along. While I think there are good reasons for me to be in the case even without this testimony, I'll stipulate to withdraw. My principal reason for being in this case is to dispute the supplemental application.

When Consumers sent me that application, I looked at it and I said, I know what's going on here. We've gone from what is really a PSCR case to a case where they want a declaratory ruling to a case where they are absolutely trying to make a decision. And

what's going to happen is all of these parties here are going to argue that the decision that the Commission makes in this case -- if it litigates this issue, they're the ones who are going to argue that it's binding not only for 2004, but it's -- they will argue that it controls all of the claims in a -- predating 2004. And they are going to argue that it controls, collaterally estops, and judicially estops all the

claims after 2004.

That's really what's going on here. In fact, you know, in Consumers' own brief -- I think it's on page seven -- makes clear that they're arguing that this is a contested case proceeding and, therefore, it is binding. What is happening here is they are trying to, you know, take a huge issue, boil it down to two months and get a decision from the Commission and then, you know, have it be binding on me and the Circuit Court.

One alternative -- I would like to address some of these things. And I'll try to do it quickly, but there were so many things said. -- is to simply take the supplemental application that Consumers filed in this case and order that it be transferred into a separate contested case proceeding.

I think -- I'm not trying to hide anything.

I mean, my arguments with regard to the primary jurisdiction doctrine have been very clear. I have

talked to various Staff members and said I filed this complaint; if you want a copy, I'll give it to you. I've offered to send over copies of my pleadings in the Circuit Court case to the Staff so that they know what's going on. I'm not trying to hide anything.

There are legal issues that are raised with regard to the primary jurisdiction doctrine that I think are properly addressed by a Circuit Court. And, you know, one alternative is take -- you know, take their supplemental application and put it in a contested case proceeding. We'll have to set a separate schedule, but presumably we can do that after we have a ruling from the Circuit Court on Consumers' motion on the primary jurisdiction doctrine and then do what the utility wants to do in this PSCR plan case.

What they've asked for is to implement a specific PSCR factor. They didn't come in as they might have and say implement a higher factor or we have this dispute so, you know, take an additional amount and put it, you know, into what is essentially an escrow under 460.6j(6), I believe. They didn't do

that.

They might have -- what they requested, they

said just allow us to implement a specific PSCR factor. I agree. Let them implement that factor.

With regard to the Company's arguments with regard to 460.6j(7), 6j(7) is not mandatory. What that very clearly says is, the Commission may do certain things. The Commission doesn't need to do certain things. All three of the parties on the other side of the table have suggested that 460.6J requires that certain things be done.

If you look at 460.6J, it says the Commission may also indicate any cost items in the five-year forecast that, upon the basis of present evidence, the Commission would be unlikely. That's statute -- to allow recovery. That statute does not require that this breach of contract dispute -- and it is a breach of contract dispute -- be litigated in this case. What it does is it allows the Commission to give the

Company, you know, some guidance under certain circumstances.

Given this case, this is not an appropriate circumstance to have that happen. 460.6j(7) is not mandatory. It does not require that it be resolved here.

Consumers says that they haven't done it, that they had not calculated the energy rate -- they

say they have calculated the energy rate in a manner that's inconsistent with my interpretation of the contracts in the past. That's not true.

What's interesting is when Consumers froze their rates, the imbedded rate for the energy rate was frozen at the level that I think they should be recovering. What they then did is they then turned around and started paying us significantly less, and they pocketed the difference between the two. That is part of the underlying complaint that is over at the Circuit Court. Now, that is clearly not, you know,

what PURPA envisions.

I have not had a year to deal with this case. I mean, I tried to get as much information I could so I could proceed in good faith to pursue this. But the utility basically said we will not give you the information. Your Honor, I'd have to go back to the office and get that information, but I have correspondence of them saying no.

The fact that this case is not simple, I think, is also reflected in the fact that I sent the discovery requests in the Circuit Court case on October 21st; okay. It's been -- well, we're coming up -- it's more than two months at this point. They keep calling me and asking me for additional time

because the discovery requests are very complicated. And I've been very gracious and said, okay, we'll give you that time.

If this case were that simple, they could have provided the discovery requests like that. If

this case was as simple as they say, they would have filed a motion for summary judgment for the Circuit Court saying, on the merits, Mr. Waters is wrong, please dismiss this case. That's not what they did.

I'm not familiar with the case that Mr. Erickson cites, U-10029.

However, with the gas case, I made this argument to the Circuit Court. If you look at the primary jurisdiction doctrine cases, they really break down into two different type of cases.

Number one, they break down into cases where Consumers has a dispute with its rate-paying customer over the rate or the service that's been provided. Or they break down into cases under Act 9, which explicitly gives the Commission the authority to resolve those breach of contract cases in, you know, the contested case proceeding before it.

So the real question -- and this is the question that's before the Circuit Court -- is, you know, what statute gives the Commission the authority

to resolve a breach of contract dispute outside of Act 9 and outside of a dispute between the utility and its ratepayers. And that is the issue that the Circuit Court is struggling with. The jurisdiction issue here is very complicated, and the opponents give it short shrift.

We are not asking for more than avoided costs. That was one of the issues that had been raised here, I think, by Mr. Erickson. That's not what we're asking for. What we're asking is that the utility not be allowed to change the intent of the contract, which is to pay the QFs less than the avoided costs. That's what the utility is doing.

The contract is very clear that both the capacity and energy rates are based upon avoided costs. And the clear allegations of our complaint is that the utility has changed the entire methodology for all practical purposes by which it calculates the energy rate and is no longer paying us avoided costs. We don't want more than avoided costs. We want the utility to continue to pay us as they were paying us in

the past and, indeed, were paying -- well, were being paid by their customers during the rate freeze even though they were dropping down the rate payments that they were paying us.

The real question, your Honor, is, is the breach of contract or are the breach of contract issues that I've raised in my complaint properly before this Commission in this PSCR plan case, a case that I can't figure out how to litigate because it's mutated from a plan case to a case requesting a declaratory ruling to a case where they're now saying this is really a contested case hearing, Mr. Waters, and we want the result in this case to be binding on you not only for 2004 but for every other year of the contract.

With regard to Mr. Erickson's comment of, you know, I'm trying to hide something from the Commission, I raised the issue very plainly and clearly with the Circuit Court and provided copies of all my pleadings to whoever wanted them.

I think what Mr. Erickson is really suggesting, if you carry his analysis through to its logical conclusion, what he is suggesting is that if the Michigan Supreme Court says yeah, the Circuit Court has jurisdiction and the Circuit Court should decide, you know, the rate issue under the power purchase agreements between the utility and the QFs, that somehow the Michigan Supreme Court shouldn't recognize that and accept that decision.

I don't know what the Circuit Court or the

Court of Appeals or the Supreme Court are going to do, but I do know that I'm going to live with whatever decision they make. And to suggest that I'm trying to hide something, you know, from this Commission, I think, is really unfair and an outrage.

If the Court grants my motion or if the Court merely takes the supplemental filing and pushes it into a separate contested case proceeding, I will get out of this case. I don't think that I will have to. I think

I still meet the Commission's standing case, but I'm perfectly willing to withdraw.

I could say more, but I think I'll stop there.

JUDGE STUMP: Thank you. We're going to take a break so I can review my notes and collect my thoughts and then come back in about 20 minutes.

(Whereupon a brief recess was taken.)

JUDGE STUMP: We're back on the record. I'm going to deny the motion to strike and to limit proceedings. I agree with Consumers, the Attorney General, and the Staff that the cost of the power purchased from the QFs that will be recoverable from customers is relevant to the determination of this Power Supply Cost Recovery plan; and as a result, the issue is properly before the Commission in this case.

Furthermore, section 6j(12) of Act 304, which addresses PSCR reconciliation, does provide that, quote, the Commission shall consider any issue

regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously-conducted power supply and cost review. I tend to agree with Mr. Erickson that this section should be interpreted to mean that if you can address an issue in the plan case but failed to do so, you are barred from doing so in the reconciliation.

I'm also persuaded that the question of setting qualifying facility rates is delegated to the Commission by federal law, and the Commission has carried out that responsibility in prior cases. As a result, the Commission has continuing jurisdiction to clarify what the rate is that it previously approved.

Because I'm persuaded that the issue with respect to the supplemental application and testimony is limited to determining what is the amount of money that Consumers should be allowed to recover from its customers for the power purchased from the QFs, I do not believe it would require dozens of witnesses and hundreds of exhibits.

So for all of the reasons stated by

Consumers, the Attorney General and the Staff, the motion is denied.

Now, I will extend the schedule somewhat on this case to give you a little more time, Mr. Waters. So let's go off the record and talk about that.

(Whereupon a brief discussion was held off the record.)

JUDGE STUMP: We worked out a schedule off the record, and it will be as follows:

Staff and interveners will file its testimony March 22nd, 2004.

Rebuttal testimony will be due April 12th, 2004.

Motions to strike, April 26, 2004.

Cross-examination will be held May 3rd through May 7th.

Briefs would be due May 28th.

And initial briefs will be due June 11th.

MR. SHEA: I believe you misspoke, your Honor. I think you meant to say reply briefs.

JUDGE STUMP: Reply briefs, sorry, June 11th.

There will be a 14-day turnaround on discovery.

Now, I indicated that Mr. Waters could state

his objections to the schedule on the record.

MR. BINKE: Your Honor, just in case you want to clarify, motions to strike, April 26th. Do you have a response date that you want to establish?

MR. ERICKSON: Your Honor, why don't we just do that flexibly because we're tight on the rebuttal and all of that.

JUDGE STUMP: Just get any -- if you do want to do a written response -- and you know you don't have to. But if you do one, I'd like to get them, you know, at least the day before.

MR. BINKE: Okay.

JUDGE STUMP: You know, but not at 5 o'clock, not at two minutes to 5:00, you know, and you can E-mail them to me.

All right, Mr. Waters, go ahead.

MR. WATERS: Thank you, your Honor. I do object to the schedule which the parties, not including myself, have worked out in this matter. That schedule will not leave reasonable opportunity for me to finish discovery and to properly prepare for the case. But I understand that your Honor has indicated that that is the best it's going to be and is what everyone's come up to.

With regard to 460.6j(12), I respectfully

believe that your reading of that and Mr. Erickson's is incorrect. The last sentence clearly says, the Commission can, in a reconciliation case, consider any issue regarding the reasonableness or prudence of expenses where customers were charged if it wasn't adequately considered before. So I think that this

issue should have been addressed, if at all, in the reconciliation case. But I understand your ruling.

JUDGE STUMP: All right. Thank you very much. This concludes this hearing. Thank you.

(Whereupon the hearing was concluded at or about 11:11 a.m.)

-o0o-

CERTIFICATE OF NOTARY PUBLIC

(STATE OF MICHIGAN)
(SS)
(COUNTY OF SHIAWASSEE)

I hereby certify that on the date and at the place hereinbefore set forth, I reported stenographically the proceedings held in the matter hereinbefore set forth; and that the testimony so recorded was subsequently transcribed by me, and that the foregoing is a full, true and accurate transcript of my original stenotype notes.

DATED: December 23, 2003

Bridget R. Householder, CSR-5379
MY COMMISSION EXPIRES: 12-28-06

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ADRIAN ENERGY ASSOCIATES, LLC; CADILLAC RENEWABLE ENERGY, LLC; GENESEE POWER STATION, LP; GRAYLING GENERATING STATION, LP; HILLMAN POWER COMPANY, LLC; T.E.S. FILER CITY STATION, LP; VIKING ENERGY OF LINCOLN, INC.; and VIKING ENERGY OF MCBAIN, INC.; Plaintiffs, V CONSUMERS ENERGY COMPANY, a Michigan corporation. Defendant.	Case No.: 03-1799-CZ Hon. James R. Giddings

David E. S. Marvin (P26564)
David D. Waddell (P36814)
Thomas J. Waters (P37829)
Michael S. Ashton (P40474)
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
Telephone: (517) 482-5800
Fax: (517) 482-0887
Attorneys for Plaintiffs

Jon R. Robinson (P27953)
Consumers Energy
One Energy Plaza, Room EP11-224
Jackson, MI 49201
Telephone: (517) 788-0698
Fax: (517) 788-0768
Attorneys for Defendant

PLAINTIFFS' ANSWER AND BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Table of Contents

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

NOW COME Plaintiffs Adrian Energy Associates, LLC; Cadillac Renewable Energy, LLC; Genesee Power Station, LP; Grayling Generating Station, LP; Hillman Power Company, LLC; T.E.S. Filer City Station, LP; Viking Energy of Lincoln, Inc.; and Viking Energy of McBain, Inc., by and through their attorneys, Fraser Trebilcock Davis & Dunlap, P.C., and for their Answer and Brief in Opposition to Defendant's Motion for Summary Disposition state as follows:

BACKGROUND

1. Statutory Background.

Plaintiffs are qualifying facilities ("QFs") as that term is defined by the Public Utility Regulatory Policies Act ("PURPA"), 92 Stat 3117; 15 USC §3201 et seq; 16 USC §824(a-3) et seq. In general, a QF is a special kind of non-utility facility that generates electricity for sale to a public utility. Under federal law, a non-utility power generator qualifies as a QF if it meets certain requirements under PURPA and the rules of the Federal Energy Regulatory Commission ("FERC") implementing PURPA.

The United States Congress enacted PURPA to alleviate a national energy crisis precipitated by this country's heavy reliance upon foreign energy sources and inefficient uses of energy.[1] See, FERC v Mississippi, 456 U.S. 742, 745-46; 102 S. Ct. 2126; 72 L. Ed. 2d 532 (1982), rehearing denied, 458 U.S. 1131 (1982). PURPA requires utilities to purchase

[1] PURPA sought to accomplish its goals in two ways. First, PURPA sought to make this country less dependent upon foreign oil by encouraging the development of "cogeneration facilities" which use energy more efficiently than traditional generation sources by sequentially producing (i.e., cogenerating) electricity and "steam or [other] forms of useful energy (such as heat) which are useful for industrial, commercial, heating or cooling purposes." 16 USC §796(18)(A). Second, PURPA encouraged the development of small power production facilities that utilize renewable resources such as solar, wind, or biomass. Cogeneration and small power production facilities that meet the required criteria are defined by PURPA as "qualifying facilities" or "QFs."

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

electricity made available to them by qualifying facilities at the utility's "*avoided cost*." 18 CFR §292.304(2) The FERC regulations define a utility's avoided cost as "the cost to the electric utility of the electric energy which, but for the purchase from [the qualifying cogeneration or small power production facility] such utility would generate or purchase from another source." 16 USC §824a-3(d) and 18 CFR §292.101(b)(6).

Plaintiffs are all QFs who, pursuant to PURPA, have all entered into long term Power Purchase Agreements ("Agreements") with Consumers Energy Company ("Consumers"). These Agreements obligate the Plaintiffs to deliver electricity to Consumers and Consumers to pay for that electricity. The Agreements explicitly provide that "The capacity and energy payment rates to be paid by Consumers are based on the concept of 'avoided costs' as now described in Section 210 of [PURPA]…." The Agreements further provide that the part of the Agreements containing the foregoing statement "shall govern over any conflicting provisions of this Agreement."

2. The Defendant Is Calculating Plaintiffs' Energy Rates In A Manner That Is Inconsistent With PURPA And With The Agreements.

The Power Purchase Agreements require the Defendant to pay the Plaintiffs both "capacity" payments (i.e., payments for fixed capital costs) and "energy" payments. The first issue raised in the Plaintiffs' Complaint involves a dispute over the Defendant's calculation of the energy rate that it pays the Plaintiffs.

PURPA allows States a one-time opportunity to determine the avoided costs that an electric utility, such as Consumers, must pay to QFs, such as the Plaintiffs, for electricity. 18 CFR §292.301 *et seq*. Given this, the Plaintiffs and Defendant initiated various proceedings at the MPSC requesting that the MPSC determine the Defendant's avoided costs for purposes of the Agreements.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

In the MPSC proceedings, Defendant Consumers Energy Company testified that the costs that it would avoid by purchasing electricity from the Plaintiffs were the costs associated with a coal fired generating plant that burned high Btu, Eastern (Ohio) coal. Defendant's witness Ashish D. Sarkar specifically testified in the proceedings in MPSC Case Nos. U-8871, *et al* and U-10127 with regard to the characteristics of the coal that would be burned in the hypothetical proxy plant:

> "Q. What coal characteristics were specified?
>
> A. In our RFP we specified a typical high sulfur Eastern (Ohio) coal supply with the following properties:
>
> Heating Value – 11,500 Btu/lb.
>
> Ash Content – 11.6%
>
> Sulfur Content – 3.61%"

As discussed in more detail later in this brief, Consumers also successfully argued in MPSC Case No. U-8871, *et al* that the MPSC does not have jurisdiction to resolve contractual disputes between it and qualifying facilities. In this regard, Consumers explicitly argued that:

> "***the complaints the Commission is empowered to hear concern rates and service matters between a public utility and its customers; not between a public utility and its suppliers***." (Exhibit A, p.10)

As explained more fully later, the MPSC agreed with Consumers and only approved the capacity and energy payment rates in the Agreements.

In approving the capacity and energy payment rates in the Power Purchase Agreements, the MPSC determined that, by purchasing electricity from the Plaintiffs, the Defendant was able to avoid the cost of building and operating a coal-fired electric generating plant that would have burned high Btu, Eastern coal (i.e., the avoided unit).

The energy payments in the Agreements are calculated monthly under a formula that

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

is based upon the Defendant's coal costs at its "Base Plants." At the time the Plaintiffs signed the Power Purchase Agreements and at the time the MPSC approved the capacity and energy rates in those contracts, the Defendant's Base Plants were designed to burn, and did burn, a fuel mix that consisted of approximately 94% high Btu, bituminous Eastern coal and 6% low Btu, subbituminous Western coal (Btu percentages). This was the same type of coal that would have been burned by the generating plant that the MPSC determined the Defendant would avoid building by purchasing electricity from the Plaintiffs.

In the early years of their Agreements, the Defendant paid the Plaintiffs an energy payment that was calculated based upon the coal costs for an electric generating plant that burned predominantly high Btu, Eastern coal. Importantly, the MPSC allowed the Defendant to charge its citizen customers energy rates based on Eastern coal.

Beginning in approximately 1998, long after the Plaintiffs signed their Power Purchase Agreements and long after the MPSC approved the avoided capacity and energy rates in those Agreements, the Defendant unilaterally decided to rebuild several of its Base Plants to allow them to burn a fuel mix that consisted predominantly of low Btu, Western coal, which is far less expensive than Eastern coal. The Defendant spent several hundred million dollars rebuilding its Base Plants and has admitted that those costs are not reflected in any of the capacity or energy rates that it pays the Plaintiffs (Exhibit B). As a result, Consumers' Base Plants no longer burn the same type of coal that would have been burned by the generating plant that the MPSC determined Consumers could avoid building by purchasing electricity from the Plaintiffs.

After the Defendant rebuilt its Base Plants to burn the lower cost Western coal, it began ***unilaterally*** paying the Plaintiffs energy payments that were calculated on the basis of a fuel mix that consisted predominantly of the less expensive Western coal. This had the

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

effect of substantially reducing the energy rates that the Plaintiffs are paid under the Agreements without any consent by the Plaintiffs. By converting its Base Plants to burn Western coal, the Defendant improperly breached its contractual obligation to pay the Plaintiffs an energy rate that is based upon "avoided costs," as that term is defined by PURPA. The Defendant's actions violated PURPA and nullified the Plaintiffs' election under 18 CFR § 292.304(d)(ii) to choose to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to the Defendant (i.e., at the time they signed their power purchase agreements).[2] As a direct result, Plaintiffs have been underpaid by millions of dollars already and, unless this Court provides the equitable remedy of specific performance, will be underpaid tens of millions of dollars over the remaining terms of their 35-year contracts.

3. The Defendant Is Wrongfully Retaining Millions Of Dollars In Reimbursements That It Has Received From Its Ratepayers But Has Refused To Pay To The Plaintiffs.

The second issue raised in the Plaintiffs' Complaint relates to a dispute involving millions of dollars that the Defendant has collected from its ratepayers for reimbursement of Plaintiffs' energy charges but has refused to turn over to the Plaintiffs.

The MPSC has allowed the Defendant to recover from its customers the capacity and energy payments that it pays to the Plaintiffs through the Power Supply Cost Recovery

[2] Under PURPA, each qualifying facility has the option to choose whether its avoided cost rate will be re-calculated every time a payment is made or is calculated "up front" for the entire term of the contract. The Plaintiffs all chose to have their avoided cost rate calculated "up front" for the entire term of their contracts. 18 CFR §292.204(d)(2). In approving the rates in the Plaintiffs' Agreements, the MPSC recognized and approved the Plaintiffs' elections pursuant to 18 CFR § 292.304(d)(ii) to choose to sell electricity for a specified term and to have their "avoided cost" payments calculated (for the full term of their contracts) as of the time they incurred their obligation to the Defendant (i.e., at the time they signed their power purchase agreements).

provisions of MCL 460.6j, *et seq*. A Power Supply Cost Recovery clause ("PSCR clause") means "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs . . . of fuel burned by the utility for electric generation and booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a).

In 1997, the Defendant initiated MPSC Case No. U-11453 and requested that the MPSC freeze its rates and suspend its PSCR clause. On February 11, 1998, the MPSC issued an order granting the Defendant's request to freeze its reimbursement rates and suspend its PSCR clause. (Exhibit C, p. 11) The Defendant's frozen reimbursement rates reflected the energy rates that the Defendant actually paid to the Plaintiffs under their Power Purchase Agreements for the year 1997.

In 1997, Defendant's Base Plants still burned a fuel mix that consisted predominantly of high Btu, Eastern coal (i.e., the more expensive coal). After the MPSC granted the Defendant's request to freeze its reimbursement rates (which frozen rates included energy costs for the Plaintiffs that were calculated on the basis of a fuel mix that included the more expensive Eastern coal), the Defendant unilaterally began paying the Plaintiffs energy rates that were calculated on the basis of a fuel mix that included increasingly greater quantities of the less expensive Western coal.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

Since 1998, the Defendant has been recovering energy costs from its retail customers at a frozen reimbursement rate approved by the MPSC (which is calculated predominantly on the basis of the higher cost Eastern coal) but has been paying the Plaintiffs an energy rate calculated predominantly on the basis of the lower cost Western coal. This has resulted in Defendant Consumers Energy Company receiving a windfall of approximately $6,000,000

from the Plaintiffs that it has collected as reimbursements from its customers for electricity purchased from the Plaintiffs.

ARGUMENT

A. Consumers' Arguments In Its Motion For Summary Disposition Under The Primary Jurisdiction Doctrine Are Barred By The Doctrines Of Judicial Estoppel And Collateral Estoppel.

Michigan law has long recognized that a litigant is not entitled to make one set of arguments in one forum and make a contradictory set of arguments in another forum. Judicial estoppel prevents a party who has successfully asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding. Lichon v American Universal Insurance Co, 435 Mich 408, 416; 459 NW2d 288 (1990); Kerns v Dura Mechanical Components Inc (On Remand) 242 Mich App 1, 15-16, 618 NW2d 56 (2000); Mitchell v Washingtonville Central School Dist, 190 F3d 1, 6 (2d Cir 1999)

Consumers' argument in its motion for summary disposition that the MPSC has primary jurisdiction over the matters raised in the Plaintiffs' Complaint is inconsistent with Consumers' arguments in Case No. U-8871, *et al* (the very case in which the MPSC approved the avoided capacity and energy rates in the majority of the Plaintiffs' Agreements), that the MPSC does ***not*** have jurisdiction over disputes between it and its QF suppliers.

In the MPSC proceedings in Case No. U-8871, *et al*, Consumers extensively argued that the MPSC does ***not*** have the power to resolve disputes between Consumers and power suppliers such as the Plaintiffs. Consumers argued as follows:

> "[i]n a number of instances, some more ridiculous than others, parties seek to attribute to the Commission power and authority under state law to interfere with power supply contracts between a power supplier and an electric utility such as Consumers Power." (Exhibit A, p. 7.)

Consumers also argued that:

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

> "***the complaints the Commission is empowered to hear concern rates and service matters between a public utility and its customers; not between a public utility and its suppliers***." (Exhibit A, p. 10.)

Consumers also argued that:

> "the Commission has no statutory warrant authority under its complaint jurisdiction to order capacity set asides, negotiations, executions, abrogations, voidance, or amendments to power supply contracts with anyone or any qualifying facility." (Exhibit A, pp. 12-13.)

Consumer's continued by arguing that:

> "Some parties will also suggest that the Commission's inherent authority to hear complaints by its nature carries with it the power to resolve PURPA disputes. Even if the Commission had the power to resolve disputes, that alone does not necessarily encompass the power to order negotiations, compel execution of contracts or afford the other relief requested." (Exhibit A, p.16.)
>
> * * *
>
> "PURPA provides the Commission with no power and authority, but instead delegates limited responsibilities. … Under state law the Commission is significantly restrained." (Exhibit A, p.70.)

The Commission agreed with Consumers and limited its actions in MPSC Case Nos. U-8871, *et al* to: (1) determining Consumers' avoided costs for purposes of the Plaintiffs' Agreements; (2) determining how much electrical capacity Consumers' needed to purchase; and (3) determining, based upon fuel type, the projects from which Consumers should purchase electricity. The Commission noted that: "the Commission will not approve the contracts, only the capacity rates and amounts." MPSC Order, Case No. U-8871, *et al*, February 22, 1990, p. 6.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

On appeal, the Michigan Court of Appeals agreed that the Commission had the authority to: (i) determine Consumers' avoided costs for purposes of each of the Plaintiffs' Agreements and (ii) determine how much electrical capacity Consumers' needed to purchase. The Court of Appeals disagreed with the Commission on the question of whether it had the

authority to determine, based upon fuel type, the projects from which Consumers should purchase electricity, and found that the Commission did not have that authority. Consumers Power Co v PSC, 189 Mich App 151, 179-180, 472 NW2d 77 (Mich App, 1991).

Under Michigan law, a party who has successfully asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. Paschke v Retool Industries, 445 Mich 502, 509; 519 NW2d 441 (1994); Chon v American Universal Insurance, 435 Mich 408, 416-417; 459 NW2d 288 (1990); Hall v McRea Corp, 238 Mich App 361, 366; 605 NW2d 354 (1999). The Court of Appeals has elaborated on this principle as follows:

> "[Judicial estoppel] is applied against litigants because of their deliberate manipulation of the courts. Courts apply judicial estoppel to prevent a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment. The doctrine is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." Opland v Kiesgan, 234 Mich App 352, 363-64; 594 NW2d 505 (1999) (citations omitted).

The doctrine of collateral estoppel (issue preclusion) also prevents Consumers from now claiming that the MPSC has jurisdiction in this matter. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. McMichael v McMichael, 217 Mich App 723, 727; 552 NW2d 688 (1996); Porter v Royal Oak, 214 Mich App 478, 485; 542 NW2d 905 (1995); 1 Restatement (second) of Judgments § 27, at 250.

Agency determinations are entitled to preclusive effect if the administrative determination was adjudicatory in nature, provided a right to appeal, and the Legislature intended to make the decision final absent an appeal. Senior Accountants, Analysts &

Appraisers Ass'n v Detroit, 399 Mich 449, 457-58; 249 NW2d 121 (1976); Nummer v Treasury Dep't, 448 Mich 534, 541-42; 533 NW2d 250 (1995); Champion's Auto Ferry Inc v MPSC, 231 Mich App 699, 712; 588 NW2d 153 (1998); Kubin v Miller, 801 F Supp 1101, 1111 (SDNY 1992).

Consumers should not be allowed to alternatively argue in 1988 that the MPSC does not have jurisdiction and now argue in 2003 that the MPSC does have jurisdiction when the QFs sue it in a court of general jurisdiction. Consumers should now be estopped from arguing that the MPSC has primary jurisdiction over the breach of contract claims raised in this case. Jurisdiction to consider and resolve the present dispute rests squarely with the Michigan circuit courts, as the court of original jurisdiction.

B. Consumers' Arguments In Case No. U-8871, *Et Al* Were Correct. The MPSC Has Only Limited Powers Under PURPA, Not Including The Power To Resolve Breach Of Contract Claims.

1. Federal Law Limits The MPSC's Authority.

Consumers' argument in Case No. U-8871, *et al* that the MPSC jurisdiction is limited and does not include the authority to resolve contract disputes between it and its QFs suppliers is, in fact, correct.

Unlike all of the primary jurisdiction doctrine cases which Defendant Consumers cites in its motion and brief, the MPSC's underlying jurisdiction and authority over the Plaintiffs' Agreements is predicated upon **federal law**, not state law. PURPA allows state commissions a one-time opportunity to determine (pursuant to the FERC rules regarding the calculation of such costs) the avoided costs that an electric utility must pay to a QF for its electric generation. 18 CFR §292.301 *et seq*. The FERC has described the States' limited role in

setting QF rates as follows:[3]

> "For QFs, jurisdiction over rates for sales at wholesale is vested in this Commission. PURPA expressly directed this Commission, and not the states, to prescribe rules governing QF rates. PURPA gave the states responsibility only for "implementing" the Commission's rules."

In Smith Cogeneration Management Inc v Corporation Commission & Public Service Co of Oklahoma, 863 P2d 1227, (Okla 1993), the Oklahoma Supreme Court noted that:

> "The legislative history behind PURPA confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by qualifying facilities to utilities." 863 P2d at 1240-1241

Once a state commission establishes the avoided cost rate to be paid, its involvement with a QF's rate ceases.

> "[O]nce the [State Commission] approved the power purchase agreement between [the QF] and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [State Commission] to reconsider its approval or to deny the passage of those rates to [the utility's] consumers under purported state authority was preempted by federal law." Freehold Cogeneration Associates LP v. Board of Regulatory Commissioners of New Jersey, 44 F3d 1178, 1194 (3rd Cir 1995), *cert. den*. 516 US 815, 116 S Ct 68 (1995).

Consumers' argument in Case No. U-8871, *et al* that the MPSC has limited jurisdiction is supported by PURPA and the FERC's regulations which exempt qualifying facilities from most of the provisions of the Federal Power Act and which further exempts QFs from "state laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." 16 USC § 824a-3(e)(1).

18 CFR § 292.602 exempts qualifying facilities from burdensome regulation that would stifle their development as follows:

> "(c) Exemption from certain State law and regulation. (1) Any

[3] Connecticut Light and Power Co., 70 FERC 61,012; 1995 WL 9931.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

> qualifying facility shall be exempted (except as provided in paragraph (c)(2) of this section) from State law or regulation respecting:
>
> (i) The rates of electric utilities; and
> (ii) The financial and organizational regulation of electric utilities."[4]

The MPSC's limited jurisdiction over QFs under PURPA is consistent with the larger scheme of the Federal Power Act. Sales of electric energy generated by qualifying facilities are wholesale transactions. 16 USC § 824a-3(a). The end users of all such electric power are retail customers, not the utilities to whom the electricity is initially sold. In enacting PURPA, Congress directed the FERC, not state regulatory agencies, to prescribe rules governing QF rates. *Id*. Under PURPA, the states merely implement the standards mandated by FERC. QF rates are thus FERC-mandated rates. New York State Electric & Gas Corp, 71 FERC 61,027; 1995 WL 216781. States must treat FERC-mandated rates for wholesale transactions as just and reasonable for purposes of passthrough. Nantahala Power & Light Co v Thornburg, 476 US 953; 966-967, 106 S Ct 2349; 90 L Ed 2d 943 (1986).

> "States may not bar regulated utilities from passing through to retail customers FERC-mandated wholesale rates."

Mississippi Power & Light Co v Mississippi Ex Rel Moore, 487 US 354, 372; 108 S Ct 2428; 101 L Ed 2d 322 (1988); Nantahala Power & Light Co v Thornburg, *supra* 476 US at 970.

2. State Law Limits The MPSC's Authority.

The Michigan Legislature has also set express boundaries for the authority of the MPSC by statute.

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

[4] To ensure that qualifying facilities would not be subjected to unduly burdensome regulation, the FERC consciously opted in favor of a very broad exemption from state law and regulation. *See*: Federal Register, Vol. 45, No. 38, Monday, February 25, 1980 p. 12233.

> municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and ***except as otherwise restricted by law***…. MCL 460.6 (emphasis added).

As shown earlier, PURPA expressly limits the jurisdiction of state commissions such as the MPSC when dealing with QFs like the plaintiffs. See 18 CFR § § 292.602(c) & 292.301. The clear and plain language of MCL 460.6 includes an exception to the jurisdiction of the MPSC when it is "otherwise restricted by law." If statutory language is clear and unambiguous, a court must assume the Legislature intended its plain meaning, and the statute is enforced as written. Stanton v City of Battle Creek, 466 Mich 611, 615; 647 NW2d 508 (2002). "Congress intended to exempt qualified cogenerators from state and federal utility rate regulations." Freehold Cogeneration Assoc LP v Bd. of Regulatory Comm'rs of New Jersey, 44 F3d 1178, 1192 (3d Cir 1995). Power Purchase Agreements should not "at any time in the future" be subjected to "arbitrary reconsideration by a state utility regulatory body." *Id*. at 1193.

Defendant Consumers Energy Company was correct in arguing in MPSC Case No. U-8871, *et al* that the MPSC has no jurisdiction to resolve disputes between Consumers and its QF suppliers. PURPA allows state commissions a one-time opportunity to determine the avoided costs that an electric utility must pay to a QF for its electric generation. Nothing in PURPA authorizes a state commission to resolve breach of contract disputes between a utility and a QF.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

C. The Defendant Cannot Be Allowed To Defeat Plaintiffs' Right To A Jury Trial By Relying On The Primary Jurisdiction Doctrine.

The Defendant's motion for summary disposition must also be denied because the primary jurisdiction doctrine cannot be used to defeat the Plaintiffs' right to a jury trial.

The constitutional entitlement to jury trial in Michigan's state court system is derived

from Mich Const 1963, art 1, § 14, which provides that:

> "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors, a verdict shall be received when 10 jurors agree."

The language – "The right of trial by jury shall remain" – has been a part of Michigan's Constitution since 1850. Const 1835, art 1, § 9, provided that "[t]he right of trial by jury shall remain inviolate." The 1850 Constitution eliminated the word "inviolate" and added the provision that the right shall be deemed waived in civil cases unless demanded in the manner provided by law. Const 1850, art 6, § 27. The language commanding that "[t]he right of jury trial shall remain" was incorporated without change in the subsequent constitutions of 1908 (Const 1908, art 2, § 13) and 1963 (Const 1963, art 1, § 14).

Michigan's reported appellate decisions have long held that this constitutional language was intended to preserve the right to jury trial as it existed at common law at the time of its adoption. Const 1963, art 1, § 14, is a definition of the individual's right to jury trial. It is also a restriction of the State Legislature's authority. The Legislature cannot constitutionally provide for non-jury determination of issues which were determined by a jury at common law when the Constitution was adopted.

In the case of Tabor v Cook, 15 Mich 322 (1867), Justice Cooley, explained that the plain purpose of the now-familiar language was to preserve the right to jury trial as it had existed previously, and to restrict the authority of the Legislature to erode that right:

> It is not in the power of the legislature, under our present constitution, to provide for the trial of titles to land in equity, in the cases which were triable at law at the time the constitution was adopted, unless it shall first make provision for having the case tried by jury if the defendant shall so elect. The constitution (*art. 6, §27*) says that "the right of trial by jury shall remain; but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law." The intention

> here is plain, to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed (Work v State, 2 Ohio NS, 296; Norval v Rice, 2 Wis, 22; Exline v Smith, 5 Cal, 112; Hughes v Hughes, 4 Monr, 43); and suitors can not constitutionally be deprived of this right except where, in civil cases, they voluntarily waive it by failing to demand it in some mode which the legislature shall prescribe.
>
> The present is one of those cases where a right to a trial by jury existed when the constitution was formed, and this right must, therefore, "remain." Tabor, 15 Mich at 324-325 (emphasis added)

See also, Swart v Kimball, 43 Mich 443, 448; 5 NW 457 (1880).

The Michigan Supreme Court has continued to recognize that the purpose of this constitutional guarantee has been to preserve the right of jury trial in all cases where it existed before the constitution was adopted. *See*: Friedman v Dozorc, 412 Mich 1, 60, fn. 6; 312 NW2d 585 (1981) (Levin, J. concurring); Conservation Department v Brown, 335 Mich 343, 346; 55 NW2d 859 (1952).

Although the purpose of Const 1963 art 1, § 14, and its predecessors, has been to preserve the right to jury trial as it existed at common law, the reported decisions have come to recognize that the constitutional right to jury trial does apply to subsequent legislative enactments creating new causes of action that are "similar in character" to common law causes of action predating the adoption of the Constitution. This was recognized in the case of Guardian Depositors Corporation v Darmstaetter, 290 Mich 445; 288 NW59 (1939), which held that a jury trial could not be denied in an action to collect a deficiency judgment following foreclosure of a mortgage under a newly enacted statutory procedure, where the previously existing procedure provided a right to jury trial in such cases. In addressing this issue, the Court noted that:

> "Constitutional provisions similar to that of Michigan have uniformly been held to guarantee the continuance of the right as it existed at common law, *or by statute*, in the particular State at the

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

> time of the adoption of the Constitution. 35 CJ, p. 148, citing cases from 40 American jurisdictions.
>
> The rule applies to cases of a similar character arising under statutes enacted subsequently to the adoption of the Constitution." Guardian, 290 Mich at 451.

Count I of the Plaintiffs' Complaint is a breach of contract claim. Several federal courts have recognized that PURPA claims, such as Count I, are state law breach of contract claims. Those courts have held that such disputes are contract disputes that should be resolved pursuant to state common-law contract principles and with reference to PURPA.

In Schuylkill Energy Resources v Pennsylvania Power & Light, 113 F3d 405 (3rd Cir 1997), the QF sued Pennsylvania Power & Light for curtailing power purchases from the QF during "system emergencies." The federal court declined to retain jurisdiction over the case and determined that the dispute should be "***resolved pursuant to common-law contract principles*** and with reference to PURPA." *Id.* at 418 (emphasis added).

In Crossroads Cogeneration Corp v Orange and Rockland Utilities, 969 F Supp 907 (D NJ 1997), *reversed on other grounds*, 159 F3d 129 (3rd Cir, 1998) a QF brought an action in district court against a utility for breach of contract, federal anti-trust violations, and other state law claims. The federal court found that it did not have federal question jurisdiction over the parties, and that PURPA only "define[d] the rights and duties of the parties under the Agreement plaintiff claims was breached." *Id.* at 916. *See also*, Gray's Ferry Cogeneration Partnership v PECO Energy, 998 F Supp 542, 549-550 (ED Penn 1998).

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

These cases, and the fact that the Plaintiffs are seeking money damages, make clear that Plaintiffs' breach of contract claim is exactly that, a breach of contract claim. Breach of contract claims were tried to juries at common law. Granfinanchiera SA et al v Paul C. Nordberg, 492 US 33, 41-43; 109 S Ct 2782; 106 L Ed2d 26 (1989). This being true,

Plaintiffs remain entitled to a jury trial and the Defendant cannot rely upon the primary jurisdiction doctrine to defeat that right.

D. Under The Primary Jurisdiction Doctrine, The Michigan Circuit Courts Are The Proper Forum For This Dispute.

1. General.

Circuit courts are courts of general jurisdiction and have original jurisdiction over all civil claims and remedies "except where exclusive jurisdiction is given by the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605; Farmers Ins Exchange v South Lyon Community Schools, 237 Mich App 235, 241; 602 NW2d 588 (1999). The Michigan Supreme Court has suggested a three-prong test for determining whether the primary jurisdiction doctrine applies in any given case.

> ***No fixed formula exists*** for determining whether the doctrine of primary jurisdiction applies; each case must be decided on ***its own facts***. The question is whether the purposes underlying the doctrine will be furthered by its application to particular litigation. Three major purposes generally govern this analysis. First, a court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue. Second, the court should consider the need for uniformity and consistency in resolution of the issue. Third, it should consider whether judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities. Cherry Growers Inc v Michigan Processing Apple Growers Inc, 240 Mich App 153, 161-62; 610 NW2d 613 (2000) (citations omitted) (emphasis added).

Travelers Ins Co v Detroit Edison Co, 465 Mich 185, 207; 631 NW2d 733 (2001).

The application of the foregoing test to the present case suggests that the MPSC does not have primary jurisdiction over this dispute. This dispute involves diverse claims for breach of contract, declaratory judgment, promissory estoppel, constructive trust, and unjust enrichment. First, the circuit courts of Michigan are perfectly equipped to deal with claims

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

such as these. Second, because the MPSC has already exercised its limited PURPA jurisdiction and determined the Defendant's avoided costs, this matter need not be heard by the MPSC to insure uniformity on the unique issues that agency is empowered to address. Third, judicial resolution of the issues raised in the Plaintiffs' Complaint will not adversely affect the MPSC's performance of its regulatory duties for the reason that the MPSC has already properly exercised its limited jurisdiction by determining the Defendant's avoided costs. Moreover, the MPSC will still retain its limited authority to review these charges under MCL 460.6j in Consumers' annual PSCR proceedings. The question raised in this lawsuit is whether the Agreements allow the Defendant to unilaterally change its calculation of those avoided costs that have already been approved.

2. The MPSC Does Not Have Jurisdiction Over Plaintiffs' Claims For Past Money Damages.

The orders of the MPSC operate on a prospective basis only. Muskegon Agency Inc v General Telephone Co of Michigan, 350 Mich 41, 53; 85 NW2d 170 (1957). Therefore, the Defendant cannot rely upon the primary jurisdiction doctrine to have the MPSC exercise jurisdiction over the Plaintiffs' claims for past money damages. This Court still has jurisdiction over Plaintiffs' claims for past money damages. Consumers Power Co v Telesystems Inc, 96 Mich App 1, 4; 292 NW2d 472 (1980).

3. The MPSC Does Not Have Jurisdiction Over The Plaintiffs' Equitable Claims.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

The MPSC also has no jurisdiction over the Plaintiffs' equitable claims.

The powers of the MPSC are expressly limited.

> [i]t is well established that the PSC has ***no inherent or common-law powers***. As a creation of the Legislature, it possesses only that authority specifically granted by statute. Moreover, a "statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be

> granted plainly, because doubtful power does not exist." Booth v Consumers Power Co, 226 Mich App 368, 373; 573 NW2d 333 (1998) (citations omitted) (emphasis added).

Administrative agencies lack powers in equity. See e.g., Electronic Data Systems Corp v Twp of Flint, 253 Mich App 538, 547-48; 656 NW2d 215 (2003) (Michigan Tax Tribunal); St.Paul Fire & Marine Ins Co v Littky, 60 Mich App 375, 378; 230 NW2d 440 (1975) (Workers Compensation Bureau).

The Plaintiffs' Complaint includes a declaratory judgment claim, a constructive trust claim, a promissory estoppel claim and an unjust enrichment claim. These are equitable claims. A constructive trust is a 'formula through which the conscience of equity finds expression.' Kent v Klein, 352 Mich 652, 656; 91 NW2d 11 (1958) quoting Beatty v Guggenheim Exploration Co, 122 NE 378 (NY, 1919). Unjust enrichment is another equitable theory that applies when a person has been unjustly enriched at the expense of another. Michigan Educ Employees Mut Ins Co v Morris, 460 Mich 180, 198; 596 NW2d 142 (1999).

The MPSC has no jurisdiction over Plaintiffs' equitable claims. The circuit courts of this state have subject-matter jurisdiction over equitable claims and clear jurisdiction to issue declaratory rulings. Mich Const of 1963, art VI, § 13; MCL 600.605; MCR 2.605.

E. The Declaratory Ruling That Consumers Has Requested In Its PSCR Case Is Not Binding On The Plaintiffs And, Therefore, Should Not Be Relied Upon As A Basis For Referring This Matter to the MPSC.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

In its motion for summary disposition, Consumers argues that "there is a pending proceeding at the Michigan Public Service Commission ("MPSC"), Case No. U-13917, which will address the identical issues set forth in Plaintiffs' complaint and the Court should therefore defer to the primary jurisdiction of the MPSC and dismiss this lawsuit." Consumers also argues that the "Plaintiffs have filed a petition to intervene in case No. U-13917 and are

in no way prejudiced by being required to litigate these matters in that forum." Consumers' arguments in this regard are fatally flawed.

The Defendant is aware that the Plaintiffs have intervened in Case No. U-13917 to dispute the MPSC's jurisdiction, not to litigate these matters in that forum. (Exhibit D, ¶ 7) For all of the reasons set forth in this answer and brief, the Plaintiffs believe that the dispute between these parties should not be resolved at the MPSC. More importantly, Michigan's Administrative Procedures Act and the MPSC's rules of practice and procedure make clear that the declaratory ruling which Consumers has requested from the MPSC in case No. U-13917 is not binding on the Plaintiffs. Section 63 of the Administrative Procedures Act specifically provides that "a declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court." MCL 24.263. Section 63 does not provide that the declaratory ruling is binding on anyone other than the agency and the person requesting it. Because the declaratory ruling that Consumers has requested is not binding upon the Plaintiffs and cannot serve as a basis for granting the Defendant's motion for summary disposition.

WHEREFORE, Plaintiffs respectfully request that the Defendant's motion for summary disposition be DENIED.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.

Date: December 2, 2003

By:_____
Thomas J. Waters (P37829)

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933