The Detroit Edison Company
One Energy Plaza, MI 48226-1279

Detroit Edison
A DTE Energy Company

MICHAEL J SOLO, JR.
Attorney
(313) 235-9512

December 3, 2010

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way, Suite 15
Lansing, Michigan 48909

Re: In the matter of the Application of The Detroit Edison Company for reconciliation of its Choice Incentive Mechanism for the 12-month period ending December 31, 2008
Case No. U-16262 (CIM) (Paperless e-file)

Dear Ms. Kunkle:

Attached for electronic filing is The Detroit Edison Company's Reply Brief, as well as a Proof of Service upon all parties, with regard to the above-referenced matter.

Very truly yours,

Michael J. Solo

Digitally signed by Michael J. Solo
DN: cn=Michael J. Solo, o=DTE Energy, ou=Legal - Regulatory Affairs, email=solom@dteenergy.com, c=US
Date: 2010.12.03 14:25:20 -05'00'

Michael J. Solo, Jr.

MJS/jmb
Attachments
cc: Service List

STATE OF MICHIGAN

BEFORE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of THE DETROIT EDISON COMPANY for reconciliation of its Choice Incentive Mechanism for the 12-month period ending December 31, 2008	))))))	Case No. U-16262

THE DETROIT EDISON COMPANY'S
REPLY BRIEF

I. INTRODUCTION

The Detroit Edison Company ("Edison" or the "Applicant") filed its Initial Brief in support of its Application requesting approval of the Reconciliation of its Choice Incentive Mechanism ("CIM") for the period from January 14, 2009 through December 31, 2009. The Michigan Public Service Commission Staff ("Staff") filed its initial Brief in support of Edison's Application. (Staff Brief P.3) The Association of Businesses Advocating Tariff Equity ("ABATE") filed its Initial Brief in this proceeding for the sole purpose of arguing against the legality of the CIM. ABATE raised no factual issue in regard to Edison's CIM reconciliation and its supporting testimony and exhibits. Thus, the only issue presented is a question of law of whether what ABATE describes as single expense item trackers, such as the CIM, are legally permissible for the Commission to approve. ABATE's Legal arguments are not valid. The Michigan appellate courts have previously decided that such mechanisms are legally permissible and within the Commission's jurisdiction and statutory authority to approve them. The Commission should reject ABATE's argument and grant the relief requested in Edison's CIM Reconciliation Application.

II. IT IS SETTLED LAW THAT THE COMMISSION HAS LEGAL AUTHORITY TO APPROVE THE CIM

ABATE contends that "single expense item trackers such as the CIM are illegal because the Commission lacks the legal authority to approve them." (ABATE's Initial Brief, p. 1) In support of its contention, ABATE relies upon the legal principle that the Commission has no common law powers, but only statutory powers. Thus, ABATE argues that the CIM is illegal since no specific statute confers authority upon the Commission to approve a single expense tracking mechanism.

The Commission is not bound to apply any particular formula or use any specific method in setting rates. *Residential Ratepayer Consortium v Public Service Comm*, 239 Mich App 1, 6; 607 NW 2d 391 (2000); *ABATE v Public Service Comm*, 208 Mich App 248, 258; 527 NW 2d 533 (1994), *lv den* 450 Mich 892 (1995). *See also, Permian Basin Area Rate Cases*, 390 US 747, 776-77; 88 S Ct 1344; 20 L Ed 2d 312 (1968).[1] The Commission is vested with broad ratemaking powers.

Further, the Michigan Court of Appeals previously decided this very same legal question that was initially raised by the Attorney General, and now raised again by ABATE in this proceeding. *See Attorney General v Michigan Pub Service Comm*, 281 Mich App

[1] The Court of Appeals has repeatedly rejected the Attorney General's arguments that the only way that the Commission can change a rate or a rate schedule is by conducting a full-scale ratemaking hearing. *Attorney General v Public Service Comm*, 122 Mich App 777, 786; 333 NW 2d 131 (1983) (affirming Commission orders establishing purchased power adjustment clause, and approving monthly increase in Consumers Power Company's rates pursuant to the clause); *Attorney General v Public Service Comm #1*, 133 Mich App 719, 727; 349 NW 2d 539 (1984) (affirming Commission orders implementing the Other Operations and Maintenance Expense Indexing System, since the required full and complete hearing was held in Case No. U—5502 where the Commission established the system for The Detroit Edison Company, and provided for additional, single-factor hearings to apply the established formula); *Attorney General v Public Service Comm #2,* 133 Mich App 790, 797; 350 NW 2d 320 (1984) (applying same reasoning to affirm orders allowing The Detroit Edison Company rate increases pursuant to the System Availability Incentive Provision that the Commission established in Case No. U-5108); *Attorney General v Public Service Comm*, 136 Mich App 515, 518-20; 358 NW 2d 351 (1984) (following cited cases and rejecting Attorney General's duplicative arguments). The relevant holding of these cases remains viable, although the Legislature passed Proposal H. *See generally*, *Attorney General v Public Service Comm*, 157 Mich App 198; 403 NW 2d 467 (1986).

545; 761 NW 2d 482 (2008), *lv den*, 483 Mich 1017; 765 NW 2d 327 (2009). In *Attorney General*, the Court of Appeals held that a similar mechanism (the Uncollectible Expense Tracking Mechanism), is lawful and within the scope of the Commission's statutory authority. *Attorney General*, 281 Mich App at 547. The Court of Appeals' reasoning in support of its holding was that the Commission acted within its general ratemaking powers in adopting the mechanism and that the rates prescribed by the Commission are presumed to be lawful and reasonable under MCL 462.25.[2] *Attorney General*, 281 Mich App at 547-549. The Michigan Supreme Court subsequently denied the Attorney General's leave to appeal the Court of Appeals' decision. *Attorney General*, 483 Mich 1017; 765 NW 2d 327 (2009).

Any argument that the Commission lacked authority to approve the CIM is meritless. As the Court of Appeals recognized in *Attorney General*, the Commission approval of the CIM is within its general ratemaking powers and is legally permissible. *See Attorney General*, 281 Mich App at 549.

III. IT IS SETTLED LAW THAT THE CIM DOES NOT CONSTITUTE RETROACTIVE RATEMAKING

With regard to ABATE's argument that the CIM constitutes retroactive ratemaking, this argument also fails as a matter of law.

The retroactive ratemaking doctrine is not relevant here, since rates can plainly be set based on past events. The prohibition is merely against re-adjusting previously-charged rates, which would not happen here, since this proceeding is designed to produce

[2] MCL 462.25 states: "All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie*, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act."

prospective rates. The Court of Appeals has repeatedly rejected ABATE'S flawed view of the retroactive ratemaking doctrine. *See Attorney General v Public Service Comm,* 262 Mich App 649, 655-59; 686 NW 2d 804 (2004) (recounting relevant case law and affirming the Commission's decision to allow The Detroit Edison Company to defer 1997 extraordinary storm-related expenses, and to amortize them during 1998 and 1999).

In addition to deciding that the mechanisms like the CIM are lawfully within the scope of the Commission's statutory authority, the Court of Appeals also previously held that mechanisms like the CIM do not constitute an impermissible retroactive ratemaking mechanism. *See Attorney General v Michigan Pub Service Comm*, 281 Mich App 545, 547; 761 NW 2d 482 (2008), *lv den*, 483 Mich 1017; 765 NW 2d 327 (2009). The Court of Appeals' reasoning in *Attorney General* was that:

> ". . . the UETM designed to defer 90 percent of the difference between the initially projected and the actual uncollectible expense for a given period to a future year does not involve retroactive ratemaking because the deferred expense is deemed an expense of the year to which it is deferred and, thus, is recovered on a prospective basis. Particularly, under the rationale of Consumers Energy Co., the 2005 uncollectible expense deferred to 2007 under the order being appealed is a 2007 expense collected on a prospective, not retroactive, basis in 2007."

Attorney General, 281 Mich App at 549-550. (Bold emphasis added)

The CIM in the present case is similar in operation and construct to the UETM in *Attorney General* and the Pension and Other Post-Employment Expense Mechanism in *Consumers Energy Co*; all of which consistent with the Court of Appeals decision, does not constitute retroactive ratemaking because the deferred expenses are deemed an expense of the year to which they were deferred.

IV. CONCLUSION

The Michigan Court of Appeals has determined as a matter of law that the Commission was permitted by statutory authority to authorize expense tracking mechanisms such as the CIM. The Court of Appeals has further determined as a matter of law that the mechanism does not constitute retroactive ratemaking. Therefore, the Commission must reject ABATE's argument and grant Edison's request relief and other such relief that the Commission deems reasonable and appropriate.

Respectfully submitted,

THE DETROIT EDISON COMPANY

By: Michael J. Solo

Digitally signed by Michael J. Solo
DN: cn=Michael J. Solo, o=DTE Energy, ou=Legal - Regulatory Affairs, email=solom@dteenergy.com, c=US
Date: 2010.12.03 14:25:49 -05'00'

Michael Solo (P57092)
One Energy Plaza, Room 688 WCB
Detroit, Michigan 48226-1221
(313) 235-9512

Dated: December 3, 2010

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of	)	
THE DETROIT EDISON COMPANY for	)	
reconciliation of its Choice Incentive	)	Case No. U-16262
Mechanism for the 12-month period	)	
ending December 31, 2008	)	
___________________________________	)	

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

JENNIFER EVANS, being duly sworn, deposes and says that on the 3rd day of December, 2010, a copy of The Detroit Edison Company's Reply Brief, and Proof of Service of the same, in the above captioned matter, was served upon the persons on the attached service list via e-mail.

Jennifer Evans
Digitally signed by Jennifer Evans
DN: cn=Jennifer Evans, o, ou=Regulatory Affairs, email=evansj2@dteenergy.com, c=US
Date: 2010.12.03 13:57:03 -05'00'

JENNIFER EVANS

Subscribed and sworn to before
me this 3rd day of December, 2010.

Estella R. Branson
Digitally signed by Estella R. Branson
DN: cn=Estella R. Branson, o=DTE - Regulatory Affairs, ou=DTE - Regulatory Affairs, email=bransone@dteenergy.com, c=US
Date: 2010.12.03 14:20:48 -05'00'

NOTARY PUBLIC

MPSC Case No. U-16262 (CIM)
<u>SERVICE LIST</u>

ADMINISTRATIVE LAW JUDGE
Mark E. Cummins
Michigan Public Service Commission
6545 Mercantile Way, Suite 7
Lansing, Michigan
Cumminsm1@michigan.gov

ABATE
Robert A.W. Strong
Thomas E. Maier
Clark Hill PLC
151 S. Old Woodward Ave., Suite 200
Birmingham, MI 48009-6179
rstrong@clarkhill.com

MPSC STAFF
Steven D. Hughey,
6545 Mercantile Way, #15
Lansing, MI 48909
hugheys@michigan.gov

THE DETROIT EDISON COMPANY
Michael J. Solo, Jr.
David Maquera
One Energy Plaza, 688 WCB
Detroit, MI 48226
solom@dteenergy.com
maquerad@dteenergy.com
mpscfilings@dteenergy.com