STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of
THE DETROIT EDISON COMPANY for
Authority to implement a Power Supply Cost Recovery Plan in its rate schedules for 2013 Metered Jurisdictional Sales of Electricity.
_____/

Case No. **U-17097**
(Paperless e-mail)

INITIAL BRIEF OF
MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION

The Michigan Community Action Agency Association (MCAAA) files this Initial Brief in accordance with the schedule set by the presiding Administrative Law Judge (ALJ). This case involves the Power Supply Cost Recovery (PSCR) Plan case of the Detroit Edison Company (DECo) for the 12-month period ending December 31, 2013, undertaken pursuant to the provisions of 1982 PA 304, MCL 460.6a and 6j, *et seq* (Act 304).

I. INTRODUCTION AND BACKGROUND

This case is one of several cases involving the Reduced Emissions Fuel (REF) program that impacts DECo's costs and revenues related to coal burned at DECo's coal plants to generate electricity for its customers. In all of the cases, the MCAAA has asserted that the REF production tax credits constitute a proper cost offset to DECo's cost of coal that should be recognized under Act 304, and that the diversion of these tax credit revenues to DTE's unregulated affiliates is unlawful and unreasonable. These cases have sequentially added to the record evidence concerning the REF issues, which on a combined basis provides overwhelming evidence to support MCAAA's position on this issue.

1. MPSC Case No. U-16434 (DECo PSCR Plan Case for 2011)

In U-16434, DECo's PSCR Plan case for 2011, MCAAA presented expert evidence concerning the REF coal issues. MCAAA Witness Peloquin in U-16434 (T 295-296) presented testimony regarding affiliated transactions and the need for "ring-fencing" remedies to proactively monitor and regulate affiliates transactions between DECo and its unregulated parent company (DTE) and DTE's unregulated subsidiaries, which remedies would be applicable to addressing the REF coal issues. MCAAA Witness Peloquin in U-16434 (T 299-301) also testified specifically in opposition to DECo's REF proposals. (The REF issues were first originated and discussed <u>in evidence</u> by MCAAA in U-16434.)

The Commission's December 6, 2011 Order in U-16434 found in relevant part (pp 8 and 11) as follows:

> . . . .The Commission agrees with the Staff, the Attorney General, MCAAA, and the ALJ that the request for inclusion of the REF Project costs in its 2011-2015 PSCR plan cases is premature. Even Detroit Edison indicates that the proposal is somewhat preliminary. The evidence offered simply does not demonstrate the reasonableness and prudence of the amounts to be paid for services rendered by the affiliates, nor does it demonstrate exactly to what extent the REF adder will actually reduce SO_2 and No_x emissions. This decision has no impact on the requested factor, and the Commission is not rejecting the entire PSCR plan. However, the Commission finds that, in order to authorize these costs in future plan cases, it will require additional evidence, as is discussed in more detail in the next section. (Order, p 8).
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> * * *
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> As with the REF Project as a whole, the Commission finds that this request is premature and not well fleshed-out. While the Commission finds that the five-year forecast complies with MCL 460.6j, it also finds that, on the basis of the evidence presented in this case only, the Commission would be unlikely to permit recovery of the requested costs in 2015. Detroit Edison has given the Commission very little idea of whether, and how much, the sorbents will actually reduce mercury emissions. This does not preclude allowing future recovery. However, the Commission will require more and better information on the efficacy of available methods for achieving mercury emissions reductions, as well as a demonstration showing that the REF Project is a reasonable and prudent way of achieving the maximum reductions for the minimum cost, from both a technological and business point of view. The REF Project must also be shown to

> comply with the Code of Conduct. The Commission recognizes that Rule 1503 presents a formidable challenge for the company, and commends Detroit Edison for diligently pursuing strategies now, for achieving compliance with Rule 1503 in 2015. Detroit Edison will need to return to the Commission with a much more detailed presentation on the costs, benefits, and efficacy of the fuel treatment program, as well as the costs and benefits of other potential mercury emissions reduction processes, if any exist. (Order, p 11).

2. MPSC Case No. U-16047-R (DECo's 2010 PSC reconciliation case)

In U-16047-R, involving the PSCR Reconciliation for the year 2010, MCAAA again presented extensive evidence and briefing on these issues.

MCAAA Witness Peloquin (T-345-346) in this case testified regarding DECo's scant reference to the REF issue in its 2010 Plan case, U-16047, and also the status of the REF project as discussed in DTE/DECo's SEC 10K report for 2010.

Exhibit MCAAA-1 in U-16047 (DTE/DECo's SEC 10K Report for 2010, page 15) describing DTE's unregulated Power and Industrial Projects subsidiary, provided more complete information concerning the REF project, as follows:

> *Reduced Emission Fuel:* We deliver reduced emission fuel to utilities with coal-fired electric generation power plants. We own and operate five facilities that process raw coal into reduced emission fuel resulting in reductions in Nitrogen Oxide (NO) and Mercury (Hg) emissions. We began generating production tax credits from these facilities beginning in 2009 which will continue through 2019 upon achieving certain criteria, including entering into transactions with unrelated equity partners or third-party customers for the reduced emission fuel. We continue to optimize these facilities by seeking investors for facilities operating at Detroit Edison sites, and intend to relocate other facilities to alternative sites which may provide increased production and emission reduction opportunities in 2011 and future years. In January 2011, the Company entered into an agreement to sell a membership interest in one of these reduced emission fuel facilities that is located at a Detroit Edison site.
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> *Coal Services:* The business provides coal transportation and related services including fuel to our customers with significant energy requirements which include electric utilities, merchant power producers, integrated steel mills and large industrial companies. We specialize in minimizing fuel costs and maximizing reliability of supply for those energy-intensive customers. We own

> and operate a coal transloading terminal which provides storage and blending for our customers. We also engage in coal marketing which includes the marketing and trading of physical coal and coal financial instruments, and forward contracts for the purchase and sale of emission allowances.

Exhibit MCAAA-1 in U-16047-R (DTE/DECo's SEC 10K Report for 2010, page 24) also states in part:

> *Our ability to utilize production tax credits may be limited.* To reduce U.S. dependence on imported oil, the Internal Revenue Code provides production tax credits as an incentive for taxpayers to produce fuels and electricity from alternative sources. We have generated production tax credits from coke production, landfill gas recovery, biomass fired electric generation, reduced emission fuel, steel industry fuel and gas production operations. All production tax credits taken after 2008 are subject to audit by the Internal Revenue Service (IRS). If our production tax credits were disallowed in whole or in part as a result of an IRS audit, there could be additional tax liabilities owed for previously recognized tax credits that could significantly impact our earnings and cash flows.

MCAAA Witness Peloquin in U-16047-R (T-356-357) also presented ratemaking remedies applicable to DECo's REF projects, as follows:

Q. Do you have a recommendation regarding DTE's REF Projects in this 2010 PSCR Reconciliation Case?

A. Yes. All Reduced Emissions Fuel costs included in DECo fuel inventories and fuel expenses should be disallowed. While DECo's REF Project expenses may well violate a number of Act 304 prohibitions, the fact that this change in accounting and ratemaking treatment for fuel expense was not previously approved in the 2010 PSCR Plan Case requires disapproval.

Q. Are there methods that could be utilized to gain approval of costs for reduced emissions fuels?

A. Yes. One possible example is the accounting and ratemaking approvals of Edison's Midwest Energy Resources Company subsidiary (MERC). The MERC facility is included in DECo's ratebase and its capital costs are excluded from DECo's fuel inventory costs. For additional information regarding MERC ratemaking, refer to the Commission orders in Case Nos. U-5041 and U-5108.

Q. Were you involved in Case U-5108?

A. Yes. I recollect testifying in support of ratebasing the MERC facility in Case U-5108.

The following interchange in U-16047-R occurred during cross-examination of DECo Witness Lapplander (T 321-322):

> Q. (By Mr. Keskey) Exhibit MCAAA-1 includes certain pages of the 10K report of DTE and Detroit Edison for 2010, and on page 15 of that exhibit, it states in part: "We began generating production tax credits from these facilities beginning in 2009 which will continue through 2019 upon achieving certain criteria, including entering into transactions with unrelated equity partners or third-party customers for the reduced emission fuel."
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> Does that pretty much comport with your understanding of the arrangement?
>
> A. Yes.
>
> Q. And is there a requirement that the unrelated equity partners have a majority interest in the facilities?
>
> A. That's my understanding.
>
> Q. And have you already entered into a transaction with one of the equity partners?
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> A. The affiliate did with St. Clair in January 2011.

DECo has also claimed in case U-16047-R that the REF transactions resulted in no cost impacts for purposes of this reconciliation case for 2010. However, it is unclear as to how this claim can be made. The record showed that the REF project was implemented in 2009 or 2010. DTE's/DECo's SEC 10K Report for 2010, included in part in Exhibit MCAAA-1 in U-16047-R, at page 43, states:

> In late 2009, we began operating reduced emission fuel facilities located at Detroit Edison owned coal-fired power plants. The facilities reduce Nitrogen Oxide (NO) and Mercury (Hg) emissions and qualify for production tax credits when the fuel is sold to an unrelated party through 2019. We continue to optimize these facilities by seeking investors for facilities operating at Detroit Edison sites and intend to relocate other facilities to alternative sites which may provide increased production and emission reduction opportunities in 2011 and future years. In January 2011, the Company entered into an agreement to sell a membership interest in one of these reduced emission fuel facilities that is located at a Detroit Edison site.

The record in U-16047-R also established that significant REF costs were included in that case for 2010. DECo provided more information regarding REF coal transactions in a discovery response to Question No. MCAAA/DE26, included within Exhibit MCAAA-7 in U-16047-R, as follows:

> **Question:** Is the company obtaining or using any coal supplied by an affiliate (as defined in the instructions above). If so, detail the amounts and costs for this PSCR year, and provide analysis that such coal is cheaper or of better quality than that available from non-affiliated parties during totally commensurate timeframes.
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> **Answer:** In 2010, the Company used refined coal and resold coal supplied by the Belle River Fuels Company (BRFC) and St. Clair Fuels Company (SCFC).
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> In 2010, the Company used 4,688,674 tons of refined and resold coal from BRFC, at a cost of $126,096,248.
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> In 2010, the Company used 430,844 tons of refined and resold coal from SCFC, at a cost of $10,764,324.
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> As described in the response to Question MCAAA/DE 21:
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> The BRFC and SCFC operated Reduced Emission Fuels (REF) facilities at the Belle River Power Plant and St. Clair Power Plant. Both BRFC and SCFC were operating these facilities to test their operational effectiveness. As a result, a substantial portion of the western coal (LSW) used at both Belle River and St. Clair Power Plants was sold to the BRFC and SCFC and purchased back by Detroit Edison. No additional fuel expense was incurred in 2010 compared to what would have occurred if the REF facilities were not operated.
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> As the coal was purchased from the BRFC and SCFC at the same cost that Detroit Edison incurred to purchase the coal initially, the costs can be reasonably assumed to be cheaper than coal purchased from and delivered by other entities. An explanation of the cost effectiveness of the Company's fuel procurement methods was discussed in the response to Question MCAAA/DE 16.

In its discovery response to Question No. MCAAA/DE30 (included in Exhibit MCAAA-9 in U-16047-R) DECo stated in part:

The BRFC and SCFC operated Reduced Emission Fuels (REF) facilities at the Belle River Power Plant and St. Clair Power Plant. Prior to either affiliate's facilities being partially sold to other investors in order to monetize future tax credits, both affiliates were operating these facilities to demonstrate their operational effectiveness.

As a result, a substantial portion of the western coal (LSW) used at both Belle River and St. Clair Power Plants was sold to the BRFC and SCFC at booked inventory cost, and purchased back (whether refined or not) at the same booked inventory cost. No additional fuel expense was incurred in 2010 compared to what would have occurred if the REF facilities were not operated.

CECo Witness James D. Good also testified regarding the REF project in U-16047-R. During cross examination (T 239-240), the following interchange occurred:

Q (By Mr. Keskey): Now, let me turn, Mr. Good, to Exhibit MCA-7, and particularly to the Response DE26. And there you mention in your answer that the Company in 2010 used refined coal and resold coal supplied by the Belle River Fuels Company and the St. Clair Fuels Company. Are those the only two fuels companies that are engaged in the reduced emission fuels transactions?

A In 2010, yes.

Q Are there some additional ones in 2011?

A Yes, there's the Monroe Fuels Company.

Q Any others?

A No.

Q Now, I believe it's your 10K report with the SEC for 2010 on page 15 indicates that the Company owns and operates five facilities that process raw coal into reduced- emission fuel. And are there, are those five facilities all located at specific plants?

A Yes. Three of them are at St. Clair and two are at Belle River.

Q So there are five facilities, but they're serving two plants?

A Yes. For purposes of clarification, each piece of equipment is titled to a facility, each piece of equipment, of the REF equipment, each product line, as it were, so there's three parallel treatment lines. For example, for the St. Clair, it's listed as three facilities.

DECo Witness Gary Lapplander in U-16047-R also presented rebuttal testimony and Exhibits A-24 and A-25 concerning the REF issues. His Exhibit A-24 presents an overview of

the REF project, while his A-25 is described as a Refined Coal Added Impacts Calculation Worksheet (T 281). DECo Witness Lapplander (T 281-283) testified:

Q. When did the REF facilities begin operation at Detroit Edison plants?

A. The Belle River Fuels Company (BRFC) and St. Clair Fuels Company (SCFC), subsidiaries of DTE Energy Services, placed in service their respective facilities in December 2009. These facilities produced REF during 2010 to allow for testing at both the Detroit Edison Belle River and St. Clair Plants. The Belle River facility has two production lines and the St. Clair facility has three production lines.

Q. Did BRFC generate any tax credits through the operation of the BRFC facilities through 2010?

A. Yes. To qualify for a tax credit under section 45 of the IRS Tax Code a facility had to be placed into service prior to January 1, 2010. In addition, the Refined Coal must be sold to an unrelated party. The tax credits belong to the owner of the REF facility. The BRFC had the opportunity to generate a tax credit because their facility was placed into service in December 2009 and could sell Refined Coal to an unrelated third party, the Michigan Public Power Agency (MPPA).

Q. Did SCFC generate any tax credits through the operation of the SCFC facilities through 2010?

A. No.

Q. How much REF did the Belle River and St. Clair Power Plants consume during 2010?

A. The Belle River Plant consumed 4.6 million tons of coal in 2010 and approximately 1.2 million tons or 26% was REF. The St. Clair Plant consumed approximately 400,000 tons of REF or 11% of its total consumption of 3.8 million tons of coal. The REF purchased by Detroit Edison in 2010 was priced at the original weighted average inventory cost at which Detroit Edison sold the coal to the BRFC and SCFC, i.e., the price did not include a Refined Coal Adder and there was no increased cost whatsoever to Detroit Edison associated with the REF project.

Q. Did either BRFC or SCFC sell an interest in any of their production lines at Belle River or St. Clair Power Plants?

A. Yes. In January of 2011 a membership interest was sold in the entity owning one of the REF production lines at the St. Clair Power Plant. This arrangement allows the SCFC to begin generating tax credits through the production of Refined Coal sold to Detroit Edison.

On April 25, 2013, the MPSC issued an Order in U-16047-R that essentially sidestepped the need to reconcile the net costs of DECo's coal (after reduction for the REF production tax credits) for each year of the 10-year tax credit program, including 2010. The order disregarded evidence, including DTEs/DECo's 10-K SEC Reports, indicating the realization of tax credits in 2010. The Order (pp 7-8) stated in relevant part:

> Not only was there no change in accounting and ratemaking related to REF during 2010, but there was also no REF-related cost increase. *See*, 2 Tr 264. MCAAA provided no evidence disputing these facts. On this basis alone, the Commission finds that it must reject MCAAA's exceptions respecting the REF program. The Commission further notes that MCAAA ignores several essential facts, most notably that no party proved that any tax credit was realized for 2010 by Detroit Edison, its parent, or any of its affiliates, associated with the REF project. No evidence regarding tax credits was presented for the Commission's consideration, and thus there is nothing for the Commission to "net." Finally, MCAAA fails to address the fact that Detroit Edison did not incur the costs associated with building the REF facilities, and thus could not accrue the tax credit benefits that flow therefrom.

The Order improperly shifts the burden of proof to MCAAA to establish the amount of the REF tax credits or revenues obtained in 2010 (by DTE and its affiliates) which information DECo refused to disclose in discovery.

The Order also states that "Detroit Edison did not incur the costs associated with building the REF facilities, and thus could not accrue the tax credit benefits that flow therefrom." This extraneous finding is not based upon any factual evidence or discussion in this case comparing the costs of the REF facilities (of which only 3 of the 7 were useable at DECo's plants, whereas the rest were developed to market to third parties), in comparison to the vast size of the tax credit benefits obtained by DTE and it affiliates. The Order fails to recognize that the major costs of the DECo supply chain and the coal inventories are supported by DECo's ratepayers, and that the tax credit revenues in 2010 were based upon a per-ton-of-coal basis ($6.33 per ton), not with

respect to the cost of the REF facilities, and that in any event the capital and other costs of the REF facilities have already been otherwise provided for and covered by other aspects of the REF proposal.

3. MPSC Case No. U-16892 (DECo's PSCR Plan Case for 2012)

In U-16892, DECo's PSCR Plan case for 2012, MCAAA again presented extensive evidence and briefing on the REF issues. MCAAA's testimony in U-16892 on the REF issues included the direct testimony of CPA William A. Peloquin, with revisions and cross-examination, appears at TR 641-698. The witness' exhibits entered into the record includes Exhibit MCAAA-4, Exhibit MCAAA-5 (updated), Exhibit MCAAA-6 (Revised), Exhibit MCAAA-7, and Exhibit MCAAA-8. Witness Peloquin's testified (T 666-676) regarding DECo's Refined Emission Fuel (REF) projects, as follows:

Q. What is the purpose of your testimony in this case?

A. I am addressing the issue of the refined coal production tax credits and the REF projects.

My testimony deals with the action by DTE Energy, DECo's unregulated parent holding company, and by DECo, in transferring to third party fuel companies large portions of DECo's coal inventories and transportation functions in a manner that diverts offsets to Edison's fuel costs (such as tax benefits) to the detriment of DECo's Act 304 costs and rates.

Q. Detroit Edison alleges that the REF program is not relevant to the PSCR process because it does not increase expenses. Do you agree that it is irrelevant?

A. No. Detroit Edison adds substantial expenses to the PSCR process for environmental compliance. Mr. Wojtowicz's pre-filed testimony includes:

a. $1.7 million to purchase No× ozone emission allowances at page 23, and;

b) $1.95 million to purchase NO_x annual emission allowances at page 23, and;

c. Acid Rain Program $S0_2$ emission allowances with an expense of $1.47 million at page 24, and;

d. Urea expense of $4.6 million at page 29, and;

e. beginning in 2015, $11.1 million for Mercury Sorbent at page 20 and Exhibit A-20.

Edison charges the ratepayers for its environment compliance through the PSCR process for emission allowances and sorbents, and through base rates for capital investments and O&M applicable to electrostatic precipitators, scrubbers (FGD), activated carbon injection (ACI) systems, and fabric filters (FF). However, when the federal government subsidizes the REF program, Edison refuses to flow the generous production tax credits through to its ratepayers. If the ratepayers are charged for the expenses of environmental compliance they should also receive the collateral benefits when they are available.

Q. Are there other examples of items that are included in the PSCR/GCR process even though they do not increase expenses?

A. Yes. Ms. Wojtowicz included a PSCR benefit of $14.7 million for the projected sale of CSAPR SO_2 emission allowances at page 24 of her prefiled testimony.

Gas utilities routinely flow pipeline refunds through their GCR clauses even though they do not increase expenses.

Q. What other reasons are the REF projects relevant in this case?

A. The REF projects are directly related to the cost of fuel that the Commission is reviewing to set PSCR rates. The cost of fuel includes both cost increases and cost decreases or offsets (such as fuel related tax events) to determine and reconcile net fuel costs.

Q. Please describe the Reduced Emission's Fuel (REF) project(s) that has been instituted by DTE/DECO?

A. DTE placed (5) five REF units in-service in 2009 at the Belle River/St. Clair complex. DTE recorded about $1 million of refined coal productions tax credits in 2009 per its SEC Form 10K. These five REF units were owned by the newly formed St. Clair Fuel Company and the Belle River Fuel Company (SCFC and BRFC). Detroit Edison and the Fuel Companies are all subsidiaries of DTE Energy, therefore they are financial affiliates. DTE placed another (4) four REF units in-service during 2011. Edison claims that the St. Clair Fuel Company was placed in-service

January 2011 and the Monroe Fuel Company was placed in-service November 2011.

DECo transferred large portions of its coal inventories, plus its coal transportation functions, to the fuel companies starting approximately in 2009, as detailed in DECo's SEC 10-K Annual reports for the years, 2009, 2010, and 2011 (attached as Exhibit MCAAA-4). Edison has transferred its low sulphur western (LSW) coal for St. Clair and Monroe to the St. Clair and Monroe Fuel Companies, FOB MERC. Edison has also transferred its St. Clair and Monroe eastern coal FOB the mine sites. Therefore, all of this coal is now apparently non-jurisdictional. Edison has ripped asunder its fuel supply in part to shield the REF tax credits benefits from the ratepayers.

Q. Has the Commission approved any of DECo's transactions related to the REF projects?

A. No. DECo made scant reference to the REF Projects in its 2009 and 2010 Plan cases. In DECo's PSCR Plan case for 2011, MPSC Case No. U-16434, DECo also made brief mention of the REF projects.

In that case, I testified extensively regarding the lack of information and documentation requesting the REF projects. The ALJ and Commission rejected DECo's REF proposal.

Q. Has DECo provided more information in this case to explain and justify its REF proposals?

A. No. DECo's case provides precious little information to justify MPSC approval of the REF projects. DECo did provide some incomplete information regarding the REF proposals in its PSCR reconciliation case for 2010, MPSC Case No. U-16047-R, but none of the information justified DECo's REF projects, or the resulting impact on PSCR costs (including the diversion of net cost reductions from receipt of tax credit benefits to minimize the cost of fuel).

Q. Why do you challenge DECo's REF projects in this case?

A. DECo and DTE Energy proceeded to undertake these major transactions without any prior approval of the Commission. Also, the transactions have adversely impacted PSCR costs and rates because they have diverted PSCR cost reductions or savings that would otherwise go to reduce PSCR costs and rates, to the benefit of the Fuel Companies, which are owned in whole or part by DTE affiliates or have been sold to third parties.

Q. Please describe your concerns regarding the REF projects in addition to the PSCR cost and rate impacts.

A. DECo has effectively transferred major elements and components of its coal and coal transportation functions from the regulated utility to unregulated third party entities. In doing so, DECo appears to take the position that the books and records of the fuel companies are diverted from MPSC regulating oversight and control, and audit and review (and similarly being made out of reach by other parties intervening in DECo rate and Act 304 cases). This constitutes a major divestment of major components of DECo as a utility to evade regulation and to diminish MPSC's ratemaking and accounting authority.

Q. What are your recommendations to address DECo's REF projects?

A. It is my recommendation that the ALJ and Commission order the following:

1. The Commission should order that all of the Fuel Companies should be required to disclose all of their books and records. The Commission should jurisdictionize the Fuel Companies and they should be "rolled into" the ratemaking process. This is similar to the jurisdictionization and "rollin" of DECo's Midwest Energy Resources Company (MERC), at DECo's request, in Case Nos. U-5041 and U-5108.

2. The MPSC should expressly require that all cost increase impacts, as well as all cost decreases or benefits (including tax credits) that otherwise would reduce base rates or PSCR rates be fully recognized in rates. In this proceeding the Commission should reduce the PSCR costs by $30 million for the Monroe Fuels Company coal discount and by $9 million for the St. Clair Fuels Company coal discount. (See Exhibits MCAAA - 7 & 8).

3. That the Commission order DECo to report any and all aspects of the REF projects, including any updates or changes thereto, on an annual basis.

Q. Was there a benefit to Detroit Edison to jurisdictionalize MERC?

A. Yes. MERC was initially constructed to transship Decker coal. The Decker coal contract included several step increases in the annual tonnages with a final large step increase applicable to the completion of a new powerplant (Belle River). Because of the gradual increases in Decker coal tonnages, the MERC facility initially had substantial excess capacity.

By including MERC in DECo's rate base, Edison avoided the probability of serious under-recoveries.

Q. Do you believe that the MPSC has the authority to institute your recommendations?

A. Yes. The Commission has jurisdiction to engage in the regulation of accounting matters, including requiring reports, undertaking audits, and obtaining discovery to complement its ratemaking authority. The Commission also has authority to review affiliated intercorporate transactions, as confirmed by a considerable MPSC and judicial authority. The MPSC also has enhanced authority to review the books and records of affiliates pursuant to the 2005 Amendments to the Public Utility Holding Company Act (PUHCA).

Q. Do you have an estimate of the 2012 amount of DTE's REF production tax credits?

A. Yes, in excess of $120.5 million. Tax credits are after tax amounts since they are not taxable.[1] (Brief footnote 1 added below - not part of quote).

Q. Please describe your Exhibit MCAAA-5.

A. Exhibit MCAAA-5 (Updated) illustrates the REF production tax credits generated in 2012. The $14,083,125 2012 tax credit for St. Clair is utilized for my subsequent exhibit.

The IRS should publish the 2012 REF Tax Credit rate in April 2012. I updated this exhibit with the 2012 data when it became available.

Q. Please explain your Exhibit MCAAA-6 (Revised).

A. Exhibit MCAAA-6 (Revised) develops the 2012 revenue deficiency/sufficiency of the St. Clair Fuels Company, on a traditional ratemaking basis. The compilation of this exhibit begins at page 3 of 6, with the data provided by DECo. Note that DECo's calculation included an overall rate of return of 6.586%. This is the overall rate of return found at page 41 of the Commission's October 20, 2011 Order in Case Nos.

U-16472/U-16489. This order included a 1.6355 revenue multiplier at page 92, which rounds to a 1.636 "Revenue Conversion Factor" found in the DECo response. A 1.6355 revenue multiplier implicitly includes a composite income tax rate of 38.856%.

[1] During cross-examination (T 691-692) Witness Peloquin acknowledged that his corrections to his testimony included an error on page 13 (pre-filed, line 9, T-671). The correct figures, as noted on Exhibit MCAAA-5 (updated) is $62,684,475, not the prior stated figure of $120.5 million (see above).

Page 2 of 6 of Exhibit MCAAA-6 (Revised) develops the 2012 Adjusted Net Operating Income for St. Clair Fuels Company. The Production Tax Credits on line 1 are transcribed from Exhibit MCAAA-5 (Updated). The amounts on lines 2 though 8 are transcribed from the DECo data. The amounts for lines 2 through 7 are converted to after-tax values.

I excluded the amount for "Interest on Working Capital Loan". Edison already included a recovery of its overall rate of return on its rate base, therefore a second recovery of capital costs is inappropriate. I then added amounts for depreciation expense and proforma interest tax savings. This results in a $11.5 million Adjusted Net Operating Income (ANOI) for 2012.

The compilation continues on page 1. Note that the amounts for lines 1 through 6 are transcribed from the Edison data. The insertation of the ANOI from page 2 results in a income sufficiency of $8 million and a revenue sufficiency of $13.2 million.

Q. What is the relevance of the 8.40 $/ton Revenue Sufficiency found at the bottom of page 1?

A. St. Clair Fuels Company could transfer a $8.40 per ton coal discount to the PSCR customers for 2012 and still earn a full 6.586% overall rate of return on its ratebase.

Q. If St. Clair Fuels had a $13.2 million revenue sufficiency for 2012, what rate of return did it earn?

A. St. Clair Fuels earned a 22.090% overall rate of return and a 48.733% return on equity (ROE). These returns are computed on pages 5 and 6 of this exhibit.

Q. You also include amounts for the revenue sufficiency "Excluding Coal Inventory". What is the purpose of this column?

A. The "Coal in Inventory" amounts are still included in the calculation of Edison's base rates. Therefore, including this category in the fuel company's rate base is a double recovery. Excluding the "Coal in Inventory" results in a 10.39 $/ton of excess revenue equivalence. While I have not utilized the $10.39 per ton amount, only in an attempt to be conservative for this Plan case.

Q. Please explain your Exhibit MCAAA-7.

A. Detroit Edison includes a small Monroe REF Coal Discount in its 2012 Plan case. However, it is not adequate. Based upon my analysis of St. Clair's 2011 revenue sufficiency of $8.40 to $10.39 per ton, I believe that a $4.00 $/ton 2012 coal discount for Monroe would be appropriate. A 4.00

$/ton coal discount for Monroe would yield a PSCR cost reduction of $30 million, or $24.8 million in addition to DECo's proposed cost discount.

Q. Why do you believe that a 4 $/ton coal discount is appropriate.

A. The REF facilities and their process is not likely to change between 2011 and 2012, nor between St. Clair and Monroe.

St. Clair included a full year, or almost a full year, of operation in 2011. Therefore, it is a fair standard to set the coal discount. Additionally, by utilizing a 4 $/ton discount rate, variances in volumes are automatically adjusted for. The 4 $/ton rate is conservative for a least two reasons. The 2012 refined coal production tax credit will be increased for inflation. And, as the Fuel Company's gain experience, their costs per ton should decrease.

I would also note that Plan cases are always projections. Absolute precision is not necessary since actual amounts will be known and utilized in the subsequent Reconciliation Cases.

Q. Why did you use 2011 data for the 2012 Monroe coal discount?

A. Edison refused to furnish the requested data.

Q. Please explain your Exhibit MCAAA-8?

A. This exhibit is very similar to Exhibit MCAAA-7. I used the 4.00 $/ton coal discount rate for St. Clairs 2012 REF tonnage, which I believe is appropriate.

I also excluded DECo's proposed St. Clair Coal Adder. St. Clair Fuels generated a 29% ROE in 2011. Their request to recover an addition $416,000 for emission allowances is an unreasonable request. St. Clair can readily afford to provide a 4 $/ton coal discount without an coal adder.

Q. Why did you use 2011 data for the 2012 St. Clair coal discount?

A. Edison refused to furnish the requested data.

Q. DTE's 2011 SEC Form 10K indicates that the 99% of St. Clair Fuels Company was sold to a tax partner. Does this affect your St. Clair coal discount?

A. Not necessarily. The Form 10K indicates that there was only a minor down payment with installment payments as the production tax credits are earned. Therefore, the tax sale may have little or no effect on the coal discount.

Q. Did you request information about these tax sales?

A. Yes, and Edison refused to furnish the information.

Q. Please summarize other reasons why the Commission should implement adjustments related to the REF projects and the Fuel Companies?

A. First, DECO and its parent, DTE, have undertaken, without Commission approval, a major divestment of its coal supply chain and coal inventories, and have attempted to divert revenues or tax credit benefits away from DECO and its regulated rates, and for the benefit of DTE or its unregulated subsidiaries and third parties. The solution to this problem is to role [sic] in all of the Fuel Companies into the ratemaking process and to make appropriate offsetting rate adjustments to protect ratepayers. The Commission should assert full ratemaking, accounting, and audit authority over all of the fuel companies, much the same as the Commission did with respect to MERC in Case U-5041 and U- 5108.

Second, DECO has effected in part a double recovery on working capital associated with the coal inventories sold to the fuel companies, and has not fully aligned the working capital impacts in this case with corresponding adjustments in its most recent rate case, U-16472.

Third, the creation of the fuel companies has served to transfer major aspects of DECo's utility functions, including its coal inventories, coal transportation, and coal handling and processing to unregulated entities, and has thus attempted to diminish the Commission's regulatory jurisdiction relative to ratemaking and accounting under Act 304 and other statutes. It has also attempted to undermine the contested case process under these statutes by refusing to provide information and discovery answers relative to important financial details and ratemaking impacts arising from these transactions and relating to the fuel companies.

Fourth, DECo and DTE have sought to divert important tax credit benefits and other revenues which should be full offsets to Act 304 rates, and has also sought to monetize its transactions by selling its interests in the fuel companies without recognizing these gains as an offset to DECO's costs and rates.

Fifth, the fuel companies have not assumed any risk. DTE pursued the creation of the fuel companies by using DECO's resources and services, and by making DECO the captive participant or customer in the transactions.

Sixth, Act 304 appears to prohibit the kind of transactions that have been undertaken with respect to the fuel companies. See Sections 6j(13)(a), (d), (e), and (g) of Act 304, MCL 18 460.6j (a), (d), (e), and (g).

4. MPSC Case No. U-16434-R

In this case, U-16434-R, the PSCR reconciliation for 2011, wherein the hearings were completed on March 8, 2013, MCAAA again presented extensive evidence and briefing regarding the REF coal issues.

MCAAA presented the direct testimony (T 793-812) and Exhibits (Exhibits MCAAA 1 through 7) of its Witness Geoffrey Crandall, and also the surrebuttal testimony (T 890-901, with portions stricken) and Exhibit MCAAA-34 of its Witness CPA William A. Peloquin. MCAAA Witness Crandall discussed the REF projects in part at T 795-796:

Q. What is the purpose of your testimony in this case?

A. I address issues related to the proposed ratemaking treatment of the Applicants Reduced Emission Fuels (REF) projects. Various affiliated transactions have occurred during the Act 304 – CY 2011 reconciliation period between DTE Energy (DTE) affiliates, Special Fuel Companies, and the Detroit Edison Company (DECo) and I specifically address the implications of those transactions on Act 304 customer's fuel costs.

Q. Please describe the 2011 REF projects based on the information you have access to.

A. According to DTE Exhibit A-10, the production and sale of refined coal from a qualified facility is eligible for a tax credit under Section 45 of the Internal Revenue Code. DTE also indicates that refined coal must be sold to an unrelated person in order to qualify for a federal tax credit. The tax credit is reportedly available for a 10-year period beginning on the date the facility is placed into service. In Exhibit A-10, DTE indicated that the tax credit value for refined coal in 2011 was equal to $6.33 per ton of refined coal. DTE also indicated in Exhibit A-10 that in 2011 it had seven production lines in either the test phase or operational. These were located at the Monroe Power Plant (2), at the Belle River Power Plant (2) and at the St Clair Power Plant (3).

Q. Did DECO request advance approval for the REF projects and to divert revenues or credits as an offset to coal costs under Act 304?

A. No. It is my understanding that DECo did not seek authorization from the MPSC to utilize the credits in conjunction with the 2009 or 2010 Act 304

planning cases. It is also my understanding that the Administrative Law Judge and the Commission rejected DECo's REF proposal in conjunction with the U-16434 Plan case.

MCAAA Witness Crandall (T 796-797) in U-16434-R described the lack of "benefits" of the REF transactions:

Q. Are DECO's suggested justifications or "benefits" for the REF-affiliated transactions sufficient for MPSC approval of a diversion of the REF generated revenues as a reduction to coal costs in this and other Act 304 cases?

A. No. For example, DECo suggests that increases in emissions control costs will be saved by allowing the diversion of REF revenues to offset coal costs. However, future emission control costs are speculative, and in any event have always been included as Act 304 costs. Also, the claimed "savings" in emission allowances or other costs are also speculative and are subject to change. By definition, a future savings in future "expenses" is outside the 2011 period and is not a CY 2011 expense.

MCAAA Witness Crandall in U-16434-R (T 797-802) also described the impact of REF projects upon PSCR costs and rates:

Q. Please describe the impact of the REF projects upon the PSCR costs and rate factors of DECO.

A. REF transactions divert significant tax credit revenues from use and transformation of the DECo 304 purchased coal (which by all rights should otherwise be an offset to coal costs) to unregulated affiliates of DTE, the unregulated parent company of DECo. This business arrangement is contrary to provisions of Act 304 and is fatally flawed since it is oblivious to the crucial, ratepayer-supported operational and financial resources that provide the foundation and means for DECo's coal acquisition and transportation activities. Ratepayer support was the principal reason that DECo has in the past and now operates a significant coal acquisition and transportation operation that serves the customers in the State of Michigan.

Q. How is Act 304 relevant to the proposed REF activity that DECO has included in this application?

A. This is the 2011 reconciliation case which is required under Act 304, MCL 6a and 6j *et seq*. Act 304, in its Plan and Reconciliation process, provide for a comprehensive review of fuel related contracts and costs, and places the duty on the utility to minimize costs. Section 6j(3) requires the utility

to file…"a complete power supply cost recovery plan"… which "shall describe all major contracts and power supply arrangements entered into by the utility for providing power supply during the specified 12-month period". Section 6j(3) also requires the utility to provide "an explanation of the actions taken by the utility to minimize the cost of fuel to the utility".

Section 6j(4) provides for the 5-year forecast that … "shall include a description of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, and such other information as the Commission may require".

Section 6j(6) requires among other duties that "the Commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan"… including "whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors".

Section 6j(12) *et seq* provides for the PSCR reconciliation prices. Sections 6j(13)(a), (d), (e), and (g), state in part:

> . . . (13) In its order in a power supply cost reconciliation, the commission shall:
>
> (a) Disallow cost increases resulting from changes in accounting or rate-making expense treatment not previously approved by the commission.
>
> * * * *
>
> . . . (d) Disallow transportation costs attributable to capital investments to develop a utility's capability to transport fuel or relocate fuel at the utility's facilities and disallow unloading and handling expenses incurred after receipt of fuel by the utility.
>
> (e) Disallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparably cost beneficial to deal.
>
> * * * *
>
> (g) Disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts.

With respect to these provisions, DECo did not apply for its REF transactions, including related accounting or ratemaking expense treatment, in advance. DECo has not revealed the transportation (capital) costs, and unloading and handling expenses incurred after receipt of the fuel, that it is incurring through its arrangements and transactions with the affiliated fuel companies. DECo has not carried its burden to demonstrate it meets the affiliate purchasing requirements set forth in sub-paragraph (e) above. Moreover, the REF arrangements and transactions appear to result

in additional costs (i.e. failure to recognize net coal costs after REF tax credit revenue offsets) which in essence comprises "unreasonably or imprudently renegotiate fuel contracts".

Section 6j(14) and (15) of Act 304 states in part:

"(14) in its order in a power supply cost reconciliation, the commission shall require a utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. (emphasis added)

* * * *

"(15) In its order in a power supply cost reconciliation, the commission shall authorize a utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. For excess costs incurred through management actions contrary to the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through management actions consistent with the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates that the level of such expenses resulted form reasonable and prudent management actions" … (emphasis added).

Act 304 envisions a reconciliation of net amounts (i.e. increases and decreases or offsets to costs) and makes cost incurrences subject to a standard requiring "reasonable and prudent actions". The complicated affiliated REF arrangements establish a construct whereby incurred costs of coal and control of emissions remain fully in rates, while substantial cost reductions in the form of substantial revenues arising from tax credits associated with coal handling and processing are diverted (and not recognized), all for the benefit of affiliates of DTE (which also wholly owns and controls the DECo). This arrangement does not minimize coal costs and does not involve reasonable and prudent actions by the utility. This result is not the kind that would be expected if the utility and the DTE affiliates were independent and were dealing at arms-length (where at least a major sharing of the revenue benefits would be expected, with resulting direct coal cost reductions to DECo).

The Act requires DECo to demonstrate that its actions in procuring fuel was reasonable, prudent and that it took actions to minimize the cost of fuel to the utility and ultimately the Act 304 customers. The operation of the proposed REF project does not satisfy the requirements and mandates set forward in Act 304 because DECo is not proposing to operate the REF so that it can "minimize the cost of fuel" needed to provide electricity to its Act 304 customers. The proposed REF project does not comport with the requirements contained in Act 304 and would therefore not be in the public interest and should not be authorized and allowed by the Commission as is proposed .

Q. Should there be additional scrutiny of the REF transitions because they were created by the holding parent company and its affiliates, and thus involved an affiliated transaction subject to incentives for inter-corporate abuses?

A. Yes. I have been advised by counsel that both state and federal precedent establishes that enhanced scrutiny and skepticism of affiliates transactions should be applied to these transactions because of their affiliated nature.

Q. In your opinion, do the REF projects and transactions comprise the kind of transactions and functions that should be subject to review and remedy in an Act 304 reconciliation case?

A. Yes. The Commission's regulation and reconciliation of the diverted REF tax credit revenues as a means to reduce Act 304 related costs goes to the core of Act 304 fuel cost regulation. The attempted REF-diverted revenues should be recognized as integral in the calculation of coal fuel costs and should be recognized as a reduction to fuel costs.

Q. Has DECo shown in any way that the benefits to the DTE holding company system achieved through the diversion of REF tax credit revenues (which should otherwise be an offset to DECo's coal costs) is commensurate or reasonable compared to the costs or impacts on Act 304 ratepayers?

A. No. As noted, there is no demonstration of benefits accruing to ratepayers from DECo's proposal as compared to the benefits given up by the ratepayers.

Q. Is the review of REF issues and ratemaking remedies limited to costs recovery or cost increases exclusively or does it also include recognition of benefits such as "negative costs" (credits or refunds) for ratemaking purposes in this and other Act 304 cases.

A. Act 304 is not a limited to rate freezes or upward adjustments. The purpose of frequent review and fuel clause adjustments as Act 304 is to adopt rates based upon costs of fuel, purchased power, and other related costs. Act 304 provides for increases <u>and decreases</u> in such costs.

MCAAA Witness Crandall in U-16434-R (T 802-811) then explained various ratemaking remedies to address the REF transactions:

Q. You have explained that the clean coal tax credits should flow back to the ratepayers. How would you recommend the clean coal tax credits for 2011 be returned to the ratepayers?

A. This docket is a reconciliation of the 2011 PSCR fuel and purchased power costs. The most straightforward way to return the clean coal tax credits to the ratepayers is to disallow coal costs by the amount of the tax credit and adjust the PSCR rate accordingly. This would reduce the amount of coal expense recoverable through the rates to what the ratepayer cost would have been had ratepayers received the clean coal tax credit.

Q. How large was the tax credit received for REF in 2011?

A. I have estimated the tax credit received for 2011 REF coal burned to be $18,413,000.

According to the Company in response to MCAAA/DE-47, DECo purchased a total of 2,908,986 tons of REF coal in 2011 (See Exhibit MCAAA-2). Mr. Lapplander identified the 2011 tax credit as $6.33 per ton of REF coal during cross examination in Docket

U-16047-R, Tr. 316, line 15. I confirmed that value was reported in the April 26, 2011 IRS release of the 2011 Section 45 Production Tax credits. Based on this information, the tax credit received for the REF coal burned by DECO in 2011 was $18,413,000.

Q. Is this the amount of tax credit actually received by DTE in 2011 for REF coal?

A. Probably not. DTE engaged in a complicated set of transactions to "monetize" the tax credit through tax partners and to prevent it from flowing to ratepayers. As a result of that process, it is probable that DTE received a far greater amount of money in 2011 for the REF clean coal tax credits.

Q. Please explain.

A. DTE structured the REF Fuels Companies as seven separate limited liability corporations under DTE REF Holdings LLC. DTE REF Holdings LLC is a subsidiary of DTE Energy Services, Inc., which s a subsidiary of DTE Energy Resources, Inc., which in turn is a company held by DTE Energy Company. This structure was described in response to MCAAA/DE-11. Please see Exhibit MCAAA-3.

To monetize the tax credit, DTE sold membership shares of its REF facilities at St. Clair and Monroe. In January 2011, it sold 99% of its St. Clair REF LLCs and in November 2011 it sold 99% of its Monroe REF

LLCs to one or more non-affiliated tax partners. DTE still retains 100% ownership of the Belle River REF LLCs and 1% ownership of the St. Clair and Monroe REF LLCs.

Q. Who bought the membership shares of DTE' REF LLCs?

A. DTE refused to provide this information in the discovery process up to this time.

Q. How much money did DTE receive in compensation for the membership shares it sold?

A. DTE refused to provide that information, but we can make an estimate that DTE may have received $300 - $400 million in monetized tax credits in 2011.

The principle of the membership sale is to allow DTE to gain the REF clean coal tax credits. The deal would probably involve DTE selling memberships in the REF LLCs to tax partners, and allow the tax partners to collect the tax credits from the IRS. Thus, the cost of the membership to the tax partner should approach, but be less than the expected value of the tax credits received over the ten year period for which the credits are available. They would have to be less than the expected value of the tax credits to give the tax partner an opportunity to earn on their investment and also to compensate them for the risk that the tax credits could be less than expected.

According to information filed by DECo in response to MEC/DE-3.2 in Docket U-16892, the amount of REF coal DECo expects to purchase rises from 2,908,986 tons in 2011 to 9,681,000 tons in 2012, up to 14,299,000 tons in 2016. See Exhibit MCAAA-4.

Q. Are all of the REF coal purchases described above relevant to the monetized tax credit received in 2011 by DTE?

A. No. DTE's membership sales involved only the St. Clair and Monroe Fuel Companies in 2011. Thus, any monetization of tax credits that may be associated with Belle River or other future Fuel Companies was not included in the 2011 tax partner transactions.

Q. Why is it appropriate to consider tax credits that the tax partners will receive in 2012 and beyond when estimating the compensation that DTE received in 2011?

A. It is appropriate and necessary to consider the tax credits that the tax partners will receive in 2012 through 2020 when estimating the compensation received by DTE in 2011 for the membership sale because the tax credits are received over a 10-year period. In 2011, DTE exchanged the annual tax credit for the 10-year period for the St Clair and Monroe REF for a membership sale price.

We can estimate the membership sale price received by DTE by multiplying the expected tons of REF fuel sold to DECo by the tax credit

in each year through 2020. Taking the present value of that stream of payments establishes the current value of the expected stream. Tax partners would demand the opportunity to earn on their investment in the membership, thus the compensation received by DTE would approach, but be less than the present value of the tax credits. Since the annual tax credits are a product of the REF tons and the tax credit per ton, the actual tax credits may be higher or lower than expected, primarily because the volumes of REF coal consumed may be higher or lower than expected.

Q. Please explain Exhibit MCAAA-5.

A. Exhibit MCAAA-5 is the basis of my estimate that DTE may have received $300 to $400 million in 2011 to monetize the tax credits for REF from St Clair and Monroe. The first column shows the tons of REF coal DECo expects to purchase. The second column shows the actual and assumed IRS tax credits per ton of REF coal. The third column is the annual tax credit (product of the previous two columns), and the fourth is the present value of each annual tax credit. The present value of the expected REF tax credits for the St Clair and Monroe REF companies is $502 million.

Giving the tax partners an opportunity to make a profit and to compensate them for the risk that the REF volumes are less than expected, I adjusted the present value down from $500 million to $300 to $400 million. I believe this to be a reasonable estimate of what DTE may have received in 2011 as a monetization of the REF clean coal tax credit. This money should be flowed back to ratepayers.

Q. Are there other ways that the REF tax credits could be returned to ratepayers?

A. Yes. The Fuel Companies could discount the cost of the processed clean coal, similar to what is proposed for the Monroe Fuel Company in the current PSCR Plan case, Docket U-16892. The discount could reflect the overall effect of the REF tax credit and overall costs and revenues associated with the processing.

Q. What would be the appropriate discount to the cost of coal purchased from the fuel companies?

A. Details were not provided by the Company, but Michigan Community Action Agency Association Witness Peloquin in the current PSCR Plan case suggested a discount of $4.00 per ton of processed coal in his direct testimony, Docket U-16892, MCAAA-7, page 1.

Mr. Lapplander also gave credence to the $4.00 value in his cross examination in Docket U-16047-R, Tr. 316, line 15. Mr. Lapplander indicated that roughly $2.00 of the $6.33 per ton tax credit goes to the fixed and variable operating cost of the facility, leaving approximately $4.00 per ton available for refund to the ratepayers.

Q. How would this $4.00 per ton discount be implemented?

A. In the current reconciliation case for 2011, the $4.00 per ton discount would be applied to each ton of REF coal sold to DECo in 2011. The resulting amount (2,908,986 tons times $4.00 per ton) would result in an adjustment of $11,636,000. In my opinion, this is the minimum amount by which fuel costs should be adjusted in 2011.

If the Commission uses this method, future repurchases of clean coal from the fuel companies should be discounted by $4.00 per ton as they are invoiced.

Q. Mr. Lapplander on page GEL-9, lines 12 – 20, testifies that DECO sells coal to the Fuels Companies at its fully allocated or book cost rather than market prices, and argues that any adjustments to the sale price to reflect higher market pricing would only serve to increase the resale price to DECO. Do you agree?

A. No. Failing to charge the Fuels Companies the higher of fully allocated cost or market price may adversely affect ratepayers to the benefit of the Fuels Companies and DTE.

Q. Please explain.

A. Mr. Lapplander's argument that the price at which DECO sells coal to the Fuels Companies doesn't matter fails to consider the impact of sales of REF to non-affiliated entities. If a Fuels Company sells cleaned coal to a party other than DECo, they may generate a profit on the sale which will be retained by the Fuels Company (and DTE) rather than returned to the ratepayers.

Consider the following example whereby DECo purchases coal at less than market prices due to its large volume purchases and transportation systems in place. DECo purchases coal at $35 per ton, but the market price for smaller purchases in the same general location is $40 per ton. If DECo sells coal to the Fuels Company at either $35 or $40, and the Fuels Company processes it and sells it back at the same price plus its adder (reflecting environmental value added to the coal through the processing), Mr. Lapplander is correct that the net cost to ratepayers will be the same whether DECo charges the fully allocated cost or the market price, *for the clean coal repurchased by DECO for its use* (independent of the cost reduction for tax credit revenues discussed earlier).

Now consider the same example, except that the coal DECo sells to the Fuels Company is processed and sold to a non-affiliated entity. If DECo sells at the fully allocated cost of $35 per ton, and the Fuels Company processes it and sells it to a third party at market prices of $40 per ton (plus the adder reflecting environmental value added), then the Fuels Company makes a $5 per ton profit on coal sold to the third party. This profit should inure to the ratepayers, but it will instead remain undetected in the hands of the Fuels Company and DTE. DECo and its affiliates have not provided information regarding details of transactions related to the

Fuels Company and surely would object to providing information regarding the off-system sales of clean coal.

Finally, there is also a possibility that the Fuels Company could buy the coal at below market prices and sell it at below market prices, effectively artificially becoming a more competitive supplier rather than keeping all of the profits. This would enhance their sales volumes, but the lower cost would in effect be made possible only because of the existence of and past investments by ratepayers. In effect, ratepayers would involuntarily be supporting below market deals to third parties without compensation for ratepayers' role in developing and paying for the large scale utility coal procurement that can result in below market costs.

Q. Under DECO's approach of charging a below market price for coal sold to the Fuels Companies, ratepayers may be adversely affected by paying higher PSCR rates than they would if profits from off-system sales offset PSCR coal costs. How can this problem be resolved?

A. It would be resolved by DECo following the Code of Conduct, which requires DECo to sell to its affiliates at the higher of fully allocated cost or market price. If coal was procured by DECo at below market prices, charging market prices for coal sold to its Fuels Companies affiliates would result in profits that would offset PSCR coal costs, i.e., the PSCR rates would reflect the offsets to the fuel costs through normal record-keeping rather than having to make adjustments.

The Commission should note that Mr. Lapplander indicated that DECo is selling coal to its affiliates at their fully allocated cost even though it is less than market price. This practice is in violation of the Code of Conduct which requires DECo to make sales to affiliates at the higher of fully allocated cost or market price.

The Commission should also note that the Company did not suggest that charging the higher market price was burdensome or difficult. In fact, the Company appears to be indifferent to which method is used based on their erroneous view that either method ends up costing ratepayers the same.

I recommend that the Commission require DECo to charge the higher of fully allocated costs or market prices for its transactions with affiliates, as required under the Code of Conduct.

Q. Should the Commission adjust the fuel costs in the current reconciliation case in order for the ratepayers to benefit from off system coal sales?

A. Yes, this adjustment should be made if clean coal sales were made to non-related parties in 2011. The Company has not provided information to corroborate whether the Fuels Company's made coal sales to non-related parties.

The Fuels Companies have made clean coal sales to non-related parties in the past. In 2010, Belle River Fuels Company sold REF processed coal to Michigan Public Power Authority (MPPA).

The Fuels Companies could have made sales of REF processed coal in 2011. According to discovery response to MCAAA/DE-3 (Exhibit MCAAA-6), DECo sold 4,250,000 tons of coal to the Belle River Fuels Company, much more coal than the 2,908,986 tons of REF processed coal DECo bought back from all the Fuels Companies in 2011. It is not clear to what extent the excess coal sold to the Fuels Companies in 2011 was processed and sold to unrelated third parties or simply sold to unrelated third parties without processing. In either case, the sale of coal purchased from DECo at fully allocated costs and resold to a third party at market prices would generate a profit that should flow to the ratepayers.

The Fuels Companies may be planning to make REF coal sales to unrelated third parties in the future. In response to MEC/DE-17a, the Company provided an excerpt from DTE Energy Company's 8-K filing of October 9, 2012. Please see Exhibit MCAAA-7. Page 3 of the attachment to the response summarizes the REF development update. Under the 2012 Status, DTE indicates that they are trying to relocate four [coal REF processing] units, and specifically regarding units 3 and 4, that the Company is "In discussions with several potential host utilities." It appears that they are considering host utilities other than DECo. The 8-K filing from June 15, 2012, indicated that the Company was in discussion with five potential host utilities. From the 8-K filings, I conclude that the Company is seeking to sell REF coal to unrelated third parties, perhaps as early as 2012.

MCAAA Witness Crandall in U-16434-R (T 812) concluded his direct testimony with the following recommendations:

Q. In conclusion, what are your recommendations that the Commission should adopt in this case?

A. I recommend the following:

a. The Commission find that DECo's use of the REF in 2011 has disadvantaged Act 304 ratepayers and has resulted in higher fuel costs than would other wise be the case.

b. The Commission require a fuel cost adjustment for the 2011 PSCR reconciliation case in the amount of either $18.4 million or $11.6 million based on annual credits, or $300 - $400 million based on ten year life of the tax credits, as is more fully described in this testimony.

c. The Commission find that DECo is in violation of the Code of Conduct and that the Commission direct DECo to use the higher of the market price or fully allocated costs when selling coal to its affiliates.

d. The Commission order in all Act 304 cases require DECo to file complete information regarding its REF arrangements and transactions, including the amount of REF tax credit revenues obtained, and such further information required by the Commission.

MCAAA Witness Peloquin's surrebuttal testimony in U-16434-R (T 896-900) addressed the redacted portion of pages 618 - 619 of DECo's Exhibit A-30, which was later produced in unredacted form in DECo's Exhibit A-30 (supplemental):

Q. A paragraph of the Monroe Refined Coal Supply Agreement, found at pages 618-619 of Exhibit A-30 was redacted. Have you reviewed Section 9.4 of the Monroe Refined Coal Supply Agreement?

A. Yes, I have. I compared the Monroe Section 9.4 with the St. Clair and Belle River contracts' Section 9.4. This comparison is shown on Exhibit MCAAA-34. The left hand column of this Exhibit is Section 9.4 transcribed from the St. Clair and Belle River Refined Coal Supply Agreements, Exhibit A-30 pp 375-76. The right hand column is transcribed from the unredacted Monroe Refined Coal Supply Agreement found at pp 1-2 of Exhibit A-30 Supplemental. The Monroe Refund Coal Supply Agreement deleted the previous paragraph 9.4(a) as found in the earlier St. Clair contract. This was the paragraph that required the Fuels Companies to reimburse Detroit Edison for additional O&M expense caused by the use of the refined coal.

* * *

Q. Do you support Detroit Edison's unilateral decision to reduce the Monroe REF Discount to reimburse Edison for REF-related O&M expense for its powerplants?

A. No.

Q. Please explain your opposition to this DECo proposal for REF related powerplant O&M expense reimbursement via the PSCR clause.

A. First, O&M expense is recovered in base rates. It is <u>not</u> a component of recoverable power supply expense. Second, the dollar amounts requested are not supported by competent testimony and/or exhibit(s).

Q. Are there other portions of Section 9.4 that should be addressed?

A. Yes. Section 9.4(c) of the Monroe Agreement. In the event that REF results in the Monroe fly-ash being designated a "hazardous material," then paragraph (c) requires the Monroe Fuels Company to partially reimburse DECo for its hazardous material disposal cost. However, Monroe Fuels is only required to pay the cost per unit "…equal to the amount of S-Sorb III that is added to the Feedstock to produce Refined

> Coal during such contract year." If Edison were protecting itself and its ratepayers, then why was this reimbursement limitation put in the contract. Of course, there apparently is no reimbursement for St. Clair and Belle Rivers hazardous fly ash disposal cost.
>
> Another issue is found in the last sentence of Monroe's Section 9.4(c):
>
> Seller shall have the right to suspend the delivery of Refined Coal hereunder if Seller is or may be required to reimburse Buyer any amounts under this Section 9.4(c).
>
> The right of the fuels companies to unilaterally suspend the delivery of refined coal rather than reimburse Detroit Edison is found repeatedly throughout the DECo/Fuels Company contracts. This is simply unacceptable. Contractually allowing a vendor to unilaterally suspend deliveries whenever the vendor is requested to provide a contract reimbursement is not worth the paper it is written on. What happens in 2015 (or 2016) if the Fuel Company suspends providing refined coal and Edison therefore violates the Clean Air Act.

Witness Peloquin's Exhibit MCAAA- 34 in U-16434-R illustrated the contract differences described in his testimony.

II. MCAAA'S EVIDENCE IN THIS 2013 PLAN CASE (U-17097).

MCAAA presented the testimony of Geoffrey C. Crandall in this case (at T-326-338) in opposition to the cost and rate treatment of DECo's REF coal proposals. MCAAA Witness Crandall testified on this issue at T 329-338, as follows:

> **Q. What is the purpose of your testimony in this case?**
>
> A. I address issues related to the Reduced Emission Fuels (REF) projects that have been identified in this plan filing. Various affiliated transactions have occurred in past years between DTE Energy (DTE) affiliates, Special Fuel Companies, and the Detroit Edison Company (DECo) and I address the implications of those fuel procurement arrangements on Act 304 customer's PSCR five-year resource plan.
>
> **Q. In your opinion, do the REF projects and transactions comprise the kind of transactions and functions that should be subject to review and remedy in an Act 304 reconciliation case?**
>
> A. Yes. The Commission's regulation of the diverted revenues derived from REF tax credits as a means to reduce Act 304 related costs goes to the core of Act 304 fuel cost regulation. The attempted diversion of revenues derived from REF tax credits should be recognized as integral in the

calculation of coal fuel costs and should be recognized as a reduction to fuel costs.

Q. Has DECo shown that the benefits to the DTE holding company system achieved through the diversion of revenues derived from REF tax credits (which should otherwise be an offset to DECo's coal costs) is commensurate or reasonable compared to the costs or impacts on Act 304 ratepayers?

A. No. DECO's direct testimony in this docket does not address the distribution of revenues derived from the REF tax credits. DECO apparently continues to believe that ratepayers have no claim to these rather substantial sums of money resulting from the monetization of the tax credit by selling interest to third party tax partners. As discussed in my testimony in Docket U-16434-R, the revenues derived from REF tax credits are estimated to be $300 million to $400 million. In the U-16892 Proposal for Decision, on page 84, the ALJ indicated that intervenors had a fundamental concern that DECo's decision to fracture off one aspect of its integrated electric generation process so that its parent company can generate hundreds of millions of dollars in profits for itself and its investors.

In Docket U-16434-R, DECO Witness Lapplander states "there is no reasoned basis to impute tax credit revenues to Detroit Edison PSCR customers." (GEL Rebuttal, page 7, lines 11-12). DECO does not appear to have expanded or substantiated its arguments in the current PSCR Plan docket.

Q. Do you agree that there is no reasoned basis to impute credits to DECO PSCR customers for revenues derived from the REF tax credits?

A. No. DECO's appears to base its position on the fact that DECO would not be eligible to receive tax credits for REF if it owned the REF facility. DECO's logic appears to be that if a third party tax partner is needed to claim the tax credit, that is a private matter between DECO, the REF facility and DTE and therefore DECO's ratepayers have no basis to question these private arrangements or make claims to the revenues derived from the private REF tax credit arrangement.

In reality, the benefits of the tax credit would not be available to a tax partner but for the existence of the ratepayer supported utility power plants, coal handling, coal contracting and other facilities and services provided by DECO. This entire REF arrangement would not exist but for the funds provided by DECO's ratepayers, including PSCR customers, for the fuel handling infrastructure. The REF facility is embedded within the DECO plant, using coal that DECO secures and sells to an affiliated interest. The coal is resold, at least for now, exclusively to DECO for the power plant built to serve and paid for by DECO ratepayers. The REF facility, and the tax credit revenues derived therefrom, would not be possible without the ratepayers and DECO, a regulated entity. The fact

that a third party tax partner may be required for DTE to avail itself of the substantial revenues derived from the REF facilities does not negate the ratepayers interests. Moreover, DECo has not explained why any third party tax partner requirement could not have been met if the Fuels Companies were owned by a DECo subsidiary rather than a DTE subsidiary.

That DTE created a complex structure to enable it to tap the REF tax credit does not entitle it to ignore the interests of the ratepayers. The Proposal For Decision in Case No. U-16892 regarding DECO's 2012 PSCR Plan summarizes it well.

> By artfully structuring layers of corporate ownership and investment partners to take advantage of the available tax credits, DTE Energy has devised a scheme to generate substantial profits from the chemical treatment of Detroit Edison's coal. This show of ingenuity is not criticized. However, the issue that must be thoroughly addressed is whether and, if so, to what degree these profits are properly considered a reduced cost of fuel and accounted for in the PSCR process. (Page 84)

In the current docket as was also the case in the U-16892 and U-16434-R dockets, DECO continues to not address the ratepayers claim to the revenues derived from the REF tax credits.

Q. You have explained that the revenues derived from clean coal tax credits should flow back to the ratepayers. How would you recommend the revenues derived from clean coal tax credits be returned to the ratepayers?

A. The most straightforward way to flow the revenues derived from the clean coal tax credits to the ratepayers is to offset coal costs as the coal is purchased. This would reduce the amount of coal expense recoverable through the rates to what the ratepayer cost would have been had ratepayers received the clean coal tax credit.

To refund revenues that have already been diverted, the Commission can disallow or reduce coal costs by the amount of the revenues derived from the tax credit and adjust the PSCR rate**s** accordingly in yet undecided and future reconciliations of fuel and purchased power costs. Notably, all PSCR Reconciliation cases going back to the year 2010 (U-16047-R) remain undecided by the Commission.

Q. Mr. Krishnamurthy on page KK-13, lines 3-8, of his U-17097 testimony testifies that DECO sells coal to the Fuels Companies at its fully allocated or book cost rather than market prices, and argues that any adjustments to the sale price to reflect higher market pricing would only serve to increase the resale price to DECO. Do you agree?

A. No. Failing to charge the Fuels Companies the higher of fully allocated cost or market price may adversely affect ratepayers to the benefit of the Fuels Companies and DTE.

Q. Please explain.

A. Mr. Krishnamurthy's argument that the price at which DECO sells coal to the Fuels Companies doesn't matter fails to consider the impact of sales of REF to non-affiliated entities. If a Fuels Company sells cleaned coal to a party other than DECo, they may generate a profit on the sale which will be retained by the Fuels Company (and DTE) rather than returned to the ratepayers.

Consider the following example whereby DECo purchases coal at less than market prices due to its large volume purchases and transportation systems in place. DECo purchases coal at $35 per ton, but the market price for smaller purchases in the same general location is $40 per ton. If DECo sells coal to the Fuels Company at either $35 or $40, and the Fuels Company processes it and sells it back at the same price plus its adder (reflecting environmental value added to the coal through the processing), Mr. Krishnamurthy is correct that the net cost to ratepayers will be the same whether DECo charges the fully allocated cost or the market price, *for the clean coal repurchased by DECO for its use* (independent of the cost reduction for tax credit revenues discussed earlier).

Now consider the same example, except that the coal DECo sells to the Fuels Company is processed and sold to a non-affiliated entity. If DECo sells at the fully allocated cost of $35 per ton, and the Fuels Company processes it and sells it to a third party at market prices of $40 per ton (plus the adder reflecting environmental value added), then the Fuels Company makes a $5 per ton profit on coal sold to the third party. This profit should inure to the ratepayers, but it will instead remain undetected in the hands of the Fuels Company and DTE.

Finally, there is also a possibility that the Fuels Company could buy the coal at below market prices and sell it at below market prices, effectively artificially becoming a more competitive supplier rather than keeping all of the profits. This would enhance their sales volumes, but the lower cost would in effect be made possible only because of the existence of and past investments by ratepayers. In effect, ratepayers would involuntarily be supporting below market deals to third parties without compensation for ratepayers' role in developing and paying for the large scale utility coal procurement that can result in below market costs.

Q. Do the Fuels Companies sell coal, either processed or unprocessed, to any third parties?

A. In rebuttal testimony in Case No. U-16434-R, DECO Witness Lapplander testified that the Fuels Companies had not sold any *refined* coal to a third party, and that non-DECO facilities will not utilize DECO procured feedstock coal (page 13). He went on to say that DECO's REF project

agreements limit the ability of the Fuel Companies to resell REF to third parties, and that they would need DECO's consent to resell to third parties.

From this I would conclude that sales of refined coal to a third party has not occurred. But in fact off-system third party sales may or could occur in the future and within this five-year PSCR plan horizon. Moreover, DECo's consent could be readily obtained by direction of its controlling parent company, DTE Energy**.**

Q. Under DECO's approach of charging a below market price for coal sold to the Fuels Companies, ratepayers may be adversely affected by paying higher PSCR rates than they would if profits from off-system sales offset PSCR coal costs. How can this problem be resolved?

A. It would be resolved by DECo following the Code of Conduct, which requires DECo to sell to its affiliates at the higher of fully allocated cost or market price. If coal was procured by DECo at below market prices, charging market prices for coal sold to its Fuels Companies affiliates would result in profits that would offset PSCR coal costs, i.e., the PSCR rates would reflect the offsets to the fuel costs through normal record-keeping rather than having to make adjustments.

The Commission should note that DECo is selling coal to its affiliates at their fully allocated cost even though it is less than market price. This practice is in violation of the Code of Conduct which requires DECo to make sales to affiliates at the higher of fully allocated cost or market price.

The Commission should also note that the Company did not suggest that charging the higher market price was burdensome or difficult. In fact, the Company appears to be indifferent to which method is used based on their erroneous view that either method ends up costing ratepayers the same.

I recommend that the Commission require DECo to charge the higher of fully allocated costs or market prices for its transactions with affiliates, as required under the Code of Conduct.

Q. Do you agree with the applicant that DECO's sale of coal to its affiliate Fuels Companies were appropriate and were arms length transactions?

A. No. Witness Krishnamurthy asserts on KK-13 lines 9-11 that "Since the asymmetrical pricing provision of the Code of Conduct is intended to prevent Detroit Edison from subsidizing its unregulated affiliates, it is clear that this transaction is consistent with that intent and effectuates the proper outcome". MCAAA Witness William Peloquin in U-16434-R Surrebuttal testimony articulates the reasons that MCAAA has concerns about the REF arrangement. MCAAA does not believe DECO and each fuel company demonstrated that this arrangement is consistent with the Code of Conduct or that the arrangements were made at arms length. The Merriam-Webster Collegiate Dictionary, 11th Edition, defines arm's length as: **arm's length** *n* (1701) 1: a distance discouraging personal contact or familiarity <kept former friends at *arm's length* now> 2: the condition or

fact that the parties to a transaction are independent and on an equal footing.

Since the Fuels Company and DECo are owned by the same parent corporation these contracts were not done at arm's length. Also, as MCAAA pointed out in U-16434-R, the contract negotiators are not independent since they are ultimately employees of DTE. In MCAAA's recent review of Exhibit A-30 in U-16434-R it was apparent that the contact was complex and lengthy i.e., over 800 pages of contract language. Mr. Lapplander, the DECO negotiator, was not provided comparative contracts involving other host utilities nor was he provided independent DECO-dedicated legal counsel. Instead, he was made to rely upon the advice and counsel of the DTE holding company attorney for tax advice. Also, Mr. Lapplander, as an employee, was assigned to negotiate the DECo/Fuels Company contracts against a higher level corporate officer at the Vice-President level. Due to these constraints, Mr. Lapplander was not on equal footing organizationally or in terms of dedicated resources to inform him in making these complex contractual arrangements. This was duly noted by the ALJ in the U-16892 docket. On page 35 of the PFD the ALJ indicated that "Contrary to his statement, Mr. Lapplander's demeanor, during the live testimony, left the strong impression that no realistic likelihood existed for the REF project to have been undertaken with an unaffiliated company. Furthermore, there is no evidence to suggest that Detroit Edison sought arrangements with anyone other than its affiliates."

Q. In conclusion, what are your recommendations that the Commission should adopt in this case?

A. I recommend the following:

a. The Commission direct DECo to credit or flow back to the ratepayers the revenues derived from REF tax credits in 2013 and in future years (consistent with this recommendation preserved for previous PSCR years in cases not yet decided by the Commission);

b. The Commission in the reconciliation phase of this case determine the specific amount of the credit or flow-back to ratepayers referenced in sub-paragraph a;

c. The Commission find that DECo is in violation of the Code of Conduct and that the Commission direct DECo to use the higher of the market price or fully allocated costs when selling coal to its affiliates.

d. The Commission order require DECo in all Act 304 cases to file complete information regarding its REF arrangements and transactions, including the amount of revenues derived from REF tax credit revenues obtained, and such further information required by the Commission;

e. The Commission require such further relief consistent with the above recommendations.

III. ARGUMENT

A. The statutory provisions and objectives of Act 304 require the production tax credits associated with DECo's coal burns to be recognized as an offset to DECo's coal costs for PSCR ratemaking purposes

MCAAA asserts that the REF production tax credit revenues are a proper offset to the cost of CECo's coal for purposes of setting just and reasonable PSCR rate factors under Act 304.

The REF production tax credits arise from DECo's coal supply chain and the burning of coal at DECo's coal plants, all developed and supported for many years by ratepayers, and arise also from DECo's customer base as a utility. Without DECo's extensive operations, financial resources, and customer base, no opportunity would exist to develop REF projects, and to be in the position to generate the REF tax credits. Thus, the tax credit revenues are integrally related to DECo's coal plants and operations, all covered by customer rates.

These cases relating to the REF tax credits appear to be the first cases in which DECo has not offset or reconciled fuel costs for refunds or credits arising from the fuel-related costs. For example, DECo and other utilities have traditionally credited FERC natural gas rate refunds against its Act 304 fuel costs, or rail or pipeline transportation refunds as an offset to said costs. The same consistent treatment should be applied here with respect to the REF production tax credit revenues, which directly relate on a per-ton basis to the coal burns at DECo's coal plants.

By ignoring the cost offsets to coal costs that should be recognized from the production tax credit revenues associated with DECo's coal burns, DECo has revealed its erroneous premise that the unregulated DTE and its subsidiary Fuel Companies may divert the tax credit benefits from DECo to themselves, and that such action escapes scrutiny and reconciliation under Act 304 on the basis that it does not <u>increase</u> DECo's costs. However, DECo's premise is erroneous. The failure to recognize the tax credit offset to DECo's coal costs <u>does increase</u> DECo's coal

costs from what these costs otherwise would and should be, and also constitutes a failure by the utility to minimize its costs in accordance with Act 304. The lack of the coal cost offset also does not comport with the Act 304 process which traditionally has recognized net costs — both cost increase and decreases — including offsets such as federally determined refunds, rail transportation refunds, and similar credits analogous to the tax credit revenues at issue in this case. Quite simply, Act 304 does not establish a rate freeze or "ratchet up" statutory framework or process.

The REF transactions also ensure the diversion of a profit margin (and tax credit benefits) to the fuel company affiliates (or their third party investors), or to DTE that has or will sell interests in the fuel companies to obtain an advance "monetization" of the value of the revenue stream/tax credit benefits, at the expense of DECo (compared to the situation if DECo or DECo subsidiaries undertook the transactions as a utility). In the process, opportunities to reduce PSCR costs have been lost. At no time has DECo in its evidence or arguments denied that DTE and/or its Fuel Company subsidiaries obtained tax credit revenues, or monetization or tax credit benefits, from its REF transactions for each year since 2009, and secondly, that none of these tax credits or benefits have yet been subtracted from DECo's coal costs included in its PSCR. In other words, DECo's erroneous interpretation and applications of Act 304 would refuse to reconcile and include in Act 304 costs its net costs of coal (i.e., coal costs minus tax credit revenues and benefits). Rather, DECo (at the direction of its unregulated parent holding company, DTE) seeks to "privatize" for the unregulated DTE and its Fuel Company subsidiaries all tax credit revenue benefits from DECo's coal inventories and supply chain, and to "socialize" to ratepayers without offset the costs thereof.

DECo has repeatedly asserted that DECo's customers are not harmed by the non-recognition of the tax credit revenues or benefits because their costs do not increase. However, DECo in its most recent PSCR reconciliation (U-16434-R for 2011) requested recognition of an underrecovery of some $148 million or more which in large part resulted from the non-recognition of the REF tax credit revenues or benefits as an offset to coal costs in its previous PSCR cases. Moreover, this non-recognition of major REF offsets to coal costs will be accumulating and will become ever more severe with each passing year of the 10 year REF tax credit program. This places immense unwarranted burdens upon ratepayers which violates the judicial standard that the Commission must balance the interests of stockholders and ratepayers [*City of Detroit v Michigan Public Service Comm'n*, 308 Mich 706; 14 NW2d 784 (1944), *Union Carbide Corp v Public Service Commission*, 431 Mich 135; 428 NW2d 322 (1988)].

DECo's position on the REF issues is unprecedented and also does not comport with previous case results involving analogous circumstances. For example, when it was found that CECo was engaging in forced burns of oil at its Karn plants to consume excess oil shipments CECo received under contract with the Union Carbide Corporation, the Commission ultimately protected ratepayers by requiring Act 304 refunds or cost offsets to remove scores of million of dollars in excess costs from Act 304 rate factors. The Commission's order was affirmed by the reviewing Court in *Consumers Energy Company v MPSC*, 196 Mich App 687 (1992). Another analogous example is the result which occurred in the consolidated MichCon case U-14800/U-15042 (the latter docket being MichCon's GCR case for the 12-months ending March 31, 2008). In that case, MichCon was <u>not</u> ultimately permitted to retain the proceeds of the sale of excess storage gas reserves that MichCon had arranged to sell at market prices. Instead, as a result of litigation and settlement discussions in that case, the parties ultimately reached a settlement whereby the proceeds of the gas sales were shared as between ratepayers

and the utility, along with other provisions whereby MichCon committed to undertaking certain studies and pilot energy efficiency programs.[2]

DECo in these REF cases has also made unfounded claims that customer benefits of the REF program include a reduction in Detroit Edison's working capital expense by not carrying coal inventory, or reductions in emission allowances expenses, or a cap on never paying more than the value of environmental benefits received. However, these assertions are highly questionable. The "Fuel Companies" are going to charge Edison for their capital costs, including a return on their investment in fuel inventory (fuel inventory which otherwise would have been on the books of Detroit Edison). The result is a zero net savings for working capital.

Rather than a savings, the aspect of the "Fuel Companies" owning fuel inventories may well result in a double recovery of capital costs related to these fuel inventory. A review of the Commissions' October 26, 2011 Order in Case No. U-16472 (DECo's most recent general electric rate case) establishes that there is no reference to a reduction of DECo's working capital ratebase specifically for fuel transferred to REF projects. DECo's projected test year in its rate case, U-16472, did <u>not</u> include a downward adjustment to working capital to account for the REF transactions. DECo's working capital costs for coal inventory are thus still being recovered in DECo's base rates, or are covered by charges by the fuel companies to DECo under the REF arrangements. Therefore, DECo customers are being charged for all DECo fuel inventory, including any transfers to REF projects. At the very least, a savings in working capital from

[2] The settlement, and MPSC order approving same, dated August 21, 2007, provided for an offset to costs and customer rates of approximately $20 million of the sale proceeds, along with Mich Con's commitment to conduct in-depth studies regarding gas storage and accounting issues, and to fund and implement pilot residential energy efficiency programs for the years 2008 and 2009, and to propose an expanded energy efficiency program in its next rate case.

"reduced" coal inventories would not result because such costs would still be recovered within the charges rendered to DECo by the Fuel Companies.

With respect to future claimed savings in emission allowance expenses, such savings are extremely small, and are highly speculative and illusory. In fact, DECo's REF proposal provides that the emission savings are part of "adder" that DECo must pay the Fuel Companies, which eliminate any savings to DECo from a cost and rate standpoint. Even more incredibly, DECo's REF proposals would charge ratepayers in Act 304 rates for these savings (within the Fuel Companies' "adder charges"), which means that DECo proposes to charge ratepayers under Act 304 for a **non-cost**. By definition a "savings" is not a cost recognized under Act 304. Moreover, DECo's assertions of an expense "cap" under the REF transactions are largely under the control of complicated internal calculations controlled by DTE, DECo, or the fuel companies, and in any event, do not address the problem of DECo losing opportunities to reduce costs and to share in the tax credit benefits.

The REF transactions also curtail or greatly complicate the audit trail for DECo's fuel expense. For example, DECo's proposal is for the St. Clair Fuel Company to take delivery of St. Clair (and presumably Belle River) coal at the MERC transshipment facility at Superior, Wisconsin. Thus, all of the records pertaining to DTE's western coal after receipt by MERC until delivered to the St Clair (and Belle River) power plants' coal conveyors would be in the possession of a non-jurisdiction DTE Energy subsidiary. At the same time, innumerable numbers of DECo employees continue to do the work associated with DECo's coal supply chain, while each of the Fuel Companies have only three (3) employees or less, as revealed in the record in U-16434-R.

The Commission should disallow the cost increases (or lost coal cost reductions) associated with the REF transactions in 2010 and for all PSCR years thereafter, for the reasons stated above. In addition, DECo's REF cost and rate proposals are prohibited by various provisions of Act 304. Sections 6j(13)(a), (d), (e), and (g) of Act 304, MCL 460.6j (a), (d), (e), and (g), provide in relevant part:

> (13) In its order in a power supply cost reconciliation, the commission shall:
>
> (a) Disallow cost increases resulting from changes in accounting or rate-making expense treatment not previously approved by the commission. The commission may order the utility to pay a penalty not to exceed 25% of the amount improperly collected.
>
> * * *
>
> (d) Disallow transportation costs attributable to capital investments to develop a utility's capability to transport fuel or relocate fuel at the utility's facilities and disallow unloading and handling expenses incurred after receipt of fuel by the utility.
>
> (e) Disallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparable cost beneficial to deal.
>
> * * *
>
> (g) Disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts.

The REF transactions indeed relate to the functions described in the above statutory provisions. At no time did DECo obtain advance approval of the REF transactions as required under Section 6j(13)(a). DECo has also failed to carry its burden of proof to establish that DECo has met the requirements of Section 6j(13)(d), (e), and (g) quoted above.

B. The Production Tax Credit revenues could have been (and should have been) realized by DECo or a DECo subsidiary rather than being diverted to unregulated subsidiaries of the unregulated DTE parent company -- a situation that can be corrected through the adoption of appropriate ratemaking remedies

Certain parties to prior REF cases (such as the MPSC Staff and DECo) have erroneously suggested that the provisions of Internal Revenue Code (IRC) Section 45 prohibit ratemaking recognition of the tax credit benefits or monetization revenues generated under IRC Section 45 for the handling and processing of Reduced Emissions Fuel (REF) coal at DECo's coal plants.

DECo in this and other cases have also presented non-qualified third-hand testimony intimating that the creation of affiliated Fuel Companies under the unregulated parent company, DTE, and its subsidiaries, was necessary in order to realize the REF tax credits. However, this has not been established.

Major flaws exist with respect to these asserted claims or implied positions. First, the tax credit benefits or revenues were not (or are not) unavailable to DECo (or its ratepayers), either directly or indirectly, by IRC Section 45 requirements that "unrelated parties" be involved in the activity. The definitional subparagraph of the same IRC Section 45, cited by these parties, specifically states:

> Persons shall be treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b). In the case of a corporation which is a member of an affiliated group of corporations filing a consolidated return, such corporation shall be treated as selling electricity to an unrelated person if such electricity is sold to such a person by another member of such group.

A 2009 interpretation of Section 45 issued by the Internal Revenue Service (IRS Notice 2009-90, issued December 7, 2009) further defines what is meant in Section 45 by "related persons" as follows:

> Related persons. Persons are treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under § 52(b). A corporation that is a member of an affiliated group filing a consolidated return is treated as selling coal to an unrelated person if the coal is sold to an unrelated person by another member of the affiliated group.

(Notably, DECo in this case has also stipulated that DECo is in fact a member of the DTE affiliated group that files a consolidated tax return.)

This liberal and expansive definition of "unrelated parties" in Section 45(e)(4) clarifies that there was no bar (and is no bar) to DECo forming separate subsidiaries to capture the tax credits and revenue benefits for the utility (DECo), as opposed to DTE Energy or its affiliate, DTEES. In other words, the tax credits or revenue benefits thereof could just as easily have been derived for the benefit of DECo, rather than the unregulated DTE or its affiliates, in order to meet the prerequisites of obtaining the tax credits or benefits under IRC Section 45.

Serious problems exist with respect to unfounded assertions or suggestions concerning the requirements of IRC Section 45. First, such assertions or suggestions are wholly unsupported by "competent, material and substantial evidence" as required by both Constitutional and statutory standards.[3] The MPSC Staff did not even present any expert testimony on REF issues in this case or in previous cases. No witness sponsored by DECo in this or previous cases had the expertise or qualifications to make such claims regarding the legal requirements of Section 45, nor has DECo in any of its briefings provided any assertions, signed by counsel, concerning such legal claims. Neither DECo or the Staff has cited any IRS private ruling, regulatory interpretation, or any other authority issued by the IRS or by a court to support the unsupported claims made by the Staff or DECo in these cases relative to the requirements for capturing the subject tax credit benefits. Moreover, DECo's witnesses revealed in U-16434-R that DECo

[3] Article 6 Section 28 of the Michigan Constitution of 1963, Section 85 of the Michigan Administrative Procedures Act (APA), MCL 24.285, and prevailing precedent.

sought no independent tax advice or independent tax counsel and that the creation of the Fuel Companies as subsidiaries of DTE rather than of DECo occurred as a result of a "top-down" (DTE controlled) decisional process.

The DECo witnesses in this and previous cases who have discussed this tax issue were clearly not qualified as either a tax lawyer or tax expert, and did not refer to any tax regulation, IRS interpretation, or case that supported the unsupported theory that the Fuel Companies had to be set up as subsidiaries of DTE rather than under DECo. The DECo witnesses' vague assertions thus must be disregarded under controlling judicial principles applied to experts, such as in *Daubert v Merrell Dow Pharmaceuticals,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), Const 1963, art 6, § 28, and Section 85 of the Administrative Procedure Act, MCL 24.285, and by legal requirements that the Commission's findings must "be supported by competent, material and substantial evidence on the whole record." Expert testimony meets this test only if presented by a ***qualified*** expert who has an ***informed*** basis for his testimony.[4] DECo in this and prior cases has presented no *qualified* witness who could testify on the requirements of IRS Section 45, and DECo up to now has presented no substantive briefing concerning Section 45, such as Court precedent, IRS regulations, or IRS opinions or private letters, or any other supporting authority. The Commission therefore has no basis for adopting DECo's claims or assertions regarding the requirements of IRS Section 45 in this case.

Another major problem with the arguments made by MPSC Staff or DECo in prior cases (no doubt to be repeated here) concerned the implication that Section 45 would in any way affect or have any relevance to the MPSC's ratemaking authority. Section 45 dealing with the

[4] *Great Lakes Steel v Public Service Comm,* 130 Mich App 470, 481; 334 NW2d 321 (1983)., *General Electric Co v Joiner,* 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997), quoted with approval in *Gilbert v Daimler Chrysler Corp,* 470 Mich 749, 783; 685 NW2d 391 (2004). *Daubert v Merrell Down Pharmaceuticals, Inc,* 43 F3d 1311, 1316 (CA 9, 1995).

obtaining of production tax credits for REF coal processing did not, and do not, in any way complicate ratemaking recognition of the tax credits or the revenue value of the tax credits. No party has cited any provision in either IRC Section 45, or any other Section of the IRC, that in any way affects the manner in which the state regulatory commission should regulate the rates of the regulated utility with respect to production tax credits and revenues associated with the processing of coal under REF projects. Certainly, any implication of federal preemption of state ratemaking authority with respect to the treatment of the subject tax credits (or monetization of revenues arising thereby) has not been claimed by any party. The Congress, in the Federal Power Act, has expressly provided for the division of regulation of electric rates with respect to separate interstate and intrastate spheres. The MPSC also has the primary regulatory jurisdiction under state statutes to review the ratemaking treatment of the REF issues, fully consistent with Congress' demarcation in the regulation of utilities between the federal and state governments. Congress in Section 201(b) of the Federal Power Act, 16 USC § 824(b), expressly preserved state ratemaking and other regulation over retail electric sales. *Connecticut Light & Power Co v FPC*, 324 US 515 (1945); *New York v Federal Energy Regulatory Comm*, 535 US 1 (2002); *Detroit Edison v FERC*, 334 F3d 48 (2003). The proper recognition of tax credits or monetization revenues derived therefrom by the state ratemaking commission also would not interfere with the purposes and objectives of Congress either with respect to administration of the Internal Revenue Code or electric ratemaking, or environmental compliance. Again, no party has even hinted at such claims in this case.

To be certain, a DECo utility subsidiary could qualify as a “non-regulated entity” just as easily as a DTE affiliate, and the REF transactions could have been similarly conducted through the use of a DECo subsidiary. It is thus clear that the establishment of the Fuels Company affiliates, under DTE rather than under DECo, had the overriding purpose of facilitating the

diversion of the tax credit revenues as an offset to coal costs for ratemaking purposes for the profit making benefit of DTE. This purpose is contrary to the objectives and purposes of Act 304, and the duties to both the MPSC and the utility under Act 304.

Based upon the above, the Commission retains full authority to "roll-in" or otherwise recognize for ratemaking purposes all of the tax credit benefits, or monetization of revenues derived therefrom, realized by the Fuel Companies with respect to the handling and processing of the coal at DECo's plant sites. The Commission should undertake such ratemaking remedies.

C. The diversion of the production tax credit revenues from being an offset to DECo's coal costs for ratemaking purposes, to DTE's unregulated affiliates, constitutes an abuse of affiliated transactions

MCAAA asserts that the diversion of the REF production tax credit revenues to unregulated affiliates of DTE in lieu of being recognized as an offset or credit to DECo's coal costs, constitutes the kind of intercorporate affiliated transaction that should be scrutinized and remedied by the MPSC in this and other ratemaking cases.

The situation in this and other cases whereby DTE seeks to divert REF production tax revenues away from the ratemaking process is just another example of such affiliated transactions. The Commission should therefore remedy this situation to protect ratepayers, just as the Commission and Courts have done so in other analogous cases and circumstances.

Both statutory and case law establish that the Commission can and should scrutinize affiliated transactions in order to set and maintain just and reasonable rates and in otherwise protecting ratepayers. Affiliated transactions between a regulated utility and its unregulated affiliates can adversely impact the regulated utility's costs and rates, including both the base rates and Act 304 rates.

The Commission has broad jurisdiction and authority to review and adopt ratemaking remedies to deal with affiliate transactions under its enabling acts and Act 304 to: (1) set and maintain "just and reasonable" base rates and also rate surcharges or credits for fuel and purchased power costs regulated under Act 304;[5] (2) to regulate the books, records and accounting of utilities, and (3) to require reports, production of documents, and to undertake investigations as to utility costs and rate matters, and to establish rules and regulations governing utilities and the regulation thereof.

The MPSC has inherited all of the jurisdiction, duties, and authority previously possessed by its predecessor commissions, the Public Utilities Commission and the Michigan Railroad Commission, *Union Carbide Corporation vs. Public Service Commission*, 431 Mich 118, 150, 155-156 (1988); Section 4 of the Public Service Commission Act, MCL 460.4; Section 4 of the Public Utilities Commission Act, MCL 460.54. The Commission therefore has broad ratemaking authority over CECo's rates pursuant to all of the various "enabling acts" applicable to the Commission.[6]

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[5] *Attorney General v PSC*, 189 Mich App 138, 146 (1991), *Northern Michigan Water Company v Public Service Commission*, 381 Mich 340, 351 (1968). Sections 4(a) and (b), 6(a), 10(g), 22 and 32 of the Railroad Act, 1909 PA 300, MCL 462.4(a) et seq.; Section 8 of the Public Utilities Commission Act, 1919 PA 410; MCL 460.58 et seq., Sections 6 and 6a of the Public Service Commission Act 1939 PA 3, MCL 460.6 et seq., and Section 7 of the Electric Transmission Act, 1909 PA 106, MCL 460.557 et seq.

[6] These statutory provisions include Section 6 and 6a of the Public Service Commission Act, MCL 460.6 and MCL 460.6a, as amended by 1982 PA 304, MCL 460.6 et seq., and MCL 460.6a et seq., (Act 304), and 2000 PA 141, Section 10-10cc, MCL 460.10 et seq. (Act 141), Section 4 et seq. of the Public Utilities Commission Act, MCL 460.54 et seq., Section 2 et seq. of the Railroad Act, MCL 462.2 et seq., the Electric Transmission of Electricity Act, Section 1 et seq., MCL 460.551 et seq., the Electric Transmission Line Certification Act, Section 1 et seq., MCL 460.561 et seq., and related statutes. The Commission is also subject to the procedural requirements of Michigan's Administrative Procedures Act ("MAPA"), MCL 24.201 et seq., and the Commission's own Rules of Practice and Procedure Before the Commission, 1992 AACS R 460.17101 et seq. ("Commission Rules").

General rate cases and Act 304 PSCR proceedings are also subject to formal contested case procedures, as set forth in Section 6a and MAPA. The Commission is to make legal and factual findings and to render its decision based upon the whole record, as formulated by the parties (MAPA Section 85, MCL 24.285). The Commission has also established the *Commission's Rules of Practice and Procedure Before the Commission*, 1992 AACS, R 460.17101 *et seq*., to govern contested rate and other procedures. These rules incorporate the Michigan Court Rules relative to numerous matters, including the issuance of subpoenas, discovery, the taking of depositions, and numerous other matters. Our courts have affirmed the Commission's widespread authority to undertake discovery in contested cases, and to obtain all necessary information to regulate the rates and books of all utilities. *Midland Cogeneration Venture Ltd and Consumers Power Co v Michigan Public Service Comm'n*, 199 Mich App 286; 501 NW2d 573 (1993). These procedures give the Commission, and parties participating in contested rate and PSCR proceedings, enhanced powers to investigate and to require the production of information concerning claimed costs and requested rates.

The Commission also has specific jurisdiction and authority to investigate rate and service issues, and actions, practices, or omissions of utilities, and to commence proceedings to protect ratepayers and to undertake corrective action pursuant to the filing of a formal complaint.[7] Section 8 also provides the Commission with the authority to hold hearings, to subpoena witnesses, and require the production of books and records, for purposes of investigating and ruling upon the subject matter of the complaint. Section 7 also provides the

[7] Section 8 of the Public Utilities Commission Act, MCL 460.58, Sections 4 and 6 of the Public Service Commission *Act*, MCL 460.4 and MCL 460.6, Section 7 of the Transmission of Electricity Act, MCL 460.557; and Sections 10(g) and 22 of the Railroad Act, MCL 462.10(g) and 462.22. The Commission Rules, R 460.17101 *et seq.*, including Rules 501 – *et seq.*, R 460.17501 *et seq.*

Commission broad powers to investigate and hold hearings regarding the subject of the complaint, and to inspect the books and records of a utility and to inquire into the matters relating to the complaint.

The Commission also has extensive jurisdiction and authority to regulate the books, records and accounting of utilities, to require the filing of reports, the production of documents, and to undertake investigations as to utility costs and rate matters, and to require utilities to maintain and produce for review information, data, and contracts as needed by the Commission to properly regulate and perform its duties, and to establish rules and regulations governing utilities and the Commission's regulation thereof.[8] The Commission is empowered with respect to a rate, service, or other investigation to make an audit and analysis of the books and records of a utility. Section 6, Public Utilities Commission Act, MCL 460.556, Section 28, Railroad Act, MCL 462.28. The Commission also has established a Uniform System of Accounts for Major and Nonmajor Electric Utilities (R 460.9001 and R 460.9019), which governs the manner in which utilities are to keep their books for regulatory purposes.

The Commission also has jurisdiction and authority to issue declaratory rulings regarding its jurisdiction and authority, and regulatory matters, pursuant to MAPA Sections 33, 63, and 64, MCL 24.233 et seq., and Rule 701 of the Commission's Rules, 1992 AACS R 460.17701.

The Commission's authority above has been further clarified and buttressed by the federal statutory changes under the 2005 EPAct. Federal law now delegates to the states enhanced authority to scrutinize holding company transactions as part of the elimination of most previous

[8] Sections 2, 28, and 29 of the Railroad Act, MCL 462.2 *et seq.* Sections 3, 4, 5, 6, 7, and 8 of the Public Utilities Commission Act, MCL 460.53 *et seq.*, Sections 6, 6a, and 6j *et seq.*, of the Public Service Commission Act, MCL 460.6 *et seq.*, and Sections 6 and 7, of the Electric Transmission Act, MCL 460.556 *et seq.*

provisions of the federal Public Utility Holding Company Act (PUHCA), as indicated by Section 1265, 42 USC §1265, which states:

> SEC. 1265. STATE ACCESS TO BOOKS AND RECORDS.
>
> (a) IN GENERAL. - Upon the written request of a State Commission having jurisdiction to regulate a public-utility company in a holding company system, the holding company or any associate company or affiliate thereof, other than such public-utility company, wherever located, shall produce for inspection books, accounts, memoranda, and other records that-
>
> (1) have been identified in reasonable detail in a proceeding before the State commission;
>
> (2) the State commission determines are relevant to costs incurred by such public-utility company; and
>
> (3) are necessary for the effective discharge of the responsibilities of the State commission with respect to such proceeding.
>
> (b) LIMITATION. - Subsection (a) does not apply to any person that is a holding company solely by reason of ownership of one or more qualifying facilities under the Public Utility regulatory Policies Act of 1978 (16 U.S.C. 2601 *et seq.*).
>
> (c) CONFIDENTIALITY OF INFORMATION. - The production of books, accounts, memoranda, and other records under subsection (a) shall be subject to such terms and conditions as may be necessary and appropriate to safeguard against unwarranted disclosure to the public of any trade secrets or sensitive commercial information.
>
> (d) EFFECT ON STATE LAW. - Nothing in this section shall pre-empt applicable State law concerning the provision of books, accounts, memoranda, and other records, or in any way limit the rights of any State to obtain books, accounts, memoranda, and other records under any other Federal law, contract, or otherwise.
>
> (e) COURT JURISDICTION. - Any United States district court located in the State in which the State commission referred to in subsection (a) is located shall have jurisdiction to enforce compliance with this section.

A 2006 research article provides insightful descriptions of the dangers involved relative to affiliated transactions, and also the impact of EPAct 2005[9]

> Technically, in repealing PUHCA 1935, Congress in § 1263 of EPAct 2005 substituted a new Public Utility Holding Company Act of 2005 (PUHCA 2005)[10]. PUHCA 2005 is much more limited than the original, however. The broad authority of the Securities and Exchange Commission under PUHCA 1935 to regulate public utility holding companies is replaced primarily with statutory provisions dealing with access to books and records for both state commissions and the Federal Energy Regulatory Commission (EPAct 2005 §§ 1264 and 1265). Both state commissions and FERC have the ability to check affiliate transactions (§ 1267). And both state commissions and FERC have the authority to deal with cost allocations and cross-subsidies. For the analysis in this article, it is also important that PUHCA 2005 authorizes the states and federal agencies to protect utility customers with "otherwise applicable law" (§ 1269).
>
> * * *
>
> The savings provision in EPAct 2005 § 1265 provides that, under otherwise applicable state laws, state commissions are allowed to gain access to books and records. State commissions are also not precluded form exercising their authority under otherwise applicable laws to determine whether a utility company may recover in its rates any costs of an activity performed by an affiliate, or any costs of goods or services acquired by the utility from the affiliate. There is another savings provision in PUHCA 2005 pursuant to EPAct 2005 § 1267 that makes this clear.[11] A state commission could obtain books and records through exercise of its own authority pursuant to state statute, commission could obtain books and records through exercise of its own authority pursuant to state statute, commission rule, or order. Such state authority might be broader than the federal access to books and records discussed above.
>
> EPAct 2005 § 1275 contains an explicit savings provision that allows state commissions to continue to exercise their authority under otherwise applicable law to deal with cost allocation and cross-subsidy issues.[12]

Michigan judicial authority has held that the MPSC may and should scrutinize and remedy intercorporate affiliated transactions of a holding company whereby the unregulated

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[9] "*Repeal of the Public Utility Holding Company Act of 1935: Implications and Options for State Commissions*", by Robert E. Burns and Michael Murphy, the Electricity Journal, Volume 19, Issue 8, October 2006.

[10] *The Public Utility Holding Company Act* of 2005, 42 USC § 1261 *et seq.*

[11] EPAct 2005, Section 1267(b).

[12] EPAct 2005, Section 1275 (c).

parent company and its affiliates reap profits under the guise of expenses passed through to customers of a utility where no protections inherent in arms-length bargaining is present. *Michigan Bell Telephone Co v Public Service Commencement*, 85 Mich App 163; 270 NW2d 546 (1978), *CMS Energy Corp v Attorney General*, 190 Mich App 220, 475 NW2d 451 (1991), *Midland Cogeneration Venture Limited Partnership, et al v Michigan Public Service Commission, et al*, 199 Mich App 286; 501 NW2d 573 (1993), and *In re Application of Detroit Edison Company*, Supreme Court dockets 134667, 134668, 134669, 134671, 134672, 134674, 134767, and 134677, where the Michigan Supreme Court in its May 1, 2009 Order affirmed the Commission's order, thereby reversing and vacating a Court of Appeals decision in *In re Application of Detroit Edison Company*, 276 Mich App 216 (2007).

The record establishes that the REF proposal intrudes deeply into integral utility functions and costs that should remain under the utility's control and remain subject to transparent regulatory review by the Commission. The REF transactions overall involve a construct in which the newly established "fuel company" affiliates will earn an unregulated profit (plus the realization of significant tax credit benefits) at the expense of the utility. While DECo claims that DECo's costs are capped, this does not remove the obvious fact that the fuel affiliates will undoubtedly realize huge profits and tax benefits at DECo's expense. The overall proposal establishes a construct whereby the unregulated affiliates have been interjected into major basic supply chain functions of DECo involving coal transportation, inventory management, and coal handling. The fuel company affiliates are set up to divert opportunities for DECo itself to have reduced its coal costs by undertaking the REF functions itself so as to realize the tax credit revenue benefits involved. The profit that the fuel company affiliates earn, along with the tax credits that they have obtained, by the REF transactions are derived in reality at the expense of DECo and its ratepayers. Inherently, these profits and tax credits are derived from cost decreases

or tax benefits that otherwise would go to DECo if DECo had undertaken the REF program itself or through DECo subsidiaries and not through fuel company affiliates set up by DTE.

MCAAA also asserts that the unwarranted REF benefits diverted to DTE and its unregulated affiliates, at the direct expense and detriment of DECo's customers, is contrary to the plain language and objectives of Act 304. The record in this case and prior cases establishes that each of the Fuel Companies set up to handle or process REF coal at DECo's plants have only about three employees (U-16434-R, Exhibit MCAAA-12; this case, see T 767-768). In contrast, the long-standing entire coal supply chain of DECo, which has been established over many decades, includes thousands of employees engaged in administration, contracting, legal matters, coal acquisition, rail and vessel transportation, among a myriad of other functions that makes it possible for DECo's vast coal inventories to arrive at each of its coal generating plants. The records in all of the cases on this issue have revealed, by DECo's own witness admissions, that DECo handles all of the administration and other functions in the coal supply chain, while the Fuel Companies with three employees each admittedly must undertake the most bare bones, artificial, and limited functions. Yet, the Fuel Companies claim to generate many millions of dollars annually, by obtaining tax credits of $6.33 per ton as of 2010 (to be escalated annually) for each of the millions of tons of coal inventories assigned to the REF process.

DECo's witnesses have also admitted that Detroit Edison sells its coal inventories to the Fuel Companies, and then buys the coal back from the Fuel Companies at the same price (with relative minor adjustments related to cost adders, coal ash adjustments, etc). DECo therefore admits that the Fuel Companies sell the REF coal back to DECo at a price that does not reflect a subtraction for the per-ton tax credit generated under the tax code (which was $6.33 per ton for the reconciliation year 2010). Considering the vastness of the long standing coal supply chain of

DECo (which long pre-dated the creation of the DTE parent holding company and its subsidiaries), and given DECo's remaining and existing responsibilities and costs related to this coal supply chain (in contrast to the artificial, anemic, self-serving, and recent creation of Fuel Companies with only three employees each), it becomes clear that an incredible imbalance now exists by which DECo is being taken advantage of (along with its customers) so as to provide unwarranted, unearned, windfall benefits to DTE's unregulated affiliates (namely DTE, and its affiliates DTEES and the Fuel Companies).

The reality is that the cross-subsidies and transfer of windfall benefits to the unregulated affiliates in the DTE holding company system are not limited to the shocking situation described above. In fact, the record in the previous cases and in this case establishes that unacceptable cross-subsidization logically exists in several other ways. For example, there is no evidence in the record in this or other cases that the Fuel Companies deriving the benefits of fuel credit revenues adequately compensated DECo's vast coal supply chain network and costs for the function of acquiring and delivering the coal to DECo's plant sites, with an appropriate margin or rate of return to compensate this supply chain for these vast activities. There is no analysis as to what the cost and benefits would be if DECo (or its own separate affiliates or subsidiaries) had undertaken the same REF process itself so as to capture the tax credit revenue benefits while still complying with IRC Section 45. The evidence in various cases, including U-16434-R, also established that DTE as the controlling holding company has placed and required the placement of excess REF production units at DECo's coal plants, in excess of what DECo would require (one REF-processing unit per plant) to meet REF processing for its own purposes. This means that DECo has been utilized as the "guinea pig" to develop a market for the unregulated DTE and its affiliates to then sell the REF production units and process to other third parties. In fact, the record in these cases establish that DECo has already relocated excess REF production units,

tested and developed at DECo's sites (at DECo's expense) to other out-of-state locations, including Oklahoma and Illinois. This creates another form of cross-subsidization of the utility in favor of unregulated affiliates in the DTE holding company system (which controls the subsidiary DECo) in a manner which is unwarranted.

This situation strongly supports dramatic action by the Commission to reject DECo's REF proposals, and to block the associated cross-subsidization inherent in such inter-affiliated corporate abuses, and to remedy the resulting extreme imbalance relating to utility stockholder and customer interests.[13]

The approach advocated by DECo and the MPSC Staff in these REF cases also flies in the face of the standards and criteria of Act 304 itself which requires the utility to carry its burden of proof to demonstrate all regulatory actions undertaken to minimize its PSCR costs. The reality is that the decision by the unregulated holding company, DTE, and its creation of affiliates to take advantage of DECo, constitutes an affiliated transaction abuse which the Commission should curtail, limit, and reverse, consistent with the statutory and judicial authority cited above.

The MCAAA also cautions against the Commission misanalyzing this case as one involving simply reductions or disallowances from the cost of coal as advocated by DECo. In other words, this case does not involve simply the disallowance of the cost of a Fuel Companies adder or of some miscellaneous O&M cost, or of minor other costs. The major issue is actually straightforward, that is, that DTE as a holding company has utilized its affiliated intercorporate structure and power to seek to divert scores of millions, if not hundreds of millions of dollars

[13] Michigan Supreme Court precedent established that the duty of the Commission is to balance the interests of utility stockholders and customers (e.g., *City of Detroit v MPSC*, 308 Mich 706; 14 NW2d 784 (1944); *Union Carbide v MPSC*, 431 Mich 135; 428 NW2d 322 (1988)).

over a ten year period, to the benefit of its unregulated company structure at the direct expense (or lack of recognition of a coal cost offset) of DECo's customers. This is in the context of the corporate structure in which DECo has no power to defend itself as compared to a situation where it was a separate independent utility. The Commission's regulatory ratemaking duties must override the corporate strategies of a self-serving unregulated holding company system which seeks to pass through or maintain costs of the captured utility to its customers while capturing for itself the unearned and windfall benefits of associated tax credits or refunds integrally related to the same fuel supply chain. The failure of the Commission to recognize the importance of its jurisdiction under act 304 to prevent such a holding company abuse will destroy the authority of the Commission under the plain language and purposes of Act 304 to the detriment of the public interests adopted by the people of Michigan.

D. The record in this and previous cases establish that significant REF tax credit revenues have been diverted from being accounted for as coal cost offsets for this 2011 PSCR reconciliation year

The record in this and other cases also establishes that significant REF tax credit revenues have been diverted to the unregulated DTE affiliates and away from being accounted for as an offset to DECo coal costs commencing in the 2010 PSCR year and during this PSCR year.

The 2010 SEC 10-K reports of DTE/DECo presented by MCAAA in U-16047-R (and quoted in Facts, *supra*) establish that DTE (or Fuel Companies) realized REF production tax credits in 2010.

MCAAA's testimony and exhibits in U-16434-R (summarized in Facts, *supra*) also establish that significant REF tax credit revenues are associated with the 2011 PSCR year. In fact, over the 10-year period of the REF tax credit program, the revenue diversion can easily exceed $500 million (e.g., U-16434-R Crandall Facts, *supra*, and Exhibit MCAAA-5). Also,

Exhibit MCAAA-9 (MCAAA/DE-62(49), p 2), in U-16434-R, comprising a discovery response by DECo, states in relevant part:

> In 2011, the Company spent $77,868,516 on refined coal and resold coal from the Belle River Fuels Company (BRFC), $87,107,457 on refined coal and resold coal from the St. Clair Fuels Company (SCFC), and $54,481,612 on refined and resold coal from the Monroe Fuels Company (MFC).

MCAAA's evidence in this case (quoted *supra*) again verifies that many millions of dollars in tax credit revenues and benefits have been diverted from being reflected as an offset to DECo's coal costs, which situation will continue in 2013 unless properly addressed and remedied by the Commission.

DECo's erroneous premise in this and in previous cases is that the issues regarding REF coal transactions in this case involves a review of only (affirmative) costs or cost increases, coupled with DECo's assertions that no REF costs exist. In contrast, MCAAA's evidence and briefing arguments have consistently asserted that the tax credit revenues and benefits are derived from and associated with DECo's coal supply chain, and should constitute offsets or reductions to DECo's coal costs (negative cost adjustments to determine DECo's net cost of coal). The failure to offset the tax credit revenues associated with DECo's coal and utility related operations would result in a failure to determine the DECo's proper net coal costs to be recognized for ratemaking purposes in this case.

Importantly, DECo has not asserted that no production tax credit benefits were monetized or were realized by DTE and its specially created Fuel Company or other subsidiaries (which were established as an affiliated company contrivance to divert the tax credit revenue benefits away from being an offset to DECo's coal costs). Instead, DECo has refused to provide said information through discovery or through the hearing process.

E. The REF transactions demonstrate that DECo has not complied with the letter and spirit of the Commission's Code of Conduct and affiliated transaction guidelines

MCAAA also asserts that DTE's/DECo's REF transactions also demonstrate that DECo has not complied with the letter and spirit of the Commission's Code of Conduct and affiliated transaction guidelines. MCAAA's testimony and exhibits in this and related Act 304 cases demonstrates this.

As a caveat, however, MCAAA asserts that the primary standards and criteria applicable to the utility's cost minimization duties, and the Commission's regulatory duties, are established by statute, including Act 304, and by prevailing judicial precedent. Commission regulatory orders creating a non-statutory Code of Conduct does not dispense with or displace the regulatory ratemaking scheme mandated by statute.

The record and arguments in this case, along with the ALJ's PFD in U-16892, establish that DECo has violated the Commission's Code of Conduct and the affiliated transaction guidelines. This conclusion is clear by the numerous instances of cross-subsidization that have occurred and are occurring under the REF transactions. The failure of the Fuel Companies to sell the coal back to DECo at a price that is discounted for the per-ton tax credits generated by the Fuel Companies justifies the conclusion that improper cross-subsidization under the Code of Conduct and affiliated transaction guidelines has (and is) occurring (DECo's witnesses have admitted that the coal buy back occurs at the same price, with further upward adjustments, without discount for the tax credit benefits).

Moreover, the record strongly suggests that the market price for coal at St. Clair, Michigan, is or should be regarded as being <u>higher</u> than DECo's costs and thus the sale of DECo coal inventories to the fuel company affiliates at DECo's costs underprices the revenues DECo

should receive for these sales. The problem is compounded by the fact that the Fuel Companies will sell the coal back to DECo at a profit (while important tax credit benefits are captured by the fuel companies or their third party investors, and not DECo).

The PFD in U-16892 properly found non-compliance by DECo of the Code of Conduct. As an example, the U-16892 PFD states:

> By artfully structuring layers of corporate ownership and investment partners to take advantage of the available tax credits, DTE Energy has devised a scheme to generate substantial profits from the chemical treatment of Detroit Edison's coal. (PFD, p 84).
>
> * * *
>
> Detroit has agreed to contractual relationships with its affiliates for the provision of REF for a ten year period. Under these agreements, the affiliates stand to profit considerably…. (PFD, p 86).

The PFD in U-16892, at p 71, also cited Section IIB of the Code:

> B. An electric utility's… regulated services shall not subsidize in any manner, directly of [sic] indirectly, the unregulated business of its affiliates or other separate entities.

While the U-16892 PFD opines that Edison is not in compliance with the Code of Conduct, it fails to specifically find that Edison's transfer pricing is a violation. The PFD in U-16892 stated:

> If Detroit Edison's affiliate provides services, products, or property to Detroit Edison, compensation for services and supplies shall be at the lower of market price or 10% over fully allocated embedded cost and transfers of assets shall be based upon the lower of fully allocated embedded cost or market price….

In turn, DECo has claimed that the fuel companies asymmetric transfer pricing complies with the Code of Conduct. However, the fuel companies' embedded cost is not the price that they initially pay Edison for the coal. Edison artfully crafted its new corporate structure to

ensure that the REF tax credits were captured by the fuel companies. Therefore, the embedded coal cost of the fuel companies includes (or is reduced by) the REF Tax Credits that they (instead of DECo) generate.

It may also be noted that the transfer of title to coal by DECo to the Fuel Companies at the MERC facility in Superior Wisconsin (i.e., the purchase of coal by the Fuel Companies from DECo) does not comport timewise with the repurchase of the coal by DECo from the Fuel Companies at DECo's plant sites. In other words, a significant time difference exists. Thus, there can be no contemporaneous and consistent comparison of "market prices" to allocated costs to comply with the tests established by the Code of Conduct.

The Commission should rule that the gross REF Tax Credits generated in 2010 and thereafter must be reconciled. This dollar amount can be determined. However, DECo is the only party that can document and justify any costs that it believes should be netted against the gross REF Tax Credits. This burden should be placed upon DECo, and its affiliates, which have full access to this data, unlike any other party.

The lack of DECo's compliance with the Code of Conduct and affiliated transaction guidelines, as well as the standards of Act 304, is also established by the lack of forthrightness by DECo concerning the REF projects, the resulting tax credit benefits, and DTE's creation of unregulated affiliates to capture the tax credit benefits in contrast to the creation of DECo affiliates to capture such benefits. DECo never provided forthright advance disclosures of the REF program and associated tax credit revenues. DECo also never filed for an advance approval of the accounting and ratemaking treatment of same, before or during the 2010 Plan case. DECo in this and previous cases also refused to answer all discovery inquiring into the amount of tax credit revenues denied or tax credits "monetized" in 2010 (or at any other time) by the

unregulated DTE and its subsidiaries. DECo has thus not complied with the letter and spirit of provisions of Act 304, and of the Commission orders establishing the Code of Conduct or the affiliated transactions guidelines.

F. The REF program is not necessary to meeting state or federal environmental standards, including future mercury standards--in any event, this assertion, if made, does not justify diverting the tax credit revenues away from DECo as a regulated utility

In U-16434, the Commission's order made an indirect reference to DECo's efforts to address future environmental standards, including the then expected future standards applicable to mercury emissions.

The evidence in this case and in U-16434-R includes the forthright acknowledgement by DECo Witness Rogers that the REF process is not necessary to meet state and federal environmental standards, including those future standards applicable to mercury standards. DECo Witness Rogers testified instead that such emissions standards can readily be met by other available technologies and methods. At the same time, DECo Witness Rogers suggested that the REF process may reduce the cost of such emission control methods, but acknowledged in U-16434-R that such future cost comparisons and forecasts are speculative.

While all parties would ostensibly be in favor of reducing emissions and meeting environmental standards, the overriding logical concept here is that such goals and objectives do not justify the diversion of the REF tax credit revenues from the regulated utility (DECo) and to the DTE unregulated affiliates. In fact, the opposite is true. It would be beneficial for the utility to receive the REF coal related tax credit revenues so that the utility would be in a strong financial position to address such environmental matters, which are the direct responsibility of the utility and not of DTE or its unregulated affiliates.

G. The various contracts between DECo and the Fuel Companies demonstrate that the REF program constitutes an affiliate abuse to benefit unregulated DTE profits at the expense of DECo ratepayers

The numerous agreements between DECo and the numerous Fuels Company affiliates (included in Exhibit A-30 and A-30 supplemental in U-16434-R) also demonstrate that the REF program constitutes an affiliate abuse to benefit unregulated DTE profits at the expense of DECo ratepayers. While a summary of all of these contracts would be voluminous, this conclusion can be drawn from the shortcomings and "non-arms-length" provisions inherent in the contracts.[14]

The various contracts demonstrate the favoritism granted by DECo to DTE's Fuels Company affiliates. For example the contracts in reality relieve the Fuel Companies from having to deliver REF coal, and permit sales or resales of coal to third parties, and contain fairly broad warranty disclaimers and limitations of liability.

MCAAA Witness Peloquin, in his surrebuttal testimony in U-16434-R (quoted Facts, *supra*) also pointed out some of the shortcomings of DECo's contracts with DTE's Fuel Companies affiliates. Witness Peloquin's Exhibit MCAAA-34 in U-16434-R also further demonstrated his contract criticisms.

H. The ALJ should Recommend and the Commission should invoke audit and ratemaking remedies to determine the proper coal cost offsets to determine just and reasonable PSCR rates

The MCAAA asserts that the ALJ should recommend, and the Commission should adopt, audit and ratemaking remedies to determine and recognize proper REF tax credit revenues as offsets to DECo's coal costs in this and other PSCR cases.

[14] A listing of the contracts, and a summary of a representative contract, such as the DECo/Belle River Fuels Company contract is attached to this Brief as Attachment A.

The Commission could and should offset all PSCR rates by the revenue benefits obtained from the REF transactions and tax credits.

The Commission for many years has already utilized the “unified ratemaking approach” relative to DECo and its affiliate, the MERC coal handling facilities, ever sense the MPSC orders in U-5041 and U-5108. The same ratemaking approach could be used here to properly reconcile DECo’s coal costs and to recognize as cost offsets the REF tax credit revenues derived from DECo’s utility business and coal operations. Under this approach, all increased costs (or lost savings associated with the maintenance of higher costs, or tax the diversion of benefits, that otherwise would have inured to DECo if the REF transactions had not occurred) would be credited to DECo for ratemaking purposes.

MCAAA’s reference to the need for a comprehensive audit and review of the books and records of DECo, DTE, and all REF-related subsidiaries, is also supported by extensive state statutory authority granting the Commission the power to undertake such audits, as augmented by the audit powers delegated to state commissions under federal law, including Section 1265 of the Public Utility Holding Company Act of 2005, 42 USC 1261, *et seq*, which is incorporated in the Energy Policy Act of 2005, as discussed earlier.

The ALJ and Commission should also order a reopening of this case and should provide for a thorough Staff audit of the REF transactions, followed by further evidentiary proceedings and supplemental briefing. While this would delay a final order in this case -- this by itself is of no significance and harms no one. In contrast, given the delayed revelations by DECo of the REF transactions, and the immense regulatory and cost implications relating to this "piece-mealing" of DECo's coal supply chain, the issue needs to be more thoroughly reviewed in this case.

The Commission should also examine what regulatory remedies are necessary to address these REF transactions, apparently undertaken by DTE on a unilateral basis and imposed upon DECo. For example, this Commission could require appropriate rate adjustments and disallowances. The Commission could order that all books and records of the fuel company affiliates will be open and available to full audits by the Commission on an ongoing basis.

The Commission should also clarify that the appropriate remedies in these REF cases are not only the rejection of any requested "cost increases," arising from REF, but also to recognize as an offset or reduction to coal costs of the revenue benefit or value of the REF tax credits (i.e. recognition of the corresponding reduction in coal costs to account for the REF tax credit revenues or benefits). In essence, all cost and cost offset (revenues) related to coal should be rolled into Act 304 review and ratemaking.

The cost offsets to coal costs arising from the tax credit revenues or benefits should also be determined and imposed in the Act 304 cases, for each year and continuing over the 10 or more years of the REF tax credit program (and as part of the "roll-over" process the Commission used from one Act 304 year to the next).

In short, if a separate case were to be initiated with respect to the REF issues and remedies, all of the remedies provided by Act 304 for each year must nevertheless be preserved. Otherwise, the diversion of the REF issues to a separate case could disengage and destroy the rate remedies that are necessary and appropriate under Act 304 (i.e. the recognition as an offset to coal costs each year of the revenue benefit or values arising from the REF tax credits).

MCAAA also requests that the remedies should extend to requiring DECO to provide full disclosure, and open transparency, of all books and records, contracts, cost and revenue impacts,

financial records, etc., of DECO, and also of DTE and all affiliates involved in the REF projects, to the Commission, its Staff, and to intervenors in Act 304 cases.

IV. CONCLUSION AND RELIEF

The MCAAA requests the ALJ to recommend, and the Commission to adopt, the arguments and remedies presented by the MCAAA in this case and in previous cases concerning the proper ratemaking treatment of the REF coal issues.

Respectfully submitted,

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Dated: June 27, 2013

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of
THE DETROIT EDISON COMPANY for
Authority to implement a Power Supply Cost
Recovery Plan in its rate schedules for 2013
Metered Jurisdictional Sales of Electricity.
_____/

Case No. **U-17097**
(Paperless e-mail)

ATTACHMENT A

TO

INITIAL BRIEF OF
MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION

Listing of Agreements (and Amendments)

The Agreements, with Amendments, and/or attachments, included in Exhibit A-30, as supplemented by DECo's January 23, 2013, filing include the following:

1. **Refined Coal Supply Agreement** by and between **Belle River Fuels Company, LLC** and **The Detroit Edison Company**, dated December 4, 2009, **Amendment to Belle River Refined Coal Supply Agreement**, dated March 1, 2010;
2. **Coal Inventory Purchase Agreement** by and between **Belle River Fuels Company, LLC** and **The Detroit Edison Company**, dated December 4, 2009, and **Amendment to Belle River Coal Inventory Purchase Agreement with Detroit Edison** dated March 1, 2010, and **Amendment No. 2 to Belle River Coal Inventory Purchase Agreement** dated December 1, 2010;
3. **License and Services Agreement** by and among **Belle River Fuels Company, LLC** and **The Detroit Edison Company** and **Michigan Public Power Agency**, dated August 24, 2009, and **Amendment to Belle River License and Services Agreement** dated March 1, 2010;
4. **Environmental Indemnity Agreement** by and between **Belle River Fuels Company, LLC** and **The Detroit Edison Company**, dated August 24, 2009 and **Amendment to Belle River Environmental Indemnity Agreement**, dated March 1, 2010;
5. **Coal Handling and Consulting Agreement** by and between **Belle River Fuels Company, LLC** and **The Detroit Edison Company**, dated December 4, 2009 and **Amendment to Belle River Coal Handling Consulting Agreement**, dated March 1, 2010;
6. **Acceptance Period Coal Inventory Purchase Agreement** by and between **Belle River Fuels Company, LLC** and **The Detroit Edison Company**, dated December 4, 2009;
7. **Refined Coal Supply Agreement** by and between **St. Clair Fuels Company, LLC** and **The Detroit Edison Company**, dated December 18, 2009, and **Amendment to St. Clair Refined Coal Supply Agreement**, dated March 1, 2010, and **Amendment No. 2 to St. Clair Refined Coal Supply Agreement**, dated January 7, 2011; **Amendment No. 3 to St. Clair Refined Coal Supply Agreement**, dated September 30, 2011;
8. **Coal Inventory Purchase Agreement by** and between **St. Clair Fuels Company, LLC** and **The Detroit Edison Company**, dated December 18, 2009, and **Amendment No. 1 to St. Clair Coal Inventory Purchase Agreement**, dated December 1, 2010;

9. **Acceptance Period Coal Inventory Purchase Agreement** by and between **St. Clair Fuels Company, LLC** and **The Detroit Edison Company**, dated December 18, 2009;

10. **License and Services Agreement** by and between **St. Clair Fuels Company, LLC** and The **Detroit Edison Company**, dated September 22, 2009, and **Amendment No. 1 to St. Clair License and Services Agreement**, dated January 7, 2011;

11. **Environmental Indemnity Agreement** by and between **St. Clair Fuels Company, LLC** and **The Detroit Edison Company**, dated September 22, 2009, and **Amendment to St. Clair Environmental Indemnity Agreement**, dated March 1, 2010, and **Amendment No. 2 to St. Clair Environmental Indemnity Agreement**, dated January 7, 2011;

12. **Coal Handling and Consulting Agreeme**nt by and between **St. Clair Fuels Company, LLC** and **The Detroit Edison Company**, dated December 18, 2009, and **Amendment to St. Clair Coal Handling and Consulting Agreement**, dated March 1, 2010, and **Amendment No. 2 to St. Clair Coal Handling and Consulting Agreement**, dated January 7, 2011, and Agreement effective January 1, 2011 between **The Detroit Edison Company** ("DECO"), a Michigan corporation, and **DTE ENERGY SERVICES, INC**. ("DTEES"), a Michigan Corporation (undated);

13. **Refined Coal Supply Agreement** by and between **Monroe Fuels Company, LLC** and **The Detroit Edison Company**, dated August 21, 2011, and **Amendment No. 1 to Monroe Refined Coal Supply Agreement**, dated November 16, 2011;

14. **Pre-Closing Coal Inventory Purchase Agreement** by and between **Monroe Fuels Company, LLC** and **The Detroit Edison Company**, dated August 21, 2011;

15. **License and Services Agreement** by and between **Monroe Fuels Company, LLC** and The **Detroit Edison Company**, dated June 13, 2011, and **Amendment No. 1 to Monroe License and Services Agreement,** dated November 16, 2011;

16. **Environmental Indemnity Agreement** by and between **Monroe Fuels Company, LLC** and **The Detroit Edison Company,** dated June 13, 2011, and **Amendment No. 1 to Monroe Environmental Indemnity Agreement**, dated November 16, 2011;

17. **Coal Handling and Consulting Agreement** by and between **Monroe Fuels Company, LLC** and **The Detroit Edison Company**, dated August 21, 2011, and **Amendment No. 1 to Monroe Coal Handling and Consulting Agreement**, dated November 16, 2011;

18. **Coal Feedstock Purchase Agreement** by and between **Monroe Fuels Company, LLC** and **The Detroit Edison Company**, dated August 21, 2011, and **Amendment No. 1 to Monroe Coal Feedstock Purchase Agreement**, dated November 16, 2011.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of
THE DETROIT EDISON COMPANY for
Authority to implement a Power Supply Cost Recovery Plan in its rate schedules for 2013 Metered Jurisdictional Sales of Electricity.
_____/

Case No. **U-17097**

ELECTRONIC SERVICE LIST

On the date below, an electronic copy of the **Initial Brief of Michigan Community Action Agency Association** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

Respectfully submitted,

Don L. Keskey

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