STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of
CONSUMERS ENERGY COMPANY for
authority to increase its rates for the generation
and distribution of electricity and for other relief.
_____/

Case No. **U-16191**
E-File/Paperless

REPLY BRIEF OF THE
MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION

The Michigan Community Action Agency Association (MCAAA) files this Reply Brief in accordance with the schedule set by the Administrative Law Judge (ALJ). This case involves review of an application by Consumers Energy Company (CECO) to increase its base electric rates.

I. The Parties Appear to Agree to the Implementation of an External Trust for the DOE Liability Funds

Aside from details of trust structure and management, it appears that all parties to this case agree to the general concept that an external trust be established to receive the DOE Liability Funds in this case. On this basis, the Commission should proceed further to adopt this remedy in this case.

While appearing to agree to a trust remedy, CECO in this case continues to advocate in some respects against a trust remedy. MCAAA's reply brief this addresses CECO's arguments.

II. CECO's Option Analysis Dealing With the DOE Liability is Erroneous and Self-Serving.

CECO's initial brief (p 82) asserts that paying the DOE Liability to the federal government would be a superior option compared to the establishment of an external trust to receive the DOE Liability Funds (including principal and accumulated interest). CECO's brief (p 82) states:

> Consumers Energy has presented evidence evaluating benefits, costs, and risks of payment of the Company's obligation to the DOE *versus* (ii) paying the DOE Liability and extinguishing the DOE Liability obligation. Consumers Energy has concluded that the trust fund approach is the most expensive alternative from a customer standpoint and that it could create additional risks to customers. 3 TR 465. In contrast, paying the DOE Liability would accomplish the goal of assuring funding is paid to the DOE with the only incremental cost to customers being the cost of debt which is issued to replace funds previously available from use of the DOE Liability. 3 TR 465. This incremental cost will, however, exist under either the trust fund approach or the payment approach. Mr. Rao testified that, as between paying off the DOE Liability and placing funds into an external trust, the option that best balances customer and Company considerations would be paying off the DOE Liability. 3 TR 471, 474.

CECO's option analysis is seriously flawed. First, CECO has unnecessarily skewed the analysis based upon an unwarranted suggestion that an external trust should invest the funds only in 13-week Treasury Bills, in contrast to other prudent and conservative investments providing higher returns. For example, even if the trust limited itself to 10-year Treasury Bonds, the yields would be substantially higher than 13-week T-Bills. Such an approach would make the trust option far more beneficial, as confirmed by the expert witness presented by MCAAA, as discussed in MCAAA's Initial Brief.

Second, CECO's suggested option of paying the federal government now for the amount of the DOE Liability would be reckless and wholly inconsistent with the "quid-pro-quo" established by the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, *et seq* (the NWPA) and

the Standard Contract.[1] The essential bargain was the payment of fees in exchange for the disposal of spent nuclear fuel (SNF) by the DOE. *Indiana Michigan v Department of Energy,* 88 F. 3d. 1272 (1996); *Northern States Power Co v Department of Energy,* 128 F.3d. 754 (1997). The DOE has failed badly in carrying out its end of the statutory and contractual bargain for many years. However, DOE's inexplicable March 2010 Motion to Withdraw its License Application for the Yucca Mountain Repository in the NRC License Application case[2] threatens to permanently doom the bargain, and constitutes a complete default by the federal government. In this context, it would be highly unreasonable and imprudent for CECO to give up enforcement of the statutory and contractual bargain, and to reward the federal government for its default of same, by paying the federal government for the "DOE Liability." In reality, the so-called "liability" has disappeared because the federal government will not be disposing of SNF (a predicate upon which any payment obligation would arise).

CECO's witnesses in this case presented broad, vague, and erroneous statements which were devoid of any of the above legal analysis, and contained no explanation as to how CECO now analyzes the legal context in light of the federal government's default. CECO's presentation is devoid of any foundation based upon the present legal context. Exasperatingly, CECO in essence suggests giving up the enforcement of the Standard Contract, and failing to <u>increase</u> its damage claim by simply paying the federal government for its own complete default! This makes no sense!

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[1] Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. §961.11 *et seq.*

[2] *In the Matter of: U.S. Department of Energy (High Level Waste Repository),* Docket No. 63-001-HLW, ALSBP No. 09-892-HLW-CAB04.

The above illogic and drawbacks in CECO's position is further illustrated by its Initial Brief (p 83) wherein CECO states:

> Consumers Energy has the obligation under the NWPA to pay the DOE Liability to the federal government and the right under the NWPA to pay and extinguish the DOE Liability at any time. Any trust structure that directly or indirectly restricts or hinders this ability would be detrimental to the interests of the Company and customers. Among other things, it could impede the ability to bring to resolution a lawsuit Consumers Energy has filed against the DOE. 3 TR 519. If an external trust approach is used, it is important that it be structured in a way that assures the ability of Consumers Energy to extinguish the DOE Liability.

In the present legal default context, CECO does not have an obligation to pay the DOE Liability to the federal government due to the federal government's default. Paying the federal government in this situation undercuts needed enforcement of the Standard Contract, and the obtaining of enhanced legal remedies arising from the federal default, and would be highly detrimental to CECO and its customers. Now is not the time to reward the federal government for its default by paying it funds it is not entitled to under the Standard Contract. There is no need "to extinguish the DOE Liability" because the DOE has already done so by its own default.

Moreover, CECO's suggestion that a proper trust remedy "could impede the ability to bring to resolution a lawsuit Consumers Energy has filed against the DOE" is also meritless. First, CECO presents no explanation of the legal status and considerations existing in its lawsuit. Also, there is no benefit to "resolving the lawsuit" if such is accomplished by an unwarranted surrender of the lawsuit and its needed remedies. DOE's total default should make its federal Court of Claims damage claims even stronger, as has been demonstrated by similar lawsuits filed by other utilities. This is not the time to retreat and surrender such claims. CECO's citation of this consideration is unsupported by any explanation and thus should be given no weight.

CECO's position is also narrow, limited, and erroneous. Its characterization of the purpose for the DOE Liability funds is truncated. CECO's brief (p 83) states:

> If a trust is established for funding of the pre-1983 DOE Liability, it should be structured in a manner that is simple and straightforward, and should be consistent with the purposes for which the DOE Liability funds were originally recovered from customers in rates. The purpose for which funds were recovered from customers was to allow Consumers Energy funds to pay and extinguish the DOE Liability. It is for this purpose, and this purpose only, that any trust should be created and used.

Contrary to CECO's thesis, the purpose for the funds (raised by the fees collected from ratepayers) was to carry out the statutory and contractual bargain -- payment of fees in exchange for SNF disposal. The SNF disposal purpose remains the significant objective -- and for which the funds must be preserved. The funds do not exist to extinguish a DOE Liability that DOE itself has extinguished by its default in carrying out the "quid-pro-quo" established by the NWPA and Standard Contract, (*Indiana Michigan, supra*; *Northern States Power, supra)*. Even in the pre-default context, the federal court in *Indiana Michigan* at 88 F. 3d. 1272, 1276, referred to DOE's position as equivalent to "Here is air; give me money". In the current legal context, DOE's position is even more vacuous, such that "payment to the DOE" is not a sensible option.

CECO's suggestion of settling its federal lawsuit despite the current context, or any other suggestion of paying the federal government for the "liability", is also unsupported because it contrasts with the large number of successful outcomes that a score of utilities have already obtained for the U.S. Court of Federal Claims, and the successful outcomes on appeal. A most recent example is the September 7, 2010 decision of that Court in *Yankee Atomic Power Company v The United States,* Court Docket No. 98-126C, wherein the Court awarded three Yankee Companies a total of $143 Million (Yankee Atomic Electric Company, $21 million; Connecticut Yankee Atomic Power Company, $40 million; and Maine Yankee Atomic Power

Company, $82 million), to reimburse said companies for costs related to the construction of Independent Spent Fuel Storage Installations (ISFSI's) and to store SNF at the sites through 2001 and 2002 (depending upon the company), based upon lawsuits commenced in 2001 and 2002. Counsel for these companies has indicated in a recent conference call[3] that these damages relate only to the first round of damages, and further, that the companies will soon file another lawsuit for a second round of damages to update damages subsequent to 2001 and 2002 to seek additional damages of $264 million.[4]

Notably, the Yankee companies are in a situation similar to CECO, particularly with respect to CECO's former Big Rock Plant. The Yankee companies completed the decommissioning of their plants by 2007. The only facilities remaining at their sites are the ISFSIs. This mirrors the same situation involving Big Rock.

As applied to CECO here, a major concern is that CECO has not and will not be aggressive enough to seek damages against the DOE, and will also deprive itself of being able to file sequential damage suits for its costs incurred at Palisades and at Big Rock. The concern is increased by the fact that CECo has allowed its case to languish behind scores of others at the Court of Claims. Numerous utilities have completed hearings and have been awarded substantial damages. This is not the case for CECO.

[3] NWSC conference call, 9/15/10.
[4] The Court has ruled that damages should be based upon actual costs, but that the nuclear utilities many file sequential lawsuits within each 6-year statute of limitations period to cover incremental ongoing damages as time goes forward.

III. CECO's Position in Favor of Restricting Trust Investments to 13-Week Treasury Bills is Illogical, Unreasonable, and Imprudent.

CECO's position or proposal to restrict DOE Liability Trust Investments to 13-week Treasury Bills is illogical, unreasonable, and imprudent.

While the NWPA/Standard Contract provided for interest to be calculated for purposes of the Nuclear Waste Fund (NWF) based upon the 13-week Treasury Bill rate, the statute and contract also contemplated that the DOE would commence disposal of SNF by January 31, 1998. If there were any grounds for arguing the need for riskless, extremely short term, and liquid T-Bill investments, such arguments disappear relative to evaluating reasonable and prudent trust investments given that the DOE default has made indefinite or non-existent any SNF disposal and any obligation to pay the DOE Liability. Thus, the investment horizon has been extended dramatically, perhaps into infinity. Under these circumstances, long-term investments can be made by the trust, even if the funds were invested in riskless longer-term treasury bonds, or a portfolio of highly rated bonds or securities. The need for immediate liquidity is removed because there is no prospect that the federal government will pick up SNF for disposal.[5]

Another clarifying point is that, while the 13-week T-bill rate was provided for to calculate interest accumulations for purposes of the U.S. Treasury's accounting for the NWF, the NWPA and Standard Contract do not restrict investments made by any DOE Liability Trust to only 13-week T-bill investments. Nor does the NWPA/Standard Contract bar the use of a trust

[5] As partial support for this assertion, the Commission can take judicial notice of the Nuclear Regulatory Commission's revisions to its Nuclear Waste Confidence decision which drastically extends on-site storage timeframes (see the Nuclear Regulatory Commission (NRC) announcement issued on September 15, 2010, attached hereto).

remedy at the state level to segregate and hold the "liability", but is wholly silent as to that remedy.

IV. CECO's Claims that the DOE Liability Constitutes Corporate Funds or Property are Erroneous.

CECO's Initial Brief (p 87) also presents another erroneous premise that the DOE Liability Funds "have consistently been treated as general corporate funds…" and "are Consumers Energy assets and are not customer property," or that (p 85) the "decision to invest in 13-week Treasury Bills is a management decision," or (pp 89-90) that the adoption of Trust Fund structures other than CECO's proposals "…would be inconsistent with Consumers Energy's general power of management incident to ownership." On this latter point, CECO's brief (pp 89-90) states:

> The Court of Appeals held in *Detroit Edison v Public Service Commission,* 221 Mich App 370; 562 NW2d 864 (1997) that the Commission impermissibly infringed upon Detroit Edison's management prerogatives by modifying a demand-side management program proposed by the utility. Consumers Energy submits that modifying the DOE Liability trust structure or trust fund investment strategy proposed by Consumers Energy would impermissibly infringe upon Consumers Energy's management prerogatives. Consumers Energy's proposals are consistent with the goal of extinguishing the DOE Liability.
>
> It is well established that the State is not the owner of property of a public utility and that the Commission's authority to regulate a utility's rates and charges does not include the power to make management decisions. *Consumers Power v Public Service Comm,* 460 Mich 148, 158; 596 NW2d 126 (1999), *Union Carbide v Public Service Comm,* 431 Mich 135, 148; 428 NW2d 322 (1988). Hindering Consumers Energy's ability to use funds previously recovered in rates to extinguish the DOE Liability or mandating funds previously recovered in rates be invested with the goal of making a profit for customers would violate prohibitions set forth in *Consumers Power* and *Union Carbide*.

CECO's various points above miss the mark by a wide margin. The SNF fees included in rates, and collected from ratepayers, was for a specific and important special purpose -- to fund SNF disposal as noted earlier. These fees bear a very close relationship to nuclear plant

decommissioning surcharges -- to provide for the eventual dismantling of nuclear plants, except for the fact that SNF is even more toxic than the pieces of a decommissioned plant. Ratepayers have also paid in rates for additional, and in part, duplicative costs because the federal government has failed to perform SNF disposal as required.

Proposals made by MCAAA and Staff to place the DOE Liability in an external trust separate from CECO's control, does not affect CECO's property, assets, or alter the purpose for the rate collections that funded the liability. Rather, the trust proposals provide for the funds recorded on CECO's books as a "liability", representing funds collected for the SNF disposal purpose (under the NWPA and Standard Contract) to continue to be recognized as such, but to be better segregated and protected by transferring the liability funds into an external trust. The trust remedy recognizes that the SNF fees were never collected for general corporate purposes.[6]

The trust remedy recognizes that such a trust is now particularly needed and is timely given the changed circumstances and present context, such as (1) the federal government's permanent default; (2) CECO's total exit from the nuclear business and from SNF responsibilities in all other respects; (3) the increased risks that the task of SNF disposal may fall upon state ratepayers and taxpayers due to the federal default, thereby increasing the need for funds to be preserved for this purpose; and (4) the several benefits that will result from segregating these funds into an external trust, including greater protection from the risks of further CECO restructuring or other actions to shift risks to the public while privatizing gains; (5) clarifying the status of the funds, and simplifying CECO's rate cases, (6) among other factors.

[6] CECO's argument along this time mirrors similar arguments that CECO made with respect to the Big Rock Nuclear Plant decommissioning trust surcharges in U-15611.

CECO's argument that the funds represented by the DOE Liability are general corporate funds is also inconsistent with its argument that the funds are collected for the special purpose of paying them to the federal government. The reality is that these are special purpose funds, and the best way to preserve them for the designated special purposes as outlined in the NWPA and Standard Contract (i.e. SNF disposal) is to establish an external rust to hold and manage the funds.

The various cases cited by CECO, cited above, are not applicable, either factually or legally. In the *Detroit Edison* case, the Court ruled that the Commission had the jurisdiction to provide in rates for DSM programs, but could not dictate specific details of the program. This did not involve the collection of funds for a specific purpose and to accumulated fund in a recorded liability (the DOE liability), and proposals to transfer the liability funds to a trust.

In *Union Carbide*, cited *supra,* the Court held that the Commission could not order CECO's management to stop the uneconomic dispatch of certain generating plants, but that the Commission did have jurisdiction to protect ratepayers through its ratemaking powers, by excluding the resulting excessive costs from rates.[7]

The Commission here can use its ratemaking power to adjust CECO's rates to fund a trust to align with the DOE Liability. The Commission can establish reasonable and prudent terms to govern the trust under the same powers it has done so for nuclear plant decommissioning. The Commission in accordance with *Union Carbide* can also utilize its ratemaking powers to protect ratepayers from unreasonable and imprudent action of utility management. CECO's intimations regarding its paying the DOE Liability to the federal government in the current circumstances

[7] The Court of Appeals later affirmed rate reductions to exclude the wasteful costs resulting from the uneconomic dispatch in a subsequent Act 304 case.

would be decidedly unreasonable and imprudent. Such action would constitute a failure to use appropriate remedies to enforce its contractual remedies under the NWPA and Standard Contract.

V. The Commission Should Continue its Precedent from U-16425 By Ensuring Removal of all DOE Liability Costs from the Cost of Service for Ratemaking Purposes.

The Commission should continue to uphold its U-16425 precedent by ensuring that all costs related to the DOE Liability are eliminated from the cost of service for ratemaking purposes, including direct and indirect impacts upon rate base and cost of capital (including Letters of Credit costs).

The DOE Liability Funds should be treated as zero cost capital, pending their prompt transfer or placement into an external trust, after which the Funds will be segregated and separated from CECO to simplify ratemaking regulation. The annual interest cost associated with the DOE Liability should be removed from Operation and Maintenance (O&M) costs consistent with the adoption of a trust remedy.

The cost of a bank Letter of Credit (LOC) should also be excluded from the cost of capital or other expense for ratemaking purposes as the Commission ruled in U-14992, U-15245, and U-15645. These costs are rising rapidly and geometrically. The payment for an LOC on an annual basis also constitutes the wasteful incurrence of costs for a wholly illusory purpose. The bank is being compensated millions of dollars to "protect" CECO for only one year for risks that do not exist and relative to events that are <u>impossible</u>, namely: (1) the risk that the federal government will offer to pick up the subject SNF for disposal, which is a predicate to any CECO obligation to actually pay the DOE Liability; and (2) even if the impossible event of (1) should occur -- that CECO would then be unable to make such a payment.

The Commission should also ensure that the DOE Liability is not included in rate base, consistent with the Commission's rulings in U-16425. CECO in this case in reality seeks to include the impact of the DOE Liability in rate base. CECO does so by inappropriately including the DOE Liability in rate base in its historical test year presentation in this case. CECO's responses on discovery (included in MCAAA Exhibit 9) establishes that CECO has included the DOE Liability in rate base for purposes of presenting its historical test year results. Thus, unless the Commission subtracts the impact of this in evaluating the historical test year, the result will be that the Commission in effect will be continuing to include the DOE Liability in rate base (which is highly inappropriate as fully explained and presented in U-15645).

VI. Conclusion and Relief.

Based upon the evidentiary record, and MCAAA's Initial Brief and this Reply Brief, MCAAA respectfully requests that the Commission require in its order that an external trust be established to receive, or to fund, the DOE Liability or an equivalent amount for the DOE Liability, and that all impacts on the cost of service for ratemaking purposes resulting from the DOE Liability be removed from CECO's rates. MCAAA requests such further and consistent relief that is lawful and reasonable.

Respectfully submitted,

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Dated: September 16, 2010

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ATTACHMENT TO MCAAA REPLY BRIEF

September 16, 2010

NRC NEWS

U.S. NUCLEAR REGULATORY COMMISSION

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No. 10-162 September 15, 2010

NRC APPROVES UPDATES TO NUCLEAR WASTE CONFIDENCE FINDINGS AND RULE

The Nuclear Regulatory Commission has approved final revisions to the agency's "Waste Confidence" findings and regulation, expressing the Commission's confidence that the nation's spent nuclear fuel can be safely stored for at least 60 years beyond the licensed life of any reactor and that sufficient repository capacity will be available when necessary.

In a Staff Requirements Memorandum (SRM) approved and issued today, the Commission approved the revisions to the draft final rule and additionally directed the staff to initiate a long-term rulemaking to address impacts of storage at onsite storage facilities, offsite storage facilities or both for extended periods.

"Today the Commission affirmed our confidence that spent nuclear fuel can be stored safely and securely without significant environmental impacts for at least 60 years after operation at any nuclear power plant," said NRC Chairman Gregory B. Jaczko. "We also directed the NRC staff to conduct additional analysis for longer-term storage to ensure that we remain fully informed by current circumstances and scientific knowledge relating to spent fuel storage and disposal. This decision was carefully considered by the Commission. It is an important step forward as it provides a measure of certainty to all of our stakeholders."

The Commission made clear in its SRM that the revisions of the waste confidence findings and rule are not intended to signal an endorsement of indefinite storage of spent fuel at reactor sites.

The current Waste Confidence rule (10 CFR Part 51.23) and findings, that this new rule and findings will update, express confidence that commercial high-level radioactive waste and spent fuel generated by any reactor "can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor" in its spent fuel basin or at either onsite or offsite independent spent fuel storage installations.

The SRM gives the staff 60 days to incorporate these revisions to the Waste Confidence rule and findings before sending them to the *Federal Register* for publication. It also directs the staff to provide a plan to the Commission for the long-term rulemaking by the end of the calendar year.

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PROOF OF SERVICE

Cindy J. DeLong says that she is an employee of Public Law Resource Center, PLLC, and that on September 16, 2010, she served a copy of the **Reply Brief of the Michigan Community Action Agency Association** via e-mail to the parties listed on the attached service list.

Cindy J. DeLong

_____
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MPSC Case No. U-16191
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