

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, )  
to consider the restructuring of the electric )  
utility industry. ) Case No. U-11290  
\_\_\_\_\_ )

In the matter of the application of )  
**THE DETROIT EDISON COMPANY** for authority )  
to suspend implementation of its power supply cost )  
recovery clause and related relief. ) Case No. U-11449  
\_\_\_\_\_ )

In the matter of the request of )  
**CONSUMERS ENERGY COMPANY** for )  
approval of a retail open access tariff. ) Case No. U-11451  
\_\_\_\_\_ )

In the matter of the request of )  
**THE DETROIT EDISON COMPANY** for approval )  
of a direct access tariff. ) Case No. U-11452  
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In the matter of the request of )  
**CONSUMERS ENERGY COMPANY** for authority )  
to suspend its power supply cost recovery clause )  
and related relief. ) Case No. U-11453  
\_\_\_\_\_ )

In the matter of the request of )  
**CONSUMERS ENERGY COMPANY** and )  
**THE DETROIT EDISON COMPANY** for )  
approval of a true-up mechanism in connection )  
with the recovery of stranded costs. ) Case No. U-11454  
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**STAFF REPORT ON CODE OF CONDUCT MEETINGS  
CASE NO. U-11290  
JUNE 4, 1999**

In its order in Case No. U-11290, issued March 8, 1999, the Michigan Public Service Commission directed Staff to meet with Consumers Energy, Detroit Edison and other interested parties to discuss codes of conduct.<sup>1</sup> In particular, the Commission asked whether there are "specific issues in the electric market that would warrant modifications" to the code applied to Michigan's natural gas companies. Additionally, using the Staff's discussion paper entitled "Developing and Implementing Codes of Conduct for the Retail Electric Industry (Staff code paper)," the Commission requested that Staff ". . . attempt to develop a consensus on what additional actions, if any, are needed. . ." and identify ". . .any remaining issues that need be addressed by the Commission."<sup>2</sup> Staff held a series of meetings, initially with small groups and later with all of the groups together, to discern areas of agreement and disagreement.<sup>3</sup> Included in the discussions were representatives of Michigan's investor-owned utilities, small and large customers, alternate suppliers, heating and cooling contractors and qualifying facilities. Staff files this report based on these discussions.

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<sup>1</sup> "In the Matter, on the Commission's own motion, to consider the restructuring of the electric utility industry." Case No. U-11290, et. al.; March 8, 1999.

<sup>2</sup> id. p. 38.

<sup>3</sup> A list of those attending the small group meetings and the large meeting is included in the Appendix.

These meetings did not produce an agreement on a code of conduct. Staff, however, gained a clearer understanding of the positions of the various groups, where parties perceived voids in the existing codes and issues the Commission may wish to consider in determining the need for future action. The only code issue all participants agreed on was that a code of conduct is necessary to govern an electric utility's relationships with its marketing affiliates. There is near consensus on the code structure, with preference for, or tolerance of, broad provisions with specific illustrative examples. There is no consensus on code application, provisions and enforcement.<sup>4</sup> For example, while there is agreement that discrimination by the utility in favor of its marketing affiliates should be prohibited, there is no consensus on what behaviors should be considered discriminatory. Nor is there agreement on whether the Commission could rely on existing antitrust laws to prevent discrimination instead of implementing a code. Some believe that an unenforced or weak code might provide a shield for anticompetitive behavior. This could serve as the basis for protections under the State Action Doctrine.<sup>5</sup> Utilities generally support a less stringent code with minimal Commission oversight and the retention of economies associated with vertical integration. Customer groups and alternate suppliers support more specific code provisions, active Commission enforcement and structural separation of regulated and nonregulated activities.

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<sup>4</sup> As used in this paper, "consensus" refers to a unanimous agreement.

<sup>5</sup> For additional discussion of the State Action Doctrine, see the "Michigan Public Service Commission Staff Market Power Discussion Paper;" June, 1998, p. 49.

## BACKGROUND

Codes of conduct can be a method to reduce the market power available to an incumbent electric utility in an emerging competitive market. Codes govern the utility's relationship with any marketing affiliates and, to an extent, with alternate suppliers. In contrast to mitigation methods which eliminate the incentive to use market power, codes establish rules to prevent anticompetitive conduct.<sup>6</sup> During the past several years, the Commission has adopted Transportation Standards of Conduct for several natural gas utilities (natural gas code), including Consumers Energy.<sup>7</sup> In its implementation filing in Case No. U-11290, Consumers Energy included a proposed code of conduct for its electric operations, covering its relationship with its marketing affiliates.<sup>8</sup>

In its March 8, 1999 order, the Commission found the natural gas code and Consumers Energy's proposed electric code were similar, with a few exceptions.<sup>9</sup>

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<sup>6</sup> Divestiture, for example, changes the framework of the market, eliminating the incentive to use market power. Behavioral remedies, like codes, do not eliminate the incentive to abuse market power, but rather establish rules to prevent the abuse. For an additional discussion of codes of conduct, see "Developing and Implementing Codes of Conduct for the Retail Electric Industry;" filed by the Michigan Public Service Commission Staff on December 23, 1998 in Case No. U-11290.

<sup>7</sup> As a result of a Commission approved settlement in Case No. U-11220, "In the matter of the application of Michigan Gas Company and Southeastern Michigan Gas Company for authority to merge and increased rates for the sale and transportation of natural gas and related approvals." October 29, 1997. Later, similar codes were adopted by Wisconsin Public Service Corporation (U-11621), Consumers Energy (U-11599), and Michigan Consolidated Gas Company (U-11682).

<sup>8</sup> "Consumers Energy Company's Electric Restructuring Implementation Plan;" filed in Case No. U-11290, et.al, June 30, 1998.

<sup>9</sup> 1) The electric code identifies two classes of affiliates, contrary to the natural gas code. 2) The natural gas code requires operating employees of Consumers Energy and its marketing affiliates to function independently, be employed by separate corporate entities, and maintain separate business offices; the electric code does not. 3) The natural gas code has

The Commission modified the proposed electric code to require Consumers Energy's affiliates to maintain separate business offices, a similar provision to the language in the natural gas code. In this Order, the Commission clarified that the code applies to Consumers Energy irrespective of whether Consumers Energy's first tier affiliates are selling power in the competitive market within Consumers Energy's service territory or not.<sup>10</sup> In light of the Commission's directive to Staff to initiate these discussions, Staff views the code proposed by Consumers Energy and modified by the Commission as an interim code.

On April 12, 1999, Detroit Edison filed an electric code of conduct similar to the one approved for Consumers Energy in Case No. U-11290. Detroit Edison, however, did not include the designation of first and second tier affiliates. The Commission has not yet acted on this filing.

### SUMMARY OF POSITIONS

Based on the discussions during the small group and combined meetings, Staff found that, in general, alternate suppliers and customers share similar positions.

With some exceptions, they favor a stronger code with specific provisions, clear

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provisions relating to discounts offered to affiliates and nonaffiliates; the electric code does not. 4) The proposed electric code of conduct has a provision indicating that there is no intent to relieve Consumers Energy of its responsibility to comply with the Standards of Conduct established by the Federal Energy Regulatory Commission.

<sup>10</sup> Consumers Energy's code defines first tier affiliates as "divisions of, departments within or wholly-owned subsidiaries of Consumers" and second tier affiliates as "separately organized affiliated companies or joint ventures."

separation of regulated and nonregulated activities and proactive Commission oversight. The utilities, in general, favor a less stringent code, retention of the economies associated with vertical integration, and less intrusive Commission oversight.

## RESULTS

The participants in the code of conduct discussion meetings reached agreement on a limited number of issues:

- There should be a code and the preferred format is broad provisions with specific clarifying examples;
- Discrimination should be prohibited;
- If customer names and addresses or system operation information is provided to anyone, it must be contemporaneously provided to all marketing affiliates and alternate suppliers under the same terms and conditions;
- Information on alternate suppliers held by the utility will not be shared with utility affiliates; and
- A speedy complaint or dispute resolution process should be adopted.

Most of the other issues discussed produced differing opinions, which in some cases were expressed quite vehemently. While there are exceptions, in general the utilities share similar perspectives. Customer and alternate supplier perspectives are opposite to those of the utilities. Based on what Staff believes are strongly held positions presented by the participants in the meetings, Staff does not foresee the

opportunity to reach a consensus on a code of conduct or even code components in the near future.

Staff has identified three issues which it believes require further Commission guidance prior to the finalization of a code of conduct:

1. To what extent should the utility have the option of retaining the economies of scale and scope inherent in the monopoly structure? The utilities argue that these economies are a critical factor in their ability to compete in the electric market. Customers and alternate suppliers believe that allowing the utilities to retain these economies will result in subsidization of competitive activities by non-competitors or monopoly customers, inhibiting the development of a competitive market. The degree of separation between the regulated activities of the utility and the competitive activities of the utility and/or its marketing affiliates appears to be a fundamental issue on which the code should be based.
2. How does the Commission plan to oversee and enforce the code of conduct? How will it impose penalties? The participants in the discussions are again polarized on the role of the Commission. Utilities support oversight through a complaint and mediation process. Customers and alternate suppliers not only support establishment of a speedy complaint process, but also strongly believe the Commission should take an active role through the application of

code compliance audits and other monitoring mechanisms.

3. There is a lack of understanding on which companies will be covered by the code. While all agree that Consumers Energy and Detroit Edison would be subject to the code, it is unclear whether the other investor-owned utilities, cooperatives and alternate suppliers operating within the state would be subject to the same code. It is also unclear how the Commission anticipates the code will interact with Act 69 and the alternative licensing process. Finally, the Commission should consider whether it would grant exemptions to the code.

While the code of conduct discussion meetings did not produce consensus on a code of conduct, Staff believes the information presented in Appendix A should assist the Commission in evaluating the need for change to the interim Consumers Energy Electric Code and the applicability of those concepts to Detroit Edison in Case No. U-11290.

**STAFF REPORT ON CODE OF CONDUCT MEETINGS  
U-11290  
APPENDIX A**

SUMMARY OF CODE OF CONDUCT MEETINGS

Most customers and alternate suppliers agree that the existing natural gas code contains elements appropriate for an electric code but the gas code is insufficient to deal with the potential market power problems likely to occur in the electric industry. The vertically integrated nature of the electric industry - both economically and technically - provides the opportunity for cross-subsidization and discrimination which they believe will inhibit the development of a competitive market. Alternate suppliers indicate that a weak code will favor the utilities and their affiliates, deterring competitors from entering the market.<sup>1</sup> Participants in the meetings identified concerns with the existing code language and proposed additional provisions which they feel the Commission should consider.

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<sup>1</sup> The Federal Energy Regulatory Commission (FERC), in reviewing its standards of conduct for wholesale transactions, has found that codes of conduct do not necessarily produce confidence in the market: "It appears, based upon our experience thus far, that no matter how detailed the standards of conduct and how intensive our enforcement, competitors will continue to be suspicious that the wall between transmission operations and power sales is being breached in subtle and hard to detect ways. The perception that many entities that operate the transmission system cannot be trusted is not a good foundation on which to build a competitive power market." FERC, "Regional Transmission Organization: Notice of Proposed Rulemaking;" Docket No. RM99-2-000, 18 CFR Part 35, May 13, 1999, (p. 85)

## Existing Code:

- Most customers and alternate suppliers find the natural gas code insufficient for preventing market power abuses in the competitive electric industry. They argue that the vertically integrated nature of the electric utility industry, coupled with the significant market power possessed by the state's two largest electric utilities, requires additional provisions. These parties also state that oversight, enforcement, and penalty provisions should be included in the code. Since Consumers Energy's interim code mirrors the natural gas code, it is found by the non-utility participants to lack the breadth necessary to prevent anticompetitive behaviors. For example, the Consumers Energy interim code includes only limited provisions on separation of regulated and competitive activities which can result in cross-subsidization.
- Many customers and alternate suppliers state that some of the provisions in Consumers Energy's interim code lacked clarity, leaving the provisions open to interpretation. Code language needs to be clear to prevent confusion of those subject to it as well as those seeking its protection.
- Consumers Energy's interim code conditions many provisions with language such as "undue discrimination," "to the extent practicable" and "undue preference", a deviation from its natural gas code. Customers and alternate suppliers believe this language weakens the code and opens the door to abuses. They assert this conditioning language should be deleted.

## Conclusions Related to the Existing Code:

### Customer groups and alternate suppliers:

The customer groups and alternate suppliers believe that additional provisions are necessary to prevent anticompetitive behavior. Without such protections, they believe incumbent utilities will be able to abuse their market position and inhibit the development of competition.

### Incumbent Utilities:

Consumers Energy believes that its approved code should be given a chance to work. If deficiencies in the existing code are identified during the transition to retail access, the code can be modified to correct the problem at that time.

## Discussion of Code Topics:

In conducting the small group meetings and the larger meeting, the Staff addressed code of conduct issues by exploring specific topics. These topics were:

- Separation
- Discrimination
- Sharing Information
- Utility - Alternate Supplier Relationship
- Compliance Plans
- Oversight and Enforcement
- Penalties
- Applicability
- Code Format

The following sections discuss these topics presenting the general positions of the participants and recommendations related to the topics.

#### Separation:

The most contentious issue discussed during each meeting was the degree of separation that should exist between the utility and its competitive suppliers.

Theoretically, the greater the degree of separation, the less opportunity there is for anticompetitive behavior. Whereas divestiture removes the incentive to abuse market power, separation standards attempt to curb the utility's ability to do so.<sup>2</sup>

With functional separation, the utility is able to conduct competitive businesses through separate divisions or departments. This allows the utility to retain existing efficiencies, benefitting customers and enhancing the utility's position in the competitive market. The incumbent utilities take a strong position that they will not be able to compete with large, out-of-state suppliers without the opportunity to use existing economies associated with vertical integration. While they might share employees, purchases, and/or equipment, they do expect to employ appropriate accounting procedures to allocate costs. If they lose this opportunity, they argue that their competitive business will be inhibited and bundled ratepayers will pay higher rates to compensate for lost economies in competitive ventures.

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<sup>2</sup> Several customers and alternate providers supported divestiture as their first option, eliminating the need for many provisions in the code. However, since ordering divestiture may not be within existing Commission authority, Staff has not discussed it in depth in this report.

Structural separation standards require competitive activities to be offered through a legally established corporate affiliate. Customers and alternate suppliers strongly support a code requiring structural separation. They argue that the incumbent utilities want to provide competitive services on an incremental rather than fully allocated cost basis. They add that a requirement for structural separation would restrict a utility's ability to easily transfer valuable customer and alternate supplier information. It would also limit the opportunity to subsidize competitive activities with ratepayer funds. Both customers and alternate suppliers state their belief that equivalent economies will be available to the utilities and their marketing affiliates through participation in a truly competitive market. Alternate suppliers believe that relying on existing economies became a moot point once the decision was made to move to a competitive market: monopoly protections and competition cannot co-exist in a competitive or emerging competitive market.

Consumers Energy's interim code allows competitive activities to take place within the utility.<sup>3</sup> To some degree, the code limits interaction between regulated and competitive activities:

- Employees of its first and second tier affiliates must function independently of the transmission and distribution employees,<sup>4</sup>

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<sup>3</sup> While the focus of the meetings was codes of conduct covering the provision of generation services, the heating, cooling, and air conditioning contractors attended the meeting and expressed their position that the code should cover the provision of all competitive services offered by the utility and its affiliates.

<sup>4</sup> Consumers Energy Retail Open Access Program Standards of Conduct, (l)

- Consumers Energy must maintain separate business offices from its wholly-owned subsidiaries and second-tier affiliates involved in retail open access<sup>5</sup> and
- The books and records of the regulated utility must be maintained separately from marketing affiliates.<sup>6</sup>

Most non-utility participants believe that these provisions are inadequate to prevent cross-subsidization and other market abuses. They assert that in the absence of divestiture there needs to be a legal structural separation to ensure a clear audit trail, limit cross-subsidization and prevent the abuse of market power. In light of this, they urge the inclusion of additional separation provisions, including:

- legal separation of regulated and nonregulated business functions;
- prohibition against ratepayer subsidization of nonregulated business activities;
- prohibition against, or conditioning of, affiliate use of the utility logo;
- prohibition against the utility sharing employees with the affiliates and restrictions on employee transfers between the utility and its affiliates;
- prohibition against joint marketing with affiliates and
- prohibition against or limitations on joint purchases.

Some parties suggest it may be appropriate to allow the utility to share some joint corporate functions with its affiliates, including corporate oversight, payroll related

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<sup>5</sup> Consumers Energy Retail Open Access Program Standards of Conduct, (I).

<sup>6</sup> Consumers Energy Retail Open Access Program Standards of Conduct, (J).

tasks, and financial analysis. These joint functions, if allowed in the code of conduct, must be clearly identified and there must be active Commission oversight to ensure the costs are properly allocated.

Customers and alternate suppliers point to the Staff's Code of Conduct paper for examples of provision language adopted in other states that should be included in Michigan's code.

Several parties also express concern that allowing the utility to carry out competitive activities will provide the utility with antitrust protections under the State Action Doctrine. The State Action Doctrine provides immunity to a regulated business for actions which might be considered anticompetitive, but have been "clearly articulated and affirmatively expressed as state policy" and "actively supervised by the State itself."<sup>7</sup>

Discrimination:

All participants agree that the utility should not discriminate in favor of its affiliates or customers of its affiliates. However, there is disagreement on what constitutes discrimination. As noted previously, several of the provisions in Consumers Energy's interim code are conditioned by terms such as "undue discrimination."

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<sup>7</sup> California Retail Liquor Dealers Assoc. v Midcal Aluminum, Inc., 445 US 97, 105; 100 S Ct 937; 63 L Ed 2d 233 (1980).

This hedge is not in Consumers Energy's natural gas code. Consumers Energy explains that it is virtually impossible to prevent all incidents of discrimination. Conditioning language provides the utility with protection from potential penalties resulting from unintentional violations. Customers and alternate suppliers contend that the use of conditioning terms such as "undue" provides the utility an opportunity to discriminate, adds unnecessary complexity to the complaint and litigation process and should be eliminated.

In addition to the elimination of all "undue" language, non-utility discussion participants recommend the addition or clarification of several provisions relating to discrimination:

- an unconditional prohibition against any discriminatory treatment in favor of affiliates, including the provision of tariffed and nontariffed services or products, hook-ups, transmission and distribution maintenance and repairs;
- prohibition against tying arrangements;
- prohibition against the utility suggesting to customers that use of its affiliate services could result in more favorable treatment by the utility;
- prohibition against the utility steering customers to its affiliates and
- prohibitions against, or limitations on, utility purchases from the affiliate and affiliate purchases from the utility.

Several participants representing utilities, customers and alternate suppliers point out that discriminatory behavior is prohibited under existing State and Federal

antitrust laws.

Sharing information:

The information possessed by a utility is a valuable commodity to its marketing affiliates and alternate suppliers. The utility has information on:

- individual customers including names, addresses, phone numbers and usage and billing data;
- aggregate customer data;
- information on utility operations and
- information on alternate suppliers obtained through the provision of transmission and distribution services.

Any sharing of this information by utilities with an affiliate can provide the affiliate with a competitive advantage. All participants agree that customer lists and aggregate customer data should be provided to affiliates and alternate suppliers on the same terms and conditions and contemporaneously, or not at all.<sup>8</sup> Customer usage and billing data should only be provided upon customer request to the customer or the customer's designee only. Any data on an alternate supplier should only be provided at the request of that alternate supplier. To some extent, the information on utility operations is covered by Federal Energy Regulatory Commission (FERC) guidelines. However, those guidelines deal predominantly with wholesale transactions and should be re-examined if they are to be relied upon for

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<sup>8</sup> There was concern raised about sharing phone numbers, since some customers have unlisted phone numbers the privacy of which should be protected. There was little disagreement that phone numbers should not be distributed.

retail use.<sup>9</sup>

Consumers Energy and Detroit Edison suggest they will not provide information to anyone unless the customer requests usage data be provided to a utility affiliate or alternate supplier. Nonetheless, alternate suppliers are less assured that information has not been and will not be transferred indirectly or inadvertently, by means of shared or transferred employees or shared equipment. Since this information is a critical component of any marketing effort, alternate suppliers favor the sharing of customer names and addresses with all suppliers as a means to jump-start the market. They support detailed provisions in the code prohibiting situations which could reasonably result in the inappropriate transfer of information, including:

- the utility will not provide information on its transmission and distribution system to its affiliates unless the same information is provided contemporaneously to every alternate supplier licensed or certified to provide service within that service area, on the same terms and conditions and in the same form;
- the utility will not provide customer credit information to its affiliates unless the same information is provided contemporaneously to all alternate suppliers licensed or certified to provide service within that service area, on the same terms and conditions and in the same form; and
- the utility will not provide to anyone any information received from an alternate supplier in the course of providing transmission and distribution services without written approval of the alternate supplier.

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<sup>9</sup> See The Federal Energy Regulatory Commission; *Heartland Energy Services, Inc.*, 68 FERC 61,223 (1994) and The Federal Energy Regulatory Commission; *Open Access Same-Time Information System and Standards of Conduct*; 78 FERC 61,221 (1997).

#### Utility - Alternate Supplier Relationship:

All parties agree that the utility should not interfere in the relationship between the alternate supplier and its customers. However, there is some disagreement as to what this would actually mean. Consumers Energy and Detroit Edison indicate that they would allow a customer under contract to an alternate supplier to return to the utility's bundled service if the customer is dissatisfied with the alternate supplier regardless of the terms of the customer's contract with the alternate supplier.

Other utilities are concerned that such a provision would require them to maintain enough capacity to allow switchbacks, which could be detrimental to their position in the market. Alternate suppliers would like provisions added that would support the contractual relationship they will have with their customers. Interested parties recommend adding provisions to the code, including:

- prohibiting the utility from giving the appearance it speaks on behalf of the alternate supplier unless there is a signed agreement allowing it; and
- prohibiting the utility, acting in its role as transmission and distribution provider, from interfering in the contractual relationship between the alternate supplier and its customers.

#### Compliance Plans:

Most parties believe it would be useful to include a provision requiring utilities to file a code of conduct compliance plan with the Commission. The plan would provide details on how the utility anticipates meeting the requirements in the code and would be signed by a designated corporate officer. The Commission would

review the plan, and approve it or modify it as required.

#### Oversight and Enforcement:

Commission oversight can include active methods, such as compliance audits, or reactive methods, such as responding to complaints. The utilities generally argue against active oversight. They reason that a transition to deregulation should not include additional regulation. They claim that compliance audits will result in higher rates for ratepayers. Finally, active oversight is unnecessary as long as those aggrieved have the opportunity to file complaints.

Customer groups and alternate suppliers argue a complaint process alone is inadequate to deal with anticompetitive behavior.<sup>10</sup> They strongly state that active Commission oversight is necessary to the development of the market. The additional costs associated with staff oversight will be offset by reductions in other staff costs. Further, there will be benefits to ratepayers if active oversight results in a reduction of cross-subsidization. While they support a complaint process, some stated reluctance to file a complaint against the utility on which they depend to provide transmission and distribution services.<sup>11</sup> Some refer to Staff's code of

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<sup>10</sup> In its Notice of Proposed Rulemaking (*supra*), the FERC stated that “. . . a system that attempts to control behavior that is motivated by economic self-interest through the use of standards of conduct will require constant and extensive policing. This kind of regulation goes beyond traditional price regulation and forces us to regulate very detailed aspects of internal company policy and communication . . . Functional unbundling does not necessarily promote light-handed regulation.” (p. 84).

<sup>11</sup> The FERC, in its Notice of Proposed Rulemaking, stated, “However, we also believe that there is a great potential for standards of conduct violations that will never even be reported or detected.” (p. 79).

conduct paper: that behavioral remedies for market power such as codes of conduct are more staff-intensive than divestiture.<sup>12</sup>

The discussion of oversight did produce one area of agreement by all parties: the need for timely resolutions to violations. Some parties find complaint processes in other states to be cumbersome and time-consuming, a situation which only magnifies the abuse. They request the Commission adopt an expedited time frame for resolving complaints.

#### Penalties:

Most participants agree that the Commission, under current statutory authority, is limited in its ability to assess penalties for code violations. Currently, the most reasonable options available to the Commission include cease and desist orders; a reduction in stranded cost recovery through the true-up proceeding and a reduction in rate of return. For marketing affiliates benefitting from the utility's code violations, some suggest revocation of Act 69 or alternative licensing approval for either all customers or, in order to protect existing customers, from contracting with new customers. As an alternative, the Commission could revoke the affiliates' approval to compete in the affiliated utility's service territory.

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<sup>12</sup> "Developing and Implementing Codes of Conduct for the Retail Electric Industry;" December 23, 1998, p. 5.

Utilities tend to support less stringent penalties, preferring to rely on complaints and mediation. Customers and alternate suppliers, perhaps anticipating more code violations, want stronger penalties as a deterrent to anticompetitive behavior. Most agreed the ultimate penalty, divestiture, which is an option in several states, falls outside of the Commission's existing jurisdiction.

#### Applicability:

There is some disagreement regarding to whom the code should apply. All agree the code should apply to investor-owned utilities. Some suggest that the same code or a similar one should apply to electric cooperatives. While some suggest that the code should apply to alternate suppliers and affiliates, others point out that they should be covered under the Act 69/alternative licensing provisions.<sup>13</sup>

The Michigan Electric and Gas Association (MEGA) utilities make a case for a different code for small utilities and those operating in more than one state. In the absence of that, they request the opportunity to seek Commission approved exemptions from specific provisions. They cite two primary reasons: 1) Some MEGA companies are small, pose little or no risk of abusing market power, and would be harmed especially by stringent separation requirements. For example, one employee of a small utility may currently carry out several different regulated and

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<sup>13</sup> Consumers Energy's code states that "These standards of conduct shall apply as follows to affiliates of Consumers Energy." However, Consumers Energy stated during its small group meeting that it cannot commit on behalf of its affiliates.

competitive functions; requiring structural separation would result in the need to hire an additional person, a problem for a small company. 2) Some Michigan utilities operate in two or more states. They state that it would be administratively difficult to comply with different codes in each state. Thus, they would like the opportunity to use the code from one state in all other states. Based on these two reasons, they believe an exemption process would be appropriate.

Small qualifying facilities anticipate problems if their contracts are bought out, yet some of their facilities remain under joint venture agreements with a utility. It appears the qualifying facility would then be considered an affiliate of the utility and bound by the same restrictions as marketing affiliates. They believe this situation would restrict their opportunity to participate in the market, even though they would not be functioning in the same role as the utility's marketing affiliates. Therefore, they requested a blanket exemption for small qualifying facilities (80 mW or less), or alternatively, the opportunity to seek code exemptions from the Commission.

#### Code Format:

There was significant discussion about the format of the code. Codes adopted in other states have two basic formats, broadly stated provisions and specific provisions. A broad provision encompasses a wide range of related prohibitions

within one statement. For example, “The utility will not discriminate in favor of its marketing affiliates.” Such broad language makes it possible to argue that any discriminatory behavior would be prohibited by this provision, making it less likely that an anticompetitive behavior would be inadvertently left out of the code. On the other hand, broad provisions can be vague, open to interpretation and, therefore, more difficult to litigate. Two participants favor general provisions, suggesting they will be easier for smaller utilities to implement and would provide more appropriate guidance to the state legislature if it takes up codes of conduct in electric industry restructuring legislation.

Specific provisions provide more detail and thus clearer direction regarding prohibited behaviors. For example, a section on discrimination might include several provisions prohibiting different types of discriminatory behavior. While specific provisions are clearer and, according to several participants, easier to litigate, there is a greater risk that an unanticipated discriminatory behavior will be omitted from inclusion in the code. Even with this concern, most participants believe that specific provisions would be more effective in prohibiting market power abuses than general provisions.

During the discussions, however, a third option was recommended: a code comprised of broad provisions followed by specific examples. For example, “The

utility will not discriminate in favor of its marketing affiliates. Discriminatory behaviors include, but are not limited to. . .” This format combines the strengths of broad and specific provisions. Virtually all participants indicated they favored or would accept this hybrid code format.

## CONCLUSION

The meetings demonstrated that there is little consensus on what should be included in a code of conduct for the electric industry. Most parties are grouped into one of two polar positions: Consumers Energy and Detroit Edison are satisfied with the the codes they have filed as part of their retail access implementation plans, although they remain open to a limited number of adjustments. The large and small customers and alternate suppliers believe there need to be significant changes and additions to ensure a competitive market and prevent anticompetitive behavior. The MEGA utilities are positioned at various places along this continuum.

Alternate suppliers indicate that it is not only anticompetitive behavior that damages the market, it is also the perception that there is an environment that allows anticompetitive behavior. If competitors believe the playing field is tilted in the utility’s favor, they are less likely to put forward the investment to enter the market, especially if there are other states with a more competitor-friendly

environment. They argue that a strong code, including legal separation of the utility and its affiliates, with active oversight and enforcement, will help convey the message that Michigan is an attractive place for them to do business.

**CODE OF CONDUCT MEETINGS  
U-11290  
MEETING ATTENDANCE  
APPENDIX B**

Individual Meetings:\*

Michigan Alliance for Fair Competition

Michigan Chamber of Commerce

Alternate Suppliers:

Energy Michigan

Enron Corporation

Michigan Independent Power Producers Association

Business Customers:

ABATE

Competitive Utility Tariffs

Michigan Manufacturers Association

Michigan Retailers Association

Small Business Association of Michigan

Residential Customers:

American Association of Retired Persons

Attorney General

Michigan Consumer Federation

Residential Ratepayers Consortium

Small Qualifying Facilities:

Landfill Energy

Primary Power Management

Detroit Edison

Consumers Energy

Michigan Electric and Gas Association

PG & E Energy Services

\* Meetings are listed in chronological order. They were held From February through May, 1999.

Large Group Meeting:

Consumers Energy

Detroit Edison

Michigan Electric and Gas Association:

- Alpena Power Company
- American Electric Power
- Northern States Power Company - Wisconsin
- Upper Peninsula Power Company
- Wisconsin Electric Power Company
- Wisconsin Public Service Company

Alternate Suppliers

- Energy Michigan
- Engage Energy
- Enron Corporation
- EnStar Energy Group
- Greater Detroit Resource Recovery Authority
- Kimball Power Company
- Primary Power, Inc.
- Russell and Russell, P.C.
- WPS Energy Services, Inc.

Customer Groups

- ABATE
- American Association of Retired Persons
- Attorney General
- Competitive Utility Tariffs
- Michigan Manufacturers Association
- Perrigo

Michigan Alliance for Fair Competition / ACCA / SMACNA

Others:

- Jonathon Washington
- Karoub and Associates