

Complaint

IN THE MATTER OF

DTE ENERGY COMPANY, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4008; File No. 0010067
Complaint, May 15, 2001--Decision, May 15, 2001*

This consent order addresses the merger of a subsidiary of Respondent DTE Energy Company -- a diversified energy holding company whose principal operating subsidiary, The Detroit Edison Company ("Edison"), is a public utility engaged in the generation, transmission, distribution, and sale of electricity in southeastern Michigan, including the Detroit metropolitan area -- and Respondent MCN Energy Group Inc., another diversified energy holding company and the parent of Michigan Consolidated Gas Company ("MichCon"), a natural gas utility serving areas throughout the State of Michigan, including southeastern Michigan. The order, among other things, requires the respondents to divest certain assets -- including an easement over MichCon's local natural gas distribution system permitting the distribution of natural gas in the city of Detroit and all or parts of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties (the Overlap Area) -- to Exelon Energy Company or to another acquirer approved by the Commission. The order also requires the respondents to appoint an independent third-party auditor with knowledge of the natural gas industry to oversee the easement agreement; to repair and replace all components of the distribution system necessary for the proper operation thereof; and to comply promptly with any request from any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services from Exelon.

Participants

For the Commission: *Dennis F. Johnson, Marc W. Schneider, Constance M. Salemi, Andrew Lee, Mary Rose Emig, Evelyn Boynton, Phillip L. Broyles, Arthur Strong, Elizabeth A. Piotrowski, Roger Boner, John C. Hilke, J. Elizabeth Callison and Daniel O'Brien.*

For the Respondents: *William F. Young, Hunton & Williams, Mary Azcuenaga, Heller Ehrman White & McAuliffe, Ilene*

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*Knable Gotts and Joseph Larson, Wachtell, Lipton, Rosen & Katz,
and Paul Fabien, Honnigman Miller Schwartz and Cohn.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondents DTE Energy Company ("DTE"), a corporation, and MCN Energy Group, Inc. ("MCN"), a corporation, have entered into an agreement and plan of merger whereby MCN will merge with a subsidiary of DTE and become a wholly owned subsidiary of DTE, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such agreement and merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

A. DTE Energy Company

1. Respondent DTE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 2000 2nd Avenue, Detroit, Michigan 48226.

2. Respondent DTE is, and at all times relevant herein has been, the parent holding company of The Detroit Edison Company ("Edison"), a public utility engaged in the generation, purchase, transmission, distribution and sale of electricity in Southeastern Michigan, including the city of Detroit, Michigan.

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3. Respondent DTE is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

B. MCN Energy Group Inc.

4. Respondent MCN is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 500 Griswold Street, Detroit, Michigan 48226.

5. Respondent MCN is, and at all times relevant herein has been, an integrated energy company primarily involved in the production, gathering, processing, transmission, storage and distribution of natural gas. MCN is the parent of Michigan Consolidated Gas Company (“MichCon”), a natural gas utility serving communities throughout the State of Michigan, including Southeastern Michigan and the city of Detroit, Michigan.

6. Respondent MCN is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED MERGER

7. Pursuant to an agreement and plan of merger dated October 4, 1999, and amended November 12, 1999, by and among DTE, MCN and DTE Enterprises, Inc., a wholly-owned subsidiary of DTE, MCN will merge into DTE Enterprises, Inc.. Each share of MCN common stock will be converted into the right to receive either \$28.50 in cash or .775 shares of DTE common stock,

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subject to proration procedures. Including the assumption of debt, the transaction is valued at approximately \$4.6 billion.

III. TRADE AND COMMERCE

A. Self-Generation of Electricity

8. Edison distributes electricity to customers located in Southeastern Michigan. MichCon distributes natural gas to customers throughout various areas in Michigan, including part of the area in Southeastern Michigan served by Edison. The area in which the two firms overlap (*i.e.*, the area in which both Edison distributes electricity and MichCon distributes natural gas) consists of the City of Detroit and all (or parts) of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan (the “Overlap Area”).

9. Natural gas is the fuel of choice for new electricity generation in the Overlap Area. Other fuels are not likely to be used for new generation because of a variety of disadvantages relative to natural gas. Coal and fuel oil, for example, present environmental problems that do not exist with natural gas. Virtually all new electricity generation in the Overlap Area is likely to rely on natural gas as its source of fuel.

10. Customers in the Overlap Area who need electricity have limited options. They can have electricity delivered by Edison, or they can self-generate electricity using natural gas delivered by MichCon. Self-generation includes cogeneration, generation by municipalities, and emerging forms of distributed generation, such as microturbines and fuel cells, that use natural gas. MichCon has aggressively sought to encourage customers to install gas-powered cogeneration equipment that would allow them to minimize or eliminate the purchase of electricity from Edison.

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B. The City of Detroit

11. The City of Detroit operates a municipal utility (the Public Lighting Department, or “PLD”) that distributes electricity to industrial, business, and public sector customers in Detroit. The PLD competes directly with Edison for new non-residential customers in Detroit.

12. The PLD has two sources of electricity. It purchases some power at wholesale, which is delivered over Edison’s power lines, and it generates the rest of its requirements using natural gas delivered by MichCon. The PLD has no viable option for natural gas delivery other than MichCon, and after the merger will have to rely on its only direct electricity competitor for delivery of natural gas.

C. Competing Applications

13. Electricity and natural gas compete directly for certain commercial and industrial applications. Some customers can choose either natural gas or electricity for specific energy needs, such as powering air compressors, commercial cooking, and various process applications. Customers within the Overlap Area who choose natural gas for these applications must use natural gas delivered by MichCon, and customers who choose electricity must use power delivered by the local electric utility, usually Edison. MichCon has aggressively sought to convert customers using electricity for such applications to natural gas, typically by attempting to convince customers of the relative economic benefits of natural gas compared to electricity.

IV. THE RELEVANT MARKETS

14. Relevant lines of commerce in which to analyze the effects of this merger are the local distribution of electricity and the local distribution of natural gas.

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15. A relevant section of the country in which to analyze the effects of this merger is the Overlap Area, *i.e.*, the City of Detroit and the areas of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan, where both Edison distributes electricity and MichCon distributes natural gas.

V. MARKET STRUCTURE

16. The relevant markets are highly concentrated. MichCon is the only distributor of natural gas within the Overlap Area. Except for the cities of Detroit and Wyandotte, Michigan, which operate municipal utilities, Edison is the only distributor of electricity within the Overlap Area. The municipal utilities operated by the cities of Detroit and Wyandotte must use power lines operated and controlled by Edison to receive electricity that is not self-generated by the municipalities. Following the merger, Edison would effectively control the sources of distribution for both electricity and natural gas in the Overlap Area.

VI. ENTRY CONDITIONS

17. Entry into the distribution of electricity and the distribution of natural gas within the Overlap Area is effectively blocked by regulatory constraints and sunk costs, and would not be timely, likely, or sufficient to prevent anticompetitive effects that may result from this merger.

VII. VIOLATIONS CHARGED

First Violation

18. Respondents DTE and MCN are competitors in the Overlap Area because Edison distributes electricity and MichCon distributes natural gas used for the self-generation of electricity.

19. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in the Overlap

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Area in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. By eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas used for the self-generation of electricity in the Overlap Area;
- b. By increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas used for the self-generation of electricity;

each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas in the relevant market.

Second Violation

20. Respondent DTE competes with the PLD in the distribution of electricity in the City of Detroit.

21. The PLD has no viable option for natural gas delivery other than MichCon, and after the merger will have to rely on its only direct electricity competitor for delivery of natural gas.

22. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the distribution of electricity in the City of Detroit in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. By decreasing or eliminating competition in the distribution of electricity, and the distribution of natural gas used to produce electricity, in the City of Detroit;

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- b. By facilitating DTE's ability to raise the costs of the Detroit PLD;

each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas used to generate electricity in the City of Detroit.

Third Violation

23. Respondents DTE and MCN are competitors in the Overlap Area because Edison distributes electricity and MichCon distributes natural gas used to displace electricity in various commercial and industrial applications.

24. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in the Overlap Area in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. By eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas in the Overlap Area;
- b. By increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas;

each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas in the relevant market.

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VIII. STATUTES VIOLATED

25. The agreement and plan of merger between DTE and MCN constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

26. The proposed merger, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of May, 2001, issues its complaint against said respondents.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger between DTE Energy Company (“DTE”) and MCN Energy Group Inc. (“MCN”) (collectively “Respondents”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”) containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent DTE Energy Company is a corporation organized, existing and doing business under and by virtue of the

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laws of the State of Michigan, with its office and principal place of business at 2000 2nd Avenue, Detroit, Michigan 48226.

2. Respondent MCN Energy Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 500 Griswold Street, Detroit, Michigan 48226.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. “DTE” means DTE Energy Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by DTE (including, but not limited to, The Detroit Edison Company), and the respective directors, officers, employees, agents and representatives, predecessors, successors, and assigns of each.

B. “MCN” means MCN Energy Group Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by MCN (including, but not limited to, Michigan Consolidated Gas Company), and the respective directors, officers, employees, agents and representatives, predecessors, successors, and assigns of each.

C. “Respondents” means DTE and MCN, individually and collectively.

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D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means either Exelon or such other entity approved by the Commission to which Respondents or a trustee divest the Divested Assets pursuant to the requirements of this Order.

F. "Auditor Agreement" means the Amended and Restated Auditor Agreement made as of the 8th day of February, 2001, between Michigan Consolidated Gas Company, Exelon Energy Company, and Navigant Consulting, Inc., which is contained in Confidential Appendix B to this Order.

G. "Divested Assets" means all rights, title, and interest acquired by DTE from MCN pursuant to the Merger in all assets and businesses relating to the transportation, distribution and storage of natural gas, and the marketing and sale of natural gas distribution services, for Electric Displacement Load in the Overlap Area, including, without limitation, the following:

1. transportation and distribution capacity, storage capacity, and all other rights and assets used for, associated with, or necessary for the transportation and distribution of natural gas to any and all Electric Displacement Load customers in the Overlap Area;
2. all customer lists, customer data, vendor lists, sales promotion literature, advertising materials, marketing studies, engineering studies, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;
3. all rights, title and interest in and to owned or leased real property, together with easements, rights-of-way, appurtenances, licenses, and permits;

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4. all rights, title, and interest in and to contracts (together with associated bids) entered into with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
5. all rights under warranties and guarantees, express or implied;
6. all separately maintained, as well as relevant portions of not separately maintained, books, records and files;
7. all federal, state, and local regulatory agency registrations, permits, licenses, easements, authorizations, franchises, and applications, and all documents related thereto; and
8. all items of prepaid expense;

Provided, however, if Respondents divest to Exelon under the terms set forth in the Divestiture Agreement pursuant to Paragraph II.A. of this Order, “Divested Assets” means the easement and all rights and other assets conveyed by the Divestiture Agreement.

H. “Divestiture Agreement” means both of the following agreements, if approved by the Commission: (1) the Easement Agreement, and (2) the Auditor Agreement.

I. “Easement Agreement” means the Amended and Restated Easement Agreement made and entered into as of the 8th day of February, 2001, between Michigan Consolidated Gas Company and Exelon, which is contained in Appendix A to this Order.

J. “Electric Displacement Equipment” means any natural gas powered equipment that displaces or that can be used in lieu of electric equipment, including, but not limited to, chillers, air compressors, and commercial dishwashers and fryers; *provided, however,* that Electric Displacement Equipment does not include

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equipment used for direct-fired space heating and hot water applications.

K. “Electric Displacement Load” or “EDL” means natural gas consumption for:

1. On-Site Power Generation,
2. Electric Displacement Equipment, or
3. General Generation.

L. “Exelon” means Exelon Energy Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 2315 Enterprise Drive, Westchester, Illinois 60154, and its successors and assigns.

M. “General Generation” means up to 8,750,000 kWh of non-On-Site Power Generation per year per each unit of Generation Equipment served by the Acquirer of the Divested Assets in the Overlap Area; *provided, however*, that General Generation may not exceed 8,750,000 kWh at any Contiguous Customer Location, where a “Contiguous Customer Location” shall consist of the buildings or parts of buildings situated upon the same parcel or contiguous parcels of land and occupied and used by the customer as a unitary enterprise at one location and under one management.

N. “Generation Equipment” means power generation equipment, including, but not limited to, engines, turbines, or fuel cells.

O. “MCN Distribution System” means the natural gas distribution system operated by MCN in the Overlap Area, including, but not limited to, the gas pipelines and all related equipment, systems, components, rights and other assets used for, associated with, or necessary for the transportation, distribution or storage of natural gas within the Overlap Area.

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P. “Merger” means the merger of DTE and MCN described in the Agreement and Plan of Merger Among DTE Energy Company, MCN Energy Group Inc., and DTE Enterprises, Inc., dated October 4, 1999, as amended November 12, 1999, and February 28, 2001.

Q. “New Divestiture Agreement” means any agreement, other than the Divestiture Agreement between the Respondents and Exelon, for the sale of the Divested Assets that has been approved by the Commission to accomplish the requirements of this Order, including any agreement(s) entered into by a trustee pursuant to Paragraph III of this Order.

R. “Non-EDL” means natural gas consumption for applications or uses that are not Electric Displacement Load.

S. “Non-Utility Entity” means an entity that has no obligation under state or local law to provide utility service (*i.e.*, the local distribution of electricity or natural gas) to the public in the Overlap Area.

T. “On-Site Power Generation” means electrical generation from Generation Equipment to the extent that the electrical conductors between the Generation Equipment and facility consuming output from the Generation Equipment: (1) are owned or operated either by a Non-Utility Entity that owns or operates the Generation Equipment, or by the entity that owns or operates the facility consuming output from the Generation Equipment, or both such entities, or (2) are owned or operated by a municipal entity, including a city, village, township or county.

U. “Overlap Area” means the geographic areas in Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan, in which both DTE distributes electricity and MCN distributes natural gas.

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V.

IT IS FURTHER ORDERED that:

W. Respondents shall divest the Divested Assets:

1. to Exelon pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), no later than five (5) days after the date on which the Merger is consummated.
2. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondents either that Exelon is not an acceptable acquirer of the Divested Assets, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondents shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date on which this Order becomes final to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

X. Respondents shall:

1. Maintain, repair, and replace all components and other aspects of the MCN Distribution System:
 - a. necessary for the proper or safe operation of that system;
and
 - b. in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.

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2. Operate the MCN Distribution System in a reasonable and non-discriminatory manner, and in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.
3. Appoint an independent Auditor, subject to the approval of the Commission, that will perform such services as are necessary to effectuate the Divestiture Agreement, including, but not limited to, arbitration of disputes between Respondents and the Acquirer and all other duties and responsibilities set forth in the Divestiture Agreement. The Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Divestiture Agreement, including the right to propose changes to the Divestiture Agreement necessary to ensure the competitive viability of the Acquirer under the Divestiture Agreement, and shall have free access to all of Respondents' books, records, information, systems, and facilities as deemed reasonably necessary by the Auditor to monitor Respondents' performance under the Divestiture Agreement; *provided, however*, that the Auditor shall have no authority to modify any agreement between Respondents and the Acquirer, or otherwise to modify any obligations of the Respondents under this Order.
4. No later than five (5) days after the date on which the Merger is consummated, provide Acquirer with a list of all customers to which MCN transports natural gas in the Overlap Area, including the name, address, and rate classification for each such customer, and a statement indicating whether each such customer utilizes natural gas for Electric Displacement Load. Respondents shall provide this list and information in Microsoft Access format (if respondents divest the Divested Assets to Exelon), or in such other standard computer format as may be requested by

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another Acquirer (if respondents divest the Divested Assets to an Acquirer other than Exelon).

5. No later than five (5) days after the date on which the Merger is consummated, provide to the Auditor all information and results of the study conducted by the MCN Marketing Department of EDL opportunities in the Overlap Area referred to as the Data Collection and Analysis Team (“DCAT”) study. At the same time, Respondents shall send a letter to each customer in the DCAT study advising the customer that gas distribution services may be purchased from Acquirer and asking if the customer wishes the Auditor to provide the customer’s DCAT information to the Acquirer. Respondents shall instruct the Auditor that, upon the receipt of a request from any customer, the Auditor shall provide Acquirer with the customer-specific information, and that the Auditor shall not inform Respondents which customers did or did not authorize the transfer of their information to Acquirer.
6. For two (2) years after the date on which the Merger is consummated, promptly comply with any request of any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services provided by the Acquirer.

Y. If Respondents or a trustee, as appropriate, divest the Divested Assets pursuant to Paragraph II.A.2. or Paragraph III. of this Order, as applicable, Respondents shall execute a New Divestiture Agreement with the Acquirer (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order). Such New Divestiture Agreement shall divest the Divested Assets to the Acquirer pursuant to terms and conditions that receive the prior approval of the Commission, and shall require Respondents to:

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1. Grant the Acquirer such natural gas transportation and distribution capacity, storage capacity, and other rights in and to the MCN Distribution System that, in the sole discretion of the Commission, are necessary to insure that the Acquirer will be:
 - a. economically viable; and
 - b. able to transport and distribute natural gas for Electric Displacement Load competitively with Respondents and in a manner that achieves the purposes of this Order.
2. Operate and expand the MCN Distribution System in a manner that:
 - a. is reasonable and non-discriminatory and complies fully with all rules and regulations adopted by any federal, state or political subdivision, or any agency of any federal, state or political subdivision, having jurisdiction over any aspect of the MCN Distribution System;
 - b. enables the Acquirer to fulfill the purposes of this Order; and
 - c. reasonably allocates, consistent with the purposes of this Order, the cost of any expansion between Respondents and the Acquirer.
3. Appoint an independent Auditor, subject to the approval of the Commission, to mediate and arbitrate any dispute between Respondents and the Acquirer arising under the New Divestiture Agreement in good faith and in an expeditious manner consistent with the purposes of this Order.
4. Accept for transportation through the MCN Distribution System at all receipt points that exist at the time of the divestiture of the Divested Assets, or which shall be created

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during any period that the Divestiture Agreement is in effect, any natural gas nominated by the Acquirer, *provided, however*, that Respondents may condition acceptance of such natural gas on terms and conditions:

- a. required by rules and regulations adopted by any federal, state or political subdivision, or any agency of any federal, state or political subdivision, having jurisdiction over any aspect of the MCN Distribution System; or
 - b. required for the efficient, non-discriminatory operation of the MCN Distribution System.
5. Provide that the New Divestiture Agreement shall not be modified or assigned without the prior approval of the Commission.
 6. Require the Acquirer to agree to the exercise of powers by the independent Auditor as provided in Paragraph II.B.3. of this Order.
 7. Permit the Acquirer to sell, lease, or otherwise convey to other persons a portion of any capacity to transport or store natural gas in or through the MCN Distribution System acquired by the Acquirer pursuant to the New Divestiture Agreement; *provided, however*,
 - a. Respondents shall prohibit the Acquirer from assigning all of its rights under or interest in the New Divestiture Agreement to any person without the prior approval of the Commission; and
 - b. Respondents may prohibit the Acquirer from assigning any portion or all of the Acquirer's obligations under the New Divestiture Agreement, but may permit such assignment with the prior approval of the Commission.

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8. Indemnify and hold the Acquirer harmless from suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons in connection with the MCN Distribution System.
9. Convey to the Acquirer all of the rights, title, and interest in any customer contracts, customer information, marketing studies, or other assets surrendered back, assigned, sold, or otherwise conveyed by Exelon to Respondents if the New Divestiture Agreement is executed following the termination of the Divestiture Agreement.
10. Undertake such additional contractual obligations as, in the sole discretion of the Commission, are necessary to effectuate the purposes of this Order.

Provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.C, Respondents need not divest such assets or enter into such contracts if: (a) the Acquirer chooses not to acquire such assets or enter into such contracts; and (b) the Commission approves the New Divestiture Agreement without such assets or contracts.

Z. Respondents shall comply with the terms of the Divestiture Agreement or the New Divestiture Agreement, as applicable, which agreement, if approved by the Commission, is incorporated by reference into this Order and made a part hereof. Any failure by Respondents to comply with the terms of the Divestiture Agreement or the New Divestiture Agreement, as applicable, shall constitute a failure to comply with this Order. Further, nothing in the Divestiture Agreement or New Divestiture Agreement shall preclude, or be deemed to preclude, the Commission from bringing any action as may be appropriate under the Federal Trade Commission Act or any other statute enforced by the Commission for any failure by Respondents to comply with this Order. Notwithstanding any paragraph, section, or other provision of the

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Divestiture Agreement or the New Divestiture Agreement, as applicable, any failure to comply with any condition precedent to closing (whether or not waived), or any modification or assignment of the Divestiture Agreement or the New Divestiture Agreement, as applicable, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

AA. Pending divestiture of the Divested Assets pursuant to the Divestiture Agreement or the New Divestiture Agreement, as applicable, Respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.

BB. The purpose of the divestiture of the Divested Assets is to ensure the continuation of a viable and competitive alternative supplier of natural gas transportation and distribution services to EDL customers in the Overlap Area after the Merger, and to remedy any lessening of competition resulting from the Merger as alleged in the Commission's complaint.

II.

IT IS FURTHER ORDERED that:

A. The Commission may appoint a trustee to divest the Divested Assets ("Divestiture Trustee") to an Acquirer and to execute a New Divestiture Agreement that satisfies the requirements of Paragraph II of this Order if:

1. Respondents fail to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein;
2. Exelon terminates the Divestiture Agreement; or
3. The Divestiture Agreement is otherwise terminated.

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B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the decision of the Commission to appoint a Divestiture Trustee nor the decision of the Commission not to appoint a Divestiture Trustee shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph III. of this Order to divest the Divested Assets to an Acquirer, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Divested Assets to an Acquirer pursuant to the terms of this Order and to enter into a New Divestiture Agreement with the Acquirer pursuant to the terms of this Order, which New Divestiture Agreement shall be subject to the prior approval of the Commission.

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3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Divested Assets to an Acquirer and to enter into a New Divestiture Agreement with the Acquirer.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III. of this Order to divest the Divested Assets and to enter into a New Divestiture Agreement with an Acquirer in a manner that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend such divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondents related to the Divested Assets, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture or other responsibilities. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by

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the Commission or, for a court-appointed trustee, by the court.

6. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made to an Acquirer and pursuant to a New Divestiture Agreement in the manner as set forth in Paragraph II. of this Order; *provided, however*, that if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission, *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, engineers, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's divesting the Divested Assets to an

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Acquirer and entering into a New Divestiture Agreement in a manner that satisfies the requirements of Paragraph II. of this Order.

8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph III. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divested Assets.
12. The Divestiture Trustee shall report in writing to Respondents and to the Commission every two (2) months concerning his or her efforts to divest the Divested Assets.

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III.**IT IS FURTHER ORDERED** that:

A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the divestiture provisions of Paragraphs II or III of this Order, as applicable, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II or III of this Order, as applicable. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II or III of the Order, as applicable, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this Order becomes final, annually for the next nineteen (19) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IV.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

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VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, subject to any legally recognized privilege and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 15, 2021.

By the Commission.

AMENDED AND RESTATED

EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT (this "Agreement") is made and entered into as of the 8th day of February 2001, between MICHIGAN CONSOLIDATED GAS COMPANY, a Michigan corporation, with its principal address at 500 Griswold Street, Detroit, Michigan 48226 ("Grantor"), and EXELON ENERGY COMPANY, a Delaware corporation, with its principal address at 2315 Enterprise Drive, Westchester, Illinois 60154 ("Grantee"). Capitalized terms and phrases used and not otherwise defined herein shall for all purposes of this Agreement have the respective meanings specified therefor in Exhibit D attached hereto.

RECITALS:

This Agreement is based on the following recitals:

- A. Grantor is a regulated utility engaged in the distribution and sale of natural gas and owns and operates a natural gas distribution system consisting of gas lines and related equipment and systems constructed within easements granted pursuant to various franchise agreements and easement agreements ("Grantor's Distribution System").
- B. Grantor is selling transportation and storage capacity on Grantor's Distribution System to promote the growth of viable and competitive on-site Electric Displacement Load ("EDL") (as hereinafter defined) within the geographic area of Grantor's service territory that is also served by The Detroit Edison Company, as more fully described on the map attached as Exhibit A (the "Overlap Area").
- C. Grantee desires to purchase capacity to serve EDL in the Overlap Area and Grantor has agreed, among other things, that Grantee will have the use of portions of Grantor's Distribution System in order to develop EDL in competition with Grantor.
- D. Grantee desires that an easement be granted over portions of the Grantor's Distribution System for purposes of firm transportation and storage of gas in accordance with the terms of this Agreement.

- E. Due to the unique nature of EDL and Grantee's capacity needs, Grantor is agreeable to providing said easement to Grantee.
- F. Subject to the provisions of this Agreement and the Auditor Agreement between Grantor, Grantee and the Auditor of even date herewith, Grantor shall retain full operational control over the transportation and storage of gas on Grantor's distribution System and have ultimate control over the operation of Grantor's Distribution System.

NOW, THEREFORE, in consideration of the foregoing recitals, for ONE DOLLAR (\$1.00), the sufficiency and receipt of which is hereby acknowledged, Grantor and Grantee hereby agree as follows:

1. **GRANT:** Grantor hereby grants to Grantee a perpetual, non-exclusive easement in, across and through the portions of the Grantor's Distribution System situated in Wayne, Washtenaw, Monroe, Oakland and Macomb Counties, Michigan, as more particularly described on Exhibit B upon the terms and conditions hereinafter set forth (the "Easement").
2. **PERMITTED USE:** The Easement is granted solely for the purpose of transportation and storage of gas in accordance with the terms and conditions of this Agreement.
3. **CAPACITY RIGHTS:**
 - (a) **Initial Capacity.** Grantee shall have use of 5 Bcf of annual transportation capacity ("Initial Capacity"), to serve any end use customers located within the Overlap Area that have been designated by Grantee as being customers of Grantee for the purposes of this Agreement, during the period of any such designation ("Grantee's Customers"). Payment for the Initial Capacity shall be at the rate set forth in Section 6.
 - (b) **Supplemental Capacity.** At Grantee's option, Grantee may exercise its right to purchase up to an additional 15 Bcf of annual transportation capacity ("Supplemental Capacity") for use in serving Grantee's Customers within the Overlap Area. Such Supplemental Capacity shall be sold to Grantee in increments of 1 Bcf. Each increment of Supplemental Capacity purchased by Grantee will be charged an annual capacity payment as provided in Section 6.
 - i) Supplemental Capacity must serve a minimum of 50% Electric Displacement Load ("EDL Target"). Grantee shall be deemed to have met the EDL Target if Grantee has demonstrated to the satisfaction of the Auditor that the total EDL consumption by all of Grantee's Customers combined equals or exceeds 50% of the Supplemental Capacity already sold by Grantee. Grantee may acquire one or more additional increments of Supplemental Capacity at any time, provided that (x) the total Supplemental Capacity may not exceed 15 Bcf, and either: (y) Grantee has met the EDL Target for the Supplemental Capacity already sold by Grantee; or (z) the Auditor has determined that the additional Supplemental Capacity requested by Grantee would be used to serve EDL

Load. No demonstration of compliance with conditions (y) or (z) shall be required prior to Grantee purchasing the first increment of Supplemental Capacity.

- (c) **Growth Capacity.** If the Auditor certifies that Grantee has purchased and met the EDL Target for all 15 Bcf of Supplemental Capacity, at Grantee's option, Grantee may exercise its right to purchase additional transportation capacity ("Growth Capacity") for use in serving the On-site Generation Load within the Overlap Area. Such additional capacity shall be sold to Grantee in any increments equal to the annual volumetric requirements of each of Grantee's incremental Growth Capacity customers as specified by the Grantee at the time the capacity is acquired. Growth Capacity purchased by Grantee will be charged a monthly capacity payment as provided in Section 6.
- (d) **Non-EDL Transportation.** At Grantee's election, Grantor will transport gas to Grantee's Customers at Tariff rates. Any capacity or volumes utilized for such transportation shall not be included in the calculation of Keep-Whole Payments or Grantee's ACQ or MDQ or overruns or Excess Quantities under this Agreement. Grantee shall pay for any metering necessary to separately measure the EDL.
- (e) **Overruns.** Grantor shall notify Grantee within thirty (30) days after the end of any Contract Year in which deliveries to Grantee's Customers overrun the current ACQ ("ACQ Overrun"). Grantee shall have thirty (30) days from the date of the notice to elect to (x) acquire an additional increment of capacity or (y) pay Grantor for ACQ Overrun as follows: (1) for ACQ Overrun up to 5% of ACQ, Grantee shall pay 80 cents per Mcf; and (2) for ACQ Overrun in excess of 5% of ACQ, Grantee shall pay the Sales Rate in effect for the Contract Year in which such ACQ Overrun occurred. For purposes of the foregoing calculation Committed ACQs and related actual volumes associated with Expansion Load shall be excluded.
- (f) **Expansion Load Overruns.** For each Expansion Load to the extent actual volumes related to such Expansion Load exceed Committed ACQ ("Committed ACQ Overrun"), Grantee shall pay Grantor for each Committed ACQ Overrun as follows: (x) for Committed ACQ Overrun up to 5% of Committed ACQ, Grantee shall pay 80 cents per Mcf; and (y) for Committed ACQ Overrun in excess of 5% of Committed ACQ, Grantee shall pay the Sales Rate in effect for the Contract Year in which such Committed ACQ Overrun occurred.
- (g) **Keep-Whole.** Within 30 days after the end of the Contract Year in which Grantee first purchases Supplemental Capacity, and each Contract Year thereafter, Grantee shall submit to the Auditor all information reasonably requested by the Auditor to determine whether Grantee has met the requirements for service to Electric Displacement Load and On-site Generation Load applicable to the capacity acquired by Grantee. If the Auditor finds that Grantee's Customers (in aggregate) failed to utilize the required amount of Electric Displacement Load or

On-site Generation Load, then Grantee shall keep Grantor whole by paying Grantor the Keep-Whole Rate, defined below, that would have been paid by those of Grantee's Customers whose non-EDL consumption caused Grantee to fall short of its EDL Target ("Keep-Whole Payment"). No Keep-Whole Payments shall be required by either party if Grantee exceeds its EDL Target. In order to calculate the Keep-Whole Payment the Auditor shall make the following findings:

- i) Keep-Whole Volumes (in Mcf) for Supplemental Capacity where Grantee has used 20 Bcf or less of capacity:

$$\text{Keep-Whole Volumes} = \frac{3}{4} (\text{non-EDL consumption} - 5.5 \text{ Bcf} - \text{EDL consumption})$$

- ii) Keep-Whole Volumes (in Mcf) for Supplemental Capacity and Growth Capacity where Grantee has used more than 20 Bcf of capacity shall be the sum of Keep-Whole Volumes_{EDL} and Keep-Whole Volumes_{OGL}:

$$\text{Keep-Whole Volumes}_{\text{OGL}} = (\text{Total consumption} - 20 \text{ Bcf}) - \text{OGL consumption}$$

$$\text{Keep-Whole Volumes}_{\text{EDL}} = \frac{3}{4} (\text{non-EDL consumption} - 5.5 \text{ Bcf} - \text{EDL consumption})$$

For purposes of calculating Keep-Whole Volumes_{EDL} in Section 3(g)(ii), non-EDL consumption shall never be greater than 20 Bcf.

For the purpose of determining Keep-Whole Volumes, consumption is determined by actual metered volumes or if EDL and OGL are not separately metered, a reasonable allocation of metered volumes as approved by the Auditor. Negative Keep-Whole Volumes, Negative Keep-Whole Volumes_{OGL}, and Negative Keep-Whole Volumes_{EDL} shall be deemed to be equal to zero.

- iii) Grantee's Customers to whom Keep-Whole Volumes were delivered. For purposes of this calculation, the Auditor shall assume that Keep-Whole Volumes were delivered under the last agreement(s) executed with Grantee for deliveries using capacity acquired under this Agreement;
- iv) The lowest cost-based MPSC approved rates (both distribution and customer service charge) that each of Grantee's Customers with Keep-Whole Volumes would have paid Grantor under its then current Tariff ("Keep-Whole Rate"). Grantor's current Tariff rates are attached as Exhibit C.

The Keep-Whole Payment shall be the Keep-Whole Volumes times the Keep-Whole Rate for each applicable Grantee's Customer; provided however, that no Keep-Whole Payment shall be required to the extent that Grantee's failure to meet the EDL Targets was a result of the termination of contracts with one or more EDL customers.

- (h) Nothing in this Agreement shall be construed to prevent Grantee from marketing gas to EDL, OGL or other end use customers in the Overlap Area or other areas of

Grantor's service territory under programs that do not involve the use of the capacity made available to Grantee under this Agreement.

- (i) Notwithstanding Section 20, Grantee may transfer the right to use transportation capacity with or without any associated storage rights it purchases under this Agreement to a third party for re-sale to end-users in the Overlap Area ("Brokered Capacity"). Grantee shall remain responsible to Grantor for all Capacity Payments and any Excess Quantity or Deficient Quantity Charges associated with Brokered Capacity. For purposes of calculating Keep-Whole Volumes, the Auditor shall determine EDL and/or OGL consumption based on how Brokered Capacity is consumed by the ultimate end-user utilizing information received from the acquiror of any Brokered Capacity, relevant end-users, Grantee or Grantor.

- 4. **GRANTEE TRANSPORTATION RIGHTS:** Grantee shall cause to be delivered to Grantor at the Receipt Point(s), and Grantor shall transport from the Receipt Point(s) through the Grantor's Distribution System to the Delivery Points within the Overlap Area, Equivalent Quantities of natural gas. Grantor shall aggregate and treat as one, all Grantee's Customers for the purposes of nominations, storage utilization, balancing and any fees or penalties (if applicable). If Grantor utilizes daily balancing or MMBtu instead of Mcf for all customers in its ST and LT tariff classes, then Grantor retains the right to require Grantee to balance Receipt Point(s), Delivery Point(s) and storage on a daily basis and/or to utilize MMBtu measurement.

- (a) Grantee shall cause gas to be delivered to the Receipt Point(s) up to the following parameters:

$$\text{MDQ: Winter (November – March)} \quad \frac{ACQ - ACQ_{OGL}}{110} + \frac{ACQ_{OGL}}{170}$$

$$\text{Summer (April – August)} \quad \frac{ACQ - ACQ_{OGL}}{260} + \frac{ACQ_{OGL}}{110}$$

$$\text{Fall (September – October)} \quad \frac{ACQ - ACQ_{OGL}}{260} + \frac{ACQ_{OGL}}{200}$$

Grantee shall have no minimum delivery requirements as to its MDQ.

- (b) At no time shall Grantee's daily nomination(s) to Receipt Point(s) exceed the then authorized MDQ unless agreed upon by Grantor in advance. Deliveries to Receipt Point(s) that exceed the authorized MDQ will be excess quantities ("Excess Quantities"). Deliveries to Grantee's Customers that exceed the MDQ will be deficient quantities ("Deficient Quantities"). Grantee shall accept or pay an Excess Quantity Charge or Deficient Quantity Charge as applicable, as provided in Section 6, for all such volumes.
- (c) Grantee will also be responsible for (x) all upstream or third party transportation agreements and charges incurred in transporting the gas to the Receipt Point(s) and

(y) all charges or penalties caused by any agent acting on Grantee's behalf, including, but not limited to, unauthorized gas and storage penalties.

5. **STORAGE RIGHTS:** Transportation services under this Agreement include Grantee's access to a storage quantity equal to Grantee's Storage Capacity, which will be utilized by Grantee for balancing when Grantee's delivered volumes from the Receipt Point(s) do not match the consumption of Grantee's Customers at the Delivery Points.

- (a) During the months of September and October, net injections into storage will be limited to no more than 14.3% of Grantee's Storage Capacity unless otherwise mutually agreed to by the parties. If net injections during the September and October period exceed the 14.3% tolerance level, Grantee will accept the Excess Quantity Charge, as provided in Section 6, for volumes in excess of 14.3%.
- (b) If the volume of gas held by Grantor in storage for Grantee's account exceeds the Storage Capacity limits, Grantor shall treat the excess volumes as Excess Quantities. Grantor shall purchase the Excess Quantities from Grantee by paying Grantee the Excess Quantity Charge for all such volumes.
- (c) During the months of November through March, net withdrawals from Grantee's storage account will be limited each month to 40% of Grantee's Storage Capacity.
- (d) If (x) Grantee allows the storage balance to go below zero, or (y) during the months of November through March, net withdrawals exceed 40% of Grantee's Storage Capacity, then Grantee will be deemed to have purchased gas from Grantor and Grantee will pay Grantor the Deficient Quantity Charge for any volumes delivered from storage on behalf of Grantee when its storage balance is below zero.

6. **CHARGES**

- (a) Initial Capacity Annual Payment: \$ 3,750,000
- Supplemental Capacity Annual Payment: \$ 700,000 per 1 Bcf

Growth Capacity Monthly Payment is equal to the sum of:

One-twelfth (1/12) the annual volume of Residential Growth Capacity times 85% of the Grantor's Average Residential Distribution Charge

and

One-twelfth (1/12) the annual volume of Non-Residential Growth Capacity times the Grantor's Transportation Rate Schedule Minimum.

Provided however, that in no case shall the Growth Capacity Monthly Payment be less than one-twelfth (1/12) the total annual volume of elected Growth Capacity times 80% of the Grantor's Average Transportation Rate.

(b) Grantee shall pay, on the twenty-fifth (25th) day of each month, one-twelfth (1/12) of the Initial and Supplemental Capacity Annual Payments in effect on the first day of the preceding month, and the Growth Capacity Monthly Payment; provided, however, that (x) no payments will be due for the first three (3) months immediately following the close of the proposed merger between DTE Energy Company and MCN Energy Group, Inc.; and (y) the payments for the fourth through twelfth months immediately following the close of said merger shall be equal to one half the otherwise applicable Initial and Supplemental Capacity monthly Payments.

(c) (i) Capacity payments for Supplemental Capacity will start upon Grantee's election to purchase the additional capacity and continue as long as the capacity election remains in effect. Provided that Grantee has (x) not purchased Growth Capacity or (y) first turned back all Growth Capacity as provided below, Grantee shall have the right, upon 10 days prior notice, to reduce its election of Supplemental Capacity in the event that one or more of Grantee's Customers cease taking service from Grantee for EDL load. The amount of such reduction shall be in increments of 1 Bcf with 50% EDL and 50% non-EDL load. Any such reduction shall become effective on the first April 1 following Grantee's election.

Grantee shall have the right, upon 10 days prior notice, to reduce its election of Growth Capacity. Any such reduction shall become effective on the first April 1 following Grantee's election.

(ii) Beginning on the earlier of (x) Grantee's request or (y) with the April payment for the twenty-first (21st) Contract Year, all Initial and Supplemental Capacity Annual Payments shall be adjusted for increases or decreases in Grantor's average per Mcf volumetric cost of service as established by the MPSC, from time to time, as described below ("Adjustment Mechanism"). Once the capacity payment has been adjusted, then it shall continue to be adjusted for any change to the MPSC Rate, defined below. At no time will any annual capacity payment, on an Mcf basis, exceed 75% of Grantor's then

effective Sales Rate. The Growth Capacity Monthly Payment shall be increased or decreased coincident with any changes in Grantor's MPSC approved residential and transportation Tariff rates.

The Adjustment Mechanism shall be applied as follows: the Initial and Supplemental Capacity Annual Payments will be adjusted for increases or decreases in Grantor's current weighted average per Mcf cost of end-user service as established by the MPSC from time to time ("MPSC Rate"). For purposes of illustration, Grantor's current MPSC Rate is \$1.6012 as established by the MPSC in Case No. U-10150 and more fully set forth in Exhibit E. The Adjustment Mechanism shall be calculated using the following formula and shall be applied individually to both the Initial and Supplemental Capacity Annual Payments:

$$\text{New Capacity Payment} = \frac{\text{New MPSC Rate}}{\text{Immediately Preceding MPSC Rate}} \times \text{Immediately Preceding Capacity Payment}$$

"New MPSC Rate" means the MPSC Rate established by the MPSC after the date of this Agreement and from time to time thereafter.

- (d) A fuel use charge of 1% gas-in-kind for all volumes delivered to Grantor at the Receipt Point(s) for transportation to Grantee's Customers.
- (e) The Excess Quantity Charge is equal to 95% of the lowest price reported in *Gas Daily*, in the Daily Price Survey, for the following locations for the month in which the breach occurred or the month following such breach: Dawn, Ontario; ANR ML7 (entire zone); Chicago-LDC, large euts; Michigan - Consumers Energy, large euts; Michigan - MichCon, large euts. Grantor shall purchase Excess Quantities from Grantee by paying Grantee the Excess Quantity Charge.
- (f) The Deficient Quantity Charge is equal to 105% of the highest price reported in *Gas Daily*, in the Daily Price Survey, for the following locations for the month in which the breach occurred or the month following such breach: Dawn, Ontario; ANR ML7 (entire zone); Chicago-LDC, large euts; Michigan - Consumers Energy, large euts; Michigan - MichCon, large euts. If at any time during the term of this Agreement, *Gas Daily* ceases publication, the parties will mutually agree, subject to approval by the Auditor, on a replacement trade publication that reports regional daily gas prices. Grantee shall purchase Deficient Quantities from Grantor by paying Grantor the Deficient Quantity Charge.

7. **REPAIR AND REPLACEMENTS:** Grantor shall repair and replace all components of Grantor's Distribution System necessary for the proper operation thereof. If Grantor fails to repair or replace such components, the Auditor may, at Grantor's expense, make any repairs and or replacements necessary for the proper operation of Grantor's Distribution System. In order to facilitate the Auditor's repair or replacement or such components,

Grantee may guarantee the cost of such repairs and or replacements, and Grantor shall promptly reimburse any payments paid pursuant to such guarantee.

8. **RELOCATION:** Grantor reserves the right, from time to time, to relocate any portions of the Grantor's Distribution System. Such relocation shall in no way impact Grantee's rights, under this Agreement, to store and transport gas in the Overlap Area. If any portion of the Grantor's Distribution System required for performance of Grantor's obligations under this Agreement is relocated, Grantor will grant to Grantee a new easement and Grantee will release the existing Easement for the relocated portion of Grantor's system. Furthermore, in the event Grantee, its successors and assigns shall no longer require the use of all or any part of the Easement, the part no longer required shall automatically revert to Grantor thereof and Grantee shall release such part of the Easement which Grantee shall no longer require.
9. **EASEMENTS OR RESTRICTIONS:** The granting of the Easement is subject to any easements or restrictions of record including the lien created by Michigan Consolidated Gas Company's Indenture of Mortgage and Deed of Trust dated as of March 1, 1944, as supplemented and amended, to the terms of the underlying franchises or easement agreements. Grantor is not assigning or transferring any of its rights under any of the underlying franchises or easement agreements.
10. **CONFORMITY WITH LAW:** Grantor and Grantee shall use the Easement in conformity with safe practices and shall at all times comply with all local, State, and Federal laws, statutes, rules, and regulations pertaining thereto.
11. **INSURANCE:** Neither Grantor nor Grantee shall do or permit to be done any act or thing in connection with the use of the Easement that will invalidate or be in conflict with any insurance policies covering the Grantor's Distribution System.
12. **PROTECTION FROM LIENS:** Grantee shall keep the Easement and the Grantor's Distribution System and every part thereof free and clear of any and all liens and encumbrances for work performed by Grantee, or on Grantee's behalf, on the Easement.

13. **CONDITIONS:** This Agreement is subject to the following conditions:
- (a) Prior approval by the MPSC. Grantor will file with the MPSC for approval of this Agreement. Both parties shall openly support this Agreement and seek MPSC approval of it.
 - (b) The closing of the proposed merger between DTE Energy Company and MCN Energy Group Inc.
 - (c) Approval of this Agreement by the FTC through the issuance of a final decision and order.
14. **TERM:** Subject to Sections 13 and 17, this Agreement is effective as of the closing date of the proposed merger between DTE Energy Company and MCN Energy Group Inc.
- (a) This Agreement may be terminated by Grantee at the end of the twentieth Contract Year or the end of any succeeding Contract Year by giving Grantor and the Auditor written notice one year prior to the proposed termination date.
 - (b) This Agreement may be terminated by Grantor only if the proposed merger between DTE Energy Company and MCN Energy Group Inc. does not close within 12 months after MPSC approval of this Agreement.
 - (c) Upon termination of this Agreement, the Easement shall be deemed to have been abandoned and will cease and terminate, which termination may be evidenced by Grantor's recordation of an affidavit to that effect.
 - (d) Grantee, in its sole discretion, may terminate this Agreement at any time if the Securities and Exchange Commission ("SEC") or any successor agency asserts jurisdiction over Grantee or Exelon Corporation, or any successor, affiliate or subsidiary of either, under the Public Utility Holding Company Act of 1935 by reason of entering into this Agreement or relating to this Agreement or exercising any rights under this Agreement. Grantee may also terminate this Agreement if by reason of entering into this Agreement or relating to this Agreement or exercising any rights under this Agreement, the Federal Energy Regulatory Commission ("FERC") or the Michigan Public Service Commission ("MPSC") or any successor agencies, (i) subjects Grantee or Exelon Corporation, or any successor, affiliate or subsidiary of either, to regulation to which a gas marketer in the State of Michigan or any successor, affiliate or subsidiary thereof would not be subject and (ii) such regulation has, in Grantee's reasonable judgment, a material adverse impact upon this Agreement for Grantee or upon Grantee or Exelon Corporation or any successor, affiliate or subsidiary of either.
15. **GOVERNING LAW:** This Agreement shall be governed and construed in accordance with the laws of the State of Michigan.
16. **FURTHER ASSURANCES:** Grantor agrees to execute, acknowledge and deliver to Grantee all such further, other and additional easements, instruments, notices and other

documents and to do all such other and further acts and things as may be necessary or useful to more fully and effectively grant, convey and assign to Grantee the easements and rights in Grantor's Distribution system throughout Wayne, Washtenaw, Monroe, Oakland and Macomb Counties, Michigan being conveyed hereby or intended to be so conveyed, provided, however, that no documents executed, acknowledged or delivered pursuant to this Paragraph may modify the Easement Agreement.

17. **TERMINATION OR MODIFICATION.** This Agreement shall not be terminated, modified, altered, or amended by the parties except as provided herein or except in writing as agreed to by the parties hereto and after notice to and approval by the FTC.
18. **NOTICES:** All notices or other communications provided for under this Agreement shall be in writing, signed by the party giving the same, and shall be deemed properly given and received (i) when actually delivered and received, if personally delivered; or (ii) three (3) business days after being mailed, if sent by registered or certified mail, postage prepaid, return receipt requested; or (iii) one (1) business day after being sent by overnight delivery service; or (iv) upon receipt, if sent by facsimile, all to the following addresses:

If to Grantor: Michigan Consolidated Gas Company
500 Griswold Street
Detroit, Michigan 48226
Fax No: (313) 965-0009
Attn: Office of the General Counsel

If to Grantee: Exelon Energy Company
2315 Enterprise Drive
Westchester, Illinois 60154
Fax No: (708) 236-7901
Attn: Vice President and General Manager

Each party shall have the right to designate other or additional addresses or addressees for the delivery of notices, by giving notice of the same in the manner as previously set forth herein.

19. **SUCCESSORS AND ASSIGNS:** This Easement runs with the land and binds and benefits Grantor's and Grantee's successors and permitted assigns.
20. **ASSIGNMENT:** Neither party may assign this Agreement or any of its rights or obligations arising under this Agreement without prior approval of the FTC and without the prior written consent of the other party, which shall not be unreasonably withheld,

provided, however, either party may assign this Agreement to an affiliate so long as the assignor guarantees the continuing performance of the assignee. Furthermore, Grantee may assign this Agreement to any institution providing financing to it. In no event, however, will Grantor be required to consent to a partial assignment of any rights or obligations arising under this Agreement.

21. **FTC ACTION:** Nothing in this Agreement shall be deemed to preclude the FTC from bringing any action as may be appropriate under the Federal Trade Commission Act.
22. **GENERAL TERMS AND CONDITIONS:** All transportation services provided under this Agreement shall be in accordance with the General Terms and Conditions attached as Exhibit D.
23. **PRIOR AGREEMENTS:** This Agreement, together with Exhibits A, B, C, D and E, and the Auditor Agreement, dated of even date as this Agreement, terminate and supercede the Easement Agreement and Auditor Agreement executed by the parties on August 21, 2000.

IN WITNESS WHEREOF, the Grantor has signed and sealed this instrument this ____ day of _____, 2001, and the Grantee has signed and sealed this instrument the ____ day of _____, 2001.

In the presence of:

MICHIGAN CONSOLIDATED GAS COMPANY
a Michigan corporation

WITNESSES:

Donna E. Clark

Jeannette M. Renaud

By: _____
Steven E. Kurmas
Its: Sr. Vice President

WITNESSES:

EXELON ENERGY COMPANY
a Delaware corporation

David J. Dulick

Zina Gavin

By: _____
Gerald N. Rhodes
Its: President

STATE OF MICHIGAN)) ss.
COUNTY OF WAYNE)

The foregoing instrument was acknowledged before me this ____ day of _____, 2001, by Steven E. Kurmas, Sr. Vice President of Michigan Consolidated Gas Company, a Michigan corporation, on behalf of the corporation.

Notary Public, Wayne County, Michigan
My Commission Expires:

COMMONWEALTH OF PENNSYLVANIA)) ss.
COUNTY OF MONTGOMERY)

The foregoing instrument was acknowledged before me this ____ day of _____, 2001, by Gerald N. Rhodes, President of Exelon Energy Company, a Delaware corporation, on behalf of the corporation.

Notary Public, Montgomery County, Pennsylvania
My Commission Expires:

When recorded return to:

Julie A. Cohen
Michigan Consolidated Gas Company
500 Griswold Street
Detroit, Michigan 48226

This instrument prepared by:

Julie A. Cohen
Michigan Consolidated Gas Company
500 Griswold Street
Detroit, Michigan 48226

EXHIBIT A

MAP OF OVERLAP AREA TO BE SERVED BY GRANTEE

EXHIBIT B

PORTIONS OF GRANTOR'S DISTRIBUTION SYSTEM SUBJECT TO EASEMENT

All distribution pipelines, associated rights of way and appurtenant facilities located in Wayne County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 24280, Pages 93 through 305, Wayne County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Wayne County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Washtenaw County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 2336, Pages 494 through 706, Washtenaw County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Washtenaw County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Milford Township, Oakland County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 11005, Pages 835 through 1047, Oakland County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Oakland County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Monroe County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 1087, Pages 22 through 234, Monroe County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Monroe County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Macomb County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 4695, Pages 1 through 213, Macomb County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Macomb County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

EXHIBIT C
GRANTOR RATE SCHEDULES

Grantor's rate schedules are those found on Michigan Consolidated Gas Company's web site at:

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http://www.michcon.com/tariffs/tariffs_frameset.html

The web site will be updated to reflect any changes to Grantor's rates.

EXHIBIT D

GENERAL TERMS AND CONDITIONS

D-1. DEFINITIONS

- a) “Annual Contract Quantity” or “ACQ” refers to the total volume of firm transportation Initial Capacity, Supplemental Capacity and Growth Capacity purchased by Grantee and available for Grantee’s use in the Overlap Area in any Contract Year.
- b) “ACQ_{OGL}” refers to the volume of firm transportation Growth Capacity purchased by Grantee to serve On-site Generation Load.
- c) “Average Rate/Mcf” means, in dollars/Mcf, the Supplemental Capacity Annual Payment divided by 1,000,000.
- d) “Committed ACQ” means the anticipated ACQ of an Expansion Load (Mcf).
- e) “Committed Years” means the number of Contract Years, following the in-service of the expansion, Grantee commits to use the Committed ACQ for newly added incremental load for which the expansion was designed.
- f) “Contract Year” means the period from April 1st to March 31st.
- g) “Construct” means to design, engineer, procure, obtain regulatory approvals, permit, install, modify, upgrade, improve, build, inspect, test, or place in service.
- h) “Day” means a period of 24 consecutive hours commencing at 12:00 noon Eastern Time, or such other time as mutually agreed upon by the parties.
- i) “Delivery Point” is the interconnection(s) of the facilities of Grantor and those of each Grantee’s Customer and/or any Grantee downstream extension.
- j) “Electric Displacement Load” or “EDL” means natural gas consumption for On-Site Generation, General Generation or Electric Displacement Equipment:
 - 1) “On-Site Generation” means electrical generation from power generation equipment, including but not limited to, engines, turbines or fuel cells (“Generation Equipment”) to the extent that the electrical conductors between the Generation Equipment and the facility consuming output from the Generation Equipment (i) are owned or operated either by a non-utility entity that owns or operates the Generation Equipment, or by the entity that owns or operates the facility consuming output from the Generation Equipment, or both such entities, or (ii) are owned or operated by a municipal entity, including a city, village,

township or county. A “non-utility entity” is an entity that has no obligation under state or local law to provide utility service to the public in the Overlap Area.

- 2) “General Generation” means up to 8,750,000 kWh of non-On-Site Generation, per year per each unit of Generation Equipment served by Grantee in the Overlap Area; provided, however, that General Generation may not exceed 8,750,000 kWh at any “contiguous customer location”. A “contiguous customer location” means the buildings or parts of buildings situated upon the same parcel or contiguous parcels of land and occupied and used by the customer as a unitary enterprise at one location and under one management.
- 3) “Electric Displacement Equipment” means equipment that displaces electric equipment such as chillers, air compressors, commercial dishwashers and fryers, or other applications for which the Auditor determines that a practical and economic electric alternative exists. Electric displacement equipment shall not include direct-fired space heating and hot water applications.
- k) “Equivalent Quantities” means the quantity of gas, in MCF received from Grantee, for the account of Grantee, at the Receipt Point(s), less 1% gas-in-kind withheld by Grantor for loss and use.
- l) “Expansion Load” means new incremental Grantee Customer load added pursuant to Section D-5 of Exhibit D.
- m) “FERC” means the Federal Energy Regulatory Commission or its successor.
- n) “FTC” means the Federal Trade Commission or its successor.
- o) “Grantee’s Storage Capacity” equals 10% of Grantee's Initial Capacity and Supplemental Capacity in effect on May 31 of each Contract Year and is the maximum quantity of natural gas that Grantor will hold in firm storage on Grantee’s account under the terms of this Agreement.
- p) “Grantor's Average Residential Distribution Charge” equals the weighted average of the volumetric distribution charges of the MPSC approved residential service rates as in effect from time to time. Such distribution charges shall be exclusive of any customer charges. As of the effective date of this Agreement, the MPSC approved residential service rates include Rate Schedule Numbers 2, 2A, 3 and 3A, as identified in Exhibit C. In calculating the weighted average, the residential service rates shall be weighted by the total volume of service utilized by the MPSC in the most recent rate order to set rates for the respective residential rate classes. The Grantor's Average Residential Distribution Charge as of the effective date of this Agreement is \$1.4443/Mcf.
- q) “Grantor's Average Transportation Rate” equals the weighted average of the ST-1 and LT-1 MPSC approved fixed cost transportation rates (or any successor rate) in effect

from time to time, exclusive of any customer charges. As of the effective date of this Agreement, Rate Schedule Numbers ST-1 and LT-1 are identified in Exhibit C. In calculating the weighted average, the ST-1 and LT-1 transportation charges shall be weighted by the total volume of service for the ST-1 and LT-1 rate classes utilized by the MPSC in the most recent rate order to set rates. The "Grantor's Average Transportation Rate" as of the effective date of this Agreement is \$0.5762/Mcf.

- r) "Grantor's Transportation Rate Schedule Minimum" shall be the lowest MPSC approved non-residential Transportation Rate as listed in Exhibit C as in effect from time to time, exclusive of any customer charges. As of the effective date of this Agreement, Grantor's Transportation Rate Schedule Minimum is equal to \$0.2300/Mcf, the minimum transportation charge listed under Rate Schedule LT-2.
- s) "Maximum Daily Quantity" or "MDQ" is the maximum quantity of natural gas that may be transported from the Receipt Point(s) and/or Grantee's storage account to the Delivery Point(s) on any one Day.
- t) "MPSC" means the Michigan Public Service Commission or its successor.
- u) "Non-Residential Growth Capacity" is the volume of all Growth Capacity other than Residential Growth Capacity.
- v) "Residential Growth Capacity" is the volume of Growth Capacity that meets the definitions of residential usage as detailed in Grantor's MPSC approved rate schedules, (Exhibit C).
- w) "On-site Generation Load" or "OGL" means natural gas consumption for On-Site Generation and General Generation, as defined in Sections D-1(j)(1) and (j) (2) above.
- x) "Primary Receipt Point" refers to a Receipt Point where firm deliveries will be received.
- y) "Receipt Point(s)" are those interconnection(s) between the facilities of Grantor and third parties that deliver gas to Grantor, for the account of Grantee, identified in Section D-3.
- z) "Sales Rate" means the volumetric distribution charge for deliveries to MichCon commercial customers, as approved from time to time by the MPSC. As of the date of this Agreement, the Sales Rate, Rate 1 in the Tariff, is \$1.8179/Mcf.
- aa) "Secondary Receipt Point" refers to a Receipt Point where interruptible deliveries will be received.
- bb) "Tariff" means Grantor's Rules, Regulations and Rate Schedules for Gas Service as approved from time to time by the MPSC.

D-2. NOMINATIONS

All nominations must be made in accordance with Grantor's nomination practices in effect at the time of nomination. Grantor's current nomination practices are set out in Attachment D-I. Prior to making any change to its nomination procedure, Grantor shall submit the proposed changes to the Auditor and Grantee. Grantee and Auditor shall have a period of 45 days to review and comment on any proposed change. At the direction of the Auditor, Grantor shall implement any change to its nomination procedures that the Auditor deems consistent with good utility practice and necessary to prevent an unreasonable or discriminatory impact on Grantee. Grantor shall not impose any Excess Quantity Charges or Deficient Quantity Charges on Grantee to the extent either such charge is occasioned by a force majeure event on Grantor's Distribution System. Grantee shall promptly refer any complaints with respect to Grantor's nomination procedures to the Auditor. The Auditor shall impose monetary damages, as provided in Section D-18, if the Auditor determines that Grantor's treatment of Grantee's nominations was unreasonable or discriminatory.

D-3. RECEIPT POINTS

Grantee may deliver gas to any Receipt Point located in the Overlap Area or that serves the Overlap Area, including but not limited to the Receipt Points identified below. Grantee shall have the flexibility to deliver up to its full MDQ at any primary Receipt Point. Further, Grantee may request Receipt Points in addition to those below, and Grantor shall grant such requests on a non-discriminatory basis to the extent operationally feasible. Grantor shall give written notice to the Auditor within one business day of refusing any Receipt Point request made by Grantee, and within two business days thereafter, Grantor shall provide the Auditor with a written explanation of the reasons for refusing Grantee's Receipt Point. The Auditor shall impose monetary damages, as provided in Section D-18, if the Auditor determines that Grantor's refusal of a receipt point requested by Grantee was unreasonable or discriminatory.

Receipt Point	Summer*	Winter *
Willow/ANR Pipeline	Secondary	Primary
Northville/ Consumers Energy	Secondary	Primary
Belle River/ Great Lakes	Primary	Secondary
MichCon/ St. Clair Pipeline Co.	Primary	Secondary
Rouge/ Panhandle Eastern	Secondary	Primary
Woolfolk/ ANR Pipeline	Primary	Secondary

Kalkaska	Primary	Secondary
Belle River/ Vector Pipeline	Primary	Secondary
Milford/ Vector Pipeline	Secondary	Primary

* *Total volumes delivered at all Receipt Points may not exceed contract MDQ.*

D-4. DELIVERY POINT REQUIREMENTS

- a) For each Delivery Point, Grantee will provide customer enrollment and cancellation information to Grantor via a pre-formatted electronic file (“Enrollment/Cancellation File”). Files will be submitted through Grantor’s ConQuest™ Electronic Bulletin Board (EBB), or such other means as mutually agreed to by the parties. The Enrollment/Cancellation File will include the following information for each Delivery Point:
 - i) Name and address;
 - ii) Account number;
 - iii) Pressure requirements and maximum cubic feet/hour; and
 - iv) Any other pertinent information as necessary to process the transaction.
- b) Grantee may submit one Enrollment/Cancellation File to Grantor each business day. Grantor will perform a verification check to ensure that Grantee’s file contains accurate and complete Delivery Point information. Within ten business days after the Enrollment/Cancellation File has been received, Grantor will post a confirmation file on its EBB. The confirmation file will provide the status (i.e., accepted or rejected) of each transaction including notification whether accepted Enrollment Files will require new or incremental facilities. Rejected transactions will be accompanied with an explanation code briefly describing why the transaction could not be processed. Transactions may be rejected for the following reasons: 1) incorrect data, 2) incomplete data, or 3) inactive account. If Grantor deems an Enrollment File unacceptable for any reason other than specified above, Grantor must receive prior approval from the Auditor to reject the Enrollment File. Grantor shall provide the Auditor full electronic access to all Grantee transactions on Grantor’s EBB.

- c) Accepted enrollments and cancellations will become effective upon the earlier of (x) the next business day after all Grantor meters at the Delivery Point have been read or estimated by Grantor, or (y) 35 days after receipt of Grantee's Enrollment/Cancellation File. If the Delivery Point requires new or incremental facilities, such facilities will be installed as provided in Sections D-5, and Grantor will commence deliveries on behalf of Grantee when such facilities are placed in service.
- d) Any information or notices pertaining to Grantee's Customers ("Customer Information"), including information pertaining to any third party purchasing Brokered Capacity pursuant to Paragraph 3(i), will be maintained by Grantor's operations department in strictest confidence subject to the following:
 - i) Disclosure of Customer Information will be limited to that necessary and appropriate for ensuring compliance with the Michigan Gas Safety Code and the curtailment rules of Grantor's Tariff, which will be applied to Grantee's Customers in the same manner as applied to Grantor's customers.
 - ii) Disclosure of Customer Information will be limited to persons with responsibilities in connection with the operation and construction of Grantor facilities, and billing, if Grantee elects to have Grantor bill Grantee's Customers, and under no circumstances may Grantor disclose Customer Information or any other operational data pertaining to Grantee to employees of Grantor or any affiliate of Grantor who are engaged in the marketing of the transportation or sale of electricity or gas.
 - iii) Customer Information may be used only for the purpose of providing the transportation and storage services contemplated in this Agreement.
- e) At Grantee's election, Grantor will retain responsibility for the cost of installing, operating, maintaining (including replacing in-kind) and reading Grantee's Customer meters. Grantor will forward meter reads for Grantee's Customers to Grantee twice a month on or about the eighteenth day of the month in which meters are read and on or about the third day of the month following the month in which meters are read. Upon 30 days prior notice to the Auditor and Grantor, Grantee may assume responsibility for installing, operating, maintaining (including replacing in-kind) and reading Grantee's Customer meters. If Grantor provides billing services to Grantee, payments received from Grantee's Customers will be remitted on the same schedule as meter reads. Grantor or Grantee may install remote meter reading devices on the facilities of Grantee's Customers to get daily reads. The party requesting the installation of the remote meter reading devices shall bear all costs thereof.
- f) Subject to billing practices rules, as approved from time to time by the MPSC, Grantee may bill its customers directly or contract with Grantor for customer billing services at cost plus 10%. Grantee will bear all uncollectible risk with respect to

Grantee's Customers and Grantor shall not undertake any collection efforts on behalf of Grantee.

- g) If Grantee elects to terminate its transportation agreement with any of Grantee's Customers, Grantee must give Grantor written notice as provided in this Section D-4. Any customer terminated by Grantee may apply for service from Grantor as a "new customer" under the terms of Grantor's Tariff. Transportation service customers who are no longer served under this Agreement shall be returned to Grantor's transportation service tariff.
- h) Grantee shall have the right to transfer gas between its storage account under this Agreement and the storage accounts of Grantor's ST-1 and/or LT-1 end use transportation customers in the Overlap Area; provided that such customers also purchase their natural gas requirements from Grantee or one of its affiliates. Grantee shall notify Grantor of storage account transfers when submitting an Enrollment/Cancellation File and provide Grantor such information as reasonably requested to verify end use customer storage volumes to be transferred and gas supplier.

D-5. SYSTEM REQUIREMENTS

- a) **Operation**. Grantor shall be responsible for operation of its Distribution System and all infrastructure maintenance and system-wide upgrades.
- b) **System Expansions**. At Grantee's request, any upstream or downstream facilities necessary to interconnect with, or to meet the current or anticipated future service needs of, Grantee's Customers, including but not limited to service line extensions, upstream expansions, mains, transfer mains and gate stations shall be constructed.
 - i) System expansion requirements will be analyzed by the Stoner and Associates, Inc., SynerGEE model ("Stoner Model") as more fully described in Attachment D-II, or such other engineering modeling software generally accepted in the natural gas industry as may be agreed upon by Grantee and Grantor.
 - ii) Within five business days of receipt of all information necessary to run a Stoner Model of required facilities, Grantor will provide to Grantee, for Grantee review and approval, all of the details of the proposed facilities, including project design, lump sum cost estimate ("Construction Costs"), Expansion Allowance, as defined below, and the results, including all assumptions and variables, of its Stoner Model or such other mutually agreed upon engineering modeling software, generally accepted in the natural gas industry.
- c) **Costs**. To the extent that Grantee's level of purchased capacity is 20 Bcf or less, an

Expansion Allowance, as defined below, is available. The “Expansion Allowance” is equal to

$$\text{Average Rate/Mcf} \times \text{Committed Years} \times \text{Committed ACQ} \times 0.8$$

Grantee shall not be required to make a contribution towards the cost of any constructed upstream or downstream facilities related to Initial Capacity or Supplemental Capacity unless the actual cost of the requested expansion is greater than \$100,000.00. For expansions related to Initial Capacity or Supplemental Capacity that exceed \$100,000.00, the Grantee shall pay only those costs that exceed the Grantee's Expansion Allowance.

- i) Grantor shall submit such estimated Expansion Allowance, along with back-up data, to Grantee. The Expansion Allowance shall only be for construction or upgrades of facilities required to serve the specific Grantee Customer. Grantee shall either accept such Expansion Allowance or shall submit its dispute of the Expansion Allowance to the Auditor, under the arbitration procedures described in Section D-18, with the burden of proof on the Grantor.
- ii) If Grantor elects to over-size the expansion, Grantor will absorb the cost associated with such over-sizing.
- d) To the extent that Grantee’s level of purchased capacity exceeds 20 Bcf, Grantee shall be entitled to the same expansion allowance that Grantee’s Customers would receive if Grantee’s Customers were taking service from Grantor and paying the rate paid by Grantee for such incremental customer.
- e) **Grantor Construction.** Grantor will use commercially reasonable and non-discriminatory efforts to construct facilities requested by Grantee within the timeframe requested by Grantee. To the extent any delay to the in-service date of a facility needed to serve Grantee’s Customer(s) is caused by Grantor, the Auditor may, after hearing, impose monetary damages on Grantor to compensate Grantee for unreasonable or discriminatory delays, as provided in Section D-18.
- f) **Grantee Construction.** Grantee may construct any required expansions, provided the facilities meet all Michigan Gas Safety Code requirements and applicable metering standards of the American Gas Association. Facilities constructed by Grantee will be placed in service no later than seven days following notice to Grantor that construction is completed. Within such seven-day notice period, Grantor may inspect and test the facilities.
- i) At Grantee’s request, made within 60 days of the in-service date of extensions constructed by Grantee or third parties contracted by Grantee, Grantor shall purchase the facilities from Grantee for the Construction Costs quoted by Grantor but not to exceed the Expansion Allowance.

- g) **Interconnects.** Grantor shall interconnect with any downstream system extensions constructed by Grantee, provided such extensions meet all existing gas safety codes as established from time to time by the MPSC, Department of Transportation, or other governmental agencies with jurisdiction over natural gas pipelines. Subject to the expansion allowance provisions of this Agreement, Grantee shall be responsible for costs of such interconnection, including any upstream expansions required on Grantor's system to accommodate the downstream extension.
- h) **Disputes.** Any disputes regarding the design, cost or timing of construction of facilities shall be resolved by the Auditor, under the procedures described in Section D-18, with the burden of proof on the Grantor. The Auditor may implement additional procedures applicable to system expansions and upgrades at any time.
- i) Nothing in this section is intended to change Grantee's capacity rights under Section 3 of this Agreement.
- j) Nothing in the foregoing shall be interpreted to limit either party's ability to compete with the other party to serve any end user, including offering prices and terms to induce the end user to not purchase gas transportation services from the other party.
- k) Grantor shall take no actions before the SEC, MPSC, FERC, or any other government agency in opposition to any attempt by Grantee to serve end users in the Overlap Area without utilizing Grantor's Distribution System.

D-6. OPERATIONAL NOTICES OR CHANGES

Grantor shall provide 45-days advance notice to Grantee and the Auditor of the following operational events:

- a) Any planned new receipt points;
- b) Any proposed modifications or changes to Grantor's nomination process;
- c) Any proposed modifications or changes to Grantor's gas measurement practices;
- d) Any proposed modifications or changes to Grantor's Gas Quality Specifications;
- e) Any scheduled maintenance or any other outage known to Grantor that would impact a Receipt Point or Delivery Point being used by Grantee;
- f) Any scheduled maintenance or other outage of facilities on Grantor's Distribution System, or any change in operating standards, practices or procedures that would degrade or interrupt service to any Grantee Customer; and
- g) Any other scheduled event likely to impact Grantee or Grantee's ability to serve

Grantee's Customers.

The Auditor may revise or modify any of the foregoing in accordance with good utility practice, if such revision or modification is necessary to prevent an unreasonable or discriminatory impact on Grantee.

D-7. MEASUREMENT

- a) All quantities of gas received at the Receipt Point(s) by Grantor for the account of Grantee shall be measured at the Receipt Point(s) by Grantor or its designee in accordance with, and shall comply with the measurement practices adopted by the American Gas Association ("AGA"), as amended from time to time (all collectively referred to as "Gas Measurement Reports"). The gas measurement practices currently adopted by the AGA and followed by Grantor are more fully set out in Attachment D-III. If at any time during the term of this Agreement the AGA ceases to publish gas measurement practices, the parties will mutually agree on replacement gas measurement practices that are generally accepted in the industry.
- b) All quantities of gas delivered by Grantor to Grantee's Customers will be measured at the Delivery Point(s) by Grantor, or its designee in accordance with applicable Gas Measurement Reports.

D-8. QUALITY

- a) All gas delivered by Grantee at the Receipt Point(s) or redelivered by Grantor at the Delivery Point(s) shall conform with the same gas quality standards to which Grantor holds itself and other shippers ("Gas Quality Specifications"). Grantor's current gas quality specifications are set forth in Attachment D-IV.
- b) If the gas delivered by Grantee at any Receipt Points or by Grantor at any Delivery Points fails at any time to conform to the Gas Quality Specifications, then Grantor or Grantee, as the case may be, shall notify the other of such deficiency and thereupon may, at its option, refuse to accept delivery pending correction. Upon demonstration acceptable to Grantor or Grantee, as the case may be, that the gas being tendered for delivery conforms to the Gas Quality Specifications, Grantor or Grantee, as the case may be, shall resume taking delivery of gas.

D-9. POSSESSION AND LIABILITY

- a) As between Grantor and Grantee, Grantee shall be deemed in exclusive control and possession of the gas transported hereunder and responsible for any damage or injury caused thereby until it is delivered to Grantor at the Receipt Point(s) and after it is delivered by Grantor at the Delivery Point(s). Grantor shall be deemed in exclusive control and possession of said gas and responsible for any damage or injury caused thereby after it is delivered by Grantee, or for Grantee's account, at the Receipt Point(s) and before it is delivered by Grantor at the Delivery Point(s).

- b) Neither party shall be liable to the other party for any punitive or exemplary damages in connection with this Agreement.
- c) Upon termination of this Agreement pursuant to Section 14, neither party shall have any further obligations to the other party, except such obligations as have accrued as of the termination date, and Grantor shall dispose of any Grantee storage inventories as directed by Grantee.

D-10. WARRANTY

- a) Grantee warrants that at the time of delivery it will have the right to deliver the gas in connection with Grantee's use of the capacity made available to Grantee under this Agreement.
- b) Grantee further warrants that either independently or through the services of a gas marketer or broker, Grantee will put in place contracts for the purchase and transportation of natural gas such that sufficient quantities of gas will be delivered to the Receipt Point(s) to meet Grantee's full requirements for natural gas, less any storage balance ("Sufficient Quantities"). Failure to deliver Sufficient Quantities while continuing to accept receipt of natural gas may affect Grantor's ability to operate Grantor's Distribution System. If Grantee fails to deliver Sufficient Quantities in any particular month, Grantor will notify Grantee of the shortage in deliveries and attempt to reach the designated person for notices by telephone as an additional notice.

D-11. INDEMNIFICATION

- a) Grantee will indemnify Grantor and hold it harmless from suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons in connection with gas provided in connection with Grantee's use of the capacity made available to Grantee under this Agreement and royalties, taxes, license fees or charges related to such gas.
- b) Grantor will indemnify Grantee and hold it harmless from suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons in connection with Grantor's Distribution System.

D-12. TAXES and FRANCHISE FEES

Grantee shall pay any taxes, tariffs, and duties however designated, levied, or charged resulting from Grantee's use of capacity rights provided under this Agreement, including, without limitation, all state and local privilege or excise taxes and any amount in lieu of such taxes, tariffs and duties paid or payable by Grantor, exclusive however of taxes based on the net income of Grantor, property taxes, and Grantor's single business taxes.

Grantee shall reimburse Grantor for any such taxes, tariffs and duties that are collected and remitted or paid on Grantee's behalf by Grantor because of Grantee's failure to pay. Grantor shall, however, reimburse Grantee for 80% of any franchise fees paid by it, provided that the reimbursement in any Contract Year shall not exceed 10% of the initial Annual Capacity Payment.

D-13. BILLING AND PAYMENT

- a) On or about the fifth day of each calendar month, Grantor shall render a statement to Grantee for the Capacity Payment and any other charge, if applicable. Grantee will pay Grantor the amount billed in that statement on or before the twenty-fifth day of the month. All such payments shall be made in the form of immediately available funds directed to a bank account designated by Grantor on its invoice.
- b) The statements rendered pursuant to this Agreement will be denominated in U.S. Dollars (\$U.S.). All payments must be made in \$U.S.
- c) Grantee shall have the right at all reasonable times to examine the books, records and charts of Grantor to the extent necessary to verify the accuracy of any statement, charge or computation made under or pursuant to any provisions of this Agreement.
- d) Should Grantee fail to pay any undisputed amount of any statement rendered by Grantor as herein provided when such amount is due, such undisputed and unpaid amount shall accrue interest at the prime lending rate as published in the Wall Street Journal on the first day of each month.
- e) If Grantee finds at any time within twelve (12) months after the date of any statement rendered by Grantor that it has been overcharged in the amount billed in such statement, and if the overcharge has been paid, and Grantee makes a claim therefor within 60 days from the date of discovery thereof, the overcharge, if verified, must be refunded within 30 days. If Grantor finds at any time within twelve months after the date of any statement rendered by it that there has been an undercharge in the amount billed in such statement, it may submit a statement for the undercharge, and Grantee, upon verifying the same, shall pay such amount within 30 days.

D-14. CREDITWORTHINESS

- a) If at any time during the term of this Agreement, the long-term debt rating of Grantee, or Grantee's ultimate parent if Grantee does not have a separate long-term debt rating, becomes less than "BBB" as reported by Standard and Poor's Corporation or an equivalent rating by Moody's Investors Services, Inc. ("Investment Grade"), Grantor shall request that the Auditor calculate the capitalized value of all Capacity Payments due for the remainder of the term of the

Agreement utilizing the 10-year treasury rate ("Settlement Payment") and Grantee shall do any one of the following:

- i) Pay to Grantor the Settlement Payment; or
- ii) Provide Grantor with an irrevocable stand-by letter of credit in an amount equal to the Settlement Payment.

If Grantee elects to provide a letter of credit, such instrument must remain in place until the earlier of (x) Grantee demonstrates to Grantor's reasonable satisfaction that it has an Investment Grade long term debt rating or (y) this Agreement is terminated as provided in Section 14.

D-15. FORCE MAJEURE

- a) Neither Grantee nor Grantor shall be liable in damages, or in any other remedy, legal or equitable, to the other for any act, omission or circumstances occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, sabotage, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, and restraints of rules and peoples, civil disturbances, failure of electronic data, explosions, breakage or accident to machinery or lines of pipe, the necessity to curtail receipts and/or deliveries on Grantor's Distribution System to maintain system integrity, or the necessity to make repairs, tests, or alteration to machinery or lines of pipe, line freezups, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. A failure to settle or prevent any strike or other controversy with employees or with anyone purporting or seeking to represent employees shall not be considered to be a matter within control of the party claiming suspension. To the extent Grantor curtails service and Grantee's Customers' service is curtailed due to a Force Majeure event, it shall be done on a non-discriminatory basis compared to all other firm customers on Grantor's Distribution System.
- b) Such causes or contingencies affecting the performance of this Agreement by either party, however, shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies affecting the performance of this Agreement relieve either party from its obligation to make payments of amounts then due thereunder, nor shall such causes or contingencies relieve either party of liability

unless such party shall give notice and full particulars of the same in writing or by telegraph to the other party as soon as possible after the occurrence relied on.

D-16. REGULATION

- a) This Agreement and the respective obligations of the parties hereunder are subject to all laws, orders, rules and regulations of duly constituted authorities having jurisdiction. This Agreement is also subject to all applicable federal, state and local taxes or surcharges.
- b) In the event there is a change in law or regulation that renders this Agreement, or any part of this Agreement, unenforceable and/or illegal, the Parties shall attempt to renegotiate this Agreement on mutually acceptable terms. Neither Grantor nor Grantee shall refuse to accept changes to the Agreement that would (i) render the Agreement enforceable and legal and (ii) would not materially adversely affect the Party refusing to accept the proposed change. Any disagreements as to what constitutes a material adverse affect shall be submitted to arbitration under the procedures described in Section D-18. Any changes to this Agreement are subject to FTC approval. In the event (i) the parties cannot reach a mutually agreeable resolution or (ii) the Auditor has not determined that a proposal is acceptable, Grantor commits not to oppose any efforts by Grantee to obtain franchises and any other regulatory approvals to serve end users in the Overlap Area.

D-17. INDEPENDENT AUDITOR

- a) Grantor and Grantee shall appoint an independent, third party auditor with knowledge of the natural gas industry. Appointment of the Auditor is subject to approval of the FTC.
- b) Because this is a perpetual Easement, the parties acknowledge that during the term of this Agreement, publications, models or standards agreed to by the parties may cease to exist and need to be replaced by a new publication, model or standard to be agreed upon by the parties. Before such replacement is implemented the Auditor shall approve any such change. If the parties fail to determine a mutually agreeable substitute, the Auditor as provided in Section D-18 below shall determine the appropriate publication, model or standard for implementation of this Agreement.
- c) The Auditor shall perform the duties contemplated by this Agreement as more fully set forth in an Independent Auditor Agreement that will be effective upon the effective date of this Agreement.

D-18. DISPUTES

- a) Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof, not settled by the management of the parties within 30 days, shall be submitted to the Auditor for adjudication in accordance with this Section D-18 and the Commercial Arbitration Rules of the American Arbitration Association as in

effect from time to time; provided, however, Grantee, in its sole discretion, may terminate management discussions at any time and submit the matter to the Auditor for adjudication.

- b) The arbitration shall be held at the office of the American Arbitration Association in Detroit, Michigan on ten days notice to the parties.
- c) All decisions shall be promptly communicated to the parties within two business days after conclusion of the arbitration proceeding with a written decision to follow within 30 days.
- d) Any monetary award rendered by the Auditor against Grantor shall be limited to direct and indirect damages, including lost profits, resulting from the breach of this Agreement. Monetary damages may be awarded if the Auditor finds that Grantor unreasonably or discriminatorily took action or failed to take action which resulted in placing Grantee at a competitive disadvantage in exercising its rights under this Agreement. Grantor shall have the burden of proving that it operated the gas distribution system in the Overlap Area in a reasonable and non-discriminatory manner.
- e) The award rendered by the Auditor shall be final and binding on all parties to the proceeding unless overturned or modified by a court of competent jurisdiction because the Auditor has made a clear error of law. The Auditor's findings of fact will not be subject to judicial review. Judgment upon any award rendered by the Auditor may be entered in any court having jurisdiction and each party hereto consents and submits to the jurisdiction of such court for purposes of such action.

D-19. NON-WAIVER OF FUTURE DEFAULTS

No waiver by either party of any one or more defaults by the other in the performance of any provisions of this Agreement will operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.

D-20. TREATMENT OF CONFIDENTIAL INFORMATION

Grantor and Grantee each shall use any Confidential Information received or derived from the Auditor, from one another, or from performing this Agreement or the Auditor Agreement, as each may be modified from time to time, solely (1) in the performance of Grantor's or Grantee's obligations under this Agreement or the Auditor Agreement; (2) the performance of Grantor's obligations under any order issued by the Federal Trade Commission; (3) the performance of Grantor's or Grantee's obligations under any order, rule, regulation or statute issued or administered by the MPSC; or (4) for the purpose of complying with financial, tax reporting, legal, health, safety, and environmental obligations of Grantor or Grantee. For purposes of this paragraph, Confidential Information means:

1. Any information designated as Confidential Information by either Grantor or Grantee that is treated as confidential by the party which designates the information as Confidential Information;
2. Any information designated as Confidential Information by the Auditor; and
3. Any information that is designated as confidential by any order, rule, regulation or statute issued or administered by the MPSC.

ATTACHMENT D-I

GAS NOMINATIONS OVERVIEW

Michigan Consolidated Gas Company (MichCon) accepts transportation and end user (eut) nominations via its electronic bulletin board, ConQuest. Nominations are due to MichCon via ConQuest no later than 2:00 PM EST, the day prior to the gas day. There is no charge to establish or maintain a ConQuest account with MichCon. The deadline for nominations is the same throughout the month, i.e. October 1 noms are due at 2:00PM on September 30. MichCon accepts standing nominations for an entire calendar month.

Shippers connect to ConQuest via a modem line and nominate individual packages of gas, tracked by individual delivery points and contract numbers. MichCon accepts gas at over 60 “citygate” points located throughout the state. All gas transactions within MichCon are done on an “Mcf” basis. Interconnect gas (ANR, GLGT, PEPL) that enters the MCGC system in Mmbtu at 14.73 psi is converted to Mcf’s at 14.65 psi upon completion of the nomination process. MichCon posts the effective BTU factors to be used prior to the beginning of the month. These BTU factors may change on the first day of each month. ConQuest verifies the amount of gas and receipt points that a shipper nominates to an end user on an ongoing basis. If the shipper tries to exceed the end user’s allowable MDQ, or deliver gas from a point not specified within the end user’s contract, the nomination record is not allowed to be saved, and an error message is generated to the shipper.

MichCon also offers an intraday “window” for the current gas day. This allows shippers to match up volumes that may have changed on the interconnecting pipelines to their noms on the MichCon side of the pipe, or to reallocate gas quantities among eut or other delivery points. This “window” opens at 9:00AM EST and closes at 7:00PM EST for the current gas day only.

MichCon is not subject to FERC jurisdiction and therefore is not required to comply with GISB standards. MichCon’s gas day is currently recognized as running from noon to noon, for measurement purposes. Interconnecting pipelines’ “gas days” start at 9:00 AM CST.

MichCon reconciles the nominations on a daily basis and communicates with shippers any discrepancies that have occurred before the gas day begins. This provides the shipper with an opportunity to correct any problems with intraday nomination changes.

MichCon finalizes monthly volumes, including eut deliveries during the first seven workdays following month end. After this process is complete, the shippers are notified and they are able to retrieve their monthly source and disposition and end user delivery reports from ConQuest.

MichCon posts on ConQuest the consumption amounts as obtained by our meter readers on a monthly basis. End users can allow a shipper to view this consumption information through the use of an agency authorization. This information is posted on the 4th workday of each month,

and allows the shipper, or its agent, to calculate storage positions very early into the new month. Currently, the cut customer receives its invoice around the 11th workday of the following month.

Primary contacts within the Nominations Group are Tom Budzyn at (313) 256-5955 and David Reed at (313) 256-5262.

ATTACHMENT D-II
STONER MODEL EXPLANATION AND INPUTS

INPUTS:

- Existing system loads
- Existing system pressure ratings
- Existing pipeline diameters
- Existing pipeline lengths
- Existing valve and regulator configurations
- Expansion customer load
- Expansion customer pressure requirements

VARIABLES:

- Expansion pipeline diameter and lengths
- Expansion valve and regulator configuration

OUTPUTS:

- Actual customer delivery pressure (to be compared to proposed customer requirements)

ATTACHMENT D-III

GAS MEASUREMENT REPORTS

- ANSI B109.3 for Rotary-type Gas Displacement Meters (Standard for safe operation, durable construction and acceptable performance of rotary-type gas displacement meters.)
- Orifice Metering of Natural Gas – AGA Report No. 3 (Basic equations and uncertainty statements for computing the flow through orifice meters; specifications for construction and installation of orifice plates, meter tubes and associated fittings; guidelines for measurement of natural gas)
- Fuel Gas Energy Metering – AGA Report No. 5 (conversion of units of gas volume or mass-to-energy equivalents through the use of data associated with volume-metering practices)
- Compressibility and Super-Compressibility for Natural Gas and Other Hydrocarbon Gases – AGA Report No. 8 (Information for computation of gas phase densities, and compressibility and supercompressibility factors for natural gas and other related hydrocarbon gases)
- Measurement of Gas by Multipath Ultrasonic Meters, AGA Report No. 9 (Standards for multipath ultrasonic transit-time flow meters)

ATTACHMENT D-IV
GAS QUALITY SPECIFICATIONS

All gas received and delivered under the terms of this Agreement must conform to the following specifications:

- (a) The gas must be commercially free from dust, gum, gum-forming constituents, and all other solid and liquid matters, which may interfere with its merchantability or cause injury to or interfere with proper operation of the pipelines, regulators, meters or other appliances through which it flows;
- (b) The carbon dioxide content of the gas may not exceed a partial pressure of 5 pounds per square inch;
- (c) The water content of the gas may not exceed 7 pounds per million cubic feet; however, every reasonable effort must be made to keep the water content at or below 5 pounds per million cubic feet;
- (d) The gas may not contain oxygen. Grantee is responsible for insuring that its operator maintains its equipment to insure the gas is free of oxygen;
- (e) The gas may not contain more than 1/4 grain of hydrogen sulfide per 100 cubic feet;
- (f) The gas may not contain more than 1/2 grain of mercaptan sulfur per 100 cubic feet;
- (g) The gas may not contain more than 5 grains of total sulfur per 100 cubic feet, including the sulfur in any hydrogen sulfide, mercaptan, sulfides and residual sulfur.

EXHIBIT E

BASELINE RATE

**MICHIGAN CONSOLIDATED GAS COMPANY
CASE NO U-10150
Average Rate Per Mcf**

	Proposed Revenue	Projected Volume	Average Rate
	----- (000's)	----- (000's)	-----
Rate 1	\$ 98,062	46,453	\$ 2.1110
Rate 2	\$ 268,094	128,725	\$ 2.0827
Rate 2A	\$ 14,030	8,830	\$ 1.5889
Rate 3	\$ 12,929	6,508	\$ 1.9866
Rate 3A	\$ 14,672	8,534	\$ 1.7192
Rate 6	\$ 4,528	2,715	\$ 1.6677
Rate 8	\$ 99	89	\$ 1.1112
Rate 10	\$ 2,991	1,797	\$ 1.6644
Rate ST	\$ 31,014	31,881	\$ 0.9728
Rate LT	\$ 40,999	68,880	\$ 0.5952
	-----	-----	-----
Total	<u>\$ 487,418</u>	304,412	\$ 1.6012
	=====	=====	=====

Decision and Order

AMENDED AND RESTATED

AUDITOR AGREEMENT

THIS AGREEMENT, made as of the day of _____, 2001, is by and between **MICHIGAN CONSOLIDATED GAS COMPANY**, a Michigan corporation with offices at 500 Griswold Street, Detroit, Michigan 48226 ("MichCon") and **EXELON ENERGY, COMPANY**, a Delaware corporation with its principal address at 2315 Enterprise Drive, Westchester, Illinois 60154 ("Exelon") and **NAVIGANT CONSULTING, INC.** with an office at 200 Wheeler Road, Suite 400, Burlington, Massachusetts 01803 (the "Auditor").

RECITALS

Whereas, MichCon and Exelon are parties to an Amended and Restated Easement Agreement dated _____ ("Easement Agreement"), which grants to Exelon certain capacity rights for the transportation and storage of natural gas; and

Whereas, the Easement Agreement contemplates the appointment of an independent auditor, subject to approval of the Federal Trade Commission; and

Whereas, the Auditor is willing to provide the services contemplated in this Agreement;

Therefore, in consideration of the mutual promises contained herein and the mutual benefit to be obtained, the parties agree as follows:

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AGREEMENT**1. AUDITOR SERVICES**

- a) Subject to and in accordance with this Agreement and the Decision and Order of the Federal Trade Commission (the "Commission") in Docket No. _____ ("Commission Order"), the Auditor accepts the duties and obligations imposed by this Agreement and agrees to perform those professional services specified in the attached Schedule A (the "Services").
- b) The Auditor may engage in such other activities as the Auditor deems appropriate which are not in conflict with the interests of MichCon and Exelon and their respective subsidiaries and affiliates provided that the Services provided by the Auditor shall constitute an incidental business endeavor and the Auditor shall devote such time and skill as is necessary to fulfill all duties under this Agreement.

2. GENERAL POWERS AND OBLIGATIONS

- a) The Auditor shall perform all duties contemplated herein in a manner consistent with the terms and purposes of the Commission Order. The Auditor shall consult with the Commission Staff when the Auditor concludes such consultations are appropriate or upon the request of the Commission Staff. The Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Easement Agreement, including, without limitation, the right to assess consequential damages, including lost profits, against MichCon if found to operate its system in such a manner as to prejudice Exelon in the exercise of its rights under the Easement Agreement, and the right to propose changes to the Easement Agreement necessary to ensure the competitive viability of Exelon's efforts under the Easement Agreement.

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- b) The Auditor shall have free access to all MichCon books, records, information systems and facilities as deemed reasonably necessary by the Auditor to monitor MichCon's performance under the Easement Agreement. Exelon and MichCon shall comply with Auditor's requests to conduct interviews, meetings, or discussions with their employees or agents on any matters related to Auditor Agreement, the Easement Agreement, or the Commission Order, within such deadlines as the Auditor may establish. If the Auditor reasonably believes such material is necessary for the discharge of Auditor's duties under the Auditor Agreement, the Easement Agreement, or the Commission Order, MichCon and Exelon shall provide the Auditor with documents requested by the Auditor or compiled at the Auditor's request, within such deadlines as the Auditor may establish. The Auditor may share such information with Exelon if necessary to effectuate the terms of the Easement Agreement, subject to appropriate provisions for the protection of Confidential Information.
- c) The Auditor may consult with attorneys, accountants, engineers, appraisers or other parties deemed by the Auditor to have qualifications necessary to assist in the performance of the Services. The Auditor may select and employ such persons without Commission, MichCon or Exelon review or approval.
- d) Within 30 days after (i) the end of each full six-month calendar period during the term of this Agreement and (ii) termination of this Agreement or the Auditor's resignation, the Auditor shall provide to the Commission, MichCon and Exelon a written report and accounting, in reasonable detail, outlining: (i) the Services provided during the six-month period just ended; (ii) any operational notices provided pursuant to Section D-6 of the Easement Agreement; and (iii) any issues submitted to the Auditor for arbitration and the decision rendered. The Auditor shall also include in its reports to the Commission, or in such additional written or oral reports as the Commission or the Commission Staff may

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at any time request or as may otherwise be appropriate, in accordance with applicable confidentiality restrictions: (i) an opinion whether the parties have performed under the Easement Agreement in conformity with the Commission Order, including, as appropriate, supporting materials, documents and other information; and (ii) any other matters reasonably requested by the Commission or the Commission Staff. Unless otherwise directed by the Commission or the Commission Staff, the Auditor shall submit all written reports to be provided to the Commission pursuant to this paragraph, with all Confidential Information and other confidential portions of such reports clearly designated as “Confidential” and segregated from non-confidential portions of such reports, to: Secretary, Federal Trade Commission, Washington D.C. 20580 and Assistant Director, Compliance, Bureau of Competition, Federal Trade Commission, Washington D.C. 20580.

- e) If Exelon exercises its right to terminate the Easement Agreement or for any reason ceases to be the grantee thereunder, the Auditor shall immediately, upon receipt of Exelon’s notice of termination, utilize best efforts to attempt to find a replacement buyer for the capacity held by Exelon, such that the Easement Agreement will be assigned to the replacement buyer prior to its termination. Exelon and MichCon shall take all actions reasonably requested to assist the Auditor in finding a replacement buyer, including execution of all documents reasonably necessary to assign the Easement Agreement to a replacement buyer. Any potential replacement buyer and the manner by which it acquires Exelon’s capacity or otherwise accedes to Exelon rights shall be subject to prior approval by the Commission.
- f) Upon request by the Commission or the Commission Staff, Auditor shall provide the Commission or the Commission Staff any data, documents, reports, or other material relating to Auditor Agreement, the Easement Agreement, or the Commission Order.

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**3. RESIGNATION OR REMOVAL OF THE AUDITOR AND
APPOINTMENT OF SUCCESSOR**

- a) The Auditor may resign its duties under this Agreement by written notice filed with the Commission and served upon MichCon and Exelon, at least 30 days prior to the proposed effective date of such resignation; provided, however, that the Auditor shall continue to serve in such capacity after the filing of the resignation until its proposed effective date unless the Commission shall direct otherwise, or the Auditor consents to an earlier effective date, which shall be the date that appointment of a successor Auditor becomes effective. Nothing in this Section 3(a) shall restrict the right to remove the Auditor as provided in Section 3(b).
- b) The Auditor may be removed by MichCon and Exelon acting jointly, or by either MichCon or Exelon acting at the direction of the Commission, for any reason and without cause upon written notice served upon the Auditor and filed with the Commission at least 30 days prior to the proposed effective date of such removal; provided, however, that the Auditor shall continue to serve in such capacity after the filing of the written notice of proposed removal until its proposed effective date unless the Commission shall direct otherwise, or the Auditor consents to an earlier effective date, which shall be the date that appointment of a successor Auditor becomes effective.
- c) If at any time there is a vacancy or anticipated vacancy in the position of Auditor, MichCon and Exelon shall select a successor Auditor subject to approval by the Commission. Any Auditor appointed as a successor Auditor under the terms of this Agreement shall be a person whose experience, background and capabilities are appropriate for the responsibilities of an Auditor under the terms of this Agreement. Every successor Auditor shall execute, acknowledge and deliver to the Commission, MichCon and Exelon an instrument accepting such appointment subject the terms of this Agreement.

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- d) If MichCon and Exelon cannot agree upon a successor Auditor within 10 days, a panel of five proposed Auditors shall be selected by the American Arbitration Association and the successor Auditor shall be selected, subject to the approval of the Commission, by MichCon and Exelon by the striking method. For the purposes of this paragraph, if the Commission does not object in writing within ten business days of being notified of the identity of the successor Auditor, then the proposed Auditor shall serve as an interim Auditor until such time as the Commission approves or disapproves the interim Auditor or a successor Auditor is selected by MichCon and Exelon and approved by the Commission.

4. COMPENSATION

- a) As compensation for Services provided under this Agreement, the Auditor shall receive compensation in accordance with the terms set forth in Schedule B. All reasonable and necessary third party out-of-pocket expenses incurred by the Auditor in connection with the performance of Services will be promptly reimbursed to the Auditor.
- b) The Auditor shall submit monthly, itemized invoices to MichCon and Exelon for the Services actually completed. Payments on all undisputed amounts shall be made within 30 days of receipt of such invoices.
- c) Prior to commencing any new activities for MichCon, Exelon, or any of their affiliates or successors, the Auditor shall provide the Commission Staff with a description of such activities and estimates of the compensation the Auditor expects to receive in connection with such activities.

5. INDEMNIFICATION

- a) The Auditor, acting in any capacity contemplated by this Agreement or the Commission Order, shall not be personally liable to any person except for such Auditor's acts or omissions that constitute fraud, willful misconduct, bad faith

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or gross negligence. Except in those situations in which the Auditor is not exonerated of personal liability as provided above, MichCon and Exelon shall indemnify the Auditor and hold the Auditor harmless from any losses, claims, damages, liabilities, or expenses arising out of, or in connection with the performance of the Auditor's duties and Services under this Agreement, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability except to the extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Auditor.

6. STANDARD OF CARE

- a) The Auditor shall perform the Services in an efficient, prompt, economical, skillful and careful manner in accordance with current industry standards and practices. In performing the Services, the Auditor shall observe and obey all applicable laws, regulations, rules and standards imposed by any government or any other duly constituted authority having jurisdiction with respect to the Services or the parties to this Agreement.

7. TERM OF AGREEMENT

- a) This Agreement is effective upon the effective date of the Easement Agreement. The initial term of this Agreement expires twenty (20) years after the effective date. Thereafter, the term of this Agreement is automatically renewed for successive periods of five (5) years unless and until terminated pursuant to the terms of this Agreement. All requirements to file reports and notices with or obtain approvals from the Commission pursuant to the Auditor Agreement, the Easement Agreement or the Commission Order shall continue as provided in those Agreements and the Commission Order until the Commission Order (or relevant provisions therein) terminates.

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- b) This Agreement shall terminate immediately upon written notice to the Auditor, if either of the following occur:
- i) The Easement Agreement is terminated; or
 - ii) The Commission directs MichCon and/or Exelon or their respective parent corporations to terminate this Agreement.

8. NOTICES

- a) Any notice required to be given under this Agreement shall be in writing and sent by registered mail, overnight mail or facsimile transmission, and will be effective upon receipt thereof.

Auditor: Navigant Consulting, Inc.
200 Wheeler Road, Suite 400,
Burlington, Massachusetts 01803
Attn: _____
Fax No: _____

MichCon: Michigan Consolidated Gas Company
500 Griswold Street
Detroit, Michigan 48226
Attn: Office of General Counsel
Fax No: (313) 965-0009

Exelon: Exelon Energy, Company
2315 Enterprise Drive
Westchester, Illinois 60154
Fax No: (708) 236-7901
Attn: Vice President and General Manager

Commission: Assistant Director, Compliance
Bureau of Competition
Federal Trade Commission
Washington D.C. 20580
Fax No. (202) 326-3396 or (202) 326-2655

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Any person may change the address at which it is to receive notices under this Agreement by furnishing written notice of such change to the other parties.

9. CONFIDENTIALITY

- a) As used herein, "Confidential Information" shall include any and all oral and written information provided to the Auditor by MichCon or Exelon, provided, however, that Confidential Information shall not include any information which (i) is, or hereafter becomes (but not in violation of this Agreement), generally known to the public, (ii) was available to the Auditor on a non-confidential basis prior to the time it was disclosed by MichCon or Exelon, or (iii) is disclosed by an independent third party with a right to make such disclosure. Unless required by law, the Auditor shall not disclose the Confidential Information to any person or entity except to its directors, employees or outside consultants retained by it in connection with Auditor Agreement, the Easement Agreement, or the Commission Order.
- b) The Auditor agrees that the Confidential Information will not be used for any purpose other than in connection with the performance of its duties and obligations under this Auditor Agreement. The Auditor shall use best efforts to prevent access by unauthorized persons to the Confidential Information, such efforts to reflect at least the same general degree of security that the Auditor accords its own Confidential Information. The Auditor shall require that any outside consultant retained by the Auditor shall not disclose Confidential Information to anyone other than the FTC or the MPSC.
- c) In the event that the Auditor is requested or required under compulsion of legal process to disclose the Confidential Information, the Auditor will not, unless required by law, disclose the Confidential Information until MichCon and Exelon have each first (i) received prompt written notice of such request or requirement to disclose, and (ii) had an

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adequate opportunity to obtain a protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information. The Auditor shall not oppose actions by MichCon and Exelon to assure such confidential treatment.

- d) This paragraph 9 shall not restrict the Auditor's obligations to provide any information requested by the Commission or Commission Staff.

10. MISCELLANEOUS

- a) With the approval of the Commission, the parties may enter into an amendment of this Agreement for the purpose of adding any provision, changing it in any manner, or eliminating any of the provisions of this Agreement.
- b) The Commission's retained jurisdiction shall be as set forth in the Commission Order.
- c) This Agreement is governed by the law of the State of Michigan.
- d) This Agreement includes the following schedules (and all documents referenced therein) which are incorporated herein by reference:

SCHEDULE A - Scope of Services

SCHEDULE B - Price Schedule

This Agreement represents the entire understanding between the parties making all other representations null and void.

- e) This Agreement, together with Schedules A and B and the Easement Agreement shall be binding upon, and inure to the benefit of, the parties and their successors and assigns.

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- f) No modification, amendment, or assignment of this Auditor Agreement may become effective without the prior written approval of the Commission.
- g) Nothing in this Agreement shall be deemed to preclude the FTC from bringing any action as may be appropriate under the Federal Trade Commission Act.

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This Agreement is executed by duly authorized officers of the parties as of the day and year first above written.

MICHIGAN CONSOLIDATED GAS COMPANY

By: _____

Its: _____

EXELON ENERGY COMPANY

By: _____

Its: _____

NAVIGANT CONSULTING, INC.

By: _____

Its: _____

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SCHEDULE A

SCOPE OF SERVICES

The Auditor shall perform such services as necessary to effectuate the intent of the Easement Agreement, including but not limited to:

1. Arbitration of disputes in accordance with the procedures set forth in Section D-18 of Exhibit D to the Easement Agreement.
2. Calculation of the Keep-Whole Payment, as defined in the Easement Agreement.
3. Assessment of money damages against MichCon if found to be the cause of undue delays in the in-service date of any expansions or upgrades required to serve a customer of Exelon, or to have unreasonably denied nominations or receipt points, or otherwise to have interfered in Exelon's rights under the Easement Agreement.
4. Determination of the operational feasibility of granting Exelon's request for additional receipt points under the Easement Agreement.
5. From time to time, at Auditor's discretion, establish or modify such procedures as reasonably deemed necessary for MichCon's handling of Exelon's requests for system expansion and upgrades or for implementing any other procedures or provisions under the Easement Agreement in a non-discriminatory manner.
6. Any other duties or responsibilities as set forth in the Easement Agreement.

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SCHEDULE B**COMPENSATION SCHEDULE**

\$ _____ per month plus \$ _____ per hour and reasonable costs and third party fees incurred by Auditor for the performance of Services. Any expenses incurred by Auditor in its performance of this Agreement will be passed through at _____.

MichCon and Exelon shall each bear one-half of the Auditor's fees and expenses.

The following table details the type of activities expected and the manner in which fees would be charged:

Type of Activity	Detailed Activities	Frequency	Billing Method
Specify data requirements, collection, reporting, and frequency	Definition of all algorithms and data forms/sources/timing as specified in the Easement Agreement	Once at inception, and from time to time as needed	_____
Complete monthly analyses and reports necessary to perform as Auditor	Sales/load by customer segment, capacity utilization, storage utilization, system expansion, operational performance	Monthly	_____
Calculate Keep-Whole payment	As defined in the Easement Agreement	Annually	_____
Dispute arbitration		As required	_____
Respond to Commission requests as required by Section 2.f) of the Auditor Agreement		As requested	_____
Other activities as may be required from time to time		As required	_____
Develop reports required by Section 2.d) of the Auditor Agreement	As described in the Auditor Agreement	Semi-annually and as may be required by Section 2.d)	_____

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____. The Auditor's fees do not include sales, use, excise, gross revenue, or similar taxes. Such taxes, if applicable to all or any portion of this assignment, will be charged in addition to fees and expenses.

With respect to dispute resolution, each party shall bear its own expenses (including without limitation the fees and expenses of legal counsel and accountants) in connection with such arbitration and MichCon and Exelon shall each bear one-half of the Auditor's fees and expenses, provided that the Auditor's award shall allocate such fees and expenses of counsel, accountants, other advisors and the Auditor according to the relative success of the contesting parties in the arbitration, as determined by the Auditor. The Auditor shall award an amount equal to the actual direct and indirect damages, including lost profits, suffered by each contesting party, which may include interest costs incurred by such party, but the Auditor shall not have the authority to award punitive damages.

Analysis

**Analysis of the Proposed Consent Order and Draft Complaint
to Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on March 20, 2001

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from DTE Energy Company ("DTE") and MCN Energy Group Inc. ("MCN") (collectively the "proposed Respondents") an Agreement Containing Consent Order (the "proposed consent order"). The proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy the anticompetitive effects that are described in the Commission's draft complaint and that are likely to arise from the merger of DTE and MCN.

II. Description of the Parties and the Proposed Acquisition

DTE, headquartered in Detroit, Michigan, is a holding company with subsidiaries engaged in various energy-related businesses. DTE's principal operating subsidiary, The Detroit Edison Company ("Edison"), is a public utility engaged in the generation, transmission, distribution, and sale of electricity in southeastern Michigan, including the Detroit metropolitan area.

MCN, also headquartered in Detroit, Michigan, is a diversified energy holding company, with its primary operations involved in the production, gathering, processing, transmission, storage, and distribution of natural gas. MCN is the parent of Michigan Consolidated Gas Company ("MichCon"), a natural gas utility serving areas throughout the State of Michigan, including southeastern Michigan. MichCon distributes natural gas, and Edison distributes electricity, in a portion of southeastern Michigan consisting of the city of Detroit and all or parts of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties (the "Overlap Area").

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Pursuant to an Agreement and Plan of Merger dated October 4, 1999, and amended November 12, 1999, MCN plans to merge with a subsidiary of DTE. Each share of MCN common stock will be converted into the right to receive either \$28.50 in cash or 0.775 shares of DTE common stock, subject to proration. The transaction is valued at approximately \$2.6 billion in cash and stock, plus the assumption of approximately \$2 billion in debt.

The Commission has carefully examined all areas in which the proposed merger of DTE and MCN might be anticompetitive. The Commission found that the transaction raises competitive concerns in the Overlap Area, as described in the draft complaint, and the Commission proposes to take action to remedy these potential anticompetitive effects.

III. The Draft Complaint

The draft complaint alleges that the merger of DTE and MCN would lessen competition in the local distribution of electricity and the local distribution of natural gas in the Overlap Area. According to the complaint, MichCon is the only distributor of natural gas within the Overlap Area. Similarly, except for the cities of Detroit and Wyandotte, which operate their own municipal electric utilities, Edison is the only distributor of electricity within the Overlap Area. Following the merger, Edison would effectively control the distribution of both electricity and natural gas within the Overlap Area.

According to the complaint, entry into the distribution of electricity and the distribution of natural gas within the Overlap Area is effectively blocked by regulatory constraints, and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from the merger.

The draft complaint describes three ways in which the proposed merger would lessen competition. Each of these three ways is described below.

Analysis

A. Self-Generation of Electricity

According to the complaint, natural gas is the fuel of choice for new electricity generation in the Overlap Area. Other fuels are not likely to be used for new electricity generation because of various disadvantages relative to natural gas. Coal and fuel oil, for example, have environmental problems that do not exist with natural gas. As a result, virtually all new electricity generation in the Overlap Area is likely to rely on natural gas as its source of fuel.

The complaint alleges that customers in the Overlap Area who need electricity have limited options. They can have electricity delivered by Edison, or they can self-generate electricity using natural gas delivered by MichCon. Self-generation can take several forms, including cogeneration, generation by municipalities (such as the city of Wyandotte), and emerging forms of distributed generation, such as microturbines and fuel cells, that are fueled by natural gas. According to the complaint, MichCon has aggressively sought to encourage customers to install gas-powered self-generation equipment that would allow customers to minimize or eliminate the purchase of electricity from Edison.

The complaint charges that DTE and MCN are competitors in the Overlap Area because Edison distributes electricity and MichCon distributes natural gas used for the self-generation of electricity. The complaint further charges that the proposed merger may substantially lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in the Overlap Area in certain ways, including: (1) by eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas used for the self-generation of electricity in the Overlap Area, and (2) by increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas used for the self-generation of electricity, each of which increases the likelihood of

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anticompetitive prices and reduced competition in the distribution of electricity and the distribution of natural gas in the relevant market.

B. The City of Detroit

The city of Detroit operates a municipal utility (the Public Lighting Department, or “PLD”) that distributes electricity to industrial, business and public sector customers in Detroit. The PLD competes directly with Edison for new non-residential customers in Detroit.

According to the complaint, the PLD has two sources of electricity. It purchases some power at wholesale, which is delivered over Edison’s power lines, and it generates the rest of its requirements using natural gas delivered by MichCon. The PLD has no viable option for natural gas delivery other than MichCon, and after the merger will have to rely on its only direct electricity competitor for delivery of natural gas.

The complaint charges that the proposed merger, if consummated, may substantially lessen competition or tend to create a monopoly in the distribution of electricity in the city of Detroit in certain ways, including: (1) by decreasing or eliminating competition in the city of Detroit in the distribution of electricity and the distribution of natural gas used to produce electricity, and (2) by facilitating DTE’s ability to raise the costs of the Detroit PLD, each of which increases the likelihood of anticompetitive prices and reduced competition in the distribution of electricity and the distribution of natural gas used to generate electricity in the city of Detroit.

C. Competing Applications

Electricity and natural gas compete directly for certain commercial and industrial applications. According to the complaint, some customers can choose either natural gas or electricity for specific energy needs, such as powering air

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compressors, commercial cooking, and various process applications. Customers who choose natural gas for these applications must use natural gas delivered by MichCon, and customers who choose electricity must use power delivered by the local electric utility, usually Edison. MichCon has aggressively sought to convert customers using electricity for such applications to natural gas, typically by attempting to convince customers of the relative economic benefits of natural gas compared to electricity.

The complaint charges that the proposed merger, if consummated, would substantially lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in certain ways, including: (1) by eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas in the Overlap Area, and (2) by increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas, each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas in the relevant market.

IV. Terms of the Proposed Consent Order

The proposed consent order is designed to remedy the Commission's competitive concerns about the proposed merger. Under Paragraph II of the proposed consent order, the proposed Respondents must divest certain assets (the "Divested Assets") to Exelon Energy Company ("Exelon") pursuant to and in accordance with the terms of a Divestiture Agreement between MichCon and Exelon, no later than five (5) days after the proposed merger is consummated.¹ The Divestiture Agreement

¹ However, if the Commission determines to make the Order final, but notifies the proposed Respondents either that Exelon is
(continued...)

Analysis

consists of two separate agreements: (1) an “Easement Agreement” entered into between MichCon and Exelon, and (2) an “Auditor Agreement” entered into between MichCon, Exelon, and a third party that serves an oversight function with respect to the Easement Agreement between MichCon and Exelon.

The Easement Agreement has been approved by the Michigan Public Service Commission as a special contract between MichCon and Exelon. *See* Order Approving Special Contract, In the Matter of the Joint Application of Michigan Consolidated Gas Company and Exelon Energy Company for Ex Parte Approval of a Special Contract for Certain Transportation and Storage Rights, Case No. U-12825, February 14, 2001.

The Easement Agreement conveys to Exelon an easement over MichCon’s local natural gas distribution system that will allow Exelon to engage in the distribution and storage of natural gas in the Overlap Area. Pursuant to the Easement Agreement, Exelon is entitled to the use of five billion cubic feet (“Bcf”) of annual transportation capacity (“Initial Capacity”) to serve any end use customers within the Overlap Area. Exelon is then entitled to an additional 15 Bcf of annual transportation capacity (“Supplemental Capacity”), in increments of 1 Bcf, that must serve at least 50% Electric Displacement Load. (Electric Displacement Load, or “EDL,” includes on-site electric power generation such as cogeneration, municipal generation, emerging forms of distributed generation (such as fuel cells and microturbines), and other gas-fired electric displacement equipment.) If Exelon uses all of the Initial Capacity and

¹(...continued)

not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then proposed Respondents are to divest the Divested Assets, at no minimum price, within 90 days of the date the Order becomes final, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

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Supplemental Capacity (a total of 20 Bcf, of which 7.5 Bcf must be used for EDL), then Exelon is entitled to additional transportation capacity (“Growth Capacity”) for use in serving on-site generation customers within the Overlap Area. Exelon also is entitled to storage capacity equal to 10% of its Initial Capacity and Supplemental Capacity. Charges for the Initial Capacity, Supplemental Capacity, and Growth Capacity are set at levels designed to allow Exelon to compete with MichCon in the Overlap Area, and to provide Exelon with incentives to distribute natural gas for EDL applications.

The Easement Agreement contains a number of provisions designed to ensure Exelon’s ability to be a viable competitor. In particular, the agreement requires the parties to appoint an independent third-party auditor with knowledge of the natural gas industry to oversee the Easement Agreement and to perform such services as are necessary to effectuate the agreement, including arbitration of disputes and other duties and responsibilities designed to ensure that MichCon cannot unreasonably discriminate against Exelon. (Easement Agreement ¶ D-17.) In addition, the Easement Agreement requires MichCon to repair and replace all components of the distribution system necessary for the proper operation thereof, and allows the Auditor to make repairs or replacements, at MichCon’s cost, if MichCon fails to do so. (Easement Agreement ¶ 7.) Further, the agreement allows Exelon to expand the system if necessary, either at MichCon’s expense or with the assistance of an expansion allowance paid for by MichCon. (Easement Agreement ¶ D-5.) Moreover, the Agreement requires that MichCon give Exelon and the Auditor advance notice of important operational events that may impact the distribution system, such as scheduled maintenance, outages, changes in operating standards, planned new receipt points, proposed modifications to nomination or measurement practices or quality specifications, and any other events that may affect Exelon or Exelon’s ability to service its customers, and empowers the Auditor to revise or modify any such events if necessary to prevent an adverse impact on Exelon. (Easement Agreement ¶ D-6.)

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The proposed consent order also contains other provisions designed to ensure the continuation of a viable and competitive alternative supplier of natural gas distribution services to Electric Displacement Load customers in the Overlap Area. For example, Paragraph II.B.1 of the proposed consent order requires that proposed Respondents maintain, repair, and replace all components and other aspects of the MCN Distribution System (1) necessary for the proper or safe operation of that system; and (2) in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System. Paragraph II.B.2 of the proposed consent order requires that proposed Respondents operate the MCN Distribution System in a reasonable and non-discriminatory manner, and in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.

Paragraph II.B.3 deals with the Auditor, and provides that the Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Divestiture Agreement, including the right to propose changes to the Divestiture Agreement necessary to ensure the competitive viability of the Acquirer, and shall have free access to all of proposed Respondents' books, records, information, systems, and facilities as deemed reasonably necessary by the Auditor to monitor proposed Respondents' performance under the Divestiture Agreement. In obtaining and utilizing proprietary information, the Auditor is required to observe confidentiality restrictions designed to prevent the unauthorized disclosure of such information.

Pursuant to Paragraph II.B.4, Respondents are required to provide Exelon with a list of all customers to which MCN transports natural gas in the Overlap Area, including the name, address, and rate classification for each such customer, and a statement indicating whether each such customer utilizes natural gas for Electric Displacement Load. In addition, under Paragraph

Analysis

II.B.5, Respondents must provide to the Auditor the results of a study conducted by MCN of Electric Displacement Load opportunities in the Overlap Area. Respondents must send a letter to each customer in the study advising the customer that gas distribution services may be purchased from Exelon and asking if the customer wishes the Auditor to provide the customer's study information to Exelon.

Paragraph II.B.6 provides that, for two years after the date the Order becomes final, Respondents shall promptly comply with any request of any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services provided by Exelon.

The proposed consent order also contains provisions dealing with the appointment of an alternative acquirer if Exelon terminates the Divestiture Agreement, as well as trustee provisions dealing with the responsibilities of any trustee appointed to accomplish any divestiture required by the order.

The proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within sixty days following the date on which the order becomes final, every sixty days thereafter until the divestitures are completed, and annually for a period of twenty years.

The Auditor Agreement, executed by MichCon, Exelon and the Auditor, defines the duties, powers and obligations of the Independent Auditor required by Paragraph II.B.3 and Paragraph D-17 of the Easement Agreement. The Auditor has the ability to take all actions necessary and appropriate to effectuate the purposes of the Easement Agreement, including the right to assess consequential damages against MichCon if MichCon operates the distribution system in a manner that is prejudicial to Exelon. (Auditor Agreement ¶ 2.) The Auditor also is responsible for arbitrating disputes between the parties, as well as for performing other necessary duties and responsibilities under the Easement

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Agreement, such as verification of Exelon's Electric Displacement Load volume, system repair and maintenance if MichCon fails to do so, designation of applications that qualify as Electric Displacement Loads, resolution of complaints by Exelon, modification of operational changes that may adversely impact Exelon, and related duties and responsibilities. (Auditor Agreement Sch. A; Easement Agreement ¶¶ 3, 7, D-1(j), D-2, D-4, D-6.)

The proposed buyer of the Divested Assets, Exelon Energy, is one of the largest unregulated suppliers of electricity and natural gas in the nation. It is a unit of Exelon Corporation, which was formed from the merger of Unicom Corporation and PECO Energy Company. The parent company has operations engaged in the generation, transmission, distribution and sale of electricity, the supply of natural gas and natural gas transportation services, the sale of distributed generation products, and related businesses. The company is extremely knowledgeable about the utility business and the distribution of electricity and natural gas. It currently markets natural gas to buyers in Michigan (as well as in other states), and has an affiliate that is engaged in the distribution of microturbines and distributed generation equipment.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer must not itself present competitive problems. Exelon is a major energy company with substantial experience in natural gas, electricity, and the operation of utilities. The Commission believes that Exelon is well qualified to operate the divested assets and that divestiture to Exelon will not be anticompetitive.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again

Analysis

review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of assets to Exelon, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order, nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF
SIEMENS AG, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-4011; File No. 0010212
Complaint, May 15, 2001--Decision, May 15, 2001

The consent order addresses the acquisition by Respondent Siemens AG -- the leading supplier worldwide of highly integrated postal automation systems, which public postal services use (for letter and other flat mail) to cancel stamps or meter marks; to read addresses using optical character recognition technology; and to translate addresses into destination barcodes that can be used to sort the mail by country, state, city and/or street -- of the postal automation system subsidiary (Atecs Mannesmann AG) of Respondent Vodafone Group plc. The order, among other things, requires the respondents to divest Vodafone's Mannesmann Dematic Postal Automation ("MDPA") business to Northrop Grumman Corp., or to another acquirer approved by the Commission. The order also requires the respondents to provide incentives to certain MDPA employees to continue in their positions until the divestiture is accomplished. In addition, for different prescribed periods, the order prohibits the respondents from soliciting or inducing any employees or agents of the MDPA business to terminate their employment with MDPA; from hiring any employees or agents of MDPA; or from soliciting MDPA customers. The order also prohibits Respondent Siemens from disclosing to any person or from using any information it obtains relating to the MDPA business.

Participants

For the Commission: *Yolanda R. Gruendel, Steven K. Bernstein, Jeffrey Dahnke, Daniel P. Ducore, Hajime Hadeishi and Charissa P. Wellford.*

For the Respondents: *Steven A. Newborn, Clifford Chance Rogers & Wells, and Tom D. Smith, Jones, Day, Reavis & Pogue.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent Siemens AG ("Siemens"), a