

## AN ENERGY PLAN FOR MICHIGAN'S FUTURE

BY JENNIFER UTTER HESTON

*A*s business leaders, you are well aware of the impact that energy costs can have on your ability to compete, and electricity costs are among the biggest concerns for businesses deciding whether to locate in Michigan. Recently, J. Peter Lark, Chairman of the Michigan Public Service Commission, unveiled the 21<sup>st</sup> Century Electric Energy Plan, his plan for meeting Michigan's electricity needs for the next 20 years. The plan is expected to play a role in transitioning Michigan's economy, but is of course not without controversy.

Many of the Chairman's policy recommendations will require legislation to be implemented. Consequently, in addition to tackling business tax reform, Michigan's legislature is expected to debate the merits of the Chairman's plan this legislative session, affording stakeholders an additional opportunity to get involved. While there are certainly many positive aspects of the plan that should be recognized, the plan has become the focus of considerable debate.

### Development of the Plan

In the spring of 2006, Governor Granholm issued an executive directive calling upon the Chairman to develop a comprehensive energy plan to address Michigan's short and long term needs. As the Governor aptly noted, a reliable, safe, clean and affordable supply of electricity is critical, and any plan should support the goals of improved economic development, environmental quality and resource diversity. To that end, more than 350 people representing over 150 different organizations participated in the Chairman's forums and workgroups to share knowledge, information, and insight over the course of nine months.

The plan forecasts a 1.2 percent annual increase in Michigan's electricity demands for the next 20 years. At this rate, the Chairman concludes that Michigan will need a new large power plant by 2015. Given the long lead-time necessary for the development and construction of a power plant, we are already behind. As a result, the Chairman recommends an ambitious plan that requires the use of renewable resources and energy efficiency measures first, and supports the longer-term development of new utility-owned power plants. The

Chairman contends that his plan, if implemented, would lower Michigan's total electricity costs by \$4 billion over the next 20 years; \$2 billion resulting from new power plants, and \$2 billion from the renewable energy and energy efficiency measures. He does not provide an estimate of how much the plan would cost.

### The Plan's Recommendations

*New Electric Generation.* One of the most prominent and controversial aspects of the Chairman's plan is to change the way new power plants are built and financed. The Chairman proposes legislation that would permit existing electric utilities to file an application with the Public Service Commission to obtain a "Certificate of Need" for construction of a new power plant. If the Commission grants the application, the need for the new power plant cannot later be challenged. The Chairman also proposes permitting utilities to recover financing costs for the plant during construction.

*"Committees overseeing energy policy in both the Michigan Senate and House of Representatives will begin hearings on aspects of the plan this month, and legislative bills are expected to be introduced soon."*

As you can imagine, not everyone is in agreement with these proposals. In fact, the Chairman's recommendations run counter to a consensus proposal put forth by a majority of the parties participating in the Chairman's process. That consensus proposal advocates the use of competitive bidding for all new power plant construction, and is premised upon the idea that competitive forces are more likely to ensure the lowest cost power for Michigan's future compared to government command and control regulation methods. Backers of the consensus proposal often cite Michigan utilities' poor history of power plant construction which resulted in serious cost overruns in excess of several hundred percent and the relatively high electricity rates today.

Critics of the Chairman's plan further suggest that if the generation provisions are implemented, they could effectively eliminate new competitive sources of electricity. Non-utility power producers would not benefit from the same terms and conditions as their utility counterparts, and would be subject to significantly greater market risk. If a non-utility

*continued page 2...*

## AN ENERGY PLAN *CONTINUED...*

decides to build a power plant, but once constructed the power is no longer needed, the non-utility producer would bear all the risk and expense of that decision. Greater risk is typically associated with higher financing costs. A utility, on the other hand, would have received prior approval for the plant and by law would be permitted to recover the reasonable and prudent expenses of that construction from utility customers. The utility would likely be able to obtain lower financing costs for its new power plant. All other things being equal, the regulated utility would be able to provide a lower priced product. Moreover, whereas the non-utility must bear the risk associated with the decision to construct a new plant, under the Chairman's plan, the risk associated with new utility power plant construction shifts largely to utility customers.

Additionally, the non-utility power producer must recover its costs for the new plant in a competitive wholesale market for electricity, and can begin to recover these costs only when the plant is producing power. The non-utility producer is not guaranteed that the wholesale market will purchase its power, nor purchase the power at a price high enough to recover its costs plus earn a profit. In contrast, under the energy plan, utilities would be entitled to recover the reasonable costs of their plants from largely captive ratepayers, plus be guaranteed an opportunity to earn a reasonable rate of return on that investment. Moreover, under the proposed plan, a utility can begin recovering certain financing costs associated with a new plant from existing ratepayers even before the plant produces a single kilowatt of power. Non-utility power producers are concerned that the proposed energy plan would create an uneven playing field, so uneven that it would effectively eliminate their ability to compete in the electricity market. Consumer advocates are concerned that ratepayers would be forced to shoulder the risk of power plant construction, potentially forcing customers to pay for plants which are later not needed, and to begin paying for plants long before any benefit of the power is produced.

*Customer Choice.* Seven years ago, the legislature enacted Public Act 141, the Customer Choice and Electricity Reliability Act. That Act permits electric utility customers to price shop for electricity and to receive their electric supply from a provider other than a local utility. Historically, customers were able to switch between alternative suppliers and their utility with relative ease. The energy plan, however, characterizes customer switching as one of Michigan's "market flaws," and recommends proposals that would reduce the potential benefits of customer choice. Under the plan, if a customer exercises his ability to choose an alternative electric supplier after a Certificate of Need for a new power plant has been approved, the customer would be responsible for paying a surcharge associated with the cost of the new

power plant. Consequently, a customer must continue to pay for a portion of the utility's approved power plant, even if the customer is no longer receiving electricity from that plant. Furthermore, if a customer wishes to return to the utility for electric service after having been supplied by a competitive provider, the customer would not be able to obtain electricity at the utility's rates for two years from the date when the customer notifies the utility of his return to service. In the interim, the customer must pay market prices. Additionally, the plan proposes to require all suppliers, including competitive electric suppliers, to acquire more power than their customers need, for planning purposes. Suppliers that fail to do so would be subject to penalties.

Proponents of the Chairman's plan contend that restrictions on customer migration would result in utilities having a more stable customer base, and therefore, more stable revenues. Revenue stability would result in better financing terms, which would lower the overall cost of building large expensive power plants, benefiting all consumers. Critics of the plan argue that these proposals would effectively eliminate the benefits of customer choice, and increase costs for competitive electricity suppliers. Customers would no longer be able to take full advantage of competitive pricing and avoid costly decisions of a utility. Moreover, the benefit of relying upon competition to discipline business decision-making to ensure the lowest possible costs are incurred is significantly diminished, if not entirely eliminated, under a plan that guarantees customers pay for the plant. Critics further contend that it would not be appropriate to force customers to pay for a power plant from which they do not receive service.

*Renewable Energy Program.* The Chairman recommends that the state adopt a more extensive renewable energy program. He recommends legislation establishing a statewide renewable portfolio standard requiring all electricity providers to serve customers with at least 10 percent renewable energy by the end of 2015, with an interim goal of 3 percent by the end of 2009, and the discretion to expand the program to require 20 percent by the end of 2025. All reasonable and prudent compliance costs incurred by a utility cost recovery from ratepayers.

While many parties agree that the development of renewable energy is beneficial, there are concerns that mandates would be costly and that those costs would ultimately result in further increases to energy bills. Today, many utilities offer "green power" programs to customers on a voluntary basis where customers agree to pay any additional costs associated with their decision to support renewable energy. Under these programs, several utilities today already procure 5 percent or more renewable energy. Proponents of these programs contend that our existing energy supply is overly-dependent on fossil fuels and that diversification

involving more locally produced power is valuable. Further, proponents assert that renewable energy would actually be cheaper than fossil fuel energy if existing energy sources were required to reflect their true costs, including environmental and health impacts. With several utilities already meeting the interim goal, many proponents of renewable energy suggest that the Chairman's proposal is not aggressive enough.

The plan further recommends that the Commission be given the authority to permit customers who generate power to be able to use the utility's wires to transmit that power, and to consider an expanded net metering program so that more customers may economically benefit from the power that they produce. The plan also recommends legislation providing property tax relief for residential customers who install solar photovoltaic, wind, fuel cell, or other renewable energy resources, and to authorize the Commission to conduct a pilot project to investigate expanded solar-generated electricity involving one or more utilities.

*Electric Reliability.* The plan suggests that Michigan will need a more reliable system for delivering electricity as Michigan's economy shifts from traditional manufacturing to more high-technology processing. Recognizing that electric lines are particularly vulnerable to weather and growing trees, the plan recommends that the Commission consider requiring more electricity facilities to be placed underground. While many communities currently require new facilities to be located underground, largely for aesthetic reasons, there is a substantially higher cost associated with doing so.

*Energy Efficiency Program.* The energy plan advocates for a significant Michigan Energy Efficiency Program (MEEP). The MEEP would be funded through a new \$68 million statewide public benefits fund, expanding to \$110 million in the third year, to be administered by an independent third-party under the supervision of the Public Service Commission. The monies would be used for expenses related to program administration, education, marketing, research and development grants, evaluation studies and other oversight expenses. The Chairman proposes that the program be supported with an additional surcharge on all electric customers. Large manufacturing customers may opt out of the program on a showing that they have undertaken a self-directed program.

In addition, the Chairman recommends a number of other programs to bolster energy efficiency in the state. This includes immediately requiring utilities to engage in active electric load management activities. The Chairman further recommends processes for incorporating energy efficiency improvements into new building codes, establishing state appliance efficiency standards, and utilizing more advanced

electric metering programs. As with the plan's other proposals, concerns have been raised about the costs of these proposed programs. Advocates of greater energy efficiency, however, argue that implementing energy efficiency improvements and reducing our need for electricity is less costly than building new power plants, and therefore contend that the energy efficiency proposals do not go far enough.

## Conclusion

As you can see, there is much to discuss about the Chairman's 21<sup>st</sup> Century Electric Energy Plan. Committee chairs overseeing energy policy in both the Michigan Senate and House of Representatives will begin hearings on aspects of the plan this month, and legislative bills are expected to be introduced soon. The Governor's office is particularly supportive of establishing a renewable portfolio standard. Members of the Fraser team look forward to advocating our clients' interests in this important debate.



*Ms. Heston is a member of the Utility Law Practice Group at Fraser Trebilcock Davis & Dunlap, P.C. Previously, she served as an attorney with the Michigan Public Service Commission and as the energy policy advisor to the Michigan Senate. In addition to her law degree, she holds graduate degrees in government and public administration. Ms. Heston can be reached at 517/377-0802 or juheston@fraserlawfirm.com.*

## ATTORNEY ACTIVITIES OF NOTE

- Anita G. Fox has been elected Vice-Chair of the Children's Trust Fund of Michigan (CFT). Ms. Fox was appointed to the CFT Board of Directors by Governor Jennifer M. Granholm in 2004. The CFT provides grants for public education, training and technical assistance, and funds a network of local, community-based child abuse prevention programs and services across Michigan.
- Toni L. Harris has been reelected to serve as legal counsel of the Lansing Regional Chamber of Commerce.
- Ryan M. Wilson has been awarded the Meritorious Service Medal by the President of the United States. Wilson received this recognition because of the "exceptional professional ability, steadfast initiative, and selfless dedication to duty exhibited by Captain Wilson reflected great credit upon him and upheld the highest traditions of the United States Naval Service."
- Robert B. Nelson spoke at the Michigan State University Institute of Public Utilities Michigan Forum on January 26th on net neutrality and the new video franchising law.

**GOLDEN NUGGET**

**Question:** Do I need a Will if I have a Living Trust?

**Answer:** Yes. There are several reasons for having what is called a “pour over” Will. The Will instructs that after any debts, expenses and taxes are paid, the remainder of the probate estate would pour over into the Living Trust. The Will essentially transfers any assets that were not held in the name of the trust and that need to be transferred at your death. By having a “pour over” Will you are not directing that a probate estate be opened. Simply put, a probate estate would only be opened if you left property in your individual name without a beneficiary designation. The “pour over” Will makes sure that these miscellaneous or forgotten assets make their way into the Living Trust where they are controlled by your stated wishes under the terms of the Living Trust Agreement. Furthermore, a Will may also be important if you have minor children and need to name guardians and conservators for the minor child or children.

Interested in more information about Estate Planning and Probate issues? Sign up for Ryan Wilson’s free monthly *Golden Bullets*. It is available in print and email format. For a subscription call Mr. Wilson at 517/377-0897 or email him at [rwilson@fraserlawfirm.com](mailto:rwilson@fraserlawfirm.com).

PETER L. DUNLAP+  
DOUGLAS J. AUSTIN  
MICHAEL E. CAVANAUGH  
JOHN J. LOOSE  
DAVID E.S. MARVIN\*  
STEPHEN L. BURLINGAME  
DARRELL A. LINDMAN  
IRIS K. LINDER  
GARY C. ROGERS  
MARK A. BUSH  
MICHAEL H. PERRY  
BRANDON W. ZUK  
MICHAEL C. LEVINE  
THOMAS J. WATERS  
MARK R. FOX\*\*  
MICHAEL S. ASHTON  
H. KIRBY ALBRIGHT  
GRAHAM K. CRABTREE  
MICHAEL P. DONNELLY  
EDWARD J. CASTELLANI\*  
NAN ELIZABETH CASEY

PETER D. HOUK~  
JONATHAN E. RAVEN  
THADDEUS E. MORGAN  
ANNE BAGNO WIDLAK  
ANITA G. FOX\*  
ELIZABETH H. LATCHANA  
TODD D. CHAMBERLAIN  
RYAN M. WILSON  
KENNETH S. WILSON\*  
ROBERT B. NELSON  
BRIAN P. MORLEY+  
MARY M. MOYNE‡  
JOHN D. MILLER\*  
TONI L. HARRIS‡  
RYAN K. KAUFFMAN  
KATHERINE A. WEED  
JENNIFER UTTER HESTON  
NICOLE L. PROULX  
VINCENT M. PECORA  
G. ALAN WALLACE  
AZIZA N. YULDASHEVA

ARCHIE C. FRASER  
(1902-1998)  
EVERETT R. TREBILCOCK  
(1918-2002)  
JAMES R. DAVIS  
(1918 - 2005)

OF COUNSEL  
DONALD A. HINES  
RONALD R. PENTECOST

~RETIRED CIRCUIT JUDGE  
\*ALSO LICENSED IN FLORIDA  
+ALSO LICENSED IN COLORADO  
\*ALSO LICENSED IN DISTRICT OF COLUMBIA  
\*ALSO CERTIFIED PUBLIC ACCOUNTANT  
+ALSO LICENSED IN NORTH CAROLINA  
‡ALSO LICENSED IN GEORGIA  
‡ALSO LICENSED BY U.S. PATENT  
& TRADEMARK OFFICE

**Lansing Office:**

124 West Allegan St., Ste 1000  
Lansing, Michigan 48933  
Telephone: (517) 482-5800

**Detroit Office:**

One Woodward Ave., Ste 1550  
Detroit, Michigan 48226  
Telephone: (313) 237-7300



*The Law & Business* is published as a source of general information about current developments in the practice of business law. If you have questions regarding any of the articles included in this issue or business law in general, please contact our lawyers prior to taking action. *The material in this newsletter may be reproduced only with the acknowledgment of its source and copyright.*

©2007 Fraser Trebilcock Davis & Dunlap, P.C.

**FRASER TREBILCOCK DAVIS & DUNLAP, P.C.**

PRST STD  
U.S. Postage  
PAID  
Lansing, MI  
Permit #565

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.  
124 W. ALLEGAN, SUITE 1000  
LANSING, MI 48933  
VISIT OUR NEWLY REDESIGNED WEB SITE AT  
[WWW.FRASERLAWFIRM.COM](http://WWW.FRASERLAWFIRM.COM)