



An Integrated Energy Company



LETTER OF COMMENT NO. 150

August 8, 2008

Financial Accounting Standards Board  
Technical Director  
File Reference No. 1600-100  
401 Merritt 7  
P.O. Box 5116  
Norwalk, Connecticut 06856-5116

RE: File Reference No. 1600-100, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)*

Dear FASB board members and staff:

This letter contains the comments of CMS Energy Corporation and Consumers Energy Company (collectively, the Company) on the Exposure Draft of the Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)*.

CMS Energy Corporation, whose common stock is traded on the New York and Midwest Stock Exchanges, is a domestic energy company engaged in electric and natural gas utility services and independent power production, operating through subsidiaries in the United States, primarily in Michigan. CMS Energy Corporation's consolidated assets are \$14 billion, and annual operating revenues are \$6.5 billion. Consumers Energy Company, the principal subsidiary of CMS Energy Corporation, provides natural gas and/or electricity to almost 6.5 million of Michigan's 10 million residents and serves customers in all 68 counties of Michigan's Lower Peninsula.

While we support the FASB's efforts to address the concerns of financial statement users and improve disclosure requirements, we strongly disagree that the proposed changes to the required disclosures about loss contingencies would be beneficial to investors. Moreover, we believe that the proposed requirements would lead to the disclosure of highly sensitive and confidential information that could significantly harm public companies, whether as defendants in litigation or in settlement negotiations, or as participants in private contract disputes or matters involving environmental claims. For these reasons, we urge the FASB to reconsider whether such a significant expansion of current disclosure requirements is warranted at this time.

We recognize the importance that investors place on comprehensive and reliable financial disclosure. In recent years, however, the events that have been most responsible for eroding investor confidence have not involved losses arising from litigation or other contingent liabilities that were inadequately disclosed, but rather have been associated with fundamental issues such as overstated asset valuations and off-balance-sheet arrangements lacking in transparency. We

believe that the business risks associated with such conditions are intended to be described in Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) in the SEC filings of public companies. Regulation S-K requires public companies to disclose in the MD&A all significant risk factors and to describe how they could affect the company, to discuss and analyze known trends, demands, commitments, events and uncertainties, and to provide information about the quality of, and potential variability of, the company's earnings and cash flow. If the FASB concludes that current disclosure requirements should be expanded, we would encourage the FASB to consider whether requirements similar to those of Regulation S-K would be appropriate to incorporate into generally accepted accounting principles.

Our specific concerns about the Exposure Draft are described below.

***Paragraph 7a of the proposed statement would require an entity to disclose quantitative information about its exposure to loss from a contingency as follows: a) The amount of claim or assessment against the entity, if applicable, or b) if there is no assessment amount, the entity's best estimate of the maximum exposure to loss. An entity also may disclose its best estimate of the possible loss or range of loss if it believes that the amount of the claim or assessment or the estimate of maximum exposure to loss is not representative of the entity's actual exposure.***

An estimate of a company's maximum exposure to loss, especially in the early stages of a case, is likely to be misleading and of little value to financial statement users. During the litigation process, new facts come to light about a case, and claims and allegations made by an opposing party are examined. An estimate of the company's maximum exposure to loss could be artificially high, or artificially low, at the outset of a case and could vary significantly from period to period based on actions of a court or regulator.

Particularly with respect to environmental claims brought against a company, an estimate of the maximum exposure to loss may be distorted and may not take into account relevant facts yet to be determined. For example, Consumers Energy often arranges for disposal of waste at lawful disposal locations. At a number of these sites, action has been taken under the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and Consumers has been named a potentially responsible party (PRP) at these sites. Frequently, upon learning that the Company was a PRP, we had no idea of the ultimate cost of the remediation or of our share of that cost (which in many cases has proven to be a small share). When a company does not know either the total cost or its relative share of the total cost, the requirement to disclose a maximum potential liability would result in disclosure of very large numbers, which generally would not reflect in any way the ultimate loss.

In addition, the proposed alternative to supplement the required disclosure of maximum loss by providing the company's best estimate of the possible loss or range of loss would seldom be a viable alternative for companies. Such a disclosure would provide opposing parties with insights into the level of damages the company might consider inevitable, and thus acceptable, and would provide a minimum amount for opponents to seek to recover through litigation, arbitration, or settlement discussions. We discuss our concerns regarding sensitive information in more detail in the section below addressing the proposed requirements of paragraph 7b.

The proposed required disclosures would, in some instances, also be inconsistent with the basis for recording a contingent liability. SFAS No. 5 requires the accrual of a loss contingency only when the loss is probable and the amount can be reasonably estimated. According to SFAS No. 5, "The requirement that the loss be reasonably estimable is intended to prevent accrual in the financial statements of amounts so uncertain as to impair the integrity of those statements." However, the proposed standard would require that estimates be disclosed even for contingencies that are not accrued because they are not reasonably estimable. Once such an estimate is required to be developed, supported with documentation, and subjected to examination by external auditors, it would be difficult in practice to argue that the loss contingency should not be accrued because it is not reasonably estimable, regardless of how uncertain and unreliable the estimate may be. In this way the disclosure requirement could, in practice, give rise to an unintended change in accounting for contingencies that would be inconsistent with the basic principles of SFAS No. 5.

*Paragraph 7b of the proposed statement would require an entity to describe:*

- *the factors that are likely to affect the ultimate outcome of the contingency,*
- *these factors' potential effect on the outcome,*
- *the entity's qualitative assessment of the most likely outcome, and*
- *significant assumptions made by the entity in estimating the amounts disclosed and assessing the most likely outcome.*

These requirements would, in essence, cause a company to disclose its strategy in litigation, to describe the strengths and weaknesses of its strategy, and to predict publicly whether particular legal tactics are likely to be successful or unsuccessful. Such disclosures would reveal important information to the opposing party, which could then adjust its own strategy to exploit the company's disclosed weaknesses. Much of the required disclosure would be based on confidential communications among management, legal counsel, and subject-matter experts that would normally be subject to attorney-client privilege. Moreover, the disclosure requirements would seldom apply equitably to both parties in a dispute. For example, the defendant, having a loss contingency, would be at a disadvantage relative to the plaintiff, which would not be required to disclose comparable information about its gain contingency. In cases involving countersuits with loss contingencies on both sides, only the publicly traded corporation would be required to publish sensitive information. This inequity would have a detrimental effect on lawsuit negotiations by discouraging settlements and exposing defendants to even greater probabilities of loss.

In situations involving unasserted claims, broadening the current disclosure requirements to require the details listed above could actually invite such claims to be filed. For example, Consumers Energy has been in a number of situations in which a claim might have been brought against the Company, but no claim was ever lodged. If the Company had been required to disclose details of these potential unasserted claims, it is likely that claims would have been brought in many of those situations, making the disclosure a self-fulfilling prophecy. We would have incurred legal costs and possibly liability to other parties, thus harming the Company's investors.

Although paragraph 7 permits limited aggregation of data, the details required by paragraph 7b would effectively negate the benefit of aggregating data, as would the additional information required by paragraph 8. Paragraph 8 calls for a tabular rollforward of accrual balances; it permits aggregation within the table but requires a qualitative description of the significant

activity shown in the table. For companies having only a few changes in their accrual balances from one quarter to the next, financial statement users will often be able to see through any aggregation of data. The required descriptions of quarterly changes in accrual balances could also reveal to opponents in litigation a company's assessment of recent developments in the case.

Additionally, we do not believe that the predictive information required by paragraph 7b would be useful, given the high degree of uncertainty surrounding such matters. Attorneys and judges are seldom able to predict the outcome of litigation even with access to privileged information; it follows that an investor will not likely be able to use the information in these disclosures to predict accurately the outcome of contingencies. We believe that the only users who would find such information to be of value would be the company's opponents in a lawsuit, disclosure to whom would harm current investors.

***Paragraph 11 provides a limited exemption for disclosures that may be prejudicial to an entity's position.***

We believe that the exemption in paragraph 11, as currently written, is confusing and should be clarified and broadened. As we interpret this paragraph, it seems to provide very limited relief from the disclosures required in paragraph 7. Based on our current understanding, if an entity determines that disclosing the information required by paragraph 7 may be prejudicial to its position, the entity may aggregate those disclosures at a higher level such that disclosure of the information is not prejudicial. In rare instances in which the disclosure of information, even at an aggregated level, will be prejudicial, the entity may forgo disclosing only the information that would be prejudicial. However, the paragraph continues: "In no circumstance may an entity forgo disclosing the amount the claim or assessment against the entity (or, if there is no claim amount, an estimate of the entity's maximum exposure to loss); providing a description of the loss contingency, including how it arose, its legal or contractual basis, its current status, and the anticipated timing of its resolution; and providing a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome." Thus, the only disclosures required by paragraph 7 that are in fact subject to this exemption are 1) the significant assumptions made by the entity in estimating its maximum exposure to loss and in assessing the most likely outcome of the contingency, and 2) a qualitative and quantitative description of the terms of relevant insurance or indemnification agreements that could lead to recovery of some or all of the loss.

We believe that this exemption, as proposed, in reality would not enable a company to avoid disclosing potentially prejudicial information. Under the exemption, even if the disclosure of such information were deemed prejudicial, a company would still be required to disclose an estimate of its maximum exposure to loss (in the absence of a claim or assessment amount), a description of the factors that are likely to affect the ultimate outcome of the contingency, and an assessment of the potential impact those factors could have on the ultimate outcome. As discussed above, the disclosure of such information would severely impair a company's ability to defend its position in litigation. The significant harm to investors of such a requirement would overwhelm any potential marginal benefit derived from the disclosure of such information. Further, we believe that instances in which the disclosure of information at an aggregated level would be prejudicial will be frequent rather than rare, as the proposal indicates.

***Paragraph 6 requires the disclosure of a loss contingency, regardless of the likelihood of loss (i.e., even if it is a remote contingency), if the contingency is expected to be resolved within***

***one year and if the contingency could have a severe impact on the entity's financial position, cash flows, or results of operations.***

As acknowledged in paragraph A33, the proposed requirement to disclose information about remote loss contingencies is divergent from International Financial Reporting Standards, which requires no such disclosures. Given the almost-certain transition of U.S. public companies to IFRS within the next few years, it is important for the FASB and the IASB to work towards convergence in every new standard adopted. Since the IASB is currently redeliberating its standard on contingencies, we believe it would be in the best interests of both investors and preparers for the FASB to work with the IASB to issue a single standard on contingencies, which would include disclosure requirements.

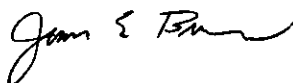
***The proposed statement would be effective for the 2008 year-end financial statements of calendar-year companies.***

We believe it would be extremely difficult for companies to establish the processes and controls needed to develop the proposed disclosures in time for year-end reporting. Once the FASB issues a final standard, companies will need to design and implement processes to gather and analyze the required information, develop loss estimates that may not previously have been quantified, and determine how to aggregate exposures for disclosure. Each of these steps will require extensive consultation with legal counsel. Additionally, companies will need to design, document, and test internal controls over these new processes. We do not believe that the proposed transition period will provide enough time for companies to complete this work. If the FASB decides to move forward with a final statement that is similar to the Exposure Draft, we recommend that the effective date be delayed at least one year.

In summary, we do not believe that the proposed standard would achieve the Board's goal to "significantly improve the overall quality of disclosures about loss contingencies by providing financial statement users with important information." In our opinion, the proposed disclosures would not help investors, and they clearly have the potential to cause significant harm to companies and their existing shareholders. For these reasons, we urge the FASB to reconsider whether such a significant expansion of current disclosure requirements is warranted. If the FASB ultimately concludes that more extensive disclosure is needed, then, as indicated above, we would encourage the FASB to consider whether requirements similar to those of Regulation S-K would be appropriate to incorporate into generally accepted accounting principles.

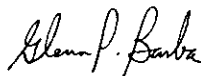
As always, we appreciate the opportunity to participate in the standard setting process.

Sincerely,



Digitally signed by James E  
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James E. Brunner  
Senior Vice President  
and General Counsel  
CMS Energy Corporation  
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Glenn P. Barba  
Vice President, Controller  
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