RESPONSE OF THE OFFICE OF
PUBLIC UTILITY REGULATION

Our Ref. No. 03-5-OPUR
DTE Heritage, LLC, Et Al.

DIVISION OF INVESTMENT MANAGEMENT

File No. 132-3

Based on the facts and representations in your letter of July 30, 2003, and without necessarily agreeing with your legal analysis, we would not recommend any enforcement action to the Commission against DTE Heritage, LLC under section 2(a)(3) of the Public Utility Holding Company Act of 1935 ("Act") or against DTE Energy Company, DTE Energy Resources, Inc., and DTE Energy Services, Inc. under section 2(a)(7) of the Act if the Transaction described in your letter takes place under the circumstances described in your letter.

You should note that facts or conditions different from those presented in your letter might require a different conclusion. Further, this response expresses only the Division's position on enforcement action. It does not purport to express any legal conclusion on the questions presented.

David G. LaRoche
Special Counsel

July 30, 2003

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
BLIC UTILITY REGULATION

July 30, 2003

Steven R. Loeshelle, Esquire
Dewey Ballantine LLP
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4605

Re: DTE Heritage, LLC, et al.
File No. 132-3

Dear Mr. Loeshelle:

Enclosed is our response to your letter of July 30, 2003. By incorporating our answer in the enclosed copy of your letter, we avoid having to recite or summarize the facts involved.

Very truly yours,

David G. LaRoche

David G. LaRoche
Special Counsel

Enclosure

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July 30, 2003

David B. Smith, Jr.
Associate Director
Division of Investment Management
Office of Public Utility Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Request for No-Action Assurance Regarding the Application of Section 2(a)(3) and Section 2(a)(7) of the Public Utility Holding Company Act of 1935 to Affiliates

Dear Mr. Smith:

We are writing on behalf of DTE Energy Company ("Parent"), DTE Energy Resources Inc. ("DTEER"), DTE Energy Services, Inc. ("DTEES") and DTE Heritage, LLC ("DTE Heritage") (collectively, "the DTE Companies") to request your concurrence in our view that, pursuant to the transaction and representations described herein (the "Transaction"): (i) DTE Heritage will not be an "electric utility company" within the meaning of Section 2(a)(3) of the Public Utility Holding Company Act of 1935, as amended (the "Act"); and (ii) DTEES, DTEER and Parent will not be "holding companies" as defined in Section 2(a)(7) of the Act, by virtue of their respective ownership interests in DTE Heritage. Specifically, we request that the Division of Investment Management (the "Staff") of the Securities and Exchange Commission (the "Commission") confirm in writing that, based on the facts and circumstances described and the representations set forth herein, the Staff will not recommend that the Commission deem DTE Heritage to be an electric utility company by virtue of its construction, ownership and maintenance of certain electric facilities (described in more detail below and referred to as, the "Equipment") located at the Ford Rouge Industrial Complex in Dearborn, Michigan (the "Rouge Complex") and its participation in an Electrical Facility Agreement (the "Agreement") with Ford Motor Company ("Ford") and that consequently, DTEES, DTEER and Parent will not be deemed to be "holding companies" under the Act with respect to DTE Heritage.

The Agreement between DTE Heritage and Ford, as amended, provides that in the event that DTE Heritage is unable to obtain a No-action letter from the Staff stating that as a result of its ownership and operation of the Equipment DTE Heritage will not be deemed to be an "electric utility company" under the Act within 160 days of the Effective Date of the

Agreement (which Effective Date is December 19, 2002) then, if either party reasonably believes that obtaining such No-action letter will not have occurred within a reasonable time, such party may terminate the Agreement.

I. FACTUAL BACKGROUND

A. Description of the Parties.

1. Parent

Parent, a Michigan corporation, is a public utility holding company exempt from registration pursuant to Section 3(a)(1) of the Act. Its public utility activities are conducted by its wholly owned subsidiaries, Detroit Edison Company ("DECO"), a franchised electric utility company serving 2.1 million customers in a 7,600 square mile service territory in Southeastern Michigan, and Michigan Consolidated Gas Company, a natural gas local distribution company serving 1.2 million customers in Michigan.

2. DTEER

DTEER, a Michigan corporation, is a wholly-owned subsidiary of Parent. Its subsidiaries, including DTEES, described below, are engaged solely in the development ownership, operation and management of non-utility energy-related businesses and services, including non-utility exempt wholesale generator and qualified facilities, electric generation facilities, electricity and natural gas trading and marketing, coal marketing and transportation, and biomass energy development. DTEER currently has no public utility interests.

3. DTEES

DTEES, a Michigan corporation, is a wholly-owned subsidiary of DTEER and an indirect wholly-owned subsidiary of Parent. Through various special purpose entities, DTEES is engaged solely in the development, ownership and operation of exempt wholesale generator, qualifying facility and non-utility energy projects for industrial, institutional and commercial customers. DTEES currently has no public utility company ownership interests.

4. DTE Heritage

DTE Heritage, a special purpose Michigan limited liability company, is a wholly-owned subsidiary of DTEES and an indirect wholly-owned subsidiary of DTEER and Parent. Pursuant to the Agreement with Ford, described below, DTE Heritage will develop, design, construct, commission, own, operate and maintain the Equipment on Ford's property

at the Rouge Complex.[1] DTE Heritage will engage in no activities, and will have no assets, other than those related to its performance of the Agreement with Ford.

5. Ford

Through a number of controlled companies, Ford, among other things, engages in automobile manufacturing and related activities throughout the world. To the knowledge of the DTE Companies, neither Ford nor any company controlled by Ford is a utility for purposes of the Act. As part of its operations, Ford owns and operates electricity-consuming manufacturing facilities at the Rouge Complex, an industrial complex located in Dearborn, Michigan.

B. The Transaction.

DTE Heritage has entered into the 15-year Agreement with Ford for the development, design, procurement, permitting, construction, commissioning, ownership, operation and maintenance by DTE Heritage of the Equipment, which includes an approximately 1.4 mile 120 kV pole line, one three-transformer substation (30/40/50) MVA) and related equipment to provide 13.8 kV electric delivery service to Ford. The sole purpose of the Equipment is (and will remain) to step-down and deliver electric energy owned by Ford from a 710 MW electric generating facility (the "DIG Facility"), owned by Dearborn Industrial Generation, L.L.C. ("DIG") and described in more detail below, to the Ford end-use manufacturing facilities at the Rouge Complex. The Equipment will extend from the Ford interconnection point approximately one-fourth of a mile from the DIG Facility to the Ford Rouge Complex facilities, and will be located solely on property owned by Ford. The Equipment will "step-down" or convert electrical power from the 120 kV level at the point of delivery to the 13,800 volt level required for use by Ford's Rouge Complex industrial facilities. The Equipment will not be physically connected directly to any transmission or distribution facilities other than the "busbar"[2] of the Ford equipment and the Ford Rouge Complex end-use manufacturing facilities. The Equipment generates no power. Pursuant to the terms of the Agreement, Ford will pay DTE Heritage a fixed monthly payment, made up of a fixed capital fee and a fixed operation and maintenance charge, neither of which are related to, nor will vary to reflect fluctuations in, the price or volume of electric energy delivered over the Equipment.

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[1] DTE Heritage and Ford also have entered into a License Agreement allowing DTE Heritage to install and operate the Equipment on Ford's property. In addition, DTEES and Ford have entered into a Guaranty, pursuant to which DTEES guarantees DTE Heritage's performance of the Agreement.

[2] As used herein, the term "busbar" means a conductor or an assembly of conductors for collecting electric currents and distributing them to outgoing feeders.

C. Relationship between the Parties.

As has been represented to our client by Ford, in 1998 Ford entered into a supply contract with DIG, an affiliate of CMS Energy Corporation ("CMS Energy"), under which DIG is obligated to provide electric energy for use at Ford's Rouge Complex facilities. That supply contract has been assigned by DIG to another affiliate of CMS Energy, CMS MS&T Michigan L.L.C. ("MST Michigan"). All or a portion of that energy will come from the DIG Facility, which is located adjacent to the Rouge Complex. The DIG Facility is owned by DIG and is operated by Dearborn Generation Operating, L.L.C., also an affiliate of CMS Energy. Electric energy purchased by Ford has been transmitted from the DIG Facility over electrical delivery facilities either wholly or partially owned by Ford since MST Michigan began selling electricity to Ford. The electric energy has been delivered at the DIG/Ford interconnection point near the DIG Facility, at which point Ford has taken title to the energy. Pursuant to the terms of the Agreement between Ford and DTE Heritage, DTE Heritage will construct the Equipment on Ford's property to replace some of the delivery facilities formerly used by Ford, starting at a point on Ford property approximately one-fourth of a mile from the DIG/Ford interconnection point described above. The electric energy owned by Ford will then flow over the Equipment and, after exiting the Equipment, will enter Ford's Rouge Complex manufacturing facilities over electrical facilities owned by Ford. Ford has advised our client that no entity or person other than Ford will take delivery of the energy through the Equipment, which will be located on Ford's property, and that Ford will hold title at all times to and will consume all electric energy passing through the Equipment.

II. DISCUSSION

We seek the Staff's assurance that it will not, as a result of the Transaction, recommend to the Commission that it commence an enforcement action to deem DTE Heritage to be an "electric utility company" within the meaning of Section 2(a)(3) of the Act.[3] It is respectfully submitted that consideration of all of the facts and circumstances described herein should permit the Staff to agree with our conclusion that DTE Heritage is not an

[3] We are thus also seeking assurance that, as a result of the transaction, Staff will not recommend that the Commission commence enforcement action against the Parent, DTEER or DTEES to deem them to be utility holding companies solely as a result of their direct and/or indirect ownership of DTE Heritage.

"electric utility company" because DTE Heritage will not generate, transmit or distribute electric energy for sale.[4]

Section 2(a)(3) of the Act defines an "electric utility company" as "any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale...."[5]

A. DTE Heritage will not be an "electric utility company" because it will not generate, transmit or distribute electric energy for sale.

As is clear from the facts as described above, DTE Heritage will not use the Equipment for the generation, transmission or distribution of electric energy "for sale." While the Act defines the term "sale," merely as "any sale, disposition by lease, exchange or pledge, or other disposition,"[6] the term generally involves the passing of title or ownership from one party to another. In this Transaction, Ford has represented that it will take title to all electric energy passing over the Equipment *prior* to its entering the Equipment. The Equipment will be located solely on Ford's property, will be constructed pursuant to an agreement with Ford, and will be operated exclusively for delivery of electric energy to Ford's manufacturing facilities. DTE Heritage will never take title to, own or sell, the electric energy, nor will it book, realize or recognize any revenues whatsoever dependent upon the quantity of electric energy passing over the Equipment to Ford. Instead, DTE Heritage will be paid a fixed amount for the cost of constructing, owning and operating the Equipment for Ford's benefit on Ford's property. Ford will take title to the electricity prior to its entering the Equipment, will hold title to the electricity at all times once it has entered the Equipment, will use the electricity for its own purposes, and will not cause the electricity to be sold or otherwise transferred for value to any other entity.

While we have not found any SEC precedent directly on point, the question of when generation, transmission or distribution "for sale" has occurred for purposes of Section 2(a)(3) has been the subject of several No-Action requests which, while based upon facts somewhat different from those described herein, lend support to the position that no "sale" will occur in the Transaction.

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[4] Indeed, it must be noted that if Ford itself were engaged in these activities directly on its own property, and the analysis described herein were not applied, it would still not be deemed to be an electric utility company under the Act since it would be "operating such facilities for [its] own use and not for sale." In the alternative, if Ford were to conduct these operations through a subsidiary in circumstances that involved a sale of electricity from one Ford affiliate to another, then Ford would qualify for an exemption under Section 3(a)(3) of the Act as a company "only incidentally a holding company," with the investment in the equipment and payments under the Agreement, if still present, clearly immaterial to Ford's income. Applying such analysis to the Transaction, the argument can also be made that DTE Heritage merely is standing in the shoes of Ford, and should not be deemed to be an electric utility company under the Act.

[5] 15 U.S.C. § 79b(a)(3).

[6] 15 U.S.C. § 79b(a)(23).

In one interpretative letter released by the Staff, Staff addressed what constitutes a "for sale" transaction under Section 2(a)(3) and we believe its position in the case supports our position with regard to the Transaction. In Southern California Edison Co., 1980 SEC No-Act LEXIS 2768 (Feb. 4, 1980) ("*Edison*"), the applicant and other investors owned a coal gasification facility and an electric generator. Edison supplied the facility with coal and supplied the investors a fee for the facility to convert the coal into electricity which was owned by Edison. The Staff disagreed with the position taken by Edison and the other investors that there was no "sale" of electricity under Section 2(a)(3) of the Act. The most important factor taken into consideration by the Staff was the fact that Edison would be reselling to its customers electricity produced by the facility. According to the Staff, "the term 'sale,' as used in the context of Section 2(a)(3), applies to the sale of power by Edison to its customers, no matter how we characterize the transaction among Edison and the other [investors]" and "a company which 'owns' the statutory facilities need not be engaged in the 'sale' of power, so long as these facilities are used in the generation of electric energy for sale." *Id.*, at *3. In *Edison*, the Staff declined to view a transaction not involving a sale in isolation where the facilities were used to produce electricity subsequently sold. In contrast to *Edison*, Ford has represented that it will both own and consume the electricity flowing over the Equipment, and that it will not be selling such electricity to any third party.

In contrast, in NIPSCO Industries, Inc., 1996 SEC No-Act LEXIS 541 (Jan. 19, 1996) ("*NIPSCO*"), the Staff granted no-action relief in a situation in which the consumer of the electricity produced was also the supplier of the steam used to generate the electricity. In *NIPSCO*, the electricity consumer paid an unaffiliated third party to use the third party's equipment to generate electricity for the consumer using steam supplied by the consumer. The owner of the generating facility argued that it would not be "generating, transmitting or distributing electric energy for sale" since it would never take title to the fuel used or the energy produced. The Transaction is similar to that in *NIPSCO*, except that it involves power lines and related equipment rather than generation equipment. The owner of the Equipment, DTE Heritage, will never take title to the energy, nor will it be compensated based on the quantity of energy moved across the Equipment. Nor, like *NIPSCO* and in contrast to *Edison*, will DTE Heritage provide a service in connection with a series of transactions which result in a subsequent sale of electricity.

Other No-Action positions are consistent with this analysis. In the El Paso Natural Gas Co., 1992 SEC No-Act LEXIS 240 (Jan. 28, 1992) ("*El Paso*") letter, El Paso argued that it was not an "electric utility company" under the Act because no "sale" of electric energy took place where El Paso had operating, maintenance and administrative responsibility over transmission lines that were owned by El Paso and another company and which were used to deliver electric energy to the other company. El Paso based its conclusion on the fact

that it never took title to the electric energy being delivered to such company and the fact that neither El Paso nor the other company resold any electric energy to any other party.[7]

B. Regulation under the Act is not necessary in the public interest.

We believe that the above analysis demonstrates that DTE Heritage is not involved in the transmission or distribution of electricity for sale, and is therefore not an "electric utility company" within the meaning of Section 2(a)(3) of the Act. In addition, the Transaction fails to give rise to circumstances that could result in the "abuses" the Act was intended to address.[8] In 1995 the Division of Investment Management briefly described these abuses as follows: "[a]mong other things, inadequate disclosure made it difficult for investors to appraise the financial position or earning power of the issuer. In addition, excessive debt and abusive affiliate transactions tended to prevent voluntary rate reductions at the operating company level. Constitutional doctrines that limited the reach of economic regulation frustrated states' efforts to respond to these problems." U.S. Securities & Exchange Commission, Division of Investment Management, *The Regulation of Public-Utility Holding Companies,* at Executive Summary (June 1995).

The Transaction clearly does not implicate the standards the Act imposed to avoid these abuses. Certainly this is not a circumstance where the consumer needs protection. The Agreement is an arms-length contract entered into by sophisticated institutional parties. No impact on any ratepayer other than Ford is present. The Transaction does not involve sales of electricity to numerous ratepayers who would be held captive by DTE Heritage and whose rates may be affected by ineffective state regulation arising from a holding company structure. Indeed, the Transaction is being entered into by Ford because its structure will result in financial benefits to Ford. In scale, the Transaction is demonstrably immaterial to Ford. The Transaction does not involve the sale of securities to the public nor, in the context of modern disclosure laws and because of its scale, does the Transaction raise issues for investors in Ford or Parent. Finally, no constitutional impediments would preclude the application of State regulation to this Michigan transaction.

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[7] Similarly, in Occidental Chemical Corp., 1988 SEC No-Act LEXIS 410 (Apr. 6, 1988) ("*Occidental*"), applicants argued that "sale" involves the transfer of title for a price and that no such transfer took place in the subject transaction. In that case, Occidental provided operation and maintenance ("O&M") services, including the provision of electricity, to an industrial facility owned by Armand Products Company ("APC"), a partnership of an Occidental subsidiary and an unaffiliated party. Occidental purchased electricity from the Tennessee Valley Authority for use both at its own industrial plant and to fulfill its O&M obligations to the adjacent APC facility, with both industrial facilities being served off the same electric meter and internal power lines. The electricity provided by Occidental to APC was provided at cost, with APC never taking title to the electricity it consumed. Applicants therefore concluded that no generation, transmission or distribution of electric energy for sale occurred.

[8] *See* 15 U.S.C. § 79a(b).

We also note that MST Michigan, as the seller of the electric energy to Ford, will be subject to all state and/or federal regulation applicable to such sales, further evidencing the fact that the regulation of DTE Heritage under the Act is not appropriate or necessary.

In light of all these facts, neither the public interest nor the protection of investors or consumers require that DTE Heritage be considered an "electric utility company" for purposes of the Act.

III. CONCLUSION

For the foregoing reasons, we respectfully request that the Staff concur in our opinion that upon completion of the Transaction (i) DTE Heritage will not be an "electric utility company" within the meaning of Section 2(a)(3) of the Act; and (ii) DTEES, DTEER and Parent will not be "holding companies" as defined in Section 2(a)(7) of the Act solely as a result of their ownership interests in DTE Heritage.

Sincerely,

Steven R. Loeshelle

Julia Dryden English

Attorneys for
DTEES, DTEER and DTE Heritage