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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ADRIAN & BLISSFIELD
RAIL ROAD COMPANY –
PETITION FOR DECLARATORY RELIEF

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Finance Docket No. 36148

**REPLY OF CONSUMERS ENERGY COMPANY
TO PETITION FOR DECLARATORY RELIEF**

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**REPLY OF CONSUMERS ENERGY COMPANY
TO PETITION FOR DECLARATORY RELIEF**

Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Part 1104.13 (a), hereby replies in opposition to the Petition for Declaratory Relief (“Petition”) that Adrian & Blissfield Rail Road Company (“ADBF”) filed on October 30, 2017. Through its Petition, ADBF asks the Board to use 49 U.S.C. § 10501(a) to frustrate Consumers’ exercise of its lawful rights under Michigan law to secure a non-exclusive, routine public utility easement to maintain essential electrical power lines and support poles that have been in place along 2.5 miles of ADBF’s right-of-way since 1996.

As will be shown in this Reply and in the accompanying Verified Statement of Dwayne C. Parker (“V.S. Parker”), ADBF’s decision to challenge Consumers’ right to an easement for power lines¹ that have co-existed with ADBF’s railroad operations for

¹ The power lines in question are known as the College Park Line and the Solvay Line. See V.S. Parker at 2.

over 20 years appears to be motivated by a desire to obtain an unreasonable premium price from Consumers in exchange for the easement (or even lesser rights). Moreover, its asserted justification for a Board finding that Consumers' state law action is preempted by the ICCTA² is not any allegation that the power lines unreasonably interfere with ADBF's *current* railroad operations, but rather the claim that the subject easement *could* adversely affect certain hypothetical construction projects that ADBF *might* undertake in the future. ADBF asserts this claim despite clear language in the proposed easement that would obligate Consumers to relocate its lines if necessary to avoid interference with future railroad operations.

ADBF's claims regarding federal preemption of Consumers' state law condemnation action previously were considered and squarely rejected by the United States District Court for the Eastern District of Michigan in a final Order issued on December 8, 2016. Its present Petition to the Board – filed nearly 11 months later – is unsupported by the relevant facts and applicable legal precedent. ADBF has failed to carry its burden of proof,³ and its Petition should be denied.

² I.C.C. Termination Act of 1996, codified at 49 U.S.C. § 10101, *et seq.*

³ *E. Alabama Ry. LLC – Pet. For Declaratory Order*, Finance Docket No. 35583 (STB served Mar. 9, 2012) at 4, *citing Fifth Third Bank v. CSX Corp.*, 415 F. 3d 741, 745 (7th Cir. 2005).

BACKGROUND

Consumers is a Michigan corporation and regulated public utility⁴ organized and existing under Public Act 238 of 1923, MCL 486.251, *et seq.*, with a statutory duty to serve customers in all 68 counties of Michigan's Lower Peninsula.⁵ Like most electric public utilities across the United States, Consumers holds thousands of non-exclusive easements over real property owned by third parties, including railroads, to support its electric transmission network and facilities. In the first instance, Consumers attempts to agree with landowners on reasonable terms to secure right-of-way easements for its power lines, and usually succeeds. If amicable discussions fail, however,

⁴ ADBF misleadingly refers to Consumers as a "privately owned utility" in its Petition (at 2). Consumers' parent company, CMS Energy Corporation, is a publicly held company, and as Mr. Parker makes clear in his Verified Statement, Consumers is a public utility subject to the jurisdiction of the Michigan Public Utilities Commission. V.S. Parker at 2.

⁵ This duty to serve has its origins in regulations that provided "[e]very common carrier is [] required to furnish reasonably adequate service and facilities and shall provide and furnish transportation of passengers and property upon reasonable requests thereof...." *In the Matter of the Investigation, on the Comm'n's own Mot., into the Elec. Supply Reliability plan of the Detroit Edison Co. for the year 2004*, Mich. Pub. Serv. Comm'n Case No. U-14109 (June 3, 2004) at 4 ("U-14109"), http://www.michigan.gov/documents/mpsc/u-14109_06-03-2004_567836_7.pdf. The Michigan Public Utilities Commission was established with the same authority held by the Michigan Railroad Commission, and "[n]umerous court decisions establish that . . . public utilities in Michigan have an obligation to serve their customers." *Id.*

Consumers must exercise its rights of eminent domain, because it has both a duty to serve⁶ and a duty to provide reasonable rates for its customers.⁷

The College Park and Solvay power lines at issue provide service to approximately 10,000 customers in the City of Adrian, Michigan and the surrounding communities in Lenawee County. Consumers installed these lines and their supporting poles in 1996 on an approximately 20-foot wide strip of land adjacent to a 2.5 mile long railroad right-of-way, subject to a 20-year lease agreement with the Michigan Department of Transportation (“MDOT”), which at the time owned the right-of-way. V.S. Parker, Exhibit No. 1. The 1996 lease agreement required Consumers to pay a one-time fee of \$12,500 for the property rights, and did not specify any “hold-over rent” or other payments.

At the time that Consumers installed the College Park and Solvay Lines, ADBF operated over the adjacent rail lines pursuant to a lease from MDOT. On November 29, 2000 ADBF purchased 18.91 miles of railroad right-of-way from MDOT for \$1.725 million, which included the 2.5 miles subject to the MDOT lease agreement with Consumers, and assumed the MDOT lease. In general, the right-of-way acquired by ADBF is about 100 feet wide, so the 20-foot strip of land on which Consumers’ power lines are located constitutes about 20% of the 2.5 mile corridor affected by the

⁶ U-14109 at 5 (quoting *People of New York ex rel. Queens Gas Co. v. McCall*, 245 U.S. 345, 351 (1917)).

⁷ V.S. Parker at 2. See also, U-14109 at 4 (“at the heart of the relationship between a public utility and its customers is an obligation to serve those customers through the provision of safe and adequate service at just and reasonable rates.”).

Consumers-MDOT lease. From these limited facts, ADBF claims that Consumers seeks to condemn “more than 20% of the railroad right of way.” Petition at 4, 6. In truth, however, Consumers’ state court condemnation action affects only about 2.6% of ADBF’s railroad property.⁸

Between 1996 and the expiration of the MDOT lease agreement with Consumers in 2016, ADBF did not raise any recorded objections to the presence of the College Park and Solvay Lines, formally claim that the lines unreasonably interfered with its railroad operations, or seek to use its purported rights under the assumed lease to compel Consumers to move the lines.

Prior to the expiration of the 20-year lease, Consumers and ADBF began discussions for a permanent easement that would support the continued operation and maintenance of Consumers’ College Park and Solvay Lines. After several offers and counter-offers, Consumers agreed to ADBF’s opening price of \$660,000 for a permanent easement – over 5,000% of what Consumers paid for the original MDOT lease. During that time, however, ADBF dramatically changed course in two ways, by abruptly demanding a payment of almost \$2 million,⁹ and only offering Consumers a revocable license rather than a permanent easement. Setting aside the extraordinary monetary demand, a mere license would have exposed Consumers’ essential service infrastructure to regular economic threat, because the license could be revoked at any time. In the face

⁸ $(2.5 \text{ “affected” miles} \div 18.91 \text{ total miles}) \times .20 = .02644$. V.S. Parker at 7.

⁹ This amount exceeded the total price that ADBF paid MDOT for the entire 18.91 miles of right-of-way and related property.

of this rather obvious effort to demand a premium to permit continued electrical service to more than 10,000 Michigan citizens and businesses, Consumers was left with little option but to pursue its legitimate rights as a Michigan public utility to secure the necessary property rights through eminent domain.¹⁰

Consumers filed its condemnation action in July 2016 before the 39th Circuit Court for the County of Lenawee pursuant to its authority under MCL § 486.252, a state statute granting rights to public utilities such as Consumers to preserve and protect infrastructure such as the College Park and Solvay power lines, which serve a public purpose. As required by state law, Consumers deposited the calculated total estimated just compensation amount of \$555,000 with the county treasurer, and recorded a copy of the proposed permanent easement. See V.S. Parker at 6 and Exhibit No. 2.

The easement submitted by Consumers in the condemnation action is in the general form of the documents that govern other railroad easements held by Consumers. However, it also includes several particular limitations and other provisions that protect ADBF's use of its railroad right-of-way in this instance. Specifically, the ADBF easement requires that "(1) no permanent, above ground structures would be installed any closer to ADBF's rail line than the existing line poles already are; (2) the area between the poles and the rail line only would be used by Consumers for temporary purposes, such as vegetation management or maintenance; (3) Consumers would not fence off or otherwise limit ADBF's access to the easement area, other than the above-ground

¹⁰ V.S. Parker at 5.

Consumers facilities allowed by the easement; and (4) ADBF would be permitted to install communications-related equipment on Consumers' line poles, so long as applicable safety codes are met and the poles could support it." V.S. Parker, at 6-7 and Exhibit No. 2. The easement also requires that Consumers accommodate "existing or actually planned railroad operations," and that Consumers' access must "not interfere with the safety of [ADBF's] railroad operations." *Id.* at 1. Significantly, the terms of the proposed easement specifically require Consumers to relocate its lines or supporting poles if necessary to "accommodate [ADBF's] existing or actually planned railroad operations," if other, more reasonable alternatives are not available. *Id.*

ADBF's Petition highlights a provision (standard in Consumers' current form of easement) that ADBF would not install structures that impair the easement without Consumers' consent, which (as ADBF emphasizes) could be withheld at Consumers' "sole discretion."¹¹ However, as Witness Parker explains, that language is subordinate to the other restrictions on uses that would impair railroad operations, and it does not supersede Consumers' relocation obligations.¹²

On August 11, 2016, ADBF removed Consumers' state court case to the U.S. District Court for the Eastern District of Michigan, invoking an exception to the "well-pleaded complaint" rule to argue that Consumers' condemnation action was

¹¹ Petition at 5.

¹² V.S. Parker at 7-8.

preempted by the ICCTA. In an Order entered on December 8, 2016, however,¹³ the District Court rejected ADBF's claim and remanded the matter to state court. After declining ADBF's suggestion that the question of preemption be referred to the Board,¹⁴ the District Court relied on Seventh Circuit and Board precedent to hold that Consumers' condemnation action was not categorically preempted, finding that "[ADBF] has made no showing that normal regulations of the electrical lines on its property will unduly burden interstate commerce."¹⁵ Then, after observing that "the parties have had ample opportunity to submit documents and affidavits in support of their briefings" on the "as-applied" preemption test,¹⁶ the Court ruled that the ICCTA did not preempt Consumers' state law claim on an "as-applied" basis.¹⁷ In particular, the Court found that ADBF had "not demonstrated that the burden on its operations would be unreasonable if Consumers were permitted to continue operating its power lines along the railroad as it has for twenty years, subject to the language in the easement that allows [ADBF] to force Consumers to relocate the lines."¹⁸

¹³ A copy of the Order is appended to this Reply as Attachment No. 1. Before ADBF filed its removal pleading, the Michigan court entered a stipulated preliminary injunction, preserving Consumers' right of access for the College Park and Solvay Lines pending further order of the court. See Order (Attachment No. 1) at 2.

¹⁴ The Court determined that "the relatively simple facts of the instant case" did not require or support referral. Order (Attachment No. 1) at 5.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 10.

¹⁸ *Id.*

ARGUMENT

Contrary to ADBF's assertion, this is not a "case of first impression,"¹⁹ as the Board previously has dealt with condemnation actions involving public utilities on numerous occasions. Consumers' power lines hardly are unique, and their usage is that of a typical "non-invasive utility."²⁰ As shown below, Consumers' condemnation action is not categorically preempted because it does not attempt to direct or regulate rail operations, and it is not subject to "as-applied" preemption because the power lines (which have been in place since 1996) do not represent an unreasonable burden on ADBF's rail operations.

Here, the record is well-developed and the facts of the case are straightforward. A U.S. District Court already has held that the state condemnation action at issue is not preempted under the ICCTA. The Board should reach the same conclusion, deny the Petition, and find that Consumers' condemnation action is not preempted. In the alternative, the Board should deny the Petition and leave the preemption decision to the Michigan state court, which has concurrent jurisdiction and where the dispute between the parties already has been joined, offering any necessary guidance to assist the court that the Board deems appropriate.

¹⁹ Petition at 2.

²⁰ *Reading Blue Mountain & N. R. Co. v. UGI Utils., Inc.*, No. 3:11-CV-2182, 2012 WL 251960, at *2 (M.D. Pa. Jan. 25, 2012) ("the Court finds that gas pipelines would fall under the same general category of non-invasive utilities, such as wire crossings and sewer crossings").

A. Consumers' Condemnation Action Is Not Preempted

The U.S. District Court for the Eastern District of Michigan already has found that the “relatively simple facts of the instant case” facilitate a straightforward preemption analysis, and that Consumers’ condemnation action is not preempted under the ICCTA. See Order (Attachment No. 1) at 5-6. While the question whether the Board is bound by the District Court’s decision may be less than clear,²¹ the Court did arrive at the right answer, performing a complete analysis using the standards and tests for both categorical and as-applied preemption. As shown below, the District Court correctly found that the condemnation action is not categorically preempted under the ICCTA, and is not preempted under the “as-applied” test because the “burden” of Consumers’ pre-existing power lines on ADBF’s rail operations is not unreasonable.

1. Consumers' Condemnation Action Is Not Categorically Preempted Under The ICCTA

As discussed in the Background section of this Reply, Consumers’ power lines have co-existed with ADBF’s railroad operations for over 20 years, and while ADBF recently has attempted to manufacture some alleged, past interference, the facts are that no contemporaneous claims of undue burden were raised throughout that time. See *V.S. Parker* at 3. Here, the state law permitting the condemnation action does not on

²¹ See generally *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181-82 (9th Cir. 1989) (“The federal court's ruling on ‘complete preemption’ has no preclusive effect on the state court's consideration of the substantive preemption defense.”).

its face regulate railroads, and the unique facts of the case necessitate a fact-based inquiry consistent with the as-applied preemption test.²²

Though ADBF makes a half-hearted suggestion that Consumers' state court action could be categorically preempted,²³ the law clearly is to the contrary. As the U.S. Court of Appeals for the Seventh Circuit has held:

[A] condemnation is not a rule of general applicability because each instance necessarily varies with the facts of the case and the specific property subject to the condemnation. Also, other courts considering condemnations have not acknowledged the Board's framework or conducted a categorical preemption analysis, but have framed the issue by asking whether the action prevents or unduly interferes with railroad operations – which corresponds to the “as-applied” analysis.

Union Pac. R.R. v. Chi. Transit Auth., 647 F. 3d 675, 679-80 (7th Cir. 2011)

(“*Chicago Transit Authority*”), citing *Island Park, LLC v. CSX Transp. Inc.*, 559 F. 3d 96, 104-06 (2d Cir. 2009).

The types of state actions and regulations that may be categorically preempted under the ICCTA include “permitting or preclearance requirements,” and “attempts to intrude into matters that are regulated by the Board.” *E. Alabama Ry.* at 5 (routine, non-conflicting easements for public works projects “are not preempted so long as they would not impede rail operations....”); *DesertXpress Enterprises, LLC—Pet. for Declaratory Order*, Finance Docket No. 34914 (STB served June 27, 2007) at 4-5

²² *E. Alabama Ry. LLC* at 4 (“preempted as applied. . . involves a fact-specific determination”).

²³ Petition at 9.

(“[N]either the court cases, nor the Board’s precedent, suggest a blanket rule that *any* eminent domain action against railroad property is impermissible”), *quoting Maumee & W. R.R. & RMW Ventures, LLC – Pet. for Declaratory Order*, Finance Docket No. 34354 (STB served Mar. 3, 2004) at 2 (emphasis in original). *See also, Norfolk S. Ry. Co. – Pet. for Declaratory Order*, Finance Docket No. 35196 (STB served Feb. 26, 2010) at 3 (state condemnation action evaluated under “as applied” test). The Fifth Circuit in *New Orleans and Gulf Coast Railway Co. v. Barrois* also found that condemnation proceedings were not categorically preempted, and that “routine crossing cases fall into the category of as-applied preemption challenges.”²⁴

Here, Consumers’ condemnation action clearly is not categorically preempted. First, Consumers’ condemnation action does not qualify as a permitting or preclearance requirement, as both the rail and the power lines already are in place and have co-existed without major incident for over 20 years. Second, ADBF has failed to explain or provide any evidence as to how the regulation at issue, MCL § 486.252, which permits electric and gas companies to obtain property rights through a state court, necessarily will regulate railroads or inhibit rail operations. *See Order* (Attachment No. 1) at 8 (ADBF failed to demonstrate how the state or local regulations permitting the condemnation or pertaining to the power lines would “unduly burden interstate commerce.”). Consistent with its own and prior court precedent, the Board should reach

²⁴ *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 333 (5th Cir. 2008).

the same conclusion as the U.S. District Court: Consumers' condemnation action is not categorically preempted. *Maumee*, *supra*.

**2. Consumers' Condemnation Action Is
Not Preempted "As-Applied"**

The test for as-applied preemption is whether the state action "would have the effect of unreasonably burdening or interfering with rail transportation," which is "a fact-specific determination." *E. Alabama Ry.* at 4. With respect to utilities, the Board repeatedly has held that "non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks." *Id.* at 5 (*quoting Maumee* at 2); *Norfolk S. Ry. Co.* at 5. *See also, Lincoln Lumber Co. – Pet. for Declaratory Order – Condemnation of R.R. Right-of-Way for a Storm Sewer*, Finance Docket No. 34915 (STB served Aug. 13, 2007) at 3 (permanent easement for operation of a storm sewer would not be preempted "unless it would prevent or unreasonably interfere with railroad operations."). In this case, the record readily demonstrates that Consumers' power lines are a "non-invasive utility"²⁵ that do not currently impede rail operations or pose undue safety risks, and are subject to relocation should they unreasonably burden expanded ADBF operations in the future. As such, and as the District Court previously found,²⁶ the ICCTA as applied does not preempt Consumers' condemnation action.

²⁵ *Reading Blue Mountain & N. R.R.*, 2012 WL 251960, at *2.

²⁶ Order (Attachment No. 1) at 10.

Consumers' power lines and the ADBF railroad have coexisted without incident for over 20 years. During the time that Consumers leased the property from MDOT (and then ADBF), there was never a request made to relocate power lines or to mitigate a specific safety threat. It is understood that the power lines are bound to have some minimal impact on ADBF, if for no other reason than the necessary support poles are located on the railroad's property and overhead lines run dozens of feet above ground. However, there is no evidence in the record to suggest that the power lines unreasonably interfere with existing rail operations or present a safety risk.²⁷ Until there is an actual conflict and Consumers violates the easement's requirement to accommodate rail operations and adhere to safety standards, a condemned easement to support Consumers' power lines cannot be found to be preempted.²⁸

ADBF argues in its Petition that the easement would "give Consumers an absolute veto over how ADBF could use its right of way." Petition at 5. This statement is incorrect, as the easement requires Consumers to accommodate all of ADBF's

²⁷ ADBF's own witness in this proceeding basically admits as much. See Reply, V.S. Dobronski at 8 (Consumers' proposed easement language "might accommodate ADBF's present needs..."). The fact that ADBF negotiated for months with Consumers regarding a permanent easement likewise belies the notion that the presence of the power lines reasonably burdens ADBF's rail operation. V.S. Parker at 4-5.

²⁸ See *Franks Inv. Co. LLC v. Union Pac. R.R.*, 593 F.3d 404, 415 (5th Cir. 2010) ("Though the Union Pacific provided two district court opinions that found preemption based on potential interference with rail transportation, both of those cases involved actions that would have the effect of regulating when a railroad or its facilities could operate. These would be instances to apply express preemption and not as-applied preemption under the STB's test. By definition, an as-applied challenge would need to address specific crossings.") (internal citations omitted).

“existing or actually planned railroad operations.” See V.S. Parker at 7, Exhibit No. 2 at 1. As such, the easement would not make “ADBF’s operations subordinate to Consumers’ control.” See Petition at 5. Utility easements commonly include the non-exclusive use of a railroad’s property, and this by itself does not alter the test or require preemption. For example, in *Lincoln Lumber*, the Lincoln Lumber Company (“LLC”) argued (similar to ADBF) “that section 10501(b) would preempt Lincoln’s use of state eminent domain power because the area to be condemned runs longitudinally along the entire length of LLC’s railroad right-of-way, and therefore, the storm sewer would interfere with LLC’s rail operations and pose safety risks.” The Board declined to initiate a proceeding, finding that “[t]he uses that LLC has raised concerns about here are common and of the type that the courts are well-suited to address.” The Board also provided the test for as-applied preemption for the state court, which was the same test set out in *Maumee*, that “routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.” *Lincoln Lumber* at 3.

ADBF’s real complaint as set out in its Petition is that the presence of Consumers’ power lines *could* interfere with hypothetical expansions of ADBF’s facilities sometime in the *future*. See Petition at 13-15. In this regard, it is noteworthy that the District Court was unmoved by this claim, finding that ADBF “could not proffer actual blueprints or engineering plans to support the existence or illuminate the details of the alleged expansions.” Order (Attachment No. 1) at 9. Nevertheless, as Consumers’

Witness Parker explains and as the proposed easement clearly provides, should the scenario that ADBF posits actually come to pass, Consumers could and would be required to relocate its lines as necessary to accommodate ADBF's facilities expansion, if the expansion reasonably could not be accomplished elsewhere on ADBF's property. V.S. Parker at 7, Exhibit No. 2 at 1. Governing precedent on this issue is provided by the Board's decision last year in *Petition of Union Pacific Railroad Company for Declaratory Order*, Finance Docket No. 35960 (STB served September 30, 2016), where it was held that so long as the railroad still would be able to compel the relocation of underground pipelines if necessary to accommodate future rail expansion, the pipeline's state court action to preserve its access to the railroad's right-of-way was not preempted. *Id.* at 8-9.

While *Union Pacific* squarely supports a "no preemption" finding here, the few decisions that ADBF purports to rely on with respect to as-applied preemption are wholly inapposite.²⁹ For example, the court in *Chicago Transit Authority* found that continued passenger rail operations unreasonably burdened expanded freight operations under the as-applied test,³⁰ because the tracks used for passenger service were only a few feet away from those used for freight, the freight railroad had to modify its maintenance practices to accommodate the passenger use, and permanent dedication of the passenger tracks to the transit authority would preclude their future use for expanded freight

²⁹ Petition at 11-13.

³⁰ As referenced *supra*, that court separately found that condemnation actions under state law were not categorically preempted under the ICCTA.

service.³¹ Here, in contrast, the power lines have had no adverse impact on ADBF's operations or maintenance practices, and the terms of the proposed easement requiring relocation of the lines protect ADBF's ability to expand freight operations in the future. Similarly, *City of Ozark*³² addressed the proposed *installation* of a crossing, and its impact on existing rail operations. In this case, the power lines have co-existed with rail operations for over 20 years without incident, and Consumers' continued use of the subject property includes a relocation obligation should interference with future rail operations materialize.³³

In sum, ADBF's "as-applied" argument boils down to professed concern over the impact of the College Park and Solvay Lines on conjectural, future railroad facilities or functions. However, since the undisputed record shows that ADBF would have the ability to require Consumers to mitigate or avoid any interference with such facilities or functions that may come to pass, the argument cannot support a finding of preemption of Consumers' present exercise of its state law condemnation rights. *Union Pacific, supra* at 8-9.

³¹ 647 F. 3d at 682-683.

³² *City of Ozark, Ark. – Pet. for Declaratory Order*, Finance Docket No. 36104 (STB served July 28, 2017).

³³ The *State of Maine* doctrine has no application to this case whatsoever. Consumers is not the owner of the railroad right-of-way, and is not seeking to direct or control rail operations. *Maine Department of Transportation – Acquisition & Operation Exemption – Maine Central Railroad*, 8 I.C.C. 2d 835 (1991). To the contrary, as Witness Parker explains, the easement language which nominally requires Consumers' approval for new construction is specifically subject to the broader restriction on any actions "that would unreasonably impair [ADBF's] lawful access to or use of the easement area" or would "interfere with ...railroad operations." V.S. Parker at 7.

The Board should deny the Petition, and rule that Consumers' Michigan state court action is not preempted by the ICCTA.

B. Alternatively, The Board Should Deny ADBF's Petition And Defer To The Michigan State Court

Consumers' condemnation action has been pending in Michigan state court since July 2016, and there has been no court referral of the matter to the Board.

Therefore, if the Board declines in the first instance to rule definitively that Consumers' action is not preempted, the Board still should deny ADBF's Petition and refrain from doing anything more than issuing guidance for the state court, as "both the Board and the courts have concurrent jurisdiction to determine preemption." *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Pet. for Declaratory Order*, Finance Docket No. 35819 (STB served Aug. 28, 2014) at 4.

Typically, when parties to a court proceeding have approached the Board for a declaration as to preemption without a court referral, the Board has denied the request. For example, in *Maumee* the Board declined to institute a declaratory order proceeding to determine preemption when "[n]either the [state] court nor the Federal court has, to date, sought the Board's opinion regarding this matter." *Id.*, at 1-2.

Similarly, in *Brookhaven Rail Terminal*, the Board declined to address preemption when the issue already was before a federal court, and the court had not referred the dispute to the Board. *Id.* at 4. To the same effect, in *Ingredion Inc. – Pet. for Declaratory Order*, Finance Docket No. 36014 (STB served Sept. 30, 2016), the Board denied a request to issue a declaratory order on preemption where, as here, the case had started in state court,

been removed to federal court, and then was remanded back to state court. *Id.* at 3 (“the state court is able to address any preemption arguments that may become relevant and has not referred any issues to the Board”). In these and other cases where parties to active court proceedings have sought declaratory relief from the Board without a court referral, the Board consistently has denied the petitions, opting at most to issue general guidance to the court concerning application of the federal preemption standards.³⁴ There are no extraordinary circumstances presented in this case that would warrant a departure from this policy. Therefore, if the Board declines to rule that Consumers’ condemnation action is not preempted (as the Eastern District of Michigan did), it nevertheless should deny ADBF’s Petition and leave the issue to the state court. Inasmuch as proceedings before that court are ongoing,³⁵ Consumers respectfully requests that the Board issue its ruling in Consumers’ favor with all deliberate speed.

CONCLUSION

For all the reasons set forth above, ADBF’s Petition for Declaratory Relief should be denied.

³⁴ See *Lincoln Lumber* at 3.

³⁵ The preliminary injunction referenced in note 12, *supra*, did not stay further proceedings in the Michigan court.

Respectfully submitted,

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Dated: November 20, 2017

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of November, 2017, I caused a copy of the foregoing Reply to Petition for Declaratory Relief to be served by U.S. First Class Mail or by more expeditious means upon the following counsel for Petitioner:

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1025 Connecticut Ave., NW
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/s/ Katherine F. Waring
An Attorney for Defendants

Attachment No. 1

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CONSUMERS ENERGY COMPANY,

Plaintiff,

v.

Case No. 16-12938

ADRIAN & BLISSFIELD RAILROAD
COMPANY, et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

On July 8, 2016, Plaintiff Consumers Energy Company ("Consumers") filed this complaint against Defendants Adrian & Blissfield Railroad Company ("A&B"), City of Adrian, Michigan Department of Transportation ("MDOT"), Norfolk Southern Corporation, and Norfolk Southern Railway Company seeking an easement over disputed parcel of land and an injunction against A&B interfering with its use of the easement. (Dkt. #1.) Defendants removed the case to this court on August 11, 2016. (*Id.*) Now before the court is Plaintiff's Motion to Remand for Lack of Jurisdiction. (Dkt. #14.) Defendant Adrian Blissfield Railroad Company has filed a response, (Dkt. #17), and Plaintiffs have filed a reply, (Dkt. #18). This court held a hearing on November 16, 2016. For the reasons stated below and at the hearing, the court will grant Plaintiff's motion.

I. BACKGROUND

Consumers, which is a Michigan electric company, entered into a 20 year land rental agreement in 1996 with MDOT for the placement of power lines over a 2.5 mile stretch of land approximately 20 feet wide running along a railway. In 2000, and before the expiration of this agreement, Defendant A&B, which is a Michigan railroad company, purchased land from MDOT including the parcel subject to the rental agreement between Consumers and MDOT. A&B then took over MDOT's role as landlord for the otherwise uneventful duration of the rental agreement with Consumers. Upon the expiration of the rental agreement in January, 2016, the parties began (unsuccessful) negotiations to allow Consumers to continue using the parcel for its active power lines.

Consumers alleges that A&B, realizing that Consumers would not be able to easily replace the lines serving approximately 10,000 customers, demanded an unreasonably high premium. Meanwhile, A&B claims that the negotiated price should reflect the value of the land to Consumers—not the general market price. It also claims that it may undertake a grand expansion of the rail service along the disputed parcel, and any price must account for the fact that the power lines will interfere with such developments. As negotiations broke down, A&B began making demands that Consumers vacate the property. Consumers then filed an action in Michigan State Court for condemnation, seeking a permanent easement allowing it to continue operating and servicing the power lines on the property and an injunction prohibiting A&B from interfering with its ability to do so. At a show cause hearing in state court, A&B agreed to the entry of a preliminary injunction to this effect.

A&B then removed the case to federal court claiming federal question jurisdiction. It is undisputed that nothing on the face of the well-pleaded complaint raises a federal question, and A&B does not claim diversity jurisdiction exists. Instead, A&B argues that federal question jurisdiction still exists even where a plaintiff's claims are only based in state law if those state law claims are completely preempted by federal law. Under its view, Plaintiff's claims are preempted by Section 10501(b) of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.* It insists that a condemnation action for land operated as a railway is categorically preempted, and even if it were not, it would be preempted as applied to the instant situation because the power lines constitute a significant interference with their use of the land as a railway. Plaintiff's motion for remand challenges this view by arguing that case law does not support the proposition that state law condemnation actions are always categorically preempted, and that, because the continued operation of the power lines would not have the effect of preventing or unreasonably interfering with railroad transportation, the "as applied" test counsels against a finding of preemption as well. It also points out that several of the cases cited in A&B's brief supporting removal have been reversed or are factually inapposite to the instant case.

II. STANDARD

Federal courts "are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress[.]" *Elgharib v. Napolitano*, 600 F.3d 597, 604-05 (6th Cir. 2010) (quotation omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the

burden of establishing the contrary rests upon the party asserting jurisdiction.”

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

The United States District Court has jurisdiction over claims based on a federal question and claims with complete diversity of citizenship between parties. Title 28 U.S.C. § 1331 defines federal question jurisdiction. It provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. The Sixth Circuit has held that “[i]n determining whether an action ‘arises under’ federal law, we are governed by the well-pleaded complaint rule, which requires that a federal question be presented on the face of the complaint.” *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass’n, Inc.*, 287 F.3d 568, 573 (6th Cir. 2002) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)). However, an exception to the well-pleaded complaint rule exists “when a federal statute wholly displaces the state-law cause of action through complete preemption.” *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 559 (6th Cir. 2007) (quotation omitted).

III. DISCUSSION

A&B claims that federal question jurisdiction exists because the condemnation action is preempted by § 10501(b) of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101-16106. In an approach it deemed “persuasive,” the Sixth Circuit applied a “comprehensive test” articulated by the Surface Transportation Board (“STB”) for determining the extent to which § 10501(b) preempts state law claims:

First, state actions are “categorically” or “facially” preempted where they “would directly conflict with exclusive federal regulation of railroads.” Courts and the STB have recognized “two broad categories of state and

local actions” that are categorically preempted regardless of the context of action: (1) “any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized” and (2) “state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.” . . . Second, those state actions that do not fall into one of these categories may be preempted as applied: “For state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.”

Adrian & Blissfield R. Co. v. Vill. of Blissfield, 550 F.3d 533, 539-40 (6th Cir. 2008)

(citations omitted). Applying this test, the court concluded a proposed sidewalk construction project which required the railroad to either personally construct or reimburse the city for the construction of a walkway along a stretch of tracks was not preempted under either the categorical or “as applied” tests and granted remand. *Id.* at 540-42.

Consumers argues that its condemnation action is not subject to this analysis because Consumers is a private actor and not a government entity. This argument is not convincing. Under MCL § 486.252, the Michigan provision allowing corporations to engage in condemnation actions, Consumers seeks relief from the state courts of Michigan. The issuance of an easement by the courts of Michigan would surely constitute “state action.” The preemption analysis applies.

At the hearing A&B suggested for the first time that this court could submit the question of preemption to the STB for a determination by that agency. The court determines that the relatively simple facts of the instant case do not appear to require specialized knowledge to assess, and therefore the delay and costs involved in the

initiation of another proceeding before an agency is not justified. Nor will the court's analysis be meaningfully assisted by an additional evidentiary hearing on the question of "as applied" preemption as requested by A&B, since the parties have had ample opportunity to submit documents and affidavits in support of their briefings.

A. Categorical Preemption

In the instant case it is obvious that the proposed condemnation action is not "permitting or preclearance," so it does not fall into the first category identified by STB's test for categorical preemption. The applicability of the second category, relating to construction or operation of the railroad, is a closer question. However, as stated at the hearing, the court finds that this avenue to a finding of categorical preemption is also foreclosed to Defendant.

A&B cites favorably to *Soo Line R. Co. v. City of St. Paul*, where the court applied categorical preemption to a city's plan to condemn a 24-foot wide strip along 2.1 miles of track to be used for a bicycle/pedestrian trail. 827 F. Supp. 2d 1017, 1018 (D. Minn. 2010). It reasoned that the language of the ICCTA meant that the condemnation amounted to a regulation that was *per se* preempted. *Id.* at 1021-22. However, under similar facts the Sixth Circuit reached the exact opposite conclusion, explaining that "[r]outine crossing disputes, despite the fact that they touch the tracks in some literal sense, are not typically preempted." *See Adrian & Blissfield*, 550 F.3d at 540. There the court was evaluating a proposed condemnation for the construction of a sidewalk which was partly on the railroad's property and actually crossed the tracks in some locations. The facts under these cases are all very similar, but this court is bound by the holding of

the Sixth Circuit's opinion in *Adrian & Blissfield* whereas the decision in *Soo Line* is merely persuasive authority.

Both within its briefings and in its statements at the hearing, Defendant also cites to *Union Pac. R. Co. v. Chicago Transit Auth.*, for the proposition that categorical preemption applied where a municipal rail system sought to condemn a strip of land adjacent to another railway. 2009 WL 448897, at *6 (N.D. Ill. 2009). Nowhere, however, does A&B note that this holding was reversed two years later by the Seventh Circuit. That court concluded that the "as applied" analysis was more appropriate given the "trend in case law" since "a condemnation is not a rule of general applicability because each instance necessarily varies with the facts of the case and the specific property subject to the condemnation." *Union Pac. R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 679-80 (7th Cir. 2011) (quotations omitted). Defendant was aware of this inconsistency at some level, since it also cited the same Seventh Circuit opinion in its brief. (Dkt. #17, Pg. ID 604-05.) The court wonders why Defendant would not be more cautious in light of Plaintiff's earlier-filed brief in support of Plaintiff's motion for remand, which calls to the court's attention a similar citation to reversed authority in Defendant's notice of removal. (Dkt. #14, Pg. ID 491.) It is fundamental that counsel bear a burden of candor to the court. Such conduct as citing to reversed authority evidences either a lack of caution or a failure of candor. Regardless, Defendant's citation to holdings from other circuits does not sustain its burden of demonstrating that categorical preemption applies in light of the controlling Sixth Circuit precedent in *Adrian & Blissfield*.

Also unavailing is A&B's argument that categorical preemption must exist because otherwise its property may be subject to regulations which apply to electrical

companies, and such regulations are categorically preempted by § 10501(b). A&B cites to *Grafton & Upton R.R. Co. F Petition for Declaratory Order* for the proposition that “[t]hese types of regulatory requirements are universally categorically preempted as applied to railroads.” (Dkt. #17 Pg. ID 594.) But the cited opinion does not support that conclusion, as STB explained that “[s]tate and local regulation is appropriate where it does not interfere with rail operations. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce.” 2014 WL 292443, at *5 (Jan. 22, 2014). A&B has made no showing that normal regulations of the electrical lines on its property will unduly burden interstate commerce. Accordingly, the “as applied” preemption test governs.

B. “As Applied” Preemption

Since the “as applied” preemption test applies, the central question is “whether the state regulation imposes an unreasonable burden on railroading.” *Adrian & Blissfield*, 550 F.3d at 541 (quotation omitted). Such regulation is permissible where “(1) it is not unreasonably burdensome, and (2) it does not discriminate against the railroads.” *Id.* (quotation omitted). Because Defendant does not assert that the proposed condemnation discriminates against the railroads, the only question is whether it is unreasonably burdensome.

The power lines currently run alongside the track, loading facilities, and cross over the track at various points. These utilities have operated along side one another for sixteen years. Defendant describes the past detrimental impact of the power lines as including but not being limited to:

- 1) Removing the ability for the A&B to use man-harnesses in transload operations due to the clearance issues with the powerline;
- 2) Limiting the transport and transload of the high/wide loads;
- 3) Limiting necessary storage space and the ability to move and store heavy equipment; [and]
- 4) Limiting how transloads are performed[.]

(Dkt. #17, Pg. ID 602.) A&B also asserts that going forward, the power lines will interfere with certain development and expansion plans involving additional facilities, tracks, a gantry, a crane, and telecommunications towers. (*Id.*, Pg. ID 604.) However, A&B stated at the hearing that it could not proffer actual blueprints or engineering plans to support the existence or illuminate the details of the alleged expansions. For their part, Consumers has indicated that even if such plans come to pass, they are able to modify the height or lateral position of the power lines to accommodate A&B's development efforts. Counsel for Consumers also pointed out during the hearing that language within the proposed easement allows A&B to have Consumers relocate their lines to account for "existing or actually planned railroad operations[.]" (See Dkt. #1, Pg. ID 91.)

It is clear that these power lines must reduce A&B's ability to maximize its profit at some level. Even if it did not plan to expand its facilities, it alleges that its ability to use its tracks has already been affected, and the value of the land itself would surely be reduced to some degree in virtue of the burden of the proposed easement. A&B would also be required to allow Consumers to service the lines, which would limit the exclusivity of A&B's possession over the entire parcel near the proposed easement.

Assuming the parties are able to negotiate smoothly in the future, A&B would still bear some costs from the arrangement that it would otherwise not necessarily incur.

However, it is not enough to demonstrate that the railroad will be burdened; the burden must be *unreasonable*. See *Adrian & Blissfield*, 550 F.3d at 541 (“state actions are not preempted merely because they reduce the profits of a railroad . . .”) (citation omitted); see also *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008) (Louisiana state law permitting private land owners to construct at-grade crossings over railroad tracks not completely preempted where statute’s cost-shifting mechanism could alleviate increased maintenance costs). A&B has not demonstrated that the burden on its operations would be unreasonable if Consumers were permitted to continue operating its power lines along the railroad as it has for twenty years, subject to the language in the easement that allows A&B to force Consumers to relocate the lines. The federal courts are forums of limited jurisdiction and, because A&B has not rebutted the presumption “that a cause lies outside this limited jurisdiction[.]” *Kokkonen*, 511 U.S. at 377, this case will be remanded to state court.

IV. CONCLUSION

IT IS ORDERED that Plaintiff’s Motion to Remand (Dkt. # 14) is GRANTED. The matter is remanded to Lenawee County Circuit Court.

s/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: December 8, 2016

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, December 8, 2016, by electronic and/or ordinary mail.

s/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

**Verified Statement
Of
Dwayne C. Parker**

VERIFIED STATEMENT
OF
DWAYNE C. PARKER

My name is Dwayne C. Parker, and I am the Director of Customer and Service Infrastructure – High Voltage Distribution Group, within the Electric Transmission and HVD Engineering Department of Consumers Energy Company (“Consumers”). I am making this Statement in order to provide the Surface Transportation Board (“STB”) with the relevant facts concerning Consumers’ installation of certain essential electrical power lines and support poles in the vicinity of Adrian, MI, its attempt to negotiate reasonable terms and conditions for a non-exclusive permanent public utility easement to maintain those power lines with the Adrian & Blissfield Rail Road Company (“ADBF”), and the circumstances that compelled Consumers to exercise its rights of eminent domain under Michigan law to secure such an easement, which I understand is the subject of the Petition for Declaratory Relief filed within the STB by ADBF on or about October 30, 2017.

A. Consumers Energy Company

Consumers is a Michigan corporation and public utility organized and existing under Public Act 238 of 1923, MCL 486.251, *et seq.*, for the purposes of generating, transmitting, distributing and selling electric energy and natural gas to the public in all 68 counties of Michigan’s Lower Peninsula. Consumers’ electric utility operations serve nearly 6.8 million Michigan residents, including the cities of Battle

Creek, Flint, Grand Rapids, Jackson, Kalamazoo, Midland, Muskegon and Saginaw.

Consumers' retail electricity rates are subject to the regulatory authority of the Michigan Public Utilities Commission.

Like most public electric utilities throughout the United States, Consumers holds non-exclusive easement rights over real property, both privately and publicly owned, to support power lines, poles and other infrastructure essential to the distribution of electricity to the rate-paying public. Among the real property parcels on, along or over which Consumers typically holds easements are portions of railroad rights-of-way. The routine easements held and used by Consumers are acquired primarily through the negotiation of agreements with property owners. If necessary, however, Consumers may acquire essential property rights through the exercise of eminent domain, which Consumers possesses under Michigan law.¹

B. The 1996 MDOT Lease

Consumers provides electric service to citizens in the City of Adrian, Michigan and surrounding communities in Lenawee County using two (2) high voltage power lines: the 46,000 volt (46 kV) College Park Line, and the 138,000 volt (138 kV) Solvay Line. Approximately 10,000 customers depend on those lines for electrical power. The College Park and Solvay Lines are supported by one line of poles installed

¹ MCL 486.252; *see also* Michigan Uniform Condemnation Procedures Act, Public Act 87 of 1980, MCL 213.51, *et seq.* ("UCPA").

on a 20-foot wide strip of land alongside a 2.5 mile long portion of railroad right-of-way through and near Adrian.

Prior to 2000, the Adrian area right-of-way was owned by the Michigan Department of Transportation (“MDOT”), and operated by ADBF pursuant to a lease. In 1996, while ADBF was the rail operator, Consumers entered into a 20-year agreement with MDOT giving Consumers non-exclusive rights on the property for purposes of installing and maintaining the College Park and Solvay Lines. The strip of property over which Consumers acquired rights roughly parallels the railroad tracks for its 2.5 mile length. A copy of this agreement, which included an expiration date of January 26, 2016, is attached to this Statement as Exhibit No. 1. The agreement provided for a single payment of \$12,500.00 by Consumers for use of the subject property over the entire 20-year term. No provision was made for “hold-over rent” or any other payments should Consumers continue its use of the property subsequent to January 26, 2016.

On or about November 29, 2000, MDOT sold a total of 18.91 miles of railroad right-of-way to ADBF, which included the 2.5 miles (about 13% of the total) that was affected by the Consumers-MDOT agreement and that ADBF already operated. According to public records, the purchase price paid by ADBF for the 18.91 miles was \$1,725,000.00. Between 1996 and 2016, then, ADBF conducted railroad operations over the former MDOT lines in co-existence with Consumers’ College Park and Solvay Lines. While ADBF very recently has claimed that the presence of Consumers’ power lines limited certain uses of its property, throughout that 20-year time period ADBF did not

raise any contemporaneous objections to the lines, or claim that they unreasonably interfered with ADBF's railroad operations.

C. Attempted Negotiations with ADBF

Prior to the scheduled, January 26, 2016 expiration date of the 1996 MDOT agreement to which ADBF had succeeded, Consumers and ADBF began discussions that led to Consumers' proposal for a permanent easement to support continued operation of the College Park and Solvay Lines. Consumers' approach was consistent with its general preference for negotiating agreements for necessary utility easements, rather than exercising its eminent domain rights. The parties agreed to extend the MDOT agreement expiration date informally while discussions proceeded, and Consumers made an initial offer to pay ADBF \$116,000.00 in consideration of a permanent easement over the identical property described in the MDOT agreement. ADBF replied with a demand for \$660,000.00 for an easement, a more than five-fold increase.

Following further research and consideration, Consumers increased its proposed easement price to \$600,000.00. However, ADBF responded by falsely claiming that Consumers had not accurately described the College Park and Solvay Lines, terminating negotiations, and demanding payment of almost \$200,000.00 in "hold-over-rent" under the MDOT agreement, this despite the fact that the agreement made no provision for such rent. Nevertheless, as a show of good faith, Consumers reiterated its offer to pay \$600,000.00 for a permanent easement, and promised to send a check for \$12,500.00 as a down payment on the price. When Consumers tendered the down payment check, however, ADBF refused to accept it.

In June 2016, Consumers' and ADBF's representatives met again. At that meeting, ADBF stated that it would only consider granting Consumers a revocable (at ADBF's option) license along the 2.5 mile portion of right-of-way where Consumers' power lines were located, and demanded a payment of \$2,000,000.00 for the license; more than ADBF had paid for ownership of the *entire* 18.91 miles of rail line that it purchased from MDOT. While ADBF subsequently offered to reduce its demand to \$1,750,000.00, it refused to discuss the permanent easement that had been the focus of the parties' negotiations from the outset. Notwithstanding the posture that ADBF had adopted, Consumers made a final offer to purchase a satisfactory permanent easement for \$660,000.00, the exact terms that ADBF originally had offered. ADBF did not respond.

D. The Eminent Domain Proceeding

The College Park and Solvay Lines are essential to Consumers' ability to continue to reliably serve approximately 10,000 customers in the Adrian area. The Lines are a permanent component of the company's system, and as such, a permanent easement is required to allow Consumers to continue to provide safe, reliable electricity to the citizens and businesses of Lenawee County. The need for permanent access to the easement area for purposes of operating, maintaining, inspecting, replacing and improving Consumers' essential infrastructure makes a license that could be revoked by ADBF at any time wholly inadequate to meet the public's need for electric power.

Given ADBF's unreasonable demands, Consumers' only remaining option was the initiation of condemnation proceedings pursuant to Michigan law, which Consumers commenced in July 2016 before the 39th Circuit Court for the County of

Lenawee.² Pursuant to applicable law and court rules, Consumers deposited the total estimated just compensation amount of \$555,000.00 with the County Treasurer (as required under state eminent domain law), for disbursement according to the court's orders. That amount is the full appraised value of the easement that Consumers seeks. Consumers' court filing also included a written description of the proposed permanent easement, a copy of which is attached as Exhibit No. 2 to this Statement.

The description of the property subject to the easement is identical to the property description in the 1996 MDOT agreement, and encompasses only so much of the 2.5 mile long right-of-way as necessary to accommodate the existing College Park and Solvay Lines, which generally is a strip about 20 feet wide, considerably narrower than the 100-foot wide ADBF right-of-way.

The form of the ADBF easement is similar to the document that Consumers currently uses when obtaining easements from railroads. However, in an effort to minimize any actual burden on ADBF's use of the property subject to the easement, Consumers modified its standard form in several respects. Specifically, it included the following limitations: (1) no permanent, above ground structures would be installed any closer to ADBF's rail line than the existing line poles already are; (2) the area between the poles and the rail line only would be used by Consumers for temporary purposes, such as vegetation management or maintenance; (3) Consumers would not fence off or otherwise limit ADBF's access to the easement area, other than the above-ground

² Case No. 16-5626-CC, before the Hon. Anna Marie Anzalone.

Consumers facilities allowed by the easement; and (4) ADBF would be permitted to install communications-related equipment on Consumers' line poles, so long as applicable safety codes are met and the poles could support it.

The easement form includes a proviso that the property owner (ADBF here) will not create or install new structures or fixtures that would intrude on the easement area without Consumers' prior consent, which Consumers may withhold in its "sole discretion."³ However, this language is subject to the prior, broader restriction on Consumers taking any actions pursuant to the easement "that would unreasonably impair [ADBF's] lawful access to or use of the easement area," or would "interfere with the safety of [ADBF's] railroad operations..."⁴ Additionally, and significantly, under the terms of the easement Consumers commits to relocate its facilities (consistent with applicable law) to another section of the easement area or ADBF's property at Consumers' expense, if necessary "to accommodate Owner's existing or *actually planned* railroad operations..."⁵ that cannot reasonably be accommodated elsewhere on ADBF's property. In this regard, I would point out that the area subject to the easement would be only about 20% of a section of ADBF's right-of-way that itself is only 13% of the right-of-way that ADBF acquired from MDOT (*i.e.*, just 2.6% of the total right-of-way).

³ Exhibit No. 2, at page 2 of 6.

⁴ *Id.* at 1 of 6, 2 of 6.

⁵ *Id.* at 1 of 6 (emphasis supplied).

I understand that ADBF has claimed before the STB that it has several planned expansions of its existing facilities in development, some of which potentially could be affected by the College Park and/or Solvay Lines. As of the date of this Statement, I am not aware that ADBF actually has begun work on any of these hypothetical projects, beyond some preliminary applications or inquiries to regulatory authorities. If and to the extent that ADBF eventually proceeds with a rail-related project that would be impeded by Consumers' power lines, however, there is no reason why Consumers could not raise and/or relocate portions of its facilities as required to maintain minimum clearances. For example, the existing wooden poles supporting the College Park and Solvay Lines could be extended from their current 80-105 feet up to approximately 125 feet, and could be replaced by steel poles to provide even higher clearances if necessary. Other relocation options also could be available, consistent with the terms of Exhibit No. 2 and as appropriate to address whatever actual burden the power lines might impose on ADBF's expanded facilities.

VERIFICATION

I, Dwayne C. Parker, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement on behalf of Consumers Energy Company. Executed on November 16, 2017.


Dwayne C. Parker

Michigan Department
of Transportation
(3/97)

LAND RENTAL AGREEMENT

Michigan Law establishes rights and obligations for parties to rental agreements.
This agreement is required to comply with the Truth in Renting Act 454, P.A. of 1978.

222614 Inside ROW

NON-FEDERAL

Michigan law establishes rights and obligations for parties to rental agreements. This agreement is required to comply with the Truth in Renting Act, Act 454, P.A. of 1978. If you have a question about the interpretation or legality of a provision of this agreement, you may want to seek assistance from a lawyer or other qualified person. Any notice or other communication to the Department may be directed to the Michigan Department of Transportation, Property Management Section. The Department of Transportation is pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the nation. It encourages and supports an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, national origin, age, sex, familial status, marital status, or mental and physical handicap. Persons denied fair housing opportunity for these reasons may file a complaint with the Michigan Civil Rights Commission. If you have a question about the interpretation or legality of a provision of this agreement, you may want to seek assistance from a lawyer or other qualified person. Any notice or other communication to the Department may be directed to the Michigan Department of Transportation, Real Estate Division, Property Management Section.

It is hereby agreed that the Michigan Department of Transportation hereafter "DEPARTMENT", does hereby let and rent to Consumers Energy, whose address is 212 West Michigan Avenue, Jackson, Michigan 49201 hereafter "TENANT", the following state-owned land located at from mile post 209.5 to mile post 212.0, City of Adrian, Lenawee County, Michigan, excepting an easement recorded on liber 1560, Page 866 (see attached sketch showing limits of property covered in this agreement) for a term beginning January 26, 1996. This agreement, unless terminated earlier as provided herein, shall expire on January 26, 2016.

RENT

TENANT agrees to pay \$12,500.00 for a twenty(20) year term beginning on January 26, 1996. Payment for the rent shall be made at the time of execution of this agreement by the TENANT. Payments will be made by money order or check to the State of Michigan, Department of Transportation. Mail payments to the Financial Operations Division, Post Office Box 30648, Lansing, Michigan 48909. Payments must include the Control Section Number, Job Number and Parcel Number to insure proper credit.

OCCUPATION OF PREMISES

The TENANT agrees not to rent, sublease or allow use by any persons other than those designated above as tenants.

TENANT'S DUTY TO MAINTAIN PREMISES

TENANT agrees that no structure of any type shall be placed on the property. No use shall be permitted within 10 feet of the edge of a cut or fill slope. All right-of-way markers and stakes shall be protected by the TENANT. The DEPARTMENT assumes no responsibility for the safe condition of the lands.

TENANT will not use or store radioactive, toxic, inflammable or poisonous materials, explosives, or other hazardous materials on the premises and will not permit hazardous or unreasonably objectionable smoke, fumes, vapor or odors to emit from the premises. No junk or garbage shall accumulate on the premises.

UTILITIES AND SERVICES

TENANT shall be responsible for all services commonly known and designated as public utilities and the securing of deposits and payments for all such obligations.

CONTROL SECTION: 4620F1	PARCEL: 119	
JOB NO. NA	FEDERAL ITEM NO. NA	FEDERAL PROJ NO. NA

NOTICE OF TERMINATION

TENANT agrees to vacate the premises upon thirty (30) days written notice. TENANT agrees that in the event the TENANT vacates the premises at will or at the request of the DEPARTMENT, that the DEPARTMENT will not be obliged to provide, and the TENANT will not be entitled to receive, relocation assistance and benefits.

Before the expiration of this agreement, the TENANT shall prepare for vacation of the premises by bringing it to a clean and sightly condition.

LIABILITY INSURANCE

The TENANT agrees to indemnify and save harmless the State of Michigan, the State Transportation Commission, the DEPARTMENT and all of its officers, agents and employees from all claim, demand payments, suits, actions, recoveries and judgements and from losses occurring or resulting to all persons, firms, or corporations furnishing work, services, materials, or supplies to the DEPARTMENT and from all claims for injuries to, or death of, all persons, and for loss of or damage to property, arising from this agreement.

The parties mutually agree that this agreement is subject to the provisions of Act 189 of 1953 as amended (users of Tax-Exempt Property).

Although duly executed, this agreement will not be binding on the parties until accepted by the Department.

CONSUMERS ENERGY COMPANY

1997 42 71 838

Date

Taxpayer ID Number

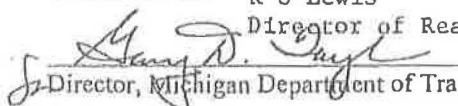
By: 

Tenant's Name R C Lewis

2/29/00
Date

Taxpayer ID Number

Director of Real Estate & Facilities


Director, Michigan Department of Transportation

3/23/2000
Date

Control 4620F1
Parcel 119

Lease Description

That part of the Michigan Department of Transportation railroad right of way, formerly Penn Central, as located over and across Sections 1, 2, 3 and 10, City of Adrian and Madison Township, Lenawee County, Michigan, as outlined on the attached sheets 1 through 8.

Contains 6.11 acres, more or less.

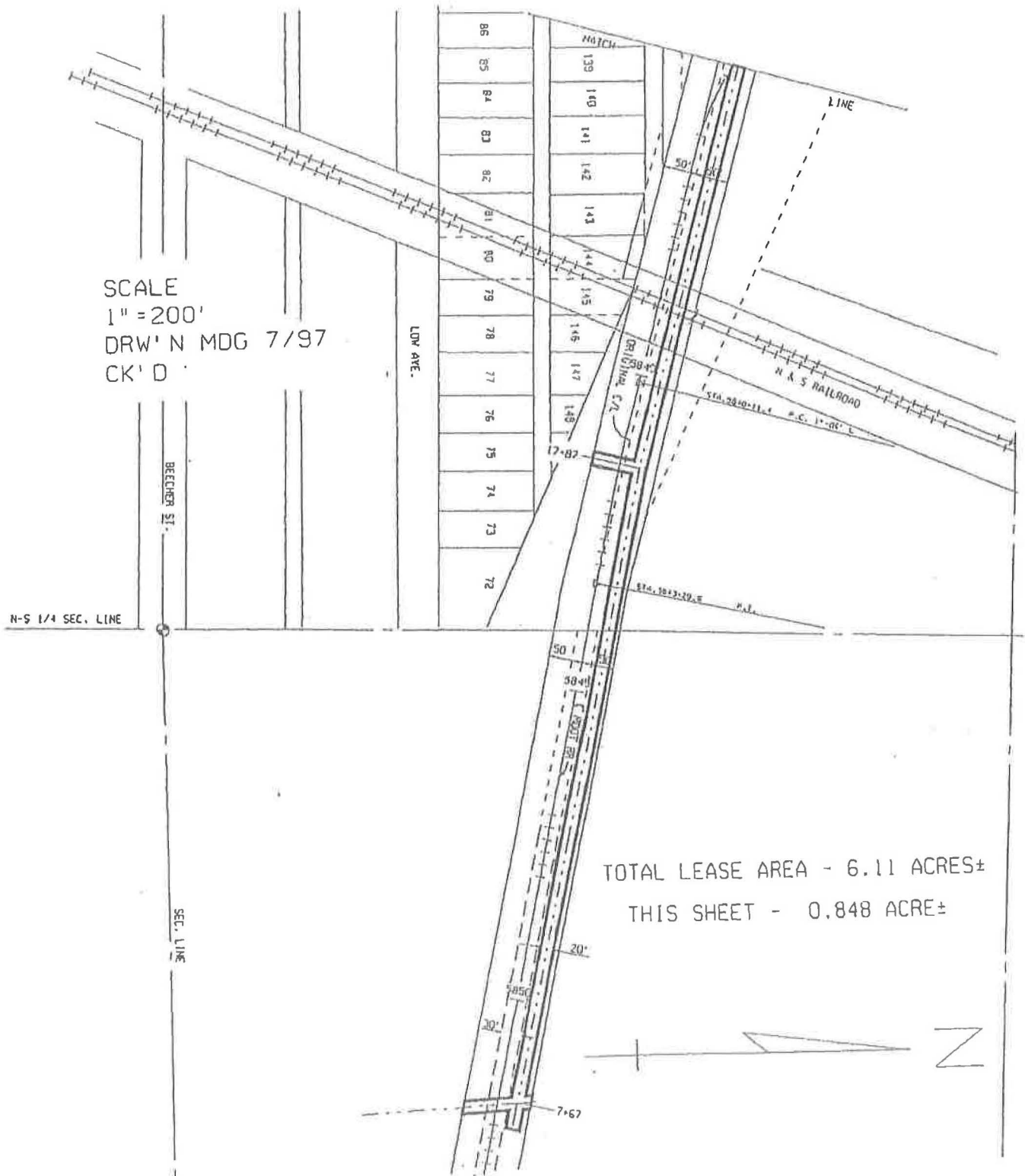
MDG 7/28/97
JHM 7/29/97

SHEET 1

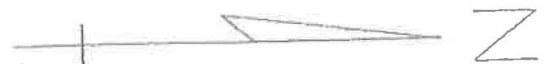
SEC. 1, T7S, R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119

SCALE
1" = 200'
DRW' N MDG 7/97
CK' D



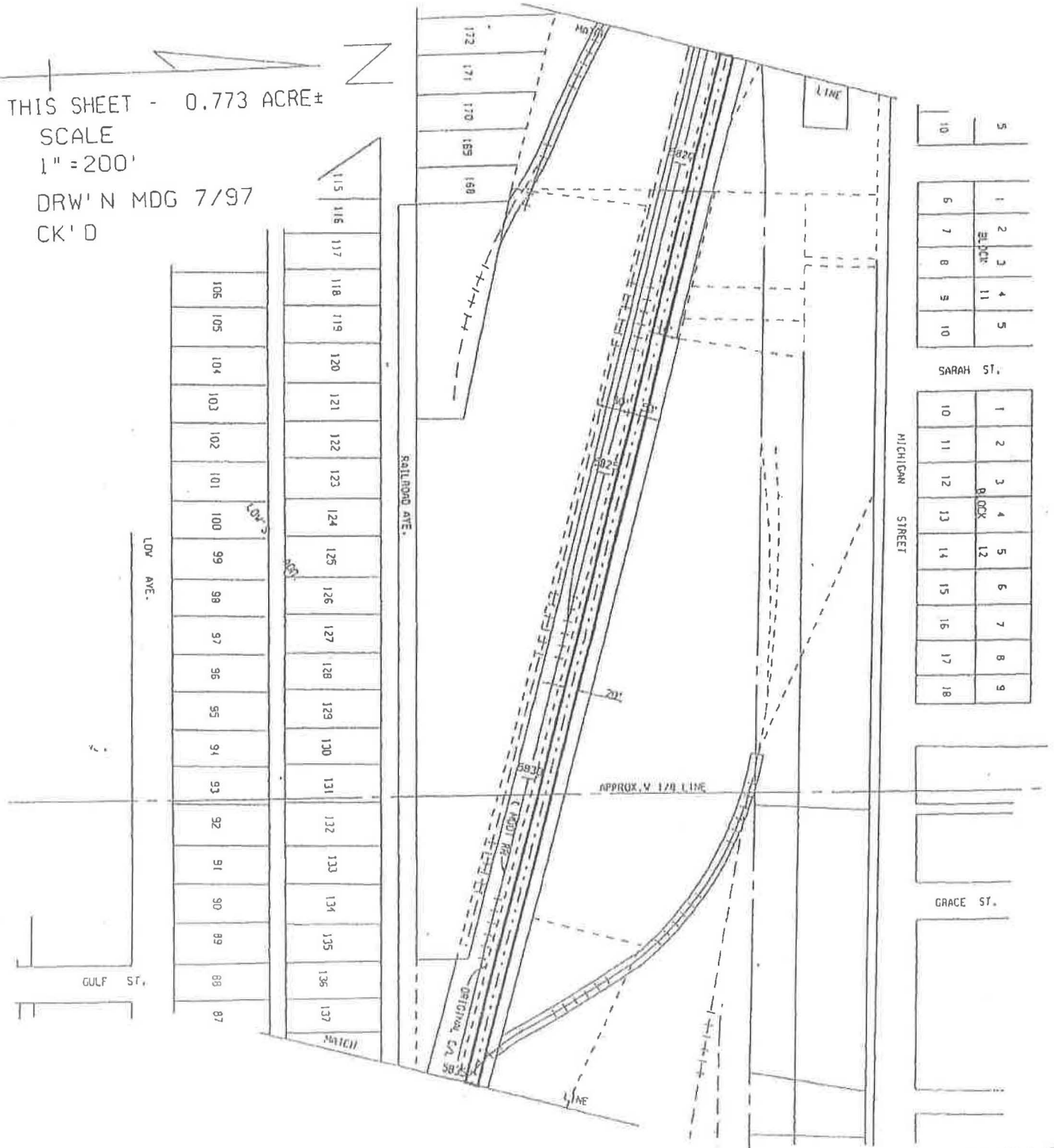
TOTAL LEASE AREA - 6.11 ACRES±
THIS SHEET - 0.848 ACRE±



SECS. 1 , T7S , R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119

THIS SHEET - 0.773 ACRE±
SCALE
1" = 200'
DRW' N MDG 7/97
CK' D



SHEET 3

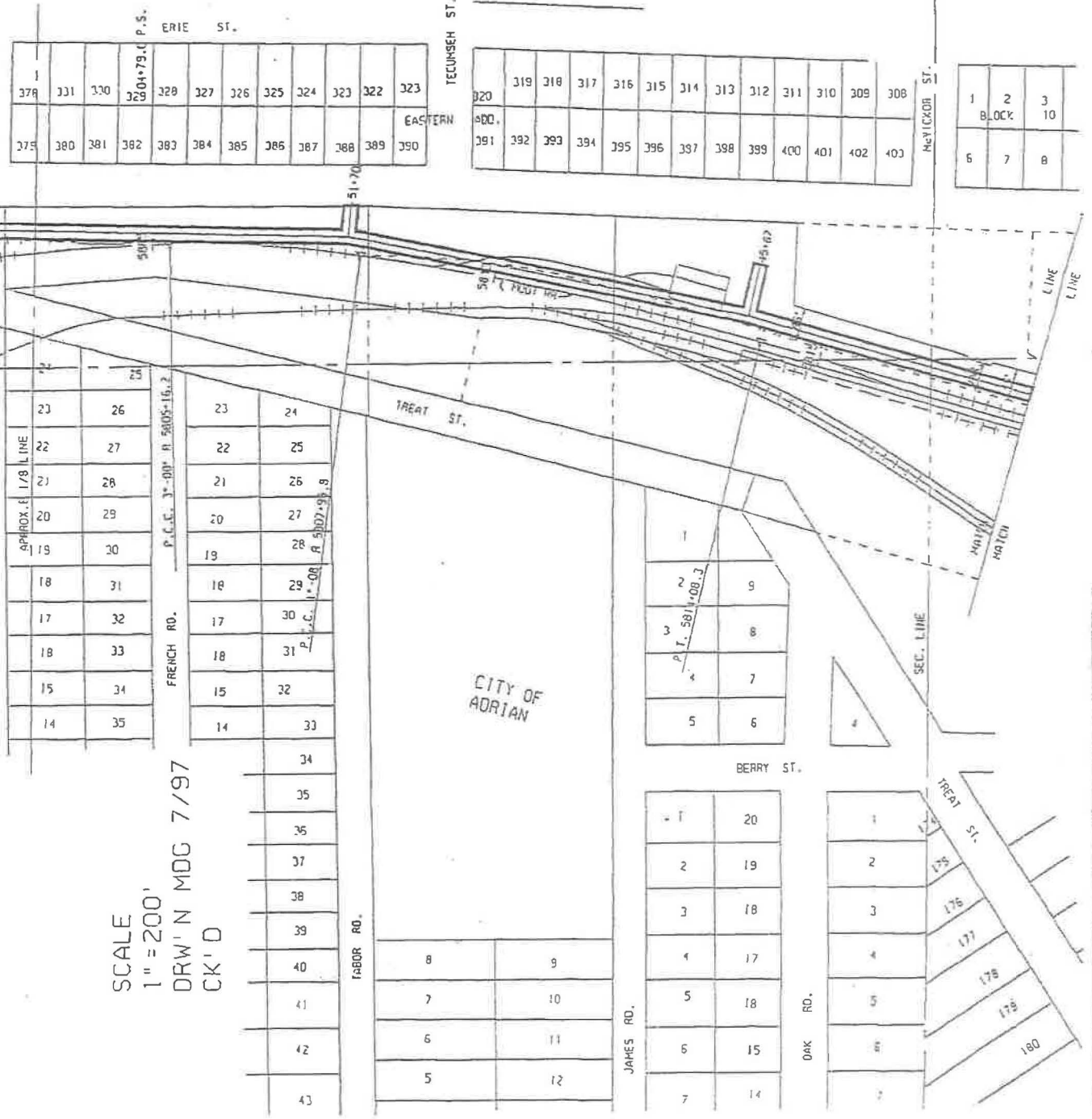
SEC. 1 & 2, T7S, R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119



THIS SHEET - 0.878 ACRE ±

SCALE
1" = 200'
DRW'N MDG 7/97
CK'D



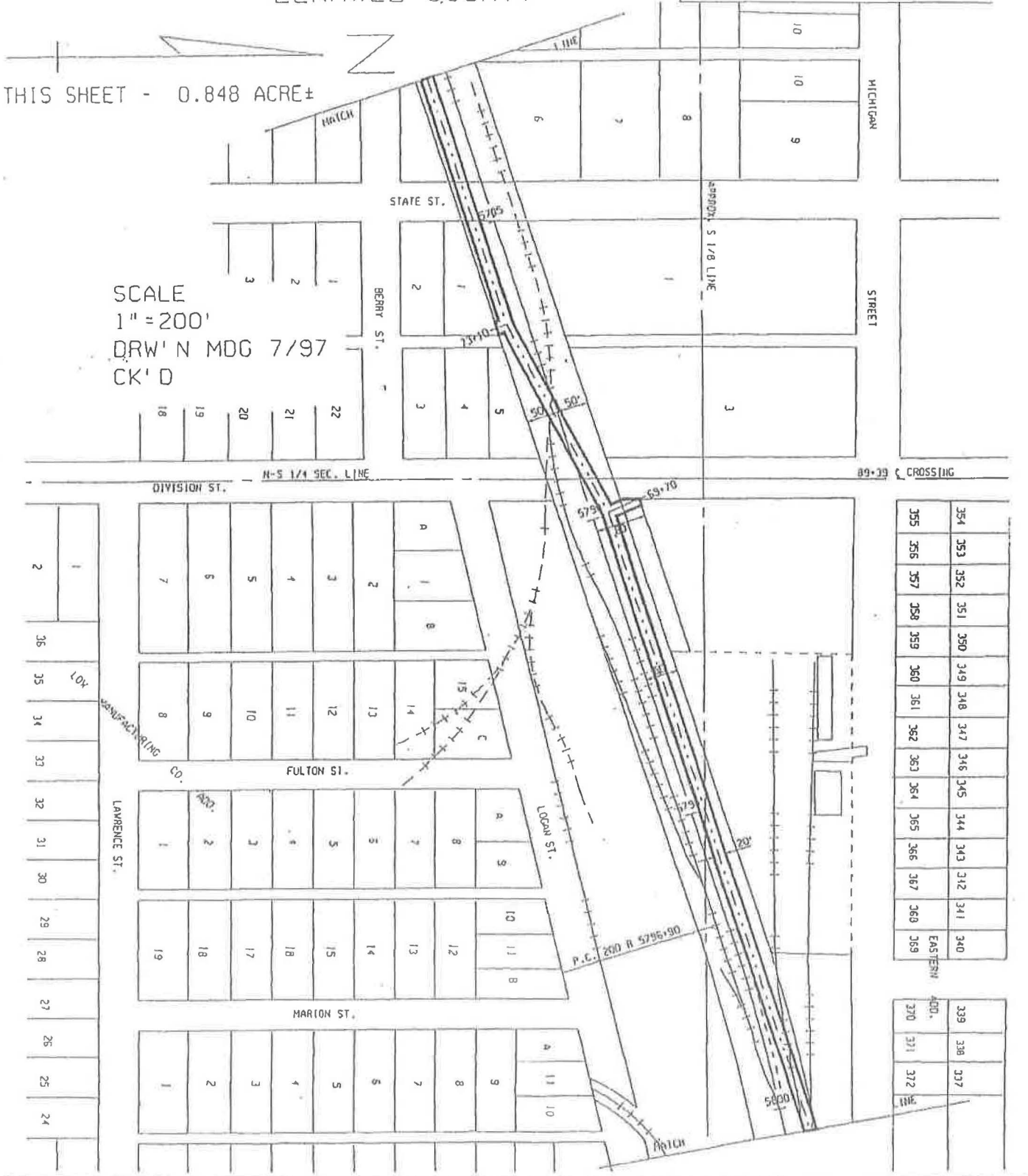
SHEET 4

SEC. 2 , T7S , R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119

THIS SHEET - 0.848 ACRE±

SCALE
1" = 200'
DRW' N MDG 7/97
CK' D



354	353	352	351	350	349	348	347	346	345	344	343	342	341	340
355	356	357	358	359	360	361	362	363	364	365	366	367	368	369

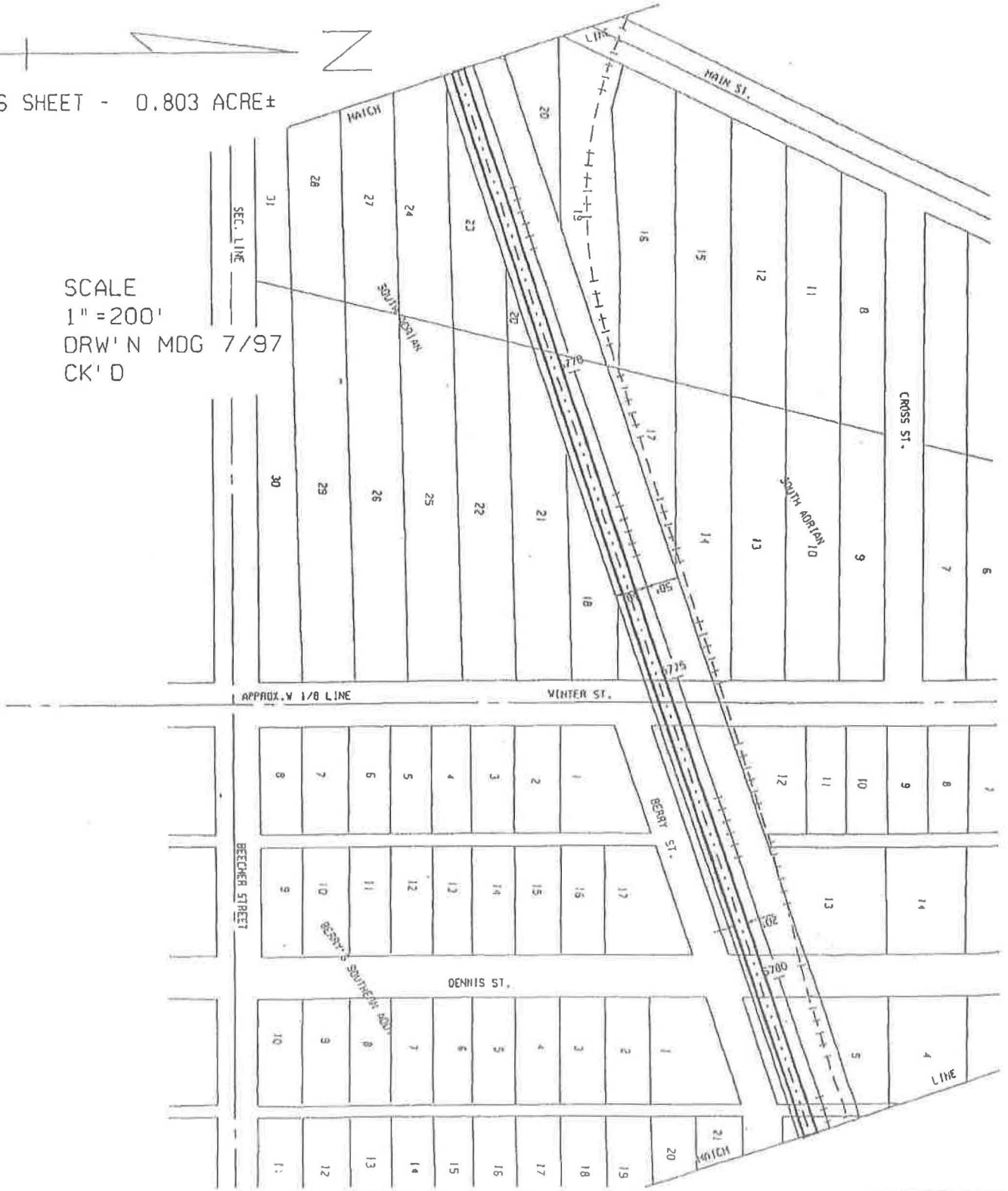
339	338	337
370	371	372

SEC. 2, T7S, R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119

THIS SHEET - 0.803 ACRE±

SCALE
1" = 200'
DRW'N MDC 7/97
CK'D



SHEET 6

SEC. 2 & 3 , T7S , R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119

APPROX. E 1/2 LINE

MATCH

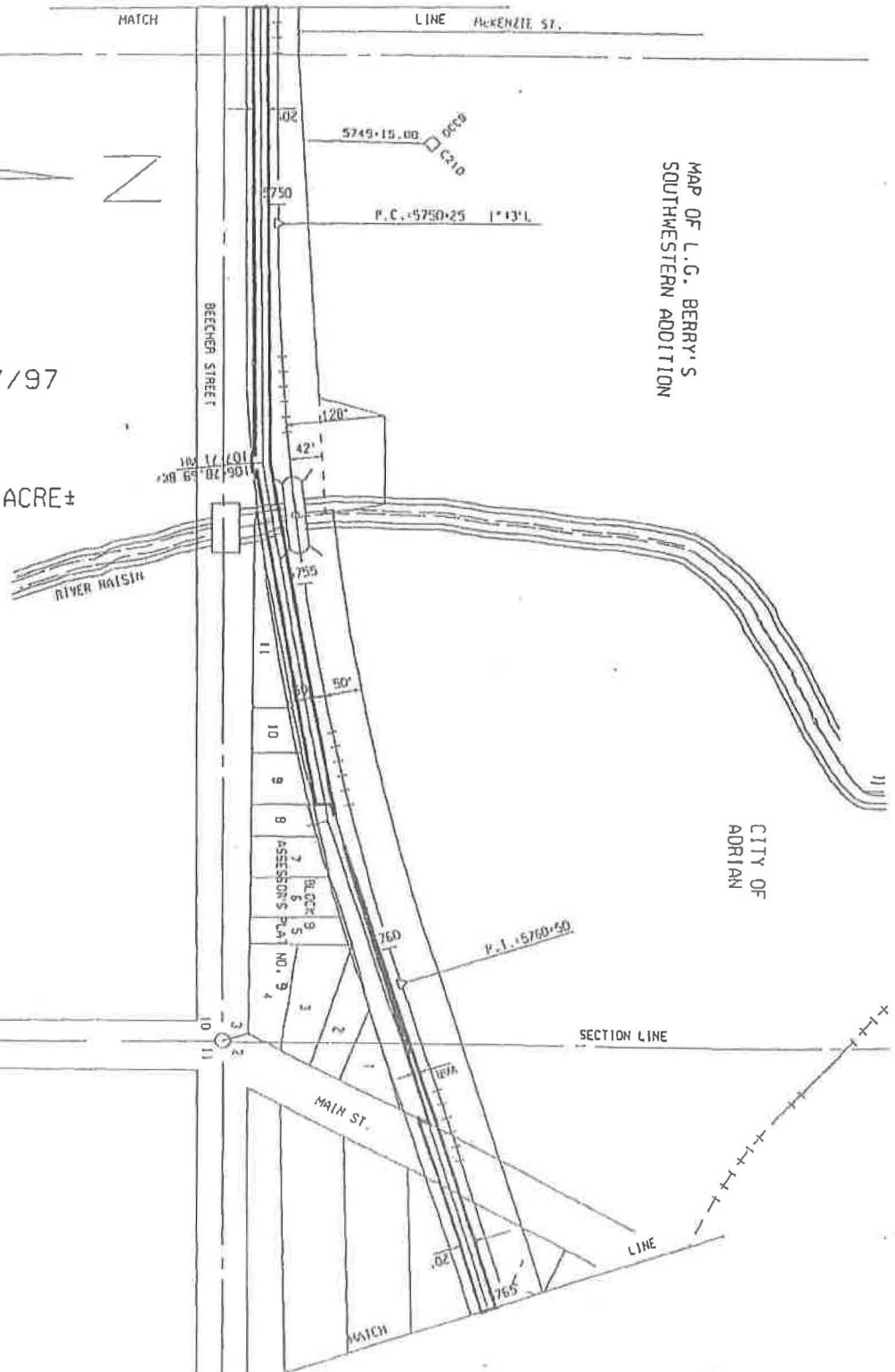
LINE HICKENZIE ST.



SCALE
1" = 200'
DRW'N MDG 7/97
CK'D

THIS SHEET - 0.645 ACRE±

MAP OF L.G. BERRY'S
SOUTHWESTERN ADDITION

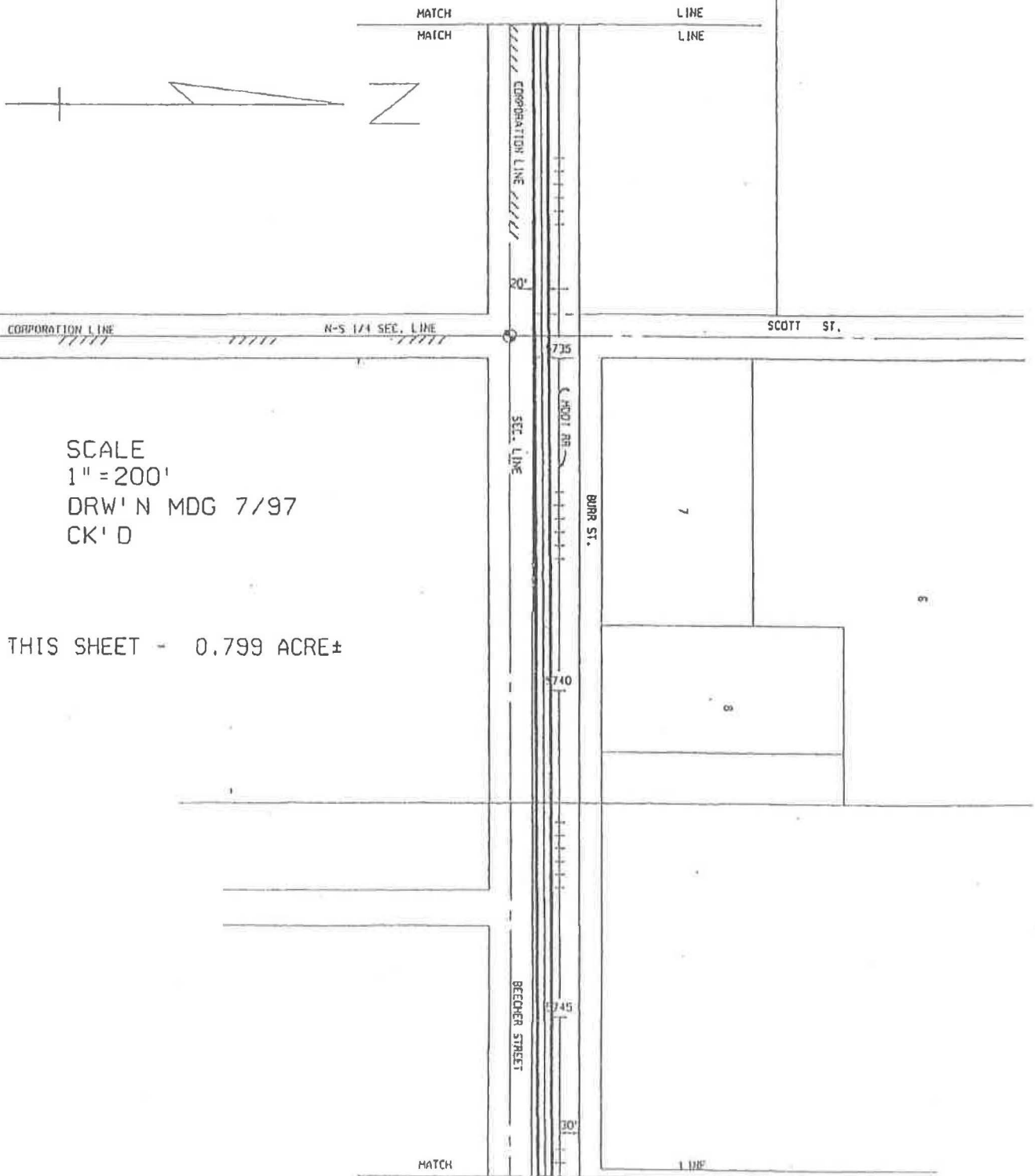


CITY OF
ADRIAN

SHEET: 7

SEC. 3, T7S , R3E
CITY OF ADRIAN
LENAWEE COUNTY

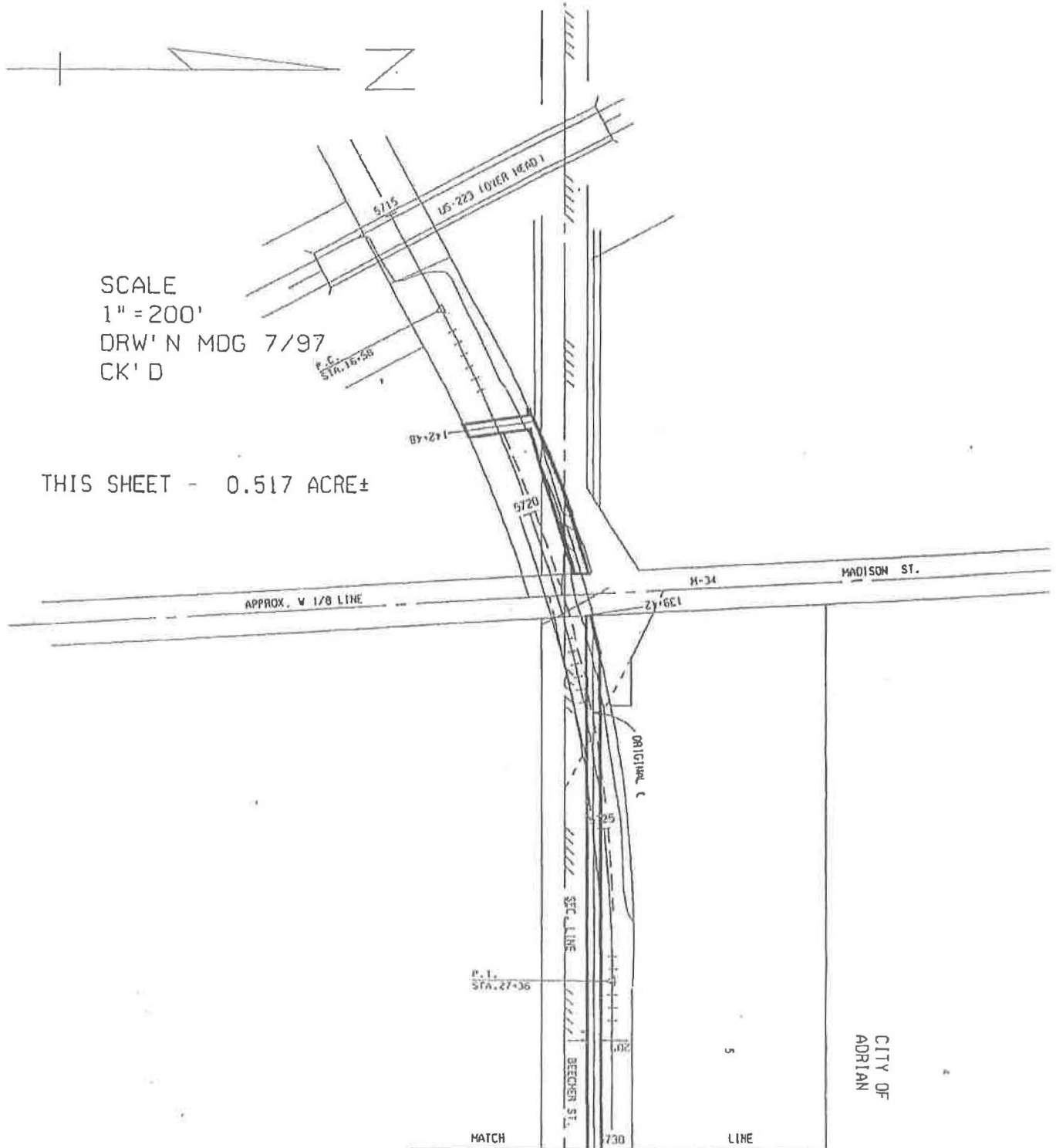
CONTROL 4620F1
PARCEL 119



SHEET 8

SEC. 3 & 10, T7S, R3E
CITY OF ADRIAN
LENAWEE COUNTY

CONTROL 4620F1
PARCEL 119



EASEMENT FOR ELECTRIC FACILITIES

ADRIAN & BLISSFIELD RAIL ROAD COMPANY, a Michigan corporation, 38235 North Executive Drive, Westland, Michigan 48185 (hereinafter "Owner")

for good and valuable consideration [exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter Owner's land (hereinafter "Owner's Land") located in the City of Adrian, County of Lenawee, and State of Michigan as more particularly described in the attached Exhibit A to construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a single line of poles or pole structures (or any combination of same) supporting a line or lines of electric facilities in, on, over, under, across, and through a portion of Owner's Land (hereinafter "Easement Area") as more fully described in the attached Exhibit B, together with any wires, cables, conduits, crossarms, braces, guys, anchors, transformers, electric control circuits and devices, location markers and signs, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities, whether above or below grade, useful or incidental to or for the operation or protection thereof, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity.

Notwithstanding Consumers' ability to exercise the rights granted in this easement to their fullest extent otherwise allowed by law, Consumers agrees that (1) it will not construct any permanent, above-ground structures that are materially closer to Owner's existing tracks than the existing line of poles supporting Consumers' lines of electrical facilities on Owner's Land, without first obtaining Owner's express, written consent; (2) Consumers will only use the portion of the Easement Area that lies between (a) the existing line of poles supporting Consumers' lines of electrical facilities on Owner's Land, and (b) the closest edge of Owner's existing railroad tracks, for temporary above-ground facilities or other non-permanent uses in connection with Consumers' electrical facilities (such as, but not limited to, access, maintenance, inspection, surveying, replacement, reconstruction, improvement, removal, relocation, modification or vegetation management); and (3) so long as any relocation of Consumers' existing above-ground facilities would not violate any law, code or regulation applicable to Consumers' facilities, if Owner has a reasonable need for Consumers to relocate some or all of its facilities to another location within the Easement Area (or another portion of Owner's Land or adjoining property, provided that Owner grants equivalent additional rights to any necessary land outside the Easement Area) to accommodate Owner's existing or actually planned railroad operations (because all other reasonable alternatives have been exhausted), such relocation will be performed at Consumers' cost provided that Owner's work that required the relocation is actually undertaken or performed.

Access: Consumers shall have the right to unimpaired access, to the extent said access does not interfere with the safety of Owner's railroad operations and follows generally accepted safety guidelines for railroad property, to said line or lines, and the right of ingress and egress on, over, and through Owner's Land for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder. Although Consumers reserves the right to install any new structures

that are allowed by this easement, Consumers agrees that it will not erect any fence, barrier or other similar permanent structure that would unreasonably impair Owner's lawful access to or use of the Easement Area.

Trees and Other Vegetation: Owner shall not plant any trees within the Easement Area. Consumers shall have the right from time to time hereafter to enter Owner's Land to trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area. Consumers shall have the right from time to time hereafter to enter Owner's Land to trim, cut down, and otherwise remove and control any trees, brush, or other vegetation located outside of the Easement Area which are of such a height or are of such a species whose mature height that in falling directly to the ground could come into contact with or land directly above Consumers' facilities.

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, or on said Easement Area, whether temporary or permanent, natural or man-made, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned. Notwithstanding the foregoing, Owner may install minor structures related to railroad operations within the Easement Area, provided said structures do not cause Consumers to be in violation of the National Electrical Safety Code as adopted by the Michigan Public Service Commission or any other applicable law, code or regulation, and further provided that said structures do not unreasonably interfere with Consumers' access to its facilities located within the Easement Area. Owner may also install communications facilities (such as wires, cables, antennas or other similar items), which are reasonably necessary for Owner's railroad operations that occur on Owner's Land, on Consumers' poles or pole structures upon execution of Consumers' standard form of attachment or pole-license agreement, or other similar agreement acceptable to Owner and Consumers. If Consumers' then-existing poles, pole structures and/or related facilities would be impaired or interfered with following the addition of Owner's proposed communication facilities, then Owner will only be able to add its communication facilities upon paying for Consumers' actual cost of improving Consumers' facilities as necessary to accommodate Owner's new facilities.

Ground Elevation: Owner shall not materially alter the ground elevation within the Easement Area without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Flagging: Except in case of emergencies or service restoration, Consumers shall notify Owner (in writing to the address above or by phoning (734) 641-2300 or other number provided in writing by Owner) at least 3 business days in advance of the commencement of work activities within the Easement Area, and Owner will then arrange for appropriate flagging services during such activities, at Consumers' expense.

Restoration: Consumers shall reasonably restore disturbed areas of Owner's Land to the condition existing before Consumers' work following completion of work on Owner's Land.

Exercise of Easement: Consumers' nonuse or limited use of this easement shall not preclude Consumers' later use of this easement to its full extent.

Severability: Whenever possible, each provision of this easement shall be interpreted in such a manner as to be effective and valid under applicable law and to provide for the safe and reliable operations of both parties hereto, but if any such provision of this easement is held to be prohibited by or invalid under applicable law or puts either party into a violation under any applicable law, code or regulation, such provision shall be ineffective only to the extent of such prohibition, invalidity, or violation, without invalidating the remainder of such provision or the remaining provisions of this easement; and the parties shall negotiate in good faith to replace such prohibited, invalid, or violated provision with the intent of preserving the original business intent thereof and ensuring the safe and reliable operations of the facilities of both parties hereto.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

Date: _____

Adrian & Blissfield Rail Road Company ("Owner");

By: _____
Its: _____

Acknowledgment

The foregoing instrument was acknowledged before me in _____ County, Michigan,
on _____ by _____
Date Print Name and Title
an authorized representative of Adrian & Blissfield Rail Road Company.

Notary Public

County, Michigan
Acting In _____ County
My Commission expires: _____

Prepared By: Adam C. Smith (P69790)
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Debra Dennis, EP7-473
Business Services
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

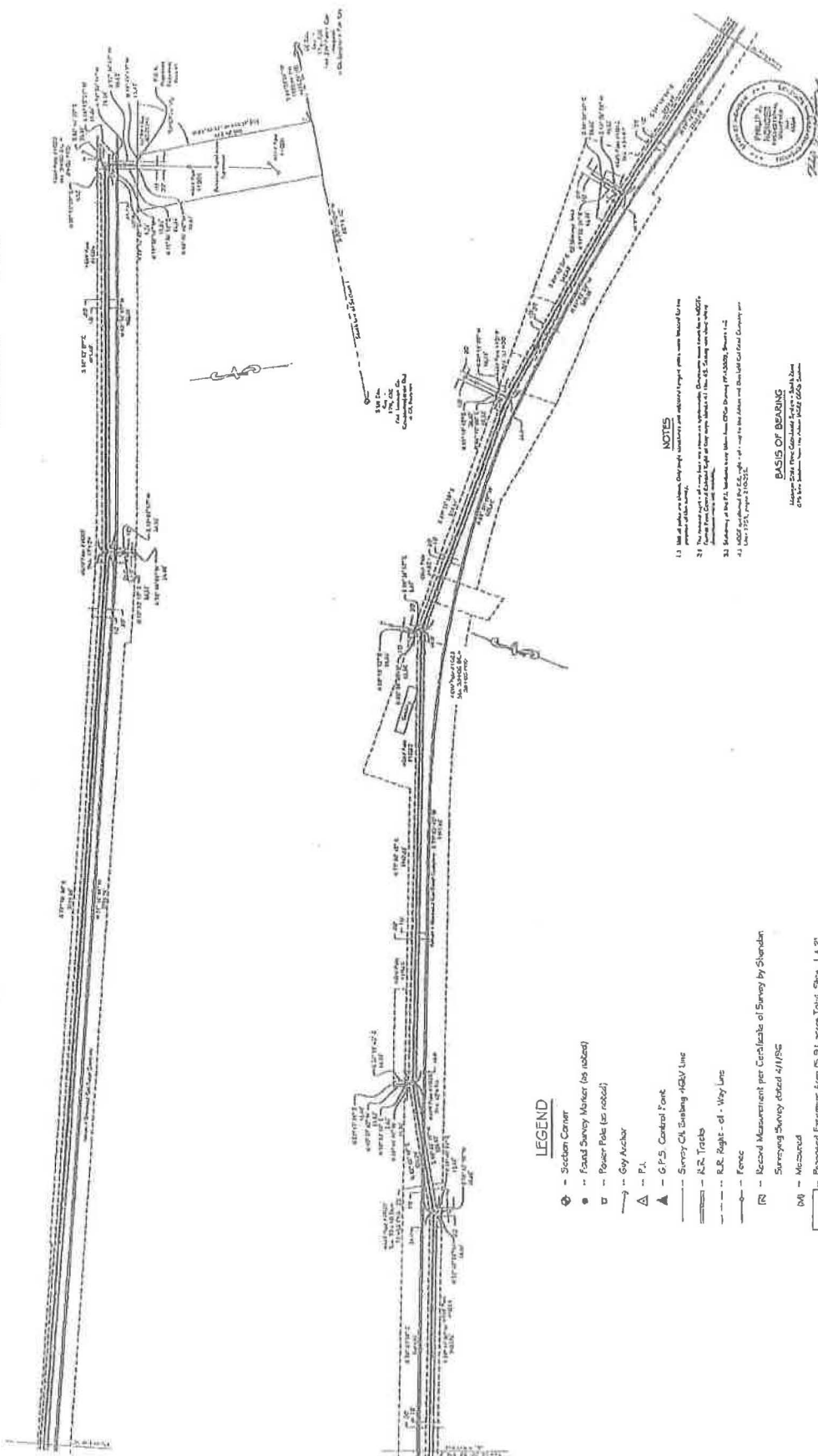
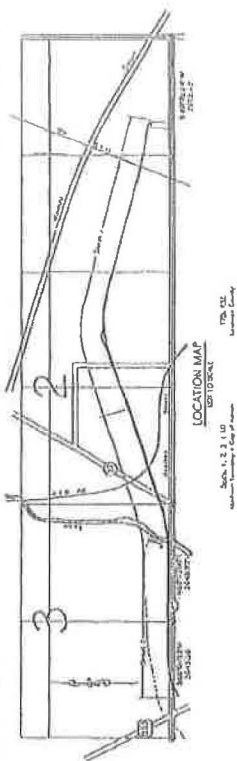
EXHIBIT A

1 of 3

Owner's Land

That part of the railroad right of way, formerly Penn Central and subsequently owned by the Michigan Department of Transportation and transferred to Owner, as located over and across Sections 1, 2, 3, and 10, City of Adrian and Madison Township, Lenawee County, Michigan, as indicated in the area shown as R.R. Right - of - Way Line on the attached drawing.

EXHIBIT A
PAGE 2 OF 3



- NOTES**
1. All measurements are taken from the centerline of the existing road.
 2. The proposed easement is shown in yellow.
 3. The proposed easement is shown in yellow.
 4. The proposed easement is shown in yellow.

BASIS OF BEARING

Magazine State Plane Coordinate System - North Zone
61° True Meridian from the National Grid (NAD 83)

LEGEND

- Section Corner
- Found Survey Marker (as noted)
- Power Pole (as noted)
- Gay Anchor
- P.L.
- G.P.S. Control Point
- Survey CM Existing HGV Line
- R.R. Tracks
- R.R. Right-of-Way Line
- Fence
- Record Measurement per Certificate of Survey by Sherrin
- Surveying Survey dated 4/1/06
- Measured
- Proposed Easement Area (S. 91 across Total, S. 91, 1 & 2)

GRAPHIC SCALE
1" = 100'

Becker - Solway 46KV Survey		775.02		775.02	
Twp 1, 2, 3, 10		775.02		775.02	
Section 1, 2, 3, 10		775.02		775.02	
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EXHIBIT BEasement Area

An area of land located in Sections 1 and 2, Town 7 South, Range 3 East, Madison Township and the City of Adrian, Lenawee County, Michigan, said area described as:

Commencing at the Southeast corner of said Section 1, thence South 88°28'24" West, along the South line of said Section 1, 1939.44 feet; thence North 01°48'17" West 442.97 feet to the Southerly line of the Adrian and Blissfield Rail Road Company right-of-way; thence North 80°45'43" West, along said right-of-way line, 15.42 feet to the POINT of BEGINNING; thence continuing North 80°45'43" West, along said right-of-way line, 20.01 feet; thence North 11°04'15" East 61.38 feet; thence North 78°36'14" West 11.03 feet; thence North 08°12'08" East 9.74 feet; thence North 80°59'57" West 962.59'; thence South 12°02'17" West 64.55 feet to the Southerly line of said railroad right-of-way; thence North 78°56'05" West, along said right-of-way line, 20.00 feet; thence North 12°02'17" East 64.51 feet; thence North 77°10'04" West 2770.78 feet; thence North 81°03'34" West 600.58 feet; thence North 89°51'19" West 632.40 feet; thence South 71°03'43" West 1163.85 feet; thence South 60°43'10" West 330.82 feet; thence South 23°40'04" East 12.66 feet to the Southerly line of said railroad right-of-way; thence South 70°52'18" West, along said right-of-way line, 20.06 feet; thence North 23°40'04" West 10.90 feet; thence South 70°51'30" West 2422.96 feet to a point on the Easterly line of an easement from MDOT to Consumers Energy, recorded in Liber 1560, Page 866; thence North 24°55'00" East, along said Easterly line, 27.83 feet; thence North 70°51'30" East 2411.96 feet; thence North 60°43'10" East 329.79 feet; thence North 24°15'43" West 11.05 feet to the Northerly line of said railroad right-of-way; thence North 70°52'18" East, along said right-of-way line, 2.04 feet to the Westerly line of said railroad right-of-way; thence North 19°07'42" West, along said Westerly line, 29.02' to the Northerly line of said railroad right-of-way; thence North 69°17'21" East, along said right-of-way line, 15.40 feet; thence South 24°15'43" East 38.70 feet; thence North 71°03'43" East 1147.29 feet; thence North 09°38'52" West 12.36 feet to the Northerly line of said railroad right-of-way; thence North 89°18'12" East, along said right-of-way line, 20.25 feet; thence South 09°38'52" East 8.47 feet; thence South 89°51'19" East 619.61 feet; thence North 04°15'00" East 17.53 feet to the Northerly line of said railroad right-of-way; thence North 89°18'12" East, along said Northerly line 20.07 feet; thence South 04°15'00" West 19.35 feet; thence South 81°03'34" East 582.90 feet; thence North 11°25'28" East 49.78 feet; thence South 78°34'32" East 20.00 feet; thence South 11°25'28" West 49.60 feet; thence South 77°10'04" East 2770.89 feet; thence South 80°59'57" East 971.46 feet; thence North 08°12'08" East 9.02 feet to the Northerly line of said railroad right-of-way; thence South 80°44'29" East 95.83 feet; thence South 56°15'27" West 59.64 feet; thence North 78°36'14" West 20.50 feet; thence South 11°04'15" West 60.63 feet to the POINT of BEGINNING. Said area containing 4.28 acres.

An area of land located in Sections 3 and 10, Town 7 South, Range 3 East, Madison Township and the City of Adrian, Lenawee County, Michigan, said area described as:

Commencing at the Southeast corner of said Section 3, thence South 88°29'00" West, along the South line of said Section, 319.49 feet; thence North 01°31'00" West, perpendicular to said South line, 117.13 feet to a point on the Westerly line of an easement from MDOT to Consumers Energy, recorded in Liber 1560, Page 866 and the POINT of BEGINNING; thence South 77°35'14" West 364.13 feet to a point on the Southerly line of the Adrian and Blissfield Rail Road Company right-of-way; thence along said Southerly right-of-way line, 148.69 feet along the arc of a curve to the right, said curve having a delta angle of 2°29'42", a radius of 3414.33 feet, and chord length of 148.68 feet bearing South 82°34'36" West; thence continuing along said right-of-way line the following three (3) courses; South 88°29'00" West 1816.01 feet; thence South 88°04'52" West 1107.86 feet to the Southerly right-of-way line of said railroad; thence along said Southerly right-of-way line, 17.20 feet along the arc of a curve to the left, said curve having a delta angle of 0°24'57", a radius of 2370.00 feet, and chord length of 17.20 feet bearing South 79°06'09" West; thence South 88°15'26" West 169.43 feet; thence South 71°50'03" West 295.71 feet; thence South 12°31'52" East 75.29 feet to the Southerly line of said railroad right-of-way; thence along said Southerly right-of-way line, 20.35 feet along the arc of a curve to the left, said curve having a delta angle of 0°30'05", a radius of 2325.64 feet, and chord length of 20.35 feet bearing South 66°45'26" West; thence North 12°31'52" West 80.14 feet; thence South 88°29'37" West 56.20 feet to the Northerly line of said railroad right-of-way; thence along said Northerly right-of-way line, 52.86 feet along the arc of a curve to the right, said curve having a delta angle of 1°14'55", a radius of 2425.64 feet, and chord length of 52.86 feet bearing North 66°15'35" East; thence North 88°29'37" East 14.90 feet; thence North 71°50'03" East 305.36 feet; thence North 88°15'26" East 8.17 feet to the Easterly right-of-way line of Highway M-34 (Madison Street);

thence South $01^{\circ}55'08''$ East, along said Easterly line, 7.47 feet to the Northerly line of said railroad right-of-way; thence along said Northerly right-of-way line, 32.55 feet along the arc of a curve to the right, said curve having a delta angle of $0^{\circ}46'31''$, a radius of 2405.64 feet, and chord length of 32.55 feet bearing North $74^{\circ}59'14''$ East; thence North $88^{\circ}15'26''$ East 3146.69 feet; thence North $77^{\circ}35'14''$ East 439.87 feet to a point Westerly line of the aforementioned easement from MDOT to Consumers Energy; thence South $01^{\circ}59'56''$ East, along said Westerly line, 20.33 feet to the POINT of BEGINNING. Said area containing 1.63 acres.