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February 23, 2001

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

RE: MPSC Case Nos. U-12762 (e-file), U-12766 (e-file); Response of Michigan Consolidated Gas Company to Motion to Dismiss Applications

Dear Ms. Wideman:

Enclosed for filing in the referenced matter, please find the original and 5 copies of the Response of Michigan Consolidated Gas Company (MichCon) to the Residential Ratepayer Consortium's Motion to Dismiss MichCon's applications in the referenced cases.

Please acknowledge receipt of this filing by date-stamping the additional copy provided and returning it to MichCon in the enclosed, self-addressed envelope.

Should you have any questions regarding this filing or require additional information, please do not hesitate to contact me. Your attention to this matter is appreciated.

Very truly yours,

David C. Champion

DCC

Enclosures

c: Counsel of Record

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of Michigan Consolidated Gas Company to terminate the suspension of its Gas Cost Recovery Clause and establish a cashout mechanism.	)	Case No. U-12762 (e-file)
In the matter of the application of Michigan Consolidated Gas Company for approval of Gas Cost Recovery plan, 5-year forecast and monthly GCR factor for the period April 1 to December 31, 2001.	)	Case No. U-12766 (e-file)

Response of
Michigan Consolidated Gas Company
To the Residential Ratepayer Consortium's
Motion to Dismiss Applications

Pursuant to Rule 335(3) of the Commission's Rules of Practice and Procedure, R 460.17335(3), Michigan Consolidated Gas Company (MichCon) hereby responds to the Motion to Dismiss the captioned applications filed February 16, 2001 by the Residential Ratepayer Consortium (RRC).

I. Introduction

The RRC asks the Commission to dismiss that portion of MichCon's application in Case No. U-12762 addressing MichCon's intent to file its gas cost recovery (GCR) Plan case in Case No. U-12766. The RRC also seeks dismissal of MichCon's GCR Plan, Case No. U-12766. The RRC claims that in each case there is no genuine issue of material fact, and that MichCon has failed to state a claim upon which relief can be granted (Motion at 2.) Based on these claims the RRC argues that summary disposition is appropriate under the statutory requirements of 1982 PA 304, MCL 460.6h, MSA 22.13(6h) (Act 304).

The RRC's motion is based on its argument that Act 304's explicit references to a 12-month plan period and a 5-year forecast require dismissal of Case No. U-12766, and the related reference to that case in the application in Case No. U-12762[1]. According to the RRC, MichCon's proposed nine-month GCR Plan and related forecast do no meet the time periods identified in Act 304 and dismissal is therefore required because these cases present no genuine issue of material fact and MichCon has failed to state a claim upon which relief can be granted.

II. <u>The RRC's Motion Should Be Denied</u>.

MichCon's application and testimony in Case No. U-12762 address, among other things, MichCon's proposals to terminate the suspension of MichCon's GCR Clause and to return to the GCR process by implementing GCR factors for the nine-month period beginning April 1 2001 and ending December 31, 2001. Thus, the issues before the Commission in these cases include the question whether, if its GCR Clause suspension is terminated, MichCon should be permitted to implement GCR factors during the period April 1, 2001 through December 31, 2001 in order to make the transition away from its currently effective experimental rates and back to its calendar year GCR cycle.

In *Attorney General v. Public Service Comm.*, 231 Mich.App.76, 310 NW2d, the Michigan Court of Appeals found that the Commission was empowered to specify procedures for suspension of the PSCR clause it implemented for Northern States Power (Northern) under Act 304. Similarly, in *Attorney General v. Public Service Comm.*, Docket No. 207491, May 21,

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[1] Paragraph 7 of the Application filed in Case No. U-12762 states:

> "Coincident with its return to the GCR process effective April 1, 2001, MichCon proposes a one-time, nine-month GCR plan period starting April 1, 2001 and ending December 31, 2001. This "stub" plan period, and a corresponding nine-month GCR reconciliation, will permit MichCon to return to the calendar year GCR process in effect prior to the suspension of MichCon's GCR clause. MichCon proposes to submit an Act 304 filing no later than December 19, 2000, requesting that the Commission approve a new GCR factor for MichCon and specify April through December 2001 as the period to which MichCon's GCR factor will apply."

1999 (unpublished, opinion attached hereto), the Court upheld a subsequent Commission order reinstating Northern's PSCR clause and directing Northern to file a PSCR Plan. MichCon submits that these cases stand for the proposition that the Commission has the power to approve the nine-month GCR period necessary to return MichCon to the calendar year GCR cycle it used before its GCR clause was suspended.

The language of Act 304 provides further evidence of the Commission's authority. Section 3 of Act 304 expressly provides that a utility's GCR plan is to be filed pursuant to procedures "... established by the Commission ...". Further, the factors requested by a utility are to be implemented during a future period " ... specified by the commission ... ". MichCon has requested authority to implement GCR factors over a future nine-month period. If, as the RRC claims, the Commission is constrained by Act 304 to specify a future 12-month period, the Commission can so conclude in its order in Case No. U-12762.

Citing case law to the effect that judicial construction of an unambiguous statute is impermissible (Motion at 4), the RRC argues that the Commission must reach just such a conclusion based on the plain language of Act 304. MichCon disagrees. Were Act 304 as clear and unambiguous as the RRC claims the Commission simply would not have accepted these cases. For instance, Act 304 contains no language authorizing the Commission to suspend a gas cost recovery clause. Yet, as noted above, the Court of Appeals found such authority to exist by implication in Act 304. *Attorney General, supra*. Furthermore, it was the Commission's exercise of its implied authority under Act 304 that resulted in the GCR suspension MichCon seeks to terminate in Case No. U-12762. Accordingly, here, as was the case in *Attorney General, supra,* the Commission will determine the extent of its authority under Act 304 and rule accordingly. If, as the RRC suggests, the Commission must specify a 12-month period, then the

Commission can, if it so chooses, grant MichCon's application in Case No. U-12762 and specify April 1, 2001 through March 31, 2002 as the period during which MichCon is authorized to charge a GCR factor.[2]

Whatever the RRC's views of the facts or law, it must be recognized that the Commission will render a decision that addresses those questions in these cases. MichCon's proposal to implement GCR factors for the nine-month period ending December 31, 2000 is identified in its application in Case No. U-12762, is mentioned in the testimony of MichCon witness Don M. Stanczak in that case, and is more fully described in the testimony filed in support of MichCon's GCR Plan case application in Case No. U-12766. Pursuant to the Commission's directive[3] that Reply Briefs in Case No. U-12762 be filed by March 9, 2001, the ALJ has placed those proceedings on an expedited schedule. Extensive discovery has already been conducted and an evidentiary hearing has already been held. Initial Briefs are due Friday, March 2, 2001 with Reply Briefs following a week thereafter. The Commission will read the record and is expected to issue its order by April 1, 2001. There is simply no basis for dismissal of either case, or a discrete portion of Case No. U-12762, at this juncture. The RRC's motion to dismiss should be denied.

III. <u>If Not Denied the RRC's Motion in Case No. U-12766 Should Be Deferred</u>

As MichCon argued in response to a prior motion to dismiss Case No. U-12766, the purpose of that proceeding is to, among other things, establish a maximum Gas Cost Recovery (GCR) factor for the nine-month period from April 1 through December 31, 2001. As MichCon

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[2] If, in its order in Case No. U-12762, the Commission specifies a future 12-month period ending March 31, 2001, it should also specify that the reconciliation process be bifurcated to permit accurate accounting for those gas costs incurred during calendar year 2001, and gas costs incurred during the first quarter of 2002.

[3] Case No. U-12762, Notice of Hearing, dated December 20, 2000.

witness Ms. Schmidt states in her testimony in that case, the nine-month period is proposed by MichCon as a transitional step away from the current fixed gas cost pricing in place under MichCon's experimental gas customer choice program and toward the traditional calendar year GCR process previously employed by MichCon. The implementation of a maximum GCR factor for the period April – December 2001 is, as Ms. Schmidt discusses, subject to the Commission's determination on MichCon's application in MPSC Case No. U-12762, where MichCon proposes termination of the GCR suspension and implementation of GCR factors for the nine-month period ending December 31, 2001.

As discussed in the preceding section of this Response, the proceedings in Case No. U-12762 are already well underway, and are following an expedited schedule intended to permit the issuance of a final Commission order on or about April 1, 2001. It makes no sense to summarily dispose of Case No. U-12766 now, when an order in Case No. U-12762 regarding the lifting of the GCR suspension and implementation of GCR factors for nine months has not yet been issued. If the Commission approves MichCon's application in Case No. U-12762, expeditious adjudication of Case No. U-12766 is essential to ensure that new GCR factors can be timely approved and implemented. It would be a waste of the Commission's and the parties' time and resources to dismiss Case No. U-12766 now, only to have it refiled if the Commission grants the relief requested in Case No. U-12762.

The presiding Administrative Law Judge (ALJ) has already recognized the linkage between the outcome of Case No. U-12762 and the processing of Case No. U-12766:

> " . . . I don't believe that procedurally it makes sense to dismiss this case [U-12766] at this time. I think that doing so prior to the completion of U-12762 would only result in MichCon having to refile its application if the Commission ultimately decides in that case to approve the early lifting of the GCR suspension. And I note that the Commission is expected to

> make that decision by April 1st. Case No. U-12766, Transcript of Prehearing Conference, at 19.

The ALJ's ruling in response to a prior Motion to Dismiss Case No. U-12766 should apply with equal force to the RRC's Motion to Dismiss. The issues raised by the RRC are squarely before the Commission in Case No. U-12762 and a determination on the RRC's Motion should await the outcome of that case.

Conclusion

Based on the foregoing, MichCon respectfully requests that the RRC's Motion to Dismiss a portion of the Application of Michigan Consolidated Gas Company in Case Nos. U-12762 and the Application of Michigan Consolidated Gas Company in Case No. U-12766 be denied.

Respectfully submitted,

Michigan Consolidated Gas Company

By ______________________
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Richard Middleton
Dennis O'Connell
500 Griswold
Detroit, MI 48226

Its Attorneys

Dated: February 23, 2001

STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and NORTHERN STATES POWER COMPANY,

Defendants-Appellees.

UNPUBLISHED
May 21, 1999

No. 207491
Public Service Commission
LC No. 11472

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

The Attorney General appeals as of right the August 25, 1997 order of the PSC reinstating Northern States Power Company's suspended Power Supply Cost Recovery (PSCR) clause without holding a contested case proceeding. We affirm.

In anticipation of a merger with Wisconsin Electric Power Company, Northern States Power requested and received authorization from the PSC to suspend its PSCR clause from January 1, 1997 to December 31, 2000. Plaintiff appealed that order, claiming that the suspension should only be granted after notice and hearing. This Court affirmed the decision of the PSC, finding that a contested case hearing was not required where the suspension would not result in an increase in costs to customers. *Attorney General v PSC*, 231 Mich App 76; 585 NW2d 310 (1998).

When the merger plans were abandoned, Northern States applied to the PSC to reinstate the PSCR clause. Without holding a contested case hearing, the PSC issued an order reinstating the PSCR clause effective January 1, 1998, and directing Northern States to file a PSCR plan. The Attorney General asserts that the PSC order was unlawful and unreasonable.

Our review of a PSC order is limited. An aggrieved party bears the burden of proving by clear and convincing evidence that the order appealed from is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). An order is unlawful if it is based on an erroneous interpretation or application of the law, and it is unreasonable if it is not supported by the evidence. *ABATE v Public Service Comm*, 219 Mich App 653, 659; 557 NW2d 918 (1996). A reviewing court must give due deference to the administrative expertise of the PSC and may not substitute its judgment for that of the agency. *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666; 523 NW2d 483 (1994). A statute that grants power to an administrative agency is to be strictly construed. *Attorney General v PSC, supra*, 78.

The PSC found that no contested case hearing was required because the order reinstating the PSCR clause would not result in an increase in rates. There would be no rate change until after a hearing was held on the annual PSCR case. A hearing was not required under MCL 460.6j(2); MSA 22.13(6j)(2) because the order did not implement a new PSCR clause, it merely reinstated the suspended clause, on which a hearing had been held.

Plaintiff has failed to show that the PSC decision is unlawful or unreasonable. MCL 460.61(1); MSA 22.13(6a)(1) provides in part: "An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the costs of service to its customers may be authorized and approved without notice or hearing." This later, more specific provision overrides the general hearing requirement of MCL 462.24; MSA 22.43. *Irons v 61st Judicial District Court Employees Chapter of Local No 1645, Michigan Council 25, AFSCME, AFL-CIO*, 139 Mich App 313, 321; 362 NW2d 262 (1984).

Plaintiff failed to present clear and satisfactory evidence that an increase in costs will result from the order. As the PSC noted, there would be no actual change in the cost of service to customers until a contested case hearing was held on the utility's annual PSCR plan. The PSC could approve the application of Northern States without notice or a hearing under MCL 460.6a(1); MSA 22.13(6a)(1).

Plaintiff also argues that MCL 462.6j(2); MSA 22.13(6j)(2) mandates that a contested case hearing be held prior to the implementation of the PSCR clause. We agree with the commission's conclusion that the original 1986 hearing was sufficient to satisfy this provision. Once the initial hearing was held, the PSCR clause was included in the utility's rates. It was unnecessary to hold another hearing where the PSCR clause was only temporarily suspended, and not terminated. *Attorney General v PSC, supra*.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Harold Hood

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of Michigan Consolidated Gas Company to terminate the suspension of its Gas Cost Recovery Clause and establish a cashout mechanism.)	Case No. U-12762 (e-file)
In the matter of the application of Michigan Consolidated Gas Company for approval of Gas Cost Recovery plan, 5-year forecast and monthly GCR factor for the period April 1 to December 31, 2001.)	Case No. U-12766 (e-file)

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the Response of Michigan Consolidated Gas Company to the Residential Ratepayer Consortium's Motion To Dismiss Applications to be served upon all counsel of record in this case by electronic mail.

David C. Champion

Dated: February 23, 2001