S T A T E  O F  M I C H I G A N

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 | ) | Case No. U-12762 |
| Clause and establish a cashout mechanism | ) | |
| ______________________________________ | ) | |

**INITIAL BRIEF**

**OF THE RESIDENTIAL RATEPAYER CONSORTIUM**

March 2, 2001

By: David L. Shaltz (P29330)
Its Attorney

Shaltz & Royal P.C.
3303 West Saginaw
Suite C-1
Lansing, MI 48917
(517) 321-7722

## TABLE OF CONTENTS

## I. THE MICHIGAN PUBLIC SERVICE COMMISSION HAS NO POWER TO APPROVE MICHCON'S REQUEST FOR A 9-MONTH GCR PLAN PERIOD.

The December 15, 2000 Application of Michigan Consolidated Gas Company (MichCon of the Company) in this case seeks approval of a one-time, nine-month GCR plan period starting April 1, 2001[1].

In anticipation of the Commission's approval of this request, MichCon filed on December 21, 2000 its Application, testimony and exhibits in Case No. U-12766. That filing covers a nine-month GCR plan period starting April 1, 2001 and proposes GCR factors for that nine-month period. It also includes a forecast of gas requirements of its customers, its anticipated sources of supply and projections of gas costs for the four-year, nine-month period starting April 1, 2001. Yet nowhere in its Application, testimony and exhibits in Case No. U-12762 does MichCon state that it is seeking approval of a one-time GCR forecast period covering four years and nine months.

As discussed more fully below, it is the RRC's position that MichCon's Application in this case should be rejected because it violates the explicit and unambiguous requirements in 1982 PA 304 that a GCR plan and factors must cover a 12-month period and that a forecast of gas requirements of its customers, its anticipated sources of supply and projections of gas costs must cover a period of 5 years.

### A. The Requirement That A GCR Plan Cover a 12-Month Period

MCL 460.6h(3) states:

---

[1] *See* Paragraph 7. on pages 3-4 of the Application and Paragraph C. on page 6 of the Application.

"In order to implement the gas cost recovery clause established pursuant to subsection (2), a utility annually shall file, pursuant to procedures established by the commission, if any, a complete gas cost recovery plan describing the expected sources and volumes of its gas supply and changes in the cost of gas anticipated over a future **12-month period** specified by the commission and requesting for each of those **12 months** a specific gas cost recovery factor. " (Emphasis added).

MCL 460.6h(3) further requires that:

"The plan shall be filed not less than 3 months before the beginning of **the 12-month period covered by the plan**. The plan shall describe all major contracts and gas supply arrangements entered into by the utility for obtaining gas during **the specified 12-month period.**" (Emphasis added).

MCL 460.6h(6) states:

"The commission shall approve, reject, or amend **the 12 monthly gas cost recovery factors** requested by the gas utility in its gas cost recovery plan." (Emphasis added).

MCL 460.6h(10) covers revised gas cost recovery plans. It says:

"Not less than 3 months before the beginning of the third quarter of **the 12-month period**, the utility may file a revised gas cost recovery plan which shall cover the remainder of **the 12-month period** . . . In addition, the commission may reopen the gas supply and cost review on its own motion or on the showing of good cause by any party if at least 6 months have elapsed since the utility submitted its complete filing and if there are at least 600 days remaining in **the 12-month period** under consideration." (Emphasis added).

MCL 460.6h(14) addresses gas cost reconciliations. It states, in pertinent part:

"For excess costs incurred through actions contrary to the commission's gas supply and cost review order, the commission shall authorize a utility to recover costs incurred for gas sold in **the 12-month period** in excess of the amount recovered over the period. . . For excess costs incurred through actions consistent with the commission's gas supply and cost review order, the commission shall authorize a utility to recover costs incurred for gas sold in **the 12-month period** in excess of the amount recovered over the period . . . " (Emphasis added).

***No less than 10 times,*** Section 6h of 1982 PA 304 sets forth the requirement that a gas utility's GCR plan and factors must cover a 12-month period.

In *In re MCI Telecommunications Complaint*, 596 NW2d 164, 174, 460 Mich 396, 411 (1999), the Michigan Supreme Court said:

> "The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 212, 501 NW 2d 76 (1993). The first step in that determination is to review the language of the statue itself. *House Speaker v State Administrative Board*, 441 Mich 547, 567, 495 NW 2d 539 (1993). If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *Lorencz v Ford Motor Co.*, 439 Mich 370, 376, 483 NW2d 844 (1992)".

Section 6h of 1982 PA 304 is unambiguous on its face. No interpretation of Section 6h that would change the requirement that a gas utility's GCR plan and factors must cover a 12-month period is permissible. While the Michigan Public Service Commission has broad jurisdiction over MichCon's gas business, it does not have the authority to modify or waive this explicit statutory requirement.

That part of MichCon's application in Case No. U-12762 which seeks approval of a one-time, nine-month GCR Plan period does not satisfy Act 304's requirement that a gas utility's GCR plan and factors cover a 12-month period. Nowhere in 1982 PA 304 is there authorization for the Commission to approve a GCR plan and factors for a period less than 12 months, as proposed by MichCon in its application. MCL 460.6h(5) states that:

> "If a utility files a gas cost recovery plan . . . as provided in subsection (3) . . . , the commission shall conduct a proceeding, to be known as a gas supply and cost review . . . "

MichCon's gas cost recovery plan does not satisfy the requirement in subsection (3)[2] that a gas cost recovery plan cover a future 12-month period. Therefore, that part of MichCon's Application in Case No. U-12762 that seeks approval of a 9-month GCR plan period must be rejected by the Commission.

**B. The Requirement That A Forecast Cover a 5-Year Period**

The Application, testimony and exhibits MichCon has filed in Case No. U-12766 in anticipation of the Commission's approval of the Application in this case shows that the Company's forecast of the gas requirements of its customers, its anticipated sources of supply, and projections of gas costs covers a four-year, nine-month period[3].

MCL 460.6h(4) states:

> "In order to implement the gas cost recovery clause established pursuant to subsection (2), a gas utility shall file, contemporaneously with the gas cost recovery plan described in subsection (3), **a 5-year forecast** of the gas requirements of its customers, its anticipated sources of supply, and projections of gas costs." (Emphasis added).

MCL 460.6h(5) states:

---

[2] MCL 460.6h(3).

[3] The testimony of George H. Chapel, attached to MichCon's December 21, 2000 Application, states:

> "My testimony will address MichCon's natural gas supply plan over the next five years ("the Plan"), April 2001 through December 2005 ("the Plan Period")."
> Page GHC-2, Lines 9-10.

Mr. Chapel's proposed Exhibits A-___(GHC-1), A-___(GHC-2), A- ___ (GHC-3), and A-___(GHC-4) all cover the period April 2001 through December 2005. The period covered by MichCon's 5-year forecast is 4 years, 9 months -- not 5 years.

> "If a utility files a gas cost recovery plan and **5-year forecast** as provided in subsections (3) and (4), the commission shall conduct a proceeding to be known as a gas supply cost review . . . " (Emphasis added).

MCL 460.6h(7) requires the Commission to:

> ". . . evaluate the decisions underlying **the 5-year forecast** filed by a gas utility pursuant to subsection (4)" and to "indicate any cost items in **the 5-year forecast** that on the basis of current evidence, the commission would be unlikely to permit the gas utility to recover from its customers in rates, rate schedules, or gas cost recovery factors established in the future." (Emphasis added).

***No less than 4 times*** Section 6h of 1982 PA 304 sets forth the requirement that a gas utility's forecast of customer requirements, anticipated sources of supply and projections of costs must cover a 5-year period. Section 6h of 1982 PA 304 is unambiguous on its face. For the reasons stated by the Michigan Supreme Court in *In re MCI Telecommunications Complaint*, *supra*, no interpretation of Section 6h that would change the requirement that a gas utility's forecast must cover a 5-year period is permissible. While the Michigan Public Service Commission has broad jurisdiction over MichCon's gas business, it does not have the authority to modify or waive this explicit statutory requirement.

MichCon's Application, testimony and exhibits in Case No. U-12766 do not satisfy Act 304's requirement that a gas forecast of customer requirements, anticipated sources of supply and projections of costs cover a 5-year period.

As stated above, MichCon's Application in Case No. U-12762 does not request a one-time shortening of the 5-year forecast period to four years, nine months. However, the Company's Application, testimony and exhibits in Case No. U-12766 show that MichCon expects that the MPSC's approval of its Application in Case No. U-12762 will amount to implicit approval of a shortened forecast period. Nowhere in 1982 PA 304 is there authorization for the Commission to evaluate a gas utility's forecast of customer requirements, anticipated sources of supply and projections of costs that covers a period less than 5 years, as proposed by MichCon in its Application in Case No. U-12766. MCL 460.6h(5) states, in pertinent part, that:

> "If a utility files a . . . 5-year forecast . . . as provided in subsection (4) . . . , the commission shall conduct a proceeding, to be known as a gas supply and cost review . . ."

MichCon's filed forecast does not satisfy the requirement in subsection (4)[4] that a forecast of customer requirements, anticipated sources of supply and projections of costs cover a 5-year period. That part of MichCon's Application in Case No. U-12762 that implicitly seeks a shortening of the 5-year forecast requirement should be rejected by the Commission.

**C. The Commission Has No Implicit Power to Waive or Modify The Explicit, Unambiguous and Mandatory Requirements Set Forth in 1982 PA 304.**

In the Michigan Court of Appeals decisions in *Attorney General v Public Service Commission*, 231 MichApp 76, 585 NW2d 310 (1998) and *Attorney General v Public Service Commission*, Docket No. 207491, May 21, 1999 the Court of Appeals found that, though 1982 PA 304 is silent on the Commission's authority to suspend and reinstate a PSCR clause, the Commission has the *implicit* power to do so based on the MPSC's explicit statutory authority to incorporate a PSCR Clause in a utility's rate schedules. Those cases lend support to that part of MichCon's Application in Case No. U-12762 which seeks "Lifting the suspension of MichCon's GCR Clause

[4] MCL 460.6h(4).

effective April 1, 2001"[5], but they are ***not*** applicable to MichCon's separate request that the Commission approve a one-time, nine-month GCR plan period starting April 1, 2001[6]. Unlike the absence of statutory language governing the Commission's power to suspend or reinstate a PSCR clause, MCL 460.6h(3), (6), (10) and (14) set forth the explicit statutory requirement that a GCR plan and factors cover a 12-month period. The MPSC has no power, implicit or otherwise, to waive or modify that unambiguous requirement. In the first *Attorney General v Public Service Commission* case cited above the court said:

> "A statute that grants power to an administrative agency is to be strictly construed."[7]

MCL 460.6h(3) does state that a utility's GCR plan is to be filed pursuant to procedures "established by the Commission". The MPSC's power to establish filing procedures is circumscribed by the statutory requirement that a GCR plan must describe:

> ". . . the expected sources and volumes of its gas supply and changes in the cost of gas anticipated **over a future 12-month period** . . . " (Emphasis added).

MCL 460.6h(3) also gives the Commission the power to specify the GCR plan period. That power is circumscribed by the statutory requirement that it be "a future 12-month period".

MCL 460.6h(3), (6), (10) and (14) are clear and unambiguous. A GCR plan period must cover a 12-month period, no less. The MPSC has no authority to waive or modify that statutory

---

[5] *See* Page 3, Paragraph 6. and Page 6. , Paragraph B. of MichCon's December 15, 2000 Application in Case No. U-12762.

[6] See Pages 3-4, Paragraph 7, and Page 6., Paragraph C. of MichCon's December 15, 2000 Application in Case No. U-12762.

[7] 585 NW2d 310 at 312, citing *Miller Bros. v Public Service Commission*, 180 MichApp 227, 232, 446 NW2d 640 (1980).

requirement. MichCon's Application seeks a nine-month GCR plan period. The MPSC has no authority, explicit or implicit, to approve that request.

**D. MichCon Chose To Ignore The Requirements Of MCL 460.6h et seq.**

Subsections (3) and (4) of MCL 460.6(h) put MichCon on notice that, in order toimplement its gas cost recovery clause:

< the utility's gas cost recovery plan and factors must cover a 12-month period; and

< the utility's forecast of customer requirements, anticipated sources of supply and projections of costs must cover a 5-year period; and

< The gas cost recovery plan "shall be filed not less than 3 months before the beginning of the 12-month period covered by the plan".

In 2000, MichCon's GCR Clause was suspended. According to Exhibit A-1, the Company knew as early as June 2000 that actual NYMEX 3-day average prices for natural gas had increased significantly[8]. The Company also knew that, in order to file a gas cost recovery plan that complied with the requirements of 1982 PA 304, it would need to file it no less than 3 months before the month that it would seek to reinstate its GCR Clause. Knowing this, MichCon had at least two choices:

< File in late September 2000 a gas cost recovery plan for the 12-month period starting January 1, 2001, concurrent with an application to reinstate its GCR Clause[9] on January 1, 2001; ***or***

---

[8] Compared to MichCon's $2.95/Mcf gas commodity rate, the actual NYMEX 3-day average prices were: June - $4.24; July - $4.54; August - $3.75; September - $4.64. These price increases should have informed MichCon's decision making and enabled it to file a timely request for a 12-month GCR plan starting January 1, 2001.

[9] Prior to the suspension of its GCR Clause on January 1, 1999, MichCon's GCR plans were on a January-December cycle.

< File in December 2000 (as the Company did), make its gas cost recovery plan effective on April 1, 2001 and make its GCR plan cover the 12-month period April 2001- March 2002 concurrent with an application to reinstate its GCR Clause on April 1, 2001[10].

Either of these choices would have satisfied the requirements of 1982 PA 304.

MichCon made a different choice. The Company: (1) waited until December 2000 to make a filing, (2) filed an application seeking to shorten the 2001 GCR plan period to 9 months, (3) filed a gas cost recovery plan that covers only 9 months, in violation of the plain requirement in MCL 460.6h(3) that a gas cost recovery plan cover a 12-month period, and (4) filed a forecast of customer requirements, anticipated sources of supply and projections of costs that covers only 4 years, 9 months, in violation of the plain requirement of MCL 460.6h(4) that such a forecast must cover a 5-year period.

The Company failed to exercise its available, lawful remedies in a timely manner. Instead, it is asking this Commission to grant it unlawful relief that violates the clear and unambiguous language in section 6h of 1982 PA 304. Under these circumstances, the Commission should reject MichCon's request.

The Commission should also reject any invitation on MichCon's part to remedy the Company's errors by issuing an order that specifies April 1, 2001 through March 30, 2002 as MichCon's new GCR plan period. MichCon did not seek that relief in its Application in this case. The public has been provided no notice that a subject of this proceeding is the shifting of MichCon's GCR plan period. Moreover, shifting MichCon's GCR plan period at this point provides the Company no real relief because it is too late for the Company to file a GCR plan and factors that satisfy the requirements in

[10] The filing to reinstate the GCR Clause might also include a request to change MichCon's GCR cycle to April-March (the same GCR cycle used by Consumers Energy Company).

MCL 460.6h(3). The filing MichCon has made in Case No. U-12766 is deficient because the GCR plan period it covers ends on December 31, 2000, not March 30, 2002. The GCR factors it requests are for March - December 2000. There are none for January - March 2001. The forecast of the gas requirements of its customers, its anticipated sources of supply, and projections of gas costs does not cover the entire 5-year period starting April 1, 2001.

For all these reasons, the Commission should reject MichCon's request for a one-time, nine-month GCR plan period.

## II. MICHCON'S REQUEST TO ELIMINATE THE FIXED $2.95 PER MCF GAS COMMODITY RATE BREAKS THE PROMISES MADE TO THE COMPANY'S SALES CUSTOMERS AND THE GAS CUSTOMER CHOICE CUSTOMERS.

On page 6, paragraph A. of MichCon's Application in Case No. U-12762, the Company asks the MPSC to issue an Order:

> "Eliminating the fixed $2.95 per Mcf natural gas commodity component from base rates effective March 31, 2001."

The Commission should deny this request because it violates explicit, unambiguous promises made by MichCon in its Application in Case No. U-11682 and the terms of the Commission's order in that docket. Sales customers relied on MichCon's promises to inform their decision to retain the Company as their natural gas supplier. Gas customer choice customers relied on MichCon's representations to secure alternative gas supply arrangements. As will be shown, MichCon's proposal to end the $2.95/Mcf gas commodity rate harms both customer groups.

### A. MichCon's Proposal Violates Explicit, Unambiguous Promises the Company Made In Its Application in Case No. U-11682.

In its April 21, 1998 Application in Case No. U-11682, MichCon made the following representations to the Michigan Public Service Commission:

> "20. Although the Company has been successfully providing reliable gas service at a reasonable cost in a volatile marketplace, it is prepared to assure its customers a more stable gas cost charge ***during the three years covered by the proposed Plan***. The Company proposes to suspend its GCR Clause during the three-year experimental program and fix its gas commodity rate at $2.95 per Mcf for customers who choose to remain as full sales customers of MichCon." Page 13. (Emphasis added).
>
> "21. In proposing a fixed gas commodity rate of $2.95 per Mcf, MichCon recognizes that it will also assume significant risks." Page 13.
>
> "22. ...Under the Plan's fixed gas rate proposal, MichCon is at risk for ***all*** gas commodity costs during the three-year experimental program." Pages 14-15. (Emphasis added).
>
> "25. As discussed earlier, by proposing a fixed gas commodity rate that is among the lowest in the Midwest Region (Ohio, Michigan, Indiana, Illinois, Wisconsin, and Minnesota), MichCon will be exposed to considerable risks previously mitigated by the GCR process. Specifically, a fixed gas commodity rate of $2.95 per Mcf shifts the risk of volatile natural gas prices from its sales customers to MichCon. ***The Company will not increase charges for gas even if the natural gas marketplace supports significantly higher gas prices. Accordingly, it is appropriate that MichCon bear the risk of its gas procurement strategies and be directly affected by the benefit/shortfall attributable to the sale of gas at the proposed fixed rate***."
> Pages 16-17. (Emphasis added).

These excerpts from the Application in Case No. U-11682 are unambiguous. The Company's proposal was that, if its GCR Clause was suspended, MichCon agreed:

< to charge its sales customers a gas commodity rate of $2.95/Mcf;

< to charge that rate for a three-year period; and

< to assume all the price risks inherent in its proposal.

By its Application in Case No. U-12762, MichCon seeks Commission approval of a proposal that breaks ***all*** the promises the Company made in Case No. U-11682. The Company wants to end the $2.95/Mcf gas commodity charge before the three-year period is over. It also seeks to shift some of the price risk to its customers for the balance of 2001. Despite the Company's suggestion that the price risk customers will assume under its proposal will be mitigated through a contract cash-out and gross margin refunds, the bottom line is that MichCon does not bear the same price risk it promised to bear in its Application in Case No. U-11682. This was confirmed by MichCon witness Don M. Stanczak on cross-examination:

> "Q. Is it the company's position that under your proposal the customers will be guaranteed not to pay more than 2.95 per Mcf after all the cashouts and gross margin refunds are taken into account?
>
> A. No." 3 TR 71.

The Commission should reject MichCon's proposal to renege on the promises the Company made to its customers in Case No. U-11682.

### B. MichCon's Proposal Violates The Terms Of The Commission's Order In Case No. U-11682.

In its April 28, 1998 Order in Case No. U-11682, the MPSC made certain statements that show that it relied on the representations contained in the Company's Application in that docket:

> "The proposed program would freeze existing noncommodity rates and the gas commodity rate for three years. A fixed distribution rate and gas commodity charge would insulate customers from potential cost increases that, under traditional regulation, would be recoverable through increased rates." Order, Page 6.

The Commission also said:

> "During the three-year program, there is no mechanism in MichCon's proposal to increase charges for system supply gas even if gas commodity prices increase." Order, Page 6.

The Commission ordered:

> "Michigan Consolidated Gas Company's gas cost recovery clause is suspended effective January 1, 1999 for a three-year period, during which the gas commodity cost shall be established at a fixed rate of $2.95 per thousand cubic feet." Order, Page 11.

Case No. U-11682 was decided on an *ex parte* basis. There was no opportunity for a public hearing or comment on MichCon's proposal. Therefore, the Commission's Order was based entirely on the representations contained in MichCon's Application. It is clear that the MPSC understood that the key elements of MichCon's proposal in Case No. U-11682 included:

< a three-year program period, and

< a frozen gas commodity rate, and

< insulation of sales customers from gas price increases, and

< no provision for increasing gas commodity charges to sales customers.

MichCon's proposal in this case violates the Commission's Order in Case No. U-11682. It curtails the three-year program, it unfreezes the gas commodity rate and it strips the Company's customers of insulation from gas price increases. Moreover, it runs counter to the Commission's clear expression of its understanding that MichCon was pledging that it would not increase prices to its sales customers under any circumstances. Despite the Company's repeated acknowledgments in its Application in Case No. U-11682 that gas prices were volatile, MichCon made no provision in its proposal for unfreezing the gas commodity rate and/or reinstating its GCR clause if gas prices rose above certain thresholds that made it uneconomic for alternative gas suppliers to compete with the utility's $2.95/Mcf factor. Nor did it describe any other conditions under which the three-year term of the experiment could be curtailed.

Under these circumstances, the MPSC should enforce the promises MichCon made to secure the Commission's approval of Case No. U-11682.

### C. MichCon's Proposal Harms Both Sales Customers and Participants In The Gas Customer Choice Program Who Relied On The Promises Made By MichCon To Choose Their Energy Supplier.

In paragraph 20 of its Application in Case No. U-11682, MichCon stated that a stable gas commodity rate during the three years covered by its proposed Plan would provide customers who choose MichCon as their natural gas supplier with price certainty and an easy means of comparing alternative gas suppliers. As stated on page 1 of that Application, the intention was "to enhance customer choice".

One of the sales customers that relied on MichCon's promise of price certainty was Blue Circle, Inc., a company that operates a cement plant in Detroit. The statement of Larry Ladomer, Plant Operations Manager for Blue Circle, Inc. appears in the record of this case at 2 TR 35-36. It shows that Blue Circle established its operating budget for 2001 based upon its reliance on the frozen GCR factor of $2.95/Mcf. Mr. Ladomer stated:

> "The cement and slag businesses are very competitive. Margins are very narrow and companies are required to develop precise budgets so that they can price their products for the next year. Blue Circle, Inc. very carefully prepared its budget for 2001 and set its prices accordingly. All of Blue Circle, Inc.'s production for 2001 has been bought out by customers for delivery throughout the year so any change in Blue Circle Inc.'s cost structure will eat into profits. The only variable cost at the plant is labor so a large increase in costs could force a loss of jobs.

> Blue Circle, Inc. will have to honor its contracts with its buyers at the stated prices regardless of any adverse changes in Blue Circle's cost structure. We believe that MichCon likewise should honor its contract with its customers to have its GCR factor frozen through the end of 2001. I am sure that Blue Circle, Inc. is not the only MichCon customer that established its budget for 2001 based upon the frozen GCR factor of $2.95 per Mcf."

Blue Circle, Inc. relied on MichCon's promise of a fixed $2.95 gas commodity rate through the end of 2001 in exercising its choice to remain a sales customer. If Blue Circle had known that MichCon could end the fixed $2.95 gas commodity rate at any time during the three-year program, that may have influenced its decision to remain a sales customer based on its need to secure price certainty. The Commission should not allow MichCon to change the basic "rules" governing its gas customer choice program -- rules that MichCon requested and the Commission approved -- when customers have relied on those rules to make their choice of gas suppliers. To do so would undermine the entire notion of customer choice. As Mr. Ladomer observed, "It is ludicrous to suggest that it is in the best interests of customers to eliminate the freeze so that customers have more 'competition'. What customers would rather have is the fixed price per Mcf promised by MichCon." 2 TR 26.

It is not only the sales customers who relied on MichCon's promise that its gas customer choice program would last three years. According to MichCon witness Stanczak, there are approximately 44,000-45,000 customers in MichCon's service territory who are currently enrolled in the gas customer choice program. 2 TR 57-58. They were able to secure contracts with alternate suppliers at prices between $2.65 and $2.80 per Mcf. 2 TR 57. According to Mr. Stanczak, if the Commission approves the Company's Application in this case, customers who have exercised their choice and selected an alternative gas supplier will be disenrolled from the gas customer choice program effective

April 1, 2001. They will be returned to MichCon as a regular sales customer. It will then be up to them to strike a new deal with their gas supplier or take their marketer to court to enforce the price in their existing contract. 2 TR 60-65.

The Company's proposal undermines the choice made by those customers who were able to secure three-year contracts with suppliers at a price lower than $2.95/Mcf. The early termination of the gas customer choice program strips them of the benefits of their choice and interferes with their contractual rights. These customers have played by the rules that MichCon requested and the Commission approved for the gas customer choice program. The Commission should reject MichCon's request to change those rules to the clear detriment of those customers who relied on and are benefitting from those rules by the exercise of their customer choice.

## III. THE MPSC SHOULD REJECT MICHCON'S PROPOSAL BECAUSE IT IS UNREASONABLE AND NOT IN THE PUBLIC INTEREST

This part of the RRC's brief examines the rationales underlying MichCon's proposal and the elements of the proposal. As will be shown, the record evidence demonstrates that the Company's proposal is flawed and should be rejected.

### A. The Gas Customer Choice Program Has Not Generated The Cost Savings Claimed By MichCon

To justify ending the $2.95 fixed gas commodity rate on April 1, 2001, MichCon claims that customers have already "saved in excess of $200 million" in 1999 and 2000 from the suspension of the Company's GCR Clause. 2 TR 43. The $200 million is based on a comparison of the $2.95/Mcf charge with the actual NYMEX 3-day average prices shown in columns A and B of Exhibit A-1.

This comparison is flawed because the record shows that, in fact, MichCon did not purchase gas at the prices shown on Exhibit A-1 in 1999 and 2000. MichCon witness Stanczak testified that the Company's annual average cost of gas was ***less than*** $2.95/Mcf in 1999 and 2000. 2 TR 56. In fact, MichCon protected itself during the first two years of its gas customer choice program by entering fixed price contracts which resulted in gross sales margins, i.e., profits, approximating $70 million. 2 TR 108. RRC Witness Frank J. Hollewa testified about the published market prices available to MichCon when it filed its Application in Case No. U-11682. He said:

> "The average period for the period 4/99 thru 3/00 was $2.37 plus $0.14 basis for adjusting NYMEX to the MichCon City Gate would have resulted in a delivered price of $2.51. This same calculation for the period 4/00 thru 3/01 would have resulted in a delivered price of $2.49." 2 TR 107.

It is wrong to suggest that, but for the suspension of MichCon's GCR Clause, customers would have borne $200 million more in gas costs. If anything, the evidence shows that because MichCon's GCR Clause was suspended during this period, GCR customers missed out on $70 million in cost savings that the Company secured for itself. As MichCon Witness Stanczak acknowledged, if the GCR process had remained in effect for the period in which the GCR Clause has been suspended, MichCon's recovery from its GCR customers would have been limited to the company's actual cost of gas. 2 TR 65-66.

Because natural gas prices have increased, 2001 will be the first year in which customers experience real savings from exercising their choice to remain sales customers at the $2.95/Mcf frozen gas commodity rate. Just as those savings are materializing, MichCon is seeking to end them.

For all the reasons set forth in sections I. and II. of this brief, that proposal is unreasonable, not in the public interest and should be rejected by the Commission.

**B. The Commission's Order In Case No. U-12550 Is Silent On Ending The Suspension of MichCon's GCR Clause**

In its Application in this case, MichCon cites the Commission's Order in Case No. U-12550 and suggests that the suspension of the Company's GCR Clause should be terminated to "aid in the goal of greater uniformity among customer choice programs as proposed in the Consumers Order and to foster competition between LDCs and alternative natural gas suppliers". Application, Pages 1 and 3. MichCon Witness Stanczak testified that the Company's application in Case No. U-12761 "proposes to implement the changes reflected in the Commission's order in Case No. U-12550." 2 TR 44

Nowhere in the Commission's Order in Case No. U-12550 did the MPSC state that MichCon's GCR Clause should be reinstated because its $2.95 gas commodity charge is too low.

Nowhere in that Order did the Commission state that MichCon's sales customers should stop benefitting from their choice of the $2.95/Mcf gas commodity charge instead of choosing an alternative supplier.

While uniformity among the gas customer choice programs offered by the LDCs is a desirable goal, it should not be achieved at the expense of MichCon's customers. RRC witness Hollewa testified:

> "The transition to customer choice is expected to cover years, not months. Experience in other states supports the conclusion that this is a slow process, especially for residential customers. The harm to MichCon's customers that will result from the early termination of MichCon's GCR suspension outweighs any result that may flow from

placing marketers in the position to "compete' with MichCon by increasing customer gas charges, thereby offering customers 'choice'." 2 TR 109-110.

As MichCon witness Stanczak testified, up to 200,000 customers will be eligible to participate in the Company's new customer choice program effective April 1, 2001 if the Commission approves this Application. (MPSC Staff Witness William Aldrich opined that, in his personal opinion, "something in the neighborhood of a hundred thousand might be more achievable." 2 TR 205.) That will leave a million sales customers for MichCon. 2 TR 67. In other words, the practical effect of MichCon's proposal is to sacrifice the concrete benefit of the fixed $2.95/Mcf gas commodity rate to more than 80% of the Company's customers in order to offer the other 20% (or less) an opportunity to purchase gas from an alternative supplier -- at a price substantially higher than $2.95/Mcf. That is not in the public interest and flies in the face of what MichCon's own studies tell us about customer choice.

The customer choice presentation made by MichCon to the MPSC Staff, dated 11/23/99 revealed that:

- 84% of 1,400 participants surveyed indicated that a key reason for participating in the gas customer choice program was to "save money". 2 TR 105. There is no evidence in this record that ending the suspension of MichCon's GCR Clause will save money for sales customers or currently enrolled GCC customers.
- The specific reasons customers gave for leaving MichCon included "high prices or rates". 2 TR 106.

As RRC witness Hollewa observed:

"MichCon's sales customers are currently in a position where most of them (especially commercial) did not or could not avail themselves of the incremental savings achieved

> by choice customers in 1999 and 2000 because of enrollment limits in the GCC program. However, they are now in a position where the selection of a supplier (choice) is far less important than the continuation of a fixed price that is extremely advantageous and beneficial to them. Can any logical person believe that a survey of customers would be necessary to determine whether choice at $5.00 per Mcf is preferable to a fixed price of $2.95 from MichCon? Why would anyone want choice simply for the sake of choice?2 TR 109.

MichCon's proposal is unreasonable because:

- it imposes cost risks on the vast majority of MichCon's customers who cannot participate in choice in 2001; and
- it offers a phony "choice" to a small minority of MichCon's customers who, but for the elimination of the $2.95 fixed gas commodity price, would have no reason to choose an alternative supplier.

Choice simply for the sake of choice is not in the public interest, especially when MichCon's proposal shifts costs to the Company's customers. Boosting customer participation in MichCon's GCC program by increasing the prices those customers pay for their gas is poor public policy.

## C. MichCon's Proposals To Credit Customers With The Value of Cashed-Out Contracts and To Refund Its Gross Margins Do Not Insulate Customers From Gas Price Increases Through The End Of 2001.

As discussed earlier in this brief, MichCon made a pledge to this Commission and to the public that, if its Application in Case No. U-11682 were approved, the Company would completely insulate its sales customers from all commodity gas cost increases during the three-year period covered by its gas customer choice program. In approving the Company's proposal, the MPSC acknowledged that MichCon made that promise.

In this Application, the Company proposes to “mitigate” gas price increases through the end of 2001 by applying a credit to all customer bills for the value of gas purchase contract cashouts in the period April 2001 through March 2002. (2 TR 47-51). It also proposes making a refund to all customers of the gross margins it realized in 1999 and 2000 starting in March or April of 2002. 2 TR 51-53; 67-68. MichCon Witness Stanczak also testified that the Company is committed to “minimizing any financial impact on its customers relative to returning to a GCR nine months early and expanding customer choice” and would also “rely on relatively low priced gas in storage to mitigate any such increase”. 2 TR 53-54.

MichCon will not, however, agree to guarantee that its customers will pay no more that $2.95/Mcf for gas during the last nine months of 2001, net of the cashout credits, gross margin refunds and its other mitigation efforts. 2 TR 71.

The problem with MichCon’s proposal is that it shifts the risk of gas price increases in April 1 - December 31, 2000 to its customers. Consider these factors:

< If MichCon’s GCR Clause is reinstated on April 1, 2001 the Company is insulated from all price increases for the balance of 2001 because of the gas cost reconciliation procedures set forth in MCL 460.6h. Absent the reinstatement of GCR Clause, MichCon would bear the risk of price increases in this period, as promised in its Application in Case No. U-11682.

< If MichCon’s GCR Clause is reinstated on April 1, 2001, the Company is substantially insulated from price increases for the balance of 2001 by the quarterly contingent GCR factor contained in its GCR plan in Case No. U-12766, which would permit the Company to increase its GCR factor up to $2.00 above the requested $5.17/Mcf GCR factor. Absent the

reinstatement of its GCR Clause, MichCon would bear the risk of price increases in this period, as promised in its Application in Case No. U-11682.

- The numbers MichCon Witness Stanczak used in his testimony and exhibits on the cash-out proposal are not credible. In discovery, the RRC sought to find the source of the NYMEX estimates shown on Exhibits A-1 and A-2 for the April through December 2001 period. RRC witness Hollewa testified that MichCon's response:

  > ". . . simply refers to the footnotes on both Exhibits. While the response is technically accurate because the same estimated 2001 NYMEX prices are used in Case No. U-12766, it does not lend credibility to the accuracy of the estimate. ***There is simply no NYMEX strip between 12/15/00 (Application) and 1/10/01 (Stanczak testimony) that bears any resemblance to the estimated 2001 NYMEX prices used in Case No. U-12766***". 2 TR 111. (Emphasis added).

- MichCon's proposal includes decrementing storage to exert downward pressure on the GCR cost of gas for the last nine months of 2001, thereby mitigating increased costs. RRC witness Hollewa evaluated MichCon's proposal and concluded that is unworkable because:

  - it jeopardizes the system integrity for design day purposes;
  - the reduction in GCR costs associated with decrementing storage could create a "Catch 22" situation for the Company to the extent that lowering the effective GCR rate will create a deterrent to competition; and
  - decrementing storage for the purpose of softening the blow of high gas prices in 2001 will result in the loss to GCR customers of the economic value of MichCon's low-cost LIFO storage layers in future GCR periods. 2 TR 116-120.

Under MichCon's proposal, the price MichCon's customers will ultimately pay for the gas they receive in April through December 2001 depends on a number of variables. MichCon witness Stanczak cited "forward prices at the time the purchase contracts are cashed out, actual gas purchase costs incurred during 2001 and the number of customers participating in choice during 2001." 2 TR 51. As the record evidence of this case shows, these variables are impossible to quantify with any degree of accuracy. For example, MichCon witness Stanczak readily admitted that the information MichCon presented on Exhibit A-3 are merely illustrative of certain scenarios. They are not projections. 2 TR 69. Because of the number of variables affecting MichCon's proposal and the lack of reliable values on which to rely for projecting the impact of those variables on MichCon's overall proposal, there is no way to know how much or how little the cashout credits, the gross margin refunds and the Company's use of low-priced gas in storage for the balance of 2001 will mitigate the price risk being shifted to customers.

The only thing that is certain is that customers will bear the risk of price increases for the balance of 2001 when MichCon promised they wouldn't. That is an unreasonable result that is contrary to the public interest. It should be rejected by the MPSC.

## IV. MICHCON'S PROPOSAL SHOULD BE REJECTED BECAUSE IT SERVES THE INTERESTS OF MICHCON AND THE MARKETERS AT THE EXPENSE OF THE COMPANY'S CUSTOMERS.

In paragraph 5. Of MichCon's Application, the Company states:

> "While MichCon's fixed commodity price has provided substantial savings to customers, it has also deterred customer migration to alternative suppliers who are forced to offer much higher market-based prices . . . If this component of the program is not modified, marketers will be unable to offer choice within MichCon's service

territory."

MichCon's customers benefit from the $2.95 fixed commodity price because it saves them gas costs. The customers derive no tangible benefit from MichCon's proposal because it shifts to them the risk of gas price increases for the balance of 2001. "Choice" means higher gas costs for customers, whether they buy from MichCon or a marketer.

The only real beneficiaries of MichCon's proposal are MichCon and the marketers.

As described more fully in the earlier sections of this brief, MichCon benefits by escaping the risk of price increases for April-December 2001 and the responsibility of guaranteeing that its sales customers pay no more than $2.95/Mcf in that period.

The marketers benefit in two ways. For those suppliers that have customers currently enrolled in the gas customer choice program at contract prices below $2.95/Mcf, it provides the opportunity to re-enroll those customers at higher prices. The other benefit is the opportunity to attract new customers who otherwise would have no interest or need for an alternative gas supplier.

All the rhetoric on the virtues of competition and choice don't square with the unusual facts presented by this case. MichCon's customers have not been harmed by the temporary absence of competitive offerings in the Company's service territory. On the other hand, they will suffer real harm if competition and choice are reintroduced under the terms of MichCon's proposal. Because of this, the Company's proposal should be rejected.

## V. RELIEF

For all the reasons discussed in this brief, the Residential Ratepayer Consortium requests that the MPSC deny the relief MichCon seeks in this case.

THE RESIDENTIAL RATEPAYER CONSORTIUM

Dated: March 2, 2001 By: ______________________________

David L. Shaltz (P 29330)
Its Attorney

Shaltz & Royal, P.C.
3303 West Saginaw
Suite C-1
Lansing, MI 48917

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 |

**PROOF OF SERVICE**

David L. Shaltz says that on March 2, 2001 he deposited in a U.S. Postal Service mail receptacle the Initial Brief of the Residential Ratepayer Consortium in the above captioned case, addressed to each of the parties on the attached service list, with first class postage thereon.

David L. Shaltz

State Of Michigan )
) ss
County of Ingham )

David L. Shaltz appeared before me on March 2, 2001 and certified that the statement above is true, accurate and correct.

Diane R. Royal, Notary Public
Ingham County, Michigan
My Commission Expires: 2/13/03

**MPSC CASE NO. U-12762**

**Service List**

David Champion
Michigan Consolidated Gas Company
500 Griswold Street
9th Floor
Detroit, MI 48226
Telephone: 313.256.6982
Fax: 313.256.5251
E-mail:david_champion@michcon.com

David M. Gadaleto
Assistant Attorney General
Public Service Division
6545 Mercantile Way
Suite 15
Lansing, MI 48911
Telephone: 517.241.6680
517.241.6678
E-mail:gadaletod@ag.state.mi.us

Orjiakor N. Isiogu
Assistant Attorney General
Special Litigation Division
6520 Mercantile Way
Suite 2
Lansing, MI 48911
Telephone: 517.373.1123
Fax: 517.373.9860
E-mail:isioguo@ag.state.mi.us

Eric J. Schneidewind
Varnum, Riddering, Schmidt & Howlett LLP
201 North Washington Square
#810
Lansing, MI 48933
Telephone: 517.482.6237
Fax: 517.482.6937
E-mail: ejschneidewind@vrsh.com

Robert A. W. Strong
Clark Hill, PLC
255 S. Old Woodward Avenue
3rd Floor
Birmingham, MI 48009
Telephone: 248.988.5861
Fax: 248.642.2174
E-mail: rstrong@clarkhill.com

Barbara A. Stump
Administrative Law Judge
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909-7721

Albert Ernst
Christine Mason Soneral
Dykema Gossett PLLC
800 Michigan National Tower
Lansing, MI 48933-1742
Telephone: 517.374.9115
FAX: 517.374.9191
E-mail: aernst@dykema.com
cmason@dykema.com