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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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 of
April 1 to December 31, 2001.

Case No. U-12766

PREHEARING CONFERENCE

Proceedings had in the above-entitled matter
before Barbara A. Stump, J.D., Administrative Law
Judge, at the Michigan Public Service Commission,
6545 Mercantile Way, Lansing, Michigan, on Thursday,
February 1, 2001.

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orig-file
Legal
Judge
Yes

APPEARANCES:

MICHIGAN CONSOLIDATED GAS COMPANY
By DAVID. C. CHAMPION, J.D.
500 Griswold Street, G.B. 9
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Appearing on behalf of Michigan Consolidated
Gas Company

SHALTZ & ROYAL, PC
By DIANE R. ROYAL, J.D.
3303 West Saginaw, Suite C-1
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Appearing on behalf of the Residential
Ratepayers Consortium

MICHIGAN PUBLIC SERVICE
FILED

FEB 6 - 2001

COMMISSION

1 APPEARANCES: (Continued)
2

3 CLARK HILL, PLC
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255 South Old Woodward Avenue, 3rd Floor
Birmingham, Michigan 48009

5 Appearing on behalf of the Association of
6 Businesses Advocating Tariff Equity

7 ORJIAKOR N. ISIOGU, J.D.
Assistant Attorney General
6520 Mercantile Way, Suite 2
8 Lansing, Michigan 48911

9 Appearing on behalf of Attorney General Jennifer
10 M. Granholm

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13 Appearing on behalf of the Commission Staff

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Lansing, Michigan

Thursday, February 1, 2001

9:00 A.M.

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JUDGE STUMP: We're on the record 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.

My name is Barbara Stump, the Administrative Law Judge assigned to this case. This is the time scheduled for a prehearing conference.

Could I have the appearances, please.

MR. CHAMPION: Good morning, your Honor, David C. Champion appearing on behalf of applicant Michigan Consolidated Gas Company.

JUDGE STUMP: Thank you.

MR. ISIOGU: Good morning, your Honor. Assistant Attorney General Orjiakor Isiogu, appearing on behalf Michigan Attorney General Jennifer M. Granholm.

JUDGE STUMP: Thank you.

MS. ROYAL: Good morning.

I'm Diane R. Royal, along with David L. Shaltz who represent Residential Ratepayer Consortium.

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1 JUDGE STUMP: Thank you.

2 MR. STRONG: Robert A. W. Strong
3 appearing on behalf of the Association of Businesses
4 Advocating Tariff Equity.

5 MR. GADALETO: Dave Gadaletto on behalf of
6 the staff of the Michigan Public Service Commission.

7 JUDGE STUMP: All right. Thank you.
8 Mr. Champion.

9 MR. CHAMPION: Yes, your Honor.

10 JUDGE STUMP: Do you have affidavits of
11 publication?

12 MR. CHAMPION: I do, your Honor. May I
13 approach?

14 JUDGE STUMP: Yes.

15 MR. CHAMPION: I tender proofs of
16 publication and mailing to your Honor for inclusion in the
17 file.

18 JUDGE STUMP: All right. Those will be
19 accepted.

20 I have petitions to intervene from ABATE,
21 the Attorney General and -- did RRC file an actual
22 petition to intervene?

23 MS. ROYAL: Yes, your Honor. I do have
24 another copy if you need one.

25 JUDGE STUMP: I don't need a copy as long

1 as it's in the docket file.

2 MS. ROYAL: Yes, it is.

3 JUDGE STUMP: Are there any objections to
4 any of the proposed interventions?

5 MR. CHAMPION: No.

6 MR. GADALETO: Staff has no objections to
7 the proposed interventions.

8 JUDGE STUMP: All right. All the
9 petitions to intervene will be granted.

10 Now, I guess the first thing we should
11 take up is the Attorney General's motion to dismiss.

12 I have read the motion and the responses
13 and I have also reviewed some past commission orders.

14 So if you'd like to make some brief
15 comments on your motion, you can do so at this time.

16 MR. ISIOGU: Thank you, your Honor.

17 In light of the fact that you have read
18 the motion and the responses to the motion, I will be very
19 brief.

20 I think in addressing the motion it's
21 important to realize what this case is not about. This
22 case is not about -- the motion is not about addressing
23 the merits of MichCon's plan case.

24 MichCon's application case is analogous
25 to an individual that resides in a jurisdiction where a

1 marriage license is required. The individual refuses or
2 neglects to obtain a license, but contacts the local
3 minister and entreats the minister to perform the marriage
4 ceremony.

5 The prerequisite for a plan case is that
6 a GCR clause has got to be in place.

7 The Act 304 of Section 6(h)(3) says in
8 order to implement the GCR clause, it's very simple. It
9 uses black letter law where the law is so clear and
10 unambiguous there's no requirement for statutory
11 construction.

12 The application as it stands now is
13 procedurally and substantially defective. So the
14 Commission has no jurisdiction to address this case.

15 It's one thing to say -- in its response
16 to the Attorney General's motion, the company says, well,
17 how come the AG has not filed a motion to dismiss its
18 application to terminate its suspended GCR clause?

19 The reason why we didn't file a motion to
20 suspend it is because the company has a right to request.
21 But until the Commission addresses that and concludes the
22 case, and says yea or nay, or in fact says yes, you can
23 reinstate your GRC clause, the company may not file a GCR
24 plan.

25 It's quite that simple, your Honor. Like

1 I said, it's clearly an attempt to circumvent both the
2 letter and the spirit of Section 6(h)(3).

3 And with that I will conclude and respond
4 to the company's arguments, your Honor.

5 JUDGE STUMP: Okay, Ms. Royal, since you
6 filed an answer in support of the Attorney General's
7 motion, I'll let you go before the company responds.

8 MR. CHAMPION: Your Honor, as a
9 procedural matter I would ask that you reject the RRC's
10 filing on the grounds that it fails to comply with the
11 Commission's procedural rules for motion practice,
12 specifically Rule 335, which says a motion has to be in
13 writing and filed seven days before a hearing.

14 I'd also note that RRC's motion includes
15 a response to MichCon's answer to the Attorney General's
16 motion. The Commission's Rules of Practice and Procedure
17 in no way, shape or form contemplate a reply to an answer
18 to a motion.

19 For those reasons the motion itself is
20 procedurally and substantively defective and should
21 therefore be rejected.

22 JUDGE STUMP: Well, RCC didn't file a
23 motion. They filed a response in support of the motion.

24 MR. CHAMPION: I understand that, your
25 Honor.

1 How they classify or categorize it, I
2 don't think is the determinative factor here. The
3 determinative factor is that it is in effect the same
4 motion that the AG has filed and includes a reply to
5 MichCon's answer to the AG's motion, neither of which are
6 contemplated by the Commission's rules.

7 JUDGE STUMP: Ms. Royal.

8 MS. ROYAL: Your Honor, it is not a
9 separate motion on its own. It is a response to the
10 Attorney General's motion that they originally put in. We
11 responded to them as they filed. We're not saying this is
12 a separate motion. This is clearly a response to the
13 Attorney General's motion which we feel is perfectly
14 suitable under the rules.

15 JUDGE STUMP: All right. I agree.
16 I realize that there's no provision in the rules for
17 filing replies to responses. But overall the response is
18 a response in support of the Attorney General's motion.
19 So I'll going to allow it.

20 You can proceed.

21 MS. ROYAL: Thank you, your Honor. I
22 won't belabor the point since you do have before you our
23 written document.

24 I would just like to underscore the fact
25 that there are two separate proceedings involved with

1 MichCon's application. The first is not one that we're
2 addressing here. That is the position where MichCon is
3 asking the Commission to release this suspension.

4 This case is, as the Attorney General
5 indicated, strictly dealing with the appropriate GCR
6 clause that MichCon has asked us to all participate in
7 this case.

8 There is no clause in effect right now.
9 So you can't file a GCR plan without a clause. The
10 appropriate steps would be to wait until the Commission
11 rules one way or another on the previous application to
12 release the suspension.

13 The GCR statute is very clear. That
14 first there must be a clause. And to implement that
15 clause, then the company is to file their 12-month plan.
16 That was not done here.

17 Just to reply quickly to MichCon's
18 response. They indicate that it would be less inefficient
19 if we waited until the Commission ruled on whether or not
20 to suspend the suspension or to release the suspension.

21 Whether it's efficient or inefficient
22 isn't the issue. The issue is that we have no operative
23 clause. Therefore we can't go forward with this
24 particular case.

25 As far as the company's averment that

1 when you have a trial test or a pilot, that if it starts
2 to look like it's not working, that the Commission or
3 anyone else can suspend it. Well, the problem with it is
4 any test goes up and down during the process of the
5 testing period.

6 MichCon made promises to the Commission
7 that it would take risks and it knew that there were
8 risks. And now to come back and say, well, we want to
9 suspend -- we want the suspension lifted and here is our
10 case, our GCR plan, just simply isn't the appropriate
11 process to go through.

12 We urge that you grant the Attorney
13 General's motion in this case.

14 JUDGE STUMP: All right. Thank you.

15 Mr. Champion.

16 MR. CHAMPION: Thank you, your Honor.

17 With respect to the question of
18 jurisdiction and the alleged lack of GCR clause, the
19 movants are misplaced. MichCon has a GCR clause in its
20 rates schedules. Pursuant to the order in U-11682, that
21 clause was suspended. It was not terminated. It was not
22 eliminated. It was merely suspended.

23 The Court of Appeals in an order in a
24 case brought by, among others, the movants here, has said
25 that the Commission has broad authority under Act 304.

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1 That authority includes the power to suspend and in fact
2 to reimplement or reinstate a suspended gas cost recovery
3 clause.

4 In MichCon's case the clause has been
5 suspended. And because of the experiment, the results of
6 the experiment that MichCon has been involved in with the
7 Commission and others over the course of the last several
8 years, MichCon has requested authority to reinstate its
9 gas cost recovery clause.

10 The fact of the matter is that the
11 results of the experiment are in. In Case No. U-12550 the
12 Commission addressed a report issued by the Commission
13 staff as a result of a collaborative process to discuss
14 the gas customer choice experiments then ongoing amongst
15 MichCon, Consumers Energy Company and SEMCO.

16 The Commission's order clearly
17 recognized, among other things, that in terms of fixed gas
18 cost pricing, the experiment was something less than a
19 success.

20 The staff report was responded to by,
21 among others, one of the largest marketers in any of, and
22 I think all of the experimental programs. That marketer
23 said because of fixed gas cost prices it could no longer
24 and would in the future refuse to participate in gas
25 customer choice because it couldn't compete with a fixed

1 gas cost that bore no reasonable relationship to the
2 market price of natural gas.

3 MichCon responded to that staff report
4 with comments of its own to the Commission indicating that
5 it desired to further the Commission's goal of meaningful
6 competition by eliminating fixed gas cost pricing and
7 going to something resembling market pricing. It proposes
8 to do so through the reinstatement of its gas cost
9 recovery clause.

10 The commitments that the movants argue
11 MichCon made and is now allegedly reneging on, were
12 commitments MichCon voluntarily made on the assumption
13 that fixed gas cost pricing would promote competition
14 within its service territory.

15 In fact, the result has been exactly the
16 opposite. As a result of increasing gas cost prices, we
17 have had marketers default; we have had marketers leave
18 the program. And as I have indicated, we have had one
19 marketer indicate to the Commission that it would no
20 longer participate in gas customer choice if fixed gas
21 cost pricing remained in effect.

22 Your Honor, the Court of Appeals has
23 indicated that the Commission has broad authority with
24 respect to the promulgation of energy cost recovery
25 clauses and that it is not somehow constrained with

1 respect to its authority to modify those clauses,
2 notwithstanding any changes and circumstances that might
3 warrant rescission of such a clause.

4 In the instant case we have asked for a
5 listing of the existing suspension and reinstitution of
6 our gas cost recovery clause based, among other things,
7 upon our belief that the Commission has precisely that
8 authority.

9 The claim that you have to have a gas
10 cost recovery clause in place before you can file a gas
11 cost recovery plan is, I think, again, misplaced.

12 Nearly 20 years ago MichCon filed for
13 implementation of the gas cost recovery clause. I believe
14 it was December 3, 1983. That same day it filed a gas
15 cost recovery plan. The Commission proceeded to issue
16 orders in both those cases. They were Docket Nos. U-7479
17 and U-7480.

18 There is precedent going back to the
19 very, very beginning of 1984, PA 304, to the effect that a
20 gas cost recovery plan case can proceed while the
21 Commission is considering a request to implement a gas
22 cost recovery clause.

23 We have a clause in effect. We have a
24 clause in our rate schedules. It has been temporarily
25 suspended. We have requested that it be reimplemented.

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1 If these motions are to be considered,
2 they should be considered in that docket. As you are well
3 aware, your Honor, that docket is proceeding. This docket
4 should proceed as well.

5 There is no basis in law for the Attorney
6 General's motion, nor for the RRC's support for it. The
7 Commission has general authority under 1939 PA 3 to
8 regulate all matters with respect to public utilities. It
9 has express authority to implement a gas cost recovery
10 clause under 1984 PA-304. It has, according to the Court
11 of Appeals, implied authority to both suspend and
12 terminate suspension of such clauses.

13 We submit that the law clearly supports
14 our request to implement a gas cost recovery plan and that
15 the motions to the contrary are without merit and should
16 be denied.

17 JUDGE STUMP: Thank you.

18 Any further comments?

19 MR. ISIUGU: Yes, your Honor.

20 With all due respect to counsel for
21 MichCon, your Honor, the Commission has no implied
22 authority. The Commission may not exercise any authority
23 that is not expressly granted to it by the Legislature.
24 That basic fundamental principle has been vindicated by
25 the state courts and more recently in the Detroit Edison

1 case by the Michigan Supreme Court, your Honor. That is a
2 fundamental principle.

3 So when the company asserts that the
4 Commission may do whatever it chooses to do, that is
5 clearly erroneous. The Commission is bound to exercise
6 only those rights and authorities granted to it under the
7 statute.

8 And Act 304 is clear and unambiguous as
9 to the requirements under which the Commission may review
10 a GCR plan case. Clearly in this case those requirements
11 have not been met by the company.

12 What you have essentially is an argument
13 that should properly be made in the context of its request
14 to lift its GCR clause termination in 12762.

15 For purposes of this motion, all that you
16 need to address is, is the application procedurally
17 accurate? Two, is there a claim for relief that may be
18 rendered in this case? And I suggest to you, your Honor,
19 that the answers to those questions are absolutely no.

20 MR. CHAMPION: May I make one last
21 comment?

22 JUDGE STUMP: Sure.

23 MR. CHAMPION: Thank you. Two matters.
24 Actually, three.

25 Nowhere in 1939 PA 3 has the Commission

1 granted express authority to conduct an experimental
2 program of any type. The Court of Appeals has found,
3 despite the lack of it, an express grant of such authority
4 in the statute, that the Commission has that power.

5 Nowhere in 1984 PA 304 does the statute
6 say that the Commission can terminate, suspend, lift
7 suspension of a GCR clause. The statute instead gives the
8 Commission broad discretion with respect to GCR clauses.

9 The Court of Appeals has found that to be
10 the case in an order issued on an appeal brought by, among
11 others, these movants against or from a Commission order
12 in both Consumers Energy and MichCon experimental gas cost
13 or gas customer choice program cases.

14 The Commission's authority as interpreted
15 by the Court of Appeals under both 39 PA 3 and 82 304
16 includes precisely the authority to grant the relief
17 MichCon is requesting here.

18 And lastly, your Honor, I'll note that
19 the Commission itself has issued a notice of hearing in
20 this proceeding where it says it has jurisdiction over
21 this case. And it has said in that notice that this
22 hearing is a hearing on scheduling and other procedural
23 matters. The Commission didn't say that this hearing was
24 being held to address the substance of MichCon's
25 application.

1 If the Attorney General has a problem
2 with the substance of MichCon's application and the
3 Commission's authority to process it --

4 JUDGE STUMP: Well --

5 MR. CHAMPION: -- he can take that up
6 with the Commission.

7 JUDGE STUMP: Under that argument nobody
8 could ever file a motion to dismiss in a case because in
9 the notice of hearing it says the Commission always has
10 jurisdiction.

11 MR. CHAMPION: I don't disagree with the
12 notion that the Commission always says it has
13 jurisdiction, your Honor.

14 My point simply is that the Commission
15 could have, had it so chosen, determined in advance of
16 issuance of any notice that it lacked the authority to
17 grant the relief requested in MichCon's application. And
18 it could have issued an order rejecting it under its own
19 procedural rules because MichCon's application failed to
20 comply with either the law or the procedures established
21 by the Commission. It elected not to do so. This case
22 has been noticed and we are here to set a procedural
23 schedule and move forward.

24 MichCon urges you to do just that.

25 JUDGE STUMP: All right. Thank you.

1 One last comment.

2 MR. ISIOGU: Yes, your Honor.

3 With respect to that last remark by
4 counsel that the Commission has not sua sponte rejected
5 the application, I would note, your Honor, that in the
6 context of the telecommunications laws of Michigan, the
7 law provides that a prima facie case has to be made
8 initially before you can forward.

9 That's not the case under the gas and
10 electric laws of Michigan, your Honor. So I think your
11 point is well taken. The normal mode of operation is that
12 parties may file whatever they wish to file and the
13 Commission may accept the case. But entrusted parties
14 also have the right to contest and file motions to dismiss
15 those cases, which more often than not, when those cases
16 are inapplicable, they are dismissed, your Honor.

17 So I think it is rather -- one should be
18 very worried about putting too much weight to the fact
19 that the Commission has issued a notice in this case.

20 The company makes much of the fact that
21 the Court of Appeals has stated that the Commission has
22 authority to suspend the GCR clause, the GCR and PSCR
23 clause.

24 Your Honor, I would note that in those
25 cases the issue has always been whether or not the

1 suspension, the action contemplated by the Commission,
2 would result in a rate increase, therefore requiring
3 parties to give up what you need for a hearing in those
4 cases. So the issue specifically is whether the
5 Commission may issue ex parte orders in those cases.

6 So what we have here is quite
7 distinguishable from those cases. We are not arguing that
8 the Commission does not have authority to reinstate a GCR
9 clause, which the company has requested for in 12762.

10 But the issue before you here is a very
11 narrow one, your Honor. And on the law and the facts
12 before you, the motion to dismiss should be granted.
13 Thank you.

14 JUDGE STUMP: All right. Thank you.

15 I'm ready to rule at this point.

16 I think that the Attorney General has
17 presented some good arguments as to why the motion to
18 dismiss should be granted. Having said that, however, I
19 don't believe that procedurally it makes sense to dismiss
20 this case at this time. I think that doing so prior to
21 the completion of U-12762 would only result in MichCon
22 having to refile its application if the Commission
23 ultimately decides in that case to approve the early
24 lifting of the GCR suspension. And I note that the
25 Commission is expected to make that decision by April 1st.

1 Because that's just two months from now,
2 I think that the best way to handle this matter is to hold
3 in abeyance the schedule in this case until after the
4 Commission issues its order in 12762.

5 Just as I don't want MichCon to have to
6 refile its application if the Commission lifts the
7 suspension, I also don't want the staff and the
8 intervenors to expend their resources in preparing their
9 cases if the Commission decides not to lift the
10 suspension.

11 So I'm going to deny the motion to
12 dismiss at this time, but we will not go forward with this
13 case until the Commission issues its order in 12762. And
14 what I'm prepared to do this morning is to set a date for
15 a second prehearing conference in April. At that time we
16 will address a schedule for the remainder of this case.

17 MR. GADALETO: Does your Honor have a
18 suggested date?

19 JUDGE STUMP: Well, I thought that maybe
20 we should aim for possibly the second week in April to
21 ensure that the Commission will have the order out by
22 April 1st or within a few days of April 1st.

23 MR. GADALETO: Would the parties like to
24 go off the record for an moment to discuss it?

25 JUDGE STUMP: Let's go off the record.

(There was a discussion off the record.)

- - -

JUDGE STUMP: We'll go back on the
record.

We have all agreed that we will have a
second prehearing conference in this matter on Wednesday,
April 11th at 9:00 A.M.

MR. GADALETO: Thank you, your Honor.

JUDGE STUMP: Is there anything further
this morning?

MR. CHAMPION: The company has nothing,
your Honor.

JUDGE STUMP: All right. Thank you.

(At 9:40 A.M., the hearing was adjourned
to 9:00 A.M., Wednesday, April 11, 2001.)

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C E R T I F I C A T E

I, Donna-Christine Sell, do hereby
certify that I reported stenographically the foregoing
proceedings had in the within-entitled matter, being Case
No. U-12766, before Barbara A. Stump, J.D.,
Administrative Law Judge, at the Mercantile Building,
Lansing, Michigan, on Thursday, February 1, 2001;
and that the foregoing transcript constitutes a true and
correct transcript of my said stenographic notes.

Donna-Christine Sell

Dated: Friday, February 2, 2001