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
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

THE RESIDENTIAL RATEPAYER CONSORTIUM'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE APPLICATIONS OF MICHIGAN CONSOLIDATED GAS COMPANY

Rule 323 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 460.17323, governs motions for summary disposition. It states:

> "A party may make a motion for summary disposition of all or part of a proceeding. If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend to the Commission, summary disposition of all or part of the proceeding."

The RRC moves for summary disposition of that part of Michigan Consolidated Gas Company's Application in Case No. U-12762 that seeks approval of a one-time, nine-month GCR plan period starting April 1, 2001[1] and all of MichCon's Application in Case No. U-12766 because:

1. There is no genuine issue of material fact as to MichCon's application in both cases proposing a GCR plan period and GCR factors for 9 months and MichCon's application in Case No. U-12766 proposing a forecast of gas requirements of its customers, its anticipated sources of supply and projections of gas costs for a period spanning 4 years and 9 months.

2. Both of MichCon's Applications fail to state a claim for which relief can be granted because MCL 6h(3) specifies that a GCR plan and factors must cover a 12-month period and MCL 6h(4) specifies 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.

That part of MichCon's Application in Case No. U-12762 which seeks approval of a one-time, nine-moth GCR plan period and all of the Company's Application in Case No. U-12766 should be dismissed because they violate explicit and unambiguous statutory requirements set forth in MCL 460.6h(3) and (4) and other sections of 1982 PA 304.

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

The very first sentence of MichCon's December 21, 2000 Application in Case No. U-12766 for approval of its gas cost recovery plan and monthly GCR factors says that its request is made pursuant to MCL 460.6h et seq.

MCL 460.6h(3) states:

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[1] In its motion, the RRC does ***not*** challenge the MPSC's authority to reinstate MichCon's GCR Clause.

"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.

The Michigan Supreme Court in *In re MCI Telecommunications Complaint*, 596 NW2d 164, 174, 460 Mich 396, 411 (1999) 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 and MichCon's application, testimony and exhibits in Case No. U-12766 do not satisfy Act 304's requirement that a gas utility's GCR plan and factors cover a 12-month period. Paragraph 2 of MichCon's December 21, 2000 Application in Case No. U-12766 requests a maximum GCR factor of $5.17 per Mcf for the period April 1, 2001 through December 31, 2001 -- a 9-month period. Paragraph 4 of the Application says that the testimony and exhibits attached to the Application "constitute MichCon's Gas Cost Recovery Plan for the period April 1, 2001 through December 31, 2001" -- a 9-month period.

There is no genuine issue of material fact that MichCon's GCR plan and factors cover 9 months, not 12 months. Because MichCon's application does not satisfy the requirement in MCL 460.6h that its GCR Plan and factor cover a 12-month period, the Company has failed to state a claim for which relief can be granted. 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[3]. Therefore, that part of MichCon's Application in Case No. U-12762 that seeks approval of a 9-month GCR plan period and all of MichCon's Application in Case No. U-12766 should be dismissed.

II. <u>The Requirement That A Forecast Cover a 5-Year Period</u>

The very first sentence of MichCon's December 21, 2000 Application in Case No. U-12766 for approval of its 5-year forecast says that its request is made pursuant to MCL 460.6h et seq.

MCL 460.6h(4) states:

"In order to implement the gas cost recovery clause established pursuant to subsection

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[2] MCL 460.6h(3).

[3] MichCon's Application should have been rejected by the Commission's Executive Secretary when it was filed for failure to meet applicable statutory requirements.

(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:

> "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.

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.

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 4 years, 9 months.

MichCon's Application in Case No. U-12762 does not request a one-time, 4 year, 9 month GCR forecast period starting April 1, 2001.

There is no genuine issue of material fact that MichCon's gas forecast of customer requirements, anticipated sources of supply and projections of costs cover 4 years, 9 months, not 5 years. Because MichCon's Application in Case No. U-1766 does not satisfy the requirement of MCL 460.6h that its forecast must cover a 5-year period, the Company has failed to state a claim for which relief can be granted. 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 forecast does not satisfy the requirement in subsection (4)[4] that a forecast of customer

[4] MCL 460.6h(4).

requirements, anticipated sources of supply and projections of costs cover a 5-year period. Therefore, all of MichCon's Application in Case No. U-12766 should be dismissed.

III. 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 to implement its gas cost recovery clause:

1. The utility's gas cost recovery plan and factors must cover a 12-month period; ***and***
2. the utility's forecast of customer requirements, anticipated sources of supply and projections of costs must cover a 5-year; ***and***
3. 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. The Company 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:

a. File in 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[5] on January 1, 2001; ***or***

b. 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[6].

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

[6] 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).

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

MichCon made a different choice. The Company: (1) 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 (2) 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 ignored its available, lawful remedies. Instead its has applied to the MPSC for 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.

For all these reasons, the Residential Ratepayer Consortium asks that the Michigan Public Service Commission grant its motion to dismiss.

THE RESIDENTIAL RATEPAYER CONSORTIUM

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By: ________________________________

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