

Consumers Energy

A CMS Energy Company

January 3, 2003

Hand Delivered

Ms. Sandra Schultz Mengel, Chief Clerk
Michigan Court of Appeals
Michigan Hall of Justice
925 W. Ottawa Street, 2nd Floor
P.O. Box 30022
Lansing, MI 48909-7522

**Re: Consumers Energy Company v Michigan Public Service Commission
Court of Appeals No. 245309
Michigan Public Service Commission Case No. U-12891**

Dear Ms. Mengel:

Enclosed please find two copies of the "Docketing Statement" to be filed on behalf of Appellant Consumers Energy Company. I have also enclosed one extra copy of this filing to be date stamped. I would appreciate if you would date stamp the extra copy and return the same to our courier. Thank you for your assistance.

Sincerely,

H. Richard Chambers

H. Richard Chambers

cc: Ms. Dorothy Wideman, MPSC
Parties of Record

MICHIGAN PUBLIC SERVICE
COMMISSION

JAN 06 2003

FILED

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STATE OF MICHIGAN MPSC JUDICIAL CIRCUIT MPSC COUNTY MPSC TRIAL JUDGE	DOCKETING STATEMENT MCR 7.204(H)	CASE NO. Circuit: MPSC Case No. U-12891 Court of Appeals: 245309
Court address 6545 Mercantile Way, Suite 11, P.O. Box 30221, Lansing, MI 48909		Court telephone no. (517) 241-6170

Instructions:

- MCR 7.204(H) requires appellant to file a docketing statement in a civil appeal.
- The purpose of the docketing statement is to facilitate the efficient processing of appeals by allowing the Court of Appeals to quickly identify jurisdictional problems, other related cases, and appropriate settlement conference cases, among other things.
- Appellee may respond by filing a separate docketing statement if desired.
- The requirement that appellant identify issues in the docketing statement will not limit appellant's presentation of issues in appellant's brief. Omission of an issue from the docketing statement will not provide an appropriate basis for a motion to strike any portion of appellant's brief. However, early and accurate identification of issues is critical to the success of the Court's settlement conference program and improved case processing.
- Please type or print. Appellant must complete the statement fully and accurately.
- Two copies must be filed with the clerk of the Court of Appeals within 28 days after the claim of appeal is filed or the application for leave to appeal is granted, and a copy must be served on the opposing parties. Failure to timely file this document may lead to dismissal of your appeal.

1. Case title

Plaintiff name, address, and telephone no. ☒ Appellant CONSUMERS ENERGY COMPANY ☐ Appellee 212 West Michigan Avenue Jackson, MI 49201 (517) 788-1482	v	Defendant name, address, and telephone no. ☐ Appellant Michigan Public Service Commission ☒ Appellee 6545 Mercantile Way, Suite 11, P.O. Box 30221 Lansing, MI 48909 (517) 241-6170
Plaintiff attorney name, address, telephone no., and bar no. Jon R. Robinson, Esq. (P27953) H. Richard Chambers, Esq. (P34139) 212 West Michigan Avenue Jackson, MI 49201 (517) 788-1482	Defendant attorney name, address, telephone no., and bar no. Patricia S. Barone (P29560) Assistant Attorney General 6545 Mercantile Way, Suite 15 Lansing, MI 48911 (517) 241-6680	

2. Additional appellees

Name of appellee Association of Businesses Advocating Tariff Equity ("ABATE") c/o Clark Hill PLC 255 S. Old Woodward Ave., Third Floor Birmingham, MI 48009 (248) 642-9692	Name of Appellee ATTORNEY GENERAL, MICHAEL A. COX 525 W. Ottawa Street 6th Floor Williams Building P.O. Box 30212 Lansing, MI 48909 (517) 373-1123
Attorney name, address, telephone no., and bar no. Robert A.W. Strong, Esq. (P27724) Clark Hill PLC 255 S. Old Woodward Ave., Third Floor Birmingham, MI 48009 (248) 642-9692	Attorney name, address, telephone no., and bar no. Donald E. Erickson, Esq. (P13212) 525 W. Ottawa Street 6th Floor Williams Building P O Box 30212 Lansing, MI 48909 (517) 373-1123

continued on page 2

Additional appellees (Contd)

Name of appellee

Name of appellee

3. Names of all other parties to the action who will not, or are not expected to, participate in the appeal.

Name of party and designation
Attorney name, address, telephone no., and bar no.

Name of party and designation
Attorney name, address, telephone no., and bar no.

4. ☐ A bankruptcy petition has been filed in another court which affects this court's jurisdiction over this appeal as follows:
☐ Another proceeding has been commenced which affects this court's jurisdiction over this appeal as follows:

Name of proceeding(s)

5. ☐ a. There are pending appeals in the Court of Appeals or Supreme Court which arose out of the same transaction, lower court case, or between the same parties.

Case name	Lower court no.	Docket no(s).	Citation

- ☐ b. There are prior appeals arising out of the same transaction, lower court case, or between the same parties.

Case name	Lower court no.	Docket no(s).	Citation

- ☒ c. I am aware of the following pending appeals in the Court of Appeals or Supreme Court raising the same or closely related issues.

Case name	Lower court no.	Docket no(s).	Citation
Consumers Energy Company v. Michigan Public Service Commission	U-12639	241990	
The Detroit Edison Company v. Michigan Public Service Commission	U-12639	241991	
The Detroit Edison Company v. Michigan Public Service Commission	U-12892	243268	
Consumers Energy Company v. Michigan Public Service ommission	U-12358	243360	

DOCKETING STATEMENT, page 3

6. The following are all lower court trial, motion, and other hearing proceedings and the dates held.

Instruction: Follow up with the lower court clerk's office to make sure that all transcripts are forwarded to the Court of Appeals with the lower court record [MCR 7.210(B)]. Missing transcripts will cause the case to be delayed or dismissed. If some transcripts have not been ordered, explain why.

Type of proceeding	Dates	Court reporter	Judge	Explanation if transcripts not ordered
Prehearing Conference	6/18/01	Merrill & Associates, Inc.	ALJ James N. Rigas	On file at MPSC.
Evidentiary Hearing	10/29/01	Merrill & Associates, Inc.	ALJ James N. Rigas	On file at MPSC.

7. Nature of case (check the categories which describe the matters on appeal)

a. Procedural posture of case:

- ☐ arbitration ☐ bench trial ☐ jury trial ☐ declaratory judgment
☐ interlocutory matter ☐ original action in Court of Appeals ☐ post judgment action ☐ summary disposition
☒ administrative proceeding (specify agency involved) Michigan Public Service Commission
☐ writ (mandamus, superintending control) _____
☐ other _____

b. Substantive nature of case:

- | | | |
|---|---|---|
| ☐ banking law
☐ civil procedure
☐ contempt
☐ costs and attorney fees
☐ discovery
☐ civil rights (non-employment related)
☐ commercial transactions
☐ condemnation/eminant domain
☐ conflicts of law
☐ contracts (non-employment related)
☐ corporations and partnerships
☐ domestic relations
☐ alimony
☐ child support
☐ custody/parenting time
☐ property division
☐ paternity
☐ termination of parental rights
☐ dramshop
☐ drug forfeiture
☐ elections | ☐ employment law
☐ labor relations/collective bargaining
☐ public employment (PERA)
☐ unemployment compensation
☐ wrongful discharge
☐ breach of contract
☐ civil rights/discrimination
☐ age
☐ gender
☐ handicap
☐ race
☐ Touissant
☐ governmental immunity
☐ insurance
☐ automobile (no fault)
☐ environmental cleanup
☐ homeowners
☐ other _____
☐ landlord-tenant
☐ malpractice
☐ legal
☐ medical
☐ professional – other _____ | ☐ natural resources/
environmental law
☐ prisoner appeal
☐ parole
☐ prisoner rights
☐ other _____
☐ real property
☐ schools
☐ taxation
☐ teachers
☐ torts/negligence/strict liability
☐ liability
☐ general negligence
☐ premises liability
☐ products liability
☐ torts _____
☒ utilities
☐ wills, estates, trusts
☐ worker's compensation
☐ zoning
☐ other _____ |
|---|---|---|

c. Other dispositive claim:

- | | |
|--|--|
| ☐ damages
☐ amount/calculation
☐ attorney fees and costs
☐ interest
☐ mitigation
☐ other _____
☐ jurisdiction (lower court) | ☐ law of the case
☐ mootness
☐ res judicata/collateral estoppel
☐ statute of limitation
☐ venue
☐ other _____ |
|--|--|

continued on page 4

DOCKETING STATEMENT, page 4

Instructions: Items 8 through 11 are primarily for settlement conference purposes [MCR 7.213(A)]. Attach additional pages if necessary.

8. Brief description of the nature of the action and the result in the trial court. (General conclusory statements such as "the judgment of the trial court is not supported by the law or fact" are unacceptable.)

See Attachment A to Docketing Statement.

9. Brief statement of all issues to be raised in this appeal. (This information will also be used to place cases on different processing tracks so it is important to be as accurate as possible.)

See Attachment B to Docketing Statement.

10. Settlement negotiations. (Check all boxes that apply.)

- ☐ Settlement negotiations have been conducted among the parties since the verdict.
☐ Settlement negotiations have been scheduled.
☒ Settlement is unlikely.
☐ Other _____

11. The amount and terms of the judgment appealed are: _____

01/03/2003
Date

H. Richard Chambers
Signature - H. Richard Chambers, Esq.

PROOF OF SERVICE

I certify that copies of this docketing statement and any attachments were served on all opposing parties/attorneys by regular mail at their last known addresses.

01/03/2003
Date

Kelly Fisher
Signature

Attachment A
To Court Of Appeals Docketing Statement
Docket No. 245309 (MPSC Case No. U-12891)

Item No. 8. Brief description of the nature of the action and the result in the trial court. (General conclusory statements such as “the judgment of the trial court is not supported by the law or fact” are unacceptable.)

In connection with the initiation of a voluntary Retail Open Access (“ROA”) program (which allowed retail electric customers to purchase electricity from alternative electricity suppliers), the Michigan Public Service Commission (“MPSC” or “the Commission”) had, in 1997-1999, issued orders authorizing recovery of “implementation costs” (costs incurred by electric utilities to design and implement retail open access; e.g., costs incurred to design and implement new metering, billing and other business systems to accommodate retail open access) and establishing a procedure for reviewing implementation costs. The Commission held, among other things, that if implementation costs were prudently incurred it would be inappropriate to disallow recovery by the utility. In addition, the Commission reviewed and approved an implementation plan for Consumers Energy.

In June 2000, 2000 PA 141 (“PA 141”) was enacted and became effective. MCL 460.10 et seq. PA 141 transformed the voluntary retail open access program into a mandatory program, and specifically directed the MPSC to issue orders that “shall provide for full recovery of a utility’s implementation costs.” MCL 460.10a(1). PA 141 also validated orders previously issued by the Commission authorizing the recovery of implementation costs, stating that such prior orders “are in compliance with this act.” MCL 460.10a(5).

In accordance with procedures established by the Commission for review and recovery of implementation costs, Consumers Energy filed an application in MPSC Case No. U-12891 to recover implementation costs incurred during the period ended

Attachment A (Continued)
To Court Of Appeals Docketing Statement
Docket No. 245309 (MPSC Case No. U-12891)

December 31, 2000. These costs were incurred to implement a retail open access program in accordance with previous orders of the Commission. A contested case hearing was held which addressed, among other things, the prudence of the implementation expenditures. Briefs were subsequently filed.

On November 7, 2002, the Commission issued an order authorizing recovery of \$19,587,000 of implementation costs incurred by Consumers Energy, but making such recovery conditional upon an additional, later review of the expenditures, which the Commission indicated would review subsequent events and results. The Commission stated that, as a prerequisite to recovery of implementation costs that had been reviewed and approved for conditional recovery, Consumers Energy would be required to file an additional application and supporting documentation addressing the success of Consumers Energy's implementation efforts.

Attachment B
To Court Of Appeals Docketing Statement
Docket No. 245309 (MPSC Case No. U-12891)

Item No. 9. Brief statement of all issues to be raised in this appeal. (This information will also be used to place cases on different processing tracks so it is important to be as accurate as possible.)

1. Whether those portions of the November 7, 2002 order of the Michigan Public Service Commission holding that recovery by Consumers Energy from customers of costs incurred by Consumers Energy for the period ended December 31, 2000 to implement electric retail open access will be conditioned upon some undefined notion of success and subject to an additional proceeding are unlawful and unreasonable because they are inconsistent with various provisions of 2000 PA 141, including MCL 460.10a(1) and 460.10a(5).
2. Whether those portions of the November 7, 2002 order of the Michigan Public Service Commission holding that recovery by Consumers Energy from customers of costs incurred by Consumers Energy for the period ended December 31, 2000 to implement electric retail open access will be conditioned upon some undefined notion of success and subject to an additional proceeding are unlawful and unreasonable as a result of being inconsistent with, and contrary to, established law regarding the prudent investment test.
3. Whether the Michigan Public Service Commission acted unlawfully and unreasonably by rejecting its prior orders and retroactively changing the criteria for recovery of costs incurred by Consumers Energy to implement retail open access after Consumers Energy had spent millions of dollars on implementation in reliance upon commitments of the Commission that all prudent implementation costs would be recovered and the Commission had approved Consumers Energy's implementation plan.
4. Whether the November 7, 2002 order of the Michigan Public Service Commission violates the Fifth Amendment (taking of private property) and Fourteenth Amendment (substantive and procedural due process) of the United States Constitution and article 1, § 17 (due process and right to fair and just treatment) and article 10, § 2 (taking of private property) of the Michigan Constitution 1963 as a result of (i) changing ratemaking methodologies in a way that imposes risks on investors that they did not assume and (ii) retroactively imposing additional and different procedural and substantive requirements for recovery of implementation costs after such costs had been incurred by Consumers Energy.