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June 25, 2004

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911

Dear Ms. Kunkle:

Re: <u>MPSC Case Nos. U-11955, U-12358, U-12891 & U-13340</u>

I am attaching for filing the Attorney General's Brief on Remand. I am also attaching a proof of service. This filing is being submitted electronically pursuant to the instructions in the Commission's notice of hearing, and I am submitted an original for each case file plus 4 copies.

Sincerely,

Donald E. Erickson

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c All Parties

PROOF OF SERVICE – U-11955, U-12358, U-12891 & U-13340

The undersigned certifies that a copy of the Attorney General's Brief on Remand was served upon the parties listed below by mailing the same to them at their respective addresses with first class postage fully prepaid thereon on the 25th day of June 2004

Janet A. Schafer

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY for authority to recover implementation costs, approval of a stranded cost true-up methodology, and other relief /	MPSC No. U-11955
In the matter of the application of CONSUMERS ENERGY COMPANY for authority to recover implementation costs for the 12-month period ended December 31, 1999 /	MPSC No. U-12358
In the matter of the Application of CONSUMERS ENERGY COMPANY to recover implementation costs for the period ended December 31, 2000 /	MPSC No. U-12891
In the matter of the Application of CONSUMERS ENERGY COMPANY to recover implementation costs for the period ended December 31, 2001 /	MPSC No. U-13340

Attorney General's Brief on Remand

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June 25, 2004

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History of Proceedings

In orders from 1997 through 1999, the Michigan Public Service Commission (MPSC or the Commission) addressed electric industry restructuring. Among other things, the Commission decided that it should conduct an annual review of implementation costs and potential recovery of those cost by Consumers Energy Company (CECo) and The Detroit Edison Company (DECo). The first annual review took place in the context of applications made by CECo in MPSC Case No. U-11955 and by DECo in MPSC Case No. U-11956.

The Commission consolidated those two cases, and on October 24, 2000, the Commission issued an Opinion and Order. In that order, the Commission recognized that the last two categories (employee retraining costs and cost related to the implementation of restructuring), which had been previously grouped among five categories of stranded costs had been distinguished. Page 3 in that order said:

> Generally speaking, implementation costs are non-recurring costs that the utilities incur in addition to the operational costs that they already recover in their base rates and are necessary to accomplish the changes required by restructuring.

In other words, two factors must be proved for costs to qualify as implementation costs. First, costs must be in addition to costs already being recovered in base rates. Second, costs must be necessary to accomplish the changes required by restructuring. Those conditions indicate that costs must be reviewed to determine that they are incremental and that they do not exceed amounts needed only because of restructuring.

Later in the order, the Commission acknowledged the annual true-up method it had adopted in January 14, 1998 and March 8, 1999 orders and indicated that Case Nos. U-11955 and U-11956 were the initial true-up proceedings. At the conclusion of its U-11955/U-11956 order, the Commission approved deferred recovery of $15,376,000 by CECo.

The Commission's October 24, 2000, order was not appealed. Among other things, the Commission securitized some of the costs approved for deferred recovery in U-11955 in Case No. U-12505.

On July 11, 2001, the Commission issued an order in U-12358 and authorized deferred recovery of $25,156,000 related to CECo's 1999 implementation costs. CECo sought rehearing, and on July 23, 2002, the Commission denied rehearing. CECo appealed those orders.

On November 7, 2002, the Commission issued an order in U-12891 and authorized deferred recovery of $19,587,000 in implementation costs incurred by CECo for 2000. CECo appealed that order.

On June 16, 2003, the Commission issued an order inU-13340 and authorized deferred recovery of $7,947,000 in implementation costs incurred by CECo for 2001. CECo appealed that order.

On April 1, 2004, the Michigan Court of Appeals issued an opinion and remanded Case No. U-12358 for further consideration in light of the Court's finding that recovery cannot be deferred indefinitely under MCL 460.10a(1). In addition, the Court remanded Case Nos. U-12891 and U-13340 to the Commission in light of its April 1st opinion.

In response to the Court's remand opinion, the Commission issued an opinion and order in Case No. U-12358 on April 28, 2004. The order noted that the Commission had authorized securitzation of the $25,156,000 from Case No. U-12358 in Case No. U-13715; therefore, the Commission gave CECo the option of pursuing relief in U-12358 or via securitization.

On May 7, 2004, CECo filed a document entitled "Selection of Option for Recovery of Implementation Costs." In that document, CECo states:

> 5. Consumers Energy understands the surcharge option described in the April 28, 2004 Order to mean that recovery from large manufacturing and commercial customers will begin when surcharges are approved, recovery from small manufacturing and commercial customers will begin on January 1, 2005, and recover from residential customers will begin on January 1, 2006.
>
> 6. Based upon the foregoing, Consumers Energy elects to withdraw the implementation costs from further consideration for securitization in Case No. U-13715, and to recover those implementation costs in this proceeding through the use of surcharges.
>
> **IV. PROPOSED SURCHARGES**
>
> 7. Consumers Energy proposes to recover the approved implementation costs through the use of per KWh surcharges on all customer classes (for both full service and retail open access customers) that begin for large manufacturing and commercial customers, when the surcharges are approved, and for other rate classes at the expiration of the applicable rate caps. The proposed recovery period for each customer group is 36 months. Thus, since the residential surcharge would not commence until January 1, 2006, the total recovery period would actually extend over approximately 5 years. The proposed per kWh surcharges for the large commercial and industrial group, the small commercial and industrial group and the residential customer group are equal except for an adjustment to reflect differences in carrying costs that occur based upon when collection begins and ends. This is done so that customers do not receive a benefit or suffer a detriment based upon when collection begins from their customer group.
>
> 8. Consumers Energy proposes that reconciliation filings be made following the three collection periods (i.e., each customer group would be separately reconciled) so that amounts collected can be reconciled with total implementation costs (including carrying costs) and so that customers will pay no more and no less than the recoverable costs.

CECo's document went on to summarize the prior history of the cases, which are discussed above in this brief. CECo requested the Commission to authorize surcharges totaling $87,633,000 as described in its Attachment A.

On June 3, 2004, the Commission issued its “Order and Notice of Hearing” in Case Nos. U-11955, U-12358, U-12891, and U-13340. That order and notice of hearing describes CECo’s election to recover implementation costs via surcharges, advised the parties that the Commission intends to take official notice of all existing pleadings, testimony, and exhibit in the four cases, authorized parties to file additional testimony by June 11, 2004, authorized parties to file responsive testimony and exhibits by June 18, 2004, scheduled a hearing for 1:30 p.m. on June 22, 2004, and ordered the parties to submit briefs to the Commission no later than June 25, 2004.

At the hearing on June 22, the only evidence offered was a copy of the June 3 Order and Notice of Hearing and an Exhibit A-1, which is a copy of the Commission’s February 1, 2004 report on the “Status of Electric Competition in Michigan.”

The Attorney General files this brief in accord with the June 3 Order and Notice of Hearing.

Issues

A. Recoverability

As the Attorney General understands the Commission's prior orders and the Court of Appeals opinion there are three issues concerning recoverability. First, are the costs in addition to costs already being recovered? As the Attorney General understands the prior orders and records, the Commission did decide that the previously deferred amounts were in addition to costs already being covered in base rate. Second, were the reported costs necessary to accomplish the changes required by restructuring? As the Attorney General understands the prior orders and records, the MPSC did not decide this issue. CECo presented evidence stating that the motive for making the reported expenditures was to implement electric restructuring, but the witnesses did not demonstrate that the amounts spent were necessary to accomplish the changes required by restructuring. Third, were the reported costs reasonably and prudently incurred? As the Attorney General understands the prior orders and records, the Commission and its Staff found no disputes regarding reasonableness and prudence.

In conclusion, if the Commission decides that the records demonstrate that the previously deferred costs were necessary, then those amounts are recoverable.

B. The Rate Freeze and Recovery of 2000 and 2001 Costs

As amended by 2002 PA 609, MCL 460.10d provides in relevant part:

> (1) Except as otherwise provided under subsection (3) or unless otherwise reduced by the commission under subsection (5), the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding

> any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.

When statutory language is unambiguous, courts presume that the Legislature intended the meaning clearly expressed, and no further judicial construction is required or permitted. Only where the statutory language is ambiguous may courts look outside the statute to ascertain the Legislature's intent. *Dibenedetto v West Shore Hospital,* 461 Mich 394, 402; 605 NW2d 300 (2000), and *People v McIntire,* 461 Mich 147, 153; 599 NW2d 102 (1999). Furthermore, every word in a statute should be given meaning, and courts must avoid a construction of a statute that would render any part of a statute surplusage or nugatory. *Omelenchuk v City of Warren,* 466 Mich 524, 528; 647 NW2d 493 (2002). The MPSC has a duty to interpret the statute as it finds it. The wisdom of a statute in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere. *Jennings v Southwood,* 446 Mich 125, 142; 521 NW2d 230 (1994). In other words, the MPSC is bound by the plain language in a statute. *Consumers Power Co v PSC,* 460 Mich 148, 157, n 8; 596 NW2d 126 (1999).

In this case, MCL 460.10d(1) contains a very powerful statement that the rate freeze adopted by the statute must be applied notwithstanding any other provision of law or commission order. That language is also consistent with the general rule of statutory construction that a specific statute prevails over a more general statute addressing the same subject. *Gebhardt v O’Rourke,* 444 Mich 535, 542-543; 510 NW2d 900 (1994).

Since the plain and unambiguous language of this statute provides that it prevails over any conflict between it and any other statute or MPSC order, the rate freeze created by

MCL 460.10d(1) prevails over the provision for recovery of 2000 through 2003 implementation costs prescribed by MCL 460.10a(1) and the prior orders deferring those costs. Therefore, the Commission should only authorize recovery of the 1999 deferred costs. Allowing deferral of 2000 and 2001 costs would evade and violate the very explicit terms of MCL 460.10d(1).

C. Cost Allocation

The next issue concerns how reported and approved costs are allocated. In its original June 5, 1997 Opinion and Order in U-11290 (pages 12-13), the MPSC ruled that it would not authorize recovery of stranded costs from bundled sales customers. At that time, the five categories of stranded costs included what are now called implementation costs. The June 5, 1997 order has been ratified by MCL 460.10a(5). Therefore, the Attorney General contends that implementation costs should not be allocated to bundled sales customers. If the Commission follows its original and ratified determination, then it should reject CECo's proposal to recover implementation costs via a surcharge to bundled sales customers.

Relief Requested

For the reasons stated above, the Attorney General requests the Michigan Public Service Commission to issue an order determining whether the reported costs are properly classified as recoverable implementation costs, determining that MCL 460.10d(1) precludes recovery of costs incurred during the rate freeze from June 5, 2005, through December 31, 2003, and determining that recoverable implementation costs should not be allocated to bundled sales customers.

Respectfully submitted,

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