

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30755
LANSING, MICHIGAN 48909

March 7, 2005

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

Dear Ms. Kunkle:

Re: MPSC Case No. U-12999

I am attaching for filing an original and 4 copies of the Attorney General's Answer to Petition of Consumers Energy Company for Waivers of Filing Requirements. 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.

Sincerely,

Donald E. Erickson DonaldEErickson
2005.03.07 08:11:01 -05'00'

Donald E. Erickson
Assistant Attorney General

c All Parties

PROOF OF SERVICE - U-12999

The undersigned certifies that a copy of the Attorney General's Answer to Petition of Consumers Energy Company for Waivers of Filing Requirements 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 7th day of March 2005.

 Diane M. Pittman
2005.03.07 08:40:50
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Diane M. Pittman

Administrative Law Judge:

Mr. Daniel E. Nickerson, Jr. (P36294)
Michigan Public Service Commission
6545 Mercantile Way Suite 14
Lansing, MI 48911

MPSC Staff:

Mr. Steven D. Hughey (P32230)
Assistant Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911

Consumers Energy Company:

Mr. Jon R. Robinson (P27953)
Mr. H. Richard Chambers (P34139)
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

ABATE:

Mr. Robert A. W. Strong (P27724)
Clark Hill, P.L.C.
255 S. Old Woodward Ave., Third Floor
Birmingham, MI 48009

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of
CONSUMERS ENERGY COMPANY for
Accounting and Ratemaking Approval of
Depreciation Rates for Gas Utility Plant

MPSC No. U-12999

**Attorney General's Answer to
Petition of Consumers Energy Company for Waivers of Filing Requirements**

In response to Consumers Energy Company's (CECo or the Company) petition, the Attorney General Michael A. Cox (the Attorney General) states as follows:

1. Ordering paragraph D in the Michigan Public Service Commission's (MPSC or the Commission) Opinion and Order dated October 14, 2004, in this case states in relevant part:

Consumers Energy Company shall file an application for new depreciation accrual rates for its natural gas utility plant on, or no earlier than a date three months prior to, the date that Consumers Energy Company files its next natural gas general rate case. Consumers Energy shall use its natural gas utility plant balances as of December 31 of the calendar year immediately preceding the filing date.

In its petition, CECo requests the Commission to waive the requirement to file its next application for new depreciation accrual rates no later than the date that the Company files its next natural gas general rate case. CECo's petition also requests the Commission to partially waive the requirement to use natural gas utility plant balances as of December 31 of the calendar year immediately preceding the filing date.

2. The Attorney General contends that CECo's petition violates the requirements of Rules 401 and 403 of the Commission's Rules of Practice and Procedure [1992 AACs, R460.17401 and R460.17403] and does not comply with the requirements of MCL 462.24. Furthermore, the Attorney General contends that the relief requested in CECo's petition is neither just nor reasonable.

Unlawfulness of CECo's Petition

3. Rule 401(2) permits a party to a case to file a motion to reopen a case only until the expiration of the time period for filing a petition for rehearing. Rule 403 states that a petition for rehearing shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. No statute provides for a later filing.

4. On October 19, 2004, CECo filed a petition for rehearing in this case. The MPSC granted CECo's rehearing petition in its December 2, 2004 "Order. CECo's petition for rehearing did not raise either of the issues raised in its current petition.

5. Under MPSC Rules 401 and 403, CECo is no longer legally entitled to file pleadings in this case to amend the Commission's orders.

6. In addition to following constitutional and statutory mandates, an administrative agency must comply with its own rules. *Rand v Civil Svc Comm'n*, 71 Mich App 581, 586; 248 NW2d 624 (1976). *See also*, Const 1963, art 1, § 17, and *Bohannon v Sheraton Cadillac Hotel, Inc*, 3 Mich App 81, 82; 141 NW2d 722 (1966).

6. Paragraph 9 in CECo's current petition alleges that the Commission is authorized by statute to alter or amend prior orders, but does not cite any statute.

7. MCL 462.24 empowers the Commission to alter or amend its orders, but that statute does not empower the Commission to reopen or rehear cases or to violate MPSC Rules 401 and 403. Furthermore, that statute requires notice and an opportunity for a hearing. *In re application of The Detroit Edison Company*, Order and Notice of Hearing dated October 23, 2003 in MPSC Case No. U-13933. In turn, the requirements in MCL 462.24 mean that the Commission must treat applications under MCL 462.24 as contested cases. MCL 24.203(3).

8. In conclusion, CECo may seek to amend an order pursuant to MCL 462.24, i.e., request the MPSC to rescind, alter, or amend the filing requirements adopted in the October 14, 2004, Opinion and Order. But CECo cannot legally request and the MPSC cannot legally grant CECo's request for relief in this case.

The relief requested by CECo is neither just nor reasonable.

9. Assuming only for the sake of argument that legally CECo can seek relief in this case and the MPSC can grant the requested relief, the MPSC should not grant that relief because doing so would not be just and reasonable.

10. Under its statutory powers, the Commission must fix just and reasonable rates. This can be accomplished only by balancing the interests of public utility investors and the consuming public. *Detroit v MPSC*, 308 Mich 706, 716; 14 NW2d 784 (1944).

11. In its October 14, 2004 Opinion and Order, the Commission determined that it was just and reasonable to require CECo to file an application for new depreciation accrual rates no later than the date on which CECo decides to file its next natural gas general rate case.

12. CECo now requests the Commission to waive this requirement so that the Company can file its next natural gas general rate case before the Company files an application for new depreciation accrual rates.

13. CECo argues that the Company needs this waiver because surcharges approved in Case No. U-13730 will expire so the Company must file a new natural gas general rate case by mid-2005. Under the order in U-13730, surcharges will expire in October 2006, but expiration of those surcharges in the face of the Commission's U-13730 finding that CECo failed to prove a revenue deficiency does not demonstrate a need for a mid-2005 general rate application. CECo's claim that the U-13730 surcharges will expire is not a new circumstance. The Commission issued its orders in U-13730 and U-12999 and simultaneously adopted the expiration and filing requirements. CECo did not seek relief from those rulings within the time permitted by MPSC Rules 401 and 403; therefore, CECo is not now entitled to the relief sought. Furthermore, CECo can simultaneously file a depreciation rate application and a general rate case application in mid-2005.

14. The obvious, implicit purpose of the filing requirement the Commission adopted in this case was to synchronize potential changes in depreciation rates and depreciation expense with future retail rate changes.

15. Higher depreciation rates result in higher depreciation expense all other things remaining equal. Lower depreciation rates result in lower depreciation expense all other things remaining equal. Depreciation expense is a significant part of a utility's revenue requirements. *Michigan Public Utilities Comm'n v Michigan State Tel Co*, 228 Mich 658, 664; 200 NW 749 (1924). When retail rates are established using incorrect or improper depreciation rates and expense, whether they are high or low, then retail rates cannot be just and reasonable.

16. CECo requests the Commission to allow the Company to seek a retail rate increase but make retail customers wait for depreciation expense relief until after the Commission decides U-14292 and until after the Commission decides a subsequently filed depreciation rate application.

17. The MPSC set CECo's current retail natural gas rates in Case No .U-13730, but those retail rates are based upon depreciation rates established in 1998 by the Commission in Case No. U-11509. In this case, the Proposal for Decision previously recommended a reduction of depreciation rates that would have lowered CECo's annual depreciation expense by approximately \$50 million per year and CECo's retail rates by an equivalent amount, but the Commission decided to continue the U-11509 depreciation rates pending a generic review of depreciation in Case No. U-14292. The Commission also raised CECo's retail rates by \$58,124,000 in U-13730. Under these circumstances, it would be neither just nor reasonable to allow CECo to change the filing requirements and seek a retail rate increase without simultaneously filing an application for new depreciation accrual rates.

18. Any new general rate case application filed by CECo must consider and must be based upon on facts that will not only reflect upon the present but upon a reasonable period in the future. *General Tel Co of Mich v PSC*, 341 Mich 620, 632; 67 NW2d 882 (1954).

19. The logical test year for a new general rate case would be 2006, and it would not be reasonable to establish in a 2005 case retail rates for 2006 and beyond without first including potential depreciation rate and expense changes. This is what the Commission already ruled.

20. CECo also requests partial relief from the requirement that its next depreciation rate application must be based upon plant balances in the prior year. There is no reasonable justification for CECo's requested relief. CECo claims that it needs to file by mid-2005. Before

then CECo must file its annual report to the Federal Energy Regulatory Commission and the MPSC as well as a Securities and Exchange Commission Form 10-K, so it will have 2004 plant balances available by then. Certainly 2004 plant balances will be available at least 12 months before October 2006.

21. Paragraph 12 in CECo's petition agrees to accept a surcharge mechanism after a final order in its proposed, delayed depreciation application case. CECo's agreement is specious. First, CECo assumes depreciation expense will increase and require a surcharge. Second, the relief requested by CECo would allow CECo to obtain a general rate increase before customers could receive any relief resulting from potential depreciation expense reductions, such as the one recommended by the PFD in this case. CECo does not agree to a separate retail rate credit, and a delayed rate credit is not fair to retail customers even if CECo agrees to a retail rate credit. Third, the MPSC does not have a power unless clear and unmistakable statutory language creates such a power, *Union Carbide Corp v PSC*, 431 Mich 135, 151; 428 NW2d 322 (1988), and there is no statute that authorizes the MPSC to retain unjust and unreasonable depreciation rates pending a decision in a generic case involving all Michigan utilities. This is essentially the effect of the waiver CECo requests.



Relief Requested

Attorney General Michael A. Cox requests the Michigan Public Service Commission to issue an order denying CEC's petition for waiver. CEC's petition is not legally permitted, and CEC's requested relief is neither just nor reasonable.

Respectfully submitted,

Michael A. Cox
Attorney General

Donald E. Erickson DonaldEErickson
2005.03.07 09:02:03 -05'00'

Donald E. Erickson (P13212)
Assistant Attorney General

Consumer Protection Division
Sixth Floor G. Mennen Williams Bldg.
525 W. Ottawa Street
P. O. Box 30755
Lansing, MI 48909

March 7, 2005