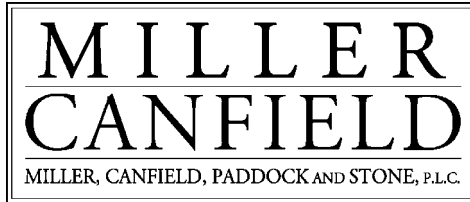


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**SHERRI A. WELLMAN**  
TEL: (517) 483-4954  
FAX: (517) 374-6304  
E-MAIL: [wellmans@millercanfield.com](mailto:wellmans@millercanfield.com)

One Michigan Avenue, Suite 900  
Lansing, Michigan 48933  
TEL: (517) 487-2070  
FAX: (517) 374-6304  
[www.millercanfield.com](http://www.millercanfield.com)

July 19, 2006

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

Re: SEMCO Energy Gas Company  
2006-07 GCR Reconciliation  
MPSC Case No. U-14718 [paperless]

Dear Ms. Kunkle:

Enclosed for electronic filing is the Response of SEMCO Energy Gas Company to the Appeal of PAYS America, Inc. Also enclosed is a Proof of Service. If you should have any questions, please advise.

Very truly yours,

Sherri Wellman

Digitally signed by Sherri Wellman  
DN: CN = Sherri Wellman, C =  
US, O = Miller Canfield  
Date: 2006.07.19 13:06:21 -04'00'

Sherri A. Wellman

SAW/lab  
Enclosures  
cc: Parties of Record  
Annette Gardiner

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of )  
**SEMCO ENERGY GAS COMPANY** )  
for authority to implement a gas cost )  
recovery plan and factors for the 12-month )  
period of April 2006 through March 2007. )

Case No. U-14718

PROOF OF SERVICE

STATE OF MICHIGAN )  
 ) ss  
COUNTY OF INGHAM )

Lisa A. Becker, being first duly sworn, deposes and says that on July 19, 2006, she served a true copy of **Response of SEMCO Energy Gas Company to the Appeal of PAYS America, Inc.** upon the parties on attached Service List by electronic mail.

Lisa Becker

Digitally signed by Lisa Becker  
DN: CN = Lisa Becker, C = US, O  
= Miller Canfield  
Date: 2006.07.19 13:05:54 -04'00'

Lisa A. Becker

Subscribed and sworn to before me  
this 19<sup>th</sup> day of July, 2006.

Edith Loomis

Digitally signed by Edith Loomis  
DN: CN = Edith Loomis, C = US,  
O = Miller Canfield  
Date: 2006.07.19 13:06:02 -04'00'

Edith D. Loomis, Notary Public  
State of Michigan, County of Ingham  
My Commission Expires: December 5, 2006

## SERVICE LIST

Patricia S. Barone  
Asst. Attorney General  
6545 Mercantile Way, Ste. 15  
Lansing, MI 48911  
Email: [baronep@michigan.gov](mailto:baronep@michigan.gov)

David Shaltz  
2379 Woodlake Dr., Suite 480B  
Okemos, MI 48864  
Email: [dshaltz@sbcglobal.net](mailto:dshaltz@sbcglobal.net)

Jerrold Oppenheim  
57 Middle Street  
Gloucester, MA 01930  
Email: [JerroldOpp@democracyandregulation.com](mailto:JerroldOpp@democracyandregulation.com)

Elizabeth Dahl MacGregor  
2154 Washtenaw Ave.  
Ypsilanti, MI 48197  
Email: [Liz@YpsiLawyer.com](mailto:Liz@YpsiLawyer.com)

Michael Moody  
Tobacco & Special Litigation Division  
P.O. Box 31212  
Lansing, MI 48909  
Email: [moodyme@michigan.gov](mailto:moodyme@michigan.gov)

Daniel E. Nickerson, Jr.  
Administrative Law Judge  
Michigan Public Service Commission  
6545 Mercantile Way, Suite 7  
Lansing, MI 48911  
Email: [denicke@michigan.gov](mailto:denicke@michigan.gov)

**STATE OF MICHIGAN**  
**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

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|                                                 |   |                  |
|-------------------------------------------------|---|------------------|
| In the matter of the application of             | ) |                  |
| <b>SEMCO ENERGY GAS COMPANY</b>                 | ) |                  |
| for authority to implement a gas cost           | ) | Case No. U-14718 |
| recovery plan and factors for the 12-month      | ) |                  |
| <u>period of April 2006 through March 2007.</u> | ) |                  |

**RESPONSE OF SEMCO ENERGY GAS COMPANY**  
**TO THE APPEAL OF PAYS AMERICA, INC.**

**I. INTRODUCTION**

On July 6, 2006, PAYS America, Inc., ("PAYS") electronically mailed its Appeal of PAYS America, Inc. of the Ruling by the Administrative Law Judge Finding its Proffered Testimony Irrelevant ("E-mail Appeal") to the counsel of SEMCO Energy Gas Company ("SEMCO Gas"). In its E-mailed Appeal, PAYS seeks a reversal of the June 22, 2006 ruling ("June 22 Ruling") of Administrative Law Judge ("ALJ") Daniel E. Nickerson, Jr.

SEMCO Gas is filing this response to the E-mail Appeal requesting the Commission to deny PAYS's request for failure to meet the filing requirements of Rule 337 of the Rules of Practice and Procedure Before the Commission and for failure to state a valid claim of error.

**II. BACKGROUND**

This proceeding is for the purpose of reviewing, approving and authorizing SEMCO Gas to implement a Gas Cost Recovery ("GCR") plan and factors for the 12-month period ending March 31, 2007, pursuant to MCL 460.6h et seq. On February 23,

2006, ALJ Nickerson denied PAYS's petition to intervene in this proceeding for lack of standing. (1Tr 39-40) PAYS subsequently appealed this denial to the Commission on March 9, 2006, and both Staff and SEMCO Gas filed responses objecting to the appeal. Despite the denial of its petition to intervene, and no Commission action on its related appeal, PAYS filed testimony and exhibits in this matter on May 30, 2006. After SEMCO Gas and the Staff objected to this filing of testimony by a non-party, PAYS filed a response stating that the filing was necessary because its appeal was still pending before the Commission. Alternatively, PAYS requested that its proffered testimony and exhibits be admitted as a "statement" of a non-party pursuant to Rule 207 of the Rules of Practice and Procedure Before the Commission, R 460.17337. Following oral argument on the Staff's and SEMCO Gas's motions to reject the filing or alternative strike the proffered testimony, in his June 22 Ruling, ALJ Nickerson found that PAYS was not entitled to the admission of testimony merely because its appeal was still pending before the Commission. ALJ Nickerson also stated that PAYS would not be allowed to make a Rule 207 non-party statement because he had previously found that PAYS did not have legally sufficient interest in this proceeding; and as such, PAYS's "statement" would be irrelevant to this proceeding. (40 Tr 6-10)

In its appeal on July 6, 2006, PAYS electronically sent its E-mail Appeal to SEMCO Gas's attorney. In this E-mail Appeal, PAYS seeks to overturn the June 22 Ruling on the basis that the ALJ erroneously found that its proffered testimony was irrelevant. This E-mail Appeal, however, was not filed with the Commission. A review of the Commission's electronic website in this matter, document #49, reveals that on July 6, 2006, PAYS electronically filed its Leave to Appeal the Ruling of the Presiding

Officer Denying Petition to Intervene and Brief, dated March 9, 2006. These same documents were previously filed as document #19 and relate to the appeal of the ALJ's February 23 Ruling already pending before the Commission.

SEMCO Gas submits that PAYS has not properly appealed the ALJ's June 22 Ruling and has not cited a legally valid claim of error; therefore, the June 22 Ruling should be upheld.

### **III. ARGUMENT**

#### **A. Failure to Properly Appeal**

Rule 337 of the Rules of Practice and Procedure Before the Commission, R 460.17337, requires applications for leave to appeal to the Commission from rulings of presiding officers to be filed within 14 days after an oral ruling. In accordance with Rule 337, an appeal of the June 22 Ruling was due to be filed on July 6, 2006. PAYS did not file an appeal of the June 22 Ruling with the Commission's Executive Secretary on July 6, 2006.<sup>1</sup> Instead, PAYS re-filed its appeal of the ALJ's February 23, 2006 ruling denying PAYS's petition to intervene. (And as of the time of the filing of this response, the E-mail Appeal has not yet been filed with the Commission.) PAYS, therefore, failed to properly and timely appeal the June 22 Ruling.

#### **B. Failure to Offer a Legally Valid Claim of Error**

Assuming that the Commission considers the merits of PAYS's E-mail Appeal, SEMCO Gas submits that the ALJ correctly denied PAYS's request to proffer nearly 40 pages of evidence into the record as a non-party.

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<sup>1</sup> Rule 109, R 460.17109 provides that "[p]leadings and other documents are filed with the commission by filing with the secretary."

PAYS's E-mail Appeal misrepresents the ALJ's ruling, the requirements of Rule 207, and the Commission's characterization of Rule 207 statements by a non-party. At the June 22 hearing, PAYS conceded that, as a non-party, it was not allowed to enter evidence into the record (See 2 Tr 37-38), and PAYS has not argued this point in its E-mail Appeal. Thus the only remaining issue is whether ALJ Nickerson correctly ruled that PAYS may not introduce as evidence nearly 40 pages of testimony and exhibits as the statements of a non-party pursuant to Rule 207.

Rule 207 of the Rule of Practice and Procedure Before the Commission, R 460.17207 provides in pertinent part:

"(1)...The position to be taken shall be fully and fairly stated, *the contentions of the person shall be reasonably pertinent to the issues in the proceeding*, and any right to unduly broaden the issues shall be disclaimed."

"(2)...A statement shall not be given under oath and *will not be subject to cross-examination by the parties.*" (Emphasis added)

Although PAYS's E-mail Appeal describes it as such, the ALJ's June 22 Ruling did not find that PAYS's proffered testimony was "admissible as the statement of a non-party but irrelevant and therefore not to be considered under Rule 207." (p.1, par. 5 of the E-mail Appeal) Specifically, ALJ Nickerson stated, "under Rule 207, it [the statement] must be relevant. And based upon my prior ruling, I don't find that that's relevant in this proceeding, and so deny status on Rule 207." (2Tr 40) In making this statement, ALJ Nickerson relied on his February 23 Ruling in which he found that PAYS did not have legally sufficient interest in this proceeding, i.e. that PAYS sought to promote issues relating to a conservation program which is irrelevant to the GCR

process. (See 1 Tr 25) Thus, ALJ Nickerson correctly denied PAYS's request to have its testimony treated as a Rule 207 non-party statement because the contentions of PAYS are not reasonably pertinent to the issues of this GCR proceeding.

PAYS's E-mail Appeal also misrepresents and redefines the character of Rule 207 statements by a non-party so grossly that, if granted, it would render the difference between parties and non-parties a nullity. Rule 207(2) states that a person may make a statement at a time provided by the ALJ. These statements are not considered testimony or evidence and are thus not subject to response or cross-examination by the parties. In re The Detroit Edison Co., March 23, 1995 Opinion and Order, Case No. U-10646, p. 32 Only parties may proffer testimony and other evidence. This is for good reason: A party's proffered evidence is subject to cross-examination by all other parties. Through this process, each party's right to due process is addressed and the issues are thoroughly probed.

Recognizing these critical distinctions, the Commission has stated:

"Rule 207 provides an opportunity for members of the public to express their views, but it does not entitle them to submit evidence without becoming parties and complying with the Administrative Procedures Act and the Commission's rules. Views and opinions expressed in Rule 207 statements are considered by the Commission, but they are not a basis for making findings of fact." (Id., Case No. U-10646, p. 32)

PAYS has proffered nearly 40 pages of testimony and exhibits. This type of submission is clearly not the type of Rule 207 non-party statement envisioned by the Commission. Plainly, PAYS seeks to introduce evidence into these proceedings through the guise of a Rule 207 non-party statement. The E-mail Appeal states that PAYS's statement is "testimony" that is "probative of material statutory issues in this proceeding." (p. 2, par. 9 of the Appeal) That PAYS itself does not view its proffered evidence as a Rule 207

statement of a non-party is further evidenced by PAYS's own petition to intervene. Indeed PAYS's stated purpose for the introduction of its proffered testimony is to support a finding of fact on the issue of "whether SEMCO 'engaged in reasonable and prudent activities that could lower the cost of gas.'" (pp. 2-3, par. 9 of the E-mail Appeal)

In clear contravention of the Commission's rules and procedures, PAYS seeks to have nearly 40 pages of testimony and exhibits admitted to this proceeding as a Rule 207 non-party statement. Allowing PAYS to submit this type of information as a Rule 207 non-party statement would destroy the distinction between evidence offered by parties and statements offered by non-parties. In so doing, it would make it unnecessary for persons to seek to intervene in future proceedings. It would also severely prejudice all of the parties and deny their rights to due process by allowing evidence to be used against them with no opportunity for cross-examination. For all of these reasons, the Commission should deny PAYS's Appeal.

#### **IV. CONCLUSION AND RELIEF**

Wherefore, for the reasons stated above, SEMCO Gas Company respectfully requests the Commission to reject PAYS America, Inc.'s E-mail Appeal as untimely and/or without merit and affirm the June 22, 2006 Ruling of ALJ Nickerson.

Respectfully submitted,

SEMCO ENERGY GAS COMPANY

Dated: July 19, 2006

By:

Sherri Wellman

Digitally signed by Sherri Wellman  
DN: CN = Sherri Wellman, C = US,  
O = Miller Canfield  
Date: 2006.07.19 13:05:31 -04'00'

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Harvey J. Messing (P23309)  
Sherri A. Wellman (P38989)  
MILLER, CANFIELD, PADDOCK  
AND STONE, P.L.C.  
One Michigan Avenue, Suite 900  
Lansing, MI 48933  
(517) 487-2070

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