

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**
(e-file paperless)

**THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
RESPONSE TO PAYS AMERICA, INC.'S APPLICATION FOR LEAVE TO APPEAL**

The Michigan Public Service Commission Staff ("Staff"), by its counsel, Patricia S. Barone, files the following response to the Application for Leave to Appeal filed by PAYS America, Inc. ("PAYS") on July 6, 2006. PAYS has sought leave to appeal the ruling of the Administrative Law Judge ("ALJ") issued on June 22, 2006. Staff opposes PAYS' Application for Leave to Appeal because no reason exists to consider PAYS' application at this time, and because the ALJ properly determined that PAYS' attempt to file testimony after being denied status as an intervenor in this case should be rejected. The ALJ also properly concluded that PAYS' alternative request that its testimony be considered a Rule 207 (R 460.17207) statement should be rejected.

PAYS is seeking leave to appeal the following ruling by the ALJ:

JUDGE NICKERSON: All right. I was just looking at the motions that were filed by SEMCO and staff with regard to their prayer for relief basically. SEMCO is asking that the Public Service Commission denies PAYS America petition to intervene, and staff says that the ALJ should reject and remove the attempted filing of direct testimony by PAYS America, Inc., and admonish PAYS that any further attempt by it as a non-party to file improper testimony or pleadings will subject it to the imposition of appropriate sanctions.

This is a little unusual in, as my experience has shown, that once a party has been denied leave to intervene, they typically will file something with the commission if they feel strongly about the ruling, which PAYS has done, and then if the commission has not addressed it by the time we come to hearing, the parties, the party that has been denied petition to intervene typically will not file anything else. But in this case, PAYS has broken that mold, so to speak, by

having filed the direct testimony. And I was advised that once a party files something, it goes on the website, it's basically as if it's filed in the docket. And so we can't control that part of it. It's as if the party had filed. What we can control is how that's treated in the context of the proceeding for hearing.

I concur with both staff and SEMCO and the attorney general, PAYS is not a party to this proceeding based upon an earlier ruling that I issued. PAYS has appealed that to the commission, the commission has not yet addressed that; but until the commission does, then my ruling stands, which means PAYS is not a party to this proceeding; and as that status, anything that PAYS files must be treated as a non-party, which means that those filings should not be prepared for, there should not be any time or expense expended in preparing for that testimony that has been filed. I don't want to go so far as to attempt to prevent PAYS from filing anything else in the future, but recognize that my ruling here today would treat all of those filings, until such time as their status changes, as a non-party filing.

As a non-party filing, I agree with Ms. Barone with regard to Rule 207. Anything that a person -- or a person seeking status under Rule 207, it 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. [TR 38-40.]

PAYS cites in support of its application for leave Rule 337(2)(b). That rule provides:

- (2) The commission will grant an application and review the presiding officer's ruling if any of the following provisions apply:
 - (b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large. [R 460.17337(2)(b).]

PAYS does not explain in its application why the Commission should grant its application for leave under this portion of the rule other than to say that it attempted to file testimony "to avoid having its appeal become moot due to the passage of the deadline for the filing of testimony." PAYS Application for Leave to Appeal, paragraph 3. Stating the reason for it attempting to file testimony does not state why the Commission should rule now on the question of whether the ALJ erred in declining to accept this testimony. PAYS has not explained why a ruling now would prevent substantial harm to it.

In fact, no substantial harm would result to PAYS by the Commission waiting to rule on the question of whether the ALJ erred when he ruled that a non-party cannot file testimony. If

PAYS earlier appeal of the ALJ's ruling that it should not be granted intervenor status were to be granted by the Commission, either in response to the application for leave to appeal or the conclusion of this case, PAYS would be entitled as a party to file testimony. This, of course, points out the fact that PAYS never should have attempted to file this testimony, and certainly should not have sought leave to appeal the ALJ's finding that a non-party does not file testimony.

For these reasons, Staff urges the Commission to find that leave to appeal this ruling not be granted.

If, however, the Commission grants the application for leave, Staff urges the Commission to deny PAYS requested relief to allow it to file testimony as a non-party, or, in the alternative, to have its testimony treated as a Rule 207 statement. PAYS has not cited any authority indicating that a non-party is entitled to file testimony in a contested case before the Commission. PAYS has also cited no authority to support the proposition that it is necessary for a non-party to pre-file testimony¹ in order "to avoid having its appeal [of its intervenor status] become moot." Staff is aware of no such precedent and is also aware of no instance at the Michigan Public Service Commission wherein an entity who sought intervenor status and that status was denied by the ALJ, attempted to file testimony anyway.

Further, Staff submits that the ALJ correctly found that since he had earlier ruled that the purported testimony concerned the same subject matter that he had earlier ruled to be irrelevant, the testimony did not meet the requirements of Rule 207 and should not be received as a Rule 207 statement. That rule provides:

¹ PAYS' argument is similar to an entity who has sought to intervene and has been denied intervenor status in a trial proceeding claiming that it had the right to show up at a trial to testify.

(1) In a proceeding to fix rates or investigate conditions of service of a utility or motor carrier subject to the jurisdiction of the commission, a person may appear without a formal petition for leave to intervene. There shall be a full disclosure of the identity of the person and the interest of the person in the proceeding. 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) An appearance pursuant to this rule entitles the person to make a statement at a time provided for that purpose by the presiding officer, but the person shall not be regarded as a party to the proceeding. A statement shall not be given under oath and will not be subject to cross-examination by the parties.

(3) A person participating in a case pursuant to this rule is not entitled to notice of adjournment or any other notice, except as otherwise provided by law, and is not entitled to be served with pleadings or other documents. [R 460.17207.]

Since the rule clearly provides that the contentions of the person “shall be reasonably pertinent to the issues in the proceeding,...” and since the testimony concerned energy efficiency measures that the Commission has previously ruled are irrelevant to GCR cases, the ALJ properly declined to accept the testimony as a Rule 207 statement.²

In conclusion, Staff urges the Commission to deny PAYS’ Application for Leave to Appeal, but if the Commission does grant the Application, to deny the requested relief. Staff also urges the Commission to admonish PAYS that attempts to participate as a party in this case constitutes an abuse of process. PAYS’ continued action in first filing testimony when it was denied party status and then filing an application for leave to appeal the ruling of the ALJ finding that a non-party cannot file testimony has caused both the Staff and the utility to unnecessarily expend resources in responding to such unwarranted acts. It is clear that an entity who successfully appeals a ruling denying it party status will have an opportunity to present its

² At paragraph 5 of PAYS’ Application for Leave to Appeal, PAYS states that the ALJ “found PAYS’s proffered testimony admissible as the statement of a non-party but irrelevant and therefore not to be considered under Rule 207.” Actually, the ALJ concluded at TR 40 that he found the testimony to be irrelevant “and so deny status on Rule 207.” The ALJ did not say the testimony was “admissible.”

testimony, participate in a hearing before the Commission, and file briefs. PAYS' actions have been completely unnecessary.

Staff further requests that the Commission consider putting in place a process whereby non-parties to a case who attempt to make filings in a case, other than an appeal of a ruling denying them intervenor status, will have those attempted filings returned to them. Such a process is similar to the process used by courts when filings are made by non-parties or pleadings are attempted to be filed in non-conformity to the court rules. This procedure would assist in ensuring that the website filings reflect only proper filings in a case so that when the Michigan Court of Appeals, which uses the website listings as its record on appeal, or the Michigan Supreme Court, will review only properly filed documents.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**

A handwritten signature in black ink, appearing to read "Patricia S. Barone". The signature is fluid and cursive, with the first name "Patricia" being more prominent than the last name "Barone".

Patricia S. Barone (P29560)
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Dated: July 20, 2006

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Linda Andreas, being first duly sworn, deposes and says that on **July 20, 2006**, she served a true copy of **THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S RESPONSE TO PAYS AMERICA, INC.'S APPLICATION FOR LEAVE TO APPEAL** upon the following parties by depositing the same in a United States postal depository enclosed in an envelope bearing postage fully prepaid, plainly addressed as follows:

Michael E. Moody
Assistant Attorney General
Tobacco and Special Litigation Division
7th Floor, G. Mennen Williams Bldg.
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909

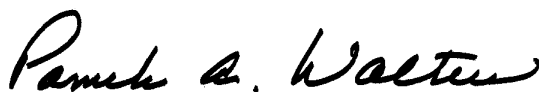
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Linda Andreas

Subscribed and sworn to before me
this 20th day of July, 2006.



Pamela A. Walters, Notary Public
State of Michigan, County of Ionia
Acting in the County of Ingham
My Commission Expires: 02/04/2007