

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the approval of a code of conduct)
for **CONSUMERS ENERGY COMPANY** and)
THE DETROIT EDISON COMPANY.)
_____)

Case No. U-12134

At the February 20, 2003 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

History of Proceedings

On December 4, 2000, the Commission issued an order adopting a code of conduct, as required
by Section 10a(4) of the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141),
MCL 460.10 to MCL 460.10bb:

Within 180 days after the effective date of the amendatory act that added
this section, the commission shall establish a code of conduct that shall apply to
all electric utilities. The code of conduct shall include, but is not limited to,
measures to prevent cross-subsidization, information sharing, and preferential
treatment, between a utility's regulated and unregulated services, whether those
services are provided by the utility or the utility's affiliated entities. The code of
conduct established under this subsection shall also be applicable to electric
utilities and alternative electric suppliers consistent with section 10, this section,
and sections 10b through 10bb.

MCL 460.10a(4).

Among other things, the order required the filing of compliance plans and permitted the filing of requests for waivers.

On January 23, 2001, the Commission issued an order amending the code of conduct to require the filing of compliance plans within 60 days after the issuance of an order on rehearing of the December 4, 2000 order. On October 29, 2001, the Commission issued the rehearing order and adopted a revised code of conduct. Consumers Energy Company (Consumers) filed a compliance plan and requested waivers of sections II.A, II.D, II.E, II.H, III, III.A, III.C, III.E, and III.F for numerous unregulated services and products that it provides, which were listed and described in Appendix D of its December 28, 2001 compliance filing. On October 3, 2002, the Commission issued an order in this proceeding granting in part and denying in part Consumers' request for waivers.

On December 19, 2002, Consumers filed a second request for a waiver. Specifically, Consumers is seeking an extension of the temporary waiver granted in the October 3, 2002 order for its appliance service plan (ASP) program.

On January 13, 2003, the Michigan Alliance for Fair Competition (MAFC) filed comments in opposition to Consumers' request for a temporary extension of the waiver. The MAFC is a coalition of associations that represent the interests of heating, ventilating, and air conditioning (HVAC) contractors in Michigan. In addition, the Commission notes that it has received several hundred letters and messages, the vast majority of which support the continuation of Consumers' ASP program.

Background

Consumers' ASP program provides repair service for residential heating and cooling equipment as well as major kitchen and laundry appliances. Customers enter into 12-month

contracts for such services and have the option of paying in advance or having a fixed monthly fee added to their monthly utility bills. Covered repairs are provided at no additional cost for service calls, parts, or labor. Approximately 176,000 of Consumers' customers have contracts for the ASP program. The term remaining on these contracts varies from one to twelve months.

The Commission's October 3, 2002 order found that Consumers' provision of heating and air conditioning sales and services was problematic in light of the passage of MCL 460.10a(4) because such activities were conducted in localized markets characterized by numerous small firms. The Commission was persuaded that Consumers could have a major advantage in such markets due to its relatively large size, name recognition that follows from its participation in the energy markets, and the lack of sufficient information on those services being readily available to customers.

The Commission was aware that Consumers' utility customers could suffer if they were to be deprived from exercising a choice of service providers with regard to routine requests for minor repairs or adjustments ordinarily associated as part of the provision of utility-related services. Accordingly, the Commission permitted Consumers to continue to respond to such requests for minor repairs or adjustments as part of its utility-related services. In so doing, the Commission indicated that such non-marketed services would be considered incidental to the utility's primary energy service functions. However, the Commission denied Consumers' requested waivers for heating and air conditioning services, which meant that marketed heating and air conditioning services could only be performed through full functional separation, preferably through a separate affiliate, i.e. no waivers were granted for these programs and any other heating and air conditioning services actively marketed or promoted by the utility. Specifically, the Commission

denied Consumers' waiver requests related to sections II.A, II.D, II.E, II.H, and III.E as applied to programs involving heating and air conditioning services.

Nevertheless, the Commission realized that some services for which it denied a waiver were currently functioning programs that involve the use of corporate employees and other resources. The Commission did not expect the utility to decide immediately whether, when, or how to redeploy these employees and resources. The Commission also recognized that these programs involve customer contractual obligations and relationships built upon the direct interaction of Consumers with its customers. Accordingly, the Commission granted Consumers a temporary waiver of the separation requirement of the code for these services for six months from the date of the October 3, 2002 order, or until April 3, 2003.

Consumers' Extension Request

Consumers begins its request for an extension of the waiver from April 3, 2003 to April 3, 2004 by stating that its maximum market penetration in the 607 local markets in which it has at least 15 customers is 19.1%. According to Consumers, its lack of market power in local marketplaces for appliance repairs is shown by the following statistics:

Number of communities	Percentage of customers in these communities who participate in the ASP program.
126	0%
172	Less than 1%
331	Less than 3%
434	Less than 5%
562	Less than 10%
603	Less than 15%

Consumers believes that this information demonstrates that its ASP program does not inhibit the development or functioning of a competitive marketplace. At a minimum, Consumers asserts that

a more comprehensive examination of the extent to which its activities affect relevant competitive markets is justified by this information.

Next, Consumers insists that the failure to grant an extension of the temporary waiver will result in the almost certain termination of the ASP program as of April 3, 2003. According to Consumers, it simply does not have adequate time to create a separate business entity to operate the ASP program in an economic manner. Consumers states that termination of the ASP program will cause the following harm to it and to its customers:

1. Its current retail gas rates, which were established by the November 7, 2002 order in Case No. U-13000, will be insufficient because such rates were set on the assumption that Consumers' gas operations would derive over \$10 million from the ASP program.
2. The ability of Consumers' management to efficiently structure its gas utility workforce would be impaired.
3. Approximately 100 employees would likely be terminated.
4. Approximately 145 independent HVAC contractors that are currently under contract with Consumers to provide ASP program repairs would be materially harmed.
5. Approximately 176,000 of Consumers' customers who participate in the ASP program would have such services terminated, causing Consumers to incur potential legal liability and potential claims for breach of these agreements.

Consumers asserts that extension of the temporary waiver from April 3, 2003 to April 3, 2004 is warranted to avoid breaching the contracts it has with its customers. According to Consumers, the extension also would provide sufficient time for the utility to develop a reasonable plan for complying with the code of conduct or terminating the ASP program. Further, Consumers maintains that granting its request for an extension of the temporary waiver would delay adverse financial effects associated with an earlier termination of the ASP program and would give the utility more time to identify sources of replacement revenue. Finally, Consumers indicates that a

delay would also permit it more time to comprehensively examine the extent to which its offering of the ASP program inhibits the development or functioning of the competitive market for these services.

The MAFC's response

Stressing that Section 10a(4) of Act 141 became effective on June 3, 2000, the MAFC argues that it has already taken too much time for the statutory provision and the code of conduct to become fully effective. According to the MAFC, if Consumers' request were to be granted, the code of conduct would not become fully effective until 1,398 days after passage of Act 141 and a full 1,216 days after the code of conduct was adopted by the Commission. The MAFC also maintains that Consumers' request for a waiver could be viewed as either an untimely petition for rehearing of the Commission's previous orders, which should be rejected, or another of Consumers' numerous efforts to postpone the effectiveness of the code of conduct, which have been repeatedly rejected by the Commission, the Michigan Court of Appeals, and the Michigan Senate.

The MAFC points out that several complaints have been filed against Consumers with regard to its violations of the code of conduct. The MAFC also attached several pages printed from Consumers' website to demonstrate the ongoing nature of Consumers' failure to abide by the code of conduct. Although the MAFC concedes that Consumers finally has begun to include the disclaimers required by Sections II.K and II.L of the code, it questions whether the clear and unambiguous intent of those provisions is being met by Consumers' use of smaller type and by placement of the disclaimers at the very bottom of the web pages. The MAFC also contends that an examination of these web pages indicates that Consumers still advertises its ASP program in conjunction with its regulated electric services programs, allows customers to join the ASP

program, allows the ASP program to bill customers on Consumers' bills, and offers contracts that extend beyond the April 3, 2003 deadline for the functional separation of the ASP program.

The MAFC also contends that there is no justification for allowing Consumers to continue the advantages inherent in its status as a monopoly to promote its self interest and to stifle the goal of a competitive market for another 365 days. According to the MAFC, Consumers' filing fails to demonstrate that an extension of the temporary waiver will not inhibit the development or functioning of a competitive market. The MAFC contends that Consumers' filing contains half-truths and misrepresentations regarding its status in the marketplace that should be rejected by the Commission.

Moreover, the MAFC insists that the Commission should stand up to Consumers' threats to terminate the ASP program, fire employees, and seek a rate increase. In so doing, the MAFC asserts that it is not suggesting that Consumers be forced to abandon the appliance repair and HVAC markets, but only that the Commission force Consumers to abide by the code of conduct by foregoing the inherent advantages that a monopoly can leverage from its market position. For these reasons, the MAFC contends that Consumers' request for an extension of the temporary waiver should be rejected as inconsistent with the legislative goal of promoting fair competition.

Discussion

The Commission finds that Consumers' request for an extension of the temporary waiver granted in the October 3, 2002 order for its ASP program should be granted, in part. In reaching this determination, the Commission relies on Consumers' assertion that it needs additional time to implement the full functional separation of its regulated activities from the ASP program and on the MAFC's assertion that it does not desire termination of the ASP program, but only a level playing field on which to compete against it. Finally, the Commission notes the hundreds of

messages of support for continuation of the ASP program that have been received from satisfied customers. Accordingly, the Commission is persuaded that an extension of the waiver until December 31, 2003 is appropriate. Therefore, no later than December 31, 2003, Consumers either shall have terminated its appliance service plan program or shall have completed the full functional separation of its regulated activities from the appliance service plan program.

In addition, the Commission is persuaded that certain conditions should accompany the extension of the temporary waiver. In Case No. U-13089, which involves a complaint filed by Phillip D. Forner, the president and owner of an HVAC contractor, the administrative law judge determined that Consumers violated Section II.H of the code of conduct by placing promotional information regarding its unregulated business activities into its billing envelopes or by printing such information on its customers' bills. Consumers failed to except to these findings. In its February 20, 2003 order, the Commission found that Consumers' failure to file exceptions to this finding constituted a concession by Consumers that such conduct violates the code of conduct and may be subject to a cease and desist order. Indeed, the order in Case No. U-13089 requires Consumers to cease and desist from further violations of the code of conduct in this regard.

Therefore, the Commission finds that until December 31, 2003, Consumers shall operate its ASP program without using messages printed on its bills, bill inserts, advertising, and other such promotional materials included with customers' bills. In addition, the Commission is persuaded that Consumers should be directed that all promotional messages about the ASP on the utility's website shall fully comply with the letter and the spirit of the code of conduct. Further, the Commission finds that until December 31, 2003, Consumers shall operate its ASP program by requiring the ASP program to bear the full cost of advertising and promotional activities through use of separate mailings. If there is ever a question regarding Consumers' compliance with this

provision, the burden of going forward with evidence shall be on Consumers to establish its compliance with this requirement due to the utility's superior access to the information necessary to establish such compliance. Finally, the Commission finds that until December 31, 2003, Consumers may continue to bill customers for the costs associated with the ASP program on its utility bills, but shall do so only if the ASP program is charged for such billing services on a fully allocated (not incremental) cost basis.

In reaching its determination, the Commission has not considered Consumers' representations regarding the level of market penetration experienced by its ASP program. The Commission has no intention to revisit this issue, which has been fully litigated, now or in the future. Accordingly, Consumers should not consider the extension of the temporary waiver to be an opportunity to comprehensively examine the extent to which Consumers' offering of the ASP program inhibits the development or functioning of the competitive market for these services. However, the MAFC's concern about the length of time it has taken to fully implement the code is well taken. If Consumers does not establish a functionally separate ASP program, it should take all steps necessary to accommodate its existing contractual obligations with customers, employees, and contractors prior to December 31, 2003.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers' request for an extension of the temporary waiver for its ASP program granted in the October 3, 2002 order in this proceeding should be granted in part, subject to the conditions imposed by this order.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's request for an extension of the temporary waiver for its appliance service plan program granted in the October 3, 2002 order in this proceeding is granted in part, subject to the conditions imposed by this order.

B. By December 31, 2003, Consumers either shall have terminated its appliance service plan program or shall have completed the full functional separation of its regulated activities from the appliance service plan program.

C. Until December 31, 2003, Consumers shall operate its appliance service plan program without using messages printed on its bills, bill inserts, advertising, and other such promotional materials included with customers' bills, and all promotional messages about the appliance service plan on the utility's website shall fully comply with the letter and the spirit of the code of conduct.

D. Until December 31, 2003, Consumers shall operate its appliance service plan program by requiring the appliance service plan program to bear the full cost of advertising and promotional activities through use of separate mailings.

E. Until December 31, 2003, Consumers may continue to bill customers for the costs associated with the appliance service plan program on its utility bills, but shall do so only if the appliance service plan is charged for such billing services on a fully allocated (not incremental) cost basis.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of February 20, 2003.

/s/ Dorothy Wideman
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated February 20, 2003 granting Consumers Energy Company’s request for an extension of the temporary waiver for its appliance service plan program subject to certain conditions, as set forth in the order.”