

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)	
PHILLIP D. FORNER against)	Case No. U-13089
CONSUMERS ENERGY COMPANY.)	
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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 July 11, 2001, Phillip D. Forner, the president and a full-time employee of a company providing heating, ventilating, and air conditioning (HVAC) services in Ottawa County, Michigan, filed a complaint against Consumers Energy Company (Consumers). The complaint alleges that Consumers has committed numerous violations of the code of conduct established by the Commission's December 4, 2000 order in Case No. U-12134. In support of his complaint, Mr. Forner submitted several inserts and printouts of information describing unregulated services that he received with Consumers' April and May 2001 electric bills. Mr. Forner requested that the Commission order Consumers to cease and desist from further violations of the code.

On October 8, 2001, Consumers filed an answer to the complaint. In so doing, Consumers contended that the activities described in Mr. Forner's complaint are lawful and do not constitute

violations of the code of conduct. Accordingly, Consumers requested dismissal of the complaint and denial of the relief requested by Mr. Forner.

On December 4, 2001, Administrative Law Judge George Schankler conducted a prehearing conference that was attended by Mr. Forner, Consumers, the Michigan Alliance for Fair Competition¹ (MAFC), and the Commission Staff (Staff). The petition to intervene filed by the MAFC was granted and a schedule for the remainder of the proceeding was established with the understanding that all further proceedings would be conducted by Administrative Law Judge James N. Rigas (ALJ).

Additional prehearing conferences were conducted on January 28, February 6, March 20, and April 2, 2002 to resolve a plethora of pretrial motions.

On March 28, 2002, Consumers filed an application for leave to appeal the ALJ's denial of its motion to hold this proceeding in abeyance pending the Commission's decision on Consumers' December 28, 2001 compliance plan that was filed in Case No. U-12134. On April 10, 2002, Mr. Forner and the MAFC filed answers in opposition to Consumers' application for leave to appeal.

On April 10, 2002, the ALJ conducted an evidentiary hearing, which was attended by Mr. Forner, Consumers, the MAFC, and the Staff. Two witnesses testified and eight exhibits were admitted into evidence. Thereafter, briefs and reply briefs were filed by Mr. Forner, Consumers, and the MAFC.

On July 25, 2002, the ALJ issued his Proposal for Decision (PFD). On August 8, 2002, Mr. Forner and the MAFC filed exceptions to the PFD. On August 16, 2002, Consumers filed a reply to exceptions.

¹The MAFC is a coalition of associations that represent the interests of HVAC contractors in Michigan.

Background

On June 5, 2000, the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141), MCL 460.10 et seq., became effective. Section 10a(4) of Act 141, MCL 460.10a(4), required the Commission to establish a code of conduct that would apply to every electric utility and alternative electric supplier (AES). The avowed purpose of the code of conduct was to prevent electric utilities and AESs from engaging in cross-subsidization, information sharing, and preferential treatment between their regulated and unregulated services.

On December 4, 2000, the Commission issued an order in Case No. U-12134 adopting the code of conduct required by section 10a(4) of Act 141. 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 issuance of an order on rehearing of the December 4, 2000 order.

On October 29, 2001, the Commission issued the rehearing order, which adopted a revised code of conduct. On December 29, 2001, Consumers filed a compliance plan and a request for waivers. The MAFC filed an objection to Consumers' requested waivers with respect to the appliance service plan (ASP) program², thermostat installation, customer-requested services, and financial solutions.

On October 3, 2002, the Commission issued an order regarding Consumers' compliance filing and request for waivers. In so doing, the Commission specifically declined to grant Consumers'

²Consumers' ASP program provides repair service for residential heating and cooling equipment as well as major kitchen and laundry appliances. Customers enter into year-long 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.

request for a waiver with regard to the company's ASP program, customer-requested services, and HVAC sales. Instead, the Commission required that Consumers provide HVAC services through full functional separation, preferably through a separate affiliate. Further, the Commission stated that waivers would not be granted for these programs or any other HVAC services that are actively marketed or promoted by the utility. However, the Commission also indicated that if a customer makes a request for a utility-related repair or adjustment, the utility could perform such service as part of its normal business given the incidental relationship to the utility's primary energy service functions so long as the service is not actively marketed or promoted by Consumers. Finally, the Commission stated:

The Commission realizes that some services for which it has denied a waiver are currently functioning programs that involve the use of corporate employees and other resources. The Commission does not expect the utility to decide immediately whether, when, or how to deploy these employees and resources. The Commission also recognizes that these programs involve customer contractual obligations and relationships built upon the direct interaction of Consumers with its customers. The Commission will therefore grant temporary waivers of the separation requirement of the code for these services for up to six months from the date of this order.

October 3, 2002 order, Case No. U-12134, p. 5.

Positions of the Parties

Mr. Forner and the MAFC maintained that Consumers' inclusion of information and solicitations for its unregulated services with Mr. Forner's regulated electric bill, without any of the disclosures required by the code of conduct, constituted per se violations of various portions of the code of conduct. Accordingly, they asserted that Consumers' unregulated businesses were cross-subsidized because the regulated electric utility paid the costs of mailing the enclosures with the electric bills.

Mr. Forner and the MAFC also argued that the content of the solicitations did not support Consumers' claim that its gas division was the provider of the services described in the billing inserts, and they insisted that Consumers failed to offer any substantiation for that contention. Moreover, Mr. Forner noted that Consumers' organizational chart, which was admitted as Exhibit I-6, did not support a finding that the unregulated services and products were provided by Consumers' other divisions.

Mr. Forner argued that Consumers violated section II.A of the code by including information about its contractor referral service, outdoor electric lighting service, ASP program, furnace and air conditioning installation financing, and fuel line extension service with electric bills and by posting such information on its website.

Next, assuming that the unregulated services in question were offered by Consumers' gas division, Mr. Forner and the MAFC contended that Consumers still violated sections II.B and II.D because allowing the regulated electric division to include unregulated service advertisements in the electric bills amounted to a direct subsidy for the unregulated business. In addition, they asserted that cross-subsidization of the unregulated services' advertising occurred when the cost of distributing a newsletter describing those services was absorbed by the electric division.

Mr. Forner and the MAFC maintained that Consumers violated section II.E because employees of Consumers' regulated electric division shared office buildings and used the same computer and mailing system, toll free telephone number, and telephone operators.

Mr. Forner asserted Consumers violated section II.F by routing phone calls to its financial services affiliate and by promoting consumer financing without collecting compensation based upon the higher of the fully allocated cost or market price of providing such services.

Mr. Forner and the MAFC contended Consumers violated section II.H by placing joint advertisements for the ASP program and other promotional activities in its newsletter.

Mr. Forner and the MAFC also claimed that Consumers violated sections II.K and II.L by sharing the company's logo and by failing to place required disclaimers on the promotional materials.

Mr. Forner and the MAFC contended that Consumers violated section III.A by failing to offer free advertising and mailing to its competitors that it extended to its unregulated services.

Mr. Forner asserted that Consumers violated section III.E by sharing its utility customer record and billing system information with its unregulated affiliates.

Mr. Forner argued that Consumers violated section III.F by steering customers to its affiliates.

Mr. Forner maintained that Consumers violated section IV by sharing information in its customer information and billing system with its unregulated businesses.

Finally, Mr. Forner and the MAFC asks the Commission to fine Consumers the maximum amount allowed under law, order Consumers to cease and desist from all activity in violation of the code of conduct, and order Consumers to pay Mr. Forner's costs and the MAFC's costs and attorneys fees.

Consumers responded that these allegations do not amount to code violations. According to Consumers, its ASP program is conducted by its gas division and the other unregulated services fall beyond reach of the code. In support of this position, Consumers stated that the code of conduct is limited to the activities of electric utilities, which is the focus of Act 141, and that the code was not intended to protect Mr. Forner or other HVAC providers from competition in the appliance repair business. Consumers also stressed that the Commission was careful to note that a different code of conduct applied to the unregulated business activities of gas utilities. In any

event, Consumers indicated that the ASP program is operated independently of its electric utility, and all costs of marketing that program, including postage and web advertising, are borne by the program.

According to Consumers, its contractor referral service program, which was a primary target of the complaint, has been abandoned. Consumers also indicated that its carbon monoxide protection, fuel line extension, and outdoor lighting programs are funded, managed, and operated independently of the electric utility. According to Consumers, the employees involved in these programs maintain separate offices from the electric utility's operating employees and act independently. As to the financing options offered to customers, Consumers maintained that no ratepayer dollars or operating employees are involved in the program. Finally, Consumers asserted that its efforts to sell shares of its stock does not involve any service covered by the code of conduct

The Staff did not take a position in this proceeding.

Discussion

1. Applicability of code revisions

Mr. Forner maintains that because his complaint was filed on July 11, 2001, Consumers' alleged wrongdoing must be reviewed in light of the code of conduct that was approved in the December 4, 2000 order in Case No. U-12134 without consideration of any subsequently approved revisions or waivers. The Commission disagrees.

The October 29, 2001 and the January 23 and October 3, 2002 orders in this proceeding demonstrate that the Commission has treated the code of conduct as a work in progress. In so doing, the Commission clearly recognized that the simultaneous adoption and implementation of the code of conduct would be problematic. Those orders provided that the implementation and

further refining of the code of conduct should take place in the context of the rehearing process and the filing of compliance plans and waiver requests. Therefore, the Commission finds that Mr. Forner's complaint should be determined on the basis of the Commission's final regulatory response to Section 10a(4), rather than its initial reaction, which is no longer operative.

2. Consumers' telephone number

At several points in his exceptions, Mr. Forner suggests that Consumers' inclusion of its toll free telephone number on its residential customers' bills constitutes a violation of the code of conduct. This contention has no merit. Every electric and gas utility in this state is required by Rule 19(1) of the Consumer Standards and Billing Practices for Electrical and Gas Residential Service, R 460.2119(1), to include its telephone number on its bills.

3. Scope of the code of conduct

Mr. Forner and the MAFC maintained that the code of conduct adopted pursuant to Section 10a(4) of Act 141 applies to Consumers' ASP program.

Based on the testimony of Terrance J. Mierzwa, its Director of Marketing, Consumers insisted that the ASP program is exempt from the code because it is operated by Consumers' gas division. The ALJ agreed with Consumers' position.

Mr. Forner and the MAFC except to this finding. They contend that the ALJ grossly perverted the legislative intent underlying the enactment of Section 10a(4) of Act 141 by concluding that Consumers' ASP program is exempt from the code of conduct on the basis of Consumers' allegation that its ASP program is operated by its gas division, not its electric division. According to them, footnote 4 of the Commission's October 29, 2001 order in Case No. U-12134, which states that natural gas utilities are covered by other codes of conduct, should not be interpreted in a way that eviscerates the protections intended by Section 10a(4). They insist that the Commission

should interpret footnote 4 to mean that the code of conduct adopted pursuant to Act 141 does not apply if a natural gas utility cross-subsidizes unregulated services without the involvement of the utility's electric division. They argue that the record clearly establishes the involvement of Consumers' electric division in the acts of cross-subsidization described by Mr. Forner.

Moreover, they state that absolving Consumers of violations of sections II.B, II.D, and II.E that occurred when the utility's electric division mailed improper solicitations to Mr. Forner, a customer of Consumers' electric division but not of its gas division, could encourage other utilities to circumvent the code of conduct by transferring supervision of all unregulated activities to their gas divisions.

Consumers responds that the challenge to the ALJ's determination regarding the ASP program is based on contentions that are not supported by the record. Citing Mr. Mierzwa's testimony at 6 Tr. 172, Consumers insists that there is adequate support for a finding by the Commission that the ASP program is operated by its gas division and not subject to the code of conduct. Moreover, Consumers maintains that the rationale underlying Mr. Forner's and the MAFC's position is garbled, tangled, and illogical.

The Commission finds that the ALJ erred in concluding that the code of conduct does not apply to Consumers' ASP program. The Commission notes that the ALJ did not have the benefit of the October 3, 2002 order in Case No. U-12134 in reaching his determination. In that order, the Commission rejected Consumers' argument that its ASP program should not be subject to the code of conduct because the costs and benefits of that program had been assigned to the utility's gas division.

The Commission is not persuaded that the Legislature intended the Commission to ignore the cross-subsidization of an unregulated ASP program by a public utility offering both electric and

natural gas service based entirely on the utility's classification of the program. This is particularly true where the utility's electric-only customers may sign up for the ASP program and receive solicitations for the program with their electric bills, as occurred in this case.

4. Section II

Section II of the code provides that an electric utility or AES that offers, itself or through its affiliates, both regulated and unregulated services shall do so with the structural or functional separation needed to prevent cross-subsidization, information sharing, and preferential treatment between the regulated and unregulated services. Thereafter, the code identifies 13 specific forms of prohibited conduct in sections II.A to II.M.

In his exceptions, Mr. Forner criticized the ALJ for failing to discuss his allegations with regard to alleged section II violations by Consumers, which he identifies in his exceptions as involving Consumers' contractor referral service, outdoor electric lighting service, ASP program, financing of furnace and air conditioners, and fuel line extensions downstream of customers' meters.

Consumers responds that the ALJ clearly addressed Mr. Forner's allegations regarding section II of the code of conduct. With regard to Mr. Forner's other arguments, Consumers urged the Commission to review its brief and reply brief, which it attached to its exceptions.

The Commission finds that Mr. Forner's exception is not well taken. Section II is a general provision. The specific provisions set forth in sections II.A to II.M are far more pertinent to the overall purpose of Section 10a(4) of Act 141. Moreover, even a cursory examination of the PFD indicates that the ALJ discussed Consumers' contractor referral service, outdoor electric lighting service, ASP program, financing of furnace and air conditioners, and fuel line extensions near the beginning of his discussion of Consumers' possible violations of section II. The ALJ found that

Consumers' discontinuation of the contractor referral service rendered moot all allegations of code violations on a going-forward basis. With regard to the operation of the service prior to its being discontinued, the ALJ found that the contractors who participated in the program were independent contractors, not affiliates of Consumers. The ALJ also found that the outdoor electric lighting service did not involve electric ratepayer dollars and that Consumers' operating employees were not used to provide this service. Rather, he noted that independent contractors installed such lights pursuant to a contractual agreement with Consumers. He next stated that Consumers' ASP program is operated by its gas division, which is subject to a separate code of conduct. Further, based on Mr. Mierzwa's testimony, the ALJ concluded that the financing of furnace and air conditioning installations by Consumers did not involve either electric ratepayer dollars or Consumers' operating employees. Finally, with regard to the fuel line extension program, the ALJ found that Consumers provided uncontradicted testimony that the program was funded, managed, and operated outside the electric utility and that the employees function independently and maintain separate offices. In any event, pursuant to the October 3, 2002 and February 20, 2003 orders in Case No. U-12134, Consumers has until at least December 31, 2003 to comply with the separation requirement of the code.³ Therefore, notwithstanding the Commission's previous finding that the code of conduct applies to Consumers' ASP program, it would be premature at this time to declare the lack of structural and functional separation of its regulated activities from its ASP program constitutes a violation of the code of conduct.

³On December 19, 2002, Consumers filed a request for extension of this deadline from April 3, 2002 to April 3, 2004. In an order issued today in Case No. U-12134, the Commission found that the temporary waiver should be extended until December 31, 2003 and should be subject to conditions.

5. Section II.A

Section II.A of the code provides that an electric utility shall not offer unregulated services or products except through one or more affiliates or through other entities within the corporate structure, such as divisions.

The ALJ determined that Consumers is not violating section II.A of the code because the various services at issue are provided through separate entities within the corporate structure.

Mr. Forner maintains that the ALJ's findings are tainted because he used the word "provided" rather than the word "offered" that is found in the section II.A of the code. According to him, it is irrelevant whether such services are provided through a separate entity within the corporate structure after they are offered by the electric utility.

The Commission finds that the semantical distinction between the terminology used by the ALJ and that preferred by Mr. Forner is inconsequential. Additionally, as previously noted, pursuant to the February 20, 2003 order in Case No. U-12134, Consumers has until at least December 31, 2003 to comply with the separation requirement of the code.

6. Sections II.B, II.D, and II.E

Section II.B of the code provides that an electric utility's or AES's regulated services shall not subsidize in any manner, directly or indirectly, the unregulated business of its affiliates or other separate entities.

Section II.D of the code provides that an electric utility or AES and its affiliates or other entities within the corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information.

Section II.E of the code provides that an electric utility's or AES's operating employees and the operating employees of its affiliates or other entities within its corporate structure shall function independently of each other and maintain separate offices.

The ALJ analyzed these sections together. In so doing, he stated that the record shows that the various services at issue are not subsidized directly or indirectly and that there is no impermissible sharing of facilities, equipment, or operating employees. Specifically, the ALJ found that although unregulated programs used the extra space in Consumers' billing envelopes, an impermissible subsidy did not occur because Consumers pays the same postage rate per billing envelope with or without the inserts so long as the envelope weighs less than one ounce. Because Consumers' billing envelopes are not filled to the point that inserts generate incremental postage costs, he concluded that billing inserts do not involve impermissible subsidies.

Mr. Forner asserts that the ALJ's conclusion that Consumers did not violate these sections of the code is baseless. According to him, a violation of section II.B does not depend on whether an activity generates additional costs for the utility. Mr. Forner asserts that each time that a customer received a billing insert from Consumers about an unregulated service, the unregulated service was impermissibly subsidized. Using various assumptions, he calculated the total value of the subsidies for the unregulated programs to be from \$500,000 to \$3,672,000. He also contends that Consumers' preferential treatment of its unregulated businesses constitutes a form of subsidization banned by section II.B of the code.

Mr. Forner also maintains that the record establishes that Consumers violated the code by sharing facilities, equipment, and operating employees. Citing the testimony of Mr. Mierzwa, Mr. Forner maintains that Consumers' maintenance of a single customer record and billing system, which is jointly used by both Consumers and its unregulated businesses, constitutes a violation of

section II.D. He also contends that Consumers' unregulated businesses are subsidized by the use of Consumers' bill insertion equipment and by the ability of the employees answering Consumers' telephones to cross-sell unregulated products, such as those marketed as part of the ASP program. Finally, Mr. Forner argues that the same sharing of employees that constitutes a violation of section II.D also constitutes a violation of section II.E.

The Commission finds that, with one notable exception, Mr. Mierzwa's testimony supports the ALJ's findings that the various services at issue are not subsidized directly or indirectly and that there is no impermissible sharing of facilities, equipment, or operating employees in violation of Section 10a(4) or the code of conduct. Mr. Mierzwa repeatedly explained that the unregulated services paid all of the costs of the promotions, were operated by separate employees, and did not rely on any ratepayer funds. The exception to these findings concerns Consumers' use of its billing machinery and envelopes to benefit its unregulated businesses.

The issue of promoting its unregulated services through use of its billing machinery and envelopes raises some thorny constitutional issues. In enacting Section 10a(4), the Legislature did not preclude electric utilities from providing unregulated services, such as Consumers' ASP program. Rather, the Legislature acted to preclude electric utilities from cross-subsidizing such programs. In crafting the code of conduct, the Commission has endeavored to carry out the will of the Legislature. As a creature of statute, the Commission is required to accept the wisdom of this legislation and must presume Section 10a(4) to be constitutional. However, existing precedent suggests that there are several First Amendment pitfalls that must be avoided.

To begin with, the United States Supreme Court has ruled that the First Amendment guarantees public utilities the right to utilize billing inserts to exercise their freedom of speech and to engage in commercial advertising. In Consolidated Edison Co v Public Service Comm of New

York, 447 US 530; 100 S Ct 2326; 65 L Ed 2d 319 (1980), the United States Supreme Court invalidated a state order prohibiting a privately owned utility from placing messages about controversial political issues in its billing envelopes. In Central Hudson Gas & Electric Co v Public Service Comm of New York, 447 US 557; 100 S Ct 2343; 65 L Ed 2d 341 (1980), the Supreme Court ruled that before a governmental agency may regulate the commercial speech of a public utility, the agency must establish that the proposed regulation directly advances a “substantial governmental interest” and does so in the least restrictive method. The Supreme Court examined New York’s ban on promotional advertising and determined that it did not meet this test. Further, in Pacific Gas & Electric Co v California Public Utilities Comm, 475 US 1; 106 S Ct 903; 89 L Ed 2d 1 (1986), the Supreme Court specifically addressed a contention that ratepayers own the extra space in a utility’s billing envelopes. In so doing, the Supreme Court determined that a utility could not be required to use the extra space in its billing envelopes to distribute messages to the utility’s ratepayers on behalf of other entities. Finally, in its 1986 order in Case No. U-7882, a majority of the Commission⁴ found that a utility could use the extra space in its billing envelopes for commercial advertising.

Consumers did not invoke the First Amendment to defend use of its billing machinery and envelopes to promote its unregulated services. Rather, Consumers claimed that there is no incremental cost increase associated with such use of its billing machinery and envelopes.

Nevertheless, the record demonstrates that the objected-to promotional messages and billings use the extra space in the company’s billing envelopes and that the company’s electric customers pay for the postage, the cost of the billing envelopes, and the machinery necessary to use those envelopes. The record also establishes that Consumers does not allow nonaffiliated companies

⁴Chairman William E. Long concurred in part and dissented in part from the majority decision.

access to its billing machinery or the extra space in its billing envelopes, although it does allow certain not-for-profit organizations to publish information about special events on a space available basis.

Sections II.B, II.D, and II.E of the code ban direct and indirect subsidies, the sharing of facilities and equipment, and joint operations between an electric utility's regulated and unregulated activities. The Commission is persuaded that Consumers' unregulated businesses are unquestionably benefited when they are permitted cost-free access to Consumers' billing machinery and envelopes. The Commission finds that this situation should be obviated by requiring the unregulated programs to bear their appropriate share of the expenses of their access to Consumers' billing machinery and envelopes. Accordingly, the Commission directs Consumers to determine what those costs are, how they should be accounted for, and how they will be charged to unregulated businesses in a manner that is appropriate in light of Section 10a(4) and the code of conduct.

7. Section II.H

Section II.H of the code provides that an electric utility and its affiliates or other entities within the corporate structure and an AES and its affiliates or other entities within the corporate structure offering both regulated and unregulated services or products in Michigan shall not engage in joint advertising, marketing, or other promotional activities related to the provision of regulated and unregulated services, nor shall they jointly sell regulated and unregulated services.

Based on a finding that Consumers' carbon monoxide protection, fuel line extension, and financing programs were jointly advertised and marketed with the regulated utility service, the ALJ found that the inclusion of such promotional inserts in Consumers' billing envelopes constitutes a violation of section II.H of the code. Consumers did not except to these findings.

In his exceptions, Mr. Forner contends that Exhibits C-1 and C-3 demonstrate additional violations of section II.H by Consumers. According to him, the presence of information about Consumers' ASP program, direct purchase stock offerings, and outdoor lighting, tree trimming, and contractor referral services with its electric bills or on the utility's website also constitute violations of section II.H.

The Commission finds that Consumers' failure to except to the ALJ's findings and recommendation that the inclusion of promotional messages in Consumers' billing envelopes violates the code of conduct amounts to a concession by Consumers that such conduct is improper and may be subject to a cease and desist order. Moreover, the Commission has already addressed Mr. Forner's concerns over the use of billing machinery and envelopes and does not need to repeat its findings on that issue. However, the Commission rejects Mr. Forner's exception with regard to Consumers' efforts to sell shares of its own stock, which is not an activity that falls under Section 10a(4). Further, Consumers' contractor referral service has been abandoned. Finally, the Commission finds that the evidence and arguments submitted by Mr. Forner and the MAFC, whose interests are focused on HVAC issues, is not sufficient to permit the Commission to reach any conclusions about Consumers' promotion of its outdoor lighting and tree trimming activities.

8. Sections II.K and II.L

Section II.K of the code provides that an electric utility or AES offering regulated service in Michigan shall not allow its affiliates to use its corporate logo unless the affiliate includes, in a clearly visible position and easily readable by customers, the following statement: "(Affiliate name) is not regulated by the Michigan Public Service Commission."

Section II.L of the code provides that if an electric utility, its affiliate, or other entity within the corporate structure offers an unregulated service, any use of its corporate logo shall include, in

a clearly visible position and easily readable by customers, the following statement: “(Service) is not regulated by the Michigan Public Service Commission.”

With regard to these sections of the code of conduct, the ALJ found that Consumers failed to include the required disclaimers on the materials promoting the carbon monoxide protection, fuel line extension, and financing services programs, which he determined to be violations of the code of conduct.

Consumers did not except to these findings.

In his exceptions, Mr. Forner contends that Exhibits C-1 and C-3 demonstrate additional violations of sections II.K and II.L by Consumers. According to him, the absence of the required disclosures about Consumers’ ASP program, direct purchase stock offering, outdoor lighting, tree trimming, and contractor referral services on advertisements distributed with its electric bills or appearing on the utility’s website also constitute violations of sections II.K and II.L.

Section II.K is directed at the use of an electric utility’s logo by an affiliate that provides an unregulated service. The testimony shows that the ASP program resides within Consumers’ gas division, which is technically not an affiliated company. The work performed under the ASP program is done by either Consumers’ employees or independent contractors, not by the employees of an affiliate.

Likewise, the Commission is not persuaded that Consumers’ outdoor lighting and tree trimming endeavors involve “affiliates.” Rather, the record indicates that independent contractors perform such services. There is no evidence that the independent contractors performing outdoor lighting and tree trimming services hold themselves out to be affiliates of Consumers through use of Consumers’ corporate logo. Further, although Consumers apparently promotes these programs, Mr. Mierzwa’s testimony establishes that these programs are not supported by ratepayers.

With regard to section II.L, the Commission finds that Consumers' ASP program, outdoor lighting service, and tree trimming activities do not appear to comply with section II.L.

Finally, the Commission's previous discussions of its rulings regarding Consumers' stock purchase and contractor referral programs obviate further deliberations on those issues.

9. Section III

Section III of the code provides that an electric utility or AES that offers, itself or through its affiliates, both regulated and unregulated services shall not unduly discriminate in favor of an affiliate or against a competitor.

Mr. Forner contends that the ALJ failed to consider his section III arguments.

The Commission finds that Mr. Forner's exception should be rejected. Section III is a general provision that is defined by sections III.A to III.F. As such, the ALJ's failure to address Mr. Forner's general contentions regarding section III is harmless error.

10. Section III.A

Section III.A of the code provides that an electric utility or AES that offers, itself or through its affiliates, both regulated and unregulated service shall not provide any affiliate or other entity in its corporate structure with preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering services or products within the same service territory or to customers of those suppliers. This provision includes, but is not limited to, all aspects of the electric utility's or AES's service, including pricing, responsiveness to requests for service or repair, the availability of firm and interruptible service, and metering requirements.

The ALJ found evidence that Consumers did not offer competitors of the carbon monoxide protection, fuel line extension, and financing services programs the opportunity to include their

promotional materials in the utility's billing envelopes. Based on this finding, the ALJ concluded that Consumers' preferential treatment of its affiliates violates section III.A.

Mr. Forner insists that Consumers also discriminates against its competitors in violation of section III.A by failing to offer them an opportunity to distribute competing advertisements regarding ASP programs, contractor services, stock sales, outdoor lighting, tree trimming, and HVAC services with Consumers' bills or on the utility's website.

Based on the Pacific Gas & Electric Co decision, the Commission is persuaded that Consumers cannot be faulted for declining to allow competitors to use the extra space in its billing envelopes or to advertise on its website. Further, the Commission finds that section III.A was never intended to reach such activities. An examination of section III.A reveals that its focus is on aspects of a utility's or an AES's provision of electric services such as "pricing, responsiveness to requests for service or repair, the availability of firm and interruptible service, and metering requirements." Code of Conduct, section III.A.

11. Sections III.E and III.F

Section III.E provides that an electric utility or AES offering regulated service in Michigan shall not provide information or consultation to an affiliate or other entity within the corporate structure offering unregulated electric service in Michigan regarding a potential business arrangement between that affiliate or other entity within the corporate structure and a potential customer.

Section III.F of the code prohibits electric utilities and AESs offering regulated services from (1) directly referring customers or potential customers to other corporate entities or affiliated companies offering unregulated electric services, (2) steering potential customers away from non-affiliated entities offering unregulated electric services, or (3) otherwise influencing customers and

potential customers with regard to their selection of other corporate entities or affiliated companies offering unregulated electric services.

With regard to sections III.E and III.F of the code, the ALJ found that the carbon monoxide protection, fuel line extension, and the financing services programs do not offer unregulated electric service in Michigan. As a result, the ALJ concluded that such services are not subject to these provisions of the code of conduct.

Mr. Forner argues that Exhibits C-4 and C-5 clearly demonstrate that Consumers provides payment information to its unregulated affiliates in violation of section III.E because Consumers bills customers for such services on its regular monthly bills. He also maintains that Consumers violates section III.F through its use of joint advertising. According to Mr. Forner, the purpose of the joint advertising of its regulated and unregulated activities is to steer potential customers away from competitors and towards its unregulated affiliates.

The Commission finds that Mr. Forner's exceptions are not well taken. Sections III.E and III.F concern the provision of regulated and unregulated "electric" services, which involves the generation, transmission, and distribution of electric power to the public. The ALJ correctly recognized that these sections of the code of conduct were never intended to apply to utility versus HVAC contractor issues.

12. Section IV

Section IV of the code provides that information obtained by an electric utility or an AES in the course of conducting its regulated business in Michigan shall not be shared directly or indirectly with its affiliates or other entities within its corporate structure unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously.

The PFD did not discuss this issue.

Mr. Forner complains that the ALJ erred in overlooking his arguments regarding Consumers' alleged violations of section IV of the code of conduct. According to him, Consumers admitted that it shared its customer information and billing system with its unregulated businesses. He also contends that by allowing its unregulated businesses to use the extra space on its bills and in its billing envelopes, Consumers improperly shared information with its unregulated businesses.

The Commission finds that Mr. Forner is correct that the PFD failed to discuss his contention that Consumers violated section IV of the code. However, the Commission is persuaded that this oversight on the part of the ALJ is harmless error. As the complainant in this proceeding, the burden of proof rests with Mr. Forner. An examination of his complaint reveals no allegation that either he or his HVAC company ever requested or was denied any specific information that was shared between Consumers' regulated and unregulated businesses.⁵ Indeed, his direct testimony regarding section IV was so terse and uninformative that Mr. Mierzwa stated that Consumers was unable to formulate any response to the allegation. 6 Tr. 184. In his rebuttal testimony, Mr. Forner did not deny the accuracy of Mr. Mierzwa's summation of his position. Rather, he offered the following statement as support for his claims:

The first example is the CEC's mailing list of customer's specific names and addresses. Specific names are provided to CEC's affiliates or other entities when because of the electric utility's actions of including information about CEC's affiliates or other entities in the electric billing process, a customer calls about any of the mentioned CEC affiliate or other entities' businesses. According to Mr. Mierzwa's testimony at the bottom of page 16,⁶ as of February 8, 2002, CEC's Appliance Service Program had received 709 specific residential names in Ottawa County. A county in which Consumers Energy Company appears from the map

⁵Exhibit C-1, which includes a copy of Mr. Forner's April 23, 2001 letter to Consumers, contains nonspecific allegations regarding violations of section IV, but the record does not explain why such allegations are missing from his July 11, 2002 complaint.

⁶6 Tr. 185.

located at: <http://www.cis.state.mi.us/mpsc/gas/servarea.htm> to function only as an electric utility for residential customers.

6 Tr. 138-139.

The Commission finds Mr. Forner's evidentiary presentation concerning Consumers' alleged violation of section IV lacking in two regards. First, there is absolutely no claim by Mr. Forner that he requested or was refused any information that might be subject to disclosure pursuant to section IV. Second, the mere existence of 709 ASP contracts in Ottawa County in February 2002 does not mean that Consumers violated section IV of the code of conduct. It is undisputed that Consumers' ASP program predates passage of Act 141 and creation of the code of conduct. As such, there is no way to determine on this record whether the 709 ASP contracts result from an improper sharing of information as alleged by Mr. Forner or consist of 709 hold-over customers from marketing activities that took place prior to adoption of Section 10a(4) and the code of conduct.

13. Punishment

Section 10c(1) of Act 141 prescribes the penalties and remedies that the Commission is authorized to impose for a violation of the code of conduct. Having found that Consumers violated several sections of the code of conduct, the ALJ recommended that the Commission order Consumers to cease and desist from all further violations of the code of conduct. No exceptions were filed concerning this recommendation.

The ALJ refused to recommend the imposition of a fine or any other sanction for the violations because he believed that Consumers' conduct did not evidence a purposeful disregard for the code of conduct. In so doing, he noted that neither Mr. Forner nor the MAFC demonstrated any actual damages as a result of the violations. Finally, the ALJ stated that an award of attorney

fees was not warranted because Mr. Forner had acted as his own attorney and because the MAFC's participation was not necessary to prosecution of the complaint.

Mr. Forner urges the Commission to seek recovery from Consumers of all monies owed to the utility's electric customers in accordance with application of section III.C.

The Commission finds that Mr. Forner's request for commencement of a cost recovery proceeding under section III.C is not well taken. Section III.C states:

If an electric utility or alternative electric supplier offering regulated service in Michigan provides services, products, or property to any affiliate or other entity within the corporate structure, compensation shall be based upon the higher of fully allocated embedded cost or market price. If an affiliate or other entity within the corporate structure provides services, products, or property to an electric utility or alternative electric supplier offering regulated service in Michigan, compensation for services and supplies shall be at the lower of market price or 10% over fully allocated embedded cost and transfers of assets shall be based upon the lower of fully allocated embedded cost or market price.

This provision is meant to indicate how utility/affiliate transactions are to be priced and accounted for. It does not pertain to retail ratemaking or refund proceedings. Moreover, nothing in the record of this case indicates that Consumers' ratepayers have been overcharged for any services regulated by the Commission.

Mr. Forner next maintains that the Commission should levy fines against Consumers because, in his opinion, the utility committed at least 97.2 million willful violations of 13 separate sections of the code of conduct. Arguing that his April 23, 2001 letter placed Consumers on notice of these violations, Mr. Forner insists that there is sufficient evidence of the company's purposeful disregard of the code of conduct to warrant the imposition of fines.

The MAFC contends that pursuant to Section 10c(1)(a) of Act 141, MCL 460.10c(1)(a), the imposition of a fine is mandatory, not discretionary. Because the ALJ found that Consumers had

committed several violations of the code of conduct, the MAFC insists that the Commission must impose a fine for each and every violation found by the ALJ.

Consumers argues that Section 10c(1)(a) does not require the imposition of a fine. According to Consumers, a fine is one of several options that the Commission has discretion to select in fashioning remedies for code of conduct violations. Further, Consumers states that the MAFC, which did not sponsor a witness or introduce any evidence in support of its contentions, failed to demonstrate that it was harmed by any of the violations found by the ALJ. Absent a showing that a person has suffered damages, Consumers insists that a violation of the code of conduct should not result in a fine.

The Commission finds that the imposition of fines pursuant to Section 10c(1)(a) is not mandatory. Section 10c(1) of Act 141 provides that, in the event of a violation of either Act 141 or a Commission order, the Commission “shall order such remedies and penalties as necessary to make whole a customer or other person who has suffered damages as a result of the violation, including, but not limited to” one of five specific remedies. Given the language chosen by the Legislature, the Commission has discretion to select one or more of the five remedies, and is not required to impose a fine in every case. After reviewing the record, the Commission agrees with the ALJ that no fines should be imposed. This is particularly appropriate because Mr. Forner did not specifically request in his complaint that Consumers be fined and he indicated that he was not seeking economic damages.

Finally, with regard to the issue of costs and attorney fees, Mr. Forner maintains that Consumers should be required to pay all costs associated with the prosecution of his complaint. In so doing, he argues that Consumers should not be permitted to keep the profits of its ill-gotten gains, which he insists total millions of dollars annually. The MAFC also seeks reimbursement of

its costs and its attorney fees. The MAFC contends that its participation in this proceeding as an intervenor conserved scarce Commission and judicial resources and avoided unnecessary and duplicative litigation. According to the MAFC, Section 10c(1)(c) specifically authorizes the Commission to make an award of reasonable attorney fees to make whole any person harmed by the violation. Citing the January 28 and October 26, 1998 orders in Cases Nos. U-11178 et seq. and U-11660, respectively, the MAFC maintains that there is precedent for the Commission to award attorney fees to intervening parties. The MAFC also relies on the August 31, 2000 order in Case No. U-12031, wherein the Commission ordered a telecommunications provider to pay the attorney fees incurred by the Staff to prosecute a claim for a customer.

Consumers opposes these requests. In particular, Consumers maintains that the MAFC should not be permitted to benefit from its meddling in Mr. Forner's complaint proceeding. Arguing that the ALJ restricted the scope of the proceeding to prevent the MAFC from attempting to turn this proceeding into a class action proceeding, Consumers states that reimbursing the MAFC for its costs and attorney fees would be improper. Moreover, Consumers insists that the MAFC's citation of the Commission's orders in telecommunications proceedings does little to justify an award of costs and attorney fees pursuant to Section 10c(1)(c) of Act 141.

The Commission finds that an award of costs to Mr. Forner or costs and attorney fees to the MAFC would not be appropriate. Mr. Forner made numerous allegations that were ultimately rejected. Further, although claiming to have been harmed by Consumers' violations, he was unable to provide any specific substantiation for his claims. Indeed, as previously noted, he did not seek recovery of any economic damages. Accordingly, the Commission finds that permitting recovery of his costs is hardly appropriate under the circumstances.

With regard to the MAFC, the Commission finds that its voluntary participation was not essential to the outcome of the case. Although representing himself, Mr. Forner submitted both direct and rebuttal testimony, supported the introduction of five exhibits, and filed a brief, reply brief, and exceptions. The MAFC did not submit a witness. Under the circumstances, the Commission agrees with the ALJ that an award of costs and attorney fees to the MAFC would not be appropriate.

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 AACCS, R 460.17101 et seq.
- b. Consumers' March 28, 2002 application for leave to appeal is moot and should be dismissed.
- c. Mr. Forner's complaint should be granted in part and rejected in part.
- d. Consumers should be ordered to cease and desist from further violations of the code of conduct adopted by the Commission's orders in Case No. U-12134.
- e. Consumers should be directed to determine the amount of the subsidy that is created by use of its billing machinery and envelopes by unregulated services and to file a proceeding seeking approval of the accounting and ratemaking authority necessary to ensure that its unregulated services are charged for the full amount of the subsidy.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's March 28, 2002 application for leave to appeal is dismissed.

B. The July 11, 2001 complaint filed by Phillip D. Forner is granted in part and rejected in part.

C. Consumers Energy Company is ordered to cease and desist from further violations of the code of conduct adopted by the Commission's orders in Case No. U-12134.

D. Consumers Energy Company is directed to determine the amount of the subsidy that is created by use of its billing machinery and envelopes by unregulated services and to file a proceeding seeking approval of the accounting and ratemaking authority necessary to ensure that its unregulated services are charged for the full amount of the subsidy.

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

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

Chairman

Commissioner

Commissioner

By its action of February 20, 2003.

Its Executive Secretary

In the matter of the complaint of)
PHILLIP D. FORNER against)
CONSUMERS ENERGY COMPANY.)
_____)

Case No. U-13089

Suggested Minute:

“Adopt and issue order dated February 20, 2003 ordering Consumers Energy Company to cease and desist from further violations of the code of conduct adopted in Case No. U-12134 and further ordering an investigation to determine the amount of the subsidy that is created by use of its billing machinery and envelopes by the utility’s unregulated services, as set forth in the order.”