

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission’s own motion,	)	
to investigate <b>CONSUMERS ENERGY COMPANY’S</b>	)	
compliance with the code of conduct adopted	)	Case No. U-13830
pursuant to MCL 460.10a(4).	)	
_____	)	

At the September 21, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair  
Hon. Robert B. Nelson, Commissioner  
Hon. Laura Chappelle, Commissioner

**OPINION AND ORDER**

History of Proceedings

In an order dated February 20, 2003 in Case No. U-12134 (February 20 order), the Commission granted a temporary waiver to Consumers Energy Company (Consumers) from certain sections of the code of conduct adopted pursuant to Section 10a(4) of the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141), MCL 460.10 et seq., finding that Consumers needed “additional time to implement the full functional separation of its regulated activities from the ASP<sup>1</sup> program . . .” February 20 order, p. 7. The Commission conditioned the

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<sup>1</sup>Appliance Service Plan. Consumers’ ASP program provides repair service for residential heating and cooling equipment, as well as major kitchen and laundry appliances. Customers contract for the service for a 12-month period, which is charged to their utility bills. In return, Consumers provides repairs at no cost for parts, labor, or service calls for covered appliances during the contract period.

waiver, indicating that: (1) Consumers shall operate its ASP program without using messages printed on its bills, bill inserts, advertising, and other such promotional materials included with its customer bills; (2) all promotional messages regarding the ASP program must conform with the code of conduct; (3) Consumers must operate its ASP program in a manner that requires it to bear the full cost of advertising and promotion through separate mailings;<sup>2</sup> and (4) the ASP program is charged for billing services on monthly utility bills on a fully-allocated cost basis.

On April 24, 2003, Lynn L. Briggs sent a letter to the Commission saying that Consumers had used a bill insert promoting its ASP program in his April billing, and on May 12, 2003, Phillip D. Forner filed a complaint alleging that Consumers sent him the same insert with his bill postmarked April 8, 2003. Based upon Mr. Briggs' letter and Mr. Forner's complaint, the Commission issued an order on May 28, 2003 in Case No. U-12134 (May 28 order) remanding the case to the Administrative Law Judge Division for a hearing and directing Consumers to demonstrate its compliance or to show cause why it should not be found in violation of the February 20 order.<sup>3</sup>

Pursuant to the May 28 order, Administrative Law Judge Mark E. Cummins (ALJ) conducted a prehearing conference on September 12, 2003. Consumers, Mr. Briggs, Mr. Forner, Attorney General Michael A. Cox (Attorney General), the Michigan Alliance for Fair Competition (MAFC),<sup>4</sup> Dow Corning Corporation (Dow), Hemlock Semiconductor Corporation (HSC), and the

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<sup>2</sup>The Commission noted that if there ever was 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." February 20 order, pp. 8-9.

<sup>3</sup>The Commission's Executive Secretary opened the present docket (Case No. U-13830) to address the show cause proceeding.

<sup>4</sup>The MAFC is an organization that represents the interests of heating, ventilating, and air conditioning (HVAC) contractors in Michigan.

Commission Staff (Staff) participated in the proceedings. At the prehearing conference, the ALJ granted the MAFC's petition to intervene, but denied intervention to Dow and HSC.

On December 11, 2003, the ALJ conducted an evidentiary hearing, during which time Mr. Briggs and Mr. Forner testified, and the Staff offered the testimony of Ronald A. Radke. Consumers presented testimony from Terrance J. Mierzwa and Michael F. Kircup. The record consists of 195 pages of transcript and 15 exhibits, all of which were received into the record. Each of the parties, except for the Attorney General, filed briefs and reply briefs on January 13 and 23, 2004, respectively.

On February 23, 2004, the ALJ issued a Proposal for Decision (PFD), and set March 8 and 15, 2004 as the dates for submission of exceptions and replies to exceptions, respectively. The ALJ recommended that the Commission find that Consumers violated the February 20 order and impose a \$40,000 fine. Consumers, the MAFC,<sup>5</sup> and Mr. Forner filed exceptions to the PFD, and Consumers, the MAFC, Mr. Forner, and the Staff filed replies to the exceptions.

On April 22, 2004, following the close of the dates established for the parties to submit exceptions to the PFD and replies to exceptions, Governor Jennifer M. Granholm signed into law 2004 PA 88 (Act 88), MCL 460.10a(4) et seq., which was given immediate effect and established operating guidelines for ASPs offered by electric utilities. On June 3, 2004, the Commission issued an order that directed the parties in this matter to submit briefs and reply briefs on whether, or to what extent, Act 88 could affect its decision in this matter.

Subsequently, Mr. Forner, Mr. Briggs, the MAFC, Consumers, and the Staff submitted briefs and Mr. Forner, the MAFC, Consumers, and the Staff submitted reply briefs regarding the applicability of Act 88 to this case. Mr. Forner, Mr. Briggs, the MAFC, and the Staff agree that Act 88

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<sup>5</sup>Mr. Briggs filed a letter supporting the exceptions filed by the MAFC.

has no effect on the outcome of this case because the alleged violations of the code of conduct occurred before the effective date of the statute. The MAFC and the Staff further propose that even if Act 88 were intended to have retrospective effect, the result would be the same because the code violations alleged in this case were prohibited activities embodied in the statute. Consumers believes that Act 88 should be given retroactive effect or, in the alternative, the Commission should be guided by the statute in reaching a decision in this matter. Consumers concedes that Act 88 does not alter the code of conduct or require the establishment of a new code.

### Positions of the Parties

Mr. Briggs testified that Consumers violated Section II.H of the code of conduct on at least three occasions by engaging “in joint advertising, marketing, or other promotional activities related to the provision of unregulated services. . . .” Specifically, Mr. Briggs maintains that Consumers: (1) on October 15, 2002, sent him a \$50 check and brochure about the ASP program; (2) included an advertisement for the ASP program in its December 2002 “Newslines” with his gas bill; and (3) included a “Visit our New Online Customer Service Center” insert with his April 2003 bill. The April 2003 bill insert was received into evidence and states in part:

**Sign up for an Appliance Service Plan.**

With our Appliance Service Plan, we’ll arrange for a qualified repair professional to come to your home to fix covered appliances, including furnaces, water heaters, refrigerators, clothes washers and dryers and more. [www.consumersenergy.com](http://www.consumersenergy.com)

Exhibit C-8. Mr. Briggs also believes that this bill insert violates Section II.L of the code of conduct because it did not have the required disclaimer that the Michigan Public Service Commission does not regulate the ASP program.

Mr. Briggs concludes that these facts reflect a pattern and practice of violating the code of conduct and that the April 2003 bill insert is a violation of the February 20 order. He does not

believe that the bill insert was accidental, as Consumers maintains. Mr. Briggs requests that Consumers pay a fine of \$3.1 million, which is \$1 for each of the utility's 3.1 million customers. Mr. Briggs also requests that he be reimbursed for all reasonable expenses arising from his participation in these proceedings. Mr. Briggs estimates his time is worth \$100 per hour and that he has spent 40 to 50 hours working on this case. Tr. p. 109.

Mr. Forner claims that Consumers has not demonstrated compliance with the code of conduct nor has it shown cause as to why it should not be found in violation of the code. Mr. Forner testified that Consumers sent him the same insert with his bill, which was postmarked April 8, 2003. See, Exhibits C-13 and C-9. Mr. Forner concludes that Consumers: (1) violated the February 20 order by including a bill insert promoting the ASP program in its customers' bills, as well as the requirement that the program bear the cost of all advertising; (2) violated the February 20 order by failing to cease and desist from further violations of the code of conduct; and (3) breached the code of conduct by failing to include a disclaimer that the ASP program was not a regulated service. Mr. Forner urges the Commission not to limit the scope of this inquiry nor ignore any violations, but, rather, "vigilantly enforce the code" as it stated it would do in the December 4, 2000 order in Case No. U-12134, p. 12.

Mr. Forner learned through discovery that 411,761 customers received the April 2003 bill insert, and, therefore, concludes that Consumers committed 411,761 separate violations of the February 20 order, for which, he says, Consumers should reimburse its customers for costs arising from this prohibited mailing. Mr. Forner takes exception with the \$40,000 fine as recommended by the ALJ and wants the costs of the April 2003 mailing returned to the ratepayers, as set forth in Section III.C of the code, including all associated costs, such as those costs incurred for using company envelopes and the billing machinery. Mr. Forner concludes that Consumers' intent is

irrelevant and that the April 2003 bill insert amounts to a cost free delivery of 411,761 ASP advertisements.

Although Mr. Forner did not request economic damages for himself at the hearing, he estimated his time to be worth \$70 per hour and that he spent 20 to 30 hours on this case. Tr. p. 109. Mr. Forner agrees with the MAFC that Consumers should pay the costs and attorney fees for the parties (who have brought these violations to the attention of the Commission) to make them whole as provided by Section 10c(1). Ratepayers, he concludes, should not bear the costs of enforcing Commission orders.

The Staff's witness, Mr. Radke, testified that he examined the bill inserts that Consumers mailed to Mr. Briggs and Mr. Forner, as well as the April 8, 2003 postmark on Mr. Forner's bill, and concludes that Consumers violated the code of conduct and was operating its ASP program in violation of the February 20 order. Further, Mr. Radke says that the Commission should fine Consumers the maximum amount, \$40,000, as authorized under Act 141. Mr. Radke pointed out that in Case No. U-13089,<sup>6</sup> the Commission found that Consumers violated the code of conduct and ordered it to cease and desist from further violations of the code. Mr. Radke concludes that the April 2003 bill insert constitutes a second violation. The Staff points out that the Commission can fine Consumers not less than \$2,000, nor more than \$40,000, pursuant to Section 10c(1)(a) of Act 141.

Consumers' Director of Marketing, Mr. Mierzwa, testified that the April 2003 bill insert was mailed due to an oversight and that the purpose of the bill insert was to encourage customers to enjoy the benefits of online transactions and was not intended to market the ASP program. Further, Mr. Mierzwa pointed out that all references to the ASP program had been removed from

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<sup>6</sup>An order dated February 20, 2003, which was a complaint case filed by Mr. Forner against Consumers.

Consumers' website by March 5, 2003, thereby making it impossible for customers to sign up for the program through the online customer service center. Consumers argues that its customers' inability to access the ASP program through the website was not addressed in the PFD. Further, Mr. Mierzwa said that within the first week of the April 2003 billing cycle, Consumers realized its mistake of using the bill insert where the ASP program was discussed and ceased the inclusion of the insert for the remainder of the billing cycle.

Consumers' Mail Processing Supervisor, Mr. Kircup, testified that he received a call from Consumers' Corporate Communications Department on April 9, 2003, that directed him to stop sending out the insert and destroy the remaining stock. Therefore, the only customers who received the April insert were those receiving bills in the first third of Consumers' billing cycle. Mr. Kircup further indicated that Mr. Briggs could not have received the December 2002 "Newline" in 2003, because it was dated material only sent out in December 2002.

Consumers argues that Mr. Briggs and Mr. Forner had the burden of proof and failed to show that the utility violated any Commission orders or the code of conduct. Consumers says that the statute does not allow a shift in the burden of proof. In the alternative, Consumers believes that there was no evidence in the record to support shifting the burden of proof. Further, Consumers feels that for public policy reasons (i.e., a small complainant pool), the MAFC claims should be rejected.

Consumers also proposes that the April 2003 web applications brochure did not promote the ASP program but advised customers how they could use its website, therefore, it was not a violation of the February 20 order. Further, Consumers says there was no evidence that awareness of its ASP program was raised because of the website promotional brochure. Even if a violation accidentally occurred, it continues, the penalties proposed are preposterously disproportionate to

any harm that might have occurred and amounts to a punishment. There was no finding of harm, Consumers continues, nor was there an increase in cost to its customers. Consumers believes that the ALJ recommended a fine because it attacked the arguments of the other parties in the case. Finally, Consumers maintains that no previous Commission orders have found a violation of the code of conduct.

The MAFC complains that Consumers has continued to engage in cross-subsidization, information sharing, and preferential treatment between its regulated and unregulated services and has committed a minimum of eight violations of the code of conduct for which the Commission should impose the maximum fine available. The MAFC claims that Consumers' April 2003 bill insert violated the specific ban on such inserts, in addition to the cease and desist portion of the February 20 order. Additionally, the MAFC says the mailing breached Sections II.B, II.H, II.K, and II.L of the code itself, and the ALJ wrongly failed to consider other violations of the code.

Further, the MAFC contends that Consumers' failure to file a proceeding seeking approval of the accounting and ratemaking authority necessary to assign its unregulated service its fair share of all billing and mailing expenses associated with the insert, as required by the Commission's order in Case No. U-13089, constitutes a seventh violation and makes it impossible to calculate the economic impact of the prohibited mailing. The MAFC disagrees with the ALJ that the Commission gave no deadline for the filing, therefore, there can be no violation. For the final violation, the MAFC reasons that Consumers failed to update its code of conduct compliance plan to reflect that its initial compliance officer, Dennis DaPra, was replaced by Glenn Barba, a violation of Section VI of the code of conduct which requires a utility to file revisions to its compliance plan in order to keep the information current.

The MAFC urges the Commission to impose the maximum fine for each of the eight violations, order Consumers to cease and desist from further violations of the code of conduct, and require Consumers to make all other parties whole by paying their reasonable expenses and attorney fees. The MAFC argues that the fine recommended by the ALJ will have no effect and that the Commission should impose the maximum amount allowed. The MAFC reminds the Commission that it requested that Mr. Briggs and Mr. Forner present evidence in this docket and relied on their testimony to “vigilantly enforce the code.”<sup>7</sup> Finally, the MAFC believes the Commission should publicly censure Consumers for its frivolous positions, including, but not limited to, Consumers’ argument that Mr. Briggs and Mr. Forner had the burden of proof in this docket, despite the Commission making it very clear that Consumers had the burden “to demonstrate its compliance or to show cause why it should not be found in violation of the Commission’s February 20, 2003 order in Case No. U-12134.” May 28 order, p. 2.

The Staff agrees with the ALJ that in Case No. U-13089 the Commission found violations of the code of conduct, which support the fine imposed by the ALJ. The Staff disagrees with Consumers that the Commission can only make parties whole because the statute is clear that the Commission can impose fines, which are punitive not compensatory in nature. Further, the Staff says, the Legislature wanted a code of conduct to create a level playing field for competition and the Michigan Court of Appeals recently upheld the code of conduct in Detroit Edison Co v Michigan Public Service Comm, 261 Mich App 1; 680 NW2d 512 (2004).

The Staff notes that although the Commission granted Consumers a waiver from structural separation of its ASP, it has not granted a waiver from using its bills to promote, inform, and facilitate its unregulated businesses. Consumers’ repeated failures, the Staff says, indicate

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<sup>7</sup>See, Case No. U-12134 decided on December 4, 2000, p. 12, where the Commission indicated it would vigilantly enforce the code of conduct.

indifference to the code of conduct which is also reflected by its failure to file a study indicating the amount of subsidy to the ASP program and a request for a proceeding seeking approval of accounting and ratemaking authority.<sup>8</sup>

### Discussion and Findings

#### a. Burden of Proof

The ALJ found that Consumers had the burden of proof in this docket. However, Consumers continues to insist that it did not have the burden of proof to show its compliance with the code of conduct. The Commission disagrees with Consumers' position. In its May 28 show cause order, the Commission stated:

“The Commission concludes Consumers should demonstrate its compliance with the Commission’s February 20, 2003 order in Case No. U-12134. Therefore, this case is remanded to the Administrative Law Division for a hearing at which Mr. Briggs and Mr. Forner will have an opportunity to present evidence that Consumers violated the Commission’s February 20, 2003 order in Case No. U-12134 and Consumers will have an opportunity to demonstrate its compliance or to show cause why it should not be found in violation of that order.”

May 28 order, p. 2.

The May 28 order should be read in conjunction with the Commission’s directive in the February 20 order, which clarified that:

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 compliance.

February 20 order, p. 9.

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<sup>8</sup>The Staff was aware that Consumers had filed an abbreviated study two or three weeks before the hearing.

Rule 515 of the Commission's Rules of Practice and Procedure allows for a shift in the burden of proof under certain instances:

R 460.17515 Formal complaint; burden of proof.

Rule 515. The complainant generally shall have the burden of proof as to matters constituting the basis for the complaint and the respondent shall have the burden of proof as to matters constituting affirmative defenses. The burden of proof, however, may be differently placed, or may shift, as provided by law or as may be appropriate under the circumstances.

As the Commission indicated in its February 20 order, because of Consumers' superior access to information, if there was ever any question about its compliance with the code of conduct, it would have the burden of proof of showing compliance. Regardless, the Commission agrees with the ALJ that even if the complainants had the burden of proof in this docket, they have succeeded in showing that Consumers violated the February 20 order.

b. Violation of the February 20 Order

The ALJ found that Consumers violated the February 20 order and the Commission agrees. Both Mr. Briggs and Mr. Forner testified that they received a bill insert promoting Consumers' ASP program in their April 2003 bills, even though the February 20 order prohibited such mailings. Additionally, Mr. Forner produced the envelope, dated April 8, 2003, in which the insert had been mailed. Consumers did not deny that the prohibited insert had been sent, but maintains that it was sent in error. Further, Consumers attempts to reason that the insert was meant to inform its customers of the services which could be completed online via its customer service center and it was impossible to sign up for the ASP program from its website when the insert was mailed. However, as the ALJ noted, the insert did not merely inform customers that they could sign up for the ASP program online, but further explained the benefits of the ASP program: "With our Appliance Service Plan, we'll arrange for a qualified repair professional to come to your home to

fix covered appliances, including furnaces, water heaters, refrigerators, clothes washers and dryers and more.” Regardless of Consumers’ intent, the April 2003 bill insert promoted its ASP program, conduct specifically prohibited by the February 20 order.

c. Penalties and Remedies

Section 10c of Act 141 provides that the Commission may order Consumers “to pay a fine of not less than \$2,000.00 or more than \$40,000.00.” MCL 460.10c(1)(a). The ALJ agrees with the Staff, Mr. Briggs, and Mr. Forner that this is at least Consumers’ second violation of the code of conduct and recommends that the Commission fine Consumers \$40,000 for its continued violation of the code of conduct and order it to cease and desist from further violations. In addition, the ALJ recommends that the Commission not award costs and attorney fees to prevailing parties.

Consumers denies any previous violations of the code of conduct and says any violations in this docket were wholly inadvertent, thereby vitiating any need for penalties. A fair reading of the Commission’s February 20, 2003 order in Case No. U-13089 shows that Consumers was previously found in violation of the code of conduct on at least one previous occasion. Therefore, the Commission agrees with the ALJ that Consumers should be fined \$40,000 and ordered to cease and desist from further violations of the code of conduct.

However, the Commission disagrees with the ALJ in the payment of costs. Insofar as Messrs. Briggs and Forner were directed by the Commission in this case to present evidence, it directs Consumers to pay to Mr. Forner \$2,100 (for 30 hours at \$70 per hour) and to Mr. Briggs \$5,000 (for 50 hours at \$100 per hour). The Commission, however, declines to award attorney fees because Mr. Forner and Mr. Briggs appeared in pro per and the MAFC’s participation was wholly voluntary as an intervener. Finally, the Commission finds that Consumers has engaged in

a pattern and practice of ignoring the code of conduct and Commission orders and, therefore, orders Consumers to cease and desist from further violations of the code of conduct.

Effect of Act 88

The Commission agrees with the Staff, the MAFC, and Messrs. Forner and Briggs that Act 88 has no effect on the outcome of the case because all of the violations occurred before passage of Act 88.

The Commission FINDS:

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, 1999 AC, R 460.17101 et seq.

b. Consumers violated the Commission's February 20 order and the code of conduct.

c. The circumstances of this case warrant the imposition of fines totaling \$40,000 against Consumers.

d. Consumers should pay costs to Mr. Forner in the amount of \$2,100 and to Mr. Briggs in the amount of \$5,000.

e. Consumers should be ordered to cease and desist from further violations of the code of conduct and Commission orders.

THEREFORE, IT IS ORDERED that:

A. Within 30 days of issuance of this order, Consumers Energy Company shall pay to the State of Michigan fines totaling \$40,000 for violations of the Commission's February 20, 2003

order and the code of conduct by delivering a check for that amount to the Commission's Executive Secretary.

B. Within 30 days of the issuance of this order, Consumers Energy Company shall pay costs to Mr. Phillip D. Forner of \$2,100 and to Mr. Lynn L. Briggs of \$5,000.

C. Consumers shall cease and desist from further violations of the code of conduct and Commission orders.

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/ J. Peter Lark

Chair

( S E A L )

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of September 21, 2004

/s/ Mary Jo Kunkle

Its Executive Secretary

order and the code of conduct by delivering a check for that amount to the Commission's Executive Secretary.

B. Within 30 days of the issuance of this order, Consumers Energy Company shall pay costs to Mr. Phillip D. Forner of \$2,100 and to Mr. Lynn L. Briggs of \$5,000.

C. Consumers shall cease and desist from further violations of the code of conduct and Commission orders.

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

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Chair

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Commissioner

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Commissioner

By its action of September 21, 2004.

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Its Executive Secretary