

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **CONSUMERS** )  
**ENERGY COMPANY** for authority to increase its )  
rates for the generation and distribution of )  
electricity and for other relief. )  
\_\_\_\_\_ )

Case No. U-15645

At the May 12, 2009 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman  
Hon. Monica Martinez, Commissioner  
Hon. Steven A. Transeth, Commissioner

**ORDER**

On October 6, 2008, Governor Jennifer M. Granholm signed Public Act 286 of 2008 (the Act), amending Public Act 3 of 1939; MCL 460.6 *et seq.* Section 6a(1) of the Act sets out certain requirements and procedures for electric utility rate cases. Section 6a(1) provides that:

If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. . . . For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges.

Section 6a(1) further provides that such implementation may not take place prior to the commencement of the projected test year (if a projected test year has been used in developing the requested rates and charges), and that, if the implemented rate exceeds the rate authorized in the final order, the excess shall be refunded to customers with interest. MCL 460.6a(1).

On November 14, 2008, Consumers Energy Company (Consumers) filed an application requesting a \$215 million rate increase, and other relief. The application relies on a 2009 projected test year. A prehearing conference was held before Administrative Law Judge Sharon L. Feldman (ALJ) on December 18, 2008. Intervention was granted to Attorney General Michael A. Cox (Attorney General); the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM); the Association of Businesses Advocating Tariff Equity (ABATE); Constellation NewEnergy, Inc. (CNE); Energy Michigan; Midland Cogeneration Venture Limited Partnership (MCV); Gerdau MacSteel; Hemlock Semiconductor Corporation (Hemlock); the Michigan Municipal League, Michigan Townships Association, City of Wyoming, City of Grand Rapids, and more than 70 cities, villages, and municipal organizations (collectively, the municipalities); Metal Technologies, Inc.; Ravenna Casting Center, Inc.; Kroger Company; the Michigan Cable Television Association (MCTA); Michigan State Utility Workers Council, Utility Workers Union of America, AFL-CIO (Union); and Philip Forner. The schedule for the proceeding provided for the filing of testimony by the Commission Staff (Staff) and intervenors by April 27, 2009. Rebuttal testimony is due by May 18, 2009, and cross-examination will take place during mid-June, briefing in July, and issuance of a Proposal for Decision in September. The Commission must issue a final order by November 14, 2009. MCL 460.6a(2).

On April 9, 2009, ABATE filed a motion for a temporary order to prevent or delay the implementation of new rates by Consumers on May 14, 2009. The motion was not accompanied by a hearing date. Under the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17335(3), the deadline for responses to motions is calculated according to the hearing date. In the absence of a hearing date, on April 15, 2009, the Commission sent a letter to all parties informing them that responses to ABATE's motion were due May 1, 2009.

On April 22, 2009, the Commission issued an order requiring Consumers to file any proposed interim tariff by April 29, 2009, allowing the parties to respond to ABATE's motion and the filed tariffs by May 1, 2009, and setting a hearing on the motion for May 5, 2009.

On April 27, 2009, the Staff filed testimony supporting a revenue deficiency of \$74.6 million.

On April 29, 2009, Consumers filed proposed tariffs reflecting a rate increase of \$179 million to be collected beginning May 14, 2009, through an equal 7.1% increase applied to all base rates.

On May 1, 2009, Hemlock, Phil Forner, MEC/PIRGIM, the municipalities, the Staff, the Attorney General, and Consumers filed responses to ABATE's motion.

A hearing on the motion took place on May 5, 2009, at which the parties presented arguments on the motion. Consumers and the Staff each presented a witness, and cross-examination took place.<sup>1</sup>

In its motion, ABATE argues that the fact that there will not be any record evidence in this matter until the hearings scheduled for June 8-19 provides good cause to prevent or delay the new rate implementation. ABATE argues that circumstances show that Consumers has failed to meet its burden to demonstrate a need for the proposed rate increase, and that no party has had the opportunity to test Consumers' application. ABATE contends that no new rate may be set in the absence of a full and complete hearing on the rate, with the opportunity to present and cross-examine evidence. ABATE maintains that these are statutory and constitutional rights that may not be ignored, notwithstanding the provisions of the Act. ABATE asserts that amending rates without any hearing presents due process problems.

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<sup>1</sup>The Commission notes the objections made by the municipalities and ABATE to the taking of evidence at the May 5 hearing on the grounds that the hearing was not a full and complete hearing and did not provide adequate notice to all interested parties. The Commission is unpersuaded by these objections. Neither party made any attempt in their objection to address the authorization to self-implement a rate increase contained in Section 6a(1). 5 Tr 144-146.

ABATE points out that Consumers' application shows that self-implementation of the full proposed rate increase on May 14 would result in a rate increase to the primary and secondary business classes of 8.5%, at the same time that rates are supposed to be realigned. *See*, Consumers proposed Exhibit A-72, p. 1, column e; MCL 460.11. Further, ABATE casts doubt on the refund mechanism provided in Section 6a, arguing that it is unclear whether any overrecovery will be measured on the basis of rates as a whole or by class, and pointing out that (as with any refund) the refunded amount will not necessarily add up to the amount overcharged to the ratepayer.

MCL 460.6a(1). ABATE contends that it is unreasonable to overcharge business customers for six months during these difficult economic times. ABATE argues that Consumers' proposed \$215 million rate increase is speculative and unsupported, and would result in an increase in non-fuel generation operations and maintenance (O&M) expense of 33% over 2007 actual amounts, and an increase in the rate of return on common equity from 10.7% to 11%. ABATE points out the vast differences between the new statutory scheme, and the previous scheme allowing partial and immediate rate relief, which allowed for a hearing and the consideration of evidence.

Hemlock and Mr. Forner filed letters indicating their support for ABATE's motion for the reasons stated in the motion.

MEC/PIRGIM filed a response in support of the motion, arguing that the Staff's evidence shows that any rate increase should be far less than the requested amount. MEC/PIRGIM contends that Consumers continues to hold \$109 million in proceeds from the Palisades Nuclear Plant that should be refunded to ratepayers. MEC/PIRGIM asserts that any rate increase at this time is unjustified.

The municipalities support the motion, pointing out that Consumers' proposed tariff would make the third substantial rate increase for Consumers in less than a year. The municipalities urge

the Commission to curtail Consumers' requests for rate increases in the present distressed economy. The municipalities argue that the procedure set by the Commission in the April 22 order for an abbreviated hearing does not constitute a full and complete hearing, and thus cannot provide the basis for a rate increase. The municipalities contend that any self-implementation will result in a "rate design mess," especially for municipal customers, who, if the interim rate is set too high, may not see a refund commensurate to what they paid during the interim period.

The Attorney General supports the motion. The Attorney General argues that the language of MCL 460.6a is clear and unambiguous in granting the Commission the authority to prevent or delay any rate increase as long as the Commission has a well founded reason for its action. The Attorney General argues that good cause is demonstrated by the fact that the Staff and intervenors will have no reasonable opportunity to cross-examine Consumers' evidence or test the legality of the proposed \$179 million rate increase, because the one day hearing does not constitute a full and complete hearing. The Attorney General further contends that good cause is demonstrated by the economic condition of the state and the clear negative impact that the rate increase would have on any chance for recovery. The Attorney General cites to the testimony filed by his expert witness Charles King indicating that Michigan is in its worst economic condition since the Great Depression and has the highest unemployment rate in the nation, and that very few of the dollars raised by Consumers through a rate increase stay in Michigan. The Attorney General urges the Commission to ensure that Consumers receives revenue only sufficient to attract capital and maintain credit.

The Staff argues that, if any rate relief is allowed by the Commission in this proceeding, it should be limited to the \$74.6 million amount supported by the Staff's 17 expert witnesses, as reflected in its April 27 evidentiary filing. The Staff further recommends that, in conjunction with

such rate relief, the Commission order Consumers to return to ratepayers \$64.9 million<sup>2</sup> related to Consumers' outstanding Palisades Nuclear Power Plant (Palisades) decommissioning refund through imposition of a negative surcharge over a nine-month period. In the alternative, if the Commission allows Consumers the full proposed amount of \$179 million, the Staff further recommends that the Commission consider directing Consumers to refund the entire outstanding Palisades decommissioning refund of \$109 million, plus interest, over a six-month period. 5 Tr 155-156.

Consumers filed a response opposing ABATE's motion. Consumers begins by arguing that the Commission's April 22 order remedied most of ABATE's objections to a rate increase by providing an opportunity for a hearing and for the presentation of evidence (which, Consumers argues, is not required by the statute).

Consumers argues that the Legislature made a policy choice to provide more defined guidelines on the processing and implementation of utility rate increases, and to provide automatic implementation of new rates at the 180-day and 12-month deadlines. Consumers contends that these changes closely resemble rate case processing in some other states and at the federal level. Consumers argues that the strict refund obligations and expensive interest penalties mitigate against unwarranted rate increases; and the statutory requirement that new rates be imposed on an equal percentage basis eliminates debate over their proper design. Consumers asserts that these measures fall within the plain meaning of MCL 460.6a(1). Consumers contends that the whole premise of ABATE's motion is in conflict with the clear meaning of the statute. Consumers maintains that the amount that it "intends to implement on May 14, 2009 is reasonable and is necessary to allow it to meet [its] obligations" to customers and other stakeholders. Consumers

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<sup>2</sup>This amount excludes amounts related to the Big Rock decommissioning fund.

contends that a “negative Commission action in this case” could result in a credit downgrade, “leading to dramatically higher borrowing costs and making it harder to access capital markets.”

Consumers response, p. 6, n. 5. *See, also*, Joos Affidavit, p. 5.

Consumers argues that the fact that Section 6a(1) does not require the presentation of evidence prior to exercising the right to self-implementation does not constitute good cause to prevent the implementation. Consumers further contends that any concern in this regard has been addressed by the Commission’s setting of the May 5 hearing. Consumers points out that the only precondition to self-implementation is the passage of 180 days without a Commission order. Consumers asserts that, under ABATE’s reading of the statute, the self-implementation right would be meaningless, and that a specific statutory provision controls over a general one. Consumers avers that utility ratemaking is legislative in nature, and has been delegated to the Commission. Consumers maintains that the Legislature has shown its determination to allow filed rates to be placed into effect under certain circumstances.

Consumers argues that the fact of equal percentage increases mandated by Section 6a(1) does not constitute good cause to prevent self-implementation. Consumers states that it elects to self-implement a \$179 million increase that results in a 7.1% increase to all base rates. *See*, Attachment 3 to Consumers response. Consumers contends that the fact that it has proposed final rates for some rate classes that are lower than what this increase will produce does not mean that the company forfeits the right to self-implement. Consumers points out that the Act gives the company no choice but to use equal percentage increases in self-implemented rates, and to use realigned rates for final rates. MCL 460.6a(1), 460.11. Consumers further argues that the increased work load of the Commission does not constitute good cause.

Attached to Consumers' response is the affidavit of David W. Joos, President and Chief Executive Officer of CMS Energy Corporation and Chief Executive Officer of Consumers. Mr. Joos states that without the \$179 million rate increase, "the Company cannot responsibly make the investments and incur the costs necessary to achieve the desired levels of service quality and reliability." Joos Affidavit, p. 3. Mr. Joos states that Consumers has plans to invest approximately \$6 billion in Michigan over the next five years, and that these investments cannot be made unless the utility is financially healthy. In explaining the major differences between the revenue deficiencies projected by the Staff and Consumers (in the interim tariff filing), Mr. Joos states that the company's sales forecast is optimistic, the cost of capital reflects a decline in variable interest rates since the initial filing, and the cost of investments also reflects a reduction. He states that the Staff's investment and operating costs are understated and are insufficient to meet requirements. Mr. Joos states that the company reduced its planned operation and maintenance costs notwithstanding the fact that uncollectibles and pension expenses in 2009 "are turning out to be substantially higher than was reflected in the Company's November filing." Joos Affidavit, p. 8.

### Discussion

MCL 460.6a(1) provides:

If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates.

Section 6a(1) allows the utility to self-implement a proposed rate request without Commission direction. Without an order, Section 6a(1) requires that, should the utility elect to self-implement all or a portion of the rate request, the rate shall be applied in an equal percentage across all base rates. However, the legislature must have foreseen that there will be circumstances when a Commission order may be necessary prior to the self-implementation deadline. Therefore, the

Commission has discretion to issue such an order when it is necessary to address the Company's self-implementation proposal.

Public Act 286 of 2008 contains two conflicting sections (Section 6a(1) and Section 11(1)) regarding rate design which require reconciliation by the Commission. In the present filing, this conflict would result in a percentage increase for some rate classes that is greater than what Consumers proposes for its final rate structure, including rate classes that have been identified as having rates in excess of the cost of providing service. Although the Act provides for a refund of amounts charged that are greater than what is approved in the final order, the rate refund mechanism may not necessarily result in a refund that equals the amount of any overcharge for these identified rate classes. This result would be in direct conflict with the Commission's statutory mandate under Section 11(1).

MCL 460.11(1) provides:

This subsection applies beginning January 1, 2009. Except as otherwise provided in this subsection, *the commission shall phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years from the effective date of the amendatory act that added this section.* If the commission determines that the rate impact on industrial metal melting customers will exceed the 2.5% limit in subsection (2), the commission may phase in cost-based rates for that class over a longer period. The cost of providing service to each customer class shall be based on the allocation of production-related and transmission costs based on using the 50-25-25 method of cost allocation. The commission may modify this method to better ensure rates are equal to the cost of service if this method does not result in a greater amount of production-related and transmission costs allocated to primary customers. (Emphasis added).

Statutes that relate to the same subject are *in pari materia* and are thus read together, even if each provision does not reference the other. *Michigan Electric Cooperative Ass'n v Public Service Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005). The goal of statutory interpretation

remains that of discerning and applying the Legislature's intent as expressed in the words of the statute. *Id.*

In reaching this conclusion, the Commission is mindful of its duty to the public interest. It thus understands Section 6a(1) as addressing situations in which existing rate classes are not subject to structural realignments of the kind explicitly required in Section 11(1). The Commission does not accept the conclusion that the Legislature intended to create a scheme in the statute to produce outcomes that, as ABATE suggests, could verge upon the absurd. This is illustrated by the present case, in which Consumers' proposal, as is, would produce volatile rate swings from existing rates to self-implemented rates to the rates implemented by the final order. It would require commercial and industrial customers to absorb millions of dollars in temporary rate hikes, with no apparent cost justification, at a time when Michigan's business climate is a matter of national focus. Such an outcome would be far removed from any reasonable person's conception of the public interest.<sup>3</sup>

In view of the circumstances of this case, the Commission determines that it will provide the necessary direction needed and allowed by law on Consumers' self-implementation proposal, as follows. If Consumers chooses to self-implement a rate increase, it shall implement the increase by applying the rate design shown on the attached tariff sheet, which is derived in accordance with the rate design included in its November 14, 2008 application. Moreover, the Commission wishes to ameliorate rate shock whenever possible. Integral to these modifications to self-implementation is that Consumers shall simultaneously refund \$36.04 million of the outstanding Palisades

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<sup>3</sup>This scenario assumes, for sake of argument, that Consumers' proposal for self-implemented and final rate relief would be implemented without modification. The Commission does not mean to prejudge the final outcome of this proceeding. Moreover, it is difficult to speculate how these provisions would apply in future cases. The interplay between Sections 6a(1) and 11(1) is highly fact-specific.

proceeds to residential customers during the self-implementation period. A final determination will be made regarding the allocation of the remainder of the Palisades proceeds and the final rate design adoption in the final order. Parties may address such issues in their filings in this case.

THEREFORE, IT IS ORDERED that:

A. If Consumers Energy Company chooses to self-implement a rate increase on and after May 14, 2009, the increase shall be implemented by applying the rate design shown on the attached tariff sheet, which has been derived in accordance with the rate design included in its November 14, 2008 application.

B. During the six-month period in which self-implemented rates are collected, Consumers Energy Company shall refund \$36.04 million of the proceeds associated with the sale of the Palisades Nuclear Power Plant to residential customers.

C. Consumers Energy Company shall file tariff sheets within 30 days that are consistent with Exhibit A attached to this order.

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, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

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Orjiakor N. Isiogu, Chairman

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Monica Martinez, Commissioner

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Steven A. Transeth, Commissioner

By its action of May 12, 2009.

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Mary Jo Kunkle, Executive Secretary

**SURCHARGES**

*Electric Interim Surcharge  
(Case No. U-15645)  
Effective for service  
rendered on and after  
May 14, 2009*

*Palisades Plant  
Sale Credit 2  
(Case No. U-15645)  
Effective May 14, 2009  
through  
November 13, 2009*

*Combined Electric Interim  
Surcharge and Palisades  
Plant Sale Credit 2  
Surcharge*

**Rate Schedule**

Rate RS	\$ 0.011622/kWh	\$ (0.005648)/kWh	\$ 0.005974/kWh
Rate RT	0.011135	(0.005838)	0.005297
Rate GS	0.005746	(0.000000)	0.005746
Rate GSD	0.002207	(0.000000)	0.002207
Rate GP	0.000187	(0.000000)	0.000187
Rate GPD	(0.000342)	(0.000000)	(0.000342)
Rate E-1	NA	NA	NA
Rate GSG-1	0.005726	(0.000000)	0.005726
Rate GSG-2	0.005726	(0.000000)	0.005726
Rate GML	0.006842	(0.000000)	0.006842
Rate GUL	0.026487	(0.000000)	0.026487
Rate GU	0.007011	(0.000000)	0.007011
Rate PA	NA	NA	NA
Rate ROA-R	0.011622	(0.005648)	0.005974
Rate ROA-S	0.000512	(0.000000)	0.000512
Rate ROA-P	(0.000027)	(0.000000)	(0.000027)

*(Continued on Sheet D-3.00)*

Issued May 13, 2009 by  
J. G. Russell,  
President and Chief Operating Officer,  
Jackson, Michigan

Effective for service rendered on  
and after May 14, 2009

Issued under authority of the  
Michigan Public Service Commission  
dated May 12, 2009  
in Case No. U-15645