

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the filing by )  
**CONSUMERS ENERGY COMPANY** )  
of the experimental gas customer choice )  
earnings sharing mechanism calculations )  
for the 1998-1999 plan year. )  
\_\_\_\_\_ )

Case No. U-12034

At the December 20, 2000 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. David A. Svanda, Commissioner  
Hon. Robert B. Nelson, Commissioner

**OPINION AND ORDER**

On July 1, 1999, Consumers Energy Company (Consumers) filed its "Attachment F" calculation of shareable earnings for the year ended March 31, 1999, as required by the December 19, 1997 order in Case No. U-11599, aff'd sub nom Residential Ratepayer Consortium v Public Service Comm, 239 Mich App 1; 607 NW2d 391 (1999).<sup>1</sup> That order approved Consumers' expanded gas customer choice program, including an earnings sharing mechanism that requires Consumers to issue refunds if its calculated earnings exceed certain thresholds based on its rate of return on common equity. The Attachment F computation filed by Consumers indicates that its earnings were not adequate to trigger a refund.

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<sup>1</sup>"Attachment F" refers to an exhibit attached to the application in Case No. U-11599 that details how the calculation is to be done.

In a letter dated July 29, 1999, the Commission Staff (Staff) explained its position on the filing, as follows:

Staff has reviewed Consumers' Attachment F filing, and has decided not to request a hearing. However, Staff believes that Consumers' Attachment F filing is not consistent with the calculations shown in its Application in Case No. U-11599. Specifically, it is Staff's position that the "Gas Net Operating Income" reported by Consumers is misstated. Consumers has excluded revenues that are includable in gas net operating income, and has included certain "below-the-line" expenses that should be excluded from gas net operating income.<sup>[2]</sup> Since the cumulative impact of these items is not sufficient to trigger customer refunds, there is little need for a hearing at this time. However, Staff reserves the right to challenge Consumers' treatment of income and "below-the-line" expenses in future Attachment F filings.

Unlike the Staff, Attorney General Jennifer M. Granholm (Attorney General) and the Residential Ratepayer Consortium requested that the Commission conduct a hearing.

On May 3, 2000, the Commission issued an order setting the matter for hearing. It stated:

The Commission intended that a hearing would be held if one were requested within 30 days. However, the Commission also intended that the hearing would be limited in scope and the parties requesting the hearing would have the burden of demonstrating that the company's calculations and filing are inconsistent with the methodology approved by the Commission. Therefore, a hearing will be held, limited in scope to the accuracy and conformance to Attachment F of the calculations contained in Consumers' filing, as well as insuring that the starting points are appropriate (for instance, that the gas net operating income was correctly stated and that the calculations are consistent with the earnings calculated in a traditional rate case). Parties intending to raise issues at the hearing shall make a filing ten days prior to the hearing that fully explains the issue or issues that will be raised at the hearing and how they would affect the calculations in Consumers' filing. The Administrative Law Judge assigned to the case should ensure that the record strictly conforms to the limited scope of the proceeding outlined in this order.

Order at 2-3.

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<sup>2</sup>In comments filed on June 19, 2000, the Staff elaborated that Consumers had excluded title transfer tracking income from net operating income and had made adjustments for executive bonuses and several other nonutility expenses to reduce net operating income. The Staff estimated the cumulative effect of the disputed items to be as much as \$1.7 million, which, it stated, was less than the \$2.9 million of additional income needed to trigger a refund.

On June 16, 2000, the Attorney General filed a petition for leave to intervene and the prefiled testimony and exhibits of William A. Peloquin. The proposed testimony recalculated Consumers' shareable earnings to produce a refund. On June 19, 2000, the Staff filed comments reaffirming the views it stated in its July 29, 1999 letter. On June 28, 2000, Administrative Law Judge James N. Rigas (ALJ) conducted a prehearing conference and granted leave to intervene to the Attorney General. The Staff also appeared.

On July 7, 2000, Consumers filed a motion for summary disposition pursuant to R 460.17323. On July 21, 2000, the Attorney General filed a response. On July 31, 2000, the ALJ conducted a hearing on the motion. At the conclusion of the hearing, the ALJ issued an oral Proposal for Decision (PFD) recommending summary disposition in Consumers' favor. He stated that the Attorney General's position attempted to modify the computational methodology that the Commission approved in Case No. U-11599 and, as such, was beyond the limited scope of the hearing provided in the May 3, 2000 order. Tr. 36-38. The Attorney General filed exceptions to the PFD. Consumers filed replies to exceptions.

The Attorney General advances two lines of argument to support her position that summary disposition is inappropriate. First, she argues that her recalculation of shareable earnings, as set forth in Mr. Peloquin's testimony, is consistent with the scope of the hearing established in the May 3, 2000 order, which includes "insuring that the starting points are appropriate (for instance, that the gas net operating income was correctly stated and that the calculations are consistent with the earnings calculated in a traditional rate case)." The Attorney General contends that the gas net operating income shown on Consumers' calculation does not reflect its actual earnings, that it is not an appropriate starting point, and that the computation does not conform to traditional rate-making practices. The Attorney General says that Consumers collected gas commodity revenues

that exceeded its cost of gas by \$32.6 million, which would have passed through to gas cost recovery (GCR) customers but for the rate freeze provisions of the expanded gas customer choice program.

Second, the Attorney General argues that summary disposition would violate the right to a hearing provided in MCL 460.6a(1); MSA 22.13(6a)(1) because Consumers, in her view, is effectively seeking to increase its rates and cost of service. Although the Attorney General notes that the Commission has issued past ex parte orders that potentially affected a utility's costs, she explains those decisions as premised upon a future opportunity for a hearing before cost increases can affect rates. The Attorney General says that the earnings sharing mechanism approved ex parte in Case No. U-11599, with the refund implementation deferred to this case, is analogous to the situation in Attorney General v Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided June 11, 1999 (Docket No. 207993). In that case, the Attorney General says, the Court invalidated an ex parte order reducing base rates by an amount that netted an increase in amortization expense against a revenue decrease. The Attorney General argues that conducting a hearing in this case will provide the opportunity to contest the reasonableness of the earnings sharing mechanism that she was unable to exercise in Case No. U-11599.

The Attorney General also relies on a comparison drawn in the order in Case No. U-11599 between Consumers' expanded gas customer choice program and a settlement agreement approved ex parte in an order dated December 19, 1991, Case No. U-10037, aff'd sub nom Attorney General v Public Service Comm, 206 Mich App 290; 520 NW2d 636 (1994). The settlement in Case No. U-10037 established a revenue sharing mechanism that required refunds to be issued if Consumers failed to meet certain conditions, including spending targets for operations and maintenance. The Attorney General reasons that there are significant differences between the

mechanisms approved in Cases Nos. U-11599 and U-10037, such that it is improper for the Commission to rely on Case No. U-10037 as a precedent for relieving Consumers of a refund obligation in this case, unless it first holds a hearing.

In response to the Attorney General's position on the shareable earnings computation, Consumers says that the Commission approved the methodology that Consumers proposed in Attachment F to the application it filed in Case No. U-11599. Consumers explains that the application expressly provided for the manner in which it treated gas commodity revenues and costs in this case, i.e., by excluding them from gas net operating income and by applying 50% of the net gain or loss on a tax-adjusted basis as an adjustment to gas net operating income. It says that the Attorney General's proposal to include gas commodity revenues and costs in full would alter the methodology approved in Case No. U-11599. Consumers contends that the Attorney General's efforts to construe the May 3, 2000 order to bring the proposed modifications within the scope of the hearing takes the order out of context. Consumers says that the order did not require Consumers' actual earnings to be used as a starting point, but that the computations follow from the methodology prescribed in Case No. U-11599.

With respect to the Attorney General's second line of argument, Consumers contends that a hearing is not necessary simply because the Attorney General disagrees with the earnings sharing mechanism. Consumers says that the Court in Residential Ratepayer Consortium v Public Service Commission, *supra*, held that the Commission has authority to freeze rates and that approving a freeze for a period in which cost reductions might have been anticipated does not qualify as a rate increase or require a hearing. Consumers adds that the Court's affirmance of a revenue sharing mechanism in Attorney General v Public Service Comm, 206 Mich App 290; 520 NW2d 636 (1994), lends support to the validity of the earnings sharing mechanism approved in Case

No. U-11599, even though the two mechanisms are not identical. Consumers distinguishes the unpublished decision in Attorney General v Public Service Comm (Docket No. 207993), supra, on the ground that the Commission had in that case cumulated offsetting changes in costs in order to implement a net change in rates.

The Commission adopts the ALJ's recommendation to grant summary disposition.<sup>3</sup> The Commission agrees with the ALJ that the Attorney General's recalculation of shareable earnings requires a major revision to the methodology set forth in Consumers' application to institute the expanded gas customer choice program. The Commission approved the computational aspects of the methodology without modification in Case No. U-11599. As such, the Attorney General's attempt to alter the treatment of Consumers' gain on the sale of the gas commodity would require the Commission to reconsider determinations it already made in Case No. U-11599.

In issuing the May 3, 2000 order, the Commission defined the scope of the hearing narrowly in order to foreclose litigation of collateral issues that are unrelated to the application of the Attachment F methodology. As the Attorney General notes, the order stated that the hearing could explore whether Consumers used appropriate "starting points" for the computation, whether "gas net operating income was correctly stated," and whether the calculations were "consistent with the earnings calculated in a traditional rate case." However, the Commission did not thereby intend to permit the parties to propose substantive modifications to the methodology. Instead, the

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<sup>3</sup>Although the parties have discussed different standards for summary disposition, the Commission does not perceive this case as turning on the appropriate standard. The parties have not identified any issue that requires findings of fact based on a record developed in a contested case hearing, nor have they disputed any material issue of fact in this case. The Attorney General does not challenge the fact or amount of the gain that Consumers earned on the sale of gas, but she instead argues that it is unreasonable to treat the gain in accordance with the shareable earnings computation. That issue can be resolved in light of the Commission's prior orders and requires no fact finding.

Commission meant to ensure that Consumers or others did not attempt to make subtle changes to the Attachment F methodology or take advantage of ambiguities or issues that the application did not clearly address. The Attorney General has failed to show that Consumers' computation was inconsistent in any material respect with the earnings sharing mechanism approved in Case No. U-11599. The Commission finds that Consumers' treatment of the gain from the sale of gas was appropriate and complied with the order in Case No. U-11599.<sup>4</sup>

The Attorney General's argument that a hearing is a statutory requirement has been answered by the decision on appeal from Case No. U-11599, in which the Court stated:

Next, appellants [including the Attorney General] argue that even if the PSC had authority to suspend the GCR clause, it committed legal error in doing so without notice or hearing because the suspension resulted in an increase in rates. Had the GCR clause remained operational, they claim, rates would be lower. MCL 460.6a; MSA 22.13(6a) provides in part that changes in rates or rate schedules may be authorized and approved without notice or hearing only if the changes will not result in an increase in cost of service. Just as in the instant matter, in Attorney General [v Public Service Comm], 231 Mich App 76; 585 NW2d 310 (1998)], the parties challenging the order raised arguments that "focused not on a rate increase directly resulting from suspension of the [power supply cost recovery] clause, but on a rate decrease an unsuspended clause might conceivably cause." 231 Mich App 80-82. The panel rejected the reasoning that the absence of a decrease is the equivalent of an increase and noted that if costs were lower in the future, procedures for seeking a rate adjustment are provided by MCL 460.58; MSA 22.8 and MCL 460.557; MSA 22.157. 231 Mich App 82. These provisions apply to all public utilities and therefore provide a means to adjust rates if the price of gas falls. Therefore, the PSC did not act unlawfully when it issued the order without notice or hearing because the change did not result in an increase in rates. Appellants' arguments comparing the order to a grant of summary judgment are without merit because ratemaking is a legislative function, not a judicial one.

Residential Ratepayer Consortium v Public Service Comm, supra at 5-6. Contrary to the Attorney General's suggestion, the order in Case No. U-11599 did not defer a hearing until a potential

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<sup>4</sup>However, the Commission adopts the reservations noted in the Staff's letter dated July 29, 1999 and its comments filed on June 19, 2000.

refund obligation became imminent. The Court decision affirming that order further held that a hearing was not necessary in the absence of an actual increase in rates (not merely a dispute over whether a refund is required when existing rates are frozen). Although this case does not present the possibility of a rate increase, the Commission had granted an opportunity for a hearing to ensure that Consumers' shareable earnings computation was in compliance with the approved methodology. Having failed to demonstrate a basis for a hearing, the Attorney General is not entitled to participate in a contested case hearing simply because she requested one.

The decision in Attorney General v Public Service Comm (Docket No. 207993), which reversed the Commission's November 25, 1997 order in Case No. U-11588, can be distinguished on the ground that the Commission had approved a change of rates in that case.<sup>5</sup> Moreover, the order in Case No. U-11588 addressed issues relating to the treatment of unaudited expense items that The Detroit Edison Company had proposed to apply as an offset against the rate effects of an unrelated settlement agreement. The earnings sharing computation filed in this case is wholly within the context of a specific program previously approved by the Commission, and the Staff has adequately reviewed the filing for compliance with the terms of the program.

With respect to the Attorney General's arguments noting various differences between the sharing mechanisms approved in Cases Nos. U-10037 and U-11599, the Commission does not agree that those differences have a meaningful effect on the Commission's statutory authority to approve either mechanism.

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<sup>5</sup>The decision was unpublished. See MCR 7.215(C)(1). The Court issued the decision in Residential Ratepayer Consortium affirming the order in Case No. U-11599 after it issued Attorney General v Public Service Comm (Docket No. 207993), supra.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 et seq.; MSA 22.21 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers' motion for summary disposition should be granted.

THEREFORE, IT IS ORDERED that:

A. The motion filed by Consumers Energy Company for summary disposition is granted.

B. This docket shall be closed.

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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

( S E A L )

/s/ John G. Strand  
Chairman

By its action of December 20, 2000.

/s/ David A. Svanda  
Commissioner

/s/ Dorothy Wideman  
Its Executive Secretary

/s/ Robert B. Nelson  
Commissioner

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Suggested Minute:

“Adopt and issue order dated December 20, 2000 granting the motion of Consumers Energy Company for summary disposition with respect to its calculation of shareable earnings under its gas customer choice program, as set forth in the order.”