

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
of the implementation of the market-based rate)	
provision of the gas customer choice program)	Case No. U-12887
approved for CONSUMERS ENERGY COMPANY)	
in Case No. U-11599.)	
_____)	

At the December 20, 2001 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

On September 27, 2001, the Commission issued an order approving a settlement, which mitigated the effect of market-based rates paid during the 2000-2001 winter heating season by customers who had returned to Consumers Energy Company's (Consumers) gas sales supply service after initially participating in the utility's experimental gas customer choice program. Parties to the settlement were Consumers, Attorney General Jennifer M. Granholm (Attorney General), the Commission Staff (Staff), and several customers who returned to Consumers' sales service after their alternative supplier decided to end its participation in the program.¹

¹ In another order issued today, the Commission approves the parties' amendment to the settlement, which modifies the amount of the refund to be issued to the market-based rate customers.

On October 29, 2001, Energy America, LLC, filed a petition for rehearing pursuant to Rule 403 of the Commission's Rules of Practice and Procedure, R 460.17403. According to the petition, Energy America is a marketer that has participated in Consumers' experimental and permanent choice programs. Energy America had not previously sought leave to intervene or otherwise participated in this case. Consumers, the Attorney General, and the Staff filed answers opposing the petition.

Energy America argues that the settlement compounds the anticompetitive effects of an earlier order (dated October 24, 2000) in Case No. U-12679, which approved an accounting reclassification of some of Consumers' storage gas and created the refund obligation that was subsequently used to mitigate the market-based rates. Energy America claims that the accounting change will lower the cost of gas sold by Consumers by an estimated 50¢ per thousand cubic feet during the 2001-2002 gas cost recovery (GCR) plan year and undermine marketers that attempt to compete with Consumers for business in the retail gas supply market. Energy America says that it cannot offer a competitive response because the permanent choice program required it to commit to its retail prices in December 2000, and it has already entered into hedging transactions on the basis of those prices. It says that its own customers in the permanent choice program have the right to return to Consumers' GCR service, and many will no doubt exercise that right in light of the attractive rates offered by Consumers.

Energy America complains that providing after-the-fact regulatory relief from Consumers' rates forces marketers to compete against a moving target and eliminates the customers' risk of staying with a utility's service. Energy America further complains that it is unfair and discriminatory to provide refunds to customers who initially chose alternative suppliers and later returned to Consumers' market-based rate, as well as those who never participated in the choice

program, but not to provide similar relief to those who honored their commitments to alternative suppliers. It argues that the settlement is unfair and that the parties to it did not adequately represent the public interest because none of them represented choice customers.

In opposing rehearing, Consumers, the Attorney General, and the Staff contend that Energy America, as a non-party, cannot seek rehearing. They argue that the settlement fully complied with the procedural requirements in R 460.17333 and that any interested person had an opportunity to participate in the case. To the extent that Energy America is arguing against the consequences of the order in Case No. U-12679, they observe that it did not file for rehearing in that docket and that the 30-day deadline for rehearing has passed. They argue that grievances regarding competition relate to the current permanent choice program, but that the orders in question relate to the last few months of the experimental program, which ended in March 2001. Consumers says that the rapid increase in market-based rates in the winter of 2000-2001 was a unique situation. The Attorney General says that the settlement does not discriminate against choice customers because they pay unregulated rates for their gas supply and are not similarly situated to utility sales customers paying tariff rates.

The Commission commenced this case on its own motion for the purpose of fashioning relief to mitigate an unforeseeable hardship resulting from the experimental program, and it provided public notice. Energy America, which did not seek to intervene in accordance with the Commission's rules and procedures, see R 460.17201 et seq., is not a party and therefore cannot seek rehearing pursuant to R 460.17403. The limited grounds for granting rehearing in R 460.17403(1)—newly discovered evidence, facts or circumstances arising subsequent to the close of the record, or unintended consequences of the order—assume that the petitioner fully participated in prior proceedings, so that the complained defects in the final decision did not result from any

earlier omission on its part to present evidence, assert known facts or circumstances, or advise of the foreseeable consequences of a proposed course of action. The rule further requires service of the petition for rehearing on “all *other* parties to the proceeding.” (Emphasis added.) See also MCL 24.287.

Moreover, the Commission is persuaded that Energy America’s petition for rehearing lacks substantive merit. Much of its grievance relates to the accounting reclassification approved in the October 24, 2000 order in Case No. U-12679, which is not properly the subject of a petition for rehearing filed in the present docket. The settlement in this case complied with R 460.17333, which sets forth the procedural requirements that ensure fairness in the settlement process. The mitigation measures in the settlement address unforeseeable economic circumstances that occurred on a national scale during the last few months of an experimental program. Many customers whose suppliers pulled out of the program returned to Consumers’ sales service through no fault of their own. The purpose of the pilot program was to test the feasibility of customer choice and to gain experience in a competitive approach before making a full transition to a permanent program. Because the experimental and permanent choice programs are separate, a limited-scale remedial measure used to modify a hardship occurring in the experimental program does not affect the terms and conditions of the permanent program.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 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. The petition for rehearing should be denied.

THEREFORE IT IS ORDERED that the petition for rehearing is denied.

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 December 20, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

THEREFORE IT IS ORDERED that the petition for rehearing is denied.

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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By its action of December 20, 2001.

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Suggested Minute:

“Adopt and issue order dated December 20, 2001 denying the petition for rehearing filed by Energy America, LLC, as set forth in the order.”