

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of	)	
<b>NORTH MICHIGAN LAND &amp; OIL</b>	)	
<b>CORPORATION, NEILSON ENTERPRISES</b>	)	Case No. U-13469
<b>CORPORATION, NEILSON ENTERPRISES</b>	)	
<b>LIMITED PARTNERSHIP, NORTH MICHIGAN</b>	)	
<b>GAS &amp; OIL, DAVID E. NEILSON, DALE M.</b>	)	
<b>NEILSON, GERALD J. TALBOT, CMK</b>	)	
<b>ENTERPRISES, INC., and J &amp; J PROPERTIES,</b>	)	
<b>INC., against MICHIGAN CONSOLIDATED</b>	)	
<b>GAS COMPANY</b> regarding their gas purchase	)	
contract.	)	
_____	)	

At the December 18, 2003 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

On July 8, 2002, North Michigan Land & Oil Corporation (North Michigan Corp.), Neilson Enterprises Corporation, Neilson Enterprises Limited Partnership, North Michigan Gas & Oil, David E. Neilson, Dale M. Neilson, Gerald J. Talbot, CMK Enterprises, Inc., and J & J Properties, Inc., (collectively, NMLO) filed a complaint against Michigan Consolidated Gas Company (Mich Con), alleging that Mich Con was in breach of its contractual obligations to purchase natural gas produced from certain Antrim shale geological formations that underlie Montmorency

and Otsego counties. The complaint explains that NMLO had previously brought this claim in a civil action in the Otsego County Circuit Court (Docket No. 97-007371-CK), but that the Court of Appeals had remanded the matter from the circuit court to the Commission on the basis of primary jurisdiction. North Michigan Land & Oil v Michigan Consolidated Gas Co, unpublished order of the Court of Appeals, decided March 27, 2000 (Docket No. 223319).

On April 8, 2003, Administrative Law Judge James N. Rigas (ALJ) conducted an evidentiary hearing on the complaint. NMLO, Mich Con, and the Commission Staff (Staff) participated and subsequently filed briefs and reply briefs. On July 22, 2003, the ALJ issued a Proposal for Decision (PFD) recommending dismissal of the complaint. On August 5, 2003, NMLO filed exceptions. On or before August 15, 2003, Mich Con and the Staff filed replies to exceptions.

### Factual Background

This dispute arises from Mich Con's relationship as a common purchaser of natural gas from the complainants over a 15-year period. NMLO and Mich Con signed a series of agreements relating to Mich Con's rights and obligations to purchase the gas, and each successive agreement purported to modify, amend, or incorporate provisions from prior agreements.

1978 Shell Gas Purchase Contract. Mich Con signed a gas purchase contract, dated March 1, 1978, with Shell Oil Company (Shell). Ex. CRS-1. Although Shell is not a party to the complaint, the 1978 contract forms the basis for the contractual relationship between NMLO and Mich Con. Under the contract, Shell committed to sell to Mich Con over the next 20 years (ending in 1998) its production from gas reserves in areas specified in Exhibit A of the contract, which lists parts or all of 58 townships in Antrim, Crawford, Grand Traverse, Kalkaska, Manistee, Montmorency, Otsego, and Wexford counties. *Id.* at 5-6, 21 & Ex. A. The contract provides an initial gas purchase price of \$2.20 per thousand cubic feet (Mcf), which is subject to escalation provisions

every three months. Id. at 15-16. It further provides that the contractual interests are assignable upon giving written notice to the other party. Id. at 32.

The 1978 Shell gas purchase contract originally covered gas produced from Niagaran geological formations. According to Mich Con, various provisions of the contract impose specifications that are consistent with the characteristics of Niagaran gas production: e.g., a minimum heating value of 1,000 British thermal units per cubic foot and a minimum delivery pressure of 200 pounds per square inch gauge. Id. at 23-25. NMLO concedes that the Antrim gas production that it claims Mich Con is contractually obligated to purchase in this case would not comply with the unamended specifications of the 1978 contract.

On July 31, 1980, Shell entered into a farmout assignment with North Michigan Corp.,<sup>1</sup> in which Shell assigned to North Michigan Corp. its contractual rights to sell to Mich Con gas produced in parts of three sections of Hayes Township<sup>2</sup> in Otsego County. Ex. CRS-36. By its terms, the assignment encompassed subsurface areas that are no deeper than the base of the Antrim formation (which is closer to the surface than a Niagaran formation). The farmout area in Hayes Township is located within the surface area committed to Shell in Exhibit A of the 1978 gas purchase contract. As is typically the case with farmout arrangements, Mich Con was not a direct party to the agreement. Thus, the rights to sell gas to Mich Con under a farmout agreement are derivative of the rights that Shell as the assignor held.

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<sup>1</sup> Although references in this order to “NMLO” include all producers that joined the complaint in this case, the only producer named in the farmout assignment was “North Michigan Land & Oil Corporation.” This order uses “North Michigan Corp.” to refer to that producer specifically.

<sup>2</sup> A township is typically configured as a grid of 36 sections, each section being a square mile, as laid out pursuant to the United States Public Land Survey methodology prescribed by the Land Ordinance of 1785 for the Northwest Territory.

1983 Letter Agreement. To accommodate North Michigan Corp.'s desire to sell Antrim gas under the farmout arrangement, Mich Con signed a letter agreement with North Michigan Corp. dated September 6, 1983. Ex. CRS-3. The letter agreement modified the 1978 Shell gas purchase contract by waiving certain specifications with respect to the Hayes Township farmout area, including the minimum heating value of the gas. It further provided that the 1978 gas purchase contract "as modified [by the letter agreement] is ratified and approved." Id. at 2.

1984 Letter Agreement. In a letter dated May 22, 1984, Mich Con and North Michigan Corp. agreed to amend the 1983 letter agreement by expanding the production area by an additional half section of Hayes Township. Ex. CRS-6. As expanded by that amendment, the gas production dedicated to Mich Con was limited to an Antrim gas field known as ASE # 1.

About the same time, Mich Con began to negotiate with Shell for gas price concessions. They eventually signed a letter agreement dated February 20, 1986, which imposed a three-year blanket pricing amendment covering several Shell contracts, including the 1978 gas purchase contract.<sup>3</sup> Mich Con filed an application in Case No. U-8421 for approval of the price change prescribed for 1986, and the Commission issued an April 29, 1986 order approving a ceiling price of \$3.65 per Mcf.<sup>4</sup>

When Mich Con attempted to apply the blanket pricing amendment to the farmout assignees, NMLO objected. NMLO took the position that its 1983 letter agreement had created a direct contractual obligation on Mich Con's part to purchase gas from NMLO under the terms of the

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<sup>3</sup> They had earlier reached less formal understandings. For example, in a letter dated November 28, 1983, Shell agreed to delay the implementation of contractual price escalations. Ex. CRS-5.

<sup>4</sup> The Commission issued further orders under the Shell blanket pricing amendment that approved ceiling prices of \$3.11414 and \$3.15142 per Mcf for 1987 and 1988, respectively, in the December 17, 1986 order in Case No. U-8572 and the March 15, 1988 order in Case No. U-8919, respectively.

1978 Shell gas purchase contract, so that Mich Con's subsequent price negotiations with Shell did not bind NMLO. Mich Con took the contrary position that the letter agreements with NMLO had not changed the status of their arrangement as a farmout assignment from Shell that was subject to the provisions it subsequently negotiated.

1986 Amendment of Gas Purchase Contract (1986 amendment). NMLO<sup>5</sup> and Mich Con resolved their differences over the price redetermination by signing a contract amendment dated January 1, 1986 for the period from January 1, 1986 through December 31, 1988. Ex. CRS-15. (According to Mich Con, NMLO actually signed the 1986 amendment somewhat later than January 1, 1986, but it was backdated to the first of the year.) The 1986 amendment incorporated the pricing provisions previously conceded by Shell.<sup>6</sup>

The basis for NMLO's claim in this case is its interpretation of the opening clauses of the 1986 amendment, which state as follows:

WITNESSETH:

WHEREAS, Buyer and Seller have entered into a Gas Purchase Contract dated March 1, 1978 (a Shell Modified and Ratified Contract) hereinafter collectively referred to as "Contract", covering the sale and purchase of gas from certain areas in the Lower Peninsula of Michigan upon the terms and conditions set forth; and

WHEREAS, Buyer and Seller desire to modify and amend certain terms and conditions of said Contract for calendar years 1986, 1987 and 1988 by setting a not to exceed cost of gas under the Contract as hereinafter set forth.

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<sup>5</sup> The parties signing the 1986 contract amendment included North Michigan Corp. and a number of other producers. Some, but not all, of the signing producers are complainants in this case, and some, but not all, of the complainants signed the 1986 amendment.

<sup>6</sup> According to Mich Con, the Commission's pricing approval in Case No. U-8421 encompassed NMLO's production interests in the Hayes Township area covered by the letter agreements. Tr. 150-51; Mich Con replies to exceptions at 38 n11.

Ex. CRS-15, at 1. The contract additionally states that “[a]ll terms, conditions, and provisions of the Contract which are not amended hereby shall remain in full force and effect.” Id. at 3.

NMLO relies on the first WHEREAS clause as giving it the right to sell gas from the entire 58-township production area set forth in Exhibit A of the 1978 Shell gas purchase contract. NMLO claims that it bargained for the elimination of the territorial constraint of the 1983 and 1984 letter agreements (which limited it to part of Hayes Township) by agreeing to the price concessions of the 1986 amendment. NMLO thus asserts a contractual obligation on Mich Con’s part to purchase Antrim production from the ASE # 2 through ASE # 8 gas fields, which underlie areas beyond those set forth in the letter agreements and include areas outside of Hayes Township altogether. Mich Con, on the other hand, maintains that the parties grafted the 1986 amendment onto their preexisting contractual relationship and thus incorporated the terms and provisions of the 1978 gas purchase contract only as previously restricted by the letter agreements.

According to NMLO, it acted on its view of the 1986 amendment by tendering additional Antrim production to Mich Con from reserves that it had acquired from various sources, including additional Shell farmouts. Mich Con declined to purchase the gas, citing its nonconformity with the heating value and other quality specifications of the 1978 Shell gas purchase contract. NMLO acknowledges that Mich Con was acting within its rights at the time. NMLO then sold the gas to Consumers Power Company (Consumers) until November 1, 1993, when Consumers canceled the purchases in accordance with rulings issued in the February 8, 1993 order in Case No. U-10029, aff’d sub nom North Michigan Land & Oil Corp v Public Service Comm, 211 Mich App 424; 536 NW2d 259 (1995).

1992 Antrim Gas Treating Agreement. Mich Con and NMLO signed an agreement dated April 1, 1992, which requires Mich Con to treat NMLO’s Antrim gas production for carbon

dioxide (CO<sub>2</sub>). Ex. CRS-32. (The presence of CO<sub>2</sub> can prevent gas from meeting the minimum heating value requirement.)

1992 Agreement Modifying 1983 Letter Agreement. By letter agreement dated December 21, 1992, Mich Con and NMLO agreed to new pricing provisions, which would be in effect through the remaining term of the 1978 gas purchase contract and could be extended, at NMLO's option, to December 31, 2003. The agreement specified that the CO<sub>2</sub> content of the gas sold to Mich Con must be 2% or less at the point of delivery. Ex. CRS-31.

NMLO's position is that the two 1992 agreements cured the contractual nonconformity of any Antrim gas that it produced from within the 58-township area of the 1978 Shell gas purchase contract. In a letter to Mich Con dated August 31, 1993, NMLO formally tendered its Antrim production from the ASE # 2 through ASE # 8 fields for delivery beginning November 1, 1993. Ex. CRS-51. Mich Con responded by letter dated October 4, 1993, in which it declined to purchase the gas. Ex. CRS-52.

### PFD

NMLO's claim rests on the legal effect of the 1986 amendment. The primary basis for the PFD's recommendation to dismiss the complaint was that the 1986 amendment was ineffective under 1929 PA 9, as amended, MCL 483.101 et seq. (Act 9). The ALJ reasoned that the 1986 amendment purported to alter or amend the "price paid, rates, charges, and conditions of service" under preexisting agreements, so that the amendment could not become effective under Section 10 of Act 9 without the Commission's approval. MCL 483.110. The ALJ thus concluded that the failure to file an application for approval of the 1986 amendment precludes its enforcement in this case.

Although the ALJ found this issue to be dispositive, he also briefly addressed the issue of whether the contract provisions would have expanded NMLO's contract area, if the 1986 amendment were deemed legally effective. He stated that the 1986 amendment incorporated the 1978 Shell gas purchase contract only as it had been previously amended by the 1983 and 1984 letter agreements. Thus, the territorial constraints of the letter agreements remained in effect, and the 1986 amendment did not alter them.

### Discussion

In its exceptions, NMLO argues that the 1986 amendment was an initial contract for purposes of Section 10 of Act 9, so that the statutory provisions requiring Commission approval of subsequent amendments or alterations do not come into play. NMLO claims that the 1986 amendment is an entirely new contract because it created an independent contractual relationship between NMLO and Mich Con and terminated NMLO's status as a farmout assignee under Shell's contract. As such, NMLO says, the act of filing the 1986 amendment, without seeking its approval by the Commission, met all of the statutory conditions for the contract to become effective.

Notwithstanding Mich Con's claims that the contract may not have been filed at all, NMLO points to a Mich Con witness's statement that he thought he had filed it. (The Staff purged its records, so that it cannot verify whether the 1986 amendment was actually filed.) NMLO further references Mich Con's application in Case No. U-8421, which stated: "All of the Contracts and amendments have been filed with the Commission pursuant to Section 11 of 1929 PA 9, as amended; MCL 483.111." Ex. CRS-104, amended application, para. 2. It notes that the same recital appears in the order approving the application. Order dated April 29, 1986, Case

No. U-8421, at 2.<sup>7</sup> NMLO contends that if in fact Mich Con did not file the 1986 amendment, it violated a statutory obligation.

Mich Con continues to question whether the 1986 amendment was ever filed. It says that its application in Case No. U-8421 sought approval of only the price change resulting from the uniform pricing structure for 1986-88, but not the contract amendment itself. Mich Con notes that the listing of covered production areas attached to the application in Case No. U-8421 included NMLO's ASE # 1 field, but no others within NMLO's claim of rights to sell Antrim gas. Mich Con states that it filed the application in Case No. U-8421 on February 21, 1986, but that it did not receive a signed copy of the 1986 amendment from NMLO until after April 23, 1986. With respect to NMLO's claim that a failure to file the contract would be a statutory violation on Mich Con's part, Mich Con responds that North Michigan Land & Oil Corp v Public Service Comm, 211 Mich App 424, 436; 536 NW2d 259 (1995), holds that an unapproved price change is ineffective, without regard to whether it was filed or who failed to file it.

Mich Con further argues that the 1986 amendment, even if it were filed, would not have been an initial or new contract for purposes of Section 10. Mich Con says that the document's title refers to an "amendment" of the prior contractual relationship memorialized in the 1983 and 1984 letter agreements, that the first WHEREAS clause refers to the 1978 gas purchase contract as a

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<sup>7</sup> This claim appears to mischaracterize the significance of representations made in Case No. U-8421. In context, Mich Con's amended application indicates that the contracts and amendments it referenced as being filed were with Shell and included the 1978 gas purchase contract. Ex. CRS-104, para. 2. The application further indicates that the other producers affected by the price redetermination were farmees with rights that were derivative of Shell's. *Id.* The listing of gas fields covered by the price redetermination in Exhibit A of the application includes "Hayes 14-29N-4W, N. Mich. Land & Oil 2-17" under the 1978 Shell gas purchase contract. Tr. 150. Exhibit B, the only agreement actually filed in the docket, is a copy of the agreement with Shell that imposed the 1986-88 uniform pricing structure. The recitals contained in the April 29, 1986 order approving the price redetermination are consistent with Mich Con's application. No copy of the 1986 amendment between NMLO and Mich Con appears in the Commission's official docket for Case No. U-8421.

“Shell Modified and Ratified Contract,” and that the amendment itself requires Mich Con to seek approval of the price changes pursuant to Section 10. Ex. CRS-15, at 1, 3. Mich Con cites the October 7, 1996 order in Case No. U-10915, which states that Act 9 requires Commission approval of a new price that results from either an amendment of an existing pricing mechanism or the substitution of a new contract for an existing contract.

The Staff argues that an agreement does not become a new contract under Section 10 simply because it changes the contractual relationship of the seller from being an assignee under another producer’s contract to a direct contracting party.

Section 10 of Act 9 requires a common purchaser to file its rates and prices to be paid for receiving natural gas, along with its contracts. (Section 11, MCL 483.111, also requires copies of gas purchase contracts to be filed with the Commission.) Section 10 further requires subsequent alterations or amendments of the “price paid, rates, charges, and conditions of service,” but not the initial contract or price, to be submitted by application to the Commission for its approval. MCL 483.110. See Antrim Resources v Public Service Comm, 179 Mich App 603, 611; 446 NW2d 515 (1989).

The Commission rejects NMLO’s claim that the 1986 amendment was a new or initial contract that did not require approval to become effective under Section 10. Prior to 1986, NMLO had been selling gas to Mich Con under the terms of the 1978 Shell gas purchase contract, as modified by the 1983 and 1984 letter agreements. Mich Con’s contractual obligation to purchase the gas continued after the 1986 amendment, which effectively incorporated the 20-year term from the 1978 gas purchase contract. The 1986 amendment, by its own terms, recognizes that it is modifying a preexisting contractual relationship. Even if it displaced NMLO’s former status as an assignee under Shell’s contract with a new status as a direct contractual seller to Mich Con, the

1986 amendment was not negotiated as an entirely new arrangement, but it reincorporated prior contracts. The Commission agrees with the Staff's contention that a contract does not become new for purposes of Section 10 simply by restructuring the contractual relationship of a preexisting producer. As noted in the October 7, 1996 order in Case No. U-10915, at 16, "the price approval process set forth in Section 10 of Act 9 obligates a common purchaser to apply for approval of a new contract price that results from either the amendment of an existing contract pricing mechanism or the substitution of a new contract for an existing contract."

Under these circumstances, the 1986 amendment was subject to the approval requirements of Section 10 and cannot be given effect in the absence of Commission approval. This is clear from the ruling in North Michigan, which rejected claims that an undisclosed, unapproved private agreement could modify the contract pricing and further held that the failure to obtain Commission approval meant that the agreement's extension of the contract term also was without effect. 211 Mich App 435-36. The Court noted that the failure of the common purchaser to file the agreement did not absolve the producer from the consequences of the non-approval. Id. at 436-37. Thus, the unapproved 1986 amendment cannot be given effect, regardless of whether a copy was submitted to the Staff.

As noted in the PFD, this issue alone would be dispositive of the merits of the complaint. However, the Commission will address an additional issue litigated by NMLO and Mich Con, which is also dispositive—whether the 1986 amendment, even if it were filed and approved under Act 9, could be interpreted to expand the contractual production area as NMLO claims.

NMLO argues that the 1986 amendment incorporated the terms of the 1978 Shell gas purchase contract without change except as otherwise noted in the amendment, which changed only the pricing provisions and substituted NMLO for Shell as the contract's seller. According to NMLO,

the first WHEREAS clause expresses the parties' contractual intent to incorporate and ratify the terms of the 1978 gas purchase contract. NMLO says that the 1986 amendment further provides that "[a]ll terms, conditions, and provisions of the Contract which are not amended hereby shall remain in full force and effect." Ex. CRS-15, at 3. Thus, NMLO asserts, the 1986 amendment incorporated the entire 58-township area of Exhibit A of the 1978 gas purchase contract and entitled NMLO to sell any gas it produced from that expanded area to Mich Con.

NMLO argues that the ALJ erred in finding that the 1986 amendment incorporated the 1978 Shell gas purchase contract only as restricted by the 1983 and 1984 letter agreements. Observing that the WHEREAS clause refers to the 1978 gas purchase contract as a "Shell Modified and Ratified Contract," NMLO says that it thereby acknowledges that Mich Con had previously signed the contract with Shell and was now modifying and ratifying that contract with NMLO. NMLO suggests that if it had been Shell that signed the 1986 amendment, there would be no question but that it would have covered the entire area of the 1978 gas purchase contract. NMLO further maintains that Mich Con's actions after 1986 are consistent with NMLO's contract interpretation, in that the reason given by Mich Con for refusing to purchase NMLO's gas production was not that it fell outside the contract area, but instead that it did not comply with the contract's quality specifications.

NMLO argues that if the contract is ambiguous with respect to the area of commitment, Mich Con drafted it, so that the ambiguities must be construed in NMLO's favor.

Mich Con observes that NMLO was not a party to the 1978 Shell gas purchase contract, which applies to a total surface area, covering all or parts of the 58 townships, that is 928 times larger than the Hayes Township area described in NMLO's 1983 and 1984 letter agreements. Mich Con denies that it agreed to an expansion of the production area as a means of obtaining the price

concessions in the 1986 amendment, but it says that it was implementing a uniform price that it, as a common purchaser, was obligated to pay to all similarly situated producers under Act 9.

According to Mich Con, the reference in the WHEREAS clause to the “Contract” includes, not only the 1978 Shell gas purchase contract, but also the subsequent letter agreements that amended it with respect to NMLO, together with their geographical restrictions. Mich Con says that the WHEREAS clause is a factual recital of a past event, and not a substantive provision of the contract. Mich Con asserts that judicially recognized principles of contract interpretation do not treat WHEREAS clauses as creating substantive rights and obligations. Mich Con says that none of the contract’s substantive provisions address the production area or purport to alter geographical restrictions.

Mich Con argues that its dealings with NMLO after signing the 1986 amendment are entirely consistent with its interpretation of the contract. Mich Con claims that it continued to purchase Antrim gas produced by NMLO from the ASE # 1 field in Hayes Township, as agreed in the 1983 and 1984 letter agreements that waived the Niagaran-specific criteria for that field. Mich Con explains that it declined to purchase NMLO’s production from other areas, as it had no obligation to purchase Antrim gas beyond the scope of the letter agreements. Mich Con says that if the 1986 amendment had invalidated the letter agreements as NMLO contends, Mich Con would not have been contractually obligated to purchase any of the ASE # 1 production after January 1, 1986, given that the letter agreements that made those purchases possible would have ceased to be effective.

Mich Con further contends that, since 1985, it has granted releases of any gas tendered from the ASE # 2 through ASE # 8 fields, that the releases were final and binding, that NMLO then sold the gas to Consumers until 1993, and that the 1992 Antrim gas treating agreement could not have

cured the nonconformity of gas it had already released. In any event, Mich Con says, the 1986 amendment expired by its own terms at the end of 1988, so that it could not confer any rights on NMLO thereafter.

The Commission finds that the 1986 amendment did not give effect to an agreement to expand NMLO's production area beyond what the parties had previously agreed in the 1983 and 1984 letter agreements. The first WHEREAS clause refers to the 1978 Shell gas purchase contract as the historical basis for the parties' contractual relationship, but it does not indicate that the parties were intending to rescind any of the non-price provisions of the letter agreements. The substantive provisions of the 1986 amendment deal with pricing issues. When read as a whole, the 1986 amendment does not manifest any intent to expand or change the production area. NMLO's claim to the contrary misconstrues a recital that forms part of the introductory framework for the substantive provisions. As Mich Con states, courts have not ordinarily construed WHEREAS clauses as conferring substantive rights or imposing substantive obligations. Genovese Drug Stores, Inc v Connecticut Packing Co, 732 F2d 286, 291 (CA2, 1984) ("[A]n expression of intent in a 'whereas' clause of an agreement between two parties may be useful as an aid in construing the rights and obligations created by the agreement, but it cannot create any right beyond those arising from the operative terms of the document."); Grynberg v FERC, 315 US App DC 154; 71 F3d 413, 416 (1995) (rejecting reliance on a WHEREAS clause to define the gas production interests subject to an interstate gas purchase contract for purposes of federal jurisdiction).

The Commission rejects NMLO's contention that the parties' dealings and actions after they signed the 1986 amendment support its interpretation of the WHEREAS clause. If, as NMLO contends, the 1986 amendment had replaced the limited area defined in the 1983 and 1984 letter agreements with Exhibit A of the 1978 Shell gas purchase contract, it concomitantly would have

had the effect of canceling the letter agreements. (According to NMLO's line of argument, the letter agreements were not part of the contract that the 1986 amendment incorporated.) Therefore, under NMLO's reading of the contract, it would have lost its right to sell the production from the ASE # 1 field, as it was the letter agreements' waiver of the Niagaran-specific criteria that permitted limited sales of otherwise non-conforming Antrim gas to take place. However, Mich Con continued to purchase Antrim gas from the ASE # 1 field as required under the terms of the 1986 amendment, but it rejected tenders of additional Antrim production. This is in keeping with its understanding that the 1986 amendment did not modify the non-price provisions of the 1983 and 1984 letter agreements.

NMLO's assertion that Mich Con's given rationale for rejecting the Antrim tenders was their noncompliance with the contractual quality specifications, and not the surface area restrictions, is not persuasive. The 1978 gas purchase contract obligated Mich Con to purchase gas that complied with the quality specifications (in other words, Niagaran gas) when tendered by Shell (or its farmees) from within the original 58-township production area. The 1983 and 1984 letter agreements modified the contract to permit NMLO to sell Antrim gas produced from the ASE # 1 field located within Hayes Township. NMLO's tenders of additional Antrim gas invited a rejection on Mich Con's part because the gas was not subject to Mich Con's contractual purchase obligation. Mich Con's rejections citing quality grounds were consistent with its understanding that the gas purchase contract did not obligate it to take noncomplying Antrim gas from outside of the ASE # 1 field, even if produced from within the original Niagaran production area.

In its exceptions, NMLO argues that the Commission does not have statutory authority to adjudicate a complaint for damages for breach of a gas purchase contract, that the Commission's assertion of jurisdiction violates NMLO's constitutional right to a jury trial, and that the matter

should be remanded to circuit court. Consideration of this exception is foreclosed by the Court of Appeals' prior ruling remanding the case from the Otsego County Circuit Court to the Commission. Moreover, NMLO's arguments, on their merits, are contrary to case law that holds that the Commission is the proper forum to interpret gas purchase contracts and adjudicate disputes over the contracts. See Dominion Reserves, Inc v Michigan Consolidated Gas Co, 240 Mich App 216; 610 NW2d 282 (2000); Energy Reserves, Inc v Consumers Power Co, 221 Mich App 210, 216-17; 561 NW2d 854 (1997); North Michigan, 211 Mich App at 430-32, 437; Antrim Resources, 179 Mich App at 609-16.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1929 PA 9, as amended, MCL 483.101 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. The complaint should be dismissed with prejudice.

THEREFORE, IT IS ORDERED that the complaint is dismissed with prejudice.

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 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 December 18, 2003.

/s/ Mary Jo Kunkle  
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

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Chair

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Commissioner

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Commissioner

By its action of December 18, 2003.

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Its Executive Secretary

In the matter of the complaint of )  
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LIMITED PARTNERSHIP, NORTH MICHIGAN )  
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ENTERPRISES, INC., and J & J PROPERTIES, )  
INC., against MICHIGAN CONSOLIDATED )  
GAS COMPANY regarding their gas purchase )  
contract. )  
\_\_\_\_\_ )

Case No. U-13469

Suggested Minute:

“Adopt and issue order dated December 18, 2003 dismissing, with prejudice, a complaint filed by North Michigan Land & Oil Corporation and other producers of natural gas against Michigan Consolidated Gas Company, as set forth in the order.”