

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
CONSUMERS ENERGY COMPANY for)	
reconciliation of its gas cost recovery revenues)	Case No. U-12752-R
and expenses for the 12-month period)	
April 1, 2001 to March 31, 2002.)	
_____)	

At the May 18, 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

On June 28, 2002, Consumers Energy Company (Consumers) filed an application, pursuant to Section 6h(12) of 1982 PA 304, as amended, MCL 460.6h(12), for a reconciliation of its gas cost recovery (GCR) revenues and expenses for the 12-month period April 1, 2001 to March 31, 2002.

Pursuant to due notice, a prehearing conference was conducted on August 13, 2002 by Administrative Law Judge Barbara A. Stump (ALJ). Consumers, Energy America, LLC, the Residential Ratepayer Consortium (RRC), Attorney General Jennifer M. Granholm¹ (Attorney General), and the Commission Staff (Staff) attended the prehearing conference. The ALJ approved the petitions to intervene filed by the RRC and the Attorney General without limitation.

¹On January 1, 2003, Michael A. Cox succeeded Ms. Granholm as Attorney General.

She granted Energy America's petition to intervene on a permissive basis, limiting its participation to matters relating solely to the implementation of the refund obligation established in Case No. U-12679.

On August 15, 2002, the ALJ granted a petition to intervene filed by the Association of Businesses Advocating Tariff Equity (ABATE).

On December 9, 2002, the ALJ conducted another hearing. At that time, Consumers, the RRC, the Attorney General, and the Staff entered into a partial settlement agreement. ABATE and Energy America submitted statements of non-objection. In the partial settlement agreement, the parties stipulated to the reasonableness and prudence of Consumers' gas purchasing practices and costs for the 2001-02 GCR plan year. Further, in lieu of a formal evidentiary hearing, the parties' pre-filed testimony was bound into the record, the parties waived cross-examination, and 19 exhibits were admitted into evidence.

On December 23, 2002 and January 17, 2003, Consumers, ABATE, the RRC, Energy America, and the Attorney General filed briefs and reply briefs, respectively.

On February 6, 2003, the ALJ issued her Proposal for Decision (PFD).

On February 20, 2003, Consumers, ABATE, the RRC, and Energy America submitted exceptions to the PFD.

On March 5, 2003, Consumers, the Attorney General, ABATE, and the RRC submitted replies to exceptions.

Consumers' Proposal

The partial settlement agreement provides that Consumers' GCR cost of gas sold of \$746,510,497 (shown on line 24 of Exhibit A-10) and total GCR revenues of \$735,180,767 (shown on line 31 of Exhibit A-10) should be used for purposes of this reconciliation proceeding.

Thus, for the 12-month period ended March 31, 2002, Consumers experienced a GCR underrecovery of \$11,329,730.

However, the testimony indicates that Consumers' GCR underrecovery was offset by various refund obligations and an offsetting adjustment, which total \$13,436,369. As shown on Exhibit A-10, the refund obligations and the offsetting adjustment include the following amounts:

Description	Amount
Case No. U-12679 refund amount	\$16,583,396
Case No. U-12887 refund offset	(\$4,964,185)
Kansas ad valorem tax refund (GCR portion)	\$1,381,887
Unrefunded balances	\$435,271
Total	\$13,436,369

Based on these adjustments, Consumers maintained that its 2001-02 net GCR overrecovery should be set at \$2,106,639. With the addition of \$1,331,076 in interest owed to customers because Consumers was in an overrecovered position for much of the 2001-02 plan year, Consumers calculated that it owes customers \$3,437,715, which the utility proposed to roll into its next GCR plan pursuant to its Commission-approved refund procedures. However, Consumers' treatment of these adjustments is a matter of considerable dispute in this proceeding.

Consumers' 50% Sharing of the Kansas Ad Valorem Tax Refund

From October 4, 1983 to June 28, 1988, the state of Kansas imposed ad valorem taxes on natural gas reserves produced in that state to the extent that the sales price of gas exceeded the maximum lawful price permitted under the Natural Gas Policy Act of 1978, 15 USC 3301. Kansas producers required interstate pipelines, including Panhandle Eastern Pipeline Company

(Panhandle), to reimburse them for such ad valorem taxes. In turn, the ad valorem taxes were passed through to Consumers' GCR customers via the GCR process.

In proceedings before the Federal Energy Regulatory Commission (FERC), it was determined that Panhandle was entitled to a refund of such Kansas ad valorem taxes. As a result of these FERC proceedings, Consumers ultimately received two supplier refunds from Panhandle. An initial refund of \$691,589 was received by Consumers on April 9, 1998. At that time, Consumers' GCR clause was suspended by virtue of the December 19, 1997 order in Case No. U-11599. Indeed, pursuant to the December 19 order, Consumers' GCR clause remained suspended from April 1, 1998 through March 31, 2001. Due to the lengthy GCR clause suspension, there was no existing mechanism for passing through the \$691,589 to Consumers' GCR customers. In recognition of that situation, in an order issued on May 22, 2000 in Case No. U-12227, the Commission approved a settlement agreement that provided for a 50/50 sharing of this refund between Consumers and its customers.

On January 3, 2002, Consumers received a second refund of \$2,980,361 pursuant to a June 22, 2001 settlement agreement filed in FERC Docket No. RP98-40-000 et al. Because Consumers received this refund during the 2001-02 GCR plan year, it proposed in this reconciliation proceeding to retain 50% of the refund, or \$1,490,181, and to return the balance to its GCR ratepayers. Consumers maintained that such treatment of the refund is consistent with and required by the May 22, 2000 order in Case No. U-12227. According to Consumers, the Commission established the treatment of the ad valorem tax refunds in its May 22, 2000 order in Case No. U-12227 through the following statement:

Future pipeline refunds received by Consumers Energy Company that related to Kansas ad valorem property tax payments shall be treated in the same manner approved in this order.

Order, p. 3.

Consumers stated that, in accordance with the Commission's May 22 order, it allocated 50% of the January 3, 2002 refund, or \$1,490,181, to its GCR customers and Rate T-1 transportation customers on the basis of throughput volumes. More specifically, Consumers proposed to allocate \$1,381,887 to GCR customers and \$108,294 to Rate T-1 transportation customers. Consumers proposed to retain the remaining 50% of the refund.

The RRC, ABATE, and the Attorney General argued that Consumers should not be allowed to retain 50% of the Kansas ad valorem tax refund. According to them, this case is distinguishable from the May 22, 2000 order in Case No. U-12227 because the initial Panhandle refund occurred after the beginning of Consumers' GCR clause suspension and there was no regulatory mechanism in effect to implement the April 9, 1998 refund.

The RRC also asserted that the \$345,794, *plus interest*, retained by Consumers as its 50% of the April 9, 1998 refund should be refunded to customers at this time. According to the RRC, the April 9, 1998 refund relates to gas commodity costs paid by Consumers' GCR customers prior to the April 1, 1998 GCR suspension and became an issue solely because it was received during the suspension period when there was no refund mechanism available. In the RRC's view, when Consumers made a commitment in Case No. U-12679 to refund all gas commodity revenues exceeding the cost of gas during the suspension period, Consumers should have credited the \$345,794 to the cost of gas during the GCR suspension period. According to the RRC, it should not be subjected to isolated treatment as incremental profit from a settlement agreement.

The ALJ recognized that the May 22, 2000 order in Case No. U-12227 expressly states that future Kansas ad valorem tax refunds received by Consumers should be treated in the same manner as approved in that order, which seems to indicate that Consumers should be permitted to retain 50% of the January 3, 2001 refund. However, the ALJ found that the Commission's order approving the settlement in Case No. U-12227 was issued in response to a unique set of circumstances. The ALJ also agreed that, by its very terms, the settlement agreement in Case No. U-12227 only applies to that order and that Consumers' reliance on the above-quoted portion of the settlement agreement is misplaced because this proceeding does not involve a dispute concerning the effects of Consumers' rate freeze or the revenue sharing mechanism approved by the December 19, 1997 order in Case No. U-11599. However, the ALJ rejected the RRC's contention that the Commission should also require Consumers to return to customers the \$345,794 retained from the April 9, 1998 refund. According to the ALJ, unlike the January 3, 2002 refund, Consumers retained the \$345,794 during the GCR suspension period and, therefore, it should remain subject to the settlement agreement in Case No. U-12227.

Consumers excepts to the ALJ's recommendation. According to Consumers, disposition of the January 3, 2002 Kansas ad valorem tax refund is controlled by the May 22, 2000 order in Case No. U-12227, which Consumers maintains determined and established the treatment of all future Kansas ad valorem tax refunds.

Consumers insists that the ALJ improperly ignored the clear and unmistakable intent of the May 22, 2000 order. Consumers argues that the May 22 order contained no time constraints and did not lose its precedential value upon expiration of the suspension of Consumers' GCR clause. To the contrary, Consumers asserts that the explicit language of the settlement agreement and order in Case No. U-12227 precludes such an interpretation. Indeed, Consumers notes that the

Commission not only approved the settlement agreement without reservation, but also specifically ordered that future Kansas ad valorem tax refunds be treated in the manner set forth in the settlement agreement.

Moreover, Consumers contends that paragraph 7 of the settlement agreement does not preclude Consumers from relying on the Case No. U-12227 settlement agreement in this proceeding. According to Consumers, paragraph 7 clearly contemplates that Consumers may rely on the settlement agreement and the May 22, 2000 order in this proceeding. In any event, Consumers insists that the Commission cannot simply ignore the May 22 order. Further, assuming that the Commission could modify the May 22, 2000 order, Consumers contends that such a modification could only be applied on a prospective basis and would not apply to a refund received by Consumers during the 2001-02 GCR plan year.

Finally, Consumers argues that upon receipt of the Kansas tax refund, Consumers acquired a vested property right that cannot be retroactively taken away without violating Consumers' state and federal constitutional rights.

In response, the Attorney General argues that an intervening change of circumstances between cases prevents application of the doctrine of res judicata. According to the Attorney General, new circumstances such as issuance of the October 24, 2000 order in Case No. U-12679, which authorized Consumers to reclassify 74.6 billion cubic feet (Bcf) of recoverable base gas from Account 358 to Account 164.1 and to transfer the cost of that gas on the company's books and records to Account 164.1, and the expiration of the gas rate freeze as of March 31, 2001, justify different results between Case No. U-12227 and this proceeding. The Attorney General maintains that at the time Case No. U-12227 was filed, there was a viable dispute concerning whether the order in Case No. U-11599 prohibited customers from receiving credit for a supplier refund

received by Consumers during the GCR suspension that related to a period prior to the GCR suspension. The Attorney General insists that the settlement agreement approved in Case No. U-12227 applies only to such circumstances and that it would be unreasonable to adhere to that agreement despite a material change of circumstances. In any event, the Attorney General contends that paragraph 7 of the Case No. U-12227 settlement agreement bars Consumers from relying upon that settlement agreement in this proceeding.

The Attorney General also insists that requiring Consumers to pass 100% of the Kansas tax refund to its customers is not tantamount to retroactive ratemaking as claimed by Consumers. In so doing, the Attorney General points out that the Kansas tax refund qualifies as a supplier refund and that Consumers' obligation to refund such amounts to its customers is governed by Consumers' approved standard refund procedures.

ABATE contends that its due process rights under the state and federal constitutions would be violated if the settlement agreement approved in Case No. U-12227 was treated as controlling the outcome of this proceeding. ABATE stresses that it did not participate in Case No. U-12227. Accordingly, because it did not sign the settlement agreement in Case No. U-12227, ABATE insists that the settlement agreement cannot legally determine its rights in this proceeding.

ABATE also insists that absent the GCR suspension approved in Case No. U-11599, there would have been no reason for Consumers to file Case No. U-12227. According to ABATE, 100% of the 1998 Kansas ad valorem tax refund would have been returned to Consumers' customers but for the order in Case No. U-11599.

Finally, ABATE argues that Consumers' claim that failure to abide by the 50/50 sharing mechanism set forth in the Case No. U-12227 settlement agreement constitutes an unconstitutional taking of its property without just compensation is spurious. ABATE states that Consumers' mere

expectation as to the continued applicability of the Case No. U-12227 settlement agreement to the 2002 Kansas ad valorem tax refund is an insufficient basis for a “takings” argument. Indeed, ABATE asserts that its members have a superior basis for claiming a 100% refund of the amounts that they were illegally required to pay from 1983 to 1988.

The RRC argues that Consumers’ reliance on the settlement agreement in Case No. U-12227 is misplaced. According to the RRC, the Commission’s primary concern in approving the settlement agreement in Case No. U-12227 was to ensure that Consumers’ ratepayers would receive a substantial portion of the 1998 Kansas ad valorem tax refund despite the lack of a regulatory mechanism by which to achieve that result.

The RRC next contends that Consumers’ argument about the absence of a time provision in paragraph 4 of the Case No. U-12227 settlement agreement is flawed. The RRC insists that the failure to place any time limit on the duration of the settlement agreement must be viewed in light of the circumstances existing at the time that the settlement agreement was executed. According to the RRC, a close reading of the Commission’s May 22 order makes it obvious that the parties and the Commission thought that further Kansas ad valorem tax refunds would be insignificant and would occur during the GCR clause suspension period.

The RRC also argues that the order in Case No. U-12227 contained the Commission’s boilerplate language about reserving jurisdiction to issue further orders as necessary. The RRC maintains that the Commission often issues subsequent amendatory orders and suggests that the changed circumstances make it appropriate to do so in this proceeding. Moreover, citing Michigan Bell Telephone Co v Public Service Comm, 332 Mich 7; 50 NW2d 826 (1952), the RRC reiterates that the Commission is not bound to use a single regulatory approach, but has the freedom to

fashion appropriate regulatory responses within the parameters of the law. According to the RRC, the Commission should reject Consumers' position in favor of the ALJ's recommendation.

Finally, the RRC states that Consumers' "takings" argument is specious. Because Consumers' customers, not Consumers, actually paid the Kansas ad valorem taxes, the RRC contends that Consumers will be unjustly enriched if it is allowed to keep 50% of the tax refund.

The Commission finds that the ALJ's recommendation should be adopted. Contrary to Consumers' contentions, the Commission's order in Case No. U-12227 and the settlement agreement approved by that order must be considered in the context of that proceeding.

Consumers received the initial Kansas ad valorem tax refund on April 9, 1998. The subject amount was placed in Account 804 as a credit to the cost of gas. Consumers planned to include the pipeline refund in the revenue sharing mechanism calculation. Pursuant to the February 19, 1999 PFD in Case No. U-11225-R, Consumers accounted for the amount as an accrued liability (Account 242) and, as a result, did not show the amount in the revenue sharing mechanism calculation in Case No. U-12034 when that case was filed on July 1, 1999.

The Commission's September 28, 1999 order in Case No. U-11225-R, Consumers' 1997-1998 GCR reconciliation proceeding, caused Consumers to move the Kansas ad valorem tax refund from the accrued liability account to a deferred credit account (Account 253) pending a final decision on ratemaking treatment.

Consumers filed Case No. U-12227 because the GCR clause suspension approved by the December 19, 1997 order in Case No. U-11599 left Consumers without an approved methodology for returning the Kansas ad valorem tax refund to its customers who had paid those taxes. Indeed, Consumers noted in its application in Case No. U-12227 that the question of how to dispose of pipeline and supplier refunds received by Consumers during the GCR suspension period had been explicitly left open by the Commission's September 28, 1999 order. Further, as evidenced by the

Commission's orders in Cases Nos. U-11225-R and U-12227, Consumers was of the opinion that that any pipeline or supplier refunds that it may receive during the GCR suspension period would not be subject to refund to its customers. Consumers claimed that the December 19, 1997 order in Case No. U-11599 foreclosed the possibility of it having to issue customer refunds for funds it received during the GCR suspension period, even if such refund related to a period prior to April 1, 1998. Consumers argued in Cases Nos. U-11225-R and U-12227 that the earnings sharing mechanism approved in Case No. U-11599 provided the only means of sharing potential refunds from interstate pipelines.

Absent the GCR clause suspension, however, Consumers' existing Standard Refund Procedures (SRP)² would have been applicable. As stated by Consumers in paragraph 10c of its application in Case No. U-12227, the basic refund technique contained in its approved refund procedures required Consumers to accomplish supplier refunds to GCR customers through the use of a roll-in methodology applied to the GCR cost of gas. SRP, III.A. For non-GCR customers, the refund liabilities were to be addressed in the company's annual GCR reconciliation proceeding. SRP, III.B.

The Commission is persuaded that the 2002 Kansas tax refund received after the GCR clause was reinstated should be subject to Consumers' SRP. The Commission believes that the Case No. U-12227 stipulation applied to that unique set of circumstances when the GCR was suspended. Now that the clause has been reinstated and a refund mechanism exists, it would be unjust and unreasonable to permit Consumers to retain any portion of the refund. It is undisputed that it was

²Consumers' SRP were approved by the September 27, 1994 order in Case No. U-10490 and became effective on April 1, 1995. The SRP were subsequently amended by the September 28, 1999 order in Case No. U-11225-R.

Consumers' customers, not Consumers, who overpaid for natural gas due to the imposition of the Kansas tax. Consumers has no lawful claim to, nor proprietary interest in, those funds.

The Commission also supports the ALJ's recommendation to not require Consumers to return to customers the \$345,794 retained from the April 9, 1998 refund, as argued by the RRC. Unlike the 2002 refund, the 1998 refund did occur during the GCR suspension period and was subject to the Case No. U-12227 settlement agreement.

Allocation of the Tax Refund

The ALJ found that the Kansas ad valorem tax refund should be divided between Consumers' GCR customers and its Rate T-1 transportation customers. In so doing, the ALJ rejected a suggestion by ABATE that Consumers' Rate T-2 transportation customers should share a portion of this refund.

In its exceptions, ABATE argues that the ALJ improperly relied on the September 27, 1994 order in Case No. U-10490 in reaching her determination. According to ABATE, the policy underlying Case No. U-10490 simply does not apply to this situation. ABATE insists that the Rate T-2 customers had no way of knowing on February 1, 1990 that the FERC would eventually determine that the Kansas ad valorem tax had been illegally added to the cost of gas from 1983 to 1988. For this reason, ABATE maintains that the Commission should modify the refund policy expressed in the September 27, 1994 order in Case No. U-10490.

ABATE also states that denying Rate T-2 customers a share of the Kansas ad valorem tax refund will result in unjust and unreasonable rates. ABATE stresses that Rate T-2 was not created until February 1, 1990.³ ABATE also argues that because the Commission made both sales and

³See, the December 7, 1989 order in Cases Nos. U-8678, U-8924, and U-9197.

transportation customers bear the burden of take-or-pay costs and excessive pipeline expenses, it would be unfair to deny the Rate T-2 customers the benefit of the tax refund.

In support of its position, ABATE offered the testimony of Nicholas Phillips, Jr., a consultant knowledgeable in the regulation of public utilities. Mr. Phillips stated that the Kansas tax refund should be returned to all customers, including Rate T-2 customers, on a volumetric basis, because, in his view, it is likely that all customers paid excess gas costs during the period from 1983 to 1988. He also recognized that volumes of sales of gas by rate class may have shifted from the 1983-1988 period, and that some customers who paid the excess gas cost may have left Consumers' service territory. Mr. Phillips therefore opined that the fairest and most reasonable way to distribute the refund to customers is to allocate the refund to all current customers in accordance with the allocation percentages found in Exhibits I-14 and I-15. Mr. Phillips' methodology calls for 75% of the refund to be distributed to Consumers' GCR customers with the remaining 25% to be distributed to Consumers' transportation customers.

Consumers, however, replies to ABATE's exception by supporting the ALJ's recommendation. Consumers contends that the proper treatment of the Kansas tax refunds is governed by the settlement agreement in Case No. U-12227. In that settlement, the existing Kansas tax refund was to be allocated among customers eligible for 90/10 refunds. Customers eligible for the 90/10 refunds were limited to GCR customers and Rate T-1 non-GCR customers. Rate T-2 customers were expressly excluded.

Consumers adds that the claim that Rate T-2 customers should be eligible for 90/10 refunds was specifically addressed and rejected by the Commission in Case No. U-10490. In that proceeding, the Commission found that it was particularly important that Rate T-2 customers are

free to negotiate whatever contract terms they believe are acceptable and that 90/10 refunds are foreseeable when negotiating contract terms. September 27, 1999 order, pp. 16-17.

Consumers also contends that Rate T-2 customers should not share in a refund of the Kansas tax because the tax was collected from customers through the GCR process. The tax was not collected from transportation customers. While Rates T-1 and T-2 were not approved until 1989 (after the Kansas tax had been collected), gas transportation activities existed on Consumers' system since 1984. Consumers notes that while it is possible that a transportation customer did pay the Kansas tax, it did not do so through Consumers' GCR process. Consumers argues that it would be inappropriate to dilute the refund to its GCR customers by allowing Rate T-2 customers to share in it.

The Attorney General, in the initial brief, argued that the Commission already considered and rejected the claim that Rate T-2 customers should receive a portion of certain refunds in Case No. U-10490. In the replies to ABATE's exceptions, however, the Attorney General posited a decision for the Commission, and then took no position on its resolution. The Attorney General indicated that the Commission must determine whether certain transportation volumes for 2000 and 2002 are more representative of the 1983-1989 period than the circumstances that led to the Commission's decision in Case No. U-10490.

The Commission finds that the T-2 customers should be allocated a share of these refunds. This is not inconsistent with the Commission's position in Case No. U-10490, which found that T-2 customers should not share in certain types of refunds. Furthermore, this finding is not controlled by the manner in which a similar refund was allocated between GCR and non-GCR customers in Case No. U-12227, because that case adopted a settlement agreement that the Commission has already found is not controlling in this case. Consumers' SRP states in part:

Gas supplier refunds shall normally be allocated in their entirety to GCR sales customers. Where appropriate, supplier refunds (particularly those pertaining to years prior to 1988) shall be allocated between GCR and non-GCR customers on the basis of actual consumption during the historical refund period.

SRP, II.A.

This language affords the Commission discretion to allocate a portion of supplier refunds to non-GCR customers for periods prior to 1988. This refund clearly falls within that time frame, and the language does not exclude T-2 customers from sharing in the refund as other paragraphs specifically do. (See, SRP, II.B.) The Commission will exercise its discretion to include T-2 customers in the refund in large part due to the fact that the T-2 rate option was not available during the period in question. Accordingly, the Commission finds that Consumers should allocate the full amount of the refunds among the various rate classes based on volumes, as shown on Exhibit I-15. Supplier refunds that are generated by rates in effect after the Commission approved the market-based T-2 rate will be viewed differently by the Commission.

Case No. U-12679 Refund

As mentioned above, Energy America's intervention was granted for the limited purpose of addressing the implementation of the refund obligation in Case No. U-12679. The supplier argues that customer choice program customers who received their natural gas from a supplier other than Consumers should receive a portion of the refunds permitted in this case.

By way of background, after approving Consumers' expanded retail gas choice program, there was an unprecedented increase in the price for wholesale natural gas. In October 2000, Consumers filed an application in Case No. U-12679, seeking accounting authority to reclassify a portion of stored natural gas, commonly referred to as base gas. The reclassification was intended

to mitigate the effect of rising gas prices on customers once Consumers' GCR clause suspension ended in March 2001.

Consumers' application also sought authority to create a refund liability account to be refunded to Consumers' GCR customers, with interest, beginning April 2001. As explained, Consumers' gas commodity revenues exceeded its cost of gas by \$45.1 million during the first two years of the gas choice program. In the third year, however, Consumers was expecting significant losses. Consequently, Consumers recorded a regulatory liability of \$45.1 million in the second quarter of 2000 to reflect estimated losses due to the unprecedented increase in natural gas prices. Consumers further requested authority to place the difference between the \$45.1 million expected loss and the actual loss in the third year into a refund liability account to be refunded to Consumers' GCR customers. By order dated October 24, 2000, the Commission approved the reclassification and establishment of the refund liability account.

By way of a settlement agreement in Case No. U-12887, Consumers reported a third year actual loss of the cost of gas revenues of approximately \$28.5 million, leaving a \$16,580,000 refund obligation. The settlement agreement also addressed what action should be taken to address the effect of market-based rates on customers who returned to Consumers' sales service during the gas choice program. The agreement recommended using \$4.9 million of the \$16,580,000 refund obligation to mitigate that effect by treating the monies as a reduction to Consumers' cost of gas revenues during the third year of the choice program. This agreement was approved by the September 27, 2001 order in Case No. U-12887. It is this allocation that Energy America is concerned with.

Energy America contends that allocating these funds solely to Consumers' GCR customers is unfair. Energy America argues that the Commission's decision creates a more favorable pricing

regime for GCR customers to the disadvantage of gas choice customers and competitive gas suppliers, which works to undermine the viability of the market. Energy America Brief, p. 5. Energy America further argues that to give the refund solely to GCR customers is particularly unfair for three reasons. First, the subsidization of the GCR price is financed by natural gas previously purchased by all of Consumers' customers, including present gas choice customers. Second, providing refunds to customers that returned to Consumers from the gas choice program creates a disincentive for customers to select and stay with a competitive supplier. Third, providing the refunds gave an economic advantage to customers who left the gas choice program during a volatile time in pricing, who were not held accountable for their earlier decision to participate in the program, and who were allowed to circumvent program rules. *Id.*, p. 6. To remedy this situation, Energy America argues that both GCR and choice customers should participate in the refund obligation.

The ALJ recommends that Energy America's arguments be rejected. PFD, pp. 13-14. She reasons that the refund obligation relates to a refund of certain gas cost commodity revenues that were collected during the natural gas choice program from Consumers' GCR customers, not from natural gas choice program customers. Because it was the GCR customers who overpaid, she contends that it is the GCR customers who should receive the refund.

Furthermore, she notes that GCR customers accept the risk that GCR costs may increase. Consequently, GCR customers should receive the benefit when costs go down. Natural gas choice customers, she argues, avoid this risk when choosing an alternative supplier with a known contract price, and therefore do not receive the benefit. Consequently, she reasons that choice customers are not entitled to a portion of the refund, which relates to the cost of gas provided to GCR customers.

Energy America filed exceptions to the PFD arguing two key points. First, Energy America contends that the ALJ erred in concluding that choice program customers did not contribute to the amounts paid upon which the refund is based. Energy America argues that the refund is based upon the reclassified accounting authority for Consumers' base gas. The base gas was paid for by all of Consumers' customers, including those who later participated in gas choice. Energy America says that it is patently unfair for only GCR customers to benefit from this reclassification and use of the base gas.

Second, Energy America reiterates its position that failing to allocate any of the refund obligation to choice customers harms the viability of the gas choice program. Energy America argues that the ALJ incorrectly concluded that choice customers accepted the risk of their participation for two reasons. First, choice customers could not have anticipated the "one-sided" regulatory intervention required to reclassify a portion of Consumers' base gas to help mitigate the effect of rising natural gas prices. Second, it was only those customers who stayed with the program that were forced to endure this "risk." Energy America argues that it makes no sense for customers who signed up for the choice program, but left prematurely against program rules, are allowed to share in the refund. Meanwhile, participants who stuck with the program and attempted to make it work are being harmed for that decision.

Consumers filed replies to Energy America's exceptions in support of the ALJ. Consumers argues that when the Commission authorized it to reclassify a portion of its base gas to working gas, and established a regulatory liability, the Commission specifically indicated that the amount to be refunded would be refunded to Consumers' GCR customers, with interest. See, October 23, 2000 order, Case No. U-12679, p. 3. While Consumers does not deny that the base gas was paid for by all of its customers, including natural gas choice customers, it asserts that the Commission

should not ignore the distinction between gas choice customers and GCR customers for purposes of determining how the refund should be distributed. Consumers argues that the refund is a refund of amounts paid by its sales customers during the first two years of the choice program, when revenues exceeded costs by approximately \$45.1 million.

Additionally, Consumers argues that choice customers should not share in the \$4.9 million portion allocated to mitigate market-based rate customers. During the choice program, customers who returned to Consumers' sales service were charged a market-base rate instead of the fixed rate of \$2.8364 per thousand cubic feet (Mcf). In Case No. U-12887, the Commission approved the allocation and resulting reduction to the \$16.6 million refund obligation. The \$4.9 million refund represented the difference between what the market-based rate customers paid and what they would have paid had they been on the fixed rate. Consumers argues that the Commission thought this was reasonable under the circumstances. Consumers is also quick to point out that Energy America's customers during this time were charged a fixed price of \$2.8364 per Mcf – the same price paid by Consumers' fixed price sales customers. Consequently, the difference between what Energy America's customers paid and would have paid had they been on Consumers' fixed rate is zero.

Consumers also argues that the Commission's treatment of the Case No. U-12679 refund, as modified by Case No. U-12887, will not determine the viability of natural gas choice programs in Michigan. Consumers contends that regardless of what action the Commission takes in this reconciliation proceeding, it will not affect the terms and conditions of the natural gas choice program. What happened during the experimental program, Consumers argues, will not happen again in the current program due to program changes. Consumers also asserts that there is no inequity here that needs to be remedied in that the refunds relate to gas commodity revenues

collected during the experimental program from customers who were not obtaining their gas from an alternative supplier.

The Attorney General also replied to Energy America's exceptions by reiterating its position that gas choice customers are not entitled to any refund because the refund relates only to the costs of Consumers' gas supplies provided to GCR customers. The Attorney General emphasizes that choice customers should not be guaranteed savings compared to GCR costs. The Attorney General also criticizes Energy America's position in that Energy America failed to describe what amount of allocation to gas choice customers would be "fair."

The Commission finds that there is no basis for allocating any portion of the Case No. U-12679 refunds to customers participating in the experimental gas choice program. As the Attorney General and Consumers point out, the \$16.6 million refund in question was the result of an over-collection of revenues from Consumers' sales customers during the first two years of the experimental program offset by third year losses. Because gas choice customers did not contribute to the over-collection, they should not benefit from the refund. Additionally, the Commission approved the settlement agreement in Case No. U-12887 allocating \$4.9 million of the \$16.6 million to Consumers' market-based rate customers. The Commission found this to be a reasonable resolution under the circumstances and will not revisit its decision here. Because Energy America's intervention was limited to addressing the refund obligation in Case No. U-12679, the allocation of the Kansas ad valorem tax refund to gas choice customers need not be addressed.

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.; 1982 PA 304, as

amended, MCL 460.6h 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 settlement agreement is reasonable and in the public interest, and should be approved.
- c. Consumers should refund the entire January 3, 2002 Kansas ad valorem tax refund plus interest, to its GCR and its T-1 and T-2 customers.
- d. Customers of alternative gas suppliers should receive no portion of the Case No. U-12679 refund.

THEREFORE, IT IS ORDERED that:

- A. The settlement agreement, attached as Exhibit A, is approved.
- B. Consumers Energy Company shall roll the net overrecovery balance of \$2,950,161, plus interest, into its current gas cost recovery plan pursuant to its standard refund procedures.
- C. Consumers Energy Company shall credit \$754,952, plus interest, to a refund liability account to benefit the Rate T-1 and Rate T-2 customers until the balance is sufficient to warrant a refund. Until a refund is issued, the utility shall continue to accrue interest on this amount at its authorized rate of return on common equity.

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 May 18, 2004.

/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

Chair

Commissioner

Commissioner

By its action of May 18, 2004.

Its Executive Secretary

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application of)
 CONSUMERS ENERGY COMPANY)
 for a Reconciliation of Gas Cost Recovery Costs)
 and Revenues for the 12-Month Period)
 April 2001 – March 2002)

Case No. U-12752-R

PARTIAL SETTLEMENT AGREEMENT

On June 28, 2002 Consumers Energy Company (“Consumers Energy” or the “Company”) filed an application with the Michigan Public Service Commission (“MPSC” or “Commission”) in the above captioned case for a reconciliation of gas cost recovery costs and revenues for the 12-month period April 2001 through March 2002. The Company filed testimony and exhibits in support of its positions concurrently with its application.

The initial prehearing conference in this case was held August 13, 2002 before Administrative Law Judge Barbara A. Stump. The parties to the case are Consumers Energy, the Commission Staff, Attorney General Jennifer M. Granholm, the Association of Businesses Advocating Tariff Equity (“ABATE”), the Residential Ratepayers Consortium (“RRC”) and Energy America. Energy America’s participation in this case is limited to matters relating solely to the implementation of the refund obligation established in Case No. U-12679. (1 Tr 11)

On November 1, 2002 ABATE, the RRC and Energy America filed testimony.

Pursuant to Section 78 of the Administrative Procedures Act of 1969, as amended, MCL 24.278, and Rule 333 of the Commission’s Rules of Practice and Procedure, R460.17333, the undersigned parties agree and stipulate as follows:

1. Consumers Energy's gas purchasing practices during the April 2001 through March 2002 GCR year were consistent with its approved GCR Plan and should be deemed to be reasonable and prudent. The parties stipulate that the costs that Consumers Energy incurred for gas sold to its customers for the April 2001 through March 2002 GCR year were reasonable and prudent.

2. The "GCR Cost of Gas Sold" shown on line 24 of Exhibit A-___(GRP-1) and the "Total GCR Revenue" shown on line 31 of Exhibit A-___(GRP-1) should be used for purposes of this reconciliation proceeding.

3. This Partial Settlement Agreement is entered into for the sole and express purpose of reaching a compromise among the positions of the parties without prejudice to their rights to take new and/or different positions in other proceedings. All offers of settlement and discussions relating to this settlement are, and shall be considered, privileged under MRE 408. If the Commission approves this Partial Settlement Agreement without modification, neither the parties to this Partial Settlement Agreement nor the Commission shall make any reference to, or use, this Settlement Agreement or the order approving it, as a reason, authority, rationale or example for taking any action or position or making any subsequent decision in any other case or proceeding; provided, however, such references may be made to enforce or implement the provisions of this Partial Settlement Agreement and the order approving it.

4. This Partial Settlement Agreement is intended for final disposition of those issues in Case No. U-12752-R identified in paragraphs 1 and 2. The parties reserve their rights to take such positions on the various refund issues raised by witnesses for ABATE, the RRC and Energy America as they believe are lawful and reasonable in briefs, reply briefs, exceptions, replies to exceptions and in appeals, if any, from the orders issued in this case. So long as the Commission

approves this Partial Settlement Agreement without any modification, the parties agree not to appeal, challenge, or otherwise contest those portions of the Commission order that approve this Partial Settlement Agreement. The parties agree and understand that the parties reserve their rights to take any positions not inconsistent with this Partial Settlement Agreement in briefs, reply briefs, exceptions, and replies to exceptions in this case, and in appeals, if any, from the orders issued in this case. Furthermore, the parties agree and understand that this Partial Settlement Agreement does not limit any party's right to take other or different positions on similar issues in other administrative proceedings, or appeals related thereto.

5. This Partial Settlement Agreement is not severable. Each provision is dependent upon all other provisions. Failure to comply with any provision of this Partial Settlement Agreement constitutes failure to comply with the entire Agreement. If the Commission rejects or modifies this Partial Settlement Agreement or any provision of it, this Partial Settlement Agreement shall be deemed to be withdrawn, shall not constitute any part of the record in this proceeding or be used for any other purpose, and shall be without prejudice to the pre-negotiation positions of the parties.

6. The parties agree to waive Section 81 of the Administrative Procedures Act of 1969, MCL 24.281, as it applies to the issues resolved by this Partial Settlement Agreement, if the Commission approves this Partial Settlement Agreement without modification.

WHEREFORE, the undersigned parties respectfully request the Commission approve this Partial Settlement Agreement and make it effective in accordance with its terms by final order.

CONSUMERS ENERGY COMPANY

By: *Richard Chambers*
H. Richard Chambers (P34139)
Attorney for Consumers Energy
Company

Dated: 12/09/02

**MICHIGAN PUBLIC SERVICE
COMMISSION STAFF**

By *Kristin M. Smith*
Kristin M. Smith (P46323)
Assistant Attorney General
for the Staff

Dated: 12/09/02

**ATTORNEY GENERAL
JENNIFER M. GRANHOLM**

By *Donald E. Erickson*
Donald E. Erickson (P13212)
Assistant Attorney General

Dated: December 9, 2003

**RESIDENTIAL RATEPAYER
CONSORTIUM**

By *Diane R. Royal*
Diane R. Royal (P39965)
Shaltz & Royal, PC
Attorney for Residential Ratepayer
Consortium

Dated: 12/9/02

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

MICHIGAN PUBLIC SERVICE
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and Revenues for the 12-Month Period)
April 2001 – March 2002)
_____)

Case No. U-12752-R

STATEMENT OF NON-OBJECTION

Pursuant to Rule 333 of the Michigan Public Service Commission's Rules of Practice and Procedure, R460.17333, the Association of Businesses Advocating Tariff Equity ("ABATE") submits this Statement of Non-Objection to the foregoing Partial Settlement Agreement in Case No. U-12752-R.

**ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY**

By Robert A. W. Strong
Robert A. W. Strong (P27724)
Clark Hill PLC
Attorney for the Association of
Businesses Advocating Tariff Equity

Dated: 12/9/02

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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April 2001 – March 2002)
_____)

Case No. U-12752-R

STATEMENT OF NON-OBJECTION

Pursuant to Rule 333 of the Michigan Public Service Commission's Rules of Practice and Procedure, R460.17333, Energy America LLC submits this Statement of Non-Objection to the foregoing Partial Settlement Agreement in Case No. U-12752-R.

ENERGY AMERICA, LLC

By



Albert Ernst (P24059)
Christine Mason Seneral (P58820)
Dykema Gossett
Attorneys for Energy America, LLC

Dated:

12/9/02