

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of	)	
<b>MICHIGAN CONSOLIDATED GAS COMPANY</b>	)	Case No. U-13898
for authority to increase it rates and other relief.	)	
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At the December 21, 2006 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman  
Hon. Laura Chappelle, Commissioner  
Hon. Monica Martinez, Commissioner

**ORDER**

On April 28, 2005, the Commission issued the final order in this proceeding (April 28 order), granting Michigan Consolidated Gas Company (Mich Con) authority to increase its rates and granting certain other relief. Among other things, the Commission approved implementation of the uncollectible expense true-up mechanism (UETM) to compensate for the unpredictability of uncollectible expenses actually experienced by Mich Con. The Commission found that there were several factors out of the company’s control that could significantly affect the level of uncollectibles. Those factors included “the state’s economy, the price of natural gas, the absolute total amount of customer billings, and the amount of state and federal aid that is available for heating assistance.” Order, p. 71. The Commission further stated that “the high price of natural gas, which has been increasing significantly during the immediate past, when coupled with reductions in government funding available to Mich Con’s low-income customers and the

significant unemployment level in Mich Con's service territories, has resulted in a large increase in uncollectible accounts." *Id.*

As established, the UETM provides Mich Con with an opportunity to recover its uncollectible expense without risking a significant under or over recovery of its actual experienced amount. The Commission set the annual amount of uncollectible expense at \$37.3 million, but held that by March 31, Mich Con should file an annual report as to its actual level of uncollectibles in the previous calendar year. 90% of the difference between the \$37.3 million set in the April 28 order and the amount of uncollectibles actually experienced would either be refunded to customers (if an over recovery) or surcharged to customers (if an under recovery). The remaining 10% provided an incentive for Mich Con to do whatever it could to minimize its uncollectible expense. The Commission further provided for prorating the amounts for the first report, as it would reflect less than a whole calendar year under the newly approved rates.

On March 1, 2006, Mich Con filed this application for approval of the UETM computation for 2005, in which it stated that a surcharge would be needed to recover about \$11 million in unrecovered uncollectibles expenses.<sup>1</sup> On May 31, 2006, Administrative Law Judge Mark D. Eyster (ALJ) held a prehearing conference, during which Mich Con, Attorney General Michael A. Cox (Attorney General) and the Commission Staff (Staff) appeared. On August 24, 2006, the parties agreed to admit Mich Con's pre-filed testimony and Exhibits A-1 through A-9, and the parties waived cross-examination.

On September 14 and 28, 2006, the parties filed briefs and reply briefs, respectively. On December 7, 2006, the ALJ issued a Proposal for Decision (PFD) in which he found that no party

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<sup>1</sup>Mich Con also requested approval of its safety and training related expenditures for 2005, as required by the order. There is no issue argued concerning those expenditures, and the Commission approves the report as submitted.

objected to the calculations or exhibits that Mich Con produced. Rather, the only objection concerned the Commission's authority to grant the application. The Attorney General argued that the Commission had no authority to create the UETM or to approve a surcharge to collect the difference between the uncollectible amount assumed in its rate case, and those actually experienced. The ALJ rejected the Attorney General's arguments and recommended that the Commission approve Mich Con's application for authority to implement the proposed UETM surcharges.

On December 14, 2006, the Attorney General filed exceptions to the PFD. On December 20, 2006 Mich Con and the Staff filed replies to exceptions.

The Attorney General argues that the ALJ erred when he determined that the Commission had specific authority to establish the UETM. In fact, the Attorney General argues, the PFD cites no specific statutory provision that grants the Commission authority to approve the UETM. He argues that the statutory citations used by the ALJ do not clearly and unmistakably grant the Commission power to create the UETM, but merely provide for general ratemaking authority. He insists that Michigan courts have rejected the argument that the power to establish rates entails the authorization to create or take action beyond the power specifically conferred by statute.

Among other things, the Attorney General says that the Commission has no authority to delay the effective date of a new rate until certain facilities were built, *General Telephone Co v PSC*, 341 Mich 620; 67 NW2d 882 (1954); to expand utility service territory, *Huron Portland Cement Co v PSC*, 351 Mich 255; 88 NW2d 492 (1958); or to make management decisions, *Union Carbide Corp v PSC*, 431 Mich 135; 428 NW2d 322 (1988). Although MCL 460.6h and MCL 460.6j provide the Commission authority to implement certain adjustment mechanisms, the Attorney General argues, there is no specific authority for the UETM.

Moreover, the Attorney General argues, the issue is a question of subject matter jurisdiction and may thus be raised at any point in the proceeding. Because there is no specific statutory authority for the UETM, the Attorney General argues, the Commission lacks subject matter jurisdiction to proceed in this case or to approve the surcharge.

The Attorney General goes on to argue that the Commission should reject the PFD's reasoning that there is authority by analogy. In his view, creation of power by analogy is just what the Michigan Supreme Court has found unlawful on many occasions. He argues that powers specifically conferred may not be extended by inference, citing *Sebawaing Industries Inc v Sebawaing*, 337 Mich 530; 60 NW2d 444 (1953).

The Attorney General next argues that the UETM violates the rule against retroactive ratemaking. He argues that, as noted by Mich Con's witness, Theresa M. Uzenski, the UETM "will compare MichCon's actual uncollectible expense for the preceding calendar year with the base level of uncollectible expense contained within the company's rates" and permit Mich Con to recover 90% of the difference through a surcharge. He insists that rates are set based on estimations and assumptions. If the estimate or assumption is not correct, and the utility recovers less than it requires, it cannot recover the lost amount in new rates. To do otherwise, he argues, constitutes retroactive ratemaking. He argues that "the Commission created a mechanism that allows MichCon to come back after a rate case that set rates for uncollectibles and surcharge its customers, effectively revising the prior set rates, based on the prior years [sic] expenses that exceeded the projection included in the rate case." Attorney General exceptions, p. 10.

In its reply brief, Mich Con argued that the Attorney General's argument should be barred because before the April 28 order, the ALJ recommended adoption of the UETM, no exceptions to that recommendation were filed, and the Commission followed the recommendation. In Mich

Con's view, the Attorney General's failure to file a timely exception to the ALJ's UETM recommendation should bar the Attorney General from now challenging the Commission's decision to follow that recommendation.

Moreover, Mich Con argued, if the Attorney General had filed a timely exception to the UETM, which he did not, his remedy would have been an appeal to the Michigan Court of Appeals under MCL 460.26. The Attorney General did not appeal, Mich Con argues, and therefore cannot complain about the UETM. Mich Con pointed out that more than a year had passed since the April 2005 order was issued. Mich Con argues that it is too late now for either an appeal or rehearing of the April 28 order.

Moreover, even if the Commission determined to consider the Attorney General's arguments, Mich Con asserts that the arguments have no merit. It characterizes the Attorney General's position as insisting that the only way the Commission may alter the rates of a utility is a full rate case proceeding. Mich Con states that this is in fact a rate case proceeding, plainly authorized by statute. The current application was filed as a continuation of the rate case.

Further, Mich Con argued, ratemaking is a legislative function, and the Commission is not bound by any particular formula or any specific method in setting rates, citing *Residential Ratepayer Consortium v PSC*, 127 Mich App 499, 524; 607 NW2d 391 (2000). Mich Con also argued that due process has been observed here, as this portion of the rate case has been conducted as a contested case, with a specific notice and an opportunity to be heard.

Mich Con stated that the Attorney General's retroactive ratemaking argument is similarly without merit. The retroactive ratemaking prohibition protects ratepayers from changes to rates for service already rendered. It holds that lawfully set rates remain in effect until altered by

subsequent lawfully established rates. Mich Con stated that this proceeding will result in a change to prospective rates only. There is no change to the rate for previous service.

The Staff also supported the Commission's authority to approve Mich Con's UETM. It stated that the Attorney General filed no new arguments that were not previously considered and rejected by the Commission and, likewise, the Michigan Court of Appeals. The Staff notes that the Commission has the power to index rate adjustments to the National Consumer Price Index for operation and maintenance expenses. *See, Attorney General v PSC #1*, 133 Mich App 719; 349 NW2d 539 (1984). Further, the Staff states, indexing of operation and maintenance expense does not violate the adjustment clause of MCL 460.6h, citing *Attorney General v PSC*, 155 Mich App 198; 403 NW2d 469 (1986). Further, the Staff notes that annual rate increases pursuant to the system availability incentive provision (SAIP) do not require a preceding full rate case, when the SAIP was approved pursuant to a full and contested rate hearing. *See, Attorney General v PSC #2*, 133 Mich App 790; 350 NW2d 320 (1984). Thus, the Staff argued, the Attorney General's arguments are fundamentally flawed and should be rejected.

The Staff asserts that the UETM was established in Case No. U-13898 pursuant to the Commission's ratemaking authority, and constituted a lawful exercise of the Commission's regulatory authority. Given that a full rate case preceded the adoption of the UETM, annual proceedings to determine the appropriate charges are within the Commission's statutory authority. *See, Attorney General v PSC #1, supra* at 727 and *Attorney General v PSC #2, supra* at 797.

The Commission finds that the Attorney General's arguments are not timely raised. Although he participated in the rate case from the beginning, and filed for rehearing of the April 28 order on other issues, he did not seek rehearing on the creation of the UETM. No appeal on the issue of the UETM has been filed. The time for challenging adoption of the UETM has lapsed.

The Commission further disagrees with the characterization of the issue by the Attorney General and the ALJ as one of subject matter jurisdiction. The Commission has subject matter jurisdiction of this case as it is the continuance of a rate case proceeding. There is no doubt that the Commission has authority to set Mich Con's rates. However, even if the Attorney General's objections are considered despite their untimeliness, they are without merit.

Adoption of the mechanism rested squarely within the Commission's authority to set rates. The Commission is not bound by any particular formula for setting rates. However, the rates it sets must be just and reasonable and not confiscatory. To accomplish that sometimes complex mandate, the Commission adopted the UETM, which would permit the Commission to set the uncollectible expense at a reasonable level, while preserving the company's incentive to minimize those expenses by permitting the utility to recover 90% of any under recovery and return 90% of any over recovery.

As approved in previous cases by the Court of Appeals, the rates set in the April 28 final order contemplated the follow up proceedings to ensure that the rates remain just and reasonable. Thus, the Commission has lawfully adopted a procedure to meet the requirements imposed by law on utility rate setting.

As pointed out by the Staff, the Commission remains free to abandon the mechanism or re-evaluate it when issuing the final order in Mich Con's next general rate case. The Commission will continue to monitor the effect of the mechanism on Mich Con's behavior with regard to its uncollectibles and the extent to which those factors outside of Mich Con's control continue to affect the level of uncollectibles. That experience will assist the Commission in determining in the next rate case whether a continuation of the mechanism is warranted. For now, the UETM falls within the Court of Appeals' statement that "Although not authorized by specific statute or case

law, the establishment of the Other O&M Indexing System appears to fall within the Commission's statutory power [to set rates]." *Attorney General v PSC #1*, at 725.

The Commission rejects the Attorney General's argument that the Commission engages in retroactive ratemaking when approving the UETM filing each year. Again, Mich Con's rates were set in the April 18 order, including this adjustment mechanism to fairly reflect the actual level of uncollectibles, while preserving an incentive for the utility to minimize those uncollectibles. The surcharge will be approved only after notice and a contested case hearing and is applied on a going forward basis, not on previous use. There is no legitimate retroactive ratemaking argument here.

Having rejected the Attorney General's arguments that the UETM surcharge may not be approved, the Commission finds that the surcharge reflected on Exhibit A-7 should be approved for service rendered on and after January 1, 2007.

The Commission further finds that Mich Con's 2005 annual safety and training related expenditure report should be approved as filed.

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, 1999 AC, R 460.17101 *et seq.*

b. The Attorney General's exceptions should be rejected.

c. Mich Con's computation and proposed surcharges as reflected on Exhibit A-7 should be approved.

d. Mich Con's 2005 annual safety and training related expenditure report should be approved as filed.

THEREFORE, IT IS ORDERED that:

A. Michigan Consolidated Gas Company's computation of its uncollectible expense true-up mechanism surcharge is approved.

B. Michigan Consolidated Gas Company is authorized to implement the uncollectible expense true-up mechanism surcharge reflected on Exhibit A-7 for service rendered on and after January 1, 2007.

C. Michigan Consolidated Gas Company shall file within 10 days of the date of this order a tariff reflecting the new surcharge, substantially in the form of the tariff attached to this order as Attachment A.

D. Michigan Consolidated Gas Company's report of its 2005 annual safety and training related expenses is approved.

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 E A L )

/s/ J. Peter Lark  
Chairman

By its action of December 21, 2006.

/s/ Laura Chappelle  
Commissioner

/s/ Mary Jo Kunkle  
Its Executive Secretary

/s/ Monica Martinez  
Commissioner

THEREFORE, IT IS ORDERED that:

A. Michigan Consolidated Gas Company's computation of its uncollectible expense true-up mechanism surcharge is approved.

B. Michigan Consolidated Gas Company is authorized to implement the uncollectible expense true-up mechanism surcharge reflected on Exhibit A-7 for service rendered on and after January 1, 2007.

C. Michigan Consolidated Gas Company shall file within 10 days of the date of this order a tariff reflecting the new surcharge, substantially in the form of the tariff attached to this order as Attachment A.

D. Michigan Consolidated Gas Company's report of its 2005 annual safety and training related expenses is approved.

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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Chairman

By its action of December 21, 2006.

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Commissioner

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Its Executive Secretary

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Commissioner

**SURCHARGES**

Rate Schedule No.	<i>Uncollectibles Expense Tracking Mechanism Surcharge (UETM)</i>
A Residential	<b>0.5456¢/Ccf</b>
AS Low Income Senior Citizens	<b>0.5456¢/Ccf</b>
2A Residential Multiple Family Dwelling <b>Class 1</b>	<b>0.5899¢/Ccf</b>
<b>2A Residential Multiple Family Dwelling Class 2</b>	<b>0.4680¢/Ccf</b>
GS-1 Non-Residential General Service	<b>0.4913¢/Ccf</b>
GS-2 Large Volume	<b>0.5438¢/Ccf</b>
S School	<b>0.3577¢/Ccf</b>
ST Small Volume Transportation	<b>0.0846¢/Ccf</b>
LT Large Volume Transportation	<b>0.0418¢/Ccf</b>
XLT Extra Large Volume Transportation	<b>0.0349¢/Ccf</b>

In addition to the above surcharges, Rate Schedules A, AS, 2A, GS-1, GS-2, and S are subject to Rule B10, Gas Cost Recovery and may be subject to Rule 7.3, Area Expansion Program, or to Rule B12, Customer Attachment Program.

ISSUED \_\_\_\_\_, 2006  
 BY M. E. CHAMPLEY  
 SENIOR VICE PRESIDENT  
 REGULATORY AFFAIRS

DETROIT, MICHIGAN

EFFECTIVE FOR GAS SERVICE  
 RENDERED ON AND AFTER  
 \_\_\_\_\_, 2006

ISSUED UNDER AUTHORITY OF THE  
 MICHIGAN PUBLIC SERVICE COMM.  
 DATED \_\_\_\_\_  
 IN CASE NO. \_\_\_\_\_