

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
MICHIGAN CONSOLIDATED GAS COMPANY)	
for <i>ex parte</i> approval of the sale of excess system)	Case No. U-14800
gas supply and related accounting changes resulting)	
from enhancements made to its gas storage system.)	

In the matter of the application of)	
MICHIGAN CONSOLIDATED GAS COMPANY)	
for approval of a gas cost recovery plan, 5-year)	Case No. U-15042
forecast and monthly GCR factor for the 12-months)	
ending March 31, 2008.)	

At the December 18, 2007 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Steven A. Transeth, Commissioner

ORDER AND OPINION

On August 23, 2006, Michigan Consolidated Gas Company (Mich Con) filed an application with supporting testimony and exhibits requesting *ex parte* approval of the sale of excess system gas supply and related accounting changes resulting from enhancements the company is making to its natural gas storage system.

A prehearing conference was held on October 17, 2006 before Administrative Law Judge James N. Rigas (ALJ). At the prehearing conference, the Commission Staff (Staff) entered its appearance, and the ALJ granted petitions to intervene filed by Attorney General Michael A. Cox

(Attorney General), the Residential Ratepayers Consortium (RRC), and the Michigan Community Action Agency Association (MCAAA). The petition to intervene filed by the National Energy Marketers Association (NEMA)¹ was denied. At that time, counsel for NEMA indicated that the association would be filing a statement of position without becoming a party.²

On December 7, 2006, the RRC filed a motion to consolidate this case with Mich Con's gas cost recovery (GCR) plan case, Case No. U-15042, which was to be filed shortly thereafter.³ At the motion hearing on December 14, 2006, the RRC's motion to consolidate the cases was granted.

A prehearing conference was held on February 8, 2007 before Administrative Law Judge Daniel E. Nickerson, Jr. Mich Con, the Staff, the Attorney General, the RRC, and the MCAAA participated in the proceedings, and a schedule for the consolidated cases was set. Counsel for NEMA indicated, as in Case No. U-14800, that it would be filing a statement of position.⁴ On August 7, 2007, the parties filed a settlement that resolved all of the issues in both dockets. The Commission approved the settlement agreement in an order issued on August 21, 2007 (August 21 order).

Under the terms of the settlement agreement, for the issues in Case No. U-14800, the parties agreed that:

¹NEMA has indicated that it "is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services and advanced technologies." NEMA petition for leave to intervene, p. 1.

² See, Tr 26.

³On December 28, 2006, Mich Con filed its application, testimony, and exhibits in Case No. U-15042, requesting approval of its GCR plan and factors for the 12 month period ending March 31, 2008.

⁴See, Tr. 5.

a) Mich Con shall make a total decrement of 17 billion cubic feet (Bcf) to its gas storage balance, with 7.2 Bcf of the decrement allocated to native base gas and the remainder to working gas;

b) GCR customers shall receive a financial benefit from the 9.8 Bcf working gas decrement on December 31 in the year the decrement is made;⁵

c) Mich Con shall account for the decrement to working gas using its annual “last in first out” (LIFO) method, with the LIFO cost reflected in the December withdrawals of the year the decrement is made;

d) accounting adjustments shall be made to reflect the working gas decrement;

e) Mich Con should be granted the authority to sell 3.6 Bcf of native base gas from the date the Commission approves the settlement agreement until December 2009, with Mich Con retaining the profits from the sale; and the revenues, cost basis, and taxes shall not be included in Mich Con’s next general rate case filing;⁶

f) Mich Con shall make accounting adjustments to reflect the actual jurisdictional rate at the time the 3.6 Bcf of native base gas is sold;

g) GCR customers shall receive the financial benefit of using the 3.6 Bcf of native base gas as a source of supply in December 2007 at a cost of \$.32 per Mcf plus tax and fees;

h) Mich Con shall not file a general rate case before January 2009 unless there are unanticipated changes in tax law, legislation, or accounting standards; and

⁵The storage decrement provides a benefit to GCR customers because it replaces a corresponding quantity of gas purchases that are expected to have a higher cost than the storage book cost of \$4.70 per thousand cubic feet (Mcf) for the working gas.

⁶Base gas is the minimum volume of gas required in a gas storage field to maintain sufficient pressure to operate the field and recover the working gas. “Native” base gas is base gas that existed in the field at the time the gas storage field was originally certificated and developed.

i) Mich Con shall use income from the sale of the native base gas to provide funding for residential energy efficiency programs for low income and other residential customers in the amount of \$500,000 in 2008 and \$625,000 in 2009.

Regarding the issues in Case No. U-15042, the parties agreed that:

a) Mich Con shall implement a maximum uniform GCR factor of \$8.49 for the remainder of the 2007-2008 GCR period;

b) for the 2007-2008 GCR plan year, the GCR factor should be adjusted quarterly, with symmetry, and the New York Mercantile Exchange increase used to calculate the quarterly adjustment should be capped at \$3.00 per million British thermal units;

c) Mich Con's proposed gas purchasing strategy described in its application and testimony is reasonable and prudent subject to certain modifications described in the settlement agreement;

d) Mich Con shall complete and file a survey and report in its 2008-2009 plan case that addresses whether or not the loss in sales volumes that the company has experienced over the past few years is a result of higher prices or the result of permanent conservation measures undertaken by its customers;

e) Mich Con shall review its heat load factors to determine the appropriate approach to forecast GCR load for its 2008-2009 plan case;

f) Mich Con shall file a storage utilization study that includes the analysis set forth in Attachment 2 to the settlement agreement;

g) Mich Con's operating plan for November 2007 through March 2008 shall be modified as shown in Attachment 1 of the settlement agreement;

h) the price limit method proposed by Mich Con shall be removed from the 2007-2008 GCR plan and the parties shall collaborate to arrive at a similar mechanism for the 2008-2009 plan case; and

i) Mich Con shall provide a detailed study of specific elements affecting its GCR cost of gas, its GCR rate level, and base rate costs from April 2002 through March 2007.

On September 20, 2007, NEMA, Direct Energy Services, LLC, (Direct Energy)⁷ and Interstate Gas Supply Inc. (IGS⁸, collectively, Movants) filed a motion to reopen proceedings, petition for rehearing, and motion for stay of proceedings (Motions) in Case Nos. U-14800 and U-15042. Movants argue that the denial of NEMA's intervention request and the Commission's August 21st order approving the settlement agreement have resulted in an inadequate and underdeveloped record, impaired the development of gas customer choice, have violated the Commission's precedent regarding standing, and have denied NEMA and its members due process.⁹

Movants assert that NEMA, a non-party to the cases, was not allowed to engage in discovery or the production of evidence. Movants further assert that this has resulted in a one-sided record that does not explain "how the base gas at issue was placed in storage and how Mich Con recovered its costs related to the storage gas."¹⁰ According to Movants, gas choice customers probably contributed to the excess commodity Mich Con has requested to sell. Movants claim that calculations reveal the potential value transferred from choice customers to GCR customers in these cases by the settlement agreement could range from \$6,356,000 to \$8,807,000 and should be

⁷Direct Energy is an alternative gas supplier and a member of NEMA.

⁸IGS is an alternative gas supplier and a member of NEMA.

⁹Motions, p. 10.

¹⁰*Id.*, p. 11.

considered newly-discovered evidence. Movants state that the Commission's August 21st order approving the settlement agreement did not mention the comments and statements filed by NEMA, Direct Energy, and others.

According to Movants, NEMA's members were improperly denied due process when its petition to intervene was denied because the interests of choice customers were not adequately represented. For these reasons, Movants request that the Commission grant NEMA, IGS, and Direct Energy's renewed petition for intervention, grant a rehearing on the application and settlement agreement, reopen the proceedings, and stay the August 21st order approving the settlement agreement.

On October 11, 2007, the Attorney General, Mich Con, RRC, and the Staff (Respondents or Parties) filed responses to Movants' Motions. Respondents recommend that the Commission deny the relief requested. Respondents point to the Movants' lack of standing as the primary rationale for denying the Motions. The crux of the Movants' arguments, according to the Attorney General, is the appeal of the denial of NEMA's intervention in Case No. U-14800.¹¹ The Attorney General, Mich Con, RRC, and the Staff all state that, without party status, Movants have no standing to bring the Motions. The Attorney General, Mich Con, and RRC assert that NEMA did not appeal the denial of its petition for intervention within the time mandated. Although NEMA attempts to

¹¹As the Attorney General points out, NEMA did not file a petition for intervener status in Case No. U-15042, and IGS and Direct Energy did not file petitions to intervene in either case.

relitigate its petition for intervention in Case No. U-14800, the Attorney General and the Staff argue that Movants still do not meet the Commission's long standing, two-pronged test.¹²

Mich Con and RRC assert that the Commission's Rules governing the reopening and rehearing of a proceeding, R 460.17401 and R 460.17403,¹³ respectively, were promulgated pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq.* Both state that the APA limits the ability to recommend reopening or rehearing a case to parties of the case. Movants are not parties to the cases. Mich Con cites to a Commission case involving Battle Creek Natural Gas Customers United, Inc. (Battle Creek United), a consumer watchdog group. The Commission's August 21, 2007 order in Case Nos. U-14882, U-15129, and U-15130 denied Battle Creek United's request to rehear the cases, stating that "[t]he Commission agrees that as a non-party to these proceedings, Battle Creek United's petition for rehearing is not properly before the Commission and should therefore be denied."¹⁴

¹²In order to be granted intervener status, a petitioner must demonstrate that: "1) it has suffered or will suffer an injury in fact and 2) the interests allegedly affected fall within the zone of interests intended to be protected or regulated by the statute or constitutional guarantee in question." The Attorney General's response, p. 5, citing the Commission's June 12, 1992 order in Case No. U-10030, p. 3. *See also*, the Staff's response, pp. 5-7.

¹³R 460.17403 provides that:

(1) A petition for rehearing after a decision or order of the commission shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. The petition shall be accompanied by proof of service on all other parties to the proceeding. (2) Within 21 days after service of a petition for rehearing, any party may file an answer. Any party failing to do so shall be considered to have waived objection to the granting of the petition.

¹⁴Mich Con's response, p. 5.

Mich Con explains that the Motions contain falsehoods, and demonstrate that Movants neither understand natural gas industry terminology nor have read the company's application. For example, Movants argue that the record is incomplete because of the lack of evidence on "how the base gas was placed in storage and how Mich Con recovered its costs."¹⁵ Mich Con notes that the application's first footnote addresses this concern by stating that the base gas was not placed in storage by Mich Con but was already in the ground or 'native' at the time the gas storage field was originally certified and developed. The footnote, according to Mich Con, also states that the native base gas is an asset that Mich Con purchased when it bought the wells, long before any choice customers existed.

RRC argues that NEMA, the only Movant to even request party status, and even then only in Case No. U-14800, filed a statement of position acknowledging that it was doing so "without becoming a party."¹⁶ According to the RRC, the time and resources invested in the negotiation of the settlement agreement approved by the Commission in its August 21, 2007 order will be wasted and the benefit to Mich Con's customers placed in jeopardy if the Commission grants the Motions.

The Staff adds that the letters received by the Commission prior to its August 21st order from alternative gas suppliers constitute hearsay, and Movants' argument that the Commission failed to address these letters should be rejected. The Commission's rules, according to the Staff, provide proper procedures for those who wish to participate in contested cases. Furthermore, the Staff asserts that Movants are competitors of Mich Con, not customers, and their only interest in the

¹⁵Motions, p. 11.

¹⁶RRC Response, p. 3, quoting Tr 26 in Case No. U-14800.

cases is “in keeping [Mich Con]’s gas costs so high so as to advance their pecuniary competitive interests to sell more gas to customers in [Mich Con]’s service territory.”¹⁷

On November 8, 2007, NEMA filed its reply to responses.¹⁸ According to NEMA, the August 21st order has resulted in the unintended consequence of “direct and substantial injury to [c]hoice customers and providers . . .”¹⁹ Specifically, NEMA argues that the approved settlement agreement decreases Mich Con’s gas costs but leaves choice customer costs as they are, to the competitive disadvantage of choice providers. These decreased costs will, NEMA posits, result in “erroneous pricing signals” and the misconception of choice customers that Mich Con’s lower rates are long-term.²⁰ NEMA states that it has based its arguments on an “analysis of general market expectations and public marketer offers” which it claims is newly-discovered evidence because “it did not exist when [NEMA] originally petitioned to intervene.”²¹

The Commission finds that NEMA was correctly denied intervention status in Case No. U-14800 because its only interest in this case is that of a competitor. As argued by many of the parties to these cases, NEMA did not seek review of the ALJ’s decision to deny its intervention within the time limits established under the Commission’s Rules of Practice and Procedure. The

¹⁷The Staff’s response, p. 7.

¹⁸The Commission’s rules and regulations do not provide for the filing of a reply to the answers responding to motions. However, the Commission has considered the Movants’ reply so as to allow Movants the full opportunity to express their arguments. The Commission notes that the decision to consider Movants’ reply is not intended to set a precedent and that this decision is limited to this matter only.

¹⁹NEMA reply, p. 2.

²⁰*Id.*, p. 3.

²¹*Id.*, p. 4, fn 3.

Commission further finds that Movants have not demonstrated good cause to grant the late-filed intervention requests of NEMA, IGS, and Direct Energy in the Motions.

The issue of standing is important because standing controls which entities may request rehearing and reopening of proceedings. Pursuant to Rule 401(2), a proceeding may be reopened “upon [the presiding officer’s] own motion or upon motion of any party.” The Commission agrees with RRC and Mich Con that, while Rule 403 does not specifically indicate who has standing to request a rehearing, the APA²² controls and provides this opportunity solely to the Commission or a party. Furthermore, the Commission finds no reason to deviate from its August 21, 2007 decision in Case No. U-14882 *et al.* whereby “as a non-party to these proceedings, Battle Creek United’s petition for rehearing is not properly before the Commission and should therefore be denied.”²³

The Movants are not parties to the consolidated cases and thus do not have standing to request a rehearing or the reopening of these proceedings based upon Rules 401 and 403. The Commission finds that Movants have also failed to demonstrate why a stay of the proceedings is necessary and in the public interest. The Motions should be denied.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 300, MCL 462 *et seq.*; 1919 PA 419, MCL 460.51 *et seq.*; 1939 PA 3, MCL 460.1 *et seq.*; 1982 PA 304, MCL 460.6h *et seq.*; 1969 PA 306, MCL 24.201 *et seq.*; and the Commission’s Rules of Practice and Procedure, 1999 AC, R 460.17101 *et seq.*
- b. The Motions should be denied.

²²MCL 24.287(1) provides that an agency may order a rehearing in a contested case on its own motion or on request of a party.

²³P. 3.

THEREFORE, IT IS ORDERED that the motion to reopen proceedings, petition for rehearing, and motion for stay of proceedings of the National Energy Marketers Association, Direct Energy Services, LLC, and Interstate Gas Supply Inc. are denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of December 18, 2007.

Mary Jo Kunkle, Executive Secretary