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September 29, 2022

Ms. Lisa Felice
Executive Secretary
Michigan Public Service Commission
7109 West Saginaw Highway
Post Office Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-21283 – In the matter of the application of Consumers Energy Company for authority to share a portion of the gain from the sale of certain communication equipment assets.

Dear Ms. Felice:

Enclosed for electronic filing in the above-captioned case, please find **Consumers Energy Company's Response to the Attorney General's Petition to Intervene and Comments**. This is a paperless filing and is therefore being filed only in PDF. Also included is a Proof of Service showing service upon the petitioner and parties to this case.

Sincerely,

Bret A. Totoraitis

cc: Attachment 1 to Proof of Service

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
CONSUMERS ENERGY COMPANY)
for authority to share a portion of the gain from)
the sale of certain communication equipment)
assets.)
_____)

Case No. U-21283

CONSUMERS ENERGY COMPANY'S
RESPONSE TO THE ATTORNEY GENERAL'S
PETITION TO INTERVENE AND COMMENTS

On August 12, 2022, the Executive Secretary filed a notice in this docket inviting responses to the June 23, 2022 Application filed by Consumers Energy Company (“Consumers Energy” or “the Company”) in this case and to the July 18, 2022 Petition for Leave to Intervene filed by the Association of Businesses Advocating Tariff Equity (“ABATE”). On August 26, the Attorney General submitted a letter containing brief comments responding to the Executive Secretary’s invitation and filed a Notice of Intervention. Although the Executive Secretary’s notice did not include any information regarding the Company’s right to respond, Consumers Energy submits this short response addressing misinformation in the Attorney General’s filing.

I. REPLY TO THE ATTORNEY GENERAL

In her comments, the Attorney General stated that any gain sharing should be used to provide “a direct benefit to ratepayers.”¹ However, she further argued that the Company’s proposed method of gain sharing (i.e. to first direct the funds toward additional forestry costs exceeding rate levels in 2022) would provide only “illusory” benefits to Consumers Energy’s customers. The Attorney General never provides any clear explanation to support that conclusion.

¹ The Attorney General indicates that she only takes issue with the electric portion of the gain sharing amount (\$4.75 million). The Attorney General did not take issue with the \$2.25 million gas portion of the gain sharing amount.

Consumers Energy disagrees. The Company's proposal provides direct benefits to its customers by ensuring that there is sufficient funding to perform additional work that is vital to service reliability. The Attorney General's comments never explain why it views this important benefit as "illusory."

Instead, the Attorney General follows her claim of "illusory" benefits with several questionable assertions that have no discernable connection to the validity or efficacy of the benefits associated with the Company's proposed method of gain sharing. First, the Attorney General claims that the Company "can already recover any forestry costs it spends through its electric rate cases so long as it demonstrates that the amount is reasonable and prudent." That statement is plainly not correct. Those costs are O&M costs that are not retroactively recoverable in a subsequent rate case.

Next the Attorney General argues that Consumers Energy's proposal "requires the Commission to determine that the proposed use of the \$4.75 million in cost is reasonable and prudent without the additional cost and forestry activities being fully vetted." Again, the Attorney General does not appear to recognize that the Company's proposal does no more than what occurs in every general rate case. It proposes an amount of future forestry costs that would be reasonable for recovery based on the Company's ability to perform additional work to enhance reliability. In fact, in this circumstance, there are better protections for customers because, as approved in rate cases, forestry amounts are set at a fixed level which cannot be retroactively revised. Therefore, if actual spending comes in below rate levels, there would be no refund to customers. Here,

however, so long as the Company's actual forestry costs in 2022 do not exceed \$99.11 million,² customers will receive a refund in 2023 of up to \$4.75 million.

Third, the Attorney General claims that, under the Company's proposal, "any forestry activities performed, and costs incurred by the Company will be at its own discretion." This claim makes no sense. Approval of the Company's request does not provide the Company with some unchecked discretion regarding the use of the money. The money must be spent to perform additional forestry work or it is subject to refund. The execution of the forestry work will occur the same way the Company executes forestry work when using dollars included in rates. The Company will identify lines where the additional funds would provide the most reliability benefit, organize crews, and perform the work. The Attorney General's claim hints of wild speculation that the Company could somehow utilize its "discretion" to direct the money in a way that would enhance the Company's profits at the expense of its customers. But, if the Company wanted to use the money to enhance its profits in 2022, it would have simply kept the gain from the sale of the communication tower assets and never filed its Application in this case in the first place. Again, this claim makes no sense.

Fourth, the Attorney General claims that it is "probable that customers funded the acquisition of the assets that were sold," implying that customers paid for the gain from the sale, and then claims that customers should "rightfully directly receive the full benefit of any gain realized from their sale." However, it is simply not correct to state that the customers "funded the acquisition of the assets that were sold" or to imply that customers paid for the gain in the value of the sold assets. Customers pay for utility services, not utility assets. While it is true that the

² The Commission's final order in Case No. U-20963 included approximately \$94.36 million of forestry spending in current rates. The Company's proposal to spend an additional \$4.75 million on forestry in 2022 would bring the total required spending in 2022 to \$99.11 million, of which the additional \$4.75 million is refundable.

rates charged to customers are calculated by including an amount corresponding to the annual depreciation of the utility's capital assets, conceptually, depreciation represents the amount of a capital asset that is "used up" or "depleted" during a specified period of time. Depreciation expense is used to calculate rates because it can be thought of as roughly representing the amount of utility *service* provided by those assets in a given year. Therefore, depreciation is simply a proxy for quantifying and monetizing the amount of service that customers received from a capital asset during a specified period of time. Furthermore, "using up" or "depleting" a capital asset does not generate gain. It does just the opposite. Gain in the value of an asset can only be generated by additional capital contributions to that asset, which are provided by shareholders, or by market dynamics, which can in some cases be credited to sound managerial decisions but might also occur for reasons entirely external to the business or its customers. In either case, customers do not pay through their rates to generate gain in the value of the utility's assets.

As the United States Supreme Court stated in *Bd of Pub Util Com'rs v New York Tel Co*, 271 US 23, 31–32; 46 S Ct 363, 366; 70 L Ed 808 (1926):

The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. Cf. *Fall River Gas Works v. Gas & Electric Light Com'rs*, 102 N. E. 475, 214 Mass. 529, 538. The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. *Galveston Electric Co. v. Galveston*, 42 S. Ct. 351, 258 U. S. 388, 395, 66 L. Ed. 678; *Georgia Ry. v. R. R. Comm.*, 43 S. Ct. 680, 262 U. S. 625, 632, 67 L. Ed. 1144. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations.

Profits of the past cannot be used to sustain confiscatory rates for the future. *Newton v. Consolidated Gas Co.*, 42 S. Ct. 264, 258 U. S. 165, 175, 66 L. Ed. 538; *Galveston Electric Co. v. Galveston*, *supra*, 396 (42 S. Ct. 351); *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission* (D. C.) 292 F. 139, 147; *City of Minneapolis v. Rand* (C. C. A.) 285 F. 818, 823; *Georgia Ry. & Power Co. v. Railroad Commission* (D. C.) 278 F. 242, 247, affirmed 43 S. Ct. 680, 262 U. S. 625, 67 L. Ed. 1144; *Chicago Rys. Co. v. Illinois Commerce Commission* (D. C.) 277 F. 970, 980; *Garden City v. Telephone Co.*, 236 F. 693, 696, 150 C. C. A. 25.

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. (Emphasis added).

The Attorney General's comments presuppose that the payments made by customers should be treated as a "contribution to depreciation . . . or to capital of the company" and that customers should, therefore, be treated as having acquired an "interest . . . in the property used for their convenience." But, the United States Supreme Court has made it clear that customer payments have no such character and customers do not, as a general rule, acquire such an interest in utility assets by paying utility rates. Again, customers pay for, and receive, utility service.

Finally, as the Company pointed out in its response to ABATE, the Attorney General's call for a contested case proceeding is unnecessary and unhelpful. MCL 460.6a(3) expressly permits the Commission to decide any request for an alteration in rates that will not result in an increase in the cost to customers to be handled without notice or hearing. There is no other statutory provision that would require a contested case in this situation. And, the contested case process would result in undue delay and possible frustration of the benefits of the Company's proposed gain sharing with customers.

Again, none of the Attorney General’s claims, even if accurate, would render the benefits of the Company’s proposal “illusory.” The benefits of the Company’s proposed use of the gain sharing are very real. The Attorney General filed virtually identical comments in Case No. U-20699, a previous case in which the Company sought to share a portion of the gain from the sale of utility assets. In that case, the Commission rejected the Attorney General’s claims in their entirety. The Commission should do the same in this case.


II. CONCLUSION

For all the reasons stated above, the Commission should reject the Attorney General’s proposed intervention and her proposals inconsistent with the Company’s request. It is reasonable, and would provide a direct benefit to customers, to utilize the \$4.75 million of shared gain from the sale of radio tower assets in 2022 to provide incremental funding above rate levels for forestry costs in 2022, with any remainder to be carried forward to 2023 to be refunded through a bill credit to customers. Consumers Energy Company respectfully requests that the Michigan Public Service Commission adopt the Company’s recommendation and grant Consumers Energy such further relief as is lawful and necessary consistent with the Company’s request.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: September 29, 2022

By: 

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Jackson, Michigan 49201
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(517) 788-0835

STATE OF MICHIGAN

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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

Jennifer Joy Yocum, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on September 29, 2022, she served an electronic copy of **Consumers Energy Company’s Response to the Attorney General’s Petition to Intervene and Comments** upon the persons listed in Attachment 1 hereto, at the e-mail addresses listed therein.



Jennifer Joy Yocum

Subscribed and sworn to before me this 29th day of September, 2022.



Crystal L. Chacon, Notary Public
State of Michigan, County of Ingham
My Commission Expires: 05/25/24
Acting in the County of Eaton

ATTACHMENT 1 TO CASE NO. U-21283

Party	Mailing Address	Email Address
Please serve all documents on mpsc.filings@cmsenergy.com as well as the attorneys appearing in this case.		
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