STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the approval of a code of conduct for **CONSUMERS ENERGY COMPANY** and **THE DETROIT EDISON COMPANY.**	))))	Case No. U-12134 (Consumers Energy)

At the October 3, 2002 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On December 4, 2000, the Commission issued an order adopting a code of conduct, as required by Section 10a(4) of the Customer Choice and Electricity Reliability Act:

> Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.

MCL 460.10a(4). Among other things, the order required the filing of compliance plans and permitted the filing of requests for waivers.

On January 23, 2001, the Commission issued an order amending the code of conduct to require the filing of compliance plans within 60 days after the issuance of an order on rehearing of the December 4, 2000 order. On October 29, 2001, the Commission issued the rehearing order, and adopted a revised code of conduct. Consumers Energy Company (Consumers) filed a compliance plan and requested waivers.

Waiver Requests

Consumers requests waivers of sections II.A, II.D, II.E, II.H, II.I, III.A, III.C, III.E, and III.F for numerous unregulated services and products that it provides (listed and described in Appendix D of its December 28, 2001 compliance filing). It says that it has offered these services at the request of its customers for many years and that doing so does not inhibit competition in those markets.

On January 30, 2002, the Michigan Alliance for Fair Competition (MAFC) filed an objection to Consumers' requested waivers with respect to the appliance service plan, thermostat installation, customer-requested services, and financial solutions. It says that the waivers, if granted, would explicitly permit cross-subsidization, information sharing, and preferential treatment between the utility's regulated and unregulated services in violation of Section 10a(4). In particular, it says that the waivers would eliminate the functional separation required by the code and would permit transfer pricing that is inconsistent with the code and the order in Case No. U-11916. It also says that the requested waivers, if granted, would unreasonably continue the status quo, without the changes envisioned by the Commission and the Legislature to allow for the development and functioning of competitive markets. It asserts that Consumers has not demonstrated that the requested waivers will not inhibit the development or functioning of the competitive markets.

The Commission notes Consumers' assertion that many of the products and services for which it seeks a waiver are requested by customers or are offered in markets that are competitive. Certainly this is true of products such as carbon monoxide detectors, lights, alarms, and surge protectors, which can be purchased in numerous retail outlets throughout the state. It is also true of services such as Internet service. Many of the competitors in those markets are large and well-established, have a national presence, and may have a significant market share, and information on those devices and services may be readily available. In those markets, Consumers would not seem to have any advantage due to its size or its business experience. In other markets, Consumers may not actively advertise its services or may not be a major provider. The Commission concludes that as long as costs are appropriately allocated and regulated operations do not subsidize unregulated services and products, waivers for many of these services and products are appropriate.

Other services included in Consumers' Appendix D, especially those related to heating and air conditioning sales and services, are provided in localized markets characterized by numerous small firms. In those markets, Consumers may have a major advantage due to its relatively large size, name recognition that follows from its participation in the energy markets, and the lack of sufficient information on those services being readily available to customers. While Consumers has provided information on market share for those services, the data provided was for the entire state of Michigan. Consumers may have a small percentage of the entire business in the state for these services, but may unfairly influence local markets because of its size and other advantages. Support for this likelihood comes from communications received by the Commission. The Commission has received numerous letters expressing concern about utilities unfairly subsidizing heating and air conditioning services that they provide. One way to assure that a utility's resources are not being used to unfairly subsidize these business activities or to unfairly influence the local markets is to require full functional separation, preferably through an affiliate, for heating and air conditioning services; i.e., to deny the requested waivers for heating and air conditioning services. At the same time, the Commission does not want to deprive the utility's customers of services that they request from the utility, especially if the request is for a minor repair or adjustment that can be viewed as part of providing utility-related services. To do so would be to prevent customers from exercising a choice of service providers.

The Commission will grant Consumers' request for waivers for the services in its Appendix D filed with its December 28, 2001 compliance filing, with the following exceptions. For the company's appliance service plan, customer-requested services, and heating and air conditioning sales, the Commission will require that heating and air conditioning services be provided through full functional separation, preferably through a separate affiliate, i.e. no waivers will be granted for these programs and any other heating and air conditioning services that are actively marketed or promoted by the utility. When a request for a utility-related repair or adjustment is made by the customer, the utility may perform those services as part of its normal business. Such non-marketed services will be considered incidental to the utility's primary energy service functions.

The second set of exceptions concerns the specific sections for which Consumers seeks waivers. The Commission will grant waivers of sections II.A, II.D, II.E, II.H, and III.E for those programs included in Appendix D to the December 28, 2001 filing, except for those programs involving heating and air conditioning services and listed above. These waivers will not apply to any new programs or variations on existing programs. New programs or modifications to existing programs will require new waiver requests. Thus, these waivers will not apply to any activity between Consumers and any affiliated alternative electric supplier or separate entity within the corporate structure serving as an alternative electric supplier.

The Commission will not grant a waiver at this time for section II.I but will grant a conditional waiver for section III.F. Specifically, a waiver will be granted for III.F so long as Consumers agrees not to steer customers away from unaffiliated alternative electric suppliers or alternative generation suppliers who compete with Consumers' or its affiliates' programs designed to supply customers with onsite or distributed generation. The Commission is not convinced of the need for waivers of sections II.I and III.A at this time. Waiving these sections could allow Consumers to provide a customer or an affiliate with a preference or benefit related to regulated service in exchange for taking unregulated products or services from the company or its affiliates. While this may not be Consumers' intention by requesting these waivers, it could be the result. The Commission will also not grant a waiver of section III.C, which regulates transfer pricing between Consumers and its affiliates. This provision represents a fundamental regulatory pricing requirement and is one of the most effective tools for preventing subsidization of the utility's unregulated operations.

The Commission realizes that some services for which it has denied a waiver are currently functioning programs that involve the use of corporate employees and other resources. The Commission does not expect the utility to decide immediately whether, when, or how to redeploy these employees and resources. The Commission also recognizes that these programs involve customer contractual obligations and relationships built upon the direct interaction of Consumers with its customers. The Commission will therefore grant temporary waivers of the separation requirement of the code for these services for up to six months from the date of this order.

Finally, the Commission has provided flexibility to Consumers (and other utilities) in this case by granting requests for waivers from selected provisions of the code. This additional flexibility requires the Commission and its Staff to be diligent in preventing cross-subsidization between utilities and their non-regulated operations and affiliates. A particularly helpful tool in doing so has been the prior reports required by the Commission and submitted by Consumers, providing crucial information relating to affiliate relations and access to affiliate information. Information and access necessary cover the following:

(1) The utility shall ensure that the Commission has access to books and records of any holding company owning the utility and each of the holding company's affiliates and their joint ventures. Any objections to providing access as requested under this requirement must be raised before the Commission, and the burden of showing that the request is unreasonable or unrelated to the Commission's responsibilities is on the party seeking to deny or withhold access.

(2) Consolidated 10k reports and shareholders' reports of the consolidated utility and/or its parent holding company on an annual basis.

(3) Annual balance sheet and income statements of the non-regulated subsidiaries of the utility and/or the non-consolidated subsidiaries of the holding company.

(4) Reports of internal audits conducted regarding transactions between the utility and its nonutility affiliates. Such reports will be submitted every three years beginning with a report for the year 2003. The audit report shall address transactions occurring since the last audit report and shall describe whether appropriate cost allocation procedures and transfer pricing methodologies were followed and whether the utility and its affiliates are maintaining records that are adequate to facilitate an effective audit of the transactions. The Commission Staff may require more frequent reports or additional audits when appropriate.

(5) A notification to the Commission 30 days prior to any transfer to non-utility affiliates of any utility assets or property exceeding a fair market value of $100,000. At the time notice is provided, the utility shall make available to the Commission information that demonstrates how the transfer price was determined.

(6) In its annual report, each utility shall provide information on any arrangement that allows an affiliate to obtain credit in a manner that permits a creditor, upon default, to have recourse to or in any way encumber the utility's assets.

As an additional condition for granting these waivers, the Commission will require Consumers to continue to file these reports annually.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 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, 1992 AACS, R 460.17101 et seq.

b. The compliance filing should be accepted, subject to the discussion above.

c. The requests for waivers should be granted in part and denied in part, as discussed above.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's compliance filing is accepted, subject to the discussion above.

B. Consumers Energy Company's requests for waivers are granted in part and denied in part, as discussed above.

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/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of October 3, 2002.

/s/ Dorothy Wideman
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

Laura Chappelle
Chairman

Commissioner

Robert B. Nelson
Commissioner

By its action of October 3, 2002.

Its Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-12134
(Consumers waivers)

County of Ingham)

Gloria P. Jones being duly sworn, deposes and says that on October 3, 2002, A.D. she served a copy of the attached Order by mailing copies thereof by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

Gloria P. Jones

Subscribed and sworn to before me
this 3rd day of October 2002

Sharon Allen
Notary Public, Ingham, County, Michigan
My Commission expires August 16, 2004

SERVICE LIST FOR DOCKET # U - 12134-   CASE #
DATE OF PREPARATION: 10/04/2002

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