

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of  
**CONSUMERS ENERGY COMPANY**  
for the reconciliation of power supply cost  
recovery (PSCR) costs and revenues for the  
calendar year 2006 and for other relief to pension  
and OPEB costs.

Case No. **U-14701-R**  
(e-file paperless)

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**THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S  
REPLIES TO EXCEPTIONS**

The Michigan Public Service Commission Staff ("Staff"), by its counsel, Patricia S. Barone, Assistant Attorney General, files the following Replies to the Exceptions.

**I. Reply to Consumers Energy Company's Exceptions.**

**A. TPR discounts.**

Consumers Energy Company ("Consumers") argues in its Exceptions that the Administrative Law Judge ("ALJ") erred in adopting Staff's position with respect to the TPR discounts. Consumers' Exceptions, pages 1-6. Consumers states that the PFD's rejection of the Company's proposal to recover a portion of the TPR discount from PSCR customers appears to contradict the reasoning set forth in Case No. U-14347 that all customers would benefit from the TPR discounts. Consumers reasons that if all customers benefit from the discounts, that it is reasonable "that all customers should be required to help fund the lost revenues, not just customers whose rates can be altered in a general rate case." Consumers' Exceptions, page 5.

Staff submits that the ALJ was correct in adopting Staff's position with respect to this issue. Staff witness, Michael Collins, the manager of the Rates and Tariff Section of the Regulated Energy Division (TR 221) testified: "[T]he TPR credit adjustment is not necessary

because Consumers is already recovering the TPR discounts from other customers.” TR 223.

He further testified:

Mr. Hunley was correct when he stated that in its December 22, 2005 Order in Case No. U-14347, the Commission approved a “General Service Transitional Primary Rate TPR” tariff which provided discounts to certain customers previously served under special contracts. However, I disagree with his conclusion that as a result of that order it is necessary for Consumers to recover a portion of those discounts through a credit adjustment to PSCR revenue. The rates in U-14347 were designed to permit Consumers to recover TPR discounts in the amount of \$14,683,000 from other commercial and industrial customers. There was no other provision made for recovery of discounts associated with sales to TPR customers. [TR 223; emphasis added.]

In his rebuttal testimony, Mr. Hunley revised his recommendation to recover \$9,875,607 through the TPR credit to \$2,340,959. This was based on the rebuttal testimony of Consumers Energy’s witness Charles F. Belknap, Jr. TR 98. Mr. Belknap testified in pertinent part:

According to the tariff, the TPR discount was to be applied to these customers’ total rate. *Id.* Therefore, all elements of these customers’ charges were reduced. The tariffs approved by the Commission in MPSC Case No. U-14347 provided that the discounts relating to the non-PSCR charges and the base PSCR factor charges would be recovered from other C&I customers. However, recovery of the annual PSCR factor discount, amounting to \$2,341,000, *see*, line 5 of Exhibit A-36 (CFB-1), was not provided for in the tariffs approved by the Commission in MPSC Case No. U-14347. [TR 26.]

Mr. Belknap’s assertion that the “tariffs” provided that the TPR discounts would be recovered from other C&I customers is incorrect. The TPR Rate tariff is silent on the manner of recovery of the TPR discounts. Consumers did not cite any language in the Commission’s order in U-14347 or the tariffs that contradicts Mr. Collins’ statement that the rates in U-14347 were designed to provide Consumers with recovery of TPR credits in the amount of \$14,683,000, and that the order did not provide for any other recovery.

As Mr. Collins testified, the base rates of other customers were designed to recover the full amount of the TPR discounts of \$14,683,000. TR 223. Rates in U-14347 were designed

based on a snapshot of the Company's revenue requirement and billing determinants at a particular point in time. This is true of rate design in all cases. When the rates go into effect, however, the Company's actual costs will vary from the level assumed in the rate case, either higher or lower, and the revenue generated by the rates will vary from the level assumed in the rate case, either higher or lower. If the Company's costs remain constant but the sales level is higher than assumed in the rate case, and all other things remain equal, the Company will enjoy higher earnings than intended in the Commission's order. Obviously, there are a number of possible scenarios where the Company would earn more or less than intended. That is the nature of setting rates without automatic adjustments or tracker provisions. The costs associated with the TPR credits should not be treated any differently than any other costs that are considered at the time the rates are designed. While Consumers Energy's rates were designed to recover \$14,683,000 from other customers, they may in fact produce more revenue than that if the sales are greater than assumed in the rate designed. Likewise, the discounts afforded to the TPR customers could be less than \$14,683,000 if their sales were less than assumed in the rate case. Again, there are a number of possible scenarios where the Company would earn more or less than intended through application of the rates. Consumers did not offer any analysis to indicate whether its total revenue associated with the TPR credit was greater than, equal to, or less than the total discounts provided to its Rate TPR customers. Instead, it focused solely on the amount of discounts associated with the PSCR factor, after it revised its position on rebuttal.

Consumers misconstrued the Commission's order in U-14347 when Mr. Hunley initially proposed to charge all of its PSCR customers \$9,875,607, and it misconstrued the order again when it changed its position on rebuttal to ask for recovery of \$2,341,000. Neither request is supported by a reference to specific language in the Commission's order or the tariff that would entitle Consumers to treat this cost any differently than any other rate case cost. The

Commission should reject Consumers' request to recover any portion of the discounts associated with the Rate TPR beyond the \$14,683,000 already included in customers' base rates.

**B. Weadock Outage Replacement Power.**

Consumers argues at pages 6-14 that the Company should not be held responsible for the negligence of its employee and tries to argue that the employee's negligence meant that he committed an intentional tort that was outside the scope of his employment. Consumers' Exceptions, page 12. In support of that proposition, Consumers cites the case of *McCann v Michigan*.<sup>1</sup> In *McCann*, the Michigan Supreme Court discussed the doctrine of respondeat superior as follows<sup>2</sup>:

Under the doctrine of *respondeat superior* there is no liability on the part of an employer for torts committed by an employee beyond the scope of the employer's business. *Bradley v Stevens*, 329 Mich 556, 552; 46 NW2d 382 (1951). The employer is liable, however, for the acts of his employee when the employee is acting within the scope of his authority, even though acting contrary to instructions. *Poledna v Bendix Aviation Corp*, 360 Mich 129; 103 NW2d 789 (1960). The employer is also liable for the torts of his employee if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation". 1 Restatement Agency, 2d, § 219(2)(d), p 481. Of course, the employer is not able to instruct his employee only to act within the confines of the law, thereby insulating him from vicarious liability if the employee acts otherwise. *Anschutz v Liquor Control Comm*, 343 Mich 630; 73 NW2d 533 (1955). See also, *Barnes v Mitchell*, 341 Mich 7; 67 NW2d 208 (1954).

Therefore, this case makes clear that an employer is responsible for the acts of its employee if the employee is acting within the scope of his or her employment. In each of the cases cited by Consumers in support of its position that it should not be held responsible for its employee's conduct, the Court addressed the question of whether intentional tortious acts committed by employees were within the scope of their employment, and hence whether the

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<sup>1</sup> *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976).

<sup>2</sup> *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976); emphasis added.

employer would be held liable. *McCann* involved a consideration of whether the State would be liable where state mental hospital officials took steps to put a newspaper that was critical of the officials out of business.<sup>3</sup> In *Bradley v Stevens*, the Michigan Supreme Court dealt with the question of whether a service station owner would be held liable for his employee attacking a customer and attacking her with a knife.<sup>4</sup> *Martin v Jones* concerned an employer's liability for an employee who pulled a gun and shot a customer in the abdomen.<sup>5</sup> *Salinas v Genesys Health System* involved a question of whether an employer would be held liable for an employee who sexually assaulted a patient.<sup>6</sup>

Finally, Consumers cites the case of *Rogers v J.B. Hunt Transport, Inc.* in support of its position that the negligence of its employee should not cause it to be found to be responsible for that negligence.<sup>7</sup> In fact, this case supports Staff's position that Consumers is responsible for the negligence of its employee. In that case, a default judgment had been entered against an employee that conclusively determined the employee's negligence in a wrongful death action involving the employee's operation of a truck for J.B. Hunt Transport, Inc. The Court of Appeals held that that judgment precluded the employer from contesting its vicarious liability. The Court stated that it granted leave because the Court of Appeals' decision suggested that an employer could be held liable not only for acts of its employee committed within the scope of his employment, but also for acts outside the scope of employment. The Court found that the

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<sup>3</sup> *McCann v Michigan*, 398 Mich 65, 80; 247 NW2d 521 (1976).

<sup>4</sup> *Bradley v Stevens*, 329 Mich 556; 46 NW2d 382 (1951).

<sup>5</sup> *Martin v Jones*, 302 Mich 355; 4 NW2d 686 (1942).

<sup>6</sup> *Salinas v Genesys Health System*, 263 Mich App 315; 688 NW2d 112 (2004).

<sup>7</sup> *Rogers v J.B. Hunt Transport, Inc.*, 466 Mich 645; 649 NW2d 23 (2002).

employee did not act within the scope of his employment when he defaulted in the wrongful death action. The Court held<sup>8</sup>:

Likewise, respondeat superior or vicarious liability principles do not support imposing liability on J. B. Hunt in the present case merely on the basis of Crenshaw's default. When Crenshaw failed to participate in this litigation, he was not acting within the scope of employment. Rather, Crenshaw was acting on behalf of himself only in regard to the litigation. In fact, his procedural failures were committed when he was a *former* employee of J. B. Hunt. Because his nonparticipation was not in the course of his employment with J. B. Hunt, extending liability to J. B. Hunt for Crenshaw's nonparticipation is beyond the scope of vicarious liability.

In this regard, we emphasize that the basis of vicarious liability is not merely that an employer typically has a greater ability to pay than an employee. As a leading treatise on American tort law explains, additional rationales for vicarious liability for acts of agents within the scope of employment include providing an incentive for employers to attempt to reduce tortious conduct by their employees and the fair distribution of risk associated with activity characteristic of a business or other entity. See Dobbs, Torts, § 334, pp 908-910. Risks typically associated with operating trucks may fairly be said to be characteristic of J. B. Hunt's business activities. However, an employee's refusal to participate in litigation is not a characteristic risk of operating a trucking business. Accordingly, such nonparticipation is not something that an employer can reasonably be expected to deter or fairly be expected to absorb as a cost of doing business.

Both the employee in this case and in the *Rogers* case, were acting within the scope of their employment, i.e., carrying out an employment function, but doing so in a negligent manner. No one argued that Consumers' employee acted intentionally or recklessly to cause the outage, only that he acted negligently in failing to follow the Company's procedures. Under Consumers' theory, the Company's Board of Directors would have had to authorize the conduct of the employee to act outside the Company's guidelines in order for the Company to be held responsible for the consequences of the outage. And, under Consumers' theory, so long as the

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<sup>8</sup> *Rogers v J.B. Hunt Transport, Inc.*, 466 Mich 645, 651-652; 649 NW2d 23 (2002); emphasis added.

Company has properly constructed written procedures, the Company cannot be held responsible for its employees' acts of negligence.

On page 12 of its Exceptions, Consumers criticizes Staff's position and states that Staff's testimony provides no guidance of exactly what degree of care should have been exercised by its employee. Clearly, in this case, the obvious degree of care would be for the employee to follow the Company's own guidelines, and that failure constitutes negligence for which the Company should be held responsible. If the Company is correct that its guidelines set forth reasonable procedures to safeguard its operation, the Company is responsible for the consequences that flow from that failure when its guidelines are not followed. To say otherwise, would be to say that the Company is never responsible so long as it has proper written procedures. Such an assertion results in making MCL 460.6j a nullity with respect to holding the utility responsibility for outages that should not have occurred. Staff submits that the Company's position should be rejected, and that Staff's proposed disallowance be adopted.

### **Conclusion**

Staff urges the Commission to adopt its positions regarding the TPR discounts, the Weadock disallowance, the 70/30 sharing of SO<sub>2</sub> sales proceeds, and the other adjustments reflected in Staff's testimony for the reasons stated herein and in Staff's previously filed briefs.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION  
STAFF**

Patricia S. Barone (P29560)  
Assistant Attorney General  
Public Service Division  
6545 Mercantile Way, Suite 15  
Lansing, MI 48911  
Telephone: (517) 241-6680

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14701-R/Replies to Exceptions



DAVID E.S. MARVIN  
FRASER TREBILCOCK  
DAVIS & DUNLAP, P.C.  
124 W. ALLEGAN, STE. 1000  
LANSING, MI 48933

HON MARK E CUMMINS (**ID MAIL**)  
ADMINISTRATIVE LAW JUDGE  
MICHIGAN PUBLIC SERVICE COMM  
6545 MERCANTILE WAY, STE 14  
PO BOX 30221  
LANSING, MI 48909

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TINA L. BIBBS

Subscribed and sworn to before me  
this 18<sup>th</sup> day of March, 2008.

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Linda S. Andreas, Notary Public  
State of Michigan, County of Ingham  
My Commission Expires: 3-22-2012