

STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



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August 21, 2007

Ms. Mary Jo Kunkle  
Executive Secretary  
Michigan Public Service Commission  
6545 Mercantile Way  
Lansing, MI 48911

Dear Ms. Kunkle:

***RE: MPSC Case No. U-15190***

Enclosed for filing in the above-captioned case please find the **Attorney General's Initial Brief**. This filing is being submitted electronically pursuant to instruction on the Commission's website. I am also attaching a proof of service.

Sincerely,

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MEM:cs  
Enclosures  
c: All Parties

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of CONSUMERS  
ENERGY COMPANY for authority to increase  
its rates for the distribution of natural gas and  
for other relief

MPSC No. U-15190

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**PROOF OF SERVICE - U-15190**

The undersigned certifies that a copy of the **Attorney General's Initial Brief** was served upon the parties listed below by mailing the same to them at their respective addresses with first class postage fully prepaid thereon on the 21<sup>st</sup> of August, 2007.

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STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of CONSUMERS  
ENERGY COMPANY for authority to increase its rates  
for the distribution of natural gas and for other relief

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**ATTORNEY GENERAL'S INITIAL BRIEF**

Attorney General Michael A. Cox, by and through his attorneys and pursuant to the partial settlement agreement and stipulation by all the parties, files the instant initial brief limited to Consumers Energy Company's (Consumers or the Company) and MPSC Staff's (Staff) energy efficiency proposal raised in the above captioned case. As provided in the partial settlement agreement, the parties have settled all issues in this case except the energy efficiency proposal set forth in Consumers and Staff's testimony. Accordingly, the Attorney General respectfully files this initial brief before the Michigan Public Service Commission (MPSC or Commission) in the above captioned case.

**I. Statement of Facts**

**A. Consumers Energy Direct Testimony**

Consumers expert witness Terrence J. Mierzwa testified that the purpose of his testimony "is to propose a natural gas efficiency and conservation plan (the "plan") for Consumers Energy's residential customers." (Mierzwa Direct, p 2). Mr. Mierzwa testified that the cost of the plan to residential customers will be \$9,350,000 annually to implement. (Mierzwa Direct, p 14). He

explained that "Consumers Energy proposes to assign a qualified program manager to implement the plan and manage a qualified third-party contractor who will be secured under a competitive bidding process." (Mierzwa Direct, p 15). In addition, Mr. Mierzwa stated that "Consumers Energy welcomes pertinent suggestions from Staff or others to refine the programs, the associated costs, and the energy savings estimates." (Mierzwa Direct, p 12).

Consumers Energy expert witness Stephen P. Stubleski testified that "Consumers Energy is proposing to recover expenses associated with the proposed plan through a fixed amount that would be included in the monthly customer charge for residential customers in Rate classes A and A-1" and that "[f]unds collected from this fee would be held in a Conservation Fund ("Fund") and used exclusively for this Program." (Stubleski Direct, p 13).

**B. Staff Direct Testimony**

Staff expert witness Robert G. Ozar testified that "Staff is recommending that the Commission approve the proposed energy efficiency program with some minor modifications." (Ozar Direct, p 3). Mr. Ozar explained that "Staff is recommending that the \$9.35 million annual funding amount should be collected from residential customers as part of the Rate A and Rate A-1 customer charges." (Ozar Direct, p 4). Mr. Ozar noted that the "proposed energy efficiency program constitutes a significant initiative whose design and implementation is at the discretion of utility management, yet funded by ratepayers."

**II. Argument**

**A. The Commission Lacks Statutory Authority to Force All of Consumers Energy's Residential Customers to Pay \$9.3 Million for an Energy Efficiency Program They May Not Use**

MPSC Staff witness Robert Ozar states that it is reasonable for the energy efficiency costs to be borne by all residential customers and that "Commission approval will serve to

prevent the waste of natural gas" as provided under MCL 483.114 [Act 9]. (Ozar Direct, p 3).

The problem with the forced energy efficiency program is that the Commission lacks the statutory authority to approve such an involuntary program on Consumers' residential customers.

Act 9's grant of authority to the commission is stated in § 3 of the act, MCL 483.103; MSA 22.1313, beginning:

There is hereby granted to and vested in the Michigan public utilities commission, hereinafter styled the "commission," the power to control and regulate corporations, associations and persons engaged, directly or indirectly, in the business of purchasing or selling or transporting natural gas for public use; and said commission shall investigate any alleged neglect or violation of the laws of the state by any corporation, association or person purchasing or selling natural gas and transmitting or conveying the same by pipe line or lines for public use.

Act 9 grants the commission power to control and regulate the purchase, sale, and transportation of natural gas for public use. *Antrim Resources v Public Service Comm*, 179 Mich App 603, 609; 446 NW2d 515 (1989). Section 3 of that act "vests in the commission certain powers of regulation and control" over only those engaged in the business of transporting, buying, and selling gas *for public use*. *Michigan Consolidated Gas Co v Sohio Petroleum Co*, 321 Mich 102, 110; 32 NW2d 353 (1948). MCL 483.114, partially quoted by Mr. Ozar, provides in full as follows:

The commission shall have authority to prevent the waste of natural gas in producing operations and in the piping and distribution thereof and to make rules and regulations for that purpose. It is hereby authorized and empowered to do all things necessary for the conservation of natural gas in connection with the production, piping and distribution thereof and to establish such other rules and regulations as well be necessary to carry into effect this act, to conserve the natural gas resources of the state and to preserve the public peace, safety, and convenience in relation thereto.

As stated earlier, Act 9 grants the Commission power to control and regulate the purchase, sale, and transportation of natural gas for public use. Forcing residential customers to pay for an

energy efficiency program does not fall within the scope of the power conferred upon Commission under Act 9. The statute only empowers the Commission "to do all things necessary for the conservation of natural gas **in connection with the production, piping and distribution thereof . . .**" Thus, approving an end use energy efficiency program for residential customers does not involve conservation of natural gas in connection with production, piping and distribution. In addition, the statute does not confer clear and unmistakable power on the Commission to approve a voluntary energy efficiency program that forces every residential customer to pay for in their rates.

The cardinal rule of statutory construction and a court's foremost duty is to discern and give effect to the Legislature's intent.<sup>1</sup> All other rules of construction are subservient to this principle.<sup>2</sup> Statutory analysis must begin with the wording of the statute.<sup>3</sup> When statutory language is unambiguous, courts presume that the Legislature intended the meaning clearly expressed, and no further judicial construction is required or permitted. Only where the statutory language is ambiguous may courts look outside the statute to ascertain the Legislature's intent.<sup>4</sup> Ambiguity does not arise simply because reasonable minds could or do differ regarding the meaning of a statute.<sup>5</sup> Unless defined in the statute, plain and ordinary meaning must be ascribed to every word or phrase of a statute.<sup>6</sup> Conclusions having no basis in the plain language

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<sup>1</sup> *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994), and *Burba v Burba (after remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000).

<sup>2</sup> *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584; 624 NW2d 180 (2001).

<sup>3</sup> *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

<sup>4</sup> *Dibenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000), and *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

<sup>5</sup> *Mayor of Lansing v PSC*, 470 Mich 154, 165; 680 NW2d 840 (2004).

<sup>6</sup> *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), and MCL 8.3a.

of a statute cannot be engrafted into a statute by interpretation.<sup>7</sup> Words expressed in a statute are the law, and unexpressed motivations or intentions of legislators are not the law.<sup>8</sup>

Courts consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, and statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.<sup>9</sup> The meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense.<sup>10</sup> MCL 483.114 must be interpreted according to these rules of statutory construction. Clearly, there is not language within this statute to permit the Commission to authorize an energy efficiency program that forces residential customers to pay \$9.3 million annually.

Absent specific statutory authority, the Commission lacks the power to authorize the \$9.3 million energy efficiency program proposed by both Consumers Energy and the Staff. The Commission is a creature of statute and has no inherent or common law power, and its jurisdiction in any instance must affirmatively appear in a statute before a power can be invoked or exercised.<sup>11</sup> Furthermore, the provisions of a statute cannot be extended by implication.<sup>12</sup> The power and authority to be exercised by the MPSC must be conferred by clear and unmistakable statutory language since a doubtful power does not exist.<sup>13</sup> An administrative

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<sup>7</sup> *Jones v Dept of Corrections*, 468 Mich 646, 655-656; 664 NW2d 717 (2003).

<sup>8</sup> *Maier v General Telephone Co*, 466 Mich 879; 645 NW2d 254 (2002)(concurring opinion by Corrigan, C.J.).

<sup>9</sup> *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

<sup>10</sup> *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995).

<sup>11</sup> *Huron Portland Cement Co v PSC*, 351 Mich 255, 262-263; 88 NW2d 492 (1958).

<sup>12</sup> *Taylor v Michigan Public Utilities Comm'n*, 217 Mich 400, 403; 186 NW 485 (1922). *Accord, Lake Isabella, Inc v Village of Lake Isabella*, 259 Mich App 393; 675 NW2d 40 (2003).

<sup>13</sup> *Union Carbide Corp v PSC*, 431 Mich 135, 151; 428 NW2d 322 (1988).

agency cannot create its own power by issuing an order.<sup>14</sup> The powers of state officers and agencies are measured by the statute from which they derive their authority, not by their own acts and assumption of authority.

Similar to the renewable energy program where the Commission authorized Consumers Energy to force every residential customer to pay five cents per meter for green power, the Commission lacks statutory authority to force every residential customer to pay \$9.3 million annually for an energy efficiency program managed by Consumers Energy. As the Court of Appeals explained in the renewable energy program<sup>15</sup>:

We hold that the PSC lacked the statutory authority to authorize CEC to impose an additional charge of \$ 0.05 a meter each month on all customers, including customers who had not agreed to pay a premium to receive green power, to finance the development of renewable resource power programs. The PSC established a renewable energy program, as required by MCL 460.10r(6). The PSC's authority to set rates that facilitate the development of new energy technologies is set out in MCL 460.10b(1); however, that authority does not include the power to make management decisions on behalf of a utility. *Union Carbide Corp v Public Service Comm*, 431 Mich. 135, 148; 428 N.W.2d 322 (1988). The PSC's ability to consider a wide variety of factors when setting rates is well-established, *Detroit Edison Co v Public Service Comm*, 221 Mich. App. 370, 375; 562 N.W.2d 224 (1997), but is not unlimited. MCL 460.10b(1) and MCL 460.10r(6) were enacted as part of the CCERA. The Legislature clearly intended consumer participation in green power programs to be voluntary. Neither MCL 460.10b(1) nor MCL 460.10r(6) specifically authorizes the PSC to enable a utility to compel customers to pay to support a voluntary renewable resource energy program even if they have not chosen to receive power from the program. The PSC exceeded its authority in concluding to the contrary. *In re Complaint of Pelland, supra*.

Requiring all customers to pay a monthly charge to build a fund to compensate CEC for costs associated with the development of renewable resource energy programs might well have positive economic and public policy implications; however, we must not consider such implications when determining

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<sup>14</sup> *Coffman v Optometry Bd*, 331 Mich 583, 589; 50 NW2d 322 (1951), and *York v Detroit*, 438 Mich 744, 767; 475 NW2d 346 (1991).

<sup>15</sup> *Attorney General v Public Service Comm*, 269 Mich. App. 473, 481-482; 713 N.W.2d 290 (2005); reaffirmed in *Attorney General v Public Service Comm*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2007) (Docket Nos. 259845, 264099, 264131, 264156, and 264191) (July 3, 2007), pp 10-11.

if the PSC acted within its statutory authority. *Consumers Power Co v Public Service Comm*, 460 Mich. 148, 156; 596 N.W.2d 126 (1999).

Following the legal reasoning and logic above, although MCL 483.114 permits the Commission to authorize conservation of natural gas in connection with the production, piping and distribution thereof, it does not specifically authorize the Commission to enable a utility to compel customers to pay to support a voluntary energy efficiency program even if they have not chosen to participate in the program.

### **III. Relief Requested**

For the reasons stated above, the Attorney General respectfully requests that the Public Service Commission reject Consumers Energy Company's and the Staff's forced \$9.3 million annually energy efficiency program as unlawful and beyond the Commission's statutory authority.

Respectfully submitted,

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