

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter on the Commission's own motion,
to implement the provisions of Section 401e of
2007 PA 164.

Case No. **U-15489**
(e-file/paperless)

**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
NOTICE OF HEARING**

TO: ALL PARTIES OF RECORD

Please take notice that the **Michigan Public Service Commission Staff's Motion to Strike Prefiled Rebuttal Testimony and Exhibits of Huron County Witness Randy Miller** will be brought on for hearing as soon as counsel may be heard at the offices of the Michigan Public Service Commission, **4300 W. Saginaw**, Lansing, Michigan.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**

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Public Service Division
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DATED: June 17, 2013

15489/NOH

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**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
MOTION TO STRIKE PREFILED REBUTTAL TESTIMONY AND EXHIBITS
OF HURON COUNTY WITNESS RANDY MILLER**

The Michigan Public Service Commission Staff, pursuant to MCR 2.115(B) and Rule 335 of the Commission's Rules of Practice and Procedure, R 460.17335, moves to strike portions of the prefiled rebuttal testimony and exhibits of Huron County (the County) witness Randy Miller.

The objectionable portions of the rebuttal testimony improperly present legal opinions and conclusions. Moreover, Staff requests that the prefiled exhibits attached to Mr. Miller's rebuttal testimony be stricken in their entirety. These exhibits, which were not referenced in the witness' testimony, are an attempt to improperly supplement the County's direct testimony rather than contradict, explain, or disprove specific testimony presented by Staff. For these reasons, as discussed more thoroughly herein, portions of the proposed rebuttal testimony and the rebuttal exhibits in their entirety should be stricken from the record. The specific portions of the County's testimony, that Staff requests be stricken, are cited in the discussion below and are specified on the attached copy of the prefiled rebuttal testimony.

In support of its Motion to Strike, Staff states:

I. Applicable Legal Standard

The Commission has consistently held that proper rebuttal evidence is evidence given by one party to contradict, explain, or disprove evidence produced by another party intending to directly weaken or impeach that evidence. Generally speaking, rebuttal evidence is confined to responding to new matters first introduced by the opposing party and is not an appropriate avenue to rehabilitate a party's direct case.

In *In Re Midland Cogeneration Venture Limited Partnership*, the Commission defined rebuttal evidence by relying on a Michigan Court of Appeals decision stating:

The Michigan Court of Appeals defined rebuttal evidence as that evidence *given by one party to contradict, explain or disprove evidence produced by the other party and tending to directly weaken or impeach that evidence*. Further, whether evidence that could have been offered in a party's case in chief may be given in rebuttal is a matter within the discretion of the trial court. *Kirk v Ford Motor Co*, 147 Mich App 337 (1985); *app lv den* 426 Mich 866 (1986). [MPSC Case No. U-8871, Opinion and Interim, January 31, 1989, p 153 (emphasis added).]

In its order, the Commission favorably cited the Administrative Law Judge's (ALJ) comments relating to the appropriate scope of rebuttal testimony. The ALJ stated:

First of all, I would advise the parties to consider what rebuttal is and what it means, and if necessary, go back to the legal statements as to what rebuttal is and to confine their rebuttal to just that. *It should not be for the purpose of rehabilitating someone's direct case*. It should be very clear in that rebuttal testimony what is being rebutted in someone else's case so that we can easily determine that it is in the nature of rebuttal.

Rebuttal should also be – in my mind should be concise and to the point. It should not be broad, sweeping-type testimony like we've seen

in the initial phase of the case. In other words, it's for the purpose of rebutting specific facts, judgments of the other parties that could not have been reasonably done with your direct case. [MPSC Case No. U-8871, Opinion and Interim, January 31, 1989, pp 153-154 (emphasis added).]

Thus, to be appropriate rebuttal evidence, the evidence must contradict, explain, or disprove evidence produced by another party and tend to directly weaken or impeach that evidence. It should not be for the purpose of providing a new proposal or otherwise supplementing direct testimony. Rebuttal testimony should be concise and to the point and not contain evidence which reasonably could have been presented in a party's direct case.

More recently, the Commission has addressed a party's attempt to supplement its direct case during the rebuttal phase of a proceeding. In Case No. U-16794, a Consumers Energy Company's electric rate case, Consumers Energy presented the rebuttal testimony of a witness whose testimony amounted to an improper attempt to present supplemental direct testimony. Similar to this proceeding, the Staff alleged that the information provided in rebuttal testimony was not offered as proper rebuttal but rather for the purpose of providing a new proposal or otherwise supplementing direct testimony that could have and should have been provided in response to the Staff's discovery requests. MPSC Case No. U-16794, Order, June 7, 2012, p 3. The ALJ agreed with the Staff and struck portions of the testimony. Consumers Energy appealed the ruling to the Commission who stated:

The Commission recently discussed the standards for proper rebuttal and the standard of review for evidentiary determinations by the hearing officer in the March 8, 2012 order in Case No. U-16034-R, pp. 9-10:

Evidence which could have been offered in a party's main case may be rejected if offered as rebuttal evidence, and this decision is within the discretion of the referee. October 30, 1984 order in Case No. U-7660, p. 3. It is true that the Commission may exercise broad latitude in considering evidence that might be rejected in a courtroom. However, that does not mean that, in cases whose outcome will affect customers' bills, the parties may divide their proofs in such a way as to prevent the opposition from being able to adequately review and respond to important evidence. The rule against improper rebuttal 'is generally aimed at preventing the unfair ordering of proofs.' *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). *Id.* at 4.

II. Argument

A. Rebuttal Testimony of Huron County witness Randy Miller

1. Page 1, line 13 through line 18, and Page 1, line 21 through Page 2, line 1.

The identified testimony presents improper opinion testimony that purports to interpret and apply legal standards. Courts will not permit even expert witness testimony on questions of law as this is the exclusive responsibility of the trial judge to make findings and interpret. See *People v Lyons*, 93 Mich App 35, 46 (1979).

While Michigan law is clear that testimony in the form of legal opinions and/or legal conclusions is impermissible, Staff acknowledges that the Commission has historically permitted some limited testimony on legal issues to the extent that, in a regulated industry, witnesses may be permitted to testify regarding their understanding of the rules under which they operate. This is not the case here.

It is clear from the testimony provided that Mr. Miller is not an attorney, and, as such, can be qualified as an expert in legal matters. Yet, throughout Mr. Miller's testimony, the arguments are laced with improper legal opinions, conclusions, and arguments. While portions of both Mr. Miller's direct and rebuttal testimony make reference to the County's past legal position, see, e.g., Mr. Miller's rebuttal testimony, page 3, line 20-22, Staff only seeks to strike the most explicit examples of legal opinion from the witness' testimony. For this reason, the portions of Mr. Miller's testimony containing legal conclusions should be stricken from the record in this matter.

2. Exhibits

Staff requests that the prefiled exhibits attached to Mr. Miller's rebuttal testimony be stricken in their entirety. These exhibits, which were not referenced in the witness' testimony, are an attempt to improperly supplement the County's testimony rather than contradict, explain, or disprove specific testimony presented by Staff.

As a backdrop to the improper rebuttal exhibits, Staff would request that the ALJ refer to the pre-filed direct testimony of Staff witness Amber McGrath. Ms. McGrath's testimony details that Staff had requested additional information from the County and the information had not been provided by the filing date of Staff testimony. (McGrath, p 12). Additionally, Staff indicated it would continue to review the information as it was provided and "may supplement its testimony" with the additional information if necessary. (McGrath, p 12). Although requested on

May 21st and May 28th, the County did not provide any information to the Staff until June 6th. As there was no proof of service attached to the discovery or filed to the e-docket, it is Staff's belief that all the parties to this proceeding were not given an opportunity to review the answers to Staff's discovery request – and some of the documents provided as rebuttal exhibits. Moreover, the information previously provided to the Staff is not identical to what was attached to the rebuttal testimony.

Additionally, these exhibits were not provided to contradict or explain the Staff's testimony. Instead, these exhibits simply provided missing financial information that could have been previously provided. Review of Staff witness McGrath's testimony demonstrates that Ms. McGrath criticized the information provided by the County stating that: "My overall assessment of the financial information that has been filed by the five Counties is that it is incomplete. I am not able to verify the financial numbers that the Counties have provided. The errors and lack of information have raised serious concerns, and at this point, the financial data presented by the Counties is inaccurate and unreliable." (McGrath, p 12). The County now attempts to introduce new information, which corresponds directly to Staff's inquiries and critique of the evidence provided through rebuttal testimony. Staff takes exception to this tactic.

Not only do the County's rebuttal exhibits equate to improper rebuttal testimony, but it essentially amounts to providing information at the last minute prior to the scheduled cross-examination. By providing this information in this manner, the County has prevented Staff from fully analyzing the information as it

relates to the County's requested 9-1-1 surcharge. Moreover, the County's presentation of the aforementioned evidence for the first time in its rebuttal evidence prejudices the Staff and interveners. This information could have been provided as part of the County's direct testimony and as such should be stricken from the record in this matter.

Relief

For all of the reasons expressed above, Staff requests that its Motion to Strike be granted as to the identified portions of proposed rebuttal testimony and the rebuttal exhibits.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**

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Dated: June 17, 2013
15489/Mot to Strike Rebut Miller

ATTACHMENT

STATE OF MICHIGAN

IN THE MICHIGAN PUBLIC SERVICE COMMISSION
[On Remand from the Court of Appeals]

GRAND TRAVERSE, MONTCALM, DELTA,
HILLSDALE, HOUGHTON, DICKINSON,
CASS, CHIPPEWA, MENOMINEE, TUSCOLA,
CHEBOYGAN, EMMET, CHARLEVOIX,
SAGINAW, NEWAYGO, IONIA, GOGEBIC, OGEMAW
MACKINAC, ALPENA, GRAND TRAVERSE
and ALCONA COUNTIES

MPSC No. U-15489

ALJ Sharon L. Feldman

Claimants-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Respondents-Appellee.

REBUTTAL TESTIMONY OF RANDY MILLER

ON BEHALF OF HURON COUNTY

Douglas W. Van Essen (P33169)
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1 I. Introduction

2 Q. Please state your name and address?

3 A. I am Randy Miller, Director of the Huron County 911 Center, 250 Huron
4 Avenue, Bad Axe, Michigan 48413

5 Q. On whose behalf are you submitting this testimony?

6 A. I am a witness for Huron County.

7 Q. What is the purpose of this testimony?

8 A. I wish to rebut the testimony of Joshua J. McConkie and Amber McGrath of the
9 the Commission and Dave Piaesecki of AT&T.

10 Q. Mr. Piaesecki suggests that the "all device" state 911 surcharge
11 revenue should be taken into account when the Commission is evaluating
12 the reasonableness and necessity of the Counties' surcharge, do you agree?

13 A. No. ~~I don't see any indication of that in the statute. In fact, the County~~
14 ~~Commission, ELSC (now State 911 Committee) and for 2008 only, the~~
15 ~~are authorized or directed to evaluate the reasonableness and necessity~~
16 ~~of the operational surcharge based on the "allowable costs" to "implement,~~
17 ~~maintain, and operate the 911 system in the county." MCL §484.1401b~~
18 ~~and MCL §484.1401e. A 911 center is entitled to rely on the surcharge and~~
19 ~~most do. Moreover, I think Mr. Piaesecki has it backwards. The state 911~~
20 ~~surcharge allocations to the counties are in the form of grants for specific~~
21 ~~purposes. If—and I don't think this would ever happen—Huron's operational~~
22 ~~surcharge were ever to exceed its reasonable and necessary operational and~~
23 ~~and capital needs, under MCL §484.1401b, the state would not fund a grant~~

1 to ~~Huron County and could use the state 911 funds elsewhere~~. That is the
2 their point. The purpose of the operational surcharge was to bring stable
3 funding to each county, independent of application for, review of and award
4 of a state grant—all of which is discretionary and optional by non Huron County
5 officials.

6 **Q. Mr. Piaesecki testifies that Huron had a carry over funding of \$799,853 in**
7 **2011, is that true?**

8 A. No. I don't know how that number popped up into the State 911 Committee's
9 Report to the Legislature for 2011, but Huron County 911 has not carried over
10 any operational surcharge funding and any carryover in state 911 grant funds
11 would only pertain to the purpose of that grant.

12 **Q. Mr. Piaesecki testifies that historically Huron has received a high voter**
13 **authorization of \$3.61 and this should be taken into account, is this fair?**

14 A. I don't understand the point. That high landline surcharge is reflected in our
15 2007 revenues and shows how dependent Huron is on the surcharge. With the
16 all device surcharge of \$2.23 we were merely trying to maintain our dependence
17 on the surcharge at a lower level than historically has been levied on just the
18 landline. We think the legislature's recognition of the old surcharge through its
19 use of the 2007 rates plus an effective 5.4% per annum is a reflection of the fact
20 that it intended that rate to be a starting point.

21 **Q. Ms. McGrath is critical that Huron's audited expenditures are not**
22 **included, what is your response?**

1 A. Huron County's Comprehensive Annual Financial Report has less detail than
2 than our Transaction Listing Report, but the two are reconciled and are attached
3 as Exhibit A. I believe they are materially consistent with what we report to
4 the state 911 committee and any difference is due to the different dates on which
5 they are prepared. 2012's CAFR, for instance, is not out yet

6 **Q. Ms. McGrath says your 2010 annual operating expenditure figure had a**
7 **typo. Is she correct?**

8 A. Yes The correct number—as confirmed by the State 911 Committee report is
9 \$980,613.00.

10 **Q. She is also critical that you don't have itemized quotes for your capital**
11 **needs.**

12 A. I have provided in Exhibit B the quotes we have gathered. It is difficult
13 to convince a vendor on very large capital items to undertake the hours to make
14 such a quote when the proposed customer cannot afford to buy the equipment.
15 Thus, in certain instances, I had to ballpark the cost figure given my discussions
16 with vendors We have done the best we can under these circumstances.

17 **Q. Mr. McConkie asserts that you under-estimated what the \$2.23**
18 **surcharge would generate in your 2008 projections, is this true?**

19 A. Of course. It would not be prudent to over project revenue. This criticism
20 is unfair. Neither the MPSC nor the ETSC ever suggested that the all device
21 projections that we were asked to submit would be caps. In fact, we actually
22 projected \$439,960 (\$879,920 annually) for 6 months in 2008. Had Huron
22 considered that projection to be a fixed cap, we would have projected

1 much higher, consistent with our need.

2 **Q. What was the County trying to do with the \$2.23 surcharge?**

3 A. Maintain our dispatch center using the operational surcharge as our funding
4 source as we had always done. Given our capital needs, it will be many years
5 if ever that we will not have to bill the full \$2.23.

6 **Q. Is the County insistent on receiving its retroactivity?**

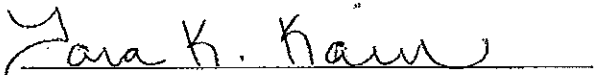
7 A. Yes. In the time that this case has taken, our county has lost substantial
8 revenue that could have increased staffing to normal levels for a center
9 our size, has deferred capital equipment that needs to buy now and will buy
10 now if we can be assured of getting retroactivity and to ease the burden
11 on the general fund that has been overly taxed because we were denied
12 what we should have been entitled to during those years.

13 **Q. Does this conclude your rebuttal testimony?**

14 A. Yes, it does.


Randy Miller

Subscribed and sworn to before me, a notary
public, on this 12th day of June, 2013.


Notary Public in Huron County,
acting in Huron County, Michigan
My commission expires: 6-22-2015

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

TINA L. BIBBS, being first duly sworn, deposes and says that on **June 17, 2013**, she served a true copy of the **MICHIGAN PUBLIC SERVICE COMMISSION STAFF’S MOTION TO STRIKE PREFILED REBUTTAL TESTIMONY AND EXHIBITS OF HURON COUNTY WITNESS RANDY MILLER and NOTICE of HEARING** upon the following parties **VIA E-MAIL** only:

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TINA L. BIBBS

Subscribed and sworn to before me
this **17th** day of **June, 2013**.

Pamela A. Pung, Notary Public
State of Michigan, County of Clinton
Acting in County of Ingham
My Commission Expires: 05/07/2018