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June 1, 2009

Mary Jo Kunkle
Michigan Public Service Commission
6545 Mercantile Way
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Re: In the matter, on the Commission's own motion, to to initiate a contested case proceeding involving Consumers Energy Company, Michigan Consolidated Gas Company, Michigan Gas Utilities Corporation, and Semco Energy Gas Company to investigate whether any clarifications, revisions, or additions should be made to certain approved gas customer choice tariffs
MPSC Case No. U-15929

Dear Ms. Kunkle:

Attached for electronic filing in the above-captioned matter is Michigan Consolidated Gas Company's Motion To Dismiss Contested Case Proceeding And Establish Informal Discussion Group and a Proof of Service.

Very truly yours,

**Richard P.
Middleton**

Richard P. Middleton

Digitally signed by Richard P. Middleton
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Attachments
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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to	)	
to initiate a contested case proceeding involving	)	
CONSUMERS ENERGY COMPANY, MICHIGAN	)	
CONSOLIDATED GAS COMPANY, MICHIGAN	)	Case No. U-15929
GAS UTILITIES CORPORATION, and SEMCO	)	
ENERGY GAS COMPANY to investigate whether	)	
any clarifications, revisions, or additions should be	)	
<u>made to certain approved gas customer choice tariffs.</u>	)	

**MICHIGAN CONSOLIDATED GAS COMPANY'S
MOTION TO DISMISS CONTESTED CASE PROCEEDING
AND ESTABLISH INFORMAL DISCUSSION GROUP**

Michigan Consolidated Gas Company ("MichCon" or "Company") submits this motion pursuant to Rule 335 of the Rules of Practice and Procedure before the Commission (R 460.17335) and requests that the Michigan Public Service Commission ("Commission" or "MPSC") issue an Order dismissing the above docketed contested case proceeding and in its place establish an informal discussion group.

I. INTRODUCTION

On April 16, 2009 the Commission in its Order approving a settlement agreement in Case Nos. U-15509 and U-15577 ("April Order") established this docket for the purpose of commencing :

". . . **a contested case** for the limited purpose of determining whether any clarifications, revisions, or additions should be made to Sections F2 (Residential Customer Protections), F3 (Solicitation Requirements), F4 (Supplier Registration and Code of Conduct), and the Minimum Term paragraph of Gas Customer Choice Rate CC of Section F (Customer Choice Program.)" (April Order, p. 7, Emphasis added)

According to the Commission's order "Consumers Energy Company, Michigan Consolidated Gas Company, Michigan Gas Utilities Corporation, SEMCO Energy Gas Company (MPSC and

Battle Creek Divisions), and the Staff are directed to participate in this case”.¹ In addition to these utilities the Commission also invites “all other interested persons” to participate and to “recommend changes to the sections of the gas customer choice tariffs specifically identified above that they believe are in the public interest”.² In essence, the Commission in its Order approving a settlement agreement solely between Staff and an alternative gas choice supplier, seeks to compel specific utilities to participate in a new contested case docket designed to modify the utilities non-rate making customer choice tariffs even though none of the named utilities has proposed to make any modifications to these tariff provisions nor were any of these utilities parties to Case Nos. U-15509 and U-15577. The Commission’s Order establishing a contested case proceeding should be dismissed because initiating such a case exceeds the statutory authority granted to the Commission, and violates the requirements of the Administrative Procedures Act (“APA”) MCL 24.201 et.seq.

II. ARGUMENT

In support of its Motion to Dismiss Michigan Consolidated Gas Company (“MichCon”) states as follows:

1. The Public Service Commission has no common-law powers. It possesses only that authority granted by the Legislature.

“It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. *Union Carbide*, 431 Mich.at 148-149.

The Michigan Supreme Court has strictly construed the statutes which confer power on the Commission. As explained in *Union Carbide*, *supra* at 151, quoting *Mason Co Civil Research Council v Mason Co*, 343 Mich. 313, 326-327; 72 N.W.2d 292 (1955): “The power and authority

¹ April Order, p. 7.

² Id.

to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." In this case the source of the Commission's authority to order this contested case proceeding must come from an express grant of statutory authority.

2. MCL 460.6 does not contain the requisite express grant of authority to conduct this contested case proceeding. The Michigan Supreme Court examined MCL 460.6 in Consumers Power v Michigan Public Service Commission, 460 Mich 148, 1999 and determined that this statutory provision did not provide the Commission with the authority to require utilities to provide a customer choice program. Specifically the Court found as follows:

"The PSC next asserts that § 6 of the public service commission act, [HN12] MCL 460.6; MSA 22.13(6), grants it broad [**133] authority over all matters pertaining to public utilities, including the power to order retail wheeling. This Court has consistently held, however, that the broad language of § 6 serves as an outline of the PSC's jurisdiction, not a grant of specific powers. [HN13] The broad language [of § 6] furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards . . . , but there would have been no need whatever for the many statutes enacted (both before and after the effective date of PA 1939, No 3) vesting specific powers in the commission. [*Huron Portland Cement, supra* at 263. ⁹] "The [HN14] legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Livonia v Dep't of Social Services*, 423 Mich. 466, 502; 378 N.W.2d 402 (1985), quoting *Dep't of Natural Resources v Seaman*, 396 Mich. 299, 308; 240 N.W.2d 206 (1976). The statute must contain sufficient standards so as not to "leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials." 396 Mich. at 308-309.

[***17] [*161] We adhered to this construction of § 6 in *Union Carbide, supra* at 147. Since the PSC has only those powers granted by statute and § 6 furnishes no grant of specific powers, § 6 provides no support for the PSC's order in this case.

Thus, MCL 460.6 provides no specific grant of authority to order a gas customer choice program. In addition to the lack of specific authority to require implementation of a choice program, there is also no express Commission authority to issue a sua sponte order requiring MichCon to participate in a contested case proceeding to change non-rate making gas choice tariffs that the Company has voluntarily implemented. As the Court found in *Consumers Power v PSC, Supra*, which is directly applicable to this case,

The PSC initially characterizes its retail wheeling program as ratemaking, thus falling within its authority under § 7 of the electric transmission act, *MCL 460.557*; MSA 22.157, and § 22 of the railroad commission act, *MCL 462.22*; MSA 22.41. See also *MCL 460.6a*; [*158] MSA 22.13(6a). The challenged portion of the order does not, however, involve ratemaking. Although retail wheeling has a ratemaking component, i.e., the establishment of the rate a third-party provider must pay to transmit power through a local utility's system, appellants do not challenge that aspect of the experimental program. Instead, appellants contend that the PSC cannot order local utilities to transmit electricity from a third-party provider's system through its own system to an end-user. This aspect of retail wheeling is simply not ratemaking.

There is no rate making involved in this case and no authority has been given by the legislature in MCL 460.6 allowing the Commission to conduct this proceeding. Where there is no authority to require the implementation of a gas choice program there can likewise be no authority to require changes to a voluntarily implemented choice program.

3. Subsequent to the Courts decision in *Consumers Power v PSC*, a number of amendments to 1939 PA 3 MCL 460.1 et. seq. have been enacted. While certain amendments have provided the Commission with specific grants of authority to regulate electric choice programs, none of these amendments pertain to gas choice programs. Specifically, 2000 PA 141 added the following statutory provisions expressly describing the purpose and scope of this new statutory authority:

MCL 460.10 states in pertinent part:

- (1) Sections 10 through 10bb shall be known and may be cited as the customer choice and **electric** reliability act’.
- (2) The purpose of sections 10a through 10bb is to do all of the following:
 - (a) To ensure that all retail customers in this state of **electric** power have a choice of **electric** suppliers.
 - (b) To allow and encourage the Michigan public service commission to foster competition in this state in the provision of electric supply and maintain regulation of **electric** supply for customers who continue to chose supply from incumbent electric utilities. (Emphasis added)

MCL 460.10a (1) states in pertinent part:

No later than January 1, 2002, the commission shall issue orders establishing rates, terms, and conditions of service that allow retail customers of an **electric** utility or provider to chose an alternative **electric** supplier.(Emphasis added)

In October 2008, the legislature amended 2000 PA 141. MCL 460.10 remained in its initial form, but MCL 460.10a (1) was amended and states:

“The commission shall issue orders establishing rates, terms, and conditions of service that allow retail customers of an **electric** utility or provider to choose an alternative electric supplier.”

Although other sections of 2000 PA 141 besides MCL 46010a (1) were also amended, none of these amendments changed the purpose set forth in MCL 460.10 which is, “To ensure that all retail customers in this state of electric power have a **choice of electric suppliers**”.(Emphasis added) None of these amendments made the provision of gas customer choice mandatory, or in any other way created an express grant of authority under which the Commission could order a gas utility to create, or modify a voluntarily implemented gas customer choice program or its associated tariffs. None of these amendments modified the relevant statutory provisions governing the regulation of natural gas utilities, and therefore did not change the legal precedent established in *Consumers Power v PSC* wherein the Court found that the Commission had not been granted the authority to require utilities to implement customer choice programs.

4. 2002 PA 634 amended 1939 PA 3 adding Section 9b; MCL 460.9b which requires alternative gas suppliers participating in a natural gas choice program to request a license from the Commission. MCL 460.9b states that:

“(1) The commission shall issue orders establishing a licensing procedure for all alternative gas suppliers participating in any natural gas customer choice program approved by the commission. An alternative gas supplier shall not do business in this state without first receiving a license under this act.

(2) An alternative gas supplier shall maintain an office within this state.

(3) The commission shall assure that an alternative gas supplier doing business in this state has the necessary financial, managerial, and technical capabilities and require the supplier to maintain records that the commission considers necessary.

(4) The commission shall require an alternative gas supplier to collect and remit to state and local units of government all applicable users, sales, and use taxes if the natural gas utility is not doing so on behalf of the supplier.”

This statutory provision extends Commission jurisdiction to licensing of alternative gas suppliers. Nothing in this language expressly or impliedly grants the Commission the authority to require a utility to provide a gas choice program or grants the Commission the authority to order changes to a voluntarily implemented gas choice program. It simply allows licensing of entities that wish to participate in a voluntarily implemented utility choice program. As with the previously discussed statutes, the alternative gas supplier licensing provisions of 1939 PA 3 do not provide an express grant of authority to the Commission to require a utility to implement a gas choice program nor does this language provide the Commission with an express or implied authority to mandate changes to voluntarily implemented gas choice programs.

5. Gas Choice programs have since their inception been voluntary programs that the utilities filed with the Commission. These filings did not seek Commission approval of whether or not the utilities could implement the proposed gas choice program, but rather as an accommodation to allow the Commission to review for consistency the tariff provisions in all

choice programs that various utilities were implementing throughout the State. This process also provided the Commission an opportunity to suggest changes that each utility was free to adopt or reject. This process did not change the laws that define the regulatory authority of the Commission, because that authority remains within the exclusive province of the Legislature.

6. Even if the Commission had the express authority to conduct a proceeding to adjudicate tariff changes to voluntarily implemented gas choice programs which it does not, the APA does not allow such matters to proceed as a contested case. Simply put, the proceeding in this matter was not properly initiated by the PSC as a "contested case" as defined by the APA. The PSC must promulgate rules "for the conduct of its business and the proper discharge of its functions" to the extent it intends to make its policies binding on "all persons dealing with the commission or interested in any matter or proceedings pending before it" *MCL 460.55* A "contested case" is defined by the APA as "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." *MCL 24.203(3)*. As discussed previously, the Supreme Court has determined that mandating that utilities implement choice programs does not involve rate making³. As in the Consumers Power case this proceeding was clearly neither a rate case, *MCL 460.1 et seq.*, nor an investigation of rates upon complaint, *MCL 460.58*. Indeed, the Commission has initiated this proceeding unilaterally for the sole purpose of reviewing and revising its existing tariffs regarding voluntarily implemented gas choice programs, not to set or review rates. Thus, there is no lawful justification for invoking a contested case, and this proceeding is invalid as a matter of law.

³ *Supra*. Consumers Power v PSC 460 Mich 148 (1999)

The PSC's order initiating this contested case listed certain named utilities that were obligated to participate in a contested case proceeding. The fact that more than one utility was named clearly indicates that this proceeding cannot be a contested case as defined by the APA because this case will not set rates or review rates of a single named party. Rather the proceeding proposed by the Commission appears to be an impermissible attempt to establish Commission policy that it wishes to make binding on all utilities that have voluntarily implemented gas choice programs. Moreover, the Commission did not limit this contested case to the named utilities, but also invited “all other interested persons” to participate and to “recommend changes to the sections of the gas customer choice tariffs specifically identified above that they believe are in the public interest”.⁴

Presumably it is the Commission’s intent for any individuals, or entities that chose to intervene in the proceeding to become a “party” as defined by the APA, *MCL 24.205(4)*, formally *MCL 24.205(4)* before enactment of 1999 PA 262, effective April 1, 2000, and the PSC's own rules of practice and procedure, 1999 AC, R 460.17101(f). However to invoke a contested case in the first instance requires that all parties be named parties. These intervening individuals and entities will not become "named" parties as required by *MCL 24.203(3)*, and thus, because "the legal rights, duties, or privileges of a named party" were not determined, this proceeding cannot be a contested case. In *Michigan Gas and Electric Association v Public Service Commission*, 252 Mich App 254, 2002 the Michigan Court of Appeals reached the identical conclusion under facts very similar to the instant case when the Commission improperly conducted a contested case proceeding with the intent of establishing affiliate guidelines applicable to all utilities in Michigan. Specifically, the Court in that case held that the

⁴ April Order, p. 7

proceeding was not properly initiated by the PSC as a "contested case" as defined by the Administrative Procedures Act, *Mich. Comp. Laws § 24.201 et seq.*⁵

7. While it is clear that the Commission has no authority to conduct its intended contested case proceeding, MichCon recognizes that its gas choice program can benefit from engaging in informal discussions with interested alternative choice providers. MichCon has always endeavored to have its gas choice program work as efficiently as possible for the utility, alternative choice suppliers, and customers. This has been accomplished through proactive voluntary communications between MichCon, customers, alternative choice suppliers and the Commission Staff. As a result of these discussions, MichCon has voluntarily proposed the implementation of changes to its choice tariffs in the past⁶. MichCon asserts that this interactive, but voluntary, discussion process should replace the Commission's contested case proceeding. The Commission's role as adjudicator of a contested case matter being properly and lawfully replaced with a role as facilitator of the informal discussions on the same gas choice tariff issues the Commission identified in its Order establishing this docket.

8. MichCon requests that the Commission grant this Motion to Dismiss and initiate an informal process that will allow utilities, alternative choice suppliers and other interested parties engage in a collaborative discussion on the specific choice tariff provisions identified in the Commission's order. If a collaborative process is established MichCon is prepared to voluntarily propose changes to the following choice tariff provisions;

- i. Section F2 (Residential Customer Protections)
- ii. Section F3 (Solicitation Requirements)

⁵ In 252 *Mich App* 254 the Court determined that unless a proceeding involves rate-making, price-fixing, or licensing, in which a determination of the legal rights, duties, or privileges of a named party will be adjudicated it is not a contested case as defined by the APA.

⁶ See Case No. U- 15215, Order issued May 22, 2007 adopting consensus gas choice tariff changes indentified during collaborative discussion and subsequently voluntarily implemented by gas utilities.

- iii. Section F4 (Supplier Registration and Code of Conduct) and
- iv. Section F (The Minimum Term paragraph of Gas Customer Choice Rate CC)

A specific schedule for this collaborative should be established to ensure that any reasonable and appropriate improvements are implemented as soon as practical pursuant to a Company application filed with the Commission indicating MichCon's willingness to implement such modifications.

9. The pre-hearing in this matter is scheduled for June 9, 2009. If this matter proceeds as a contested case only to be later deemed unlawful and therefore moot, the scarce resources of the Commission, its Staff and all of the parties participating would have been wasted. Therefore, MichCon requests that the Commission give this motion immediate consideration.

WHEREFORE Michigan Consolidated Gas Company respectfully requests that the Commission grant this motion to dismiss, and request that the named utilities, alternative gas choice suppliers and other interested parties engage in informal collaborative discussions which the utilities can use to identify gas choice tariff changes that will improve their respective gas choice programs, and that the utilities can subsequently voluntarily implement.

MICHIGAN CONSOLIDATED GAS COMPANY

By: **Richard P.
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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to)
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CONSUMERS ENERGY COMPANY, MICHIGAN)
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ENERGY GAS COMPANY to investigate whether)
any clarifications, revisions, or additions should be)
made to certain approved gas customer choice tariffs.)

Case No. U-15929

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Jennifer Evans, being duly sworn, deposes and says that on the 1st day of June, 2009, she served a copy of Michigan Consolidated Gas Company's Motion To Dismiss Contested Case Proceeding And Establish Informal Discussion Group along with a Proof of Service upon the attached service list via electronic mail.

Jennifer Evans

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Jennifer Evans

Subscribed and sworn to before
me this 1st day of June, 2009

Karyn Beth Teal

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Notary Public

MPSC Case No. U-15929
June 2009

ADMINISTRATIVE LAW JUDGE

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