

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of  
**CONSUMERS ENERGY COMPANY**  
for authority to increase its rates for the  
generation and distribution of electric and  
for other relief.

Case No. **U-17087**  
(e-file/paperless)

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**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S REPLY BRIEF  
PURSUANT TO THE COMMISSION'S ORDER ISSUED JANUARY 19, 2016**

In accordance with the briefing schedule set by the Commission in its order issued on January 19, 2016, the Michigan Public Service Commission files this reply brief in response to the briefs filed by the Residential Customer Group (RCG), the Attorney General, and Consumers Energy. Failure to address any party's assertion should not be construed as acquiescence to that position.

**I. Reply to the Residential Customer Group**

Many of the Residential Customer Group's positions in its brief are recycled arguments that have been previously rejected numerous times by the Commission and the Court of Appeals. Therefore, the Commission should similarly reject those same recommendations put forth by the RCG in its remand brief.

To begin, the first question posed by the Commission in its January 19 Order was "whether the April 30 Order requires the Commission, in the contested case, to address issues other than clarification of the purpose and nature of the opt out tariff." Order, p. 3. In response, the RCG states that the following additional issues

should be considered: 1) the scope and limitations of the Commission's jurisdiction as it relates somehow to the purported expansion of "monopoly powers" by the utility; 2) the protection of customers' constitutional rights and, 3) previously rejected alternatives to the opt-out tariff proposed by the RCG. The RCG is incorrect.

Regarding the "scope and limitations" of the Commission's jurisdiction and the notion of an "expansion of monopoly powers," it is tempting to avoid delving too deeply into the RCG's completely unsubstantiated claims and simply move on. Yet, the RCG's attempt to "throw everything at the wall and see what sticks" must be briefly addressed. The Commission simply approved AMI deployment and related cost recovery, nothing more. The RCG has not demonstrated that the approval of AMI cost recovery was tantamount to "making control of energy consumption within a residence within the control of the utility." *See RCG Brief, p. 2.* Simply making this allegation absent any convincing evidence, whatsoever, in any docket, anywhere, does not somehow mandate that the Commission review the scope and limitation of its jurisdiction as it relates to one of its most basic functions: approval of cost recovery.

Next, the RCG asserts that the Commission must consider the protection of constitutional rights of the customer as it relates to privacy and health, safety and welfare. *RCG brief, p. 2.* Again, the RCG skips multiple steps. Simply alleging that constitutional rights are at issue does not make it so. These allegations have been roundly rejected by the Commission and the Courts. For the constitutional

right to privacy to be at issue in this matter there must be some state action impinging on the customers' right to privacy. Yet, the RCG has demonstrated none. The Supreme Court of the United States determined that a public utility commission's approval of a tariff is not state action. *Jackson v Metro Edison Co*, 419 US 345, 357; 95 S Ct 449; 42 L Ed 2d 477 (1974). Thus, Consumers' approval of AMI-related cost recovery does not constitute state action. Furthermore, the Courts in Michigan have held similarly that a utility updating its infrastructure does not constitute state action. For example, in *In re Application of Detroit Edison Co to Implement Opt-Out Program*, unpublished opinion dated February 19, 2015, page 9, (Docket Nos. 316728 & 316781), the Court of Appeals stated:

“The Fourth Amendment applies only to government actions, and is not applicable to a search performed by a private actor not acting as an agent of the government. See *People v McKindrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991). Appellants have not established that the installation of either a transmitting or a non-transmitting AMI meter constitutes a search, or that even if it did, that DTE acts as an agent of the government.”

The fact that Commission approval of the AMI program and related cost recovery did not constitute state action implicating the 4<sup>th</sup> Amendment was again affirmed by the Court of Appeals in *Detroit Edison v Stenman*, 311 Mich App 367; \_\_\_ NW2d \_\_\_ (2015). Here, the Court stated further that,

“[e]ven if the state and federal governments have advocated or incentivized, as a matter of public policy, the use of smart meters, there is no indication that the government controls the operations of plaintiff, an investor-owned utility, or that plaintiff acts as an agent of the state or federal governments.” *Id.* at 11.

Additionally, the Commission itself reiterated these points in its November 19, 2015 Order in Case No. U-17735 where it stated:

“[t]he flaw in the RCG’s Fourth Amendment argument is its continued insistence that Commission approval of the AMI program and related opt-out tariff is the same as a Commission mandate. However, the Commission did not order Consumers to purchase AMI meters or install them on the homes and businesses of its customers. Consumers’ decision to implement AMI was a decision that the Commission took no part in. MPSC Case No. U-17735, Order, November 19, 2015, p. 124.

The RCG’s arguments regarding constitutional rights to privacy in the context of AMI deployment and cost recovery, are recycled, stale, and have been rejected previously multiple times. Simply repeating the same arguments in its remand brief does not constitute a sufficient reason for the Commission to change course and now consider these points.

Next, the RCG claims that to alleviate the imagined issues it presented regarding constitutionality and the limitations of the Commission’s jurisdiction the Commission should consider “regulatory modifications to the tariff terms and conditions.” RCG brief, p. 4. Yet, again, the RCG’s proposition has already been considered and rejected by the Commission. In regards to these “regulatory modifications,” the Commission stated in its Order in Case No. U-17735:

“[t]he Commission further agrees with Consumers that estimated reads and self-meter reading are not established utility practice and are not the preferred method of meter reading that the Commission requires in its rules. Estimated reads and instances where a customer reads their own meter and sends the reading to the utility via a postcard are the exception rather than the norm. The fact that other methods of reading a meter exist does not persuade the Commission that the opt-out fees and charges it approved in Case No. U-17087 are not cost-based. The RCG has supplied no contradictory evidence detailing how many opt-out customers are bypassing monthly meter reads. There is no evidentiary basis to alter the status quo by reducing or eliminating the opt-out fees and charges that the Commission approved in Case No. U-17087. Accordingly, the Commission finds

reasonable and adopts the PFD’s recommendation to continue the opt-out fees and charges it approved in Case No. U-17087.” *Id.* at 128.

The RCG has presented nothing which should persuade the Commission to consider additional issues beyond the clarification of the nature and purpose of the opt-out tariff.

Regarding the Commission’s second and third question posed in its January 19 Order, “whether the contested case should address solely the evidence on which the June 28 order was based or should provide for the filing of new evidence,” and “whether evidence filed in the intervening rate case regarding the opt-out tariff should be considered in the contested case,” the RCG answers “no” and “yes,” respectively. In support of the idea that new evidence should enter the record, the RCG incorrectly contends that the Commission’s orders in Case Nos. U-17000 and U-17102 were not legally binding and thus could not be relied upon. Yet, the Court of Appeals held that the Commission could rely on its previous determinations in Case No. U-17000. *In re Application of Detroit Edison Company To Implement Opt Out Program*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2015 (Docket Nos. 316728 and 316781). Consequently the Commission is not required to re-litigate health, safety and privacy issues decided in U-17000 and U-17102. The Court’s remand instructions do not contemplate Commission reconsideration of health, safety, and privacy issues in this proceeding. While Staff’s initial brief in response to the Commission’s January 19, 2016 Order supported the filing of new evidence, Staff reiterates that the filing of new evidence must be strictly limited to the parameters set by the Court in its remand, namely,

that the evidence should be limited to “clarify the purpose and nature of the opt-out tariff by addressing whether the tariff represents a reimbursement for costs of service, or whether the tariff constitutes something more akin to a tax, sanction, or penalty imposed upon customers who choose to opt out of the AMI program.” The Court was very clear in not counting health, safety, and privacy issue as matters to be considered in the remand proceeding.

While the RCG erroneously contends that the evidence presented in U-17087 in support of opt-out charges was too “weak” to be usable in this case, Staff and the Company presented ample evidence in the subsequent rate case on the ongoing opt-out charges approved in U-17087. The evidence presented by Staff and the Company in the next rate case effectively answered the questions posed by the Court of Appeals in its remand of Case No. U-17087. Therefore, Staff agrees with the RCG that evidence from the subsequent rate case should be considered. In the subsequent rate case, U-17735, witnesses from both Consumers and Staff presented evidence that describe the nature and purpose of the opt-out tariff and address whether the opt-out charges were duplicative. In essence, the testimony and evidence provided by the Staff and Company in U-17735 effectively and conclusively answer the questions posed by the Court of Appeals in its remand of U-17087. The Commission should consider this evidence in the remand proceeding.

## **II. Reply to Consumers Energy**

Staff disagrees with the Company regarding the issue of the standing of Michele Rison, et al, to intervene in the remanded proceeding. While Ms. Rison was not a party to the underlying rate case, U-17087 before the Commission, she was

granted standing to pursue her appeal of the opt-out tariff at the Court of Appeals, which resulted in that issue being remanded to the Commission. Additionally, she was granted intervention in the subsequent rate case, U-17735. Staff wishes to avoid a situation where the individual whose appeal resulted in the remand, and who litigated that same remanded issue in the subsequent rate case, be denied intervention in the very proceeding which is to address the issues she raised previously on appeal. Therefore, Staff recommends that if Ms. Rison files a petition to intervene in the remand proceeding that said petition be granted by the Commission.

Staff also disagrees with the Company's suggestion to delay the commencement of this remand proceeding. On page 10 of its remand brief, Consumers states,

“[i]n addition, the Company notes that the Commission may reasonably consider waiting to commence the remand ordered in Docket No. 317456 until the Court of Appeals considers and acts on the remand recently ordered by the Michigan Supreme Court in Supreme Court Docket No. 152263 and the Court of Appeals Docket No. 317434, which involves the Attorney General's AMI-related appeal of the June 28, 2013 Order in Case No. U-17087.” Consumers Brief, p. 10.

Staff maintains that the issues related to the opt-out tariff remanded to the Commission by the Court of Appeals and the Attorney General's challenge to AMI deployment remanded back to the Court of Appeals by the Supreme Court are sufficiently separate that no harm will result from the Commission proceeding with the opt-out remand while the AMI deployment remand remains pending at the Court of Appeals. Therefore, Staff believes that the Commission should not delay the commencement of the opt-out remand proceeding.

### **III. Reply to the Attorney General**

The Attorney General recommends that the Commission expand the scope of the remand proceeding in a manner congruent with the suggestions of Judge Peter D. O’Connell in his separate dissenting opinion attached to the July 22, 2015 Order denying the Commission’s motion for reconsideration. Importantly, Judge O’Connell’s dissenting opinion has no precedential effect and the Commission should not expand the scope of the remand proceeding beyond the explicit instructions in the Court’s April 30, 2015 Opinion.

In his dissenting opinion, Judge O’Connell suggested the Commission consider “health, safety and privacy issues” and the Attorney General’s request for the Commission to direct Consumers to suspend its AMI program. Yet, in that same Order denying the Commission’s motion for reconsideration, Judge Gadola wrote separately to “make clear to the parties that the scope of the remand from this Court remains as set forth in *In re Application of Consumers Energy to Increase Electric Rates*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2015 (Docket Nos. 317434; 317456).” Therefore, despite the Attorney General’s position that the scope of the remand be expanded to encompass Judge O’Connell’s suggestions, the scope of the remand remains as set in the Court of Appeals April 30, 2015 Opinion in *Attorney General v Public Service Comm.*

### **IV. Conclusion and relief requested.**

Staff respectfully requests that the Commission reject the RCG’s assertions that the scope of the remand proceeding be expanded to include the consideration of the Commission’s own jurisdiction to approve opt-out charges, constitutional issues,

and alternatives to an opt-out tariff. Further, Staff maintains that the Commission is not required to re-litigate issues pertaining to health, safety and privacy considered and decided in U-17000 and U-17102. While staff supports granting intervention to Michele Rison, et al, Staff urges the Commission to strictly limit the scope of the remand proceeding to only those issues specifically identified by the Court of Appeals in its April 30, 2015 Opinion.

Respectfully submitted,

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Dated: March 4, 2016  
17087/Remand Reply Brief

STATE OF MICHIGAN

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**PROOF OF SERVICE**

STATE OF MICHIGAN    )  
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COUNTY OF EATON    )

CORINNA C. SWAFFORD, being first duly sworn, deposes and says that on **March 4, 2016**, she served a true copy of **MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S REPLY BRIEF PURSUANT TO THE COMMISSION'S ORDER ISSUED JANUARY 19, 2016** upon the following parties **VIA EMAIL ONLY** as indicated on the attached Service List.

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CORINNA C. SWAFFORD

Subscribed and sworn to before me  
this **4th** day of **March, 2016**.

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Tina L. Bibbs, Notary Public  
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Acting in the County of Eaton  
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