NERC/MPSC Partnership Activity
June 28, 2011

Question: Are MPSC Commissioners expected to be independent umpires at hearings while licensees and Commission staff engage each other?

Answer: No. MPSC Commissioners are one step removed from the process of hearing cases.

- The Michigan Administrative Procedures Act, MCL 24.271-24.328, provides that contested cases are heard before an Administrative Law Judge or ALJ. The ALJ is the person who acts as an umpire at hearings, while licensees, complainants, utilities, the Commission staff, and others engage each other during the hearing.

- The ALJ may hear all types of cases, including rate cases, complaints by customers, and requests for licenses.

- Hearings are essentially like court cases, with all the typical rules regarding evidence. The ALJ enforces rules that govern what type of evidence can be presented, and what type of evidence is considered reliable.

- The ALJ is the ultimate fact finder. The ALJ determines whether witnesses seem like they are telling the truth. The ALJ makes findings about the facts, and then applies the law, to decide the case. The ALJ usually issues a written order deciding the case. Certain small matters may be decided orally from the bench.

- After the ALJ has issued an order, the matter moves to the Commission. At this point, all of the parties can submit briefs to the Commission, objecting to what the ALJ decided.

- The MPSC Commissioners do not enter the case at all until the ALJ has completed the case. The Commissioners act a bit like an appeals court, in the sense that they re-determine the case after the ALJ has made a decision. The Commissioners are free to disagree with the ALJ on every point. However, the Commissioners have usually not watched the testimony, and so they generally rely on the ALJ's determinations about whether witnesses are credible, and for most factual determinations.

- The Commissioners may take into account the arguments that are made in the briefs that object to the ALJ's decision. They may also consider their own outlooks on policy and the interpretation of the law. They may consider prior Commission orders and what they have decided previously, but they are not bound by what has been decided in old orders.

- An attorney in the Regulatory Affairs Division (RAD) of the MPSC will be assigned to draft the order that will be issued by the Commissioners. The assigned attorney will consider all of the arguments presented by the parties after the ALJ's decision, including arguments made by the parties who disagree with the decision, and arguments made by the parties who agree with the decision.

- The attorney will consider the evidence presented to the ALJ in the hearing, and the ALJ's evaluation of the evidence and the law. The attorney will consider all legal requirements that apply to the decision, and will draft a proposed order for the Commissioners to review. That is the point where the Commissioners become involved.

- The Commissioners may meet with one another, and/or with the attorney from RAD who drafted the proposed order, to discuss the issues that the parties are fighting over. At this point, the Commissioners engage with one another on the issues. They may revise the draft order in any way that they see fit.

- The majority of the time, all three Commissioners agree to sign a single order, and make a single decision. However, the Commissioners are allowed to disagree with one another, as long as at least two Commissioners agree on the outcome of the case. Thus, one Commissioner may choose to dissent from the order, or may choose to abstain from the order. The Commissioner who chooses to dissent or abstain may issue their own written decision, explaining their position, but they are not required to. A Commissioner may also concur in a decision, but for a reason different from the reason expressed in the order.

- An example of an order with three different positions taken by three different Commissioners is attached. This happens very rarely.

- Questions?

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.	)	Case No. U-16418

At the February 8, 2011 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Greg R. White, Commissioner

OPINION AND ORDER

On August 13, 2010, Consumers Energy Company (Consumers) filed a natural gas rate case seeking a $55.352 million rate increase and other forms of regulatory relief. The application relies on a 12-month projected test year ending December 31, 2011. A prehearing conference was held before Administrative Law Judge Sharon L. Feldman (ALJ) on September 9, 2010. At the prehearing conference, the petitions to intervene filed by the Association of Businesses Advocating Tariff Equity (ABATE), the Michigan Department of the Attorney General (Attorney General), and the Michigan Community Action Agency Association (MCAAA) were granted.[1] The Commission Staff (Staff) also participated in the proceedings.

[1]Intervention was also granted to the Midland Cogeneration Venture Limited Partnership, Retail Energy Supply Association, Lakeshore Energy Services, LLC, and Interstate Gas Supply, Inc.

On January 6, 2011, Consumers filed testimony and exhibits (including proposed tariffs) in support of a self-implemented rate increase of $48 million for service rendered on and after February 10, 2011, to be allocated through an equal percentage increase as specified in MCL 460.6a(1).[2] On January 25 and 26, 2011, ABATE and the Attorney General, respectively, filed motions for a temporary order preventing or delaying Consumers' proposed self-implementation of new rates. On January 26, 2011, MCAAA filed testimony in opposition to the proposed self-implemented tariffs. Also on January 26, 2011, the Staff filed a response to Consumers' proposed self-implemented tariffs.

On January 31, 2011, the ALJ conducted a hearing on the proposed self-implementation at which two witnesses presented testimony (on behalf of Consumers and the MCAAA) and were cross-examined.

On February 8, 2011, Consumers filed a letter with attachments, supporting a self-implemented rate increase of $29.5 million. The letter is not accompanied by testimony. Attachments 1 and 2 to the February 8, 2011 letter are intended to replace Exhibits SI-1 and SI-2.

Section 6a(1) of 2008 PA 286 (Act 286) sets out certain requirements and procedures for electric utility rate cases:

> If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. . . . For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges.

Section 6a(1) further provides that if the self-implemented rate exceeds the rate authorized in the final order, the excess shall be refunded to customers with interest. MCL 460.6a(1).

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[2]Consumers' gas rates do not require realignment.

In its motion, ABATE notes that the Commission may issue a temporary order preventing or delaying the utility from implementing its proposed rate. MCL 460.6a(1). ABATE argues that good cause exists, based on several factors. ABATE points out that on May 17, 2010 in Case No. U-15986, the Commission issued a final order in Consumers' last gas rate case authorizing a $65.9 million rate increase that has not been in effect for a full year, and has not been in effect even for a full winter heating season. ABATE contends that the effects of the $65.9 million rate increase and new pilot decoupling mechanism are not yet known. ABATE notes that the Staff and intervenors filed their direct testimony and exhibits on January 24, 2011, and that the Attorney General recommended a revenue deficiency of $400,000, and the Staff of $5.1 million. ABATE asserts that the Commission should prevent Consumers from implementing its proposed increase or, in the alternative, limit the amount to the $5.1 million recommended by the Staff.

ABATE argues that allowing the proposed self-implementation amounts to requiring ratepayers to loan Consumers approximately $43 million. ABATE notes that every self-implemented rate increase that has occurred since Act 286 was enacted has resulted in a refund because utilities consistently choose to self-implement more than final rate relief allows. ABATE points out that this loan would be forced upon ratepayers in the middle of the winter heating season, in the middle of a recession. ABATE maintains that there is no guarantee that the customers who will pay the self-implemented rates will either receive a refund or receive the correct refund, since refunds are always based on future months, and usage may vary substantially from the month that the rate increase was collected.

Finally, ABATE argues that the gap between the company's and the Staff's revenue deficiencies is so large, that if self-implementation takes place, resulting rates will not be just and reasonable, and will not be related to Consumers' cost of doing business.

The Attorney General also argues that good cause exists to prevent or delay the self-implemented rate increase, because most of Consumers' proposed increase relates to new costs that the company has not yet incurred, and because Consumers' request is significantly overstated.

MCAAA urges the Commission to deny any self-implemented rate increase, arguing that the Commission has traditionally rejected contentious issues in interim rate relief cases, such as the issue of rate of return. MCAAA notes that Consumers' proposed self-implemented increase contains "no downward adjustment to reduce the interim increase applicable to 'Cost of Capital.'" 2 Tr 59. MCAAA further argues that the rate increase should be denied because Consumers' current decoupler transfers all risk related to changes in sales from the utility to the ratepayers. MCAAA also contends that the vast difference between the company's and the Staff's recommended revenue deficiencies indicates that the utility's need for an interim increase is "de minimus or nonexistent." 2 Tr 61. MCAAA maintains that the Commission should at least delay any rate increase until the winter heating season is concluded because the state's low-income citizens and the agencies that aid them are already under great financial stress.

In its response, the Staff states that it "is not taking a position" on Consumers' proposed tariffs, but "would like to bring certain information to the Commission's attention as it considers whether there is good cause to prevent or delay" the proposed increase. Staff's response, p. 1. Like the Attorney General, the Staff argues that the proposed self-implementation will require ratepayers to pre-pay for Consumers' future capital investments. The Staff points out that $30 million of the proposed $55.352 million revenue deficiency is attributable to capital improvements. 2 Tr 84. The Staff notes that Consumers states that it plans to spend $280 million on capital improvements in the 2011 test year. Of that amount, the Staff calculates that $81 million will be spent between September and December of 2011, after a final order has been

issued in this case. The Staff notes that although these amounts will not have been spent yet, the self-implemented rates that will be charged between February and August of 2011 will have included these expenses. The Staff contends that ratepayers do not benefit by advancing cash to the utility, and ratepayers would receive the same benefit from the improvements if the improvements were not built into expenses until the final order issues in August 2011.

The Staff further notes that the difference between the company's and the Staff's revenue deficiency recommendations is the greatest that it has been, percentage-wise, since the enactment of Act 286. The Staff states that Consumers' refund of prior self-implemented rates in Case No. U-16441 will not be complete until the end of February (barring further residual amounts), thus potentially allowing Consumers to begin collecting a new self-implemented rate before it has even completed refunding overcollections from the last self-implemented rate. The Staff argues that "good cause" has been found to be "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *In re Utrera,* 281 Mich App 1, 10-11; 761 NW2d 253 (2008). The Staff also notes that gas utility rates must be just and reasonable. *See,* MCL 460.6a(1), 460.54.

Discussion

Prior to the enactment of Act 286, existing rates were conclusively deemed to be just and reasonable, and any unapproved rate increase implemented *ex parte* was conclusively unreasonable and unlawful. *Northern Michigan Water Co v Public Service Comm,* 381 Mich 340, 352-353; 161 NW2d 584 (1968). Act 286 radically revised the regulatory paradigm by authorizing utilities to simply file and use a new tariff 180 days after the filing of a rate case. However, the Legislature built an important safeguard into this authority. The new tariff may be used only absent "good

cause" for the Commission to issue an order preventing or delaying implementation of the proposed rate. MCL 460.6a(1).

Act 286 provides no definition of "good cause." Thus, the Commission may consult a dictionary and case law to ascertain its meaning. *Utrera,* 281 Mich App at 10; *Consumers Power Co v Dep't of Treasury,* 235 Mich App 380, 385; 597 NW2d 274 (1999). Black's Law Dictionary (8th ed.) defines good cause as "[a] legally sufficient reason." In defining good cause as used in the Michigan Court Rules, the Michigan Court of Appeals has found it to mean "a legally sufficient reason," and "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *Utrera,* 281 Mich App at 10-11; *Richards v McNamee,* 240 Mich App 444, 451-452; 613 NW2d 366 (2000). In applying principles of statutory interpretation, the primary goal of a court is to discern and give effect to the drafter's intent. *Richards,* 240 Mich App at 451. "When reviewing the circumstances of a given case to determine whether good cause exists, this Court seeks to effectuate the Legislature's intent." *Franchise Management Unlimited, Inc. v America's Favorite Chicken,* 221 Mich App 239, 247; 561 NW2d 123 (1997). The legislative history of Act 286, as represented by both the House Fiscal Agency Legislative Analyses and the Senate Fiscal Agency Bill Analyses, sheds no light on the meaning of "good cause," but does note that "The bill would retain a requirement that the utility place in evidence facts relied upon to support its petition or application to increase rates and charges." Senate Fiscal Agency Bill Analysis, HB 5524 (H-3), June 4, 2008, p. 3 of 17. Thus, the Commission, in determining whether good cause exists to prevent or delay self-implementation of new rates, will look to whether the utility has supported its application for a rate increase and its self-implementation filing, and will examine whether a legally sufficient or substantial reason for prevention or delay exists.

The Commission finds that, under the circumstances, there is good cause to delay the self-implementation of a $29.5 million rate increase that would otherwise take effect on February 10, 2011. Consumers' February 8 letter is unaccompanied by any testimony, and clearly conflicts with the testimony of Ronn J. Rasmussen, Vice President of Rates and Regulations for Consumers, previously filed in support of the $48 million rate increase. Mr. Rasmussen's testimony had been relied upon by the intervenors, the Staff, and the Commission, in evaluating the self-implementation proposal in light of the issue of good cause. For example, it is now not clear what percentage of the $29.5 million proposed rate increase is applicable to capital improvements and to other costs. *See,* 2 Tr 84. In light of the changed circumstances, the Commission finds it appropriate to delay Consumers' right to self-implement a rate increase at this time in order for the other parties to the proceeding to respond to the February 8 filing, and the company should be given an opportunity to reply. To that end, the Commission finds that all parties to this proceeding may file a response to Consumers' February 8 tariff filing no later than 5:00 p.m. on February 22, 2011, and Consumers may file a reply to the responses no later than 5:00 p.m. on March 1, 2011. The Commission will thereafter make a further determination on self-implemented rates.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's request to implement the tariffs filed on February 8, 2011, is delayed for good cause as set forth in the order.

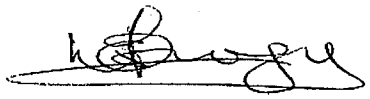
B. All parties to this proceeding may file a response to Consumers Energy Company's February 8, 2011 tariff filing no later than 5:00 p.m. on February 22, 2011.

C. Consumers Energy Company may file a reply to the responses no later than 5:00 p.m. on March 1, 2011.

The Commission reserves jurisdiction and may issue further orders as necessary.

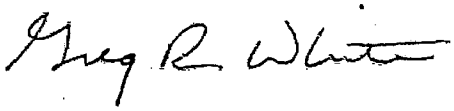
Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION



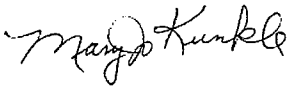
Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner, dissenting in a separate opinion.



Greg R. White, Commissioner, concurring in a separate opinion.

By its action of February 8, 2011.



Mary Jo Kunkle, Executive Secretary

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 distribution of natural gas and for other relief.	)))))	Case No. U-16418

DISSENTING OPINION OF
COMMISSIONER MONICA MARTINEZ

(Submitted February 8, 2011)

I write separately because I do not support the delay of self-implementation of natural gas rates in this matter.

Until now, the Commission has declined to delay self-implementation, as good cause to do so has not arisen. I believe that good cause is not present in this case. In enacting 2008 PA 286, the Legislature gave the Commission discretion in determining good cause, presumably based on the Commission's general and specific knowledge and expertise in the ratemaking arena. In crafting the provision pertaining to self-implementation, the Legislature lifted the burden previously placed upon the utilities to request an interim rate increase, and instead provided that, first and foremost, utilities may exercise the option to self-implement new rates unless the Commission finds good cause exists to not immediately allow such option to be exercised. Furthermore, the Legislature contemplated that diverse scenarios would arise under this new regime, and addressed potential problems associated with consecutive rate case filings by adding provisions that prohibit companies from filing multiple cases within a certain set period, and by establishing a refund mechanism to correct for self-implementation rate amounts above and beyond what is finally

approved. I do not find that the timing and evidentiary issues cited in the majority opinion amount to good cause, as the Legislature crafted provisions with these issues in mind.

I note that this is not the first case in which a revised self-implementation proposal has been presented at the last minute. Indeed, such a proposal to reduce the self-implemented increase was previously accepted by the Commission in Case No. U-16191. Unfortunately with self-implementation proceedings, the Commission must rely on the initial submission of parties without a true opportunity for intense inquiry and scrutiny into the merits of the parties' positions. In fact, in making a determination on self-implementation, the Commission must make a decision while remaining open to further facts and findings within the case as the administrative process forges down its path, in order to prevent prejudging the case. Therefore, it is my belief that decisions to prevent or delay self-implementation must not be arbitrary or done to lengthen the administrative process, but rather must be based on a finding such as gross error, or inconsistency with generally held regulatory practice.

MICHIGAN PUBLIC SERVICE COMMISSION

Monica Martinez

Commissioner, Monica Martinez

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.	)))))	Case No. U-16418

CONCURRING OPINION OF COMMISSIONER GREG R. WHITE

(Submitted February 8, 2011 concerning order issued on same date.)

I support the majority's decision to delay Consumers' proposal to self-implement new rates in the annual amount of $29.5 million, effective for service rendered on and after February 10, 2011, as proposed by the company in a filing made this morning, the day of the regularly scheduled Commission meeting, wherein the Commission had properly posted the agenda, including notice of an order in this case. The company explains that the reduction in self-implemented rates, from its original proposal of $48 million, was in response to concerns of the other parties in the case. These parties filed their responses to Consumers original self-implementation proposal on January 26, 2011 and a hearing on the proposal was conducted on January 31, 2011.

I submit this concurrence to express my concerns about Consumers' practice of filing revised self-implementation proposals, at the eleventh hour, after an apparent epiphany that its proposed self-implemented rates are too high. I note that Consumers also proposed a reduction to its self-implemented rates on the day the Commission intended to issue an order addressing those rates in the company's last electric rate case, Case No. U-16191. In that instance, Consumers had proposed on June 28, 2010, to self-implement the full amount of its rate increase of $178 million,

only to revise the request to $150 million, a matter of hours before the Commission's scheduled meeting.

In the future, I recommend that the company determine the amount that it truly believes it needs the Commission to consider under self-implementation, well in advance of the deadline for the Commission's decision on self-implementation, rather than revising its proposal for self-implemented rates at the last minute, after the parties to the case have reviewed and analyzed the original proposal.

MICHIGAN PUBLIC SERVICE COMMISSION

Greg R White

Commissioner, Greg R. White