At the June 28, 2018 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
          Hon. Norman J. Saari, Commissioner
          Hon. Rachael A. Eubanks, Commissioner

ORDER ON REHEARING

On March 31, 2017, Consumers Energy Company (Consumers) filed an application seeking authority to increase rates for the generation and distribution of electricity and requesting other regulatory approvals.

Administrative Law Judge Sharon L. Feldman held a prehearing conference on May 9, 2017, where petitions to intervene filed by the Michigan Department of the Attorney General (Attorney General), the Michigan Environmental Council and the Natural Resources Defense Council (MEC/NRDC), and the Residential Customer Group (RCG), among others, were granted. The Commission Staff (Staff) also participated.

On March 29, 2018, the Commission issued an order (March 29 order) authorizing Consumers to increase its rates by $65,753,000 above the rates approved in the February 28, 2017 order in Case No. U-17990.
On April 27 and 30, 2018, Consumers and the RCG, respectively, filed petitions for rehearing. On May 17, 2018, the Attorney General filed a response to Consumers’ petition, and on May 18, 2018, the Staff and MEC/NRDC filed responses to Consumers’ petition. On May 21, 2018, the Staff and Consumers filed responses to the RCG’s petition for rehearing.

Mich Admin Code, R 792.10437(1) (Rule 437(1)), addresses petitions for rehearing and provides as follows:

A petition for rehearing after a decision or order of the commission shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. The petition shall be accompanied by proof of service on all other parties to the proceeding.

The Commission has repeatedly found that “[a]n application for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission’s decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.” January 31, 2017 order in Case No. U-17691, p. 8.

Consumers Energy Company’s Petition for Rehearing

1. Residential Rate Design

Consumers requests rehearing on the Commission’s decision to eliminate the summer inverted block rate for residential customers and replace it with a time-of-use (TOU) rate for non-capacity charges. According to Consumers, the Commission’s failure to take into account timing and cost considerations in making such a significant change to residential rate design resulted in unintended
consequences. Consumers observes that it was the Staff that recommended the change to rate
design and therefore it was incumbent on the Staff to provide evidence with respect to timing and
costs associated with the change, but that the Staff failed to provide such support on the record.
Consumers states that it has continued to evaluate the costs and timeframe necessary to implement
the new rates, including the time needed to update the company’s billing system and the
development and dissemination of educational materials concerning the new rate. Consumers
points to affidavits attached to its petition indicating that the necessary modification of its billing
system and migration of customers will take from 18 to 24 months. Given that the company filed
its most recent rate case on May 14, 2018, Consumers maintains that it will be impossible to
comply with the Commission’s directive by the end of that 10-month proceeding. Consumers
adds that there are over $18 million in costs for this conversion that were not included in the rates
that were approved in this case.

The Attorney General supports Consumers’ contention that the March 29 order resulted in
unintended consequences and urges the Commission to adopt a two to three-year timeframe to
implement the new rate.

The Staff responds that the Commission’s decision was based on record evidence, and
additional evidence concerning the costs and timeframe for updating residential rates could have
been provided by the company, but Consumers failed to do so. Specifically, the Staff points out:

The Company responded to Staff’s proposed rate design in rebuttal by urging the
Commission, if it adopts Staff’s proposal, to include enough funding for the
Company to make the changes. (See 7 TR 984.) The Company could have but did
not supply the detailed cost information it now attempts to introduce through
affidavits.

Staff’s response, p. 5.
The Staff argues that Consumers promoted advanced metering infrastructure (AMI) by highlighting associated customer benefits, including the ability to use TOU rates. The Staff maintains that time-varying rate capability should have been available by the time the meters were fully installed. The Staff also notes that Consumers sought two to three years for implementation in the case, and the Commission considered and rejected the proposal. Staff’s response, p. 7.

Finally, the Staff observes that costs and time requirements should not preclude the company from complying with the Commission’s order. The Staff notes that additional funds may be requested (and have been requested) in Consumers’ next rate case, and, if the company needs additional time to implement its new billing system, it could have chosen to delay the filing of its next rate case.

MEC/NRDC also urge the Commission to deny the petition for rehearing of this issue. MEC/NRDC argue that Consumers simply reiterates the arguments it made in the case, and attempts to add factual detail now through affidavits that could have been included in the record. Thus, MEC/NRDC contend that the petition does not meet the standard for rehearing. These intervenors argue that the March 29 order allows for gradual implementation by the end of the next rate case, and note that “Consumers elected to file its next rate case immediately following the Order, thus assuming the burden of meeting the timeframe.” MEC/NRDC’s response, p. 2.

MEC/NRDC further contend that the shift to TOU rates has been foreseeable, ever since Consumers first sought cost recovery for implementation of AMI in 2008, and that the Commission should not attempt to award cost recovery without a full review of the alleged costs. MEC/NRDC note that Consumers has sought such recovery in the rate case it filed on May 14, 2018, in Case No. U-20134.

The Commission agrees with the Staff and MEC/NRDC that Consumers’ petition fails to meet the standard for rehearing set out in Rule 437(1). The Commission realizes that this is a
significant change which should be thoughtfully implemented, and does not view the decision in this case as foreclosing consideration of implementation issues related to timing or costs in Case No. U-20134. However, the petition for rehearing presents no error, newly discovered evidence, facts or circumstances arising subsequent to the close of the record, or unintended consequences of the Commission’s decision in this case. As the parties point out, the Commission considered Consumers’ arguments about timing and found that requiring implementation of the new rate design at the conclusion of the next rate case would allow for a gradual and deliberate move to the new rates. Consumers’ petition regarding this issue is denied.

2. Employee Benefit Expense

Consumers asserts that the Commission’s decision on this issue was premised on factual errors and will result in unintended consequences to the company and its customers if left unchanged. More specifically, Consumers claims that the “Commission inadvertently reduced the Company’s Pension Plan and OPEB [other post-employment benefits] expense projections on a Total Company basis and departed from previous Commission determinations without providing any record evidence as support for its determination.” Consumers’ petition, p. 10. In referencing the cost split between its electric and gas business set forth in Exhibit AG-11, Consumers states:

If the Commission believes that a reduction related to the discount rate is warranted, it should be in the amount of $9.46 million to reflect the impact of the discount rate on the electric business, as opposed to the removal of $9 million in Pension Plan expense and $7 million in OPEB expense on a Total Company basis that was reflected in the March 29 Order.

Consumers’ petition, pp. 11-12; see, Attachment C to the petition. Consumers contends that “the Commission abandoned its previous decisions without explanation and made a Total Company adjustment to the Company’s Pension Plan and OPEB expenses indicating that [the] discount rates were not justified based on the record in this proceeding.” Consumers’ petition, pp. 12-13.
According to Consumers, it was undisputed that these expenses were based on the 2016 year-end actuarial re-measurement, and, consistent with accounting standards, these expenses are determined annually and were the projections reported in its 2016 Form 10-K filing with the U.S. Securities and Exchange Commission. Consumers states that the actuary uses a number of assumptions to calculate these obligations, all of which are developed to meet accounting standards and none of which are developed for rate case purposes.

Citing Case Nos. U-15645, U-16191, U-16794, U-17990, and U-18124 as support, Consumers argues that the Commission “has consistently relied on Pension Plan and OPEB expenses based on the actuarial re-measurement . . . and has instructed the Company to follow the actuarial re-measurements unless it provides documentation from an actuary justifying a different expense.” Consumers’ petition, pp. 14-17. Consumers thus requests that the Commission reconsider its decision on this issue and amend the March 29 order to allow the company to recover the full amount of its pension plan and OPEB expenses based on the liability amount determined by its actuary.

In response, the Staff argues that Consumers “unfairly blames the Commission for an evidentiary oversight that the Company perpetuated by not adequately addressing these expenses.” Staff’s response, p. 9. The Staff points out that the company cited an exhibit entered into evidence by the Attorney General that Consumers argues the Commission should have used, but that the company did not, itself, address the electric and gas split in rebuttal testimony. The Staff further states, “In Exceptions, the Company noted, parenthetically, that the Attorney General recommended pension and OPEB disallowances on a total-Company basis, but the only reference to this being a mistake appears in a footnote.” Id. Considering the inadequacy of this reference, the Staff asserts that Consumers abandoned the issue, and, thus, the Commission does not have to
revisit it on rehearing. Nonetheless, the Staff acknowledges that Consumers is factually correct and therefore the Staff does not oppose correcting the issue on rehearing by revising the disallowed amount to exclude gas expenses not at issue in this case.

Prior to the filing of Consumers’ petition, the company failed to convey on the record that, if a disallowance for this expense is deemed appropriate, the Attorney General’s proposed $16 million disallowance, based on the company’s own numbers provided in evidence, was wrong and should instead be $9.46 million. Nevertheless, because the appropriate electric/gas split is in the record (Exhibit AG-11), the Commission finds that Consumers’ petition for rehearing of this issue should be granted and the previously-approved $16 million disallowance should be revised to $9.46 million. This decision on rehearing results in a final jurisdictional revenue deficiency of $72,269,000. Consumers shall file with the Commission, and serve on intervenors, revised tariff sheets, as necessary to be consistent with this decision, along with supporting workpapers, no later than July 13, 2018. Intervenors may then file comments no later than seven days from the date that the tariffs are served and filed. The Commission will thereafter issue an order addressing revised tariffs in this matter.

In this case, the Attorney General disputed this expense and raised credible arguments casting doubt on the appropriateness of the discount rates used by the company, and the company failed to provide the underlying evidence to support the chosen rates and refute these concerns, despite being specifically asked (12 Tr 2548-2549; Exhibit AG-12).

Moving forward, the Commission still expects pension and OPEB expenses in rate cases to be derived from actuarial re-measurements and encourages Consumers to pursue what it stated in
exceptions in this case.\textsuperscript{1} And, as stated in the March 29 order, p. 63, evidence that is relied upon, including underlying facts or data if from an expert, must be in the record. \textit{See also}, Mich Admin Code, R 792.10427 and MRE 703.

3. Residential Demand Response Program Parameters

Consumers requests rehearing of the Commission’s determination that the company should provide a three-month trial period for customers participating in demand response (DR) programs. March 29 order, pp. 76-77. According to Consumers, “The Commission’s determination is contrary to the plain language of the statute and counter to well-established principles of statutory interpretation” because MCL 460.1095(1)(a) requires a customer signing up for a DR program to agree to participate for one year. Consumers’ petition, p. 18. Consumers argues that the Commission’s decision renders the one-year participation provision nugatory. Although Consumers agrees that customer protections are important, “permitting \textit{all} customers the opportunity to leave the program without penalty within the first three months makes the statute’s requirement of a one-year commitment meaningless.” Consumers’ petition, p. 19.

Consumers further asserts that allowing a three-month trial period for the company’s DR programs has the unintended consequence of limiting the company’s ability to use DR as a capacity resource in the Midcontinent Independent System Operator, Inc. (MISO) market. To the extent that customers withdraw from the DR program during the trial period, Consumers argues that it will have to pay for additional capacity to replace the lost DR resources, which could result in increased costs for customers. Finally, Consumers suggests that it would be reasonable to allow

\footnote{1 In exceptions, Consumers stated that “the Company has been working with Aon Hewitt to find a reasonable method to provide [source] information to the parties on a forward-going basis.” Consumers’ exceptions, p. 99.}
participants to withdraw from the program if a substantial reason, such as illness, relocation, or financial hardship, exists to support the withdrawal.

In response, the Staff asserts that Consumers’ petition for rehearing should be denied because the Commission has already considered and rejected the company’s legal arguments. The Staff also disagrees with Consumers’ claims about the need for replacement capacity in the event that a customer withdraws from the DR program during the trial period, noting, “nothing requires the Company to offer demand response resources into the MISO market for customers who subscribe to a program on a trial basis. And if the Company does not do so, then the subscription is not a capacity resource that needs to be replaced if a customer unsubscribes.” Staff’s response, p. 11.

The Staff also points out that Consumers’ concerns about customers leaving the program are speculative and that allowing a three-month, penalty-free, trial period could result in more customers being willing to participate in the company’s DR programs.

Consumers’ argument about statutory construction was raised and rejected in the March 29 order, pp. 76-78, and the Commission agrees with the Staff that there is no requirement that the company offer DR resources into the MISO market for customers who are still in the trial period. However, the Commission finds that Consumers’ petition for rehearing should be granted to clarify that the Commission’s finding regarding use of the three-month trial period is optional and not a requirement. MCL 460.1095(1)(a) provides that DR programs “may provide incentives for customer participation and shall include customer protection provisions as required by the commission.” The Commission considers the trial period to be an appropriate incentive that could increase customer participation, and could provide an additional marketing tool for the utility should Consumers choose to use it. The petition for rehearing is granted to clarify that a three-
month residential DR trial period is a reasonable marketing option that is consistent with the requirements of the statute.

Residential Customer Group’s Petition for Rehearing

1. Injuries and Damages Expense

The RCG asserts that the Commission should hear and reconsider its decision regarding Consumers’ injuries and damages expense. The RCG claims that both the ALJ and the Commission appear to have erroneously shifted the burden of proof on this issue to the RCG, as an intervenor in this case, and that, contrary to the Commission’s decision, the Commission is the one that “is relying upon an unsupported generic formula for simply granting [Consumers] the cited amount based upon a 5 year historical average, without any audit, without any specifics, and without any specific evidence to support this unnecessary cost upon ratepayers.” RCG’s petition, p. 2. The RCG asserts that the Commission set forth no criteria or standards to evaluate the reasonableness and prudence of this cost item nor the “simplistic” methodology employed to add this expense in rates. Id.

In response, Consumers avers that the RCG’s petition should be denied because it fails to meet the standards for rehearing and “even fails to contend that any such standards are met.” Consumers’ response, p. 2. Consumers further asserts that the RCG is “repeating the same arguments previously made in this case and is taking ‘merely another opportunity . . . to argue a position or to express disagreement with the Commission’s decision.’” Id., p. 3 (citation and footnote omitted). In further argument, should rehearing be granted, Consumers contends that the Commission should continue to reject the RCG’s opposition to this expense. Consumers asserts that it met its burden of proof, citing to the evidence it provided, and contends that utilities are entitled to recover the reasonable costs to serve and do business. Consumers argues that the RCG
did not introduce any evidence to challenge either the reasonableness of this expense or the methodology of using a five-year average and further claims that the RCG’s indemnification argument is “also unavailing,” as the RCG provided no evidence to support its contention. *Id.*, pp. 4-5. Consumers thus contends that the Commission properly included this expense in rates, based on competent, material, and substantial evidence on the record.

The Staff opposes the RCG’s petition for the reasons stated by Consumers.

The Commission agrees with Consumers and the Staff and finds that the RCG’s petition on this issue fails to meet the standard for rehearing under Rule 437(1) and should therefore be denied. Injuries and damages expense includes costs for liabilities that arise in the normal course of business and are, thus, appropriate to include in rates. Further, contrary to the RCG’s assertion, neither the ALJ nor the Commission improperly shifted the burden of proof onto the RCG to show that the costs incurred were unreasonable or imprudent. Rather, based on the evidence provided by the company, particularly 6 Tr 568-569 and Exhibit A-56 (DLH-5), the ALJ and the Commission found that Consumers met its evidentiary burden on this issue. As a result, given no compelling reason to find otherwise, the Commission, in accord with its previously-approved methodology on this expense,2 adopted Consumers’ five-year historical average of its injuries and damages expense and approved the company’s projected $4.4 million for the test year involved in this case.

2. AMI and City Tax Issues

The RCG contends that the Commission’s rationale for rejecting the RCG’s request to provide evidence on the health and safety of AMI is circular, because the Commission has not accepted any evidence concerning these issues since it adopted the Staff’s report in the September 11, 2012

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2 *See, e.g.*, Case Nos. U-15244, U-15768, U-16472, U-17767, and U-17990.
order in Case No. U-17000 and addressed comments in the October 17, 2013 order in Case No. U-17102. According to the RCG, because these cases were uncontested, they cannot serve as binding precedent that would preclude the introduction of evidence in future proceedings.

Finally, the RCG contends that the Commission should reconsider its decision authorizing Consumers to defer and amortize local taxes, claiming that the record in Case No. U-17990 (where deferred accounting for local taxes was first approved) shows that the accounting treatment was based in part on bonus depreciation, which, the RCG argues, has been eliminated under the Federal Tax Cuts and Jobs Act of 2017 (TCJA) effective January 1, 2018. Thus, according to the RCG, there is no longer any rationale for the deferral and amortization of local taxes. The RCG requests that the Commission revisit this issue in the company’s upcoming TCJA cases or in the company’s next rate case.

In response, both the Staff and Consumers note that the RCG made the identical arguments in the case, which were considered and rejected by the Commission, and that simple re-argument of an issue does not meet the standard for rehearing. The Staff and Consumers contend that the RCG has failed to present any errors, newly discovered evidence, or unintended consequences as a result of the March 29 order. Moreover, they note, the petition does not even allege that it meets the Rule 437 standard. Consumers also points out that the TCJA did not eliminate bonus depreciation retroactively for years prior to 2017.

The Commission finds that the RCG’s petition for rehearing of these issues should be rejected because it does not meet the standard for rehearing set forth in Rule 437(1). Specifically, the RCG raises the same evidence and arguments in its petition for rehearing as it did in the instant proceeding (and, for some issues, in numerous prior cases). The Commission addressed the RCG’s AMI arguments at pp. 82-83 and the city tax arguments at p. 84 of the March 29 order.
The Commission is addressing the TCJA issues in other proceedings and does not find that passage of the act constitutes an error, newly discovered evidence, or an unintended consequence affecting the decisions in the March 29 order. See, Case No. U-18494. As noted above, the Commission will not grant rehearing on the basis of arguments that have been previously heard and rejected.

THEREFORE, IT IS ORDERED that:

A. The petition for rehearing filed by Consumers Energy Company is granted in part and denied in part.

B. The petition for rehearing filed by the Residential Customer Group is denied.

C. Consumers Energy Company shall file with the Commission, and serve on all intervenors, revised tariff sheets as necessary to be consistent with this order, along with supporting workpapers, no later than July 13, 2018. Intervenors may then file comments on the revised tariff sheets no later than seven days from the date that the tariffs are served and filed.

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. To comply with the Michigan Rules of Court’s requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission’s Executive Secretary and to the Commission’s Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Norman J. Saari, Commissioner

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Rachael A. Eubanks, Commissioner

By its action of June 28, 2018.

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Kavita Kale, Executive Secretary