

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of	)	
<b>CONSUMERS ENERGY COMPANY</b> for	)	
approval of rules governing the curtailment	)	Case No. U-11108
of gas service and the diversion of third-party	)	
gas.	)	
_____	)	

At the February 25, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. John C. Shea, Commissioner  
Hon. David A. Svanda, Commissioner

**OPINION AND ORDER**

**I.**

**HISTORY OF PROCEEDINGS**

On June 7, 1996, Consumers Energy Company (Consumers) filed an application seeking authority to include in Tariff M.P.S.C. No. 8-Gas a rule governing (1) the curtailment of gas service due to long-term supply deficiencies and (2) the curtailment of gas service or diversion of third-party gas in response to system capacity deficiencies and other emergencies.<sup>1</sup> This filing was made

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<sup>1</sup>Consumers' initial application also included a proposed rule governing the reduction of gas receipts from interstate pipelines in certain circumstances. However, on August 9, 1996, Consumers withdrew that proposed rule.

in compliance with directives issued in the Commission's March 11, 1996 order in Case No. U-10755, Consumers' most recent gas rate case.

Pursuant to due notice, a prehearing conference was held on July 25, 1996. In addition to Consumers and the Commission Staff (Staff), the following parties participated in the proceedings: Attorney General Frank J. Kelley (Attorney General); the Association of Businesses Advocating Tariff Equity (ABATE); the Midland Cogeneration Venture Limited Partnership (MCV); and Chevron U.S.A., Inc., SRW, Inc., Peninsular Oil & Gas Company, Ward Lake Drilling, Inc., d/b/a Ward Lake Energy, Dominion Reserves, Inc., and Wolverine Gas and Oil Company, Inc. (collectively, Chevron et al.).

After several attempts to settle the case failed, a second prehearing conference was held on January 9, 1997 before Administrative Law Judge Theodora M. Mace (ALJ). Pursuant to the schedule established at that prehearing conference, evidentiary hearings were conducted on April 7 and 8, 1997. The record consists of 301 pages of transcript and 11 exhibits, all of which were admitted into evidence. Each of the parties filed briefs on April 29, 1997. In addition, Consumers, ABATE, and Chevron et al. filed reply briefs on May 12, 1997.

On June 27, 1997, the ALJ issued a Proposal for Decision (PFD) in which she recommended approving the proposed gas curtailment and diversion rule, with certain revisions. Consumers, ABATE, Chevron et al., and the MCV filed exceptions to the PFD on July 11, 1997. Replies to exceptions were filed on July 21, 1997 by Consumers, the Staff, the Attorney General, and Chevron et al.

## II.

### DISCUSSION

James F. Bearman, the Director of Regulatory Program Implementation and Research within Consumers' Rates and Regulatory Affairs Department, provided a description of, as well as justification for, the utility's proposed gas curtailment and diversion rule. Consumers' proposed language, which the utility intended to add to its tariff sheets as Rule B4, is contained in Exhibit A-1 and consists of four subparts.

The first subpart, designated as Rule B4.1, defines 13 of the key words or phrases used throughout the utility's proposal.

The second subpart, designated as Rule B4.2, concerns the curtailment of gas deliveries in the event of a long-term gas supply deficiency. This portion of the rule requires Consumers to give 90 days' written notice of curtailment to all system supply customers<sup>2</sup> that are expected to be curtailed due to the utility's "inability to procure sufficient gas volumes from its interstate pipeline suppliers or other suppliers," and where "reliable short-term supplies are not available at reasonable and prudent prices." Exhibit A-1, p. 3. It goes on to establish five categories of customers and assigns the following curtailment priorities to each (in increasing order of priority):

Priority Five--All nonresidential customers with alternate fuel capability, as well as all sales of Consumers' system supply gas to nonsystem supply customers.

Priority Four--Commercial and industrial customers with monthly gas requirements in excess of 41,667 thousand cubic feet (Mcf).

Priority Three--Commercial and industrial customers with monthly gas requirements of between 8,334 and 41,667 Mcf per month.

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<sup>2</sup>Rule B4.2A(4) specifically states that this subrule applies only to system supply gas and does not provide for the curtailment of gas owned by parties other than Consumers.

Priority Two--Industrial customers with monthly gas requirements of 8,334 Mcf or less, as well as commercial customers with gas requirements of 1,250 to 8,334 Mcf per month.

Priority One--All residential customers, commercial customers having monthly gas requirements of 1,250 Mcf or less, customers required to use gas for plant protection, and customers providing services essential for public health and safety (to the extent that the gas requirements necessary to provide these essential services cannot be covered through the use of an alternate fuel).

This subpart further establishes the penalty to be imposed on customers that fail to adhere to the curtailment notice. Rule B4.2H states that in addition to the charges set forth in the applicable rate schedules, the price of gas used in excess of the volumes authorized during a curtailment shall be the highest price reported by Gas Daily for Consumers, Michigan Consolidated Gas Company (Mich Con), or Chicago-area gas utilities, plus \$10 per Mcf.

The third subpart, set forth as Rule B4.3, deals with the curtailment of gas service in the event of an emergency “arising out of extreme cold weather or other causes referred to as force majeure situations.” Id., p. 6. Among other things, this subpart (1) includes a list of steps that Consumers must take prior to curtailing service on an emergency basis, (2) discusses when and how third-party gas may be diverted for use by the utility, (3) sets forth a procedure for dealing with gas transported under blanket certificates, and (4) determines when and how Consumers may curtail service to companies that burn gas to generate electricity. It goes on to establish a set of priorities similar to that contained in Rule B4.2 and, in Rule B4.3J, adopts the same penalty for excess use.

The fourth and final subpart, designated as Rule B4.4, establishes limitations on liability arising from Consumers’ application of its proposed gas curtailment and diversion rule.

The other parties raised numerous concerns regarding Consumers’ proposed rule. These concerns are addressed below.

#### Necessity and Legality of the Rule in General

Chevron et al. contended that in light of the increasing level of choice available to Consumers' customers, adopting the proposed rule would be unnecessary and would only serve to shield customers from the natural consequences of choosing unwisely. They further asserted that adopting the priority classes set forth in the utility's proposal would violate 1929 PA 9, as amended, MCL 483.101 et seq.; MSA 22.1311 et seq. (Act 9), which prohibits common carriers from granting any preference or advantage to one shipper over another. Moreover, Chevron et al. took particular offense at the possibility that Consumers' gas curtailment and diversion rule could be applied even in situations where the utility caused the problem by failing to contract for adequate supplies of gas or sufficient interstate pipeline capacity. These parties therefore claimed that, at most, curtailment should only result in a pro rata allocation of the available capacity on the utility's system and that Consumers should have no discretion to arbitrarily curtail gas deliveries to any of its customers.

The ALJ disagreed with Chevron et al. According to her, Chevron et al.'s suggestion that "all [of] Consumers' customers, including residential customers or others such as hospitals, can and should fend for themselves in an emergency situation, must be rejected as against the public interest." PFD, p. 7. She went on to determine that nothing in Act 9 precludes adopting the rule. The ALJ pointed out that the curtailment rule's goal is to ensure system integrity and to protect the utility's most vulnerable customers in times of capacity or supply deficiencies. She therefore concluded that although claims of fault for such a deficiency may be raised and addressed in the context of a complaint case, they are not germane to the issue of whether the rule should be adopted in the first place. Finally, she noted that Chevron et al.'s proposal to handle curtailment situations by simply reducing each customer's capacity on a pro rata basis was both impractical and unreasonable. According to the ALJ, it would be impossible for the utility to perform that type of

allocation for each of its 1.4 million customers in an emergency curtailment situation. She therefore recommended that the Commission reject Chevron et al.'s claims and find that the proposed rule is neither unnecessary nor illegal.

Chevron et al. except to that recommendation, reasserting and expanding on several of their earlier arguments. For example, they point out that thousands of households throughout Michigan meet their space heating needs through the direct purchase of propane or heating oil and that these purchases are made from suppliers with no regulatory oversight. Claiming that "it is illogical to assume [that] residential customers taking natural gas service from Consumers are entitled to or need greater protection than those customers using other fuels," these parties argue that the proposed rule is not needed. Chevron et al.'s exceptions, p. 5.

Next, Chevron et al. reassert that implementing the priority system proposed by Consumers would violate Act 9's prohibition against "giving any preference or advantage" to one customer over another. MCL 483.106; MSA 22.1316. Specifically, Chevron et al. claim that it unlawfully gives some of Consumers' sales customers preferential treatment over transportation customers. Chevron et al. further contend that adopting such a priority system could open the door to anticompetitive abuses by the utility. They claim that by allowing Consumers to curtail service to transportation customers while continuing to provide system supply customers with uninterrupted service, the proposed rule could be manipulated to make transportation service appear unreliable. This in turn could help the utility retain existing customers and recapture those who previously switched to transportation service. Due to their concern regarding manipulation of the proposed rule, as well as the rule's application in situations where the utility is to blame for the capacity or supply deficiency triggering the curtailment, Chevron et al. renew their request to implement a pro rata curtailment system instead.

In its replies to exceptions, Consumers points out that the Commission's broad authority to regulate the terms and conditions of gas service fully encompasses the authority to establish gas curtailment and diversion rules. The utility goes on to assert that nothing in Act 9 restricts that authority as it pertains to this case. In support of its assertion, Consumers notes that Section 6 of Act 9 does not demand identical treatment of all customers; rather, it merely requires that similarly situated customers should be treated equally unless there is a rational basis for treating them differently. In this case, Consumers contends, the proposed curtailment rule and its priority categories reasonably recognize that, in accordance with longstanding public policy, certain types of customers (i.e., hospitals, residences, etc.) deserve greater protection from the interruption of gas deliveries.

Consumers further responds that the priority categories contained in its proposed rule do not grant the utility an undue competitive advantage. The utility points out that the level of priority is based on the size of the customer and the nature of its load, and does not distinguish between sales and transportation customers. As such, Consumers notes, hospitals and residences will be entitled to Priority One status and large industrial customers will receive Priority Five status regardless of whether they take sales or transportation service.

Consumers goes on to state that it is acutely aware of its duty to provide reliable gas service to all of its customers. Nevertheless, it notes that situations can arise in which the utility is unable to obtain the supply necessary to meet the demands on its system. If such a situation occurs, Consumers asserts, there must be a means of determining which customers should continue to receive gas, regardless of how or why the need for curtailment arose. Therefore, the utility claims, the issue of fault is irrelevant in this case.

Finally, Consumers argues that it would be virtually impossible to implement gas curtailment based on a pro rata allocation of capacity. In the event that curtailment is necessary, the utility notes, it must achieve the required reduction of gas deliveries very quickly. Requiring the utility to contact hundreds of thousands of residential customers to achieve a short-term gas service reduction would be prohibitively cumbersome and time-consuming, Consumers contends. It therefore asserts that Chevron et al.'s arguments in support of a pro rata system of curtailment, like all other arguments challenging the necessity and legality of the utility's proposed rule, must be rejected.

The Commission agrees with Consumers. Notwithstanding Chevron et al.'s claims to the contrary, a rule concerning the curtailment of gas service and the diversion of third-party gas on Consumers' system is clearly needed. Unlike customers who rely on propane or heating oil for heat, customers taking natural gas service on Consumers' system have no on-site fuel storage and lack access to multiple sources of distribution. Under these circumstances, the suggestion that all of Consumers' customers (including households and hospitals) can and should fend for themselves in an emergency situation should be rejected as contrary to the public interest.

The Commission further rejects Chevron et al.'s claim that implementing the proposed priority categories would violate Act 9. A review of the proposed rule shows that Consumers does not intend to curtail customers based on whether they take sales or transportation service. Instead, the priority system set forth in the proposed rule is based solely on the size and nature of each customer's load. Moreover, it appears that the rule is designed to curtail service to a few large industrial or commercial customers in order to continue serving millions of smaller customers, many of whom (like hospitals and households) could find the potential curtailment of service to be a life-or-death proposition. Therefore, a sufficiently rational basis exists for adopting the priority system



set forth in the proposed rule. Furthermore, the Commission's complaint process provides an adequate means of dealing with potential allegations that the utility is manipulating implementation of the curtailment rule for anticompetitive purposes.

Finally, the Commission rejects Chevron et al.'s claims that Consumers' proposed rule should not apply to situations where the utility is somehow at fault for the supply or capacity shortage, and that any gas curtailment must be implemented exclusively on a pro rata basis. The Commission finds that all claims that the utility was at fault for the curtailment should be addressed in the context of a complaint case. Moreover, the Commission finds that the request for a pro rata allocation of every gas supply and pipeline capacity shortage is unsupported by the evidence and, as noted by Consumers, is likely unworkable in emergency curtailment situations. For all of these reasons, the Commission concludes that Chevron et al.'s exceptions regarding these issues should be rejected.

#### Limitation of Liability

Consumers' proposed limitation of liability provision, set forth as Rule B4.4 on page 11 of Exhibit A-1, states that:

The Company shall, when acting reasonably and prudently in accordance with these rules, not be liable for any loss, cost, damage, injury, or expense that may be sustained by [a] customer by reason of partial or complete curtailment of gas service.

This clause, which Consumers' witness Bearman testified was "almost identical" to the limitation of liability provision approved for Mich Con in Case No. U-10603, was intended to protect the utility from exposure to civil damages arising from the reasonable implementation of a Commission-approved curtailment rule. Tr. 178. Citing Valentine v Michigan Bell, 388 Mich 19; 199 NW2d 182 (1972), and Rinaldo's v Michigan Bell, 454 Mich 65; 559 NW2d 647 (1997), Consumers

asserted that Michigan courts have consistently upheld the validity of such clauses, finding that they are “essential to prevent the [utility] from being exposed to unanticipated liabilities that will hinder its ability to offer affordable [utility] service.” Consumers’ initial brief, pp. 14-15.

The Attorney General and the Staff opposed the limitation of liability as written. Based on language found in the Rinaldo’s decision, these two parties recommended revising this provision to more clearly indicate the circumstances where a utility could be sued in circuit court based on implementation of a curtailment rule. The Staff therefore asserted that the following sentence should be added to Rule B4.4: “However, there may be available recourse at the Commission for breach of the regulatory code or tariff, or in a court of law for tortious conduct arising from a duty which exists apart from the tariff.” Staff’s initial brief, p. 6. According to the Staff and the Attorney General, language like that set forth in the Staff’s proposed addition is necessary to satisfy the Supreme Court’s requirement, discussed in footnote 21 of the Rinaldo’s decision, that any limitation of liability provision approved by the Commission should be drafted with as much specificity as possible.

In contrast, ABATE and Chevron et al. requested rejecting Rule B4.4 in its entirety. They argued that because the proposed curtailment rule would provide Consumers with a great deal of discretion, the utility should not be allowed to evade responsibility for the improper exercise of that discretion. This is especially true, they asserted, where the utility’s discretionary actions could cause at least some of its customers significant economic harm. These parties went on to argue that, among other things, approving a limitation of liability clause like that proposed by Consumers would conflict with Act 9, the Michigan Constitution, and the decision in United States v Winstar Corp., 518 US \_\_\_\_; 116 S Ct 2432; 135 L Ed 2d 964 (1996).

The ALJ concluded that neither Act 9, the state constitution, nor Winstar preclude adoption of a limitation of liability clause. In contrast, she noted that public policy appears to support including such a clause in a utility's tariffs in an effort to avoid having the rates charged to ratepayers "increase exponentially should many liability claims be paid out." PFD, p. 15. This is particularly true, she stated, when viewed in conjunction with the fact that insurance is available to large volume customers to cover losses arising from gas curtailment. Nevertheless, the ALJ found that the limitation of liability clause proposed by Consumers was not drafted carefully enough in light of the amount of discretion retained by the utility and that the revision suggested by the Staff failed to rectify this problem. She therefore recommended rejecting the proposed clause.

Consumers excepts to the ALJ's recommendation. The utility claims that the fact that it retains discretion over several aspects of its curtailment rule fails to justify deleting the proposed limitation of liability clause. According to Consumers, some amount of discretion is essential to the effective implementation of any curtailment rule. Moreover, it points out that Rule B4.4 protects the utility from civil liability only if Consumers acts "reasonably and prudently in accordance with these rules." Exhibit A-1, p. 11. Because any negligence or abuse of discretion by Consumers would remain actionable, the utility argues, no reason exists for rejecting the proposed limitation of liability clause.

Consumers goes on to contend that the language found in Rule B4.4 should not be revised. According to the utility, the ALJ was wrong in concluding that the limitation of liability clause was worded too broadly. Instead, Consumers asserts, its proposed language accurately indicates which utility actions would give rise to a claim for monetary damages and which would be deemed protected. Finally, the utility argues that because nearly identical language was approved as part of

Mich Con's curtailment rule by the Commission's February 23, 1995 order in Case No. U-10603, consistency supports approving Consumers' proposal without revision.

In contrast, Chevron et al. except to the ALJ's finding that limitation of liability clauses are not precluded by statute, constitutional prohibition, or existing case law. With regard to this last category, they reassert that Winstar specifically prohibits regulatory action that relieves a utility of liability. Chevron et al. further contend that the threat of lawsuits must be retained to ensure that Consumers refrains from abusing the system. Absent this threat, Chevron et al. claim, Consumers would have no incentive to avoid implementing a gas service curtailment. Finally, Chevron et al. claim that the Staff's proposed addition to the limitation of liability clause misstates the division of jurisdiction between the Commission and the courts.

The Commission finds that several of the underlying conclusions reached by the ALJ are correct. For example, she accurately noted that limitation of liability clauses may legally be adopted in cases like this. Neither Act 9 nor Michigan's Constitution prohibit including such language in gas utility tariffs. Moreover, Chevron et al.'s reliance on Winstar is misplaced. As pointed out by the ALJ, Winstar involved the federal government's attempt to evade the requirements of a contractual relationship that it had previously established with a savings and loan company through the passage of subsequent legislation. In contrast, the present case involves the question of whether a limitation of liability clause is appropriate for inclusion in the tariff-based relationship between a regulated utility and its ratepayers pursuant to state statutes.

The Commission further finds that the ALJ accurately concluded that clauses similar to the one proposed by Consumers are consistent with good public policy. Absent Consumers' proposed clause, the utility (and, ultimately, its ratepayers) could be exposed to an unlimited array of damage claims arising from the reasonable and prudent implementation of a Commission-approved gas

curtailment rule. Moreover, and notwithstanding Chevron et al.'s assertions to the contrary, the constant threat of lawsuits is unnecessary to make Consumers avoid curtailing gas service whenever reasonably possible. As noted by Mr. Bearman, "every Mcf which is curtailed results in lost revenues to the Company." Tr. 95. Thus, even if the proposed limitation of liability clause is approved, sufficient incentive exists for Consumers to avoid implementing its curtailment rule unless it is truly necessary to protect system integrity.

Nevertheless, the Commission finds that the ALJ incorrectly ruled that clarification of the proposed clause is necessary. Although the Supreme Court's decision in Rinaldo's encourages the Commission to require as much clarity as reasonably possible in the drafting of utility tariffs, the limitation of liability clause proposed in this case is sufficiently clear. This becomes apparent when the clause is read in conjunction with portions of the curtailment rule that specify (1) the factors to use in determining whether curtailment is necessary, (2) the precise manner in which notice of curtailment must be given to each of the affected customers, (3) the steps that must be taken prior to enforcement of the utility's curtailment plan, and (4) the procedures to follow when diverting customer-owned gas in the event of an emergency. The Commission therefore concludes that the utility's limitation of liability clause should be approved as written, and that the additional language proposed by the Staff should be rejected.

#### Development of an Appropriate Penalty

As noted earlier, proposed Rules B4.2H and B4.3J state that in addition to the normal charges set forth in the applicable rate schedules, the price of any gas used in excess of the volumes authorized during a period of curtailment shall be the highest price reported by Gas Daily for Consumers, Mich Con, or Chicago-area utilities, plus \$10 per Mcf. Consumers witness Bearman

testified that the Commission should adopt the proposed penalty for two reasons. First, it would send “a very powerful message” to the utility’s customers regarding the need to limit their gas usage to authorized levels during what could be “a very critical situation” for Consumers’ system. Tr. 91. Second, it would ensure that gas destined for Consumers’ customers is not “diverted from the Company’s system during an emergency just so it can be sold for a higher price in an alternate market.” Id.

The ALJ recommended approving these penalty provisions. ABATE and Chevron et al. except to that recommendation.

In its exceptions, ABATE concedes that because price signals in the regional market for natural gas could lead to the diversion of gas away from Consumers’ system during periods of gas curtailment, tying penalty provisions to a market-based price is reasonable. It further concedes that an additional disincentive may be necessary to deter transportation customers from using Consumers’ system supply as another source of gas during a curtailment by simply paying for that gas at the market price. Nevertheless, ABATE asserts that imposing a charge of \$10 per Mcf to create this disincentive is excessive and that the penalty should not exceed \$6 per Mcf. In support of that lower figure, ABATE cites Mr. Bearman’s testimony in Case No. U-10755, where he proposed reducing Consumers’ unauthorized use charge from \$10 per Mcf to \$6 per Mcf on the grounds that the higher figure was excessive. ABATE therefore asks the Commission to reject the ALJ’s recommendation and to adopt \$6 per Mcf as the appropriate penalty for a customer’s failure to follow the curtailment rules.

In their exceptions, Chevron et al. likewise claim that Consumers’ proposed penalty is too severe. According to these parties, the utility’s proposal goes well beyond letting it recover the cost of replacement gas. In support, Chevron et al. cite testimony from Mr. Bearman to the effect

that no additional costs will be incurred in some cases. Arguing that the utility “should not be allowed to turn a penalty into a windfall when the purported justification is the collection of costs,” Chevron et al. contend that Consumers’ proposed penalty should be deleted. Chevron et al.’s exceptions, p. 31.

Consumers responds to these arguments in two ways. First, it notes that Mr. Bearman’s testimony in Case No. U-10755 dealt exclusively with the unauthorized use of gas in non-curtailment situations. Because that type of unauthorized usage presents significantly less risk to the utility’s system and to other customers than the violation of a curtailment rule, Consumers continues, use of a lesser penalty was justified in Case No. U-10755. According to the utility, this dichotomy was fully explained by Mr. Bearman on pages 119 through 124 of the current transcript. Second, Consumers points out that Chevron et al. were wrong in asserting that, in at least some circumstances, the utility would bear no costs associated with gas consumed by customers who violate its curtailment rule. If a customer uses gas on an unauthorized basis during a curtailment, Consumers stresses, the utility must make up for that usage by either purchasing gas from alternative sources or by imposing additional curtailments on its other customers. Consumers therefore claims that the Commission should adopt the ALJ’s recommendation and approve the penalty proposed by the utility.

The Commission agrees with Consumers and finds that the utility’s proposed penalty for violating the curtailment rule (including an assessment of \$10 per Mcf) should be approved. As correctly noted by Consumers, the \$6 per Mcf charge recommended by Mr. Bearman in Case No. U-10755 was designed only to penalize unauthorized gas use in the context of the utility’s normal operations. Because the existence of a curtailment situation heightens the need for avoiding unauthorized use and tends to increase the cost of replacement gas, the larger penalty proposed in

this case is justified. The Commission therefore concludes that the ALJ's recommendation should be adopted.

#### Operational Flow Order

Robert G. Ozar, a Gas Supply Specialist in the Commission's Gas Division, testified that the wording of proposed Rule B4.3B(4) should be revised. Specifically, he suggested substituting language that would give Consumers the discretion to implement an operational flow order (OFO) as part of the steps instituted prior to the curtailment of gas service during an emergency. Mr. Ozar stated that his proposed language, which is set forth on Exhibit S-11, would give the utility better control over its system during emergencies by authorizing it to impose daily balancing on transportation customers and to set daily storage withdrawal limits on all transportation and contract storage customers. His proposal went on to indicate that customers who fail to comply with the OFO would be subject to the penalty provisions contained in the curtailment rule. According to Mr. Ozar, his OFO provision would provide Consumers with an additional means to avoid invoking a general curtailment of gas service.

During cross-examination, Mr. Ozar indicated that the proposed OFO was designed to give Consumers discretion to authorize storage withdrawals at any level between a customer's maximum daily quantity and zero. According to the Staff, this was intended to let the utility provide access to storage volumes, if available, to cover imbalances between a transportation customer's gas use and all city gate deliveries made on that customer's behalf. Thus, although Exhibit S-11 refers to "zero-tolerance daily balancing," Mr. Ozar and the Staff indicated that this proposal actually constitutes a flexible tolerance OFO. The Staff therefore requested deleting the phrase "zero tolerance" from the proposal prior to its adoption.



Consumers supported the Staff's OFO proposal. Despite objections from Chevron et al., the ALJ recommended adopting the Staff's proposal with the deletion of the phrase "zero tolerance."

Chevron et al. except to that recommendation. According to them, the daily balancing required by the proposed OFO would be unrealistic and onerous. In support of this assertion, they note that Consumers generally reads customers' meters and provides statements regarding gas usage once a month, thus making it impossible for customers to know whether they are in balance on a daily basis. Chevron et al. go on to note that any attempt to overcome this problem by requiring customers to install equipment capable of remote daily metering would impose enormous costs on those customers. For these reasons, Chevron et al. assert that the Commission must reject Mr. Ozar's OFO proposal.

In its replies to exceptions, Consumers notes that adopting the curtailment rule and the proposed OFO language will not force customers to pay for the installation of remote metering equipment. Rather, Consumers continues, Rule B4.3I(1) indicates that wherever daily gas usage needs to be monitored and customers have not voluntarily chosen to install remote metering equipment, it will be up to the utility to perform manual daily readings.<sup>3</sup> Consumers therefore contends that because the utility will bear the logistical and financial burden of monitoring daily compliance with the gas curtailment rule, Chevron et al.'s arguments should be rejected.

The Commission agrees with Consumers and finds that Chevron's arguments are not well taken. For affected customers that choose not to install remote metering equipment, Consumers (rather than its customers) will bear the burden of monitoring their daily usage to verify compliance with both the curtailment rule and any OFO implemented by the utility. Moreover, uncontroverted

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<sup>3</sup>Nearly identical language can be found in Rule B4.2G(1) and would apply to curtailments arising from a gas supply deficiency.

testimony indicates that the power to implement an OFO can be a valuable tool to use in avoiding the full curtailment of gas services. The Commission therefore concludes that the ALJ's recommendation to add Mr. Ozar's OFO language to the curtailment rule, but without the phrase "zero tolerance," should be adopted.

#### Treatment of Gas-Fired Electric Generation

Proposed Rule B4.3F(3) states that during emergency curtailment situations, public utilities that generate and distribute electricity may be granted Priority One status for specific portions of their gas-fired electric generation. According to Mr. Bearman, this provision "basically tracks" the wording set forth in the curtailment rule adopted for Mich Con. Tr. 92. However, there are three differences between the language proposed by Consumers and that included in Mich Con's curtailment rule.

First, Mich Con's Rule D3.1F(4), which was approved by the Commission's February 23, 1995 order in Case No. U-10603, states:

During an emergency curtailment of gas service, public utilities that generate and distribute electricity shall be granted Priority One service for that portion of their gas requirements necessary to the discharge of the utilities' obligation to provide essential services and for which no practical alternatives exist.

Tr. 128. [Emphasis added.] In contrast, Consumers' proposed language provides that Priority One status may be granted to public utilities for any gas-fired generation "necessary to the discharge of the utilities' obligation to provide services." Exhibit A-1, p. 9. Thus, Consumers' proposal omits the words "essential" and "for which no practical alternatives exist." Second, Consumers fails to include the requirement that, before any portion of a public utility's gas usage can qualify for Priority One status, the utility must (among other things) interrupt service to all of its interruptible and controlled service customers. Third, unlike the language approved for use by Mich Con,

Consumers' proposal expands the potential for obtaining Priority One status to "firm contracted generation" (rather than just company owned generation). Id.

In defense of these differences, Consumers asserted that its proposed language eliminates unnecessary restrictions, avoids interfering with electric utilities' own emergency procedures, and recognizes that independent power producers (IPPs) are satisfying an ever-increasing percentage of electric utilities' capacity requirements. The MCV agreed with Consumers and supported adopting the utility's proposed language in its entirety. The MCV went on to note that as more end-users turn to IPPs for electricity, either through application of existing direct access tariffs or as a result of future electric industry restructuring, the Commission may want to revisit this issue in the near future.

Conversely, ABATE, the Staff, and Chevron et al. favored implementing language identical to that approved for Mich Con. According to these parties, the record fails to support broadening the exception granted in Case No. U-10603 regarding utilities' gas-fired electric generation.

The ALJ agreed in part with ABATE, the Staff, and Chevron et al. Specifically, she found that Consumers failed to provide adequate support for omitting from the curtailment rule the words "essential" and "for which no practical alternatives exist." Instead, she continued, testimony offered by Consumers witness Bearman supported including, rather than deleting, those words. Although the PFD was silent with regard to the other two differences discussed above, its tone indicated that Consumers' proposals to extend Priority One status to firm contracted generation and to eliminate language requiring the interruption of service to certain customers were deemed supported by the record. Finally, the ALJ recommended that the Commission review, at some later date, issues involving the curtailment of gas service to IPPs that serve end-use customers.

Consumers and the MCV except to the ALJ's recommendation to restore the words "essential" and "for which no practical alternatives exists" to proposed Rule B4.3F(3). According to them, it is "impossible to determine [where] the electrons generated by an electric utility" will actually end up and whether their use by a customer constitutes essential service for which no alternatives exist. Consumers' exceptions, p. 10. They further contend that because the Emergency Electric Procedures (EEPs) set forth in Rule B12.1 of Consumers' electric tariffs are designed to establish which of the utility's electric services are essential, implementing the language recommended by the ALJ might interfere with the operation of those procedures.

Finally, the MCV asserts that the Commission's June 5, 1997 order in Case No. U-11290 "dramatically changed the face of the electrical industry" by expanding the opportunity for direct access service. MCV's exceptions, p. 4. It therefore claims that although related issues may need to be addressed in the future, the Commission should reject the ALJ's final recommendation regarding this issue and immediately provide all gas-fired IPPs with Priority One status. According to the MCV, this is the only way to protect the end-users of power supplied by IPPs.<sup>4</sup>

The arguments expressed by Consumers and the MCV are not well taken. First, by omitting the words "essential" and "for which no practical alternatives exist," the proposed curtailment rule could improperly elevate numerous gas-fired electric generators to Priority One status regardless of whether the service they provide is essential or whether practical alternatives to their service exist. Second, the record lacks support for deleting that language. Specifically, Consumers' witness Bearman testified that he "doesn't recall" why he omitted those words from the proposed rule and

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<sup>4</sup>Although Consumers and the MCV were in agreement regarding the previous arguments, they disagreed on whether the Commission's June 5, 1997 order requires granting Priority One status to all IPPs.

that the language submitted by Consumers “should mean the same thing” as that found in Mich Con’s curtailment rule. Tr. 130. Third, although it might be impossible to track the precise destination of an electron on Consumers’ electric system, the same can be said for any molecule of gas on the utility’s transmission and distribution system. Moreover, because the load associated with a customer’s use of electric service can be tracked, a functional basis exists for determining whether the service provided to that customer is essential and whether any practical alternatives exist.<sup>5</sup> Fourth, by more narrowly defining which gas-fired electric generators can be elevated to Priority One status, inclusion of the language recommended by the ALJ should complement (rather than interfere with) Consumers’ implementation of its EEPs. Fifth, although significant efforts have been undertaken to restructure the electric industry, those efforts are ongoing and a final resolution has not yet been achieved. Thus, although it may be appropriate to revisit the treatment of gas-fired IPPs following completion of electric restructuring, it would be premature to address that issue at this time.

The Commission therefore concludes that it should adopt the ALJ’s recommendation to insert the words “essential” and “for which no practical alternatives exist” in Rule B4.3F(3). It likewise finds that it should adopt the ALJ’s recommendation to return, at some later date, to issues involving the curtailment of gas service to IPPs that serve end-use customers.

As for the two remaining differences between the language proposed by Consumers and that approved for Mich Con in Case No. U-10603, the Commission finds adequate justification for adopting Consumers’ proposals. For example, Mr. Bearman testified that in the event of an emergency, the EEPs adopted for each of Michigan’s electric utilities require suspending service to

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<sup>5</sup>Indeed, only through a similar examination of customer load can gas curtailment priorities be established.

all interruptible and controlled service customers. He therefore stated that it makes no sense to insert a provision in Consumers' gas curtailment rule requiring electric utilities to "interrupt electric loads as a condition of obtaining Priority One status to avoid the implementation of the [EEPs] when those electric procedures already provide for the interruption of interruptible loads." Tr. 94. In support of Consumers' proposal to expand the potential for obtaining Priority One status to firm contracted generation (rather than only to company owned generation), Mr. Bearman testified that "this is appropriate because electric utilities rely on contracted generation to meet their customers' demands just as they rely on [company] owned generation." Tr. 93.

#### Emergency Supply Deficiencies

As noted in footnote 2, supra, Consumers' proposed rule concerning the curtailment of gas deliveries in the event of a long-term supply deficiency did not provide for the curtailment or diversion of third-party gas. Rule B4.2A(4), set forth on Exhibit A-1, p. 2. However, that was not the case with regard to proposed Rule 4.3, which, among other things, was designed to address emergency supply deficiencies. Chevron et al. therefore objected to this latter rule on the grounds that (1) no justification exists for curtailing the delivery of transportation customers' gas where adequate capacity exists on Consumers' system and where the gas shortage arose from the utility's poor gas purchasing practices, (2) adopting Consumers' proposal to divert third-party gas for use by other customers would violate Act 9 and provisions of the constitution, and (3) no reasonable means exists under which transportation customers could either avoid or recover from the diversion of their third-party gas.

The ALJ recommended rejecting Chevron et al.'s arguments. In so doing, she returned to her earlier conclusion that the issue of fault is irrelevant in this situation. Moreover, she noted that an

emergency curtailment of gas like that envisioned under Rule B4.3 “should occur rarely if at all,” and that the proposed rule merely constitutes “an effort to deal with that rare occurrence in a reasonable manner.” PFD, p. 34. The ALJ went on to reassert that, notwithstanding Chevron et al.’s arguments to the contrary, neither Act 9 nor any constitutional provisions preclude adoption of Rule B4.3. She supported that assertion by again noting that transportation customers would not be singled out under the priority system proposed by Consumers and by citing provisions of the rule that describe how owners of third-party gas can either avoid curtailment or obtain compensation for gas diversions.

In their exceptions, Chevron et al. argue that the frequency with which Consumers’ proposed emergency curtailment rule may be implemented has no bearing on its validity. “No matter how rare the occurrence,” they assert, “the consequences are real and potentially devastating.” Chevron et al.’s exceptions, p. 39. Specifically, they contend that curtailing or diverting a transportation customer’s gas due to a supply deficiency unjustly exposes the customer to the risk of a shutdown, injury to the plant, and injury to its employees. They go on to argue that, contrary to the ALJ’s conclusion, no reasonable protection from this harm is provided in Rule B4.3. Instead, Chevron et al. continue, the options referred to by the ALJ constitute nothing more than an ultimatum: Agree to let Consumers either buy your gas or inject it in storage, or face diversion of the gas against your will. Finally, Chevron et al. renew their claim that Act 9 and various constitutional provisions preclude implementing this rule as drafted. They therefore request rejecting Rule B4.3.

The Commission concludes that Chevron et al.’s request should be denied. Transportation customers desiring to avoid curtailments and diversions caused by emergency supply deficiencies have a reasonable means of accomplishing that objective. Specifically, Rule B4.3D(2)(a) gives these customers the option of installing electronic remote meters or reaching an agreement with the

utility to implement some other methodology for monitoring their daily gas consumption. In return for selecting either option, all of a customer's usage that is equal to its daily pipeline deliveries will be exempt from supply-related curtailments or diversions under Rule B4.3. Furthermore, in the event that all or part of a transportation customer's gas deliveries must be curtailed for any reason, Rule B4.3G gives the customer the choice of either having its curtailed deliveries injected into storage (with the suspension of any penalties and with no additional charges) or selling that gas to Consumers. The price of any gas purchased under this provision will be negotiated between the transportation customer and Consumers, but is limited to the greater of:

“(a) the customer's reasonable costs associated with using alternate fuels during the period of diversion, (b) the actual cost of the customer's diverted gas, or (c) the highest city gate price of gas for the Company's end-users contained in the publication ‘Gas Daily,’ delivered into the Company's system during the period of diversion.”

Exhibit A-1, p. 10. Taken as a whole, these provisions offer adequate protection for Consumers' transportation customers. Moreover, and consistent with its earlier findings, the Commission concludes that nothing in Act 9 nor any of the constitutional provisions cited by Chevron et al. prohibit adopting Consumers' proposed handling of emergency supply deficiencies.

#### Storage Injections and Withdrawals During Periods of Curtailment

Chevron et al. proposed adding language to Consumers' curtailment rule that would prohibit the utility from injecting gas into storage at the same time that it curtails gas deliveries to its transportation customers. They also proposed barring Consumers from simultaneously withdrawing system supply gas from storage and curtailing transportation service. The ALJ recommended rejecting these proposals.

Chevron et al. except to that recommendation and argue that both of their proposals should be adopted. With regard to the first, they note that it is impossible to determine at the time of injection



whether gas being stored by the utility will ultimately be consumed by Priority One versus Priority Five customers. Due to this uncertainty, Chevron et al. claim that Consumers should be prohibited from curtailing the movement of third-party gas on its system while conducting its own system supply injections. In support of their second proposal, Chevron et al. assert that Consumers could create capacity problems by withdrawing large volumes of stored gas for sale at higher prices during the heating season. To avoid this, they contend, the utility also must be precluded from initiating a curtailment while withdrawing gas from storage.

Chevron et al.'s arguments are not well taken. As noted by the ALJ, "the matter of allowing injection during curtailment periods is a complicated one due to the nature of [Consumers'] system." PFD, p. 38. Specifically, the need to curtail gas deliveries on one part of the system may have no effect on the operation of the remainder. In such situations, injections can reasonably be made into storage (for sales and transportation customers alike) on an unaffected part of the system while simultaneously curtailing service on the constrained part. Thus, Chevron et al.'s first proposal must be rejected.

As for their second proposal, it should be noted that storage withdrawals can often be used to reduce the severity and length of an announced curtailment. It therefore makes little sense to preclude the utility from using stored gas to meet its customers' needs during periods of curtailment. The Commission therefore concludes that the ALJ's recommendation should be adopted and that both of Chevron et al.'s proposals should be rejected.

#### Blanket Certificate Service

In Rule B4.1A, Consumers defined a "blanket certificate customer" as any transportation customer that contracted with the utility to "transport gas in interstate commerce pursuant to a

blanket certificate issued to [Consumers] by the Federal Energy Regulatory Commission” (FERC). Exhibit A-1, p. 1. The utility’s proposed curtailment rule went on to grant blanket certificate customers super-priority status in certain emergency situations. For example, proposed Rule B4.3D(1)--concerning capacity restrictions arising from force majeure or damage to part of Consumers’ system--stated that residual firm capacity at the time of curtailment should be allocated between blanket certificate customers and all other customers “based on the total volumes scheduled for service within each class on the applicable day.” *Id.*, p. 6. Furthermore, proposed Rules 4.3D(2)(b) and 4.3D(3)--concerning other emergency curtailment situations--stated that blanket certificate customers would be exempt from curtailment.

Notwithstanding the fact that the wording of these rules was identical to that approved for Mich Con in Case No. U-10603, Chevron et al. argued that Consumers’ proposed language was vague and contradicted testimony offered by its own witness. These parties therefore requested rejecting all parts of the utility’s proposed curtailment rule dealing with blanket certificates. The ALJ recommended denying that request, and Chevron et al. excepted.

Chevron et al. base their exceptions on two grounds. First, they assert that the proposed rules are inconsistent with testimony offered on behalf of the utility. Despite Mr. Bearman’s assurances that super-priority status would not be given to interruptible customers, Chevron et al. contend, none of the above-mentioned rules distinguish between firm and interruptible blanket certificate customers. Second, these parties argue that even if the rules are intended to apply only to firm blanket certificate service, they are unnecessary. According to Chevron et al., this follows from the fact that none of the utility’s customers currently receive firm service under Consumers’ blanket certificate. Chevron et al. therefore contend that the ALJ’s recommendation must be rejected.

In its replies to exceptions, Consumers argues that Chevron et al.’s complaints “do not make sense and should be dismissed.” Consumers’ replies, p. 17. For example, the utility asserts, the proposed curtailment rule clearly indicates that no interruptible customers (including those taking service under Consumers’ blanket certificate) will be eligible for the super-priority status discussed in Rules B4.3D(1), B4.3D(2)(b), and B4.3D(3). In support of this assertion, Consumers cites Rule B4.3B(1), which requires the utility to suspend all service provided under its interruptible rates or contracts before it can begin implementing a gas curtailment. The utility goes on to contend that although it does not currently provide firm service under the blanket certificate filed with the FERC, Consumers could be required to provide that service in the future. The utility therefore claims that the proposed curtailment rule’s references to blanket certificate customers are necessary and should be retained.

The Commission finds that it should approve the utility’s proposed language concerning the treatment of blanket certificate customers. As correctly noted by Consumers, Rule B4.3B(1) precludes interruptible (as opposed to firm) blanket certificate customers from obtaining super-priority status. This is fully consistent with Mr. Bearman’s statement that such status would not be given to any interruptible customers. Moreover, the fact that Consumers currently has no firm blanket certificate customers (and, according to Mr. Bearman, is not actively soliciting them) does not mean that will always be the case. Rather, this situation could change as competition in the natural gas industry increases. The Commission therefore concludes that the utility’s proposed language concerning blanket certificate customers should be approved.

#### Using Intrastate Gas as Back-up Supply

Chevron et al. argued that the proposed curtailment rule could allow Consumers to treat its transportation customers' gas as a source of back-up supply. When faced with a supply deficiency, they asserted, the utility could divert at least a portion of that gas for use in meeting the needs of its system supply customers. Chevron et al. found this possibility particularly troubling in light of the fact that, despite its availability, intrastate production makes up only a small fraction of the gas held under contract by Consumers. These parties suggested having Consumers place more of Michigan's in-state production under contract, thus reducing the utility's potential need to divert third-party gas. They further suggested that approval of Consumers' curtailment rule include a "stern warning for Consumers to take all precautions to procure adequate, reliable supplies (base and contingency) to meet its obligations to its customers." Chevron et al.'s initial brief, pp. 38-39.

The ALJ rejected these suggestions. Specifically, she concluded that Chevron et al.'s claims regarding the need to contract for additional intrastate gas supplies could better be addressed in Consumers' future gas cost recovery (GCR) proceedings. Likewise, she found no need for the Commission to issue the warning proposed by Chevron et al.

Chevron et al. except to the ALJ's conclusions and reassert their earlier arguments. Specifically, they claim that issues regarding the use of additional intrastate gas should be addressed before approving the proposed rule and that their proposed warning should be given. In response, Consumers claims that (1) the Commission has no authority to require the utility to enter into contracts with specific gas suppliers, (2) the utility's procurement of system supply gas is regulated through annual GCR proceedings, and (3) the proposed curtailment rule contains adequate restrictions regarding the diversion of third-party gas.

The Commission finds that both of Chevron et al.'s requests should be rejected. As correctly noted by Consumers and the ALJ, the adequacy and appropriateness of the utility's gas supply

contracts are best addressed in the context of its annual GCR proceedings. Moreover, the terms of Consumers' proposed curtailment rule make unnecessary the "stern warning" requested by Chevron et al. Specifically, Rule B4.3B(2) requires that, as a condition precedent to enforcing the utility's curtailment plan, Consumers must "implement contingency contracts for emergency gas supply purchases." Exhibit A-1, p. 6. The Commission therefore concludes that it should adopt the ALJ's recommendation and deny Chevron et al.'s requests.

### Miscellaneous Issues

The parties raised five additional issues regarding the wording of Consumers' proposed curtailment rule, differences between Consumers' proposal and the curtailment rule approved for use by Mich Con, and the procedure by which Consumers' rule was examined.

#### a. Effect of the Mich Con settlement

Consumers pointed out that its proposed curtailment rule was very similar to that adopted for Mich Con by the Commission's February 23, 1995 order in Case No. U-10603. The utility went on to note that Mich Con's rule arose from a settlement agreement whose signatories included ABATE and several of Chevron et al.'s members. Consumers therefore indicated that it was improper for ABATE and Chevron et al. to oppose numerous provisions in its proposed rule that are identical to language found acceptable in the Mich Con case.

The ALJ disagreed with Consumers' analysis. According to her, Consumers and Mich Con are not identical in their business operations or in the way in which their systems are configured. Thus, she noted, rules that are fine for Mich Con may not be appropriate for Consumers. The ALJ therefore concluded that ABATE and Chevron et al. were free to take different positions in this case than they did in Case No. U-10603.

No exceptions have been filed regarding the ALJ's conclusion, and the Commission finds that it should be adopted.

b. Definitions

Chevron et al. expressed concern over several words and phrases in the proposed curtailment rule that they felt were not adequately defined. After examining the portion of the rules related to each of their requests, the ALJ concluded that none of the definitions needed to be changed.

Chevron et al. except to that conclusion and contend that at least seven areas require clarification.

First, Chevron et al. argue that the phrase "supply deficiency" must be specifically defined so that customers can determine whether it means the absence of structural supplies (like pipes, meters, and valves) as opposed to the lack of natural gas. However, because the curtailment rule clearly reflects an intent to deal with situations where gas, not hardware, is in short supply, the Commission finds that no additional clarification is necessary.

Second, Chevron et al. contend that Rule B4.1C defines "capacity restriction" so broadly that it could mistakenly be interpreted to cover situations arising from damage to the transmission or distribution system due to Consumers' fault. However, as noted earlier, the issue of fault is not germane to this proceeding. Therefore, Chevron et al.'s request to narrow the range of events falling within the definition of "capacity restriction" should be denied.

Third, these parties go on to assert that the definition of "force majeure" in Rule B4.1H is unreasonably vague. Notwithstanding this assertion, the definition set forth in Rule B4.1H, which covers 16 lines and includes over 250 words, provides a great deal of specificity with regard to what circumstances constitute "force majeure" under Consumers' curtailment rule. Thus, the ALJ's recommendation to leave this rule unchanged should be adopted.

Fourth, Chevron et al. point out that according to Rule B4.2A(1), the curtailment of gas service can occur when the utility is unable “to procure sufficient gas volumes from its interstate suppliers or other suppliers.” Exhibit A-1, p. 3. These parties request expanding the quoted language to specifically mention “intrastate suppliers.” The Commission finds that the requested change is self-serving and unnecessary, and should be rejected. A full reading of this part of the curtailment rule shows that it applies to all dependable, reasonably priced sources of gas.

Fifth, Chevron et al. complain that Rule B4.1 does not specifically define who constitutes a nonsystem supply customer. Similarly, these parties contend that the phrase “other than system supply customers” is nowhere defined. They therefore assert that Consumers’ proposed curtailment rule must be amended to resolve this uncertainty. The Commission disagrees, finding instead that these phrases are self-defining. Specifically, any customer that does not pay for the right to use system supply gas (either through application of Consumers’ retail sales tariffs or through payment of the utility’s system supply entitlement charge) constitutes a non-system supply customer. Likewise, all similarly situated entities are “other than system supply customers.”

Sixth, these parties contend that the definition of “customers” in Rule B4.1E and the use of that word throughout Rule B4.2 conflict with the exclusion from curtailment of third-party gas set forth in Rule B4.2A(4). Again, the Commission disagrees. Rule B4.1E includes sales, transportation, and storage customers within the general definition of “customers.” However, it goes on to state that this definition applies “unless otherwise specified.” Exhibit A-1, p. 1. Because Rule B4.2(A)(4) specifically states that curtailment due to long-term supply deficiency will not apply to the owners of third-party gas, transportation and storage customers are exempted from its coverage and the conflict envisioned by Chevron et al. does not exist.

Seventh, these parties claim that the phrase “gas service” must be specifically defined so that customers can determine whether it is intended to apply to transportation and storage service, rather than only to sales service. Nevertheless, because a fair reading of Consumers’ proposed curtailment rule shows that this phrase refers to all regulated services provided by the utility, their claim must be rejected.

For these reasons, the Commission concludes that Chevron et al.’s exception should be rejected and that their requests to create or revise these seven definitions should be denied.

c. Elimination of Rule B4.2

In its initial brief, the Staff suggested that Rule B4.2 (concerning curtailments arising from long-term supply deficiencies) could be eliminated as superfluous. ABATE opposed this suggestion on the grounds that the Staff’s proposal first surfaced after the close of the record and that the effect of classifying a gas supply deficiency as either long-term or emergency is significant for transportation customers.

The ALJ agreed with ABATE. Based on the absence of evidentiary support for the Staff’s proposal and the inability to explore on the record the potential impact that eliminating this provision would have on transportation customers, she recommended retaining Rule B4.2. No exceptions have been filed regarding this recommendation, and the Commission finds that it should be adopted.

d. Interruptible versus firm service

Chevron et al. asserted that the proposed curtailment rule should be revised to remove “any express or implied suggestion . . . that Consumers is able to provide interruptible versus firm transportation service.” Chevron et al.’s initial brief, p. 39. This was based on their belief that



providing two different levels of transportation service would conflict with Act 9's prohibition against granting a preference or advantage to one customer over another. In support of their assertion, Chevron et al. cited the March 29, 1995 order in Case No. U-10547, in which the Commission discussed the Staff's belief that "firm transporters should not be permitted to obtain a preference over interruptible transporters through the dedication of acreage" to the operator of a new gas pipeline. March 29, 1995 order, p. 52.

The ALJ disagreed with that assertion and recommended retaining all references to firm and interruptible transportation service. Chevron et al. except to that recommendation and reassert their earlier arguments.

The Commission agrees with the ALJ and concludes that it should reject Chevron et al.'s request to strike any suggestion in the curtailment rule that Consumers can offer both firm and interruptible transportation service. As noted earlier in this order, Section 6 of Act 9 merely requires that similarly situated customers be treated equally unless a rational basis exists for treating them differently. In numerous decisions issued by the Commission and Michigan's courts, it has consistently been found that treating interruptible and firm customers differently (e.g., charging them different rates) can be justified by the fact that they impose different demands on utility systems. Moreover, the order cited by Chevron et al. provides no support for their position. The Commission did not decide whether undue discrimination occurred in that case and instead reserved for a future complaint proceeding all analysis of whether a rational basis exists for the different treatment envisioned in Case No. U-10547. Therefore, Chevron et al.'s exception concerning this issue should be rejected.

e. Chevron et al.'s motion to strike

On May 22, 1997, Chevron et al. filed a motion to strike a portion of Consumers' reply brief. Specifically, they sought to exclude from consideration the utility's arguments (which were rejected by the ALJ on February 13, 1997) that Chevron et al. had no right to participate in this case. The ALJ granted Chevron et al.'s motion on the grounds that Consumers' arguments were not timely and failed to state any basis upon which relief may be granted.

No exceptions have been filed regarding the ALJ's action, and the Commission finds that it should be upheld.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 et seq.; MSA 22.21 et seq.; 1929 PA 9, as amended, MCL 483.101 et seq.; MSA 22.1311 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.

b. Consumers' proposed curtailment rule is reasonable and should be approved, as amended by this order.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's proposed rule concerning the curtailment of gas service and the diversion of third-party gas is approved, as amended by this order.

B. Consumers Energy Company is authorized to revise its tariff concerning the curtailment of gas service and the diversion of third-party gas, Tariff M.P.S.C. No. 8-Gas, Rule B4, and shall file four sets of tariff sheets in conformity with this order.

C. The tariff revisions authorized in this case shall take effect on the date following issuance of this order.

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, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand

Chairman

( S E A L )

/s/ John C. Shea

Commissioner

/s/ David A. Svanda

Commissioner

By its action of February 25, 1998.

/s/ Dorothy Wideman  
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of February 25, 1998.

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Its Executive Secretary

In the matter of the application of )  
**CONSUMERS ENERGY COMPANY** for )  
approval of rules governing the curtailment )  
of gas service and the diversion of third-party )  
gas. )  
\_\_\_\_\_ )

Case No. U-11108

Suggested Minute:

“Adopt and issue order dated February 25, 1998 approving the implementation of rules governing the curtailment of gas service and the diversion of third-party gas by Consumers Energy Company, as set forth in the order.”