STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **GREAT LAKES ENERGY GAS SERVICES, L.L.C.,** for a certificate of public convenience and necessity relative to Corwith Township, Otsego County.	)	Case No. U-12791
In the matter of the application of **GREAT LAKES ENERGY GAS SERVICES, L.L.C.,** for a certificate of public convenience and necessity relative to Thornapple Township, Barry County.	)	Case No. U-12792

At the November 20, 2001 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On January 16, 2001, Great Lakes Energy Gas Services, L.L.C., (GLEG) filed two applications, pursuant to MCL 460.501 et seq., (Act 69) seeking a certificate of public convenience and necessity to provide propane gas service in two geographic areas described in the applications.

On February 14, 2001, the Michigan Propane Gas Association, Gaylord Gas Inc., and Johnson Oil Company (collectively, the MPGA) filed a petition to intervene in each case. On February 20, GLEG filed an objection to those petitions.

Pursuant to due notice, on February 21, 2001, a prehearing conference was held before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ). At that time, the ALJ granted petitions to intervene filed by the MPGA and Consumers Energy Company (Consumers) in Case No. U-12792 and by the MPGA in Case No. U-12791. The Commission Staff (Staff) also participated in these cases.

On May 4, 2001, the ALJ consolidated the two cases for hearing. A joint evidentiary hearing was conducted on June 12, 2001. The consolidated record consists of 173 pages of testimony and 16 exhibits that were received into evidence. Following the close of the record, the parties filed briefs and reply briefs on July 3 and 17, 2001, respectively.

On October 4, 2001, the ALJ issued his Proposal for Decision (PFD) in which he recommended that the Commission grant the applications. On October 18, 2001, the MPGA filed exceptions. On October 30, 2001, the Staff and GLEG filed replies to exceptions.

Factual Background

GLEG is a Michigan limited liability corporation engaged in the distribution and sale of natural gas and propane gas to customers in western Michigan. It provides propane service to customers with individual tanks and, in certain areas, using a fixed distribution system as it proposes here. It is an affiliate of Great Lakes Energy (an electric utility) and a member of the MPGA.

In these applications, GLEG seeks authority to install a fixed distribution system for delivery of propane gas in each of two developments, one in Corwith Township, Otsego County (Case No. U-12791) and the other in Thornapple Township, Barry County (Case No. U-12792). Randy W. Camp, GLEG's general manager, testified that the developers of each subdivision requested installation of a single propane gas storage tank (30,000 gallon capacity in Corwith Township and

18,000 gallon capacity in Thornapple Township) with connecting underground pipes to residences within the respective developments. GLEG proposes to charge customers for the propane gas they actually use, as measured by meters installed on the systems. Mr. Camp asserted that the proposed facilities will comply with the Michigan Gas Safety Standards, the National Fire Protection Association's standards, and Michigan's mechanical code, where applicable.

Mr. Camp acknowledged that propane tank service is available within the area, through providers that bring an individual storage tank to the customer's property. Mr. Camp testified that GLEG will not prohibit a customer on its fixed distribution system from choosing another supplier in these areas.

Mr. Camp further testified that GLEG will continue to employ voluntary price caps on its propane sales. Those price caps essentially permit customers that are connected to the fixed distribution system to obtain propane at a price equal to that charged to individual tank customers that have earned the 5% "customer loyalty discount."[1]

Legal Framework

Act 69 prohibits a public utility from constructing or operating any public utility plant or system, or rendering service for the purpose of transacting or carrying on a local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service without first obtaining a certificate of public convenience and necessity from the Commission. MCL 460.502. Section 5 of Act 69, MCL 460.505, requires that, before granting a certificate of public convenience and necessity, the Commission must consider four factors: (1) the service being rendered by the utility currently serving the territory;

[1]As Mr. Camp explained, the customer loyalty discount is available to each of its individual tank customers that has kept a propane account current with GLEG for at least one year.

(2) the investment in that utility; (3) the benefit, if any, to the public in the matter of rates; and (4) other equitable matters.

Current Service

The MPGA argues that the ALJ erred by failing to recognize that Gaylord Gas, Inc., serves the area that GLEG seeks to serve. Therefore, the MPGA argues, "the ALJ's finding that 'there is no waste, no obsolescence nor any rendering of any facilities unnecessary because there are no facilities currently in place at the two subdivisions' is mistaken." MPGA's exceptions, p. 12. The MPGA insists that, pursuant to MCL 460.505, the Commission must consider MPGA members' service to customers located in the area affected by the applications.

As noted above, the Commission must consider the nature and quality of service being rendered by a utility currently serving the territory. The record reflects that there is no other utility serving in the subdivisions that GLEG seeks to serve. The only other utility that entered an appearance in this case is Consumers, which did not present any argument or evidence. The Commission finds that the MPGA's argument rests on the false premise that Act 69 was intended to protect the business of providers that deliver propane by truck to individual tanks.

MCL 460.502 provides in relevant part:

> No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business, either directly or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that the public convenience and necessity requires or will require such construction.

Id.

Act 69 grants the Commission authority to limit territory served by a utility and to prevent duplication of capital facilities. Huron Portland Cement Co v PSC, 351 Mich 255; 88 NW2d 492 (1958). The Commission has not asserted that it has authority to limit the service territories of propane providers delivering by truck to individual tanks and the intervenors do not suggest that it should do so. However, they desire to claim the protections of Act 69, without themselves being subject to the Act's requirements. In the Commission's view, the interveners have impermissibly stretched the protections of Act 69 in order to prevent unwanted competition within a competitive market.

Because the Commission concludes that the interveners are not utilities or agencies intended to be protected pursuant to Act 69, their service to the area in which the certificate is requested is irrelevant. Further, the Commission finds that even if it were relevant, the interveners did not create a record that would support denying the certificates. They placed little on the record concerning the quality of their service, the options available to customers, or whether and to what extent the addition of GLEG's fixed distribution system might materially affect their ability to maintain service within the area.

Duplication of Facilities

The MPGA further argues that the ALJ improperly ignored the duplication of facilities that will result from granting the applications. The MPGA argues that as distributors of liquid propane, MPGA members provide an unregulated utility or agency service similar to that for which the certificate is requested. Although those members do not provide regulated propane gas service, the MPGA argues, they have made substantial investment in facilities for which an Act 69 certificate is not required, including propane equipment, delivery trucks, and tank facilities. It argues that "to the extent that the fixed distribution system proposed by GLEG would render the

investments in facilities, made by MPGA members, obsolete or unnecessary in the territories that GLEG proposes to serve, the proposed facilities would be duplicative of unregulated facilities already in place and result in waste, the cost of which would have to be borne by MPGA members and ultimately the consumer." MPGA's exceptions, p. 10. The MPGA insists that granting the applications will have a deleterious effect on competition in the area.

Based on the finding that the MPGA's members are not intended recipients of the protection afforded by Act 69, the Commission finds the MPGA's argument without merit. Further, the Commission rejects the MPGA's argument that granting the applications would render the MPGA members' facilities wasted, obsolete, or unnecessary. The present applications are unlike the typical situation in which a utility has built plant to serve the reasonably foreseeable needs of a particular service territory, and seeks to protect the viability of the investment that was made pursuant to an understanding that it had the exclusive right to serve that territory. Traditionally, propane providers have not had exclusive territories, nor have they built facilities that will be unnecessarily duplicated by GLEG's plan to serve customers through a fixed distribution system. From the MPGA members' point of view, there is no more waste or duplication in a customer choosing to sign up for GLEG's fixed distribution service than there would be should a customer choose to switch from one to another propane provider that leaves a tank on the customer's premises.

The Commission further rejects the MPGA's argument that the applications should not be granted due to any negative effect on the competitive market for propane gas. The MPGA companies, including GLEG, compete for delivered propane gas business throughout the area. That competition will still exist, although GLEG seeks to add an additional option to the services now available for customers.

Contrary to the arguments of the MPGA, the Commission finds that granting the applications may improve competition by offering customers a new method of delivery that does not require a propane tank situated on the customer's property. Moreover, customers will be billed for metered use, rather than for a filled tank on a periodic basis. Additionally, customers may realize some safety advantages with a tank that is remote from the customer premises, and pipes that are located underground. These advantages present customers with a real choice in service options, which is the heart of a healthy competitive market.

Rates

According to Mr. Camp, GLEG proposes to set its rates in the same fashion that the Commission approved in the June 10, 1999 order in Cases Nos. U-11814 and U-11819. That method charges captive customers the same rate that is applied to non-captive customers that have earned the 5% customer loyalty discount. The rate is thus subject to market pressures. The Commission concludes that, in the matter of rates, the public will benefit from the new option for a fixed distribution system at a rate competitive with that available for service to individual tanks.

In a related matter, the MPGA excepts to the ALJ's failure to recognize that GLEG "has intentionally mislead [sic] customers and Thornapple Township by giving the impression that the Commission is setting GLEG's rates for propane gas." MPGA's exceptions, p. 6. The MPGA argues that, although Mr. Camp testified that the Commission does not regulate GLEG's propane prices, Thornapple Township granted a franchise that specifically states that GLEG is entitled to charge rates "as approved by the Michigan Public Service Commission . . .." Id. The MPGA points out that GLEG accepted the franchise with its conditions and provisions. Exhibit I-8, 3 Tr. 94.

GLEG and the Staff respond that the ALJ properly concluded that GLEG did not intend to mislead the public or Thornapple Township. The Thornapple Township franchise grants GLEG authority to provide gas service, without specifying propane gas or natural gas. GLEG notes that natural gas prices are regulated by the Commission.

The Staff adds that the Commission does possess jurisdiction to regulate propane gas distributed over a fixed distribution system if it determines that oversight of pricing is necessary. The Staff states that there has been no misrepresentation by GLEG.

The Commission is not persuaded that GLEG engaged in misleading conduct. The ALJ found that the conditions concerning rates being regulated by the Commission referred to rates for GLEG's natural gas service. The Commission does not rely upon that analysis alone, however. Rather, the Commission also finds that it has historically regulated fixed distribution propane providers in a different manner than natural gas. Because of the effect of a competitive marketplace on the price of propane, the Commission has permitted propane providers to price their product at competitive rates. In the present applications, GLEG proposes to charge its fixed distribution system customers the same discounted rate that applies to individual tank customers that have kept their account current for at least one year. This is the same pricing scheme that was approved by the Commission in Case Nos. U-11814 and U-11819.

Other Factors

1. History of Limiting Competition

The MPGA asserts that the ALJ erroneously relied upon Mr. Camp's testimony that GLEG would not prevent a customer from choosing propane tank service, as an assurance that the market will provide a check on the services and prices that GLEG may charge. The MPGA argues that the ALJ ignored the evidence of GLEG's history of obstructing competition with a 25-year all-

requirements contract with developers, as described in the Commission's June 10, 1999 order in Cases Nos. U-11814 and U-11819. It asserts that Mr. Camp was uncertain as to whether a restrictive contract will be required in Corwith or Thornapple townships.

The MPGA argues that if the Commission is inclined to grant the applications, it should condition that grant on a prohibition against long-term exclusive contracts like the ones involved in Cases Nos. U-11814 and U-11819. Without a prohibition against this anticompetitive activity, the MPGA argues, GLEG will be permitted to permanently "skim the cream off the local market." MPGA's exceptions, p. 5.

GLEG and the Staff argue that the ALJ correctly determined that the company has not impermissibly thwarted competition, nor does it have an intention to do so should the applications be granted. GLEG asserts that granting the applications will promote competition because it will increase the number of providers from which customers can select. Further, it argues, customers will be able to choose a fixed delivery system, which no other provider offers. Moreover, GLEG states, it has committed to permit customers on its fixed distribution system to seek propane delivery from other providers should they desire to do so.

The Staff points out that the major objection from the MPGA surrounds the 25-year contracts that GLEG proposed in Cases Nos. U-11814 and U-11819. However, the present applications do not contain a proposal for long-term all-requirements contracts. In fact, the Staff states, GLEG has represented that it will not impede customers moving to a different supplier should they desire to do so. Moreover, the Staff argues, even if GLEG intended to use long-term contracts, the MPGA ignores the fact that the Commission granted the applications in the prior order despite the existence of those contracts.

The Staff further recommends that the Commission reject the MPGA's proposal that any certificate contain a condition that GLEG not engage in an exclusive arrangement for propane gas over the requested facilities. The Staff states that the MPGA's quote of the Commission's order is incomplete, and, in context, does not fairly support the MPGA's position. It further argues that the MPGA's cream skimming argument makes little sense in the context of the propane market. It states that the MPGA made no showing that the subdivisions that GLEG intends to serve are in any sense the cream of the available market. Moreover, there is no prohibition against propane gas providers serving any group of customers.

The Commission finds that the MPGA's proposed condition should not be adopted. First, there is no evidence that GLEG proposes to enter into long-term contracts with developers. In fact, the record reflects the opposite. GLEG affirmatively represented that it would not impede a customer's choice to purchase propane from an alternate supplier. Should GLEG later act in a manner that violates a statute or Commission rule, there are procedures for bringing the issue before the Commission. Second, as pointed out by the Staff, the Commission has previously granted an Act 69 certificate when the evidence included use of long-term exclusive contracts. Thus, adopting the proposed condition would be inconsistent with the prior Commission order.

2. Code of Conduct

The MPGA argues that the ALJ improperly failed to consider "code of conduct" issues in this proceeding. The MPGA asserts that the Commission must examine the specifics of the proposed investment in facilities with regard to what extent, if any, Great Lakes Energy is subsidizing the

investment of its affiliate in violation of the code of conduct adopted in the Commission's December 4, 2000 order in Case No. U-12134 and other applicable law.[2]

GLEG and the Staff respond that the ALJ properly declined to make a finding concerning any code of conduct violations. GLEG maintains that an inquiry into its investment in the area is not required by Act 69, and any code of conduct issues are irrelevant to a determination on these applications.

The Staff argues that no code of conduct issues were directly discussed at the hearing. Rather, the Staff states, the MPGA first raised the issue in its initial brief after the record was closed. Thus, the Staff points out, the record does not facilitate the MPGA's desire for a ruling, and the ALJ properly declined to discuss the issue.

The Commission finds that the MPGA has failed to demonstrate on this record that any impermissible subsidy exists or is even planned. The record reflects that GLEG has not yet determined how it will finance the project. The Commission will not assume unlawful conduct before any evidence is presented of its existence. Should Great Lakes Energy's future conduct violate the code of conduct or any applicable law, there are procedures for an injured party to bring a complaint before the Commission. Moreover, GLEG correctly points out that inquiry into investment in the area pursuant to Section 5 of Act 69, MCL 460.505, relates to the utility then serving the area, and is not required in relation to the utility seeking the Act 69 certificate.

[2]The Commission issued an order on rehearing in Case No. U-12134 on October 29, 20001, after the record in the present cases closed.

Petitions for Leave to Appeal

On February 27, 2001, GLEG and the Staff filed a joint application for leave to appeal the ruling of the ALJ granting the petition of the MPGA for leave to intervene. The MPGA filed a response on March 13, 2001.

On May 14, 2001, the MPGA filed an application for leave to appeal the ALJ's ruling that granted GLEG's motion to compel, which sought certain discovery answers. GLEG filed a response on May 21, 2001.

At this juncture, the Commission denies both of these applications for leave to appeal as moot. Granting either or both would not affect the outcome of this order. As discussed above, the Commission has found that MPGA members are not utilities or agencies protected by the provisions of Act 69. For purposes of issuing this order, the Commission has addressed the MPGA's arguments as though it had been permitted to intervene on a discretionary basis.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1929 PA 69, as amended, MCL 460.501 et seq.; 1909 PA 300, as amended, MCL 462.2 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. GLEG's applications for certificates of public convenience and necessity should be granted.

c. The applications for leave to appeal should be denied as moot.

THEREFORE, IT IS ORDERED that:

A. Great Lakes Energy Gas Services, L.L.C., is granted certificates of public convenience and necessity to provide propane gas service in Corwith Township, Otsego County, and Thornapple Township, Barry County, provided: (1) construction and maintenance of the system complies with the Michigan Gas Safety Standards and applicable Commission rules, and no newly constructed lines cross another utility's gas mains or service lines or parallel another utility's mains or service lines within a street or right-of-way; (2) any extension of service must be consistent with the utility's then existing customer attachment program or main extension policy; (3) prior to constructing any extension of a main within a township section occupied by another utility, Great Lakes Energy Gas Services, L.L.C., must give 30 days' written notice to the Commission's Gas Division's Competitive Services Section, identifying the location of the proposed extension and providing a copy of the customer attachment program worksheet, if applicable, for the extension; and (4) Great Lakes Energy Gas Services, L.L.C., may not construct facilities to serve an existing customer of another gas utility.

B. The applications for leave to appeal are denied.

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.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of November 20, 2001.

/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.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of November 20, 2001.

_____
Its Executive Secretary

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Suggested Minute:

> "Adopt and issue order dated November 20, 2001 granting Great Lakes Energy Gas Services, L.L.C., certificates of public convenience and necessity to provide propane gas service in Corwith Township, Otsego County, and Thornapple Township, Barry County, as set forth in the order."