S T A T E O F M I C H I G A N

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of Consumers Energy Company for authority to increase its rates for the distribution of natural gas and for other relief	)	Case No. U-18124

RULING GRANTING THE ATTORNEY GENERAL'S MOTION TO COMPEL CONSUMERS ENERGY COMPANY'S RESPONSE TO DISCOVERY REQUEST AG-CE-127(d)

This ruling addresses that portion of the Attorney General's Motion to Compel Discovery from Consumers Energy Company ("Consumers Energy" or "Company") taken under advisement at the December 8, 2016 hearing, specifically the Attorney General's motion to compel the Company's full and complete response to discovery request #127(d) [AG-CE-127(d)], which provides as follows:

> 127. Refer to page 19, lines 13-22, of Ms. Conrad's direct testimony. Please: d. Provide a copy of the presentation or presentations made to the Compensation Committee of the CMS Energy Board of Directors relating to setting compensation levels, goals and incentive pay for officers for the year 2016, including market data and peer group information.

In its discovery response, Consumers Energy objects to providing the information sought, claiming that it is "confidential, proprietary, and commercially sensitive, [and] that disclosure would result in competitive disadvantage and harm to Consumers Energy, and

is not relevant."[1] Consumers Energy further notes:

> As part of the contract for technical and consulting services with Pay Governance it states that the work product, which contains intellectual property, that it delivers are provided solely for the intended purpose of the Compensation Committees of the Board of Directors, and may not be referenced or distributed to any other parties without their prior written consent. Pay Governance does not consent to the distribution of their materials presented to the Compensation Committees of the Board of Directors.[2]

In his Motion to Compel, the Attorney General argues:

> [T]he Company put the requested information at issue in this case by relying on it to not only make decisions regarding compensation, but also citing to its use to support its request to include recovery of officer incentive compensation in rates in this case. The Company's own witness cited the survey data to support her assertion that the proposed EICP [Employee Incentive Compensation Plan] and restricted stock payments are reasonable. It is clearly relevant and therefore discoverable in order to determine the reasonableness of total compensation for each officer position (22 officers).[3]

In its Response, Consumers Energy asserts:

> The Attorney General's Motion to Compel contends that Consumers Energy should be required to provide the requested Willis Towers Watson ("Towers Watson") published surveys of compensation in the public utility sector because Consumers Energy witness Conrad has sponsored testimony explaining that the Company contracts with a consultant (Pay Governance) and Towers Watson to use said survey data to assist its efforts to establish market-based compensation levels for its officer employees. As explained in the discovery response quoted above, the Towers Watson survey data the Attorney General seeks is considered to be confidential, proprietary, and intellectual property which is the work product and owned by Towers Watson. Towers Watson has provided written consent for Pay Governance to use the survey data for work and analysis performed on Consumers Energy's behalf. However, Pay Governance is prohibited from using or reproducing the survey database and survey reports or any data they contain for any purpose other than advising Consumers Energy and its Board of Directors. Thus, Ms. Conrad has specifically explained that the data sought by the Attorney General are considered the confidential, proprietary, intellectual property and work product of Pay Governance and

[1] Attorney General's Motion to Compel, Attachment 2, pp. 1-3.
[2] *Id*., Attachment 2 at p. 3.
[3] Attorney General's Motion to Compel at pp. 6-7.

> Towers Watson. A copy of the terms and conditions which govern Consumers Energy's agreement with Towers Watson, and the Company's use of the survey data obtained from Towers Watson, is attached to this Response as Attachment B. Neither Pay Governance nor Towers Watson has consented to the disclosure to the Attorney General of their confidential, proprietary work product, regardless of the existence of a Confidentiality Agreement which Consumers Energy has executed for purposes of this case with the Attorney General.[4]

The Company further maintains that the Commission and the Michigan Court of Appeals have previously upheld the protection of intellectual property such as that requested by the Attorney General from discovery and use by intervenors in MPSC cases. Specifically, Consumers Energy references the Commission's December 20, 1983 Order in Case No. U-7550, subsequently affirmed by the Michigan Court of Appeals, wherein the Commission upheld the administrative law judge's decision to deny the Attorney General's discovery request to access Detroit Edison Company's PROMOD III computer program user's manual, the utility's use of which was pursuant to a license agreement with a third party. Arguing that this case is "directly analogous to Case No. U-7550", Consumers Energy maintains that this tribunal should conclude that the compensation survey data and associated work product sought by the Attorney General should be deemed "the protected proprietary property of a third party" and therefore not discoverable, the same basis on which the Attorney General was denied discovery of Detroit Edison Company's PROMOD III computer program user's model in Case No. U-7550.[5]

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[4] Consumers Energy Company's Response at pp. 8-9. At the December 8, 2016 hearing pursuant to the Attorney General's Motion to Compel, Consumers Energy also presented a copy of a December 8, 2016 letter from Pay Governance to the Company, wherein Pay Governance expressly states that it does not consent to sharing its recent executive compensation reports with third parties.

[5] Consumer Energy Company's Response at pages 13-14, citing *Attorney General v Pub Serv Comm*, 173 Mich App 47; 433 NW2d 816, 818 (1988).

Not only have the rules of evidence changed and been clarified since the issuance of the Commission's Order in Case No. U-7550, the case Consumers Energy maintains is "directly analogous" to the instant case,[6] but the Commission has since that time consistently emphasized the importance of providing parties to contested cases access to the data upon which expert testimony is based, including proprietary information relied on by utilities in these proceedings. To be sure, in its January 21, 1994 Order in Case No. U-10102, the Commission discussed a discovery dispute as follows:

> The fourth issue concerns the Attorney General's request that Detroit Edison be required to make its data base and all assumptions used for DSM screening available to the public. According to Mr. Sterzinger, it is important for all parties to have ready access to this data in order to 'ascertain its reasonableness, analyze changes to it, and modify the data in ways they believe appropriate.' . . . This was apparently recognized by the parties involved in the analysis of Consumers' DSM program, he continued, which resulted in that utility's use of sound, publicly-available data. The ALJ agreed, and therefore recommended that Detroit Edison be compelled to make its data base and assumptions public.
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> The utility initially balked at the idea of revealing the details of its DSM screening process. However, the utility now contends that if its proposal to establish the DSMOC is approved, most of the problems would be resolved. Specifically, it asserts that the data base and computer software could be made available to the participants of the DSMOC, and that issues regarding the use of proprietary and confidential information could be resolved by those parties prior to the disclosure of the information. . .
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> Because this order adopts a modified version of the utility's proposal to establish the DSMOC, and because participation in the DSMOC will likely provide all parties with access to the utility's DSM database and computer programs, the Commission finds no need to specifically rule on the ALJ's recommendation at this time. However, the Commission will revisit this issue should problems arise regarding such things as the disclosure of confidential or proprietary information.[7]

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[6] See Michigan Rules of Evidence 702 and 703; see also, *Gilbert v DaimlerChrysler Corporation,* 470 Mich 749 (2003), wherein the Michigan Supreme Court clarified that MRE 702 requires a trial court to ensure that each aspect of an expert witness's proffered testimony is reliable, including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data.

[7] See MPSC January 21, 1994 Order, Case No. U-10102, pages 170-171, citations omitted.

In its December 19, 2013 order in Case No. U-17302, the Commission addressed another dispute as follows:

> MEC filed a motion to strike certain direct and rebuttal testimony filed by DTE Electric, on grounds that the expert opinion in the testimony was unsupported by facts on the record. Specifically, MEC objected to Mr. Conlen's testimony regarding the company's assumed wind energy generation capacity factor, because the reports on which Mr. Conlen relied were not placed in evidence. According to MEC, the failure to provide the reports violates MRE 703 (Rule 703), the Commission's determination on a similar issue in the December 20, 2011 order in Case No. U-16582, p. 16, and our Supreme Court's holding in People v Fackleman, 489 Mich 515; 802 NW2d 552 (2011).
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> DTE Electric argued that although Rule 703 has been amended, the Commission's corresponding procedural rule, 1999 AC, R 460.17325(1) . . . still permits the Commission to "admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. DTE Electric contends that the reports at issue are unnecessary because the record and the amended REP support Mr. Conlen's testimony that future wind capacity factors are assumed to be 40%. DTE Electric further argues that MEC's reliance on the Commission's findings in Case No. U-16582 is misplaced because the evidentiary issue in that proceeding concerned actual transfer prices to be applied to company projects and contracts. Finally, DTE Electric argues that if MEC has filed, and prevailed, on a motion to compel, the company could have sought a protective order and produced the reports without violating its confidentiality agreement with the company that supplied the reports.
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> The Commission agrees with MEC that the pertinent testimony by Mr. Conlen should be stricken because the company failed to provide the reports on which the testimony was based. Further, the Commission agrees that simply because the evidentiary issue in this case concerns one of many estimates associated with a plan, and not transfer prices to be applied to future projects, it does not change the requirement of the rule. Moreover, Rule 703 mandates that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence" (emphasis supplied); and the rule does not require an intervening party to file a motion to compel in order to trigger compliance.[8]

[8] See MPSC December 19, 2013 Order, Case No. U-17302, pages 2-3.

Likewise, in Case No.U-15895, the Commission rejected claims that proprietary economic models could be protected from review by the parties in the context of proposed standard rate case filing forms and instructions:

> On December 23, 2008, the Commission issued an order adopting standard rate case filing forms and instructions. That order adopted both the existing standard rate case filing forms that provide information on the historical test year, and new forms, which were submitted by the Regulated Utilities that provide information on the projected test year. On January 22, 2009, MEGA filed a petition for rehearing or clarification.
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> * * *
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> MEGA further argues that, while the Commission directed utilities to file exhibits in Microsoft Excel format, "there may be situations where a particular supporting exhibit is not available in Excel format," and "some other software might become the market leader in the future." . . . MEGA further requests that the Commission acknowledge the potential intellectual property rights of third party providers of economic models that may prevent such models from being disseminated to all parties who request them. MEGA requests that the Commission clarify the December 23 order to authorize "a variance procedure for good cause as determined by its staff and indicates [sic] that the intellectual property rights of the model owners will be protected."
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> The Staff opposes MEGA's final two clarification requests regarding the use of Excel and the possibility of proprietary rights in economic models. The Staff argues that the petition fails to meet the standard for rehearing. The Staff contends that MEGA's arguments are speculative, Excel is widely available, and the utilities should be responsible for the conversion to excel of an exhibit that is not in that form. The Staff points out that protective orders are available to address proprietary concerns. Finally, the Staff notes that most utilities are using the standardized cost of service study (COSS) model that was developed through the collaborative in Case Nos. U-14399 and U-14347, and adopted by the Commission on March 21, 2007.
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> The Commission agrees with the Staff. . . . The Commission declines to make Excel optional simply because it may be eclipsed someday by another program. Further, the Staff is correct that protective orders are always available to parties in rate cases to address proprietary and confidentiality concerns. Additionally, the administrative law judge assigned to the rate case is available to handle problems with, or objections to, the form or accessibility of particular pieces of evidence.[9]

[9] See MPSC February 20, 2009 Order, Case No. U-15895, pages 3-4.

Still further, in its December 20, 2011 order in Case No. U-16582, the Commission explained:

> In its initial brief, the MEC renews its motion to strike Detroit Edison's testimony and exhibits related to the company's proposed schedule of transfer prices for 2012. According to the MEC, the transfer price schedule Detroit Edison presented is largely based on forecasts purchased by the company from a third-party consultant. The MEC contends that because Detroit Edison refused to enter these forecasts into the record, and denied the MEC an opportunity to examine them as part of discovery, the Commission should reject the company's updated transfer price schedule.
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> The MEC's motion to strike is primarily based on MRE 703, which requires that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." In response to Detroit Edison's claim that the Michigan Rules of Evidence do not apply to Commission proceedings, the MEC points to Rule 325 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17101 et seq. Rule 325(1) provides:
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> The rules of evidence as applied in nonjury civil cases in circuit court shall be followed as far as practicable, but the commission may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Objections to offers of evidence may be made and shall be noted in the record.
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> According to the MEC, Rule 325 should be construed so that the Commission has discretion to allow evidence not otherwise admissible under the Michigan Rules of Evidence, but only if: 1) it is not "practicable" to follow the Michigan Rules of Evidence; and 2) the evidence sought to be admitted must be "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." The MEC contends that the evidence underlying the transfer price schedule that Detroit Edison refused to provide does not meet the criteria under Rule 325. The MEC also cites Ohio Bell Telephone Co v Public Utilities Commission of Ohio, 301 US 292, 307; 57 S Ct 724; 81 L Ed 1093 (1937) in support of its position. In reply, Detroit Edison observes that in response to the MEC's discovery request, it provided contact information so that the MEC could purchase the forecast information from the consulting firm. Detroit Edison adds that previous Commission orders and Court of Appeals' precedent confirm the need for confidentiality of commercial and proprietary information. Detroit Edison cautions that granting the MEC's request could result in the filing of significant amounts of additional documentation and that such a requirement would not be "practicable" under Rule 325.

> The Commission finds the MEC's arguments persuasive and notes that Detroit Edison's response (essentially, "Go buy the information yourself") was wholly inadequate. The Commission agrees with MEC that neither the Staff nor the intervenors have the burden to establish a foundation for the company's expert testimony. The Commission also observes that while Detroit Edison raises the specter of the need to file massive amounts of documentation, it does not appear to be the situation in this case. Moreover, as the MEC points out, the parties to Commission proceedings are quite accustomed to dealing with copious amounts of evidence. The Commission therefore finds that the MEC's motion to strike should be granted and Detroit Edison's amended transfer price should be rejected. As the MEC contends, transfer prices are a contentious issue in the context of a company's REP with important implications for different classes of ratepayers. Without the forecast information underlying the proposed transfer price schedule, the other parties were denied the opportunity to test the company's evidence, a clear violation of their right to due process.[10]

Finally, in its June 9, 2016 Order in Case No. U-17678, the Commission offered the following observation regarding Consumers Energy's position that its PROMOD modeling is proprietary and that its license agreement with the owner of the program expressly prohibits the Company from assigning those programs to third parties or to use the programs for the benefit of other parties:

> The ALJ also determined that Consumers cannot insulate its modeling from review through its licensing agreements and that protective orders can be issued in these cases that preclude parties receiving information regarding the proprietary elements of any models from using that information for other purposes.
>
> The Commission generally agrees with the ALJ. Consumers must find a way to allow the parties to evaluate the company's implementation of the PROMOD model. As the ALJ suggested, the company should be prepared with any model to present sensitivity analyses to show the significance of underlying assumptions. Like the ALJ, the Commission is not inclined to be overly prescriptive in recommending a course of action but reinforces the importance of transparency, evidentiary standards, and understanding the impacts of key assumptions for the Commission to assess the reasonableness of the company's fuel and purchase power decisions.[11]

[10] See MPSC December 20, 2011 Order, Case No. U-16582, pages 14-16.

[11] See MPSC June 9, 2016 Order, Case No. U-17678, page 8.

Having considered the parties' respective positions and against the backdrop of the aforementioned Commission precedent, I find that because Consumers Energy's application seeks to recover in rates incentive compensation expenses, the determination of which is based in part on the Company's reliance on the information sought in AG-CE-127(d), Consumers Energy must find a way to allow the Attorney General to evaluate such information, notwithstanding the Company's proprietary concerns and contractual obligations to its consultants.[12] I will therefore grant the Attorney General's Motion to Compel as it pertains to discovery request AG-CE-127(d) and subject to an appropriate protective order or other terms or conditions mutually agreed upon by the parties.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Suzanne D. Sonneborn

Suzanne D. Sonneborn
Administrative Law Judge

Issued and Served: December 12, 2016

[12] While the Company's consultant, Pay Governance, has indicated in writing (December 8, 2016 correspondence) that it does not consent to sharing its executive compensation reports with third parties, in part because its reports rely upon survey data governed by a data sharing agreement between it, Willis Towers Watson, and Pay Governance, the Company has since indicated that Willis Towers Watson will consent to the disclosure of survey data (upon which Pay Governance's reports are based) to the Attorney General and the Commission subject to specific conditions.

S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

STATE OF MICHIGAN)
) SS.
County of Ingham)
)

Case No. U-18124

P R O O F O F S E R V I C E

Carol M. Casale being duly sworn, deposes and says that on December 12, 2016, she served a copy of the attached Ruling Granting the Attorney General's Motion to Compel Consumers Energy Company's Response to Discovery Request AG-CE-127(d) via E-Mail to the persons as shown on the attached service list.

Carol M. Casale

Carol M. Casale

Subscribed and sworn to before me
this 12th day of December, 2016.

Corinna C. Swafford

Corinna C. Swafford
Notary Public, Ionia County, Michigan
Acting in Eaton County, Michigan
My Commission Expires: 12/13/2019

ATTACHMENT A TO CASE NO. U-18124

Consumers Energy

Kelly M. Hall
kelly.hall@cmsenergy.com

Bret A. Totoraitis
Bret.Totoraitis@cmsenergy.com

Robert W. Beach
robert.beach@cmsenergy.com

Anne M. Uitvlugt
anne.uitvlugt@cmsenergy.com

Gary A. Gensch, Jr.
gary.genschjr@cmsenergy.com

mpscfilings@cmsenergy.com

MPSC Staff

Heather Durian, Assistant Attorney General
DurianH@michigan.gov

Bryan Brandenburg, Assistant Attorney General
BrandenburgB@michigan.gov

Meredith R. Beidler, Assistant Attorney General
beidlerm@michigan.gov

Attorney General Bill Schuette

Celeste R. Gill, Assistant Attorney General
gillc1@michigan.gov

John A. Janiszewski
janiszewskij2@michigan.gov

Association of Businesses Advocating Tariff Equity (ABATE)

Robert A.W. Strong
rstrong@clarkhill.com

Michael Puttwell
mpattwell@clarkhill.com

Sean Gallagher
sgallagher@clarkhill.com

Midland Cogeneration Venture Limited Partnership

David R. Whitfield
dwhitfield@wnj.com

Jason T. Hanselman
JHanselman@dykema.com

Richard J. Aaron
RAaron@dykema.com