February 16, 2018

Ms. Kavita Kale  
Executive Secretary  
Michigan Public Service Commission  
7109 West Saginaw Highway  
Post Office Box 30221  
Lansing, MI 48909

RE: Case No. U-18424 – 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.

Dear Ms. Kale:

Enclosed for electronic filing in the above-captioned case, please find the Redacted Version of Consumers Energy Company’s Response to the Attorney General’s Motion to Compel Discovery Responses. This is a paperless filing and is therefore being filed only in PDF. Also included is a Proof of Service showing electronic service upon the parties.

Please note that Attachment No. 2 contains material which has been designated as confidential. This confidential material is being filed under seal with the Michigan Public Service Commission.

Sincerely,

Gary A. Gensch, Jr.

cc: Hon. Suzanne D. Sonneborn, Administrative Law Judge  
Parties per Attachment 1 to Proof of Service
STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of )
CONSUMERS ENERGY COMPANY) Case No. U-18424
for authority to increase its rates for the )
distribution of natural gas and for other relief)

CONSUMERS ENERGY COMPANY’S RESPONSE TO THE ATTORNEY GENERAL’S MOTION TO COMPEL DISCOVERY RESPONSES

Consumers Energy Company (“Consumers Energy” or the “Company”) hereby responds to the Attorney General’s Motion to Compel Discovery Responses (“Motion to Compel”) filed on February 8, 2018 in this proceeding. As discussed below, the Administrative Law Judge (“ALJ”) should deny the Motion to Compel in its entirety.

I. 2017 PENSION AND OTHER POST-EMPLOYMENT BENEFIT MEASUREMENT AND DISCOUNT RATE – 18424-AG-CE-394(b), 398, 402(c), AND 403(b)

In Discovery Requests 18424-AG-CE-394(b), 398, 402(c), and 403(b), the Attorney General requested that the Company provide: (i) the discount rate as of December 31, 2017; and (ii) updated exhibits showing Other Post-Employment Benefit (“OPEB”) cost information reflecting updated information and assumptions as of December 31, 2017. Consumers Energy responded to these requests on January 23, 2018 by indicating that the December 31, 2017 information had not been finalized, and that the Company would provide the information following the filing of the Company’s Form 10-K Annual Report. On February 14, 2018, Consumers Energy supplemented its responses to discovery requests 18424-AG-CE-394(b), 398, and 402(c) and provided the Attorney General with the following: (i) Accounting Standards Codification (“ASC”) 715-30 Pension Plan Fiscal 2017 Accounting Requirements Report; (ii) December 31, 2017 ASC 715-30 Disclosure; (iii) ASC 715-60 OPEB Fiscal 2017
Accounting Requirements Report; (iv) December 31, 2017 ASC 715-60 Disclosure; (v) an updated Exhibit A-43 (HBK-1) that provides the projected Pension and OPEB expense based on the December 31, 2017 actuarial measurements; and (vi) a list of bonds used to determine the December 31, 2017 discount rate. Thus, the Company provided the Attorney General the information sought in these discovery requests, and the Attorney General’s Motion to Compel related to these matters is moot.

II. ADDITIONAL DISCOUNT RATE ANALYSIS – 18424-AG-CE-227(e) AND (g); 238(h) AND (j); 394(b), (c), AND (d); 402(b), (c), AND (d); AND 403(a).

In Discovery Requests 18424-AG-CE-227(e) and (g) and 238(h) and (j), the Attorney General requested “a copy of the interest rate instruments and analysis showing how the Company or its consultants determined” the discount rates. In its response to these requests, Consumers Energy indicated that its actuary Aon Hewitt determined the discount rate using the Aon Hewitt AA Above Median Yield Curve. Consumers Energy further explained:

“Aon Hewitt uses a proprietary mix of AA corporate bonds (duration and interest rates) to determine the discount rate. Because of the proprietary mix of these AA corporate bonds, Aon Hewitt’s bond portfolio and analysis is not provided to the Company and is not available. The Company’s external auditors review the Aon Hewitt AA Above Median Yield Curve methodology (on a change/update basis) to assess the reasonableness of Aon’s methodology and discount rate. The Company’s external auditors also independently create their own set of yield curves to further validate the results of the Aon spot rates used in setting the discount rate.”

In Discovery Requests 18424-AG-CE-394(c) and (d) and 402(b) and (d), the Attorney General indicated that in Case No. 18255 DTE Electric Company and Aon Hewitt had provided the Attorney General comparable information requested in 18424-AG-CE-227(e) and (g) and 238(h) and (j) under a confidentiality agreement. In response, Consumers Energy worked with
Aon Hewitt to provide the confidential list of bonds that Aon Hewitt used to develop the yield curve. Consumers Energy also offered the following additional explanation:

“The discount rate reflects the rate at which benefits could be effectively settled and is equal to the equivalent single rate resulting from a yield-curve analysis. This analysis incorporated the projected benefit payments specific to CMS Energy’s and Consumers’ DB Pension Plan and OPEB Plan and the yields on high-quality corporate bonds rated Aa or better.”

Consumers Energy also explained the change in the methodology to determine the discount rate beginning in January 2016, when the Company moved from a single weighted-average approach to a full-yield-curve approach. The Company identified the full-yield-curve approach as “more accurate in that it applies individual spot rates along the yield curve to future projected benefit payments based on the time of payment.” Consumers Energy also offered to set up a meeting between the Attorney General’s expert and Aon Hewitt to address any additional questions regarding the determination of the discount rate.

On February 14, 2018, Consumers Energy provided a supplemental response to Discovery Requests 18424-AG-CE-394(b), (c), and (d) and 402(b), (c), and (d). These responses are attached as Attachment 1. As part of these responses, Consumers Energy provided an email from its actuary Aon Hewitt outlining its process for setting the discount rate and an example from December 31, 2016 to assist in understanding the process. The email contains proprietary information, and is being filed under seal as Confidential Attachment 2.

The Attorney General requests that the ALJ require Consumers Energy to provide additional analysis as to how the discount rate was determined. Motion to Compel, pages 9-10. The ALJ should not require Consumers Energy to provide such additional analysis. Consumers

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1 The Motion to Compel identifies Discovery Requests 18424-AG-CE-239(b) and 403(a) as requests where the Attorney General requested analysis of the discount rate. However, these requests do not request an analysis of how the discount rate was determined as of September 30, 2017. Consumers Energy fully responded to these requests.
Energy relies on the expertise of its actuary Aon Hewitt to develop the discount rate. Aon Hewitt considers the AA Above Median Yield Curve bond model to be proprietary and confidential, and does not share that model with Consumers Energy. Thus, Consumers Energy has no other analysis available to it or in its possession to provide to the Attorney General. The Company’s reliance on the expertise of its actuary to develop the discount rate is reasonable - the Michigan Public Service Commission (“MPSC” or the “Commission”) has required Consumers Energy to rely on actuarial annual re-measurements in setting the pension and OPEB expense, and the Company’s auditors verify the discount rate. Consumers Energy has obtained from Aon Hewitt the information it agreed to provide in order to explain Aon Hewitt’s process for setting discount rates to the Attorney General. Consumers Energy provided the list of bonds Aon Hewitt used to develop the yield curve, provided a summary of the general process Aon Hewitt uses in developing the discount rates, and provided as an example the projected pension and OPEB benefit payments and rates from the Aon Hewitt AA Above Median Yield Curve as of December 31, 2016.

The pension expense is calculated using actuarial analysis that is performed by Aon Hewitt in accordance with ASC 715, which describes the methodology and assumptions required to properly calculate and account for pension expense, using information specific to the Company’s pension plan. This methodology includes actuarial review of the Company’s census data, plan provisions, assets, and other assumptions including the discount rate. Consistent with the requirements of ASC 715, the pension expense is determined annually. Each annual re-measurement occurs at the end of the Company’s fiscal year and reconciles changes in pension plan assets and liabilities. In order to calculate the total pension plan benefit obligation and annual ASC 715 expense, the actuary uses a number of assumptions including discount rate,
mortality table, salary change, expected return on plan assets, and expected future contributions needed to avoid at-risk status under the Pension Protection Act. These assumptions are not developed for the purpose of the Company’s rate case filing but are developed to meet the requirements of ASC 715 and Generally Accepted Accounting Principles (“GAAP”).

Likewise, the Company’s OPEB expense is determined using actuarial analysis that is performed in accordance with ASC 715 and GAAP, which is used for the Company’s financial statements. ASC 715 requires an annual determination of the Company’s OPEB expense. Each annual re-measurement occurs at the end of the Company’s fiscal year and reconciles changes in plan assets and liabilities to more accurately represent the Company’s expense for the year. This expense is determined based on actuarially reviewed employee census data, the plan provisions, plan assets, and certain other actuarial assumptions. In order to calculate the plan’s total obligation and annual ASC 715 expense, the actuary uses a number of assumptions including health care inflation trend rates, mortality table, the rate of employee retirements from the Company, the actual retiree health care and life insurance claims of the Company, a discount rate, and the expected contributions to the plan. The assumptions used are determined by the Company each year and reviewed by the Company’s auditors.

The development of the discount rate is outside of the Company’s expertise. The Commission has supported Consumers Energy’s reliance on its actuary’s expertise in developing the pension and OPEB expense, which includes the use of the discount rate developed by the actuary. In Case No. U-17990, the Commission expressly required the Company to rely on full actuarial re-measurements in support of pension and OPEB expenses. The Commission stated:

“As the Staff pointed out, actuarial re-measurements are comprehensive reviews and reports on pension and OPEB expenses, which are tied to GAAP financial statements and Securities and Exchange Commission filings, and which provide
the best estimate for projected expenses. Therefore, the Commission finds that, going forward, full actuarial re-measurements are necessary for pension and OPEB expenses. If Consumers would like to deviate from the expenses obtained from the year-end re-measurement, the company may do so only if it provides documentation from an actuary justifying a different expense. Changes in assumptions (specifically, a change in discount rate or shift in asset allocation) should be explained by the actuary. This ensures that the expense has been reviewed and vetted by the actuary and is the most accurate projection available.” MPSC Case No. U-17990, February 28, 2017 Order, page 97.

The Commission recognizes the value of the actuary in “provid[ing] the best estimate for projected expenses” and justifying any deviation from the year-end re-measurement (such as a change in the discount rate). In addition, the Company’s external auditors review the Aon Hewitt AA Above Median Yield Curve methodology and assess the reasonableness of Aon Hewitt’s methodology and discount rate. The Company’s external auditors also independently create their own set of yield curves that further validate the results of Aon Hewitt’s spot rates that are used in setting the discount rate.

Rule 423 of the Michigan Administrative Hearing System’s Rules of Practice and Procedure before the Commission provides, “Discovery shall, as far as practicable, be conducted in the same manner as in the circuit courts of this state pursuant to the Michigan court rules or as otherwise provided by law.” Mich Admin Code; R 792.10423. MCR 2.309(B)(1) states that answers to interrogatories “must include such information as is available to the party served or that the party could obtain from his or her employees, agents, representatives, sureties, or indemnitors.” The information that is requested by the Attorney General, which is additional detailed analysis of how Aon Hewitt determined the discount rate, is not “available” to Consumers Energy and Consumers Energy is unable to obtain the information from Aon Hewitt.
Aon Hewitt considers its statistical process and model used in developing the discount rate to be proprietary, business confidential, and commercially sensitive information. Aon Hewitt seeks to preserve the confidentiality of this information, and has not shared the information with Consumers Energy. Even if the Company had the requested information available to it (which it does not), a protective order would be appropriate to excuse Aon Hewitt from providing any additional discount rate analysis. The grounds for a protective order from discovery are set forth in MCR 2.302(C), which states:

“(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

“(1) that the discovery not be had;

“(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

“(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

“(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

“(5) that discovery be conducted with no one present except persons designated by the court;

“(6) that a deposition, after being sealed, be opened only by order of the court;

“(7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

“(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
“(9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.” (Emphasis added.)

As a trade secret, any additional discount rate analysis by Aon Hewitt should be protected from disclosure in this case pursuant to MCR 2.302(C)(8). A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one’s business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, a list of customers, or a software program. *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 181; 364 NW2d 609 (1984); *Restatement Torts*, § 757, Comment B.

In *Kubik v Hull*, 56 Mich App 335; 224 NW2d (1974), the Court of Appeals analyzed the various lists of factors considered in determining whether information constitutes a trade secret and made three generalizations:

“1. A trade secret consists of any valuable formula, pattern, device, process or other information that is used in one’s business and gives the possessor a competitive advantage over those who do not know or use the information.

“2. To be a trade secret, the information must, of necessity, be a Secret: specifically, there must be evidence presented that sufficient measures have been taken to guard the secrecy of the information and preserve its confidentiality….

“3. The term ‘trade secret’ does not encompass information which is readily ascertainable, i.e., capable of being acquired by competitors or the general public without undue difficulty or hardship.” *Kubik, supra*, 347-348.

See also *Manos v Melton*, 358 Mich 500, 508; 100 NW2d 235 (1960), where the Michigan Supreme Court listed factors set forth in *Ellis on Trade Secrets*, § 239, pages 324 through 325 for consideration as to the existence of a legally protectable trade secret:
“(1) The amount of labor and money expended. Those factors rather than brilliance of conception or execution determine whether an idea or information is worthy of court protection.

“(2) The idea should be embodied or be capable of being embodied in concrete form to be protectable as a trade secret.

“(3) Trivial advances or differences in formulas or process operation are not protectable as trade secrets.

“(4) The plaintiff must prove that he was in possession of the alleged trade secret at the time defendant is alleged to have obtained it from plaintiff or one of his employees.

“(5) Where the alleged trade secret was known to the recipient prior to its disclosure to him, the recipient is free to use it.

“(6) A trade secret may not be protected if it is known generally to the trade although not known to the recipient.

“(7) Plaintiff must prove that secrecy has been maintained either by nondisclosure or disclosure in confidence.”

Thus, Michigan law protects any formula, process, pattern, device, or compilation of information which is used in one’s business and gives an opportunity to obtain an advantage over competitors who do not use it. *Johns-Manville Corp v Guardian Industries Corp*, 586 F Supp 1034, 1070 (ED Mich 1983). Unlike patent protection, trade secret protection is not a reward to the inventor, but a protection against breach of faith in learning another’s secret business processes. *Allis Chalmers Mfg Co v Continental Aviation & Eng Corp*, 255 F Supp 645, 653 (ED Mich 1966).

Aon Hewitt’s detailed process for determining the discount rate sought by the Attorney General constitutes a protectable trade secret pursuant to Michigan law and MCR 2.302(8). The information is the result of research, development, and refinement. And importantly, Aon Hewitt does not make the information available to Consumers Energy. The requested
intellectual property affords Aon Hewitt a competitive advantage over its business competitors. Disclosure to third parties would harm Aon Hewitt.

Consumers Energy has made good faith efforts to provide the Attorney General an explanation of the process Aon Hewitt uses to determine the discount rate, and has provided the actual list of bonds Aon Hewitt used to develop the yield curve. The explanation Consumers Energy has provided is reasonable and sufficient. Consumers Energy has no additional discount rate analysis available to it that it can provide to the Attorney General.

WHEREFORE, Consumers Energy Company respectfully requests the Administrative Law Judge to deny the Motion to Compel in its entirety.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: February 16, 2018

By: ________________________________

Anne M. Uitvlugt (P71641)
Gary A. Gensch, Jr. (P66912)
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Jackson, Michigan 49201
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(517) 788-0698
Attachment 1
18424-AG-CE-394 (Partial Supplemental)

Question:

293. Refer to the response to AG-CE-227. Please:

b. As to subpart (c), provide the discount rate determined as of December 31, 2017. Provide a copy of the interest rate instruments and analysis showing how the Company or its consultants determined the discount rate.

c. As to subpart (e), in Case No. U-18255, the Attorney General made the same request of DTE Electric, and Aon Hewitt provided the information under confidentiality protection. Please make a similar request of Aon Hewitt.

d. As to subpart (g), please provide this information as discussed in the previous question above under subpart (c).

Response:

b. The discount rate as of 12/31/2017 is 3.64%. Please see the attached confidential list of bonds included in the development of the yield curve at 12/31/2017. The list of bonds is confidential and will be provided pursuant to the terms of the Protective Order issued in this proceeding. Also attached is an email from Aon outlining the process for setting the discount rate and an example from 12/31/2016 to aid in understanding the process. The email and 12/31/2016 example are confidential will be provided pursuant to the terms of the Protective Order issued in this proceeding.

c. Please refer to b above.

d. Please refer to b above.

Herbert B. Kops  
February 14, 2017

Total Rewards and Workforce Relations
Question:

301. Refer to the response to AG-CE-238. Please:

   b. As to subpart (h), in Case No. U-18255, the Attorney General made the same request of DTE Electric and Aon Hewitt provided the information under confidentiality protection. Please make a similar request of Aon Hewitt.

   c. As to subpart (i), provide the discount rate determined as of December 31, 2017. Provide a copy of the interest rate instruments and analysis showing how the Company or its consultants determined the discount rate.

   d. As to subpart (j), please provide this information as discussed in the previous question above under subpart (a).

Response:

b., c., d. Please see the response to 18424-AG-CE-394 (Partial Supplemental).

Herbert B. Kops
February 14, 2018

Total Rewards and Workforce Relations
Confidential
Attachment 2

(Filed under Seal with the MPSC)
STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of
CONSUMERS ENERGY COMPANY
for authority to increase its rates for the
distribution of natural gas and for other relief

Case No. U-18424

PROOF OF SERVICE

STATE OF MICHIGAN )
COUNTY OF JACKSON ) SS

Tara L. Hilliard, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on February 16, 2018, she served an electronic copy of the Redacted Version of Consumers Energy Company’s Response to the Attorney General’s Motion to Compel Discovery Responses upon the persons listed in Attachment 1 hereto, at the e-mail addresses listed therein. She further states that she also served a hard copy of the same document to the Hon. Suzanne D. Sonneborn at the address listed in Attachment 1 by depositing the same in the United States mail in the City of Jackson, Michigan, with first-class postage thereon fully paid.

Tara L. Hilliard

Subscribed and sworn to before me this 16th day of February, 2018.

Signature

Melissa K. Harris, Notary Public
State of Michigan, County of Jackson
My Commission Expires: 06/11/20
Acting in the County of Jackson
Administrative Law Judge

Hon. Suzanne D. Sonneborn
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