

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of the Complaint of Bonnie Rex)
against Consumers Energy Company)
_____)

Case No. U-21456

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on July 18, 2024.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 7109 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before August 8, 2024, or within such further period as may be authorized for filing exceptions. If Exceptions are filed, replies thereto may be filed on or before August 22, 2024.

At the expiration of the period for filing Exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless Exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, Exceptions must reach the Commission on or before the date they are due.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Christopher
S. Saunders

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July 18, 2024
Lansing, Michigan

Christopher S. Saunders
Administrative Law Judge

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
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* * * * *

In the Matter of the Complaint of Bonnie Rex)
against Consumers Energy Company)
_____)

Case No. U-21456

PROPOSAL FOR DECISION

On June 8, 2023, Bonnie Rex (Complainant) filed a complaint with the Michigan Public Service Commission (the Commission) against Consumers Energy Company (Consumers). On June 12, 2023, the Commission Staff sent a letter to Complainant stating that her complaint failed to meet the standards for a prima facie case as it did not contain specific reference to rules and/or regulations that Consumers is alleged to have violated and did not include specific references to the rules and/or regulations upon which Complainant relies on in seeking relief. On February 20, 2024, Complainant resubmitted her complaint. On April 10, 2024, Consumers filed its response to the complaint. Contemporaneously with the filing of its answer, Consumers filed a Motion for Summary Disposition. Complainant did not file a written response to Consumers' Motion.

Pursuant to notice, a prehearing conference was held on April 23, 2024. The Complainant appeared on her own behalf. Attorneys Evan Keimach and Anne Uitvlugt appeared on behalf of Consumers, and Assistant Attorney General Monica Stephens appeared on behalf of the Michigan Public Service Commission Staff (Staff). At the

prehearing, the Complainant stated that she did not want to file a written response to Consumers' Motion, but that she would prefer to respond orally. Therefore, a date for oral argument on the Motion for Summary Disposition was scheduled at the prehearing.

As agreed at the prehearing, oral argument was held on May 13, 2024. Attorneys Keimach and Uitvlugt appeared on behalf of Consumers, and Attorney Stephens appeared on behalf of Staff. Complainant did not appear at the oral argument. As Complainant was not present, an additional date for oral argument was set for May 20, 2024. At the May 20, 2024, oral argument date, Attorneys Keimach and Uitvlugt appeared on behalf of Consumers, and Attorney Stephens appeared on behalf of Staff. Complainant did not appear at this oral argument date. After the May 20, 2024, oral argument date, Consumers received a communication from Complainant stating that she had not received the link to participate in the May 20, 2024, oral argument. In light of this communication, an additional oral argument date of June 17, 2024, was scheduled. Attorneys Keimach and Uitvlugt appeared on behalf of Consumers, Attorney Stephens appeared on behalf of Staff, and Complainant was present on her own behalf.

Consumers brings its Motion for Summary Disposition under Mich Admin Code, R 792.10426 (Rule 426) which states:

A party may make a motion for summary disposition of all or part of a proceeding. If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend, to the commission, summary disposition of all or part of the proceeding. If the entire proceeding is disposed of, the presiding officer shall issue a proposal for decision. If only part of a proceeding is disposed of, the presiding officer may issue a partial proposal for decision.

Consumers' Motion for Summary Disposition under Rule 426 is akin to a motion brought under Michigan Court Rule (MCR) 2.116(C)(10). A motion filed under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161, 516 NW2d 475 (1994); *Babula v Robertson*, 212 Mich App 45, 48, 536 NW2d 834 (1995).

Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); see also *Coblentz v City of Novi*, 475 Mich 558, 719 NW2d 73 (2006); *Haliw v City of Sterling Heights*, 464 Mich 297, 627 NW2d 581 (2001); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 645 NW2d 643 (2000).

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Attorney Gen v PowerPick Players' Club of Michigan, LLC*, 287 Mich App 13, 26–27, 783 NW2d 515 (2010) (quoting *West v GMC*, 469 Mich 177, 183, 665 NW2d 468 (2003)).

A material fact has been defined as "an ultimate fact issue upon which a jury's verdict must be based." *Estate of Neal v Friendship Manor Nursing Home*, 113 Mich App 759, 763, 318 NW2d 594 (1982). In other words, "[t]he disputed factual issue must be material to the dispositive legal claim[s]." *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333, 671 NW2d 132 (2003).

In reviewing a motion brought under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in

light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120, 597 NW2d 817 (1999); *Radtke v Everett*, 442 Mich 368, 374, 501 NW2d 155 (1993); *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 233, 553 NW2d 371 (1996). Affidavits or other documentation submitted in support of or in opposition to a motion for summary disposition under MCR 2.116(C)(10) must contain admissible evidence. MCR 2.116(G)(6); *Maiden*, 461 Mich at 121.

Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618, 537 NW2d 185 (1995); *Radtke*, 442 Mich at 374. If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See *Quinto v Cross & Peters Co*, 451 Mich 358, 363, 547 NW2d 314 (1996) (plaintiff failed to present evidence on which reasonable person could find that hostile work environment existed; summary disposition proper); *Helsel v Morcom*, 219 Mich App 414, 417, 555 NW2d 852 (1996).

Consumers asserts that Complainant's complaint fails to state a claim for which the Commission can grant relief. Consumers argues that the complaint alleges negligence on behalf of Consumers, and that the Commission does not have jurisdiction to hear claims sounding in negligence. Additionally, Consumers asserts that the Commission does not have the authority to grant relief of monetary damages requested by Complainant. Furthermore, Consumers contends that the complaint does not contain an explicit discussion as to how the Rules cited by Complainant were allegedly violated, that the Rules cited do not apply to the facts alleged in this case, and that even if those Rules were violated, the Rules do not provide for the relief requested by Complainant.

During oral argument, Complainant reiterated the points made in her complaint. She stated that she is seeking reimbursement for damages to her home and personal property allegedly caused by Consumers' actions. Complainant further listed days she was without power and referenced Rule 460.745 in asserting she should receive credit for those days. Complainant alleges a malfunctioning transformer caused several thousands of dollars of damage to her home and personal property and requests the Commission order Consumers to reimburse her for those damages. Complainant did not directly address the legal arguments for summary disposition proffered by Consumers in her oral argument. Although Staff did not submit a written response to Consumers' motion, at oral argument, Staff stated that it had no objection to the motion.

Consumers contends the relief requested by Complainant cannot be granted by the Commission. In her complaint, Complainant requests to be compensated for all her damages, in an amount totaling \$2,561.41.¹ Consumers argues that the Commission lacks jurisdiction to order damages as requested by Complainant. As a creature of the legislature, the Commission is an administrative agency the powers of which are expressly delegated by statute. *Herrick District Library v Library of Michigan*, 293 Mich App 571 (2011). The Commission, therefore, does not have common law or equitable powers. *Union Carbide Corp. v Public Service Commission*, 431 Mich 135, 146; 428 NW2d 322 (1988). In the handwritten portion of Complainant's complaint, dated May 22, 2023, Complainant states that the formal complaint is being brought against Consumers for a violation of "negligence". Standing on its own, a claim of negligence is a common

¹ Complaint (resubmitted, dated August 30, 2023, at top of page).

law claim sounding in tort. As the Commission does not have common law or equitable powers, the Commission does not have authority to adjudicate such claims.

Furthermore, Complainant is requesting that the Commission award her monetary damages allegedly resulting from the actions of Consumers. In its Motion, Consumers argues the Commission does not have authority to award monetary damages. Consumers cites *Muskegon Agency, Inc. v General Telephone Co of Michigan*, 340 Mich 472, 482; 65 NW2d 748 (1954) wherein the Supreme Court held that the Commission has no jurisdiction to award damages or reimburse plaintiff for losses. Consumers further points out that, absent specific statutory authority, that the Commission has consistently held that it lacks authority to award civil damages (see *In re Summers-Smith against Michigan Consolidated Gas Co.*, MPSC Case No. U-13894, Opinion and Order dated April 20, 2004; *In re Alpena Power Company against Consumers Power Company*, MPSC Case No. U-9075, Opinion and Order dated December 19, 1991; *In re Kean Investment Company against Michigan Consolidated Gas Co.*, MPSC Case No. U-8873, Opinion and Order dated September 22, 1988).

In her complaint, Complainant references R 460.721 which states as follows:

R 460.721 Duty to plan to avoid unacceptable levels of performance.
Rule 21.

An electric utility or cooperative shall plan to operate and maintain its distribution system in a manner that will permit it to provide service to its customers without experiencing an unacceptable level of performance as defined by these rules. *2004 AACs.; 2023 MR 7, Eff. April 10, 2023.*

R 460.722 speaks to unacceptable levels of performance during service interruptions and states:

R 460.722 Unacceptable levels of performance during service interruptions.
Rule 22.

It is an unacceptable level of performance for an electric utility or cooperative to fail to meet any of the following sustained interruption standards:

(a) Considering data derived through the amalgamation of data from all conditions, an electric utility or cooperative shall restore service within 36 hours to not less than 90% of its customers experiencing sustained interruptions.

(b) Considering data including only catastrophic conditions, an electric utility or cooperative shall restore service within 48 hours to not less than 90% of its customers experiencing sustained interruptions.

(c) Considering data including only gray sky conditions, an electric utility or cooperative shall restore service within 24 hours to not less than 90% of its customers experiencing sustained interruptions.

(d) Considering data including only normal conditions, an electric utility or cooperative shall restore service within 8 hours to not less than 90% of its customers experiencing sustained interruptions.

(e) From the effective date of these rules until December 31, 2029, considering data derived through the amalgamation of data from all conditions, not more than 6% of an electric utility's or cooperative's customers may experience 4 or more sustained interruptions in a calendar year.

(f) Beginning January 1, 2030, considering data derived through the amalgamation of data from all conditions, not more than 5% of an electric utility's or cooperative's customers may experience 4 or more sustained interruptions in a calendar year. *2004 AACs.; 2023 MR 7, Eff. April 10, 2023.*

Consumers asserts that the facts in the instant matter do not apply to Rule 21, as the standards defined in Rule 22 pertain to a percentage of electric utility customers experiencing interruptions. This Proposal for Decision agrees that the facts present in this case do not apply to Rule 21, as the record contains no evidence of such a

violation. Additionally, this Proposal for Decision agrees that the Rules cited in the complaint do not provide for monetary damages should a violation of those rules be found.

At oral argument, Complainant referenced R 460.745, which states:

R 460.745 Customer accommodation for failure to restore service during normal conditions.

Rule 45.

(1) Unless an electric utility or cooperative requests a waiver pursuant to part 5 of these rules, an electric utility or cooperative that fails to restore service to a customer within 16 hours after the start of a sustained interruption that occurred during normal conditions shall provide to any affected customer a bill credit on the customer's bill within 90 days. The amount of the credit provided to a residential customer is the greater of a rate of \$35.00 for each outage over 16 hours, plus an additional \$35.00 for each day thereafter or the customer's monthly customer charge. The amount of the credit provided to any other distribution customer is the customer's minimum bill prorated on a daily basis. The rate of \$35.00 is subject to an annual adjustment pursuant to subrule (2) of this rule.

(2) No sooner than September 1, 2022, and by October 1 every year after, the commission shall issue an order adjusting the prevailing customer accommodation rate. The commission shall adjust the customer accommodation rate by multiplying the rate by the difference between the Consumer Price Index for the month of October immediately preceding the commission's order implementing the inflation adjustment, and the Consumer Price Index for the previous October. The commission shall round up each adjustment made under this subsection to the nearest \$1.00. 2004 AACS.; 2023 MR 7, Eff. April 10, 2023.

However, the complaint does not mention this Rule, nor does Complainant's request for compensation contain any calculation based on this Rule. Due process requires a party in a contested case be given timely and adequate notice detailing the reasons for the proposed administrative action. *Hardges v Dep't of Social Services*, 177 Mich App 698;

442 NW2d 792 (1989). As such, the undersigned is limited to an examination of the allegations actually set forth in the complaint and may not go beyond those allegations (See *BHCS v Jan H. Pol, DVM*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2016 (Docket No. 327346). Therefore, as the complaint contains no allegations pertaining to R 460.745, it is not appropriate to address any such allegations.

Looking at the facts presented in a light most favorable to Complainant, this Proposal for Decision finds that the Commission does not have jurisdiction to award the civil damages requested by Complainant and does not have jurisdiction to adjudicate common law claims sounding in negligence. Additionally, Rules 460.721 and 460.722 (as cited by Complainant in her complaint) do not provide for the relief requested by Complainant. Therefore, as Complainant is requesting that the Commission award her civil damages allegedly arising from actions or lack thereof on behalf of Consumers, this Proposal for Decision finds that the Commission simply does not have jurisdiction to adjudicate those claims. Accordingly, Consumers' Motion for Summary Disposition should be granted.

NOW THEREFORE, Consumers' Motion for Summary Decision is GRANTED.
Complainant's complaint is DISMISSED WITH PREJUDICE.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

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