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BILL ANALYSIS



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Senate Bill 612 (as enrolled)
Sponsor: Senator Laura M. Toy
Senate Committee: Technology and Energy
House Committee: Energy and Technology

PUBLIC ACT 88 of 2004

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RATIONALE

The Customer Choice and Electricity Reliability Act was enacted in 2000 to restructure Michigan's electricity industry. Among other things, the Act required the Michigan Public Service Commission (PSC) to establish a code of conduct applicable to all electric utilities, including measures to prevent cross-subsidization, information sharing, and preferential treatment between a utility's regulated and unregulated services. (According to the code of conduct, a service is "regulated" if the PSC has the authority to set the price for the service.) Since the code was created, there have been questions as to whether Consumers Energy's Appliance Service Plan (ASP) program complied with the code of conduct. Some also expressed concerns about the company's use of inserts in monthly bills to promote the program. The PSC ordered Consumers Energy to complete the full functional separation of the ASP program and its regulated activities, and discontinue the use of monthly promotional inserts, by December 31, 2003, or discontinue the program. (The PSC's orders to Consumers Energy related to the code of conduct are described under **BACKGROUND**.)

The ASP is a voluntary repair program for heating and cooling (HVAC) systems and large home appliances. Consumers Energy charges its participating customers a fee on their monthly utility bills for this service. Approximately 175,000 Consumers Energy customers, about 6.7% of the company's total customer pool, currently are enrolled in the program. According to the company, more than half of the ASP customers are over the age of 55, and about half have an annual income under \$40,000. Some people believe that the ASP program provides a

valuable service and that the company should be able to continue offering it to its customers, under certain circumstances.

CONTENT

The bill amended the Customer Choice and Electricity Reliability Act to allow an electric utility to offer its customers an appliance service program; and require the utility to comply with the code of conduct. The bill took effect on April 22, 2004.

Under the bill, a utility that offers an appliance service program must locate the personnel responsible for the day-to-day management of the program within a separate department of the utility or affiliate within the utility's corporate structure, and maintain separate books and records for the program, which must be made available to the PSC upon request.

The utility may not promote or market the program through the use of utility billing inserts, printed messages on billing materials, or other promotional materials included with customers' utility bills.

All costs directly attributable to the appliance service program must be allocated to it. The direct and indirect costs of employees, vehicles, equipment, office space, and other facilities used in the program must be allocated to it based upon the amount of use by the program compared with the total use of the employees, vehicles, equipment, office space, and other facilities. The program's cost must include administrative and general expense loading to be determined in the same manner as the

utility determines administrative and general expense loading for all of its regulated and unregulated activities. The bill specifies that a subsidy by the utility does not exist if the allocated costs do not exceed the program's revenue.

The bill allows the utility to include charges for its program on its monthly billings if the utility complies with all of the following requirements:

- All costs associated with the billing process, including the postage, envelopes, paper, and printing expenses, are allocated as described above.
- A customer's regulated utility service is not terminated for nonpayment of the appliance service program portion of the bill.
- A customer's partial payment first is applied to the bill for regulated service, unless the customer directs otherwise in writing.

In marketing its appliance service program to the public, the utility must do all of the following:

- Make available to a provider of appliance repair service within two business days a list of customers receiving regulated service from the utility. (The list must be provided in the same electronic format as the information is provided to the program. A new customer must be added to the list within one business day after he or she requests to turn on service.)
- Appropriately allocate costs as required under the bill when personnel employed at the utility's call center provide program marketing information to a prospective customer.
- Before enrolling a customer, inform him or her that appliance service programs may be available from another provider; that the program is not regulated by the PSC; that a new customer has 10 days after enrollment to cancel his or her program contract without penalty; and that his or her regulated rates and conditions of service provided by the utility are not affected by program enrollment or the customer's decision to use another appliance repair service.

The utility name and logo may be used to market the program, provided that the

program is not marketed in conjunction with a regulated service. To the extent that the program uses the utility's name and logo, it must include language on all material indicating that it is not regulated by the PSC. Costs may not be allocated to the program for the use of the utility's name or logo.

The bill specifies that it does not prohibit the PSC from requiring a utility to include revenue from an appliance service program in establishing base rates. If the PSC includes program revenue in determining a utility's base rates, it also must include all of the program's costs.

Except as otherwise provided in the bill, the code of conduct with respect to an appliance service program may not require a utility to form a separate affiliate or division to operate a program, impose further restrictions on the sharing of employees, vehicles, equipment, office space, and other facilities, or require the utility to give other providers of appliance repair service access to utility employees, vehicles, equipment, office space, or other facilities.

MCL 460.10a

BACKGROUND

Under the Customer Choice and Electricity Reliability Act, the PSC was required to establish a code of conduct, applicable to all electric utilities and alternative electric suppliers, to promote fair competition. On December 4, 2000, the PSC adopted a code that contains, but is not limited to, the following "separation" provisions:

- An electric utility may not offer unregulated services or products except through one or more affiliates or through other entities within the corporate structure, such as divisions.
- An electric utility's regulated services may not subsidize, directly or indirectly, the unregulated business of its affiliates or other separate entities within the corporate structure.
- An electric utility must maintain its books and records separately from those of its affiliates or other entities within its corporate structure.
- An electric utility and its affiliates or other entities within the corporate structure may not share facilities, equipment, or operating employees, but may share

computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information.

- An electric utility's operating employees and the operating employees of its affiliates must function independently of each other and maintain separate offices.
- An electric utility may not finance or co-sign loans for affiliates.
- An electric utility and its affiliates or other entities within the corporate structure offering both regulated and unregulated services or products in Michigan may not engage in joint advertising, marketing, or other promotional activities related to the provision of regulated and unregulated services, nor may they jointly sell regulated and unregulated services.

All electric utilities were required to file a code of conduct compliance plan within 90 days of the PSC's order. (In January 2001, the PSC extended the filing deadline in response to requests from the industry to examine and clarify how the code of conduct would affect utilities' appliance repair programs. Under the new deadline, electric utilities had up to 60 days after the Commission's final order on rehearing, reconsideration, and clarification to file their compliance plans.)

Consumers Energy received a temporary waiver, until April 3, 2003, of the requirement to separate its Appliance Service Plan. In December 2002, Consumers Energy sought an extension of the waiver through April 3, 2004. The PSC granted the extension, but only until December 31, 2003, at which time Consumers either was to have terminated its ASP program or have completed the full functional separation of the program from its regulated activities. The Commission granted the extension on the condition that the company stop including promotional material for the program with customers' bills and that the program bear the full cost of promotional activities through use of separate mailings by December 31, 2003.

At the time it granted the extension, the PSC also cited Consumers Energy for violating the code of conduct by jointly advertising unregulated programs with regulated programs, and ordered the company immediately to discontinue promoting the ASP program with inserts and

bills provided through ratepayer funds. Consumers Energy, along with Detroit Edison, which operates a similar program, appealed the PSC's orders to the Michigan Court of Appeals, which heard oral arguments on September 4, 2003.

Before the Court issued its decision, Public Act 214 of 2003 required the PSC to extend the temporary waiver to July 1, 2004, subject to the conditions imposed by its earlier order. The Act specified that it could not be deemed to prejudice, delay, or affect any pending legal case or legal proceeding. On March 2, 2004, the Court of Appeals published its opinion, in which it affirmed the PSC's decision.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Consumers Energy's ASP provides a valuable service for its customers, particularly senior citizens, the physically disabled, and low-income people. Customers are satisfied with the program because it is associated with a name they know and trust. If the company had been forced to terminate the program, it would have meant the end of a reliable, essential service during the coldest time of the year.

The ASP program provides cost efficiency to the regulated side of Consumers Energy's activities because it helps hold down natural gas costs. The company would have to duplicate its business infrastructure to continue operating the program as a completely separate entity, thereby eliminating the revenue and efficiency benefits that ratepayers currently enjoy.

The bill allows the utility to continue offering the ASP program while promoting fair competition. It requires the PSC to ensure that utility customers are not subsidizing the program, and prohibits the company from including promotional material for the program in its monthly bills.

Supporting Argument

The ASP program is a benefit to many small businesses. In 2002, the program paid \$6.9 million to its network of 152 independent contractors who performed approximately

half of Consumers' ASP work. Additionally, the program provides employment to many utility workers during seasonal non-peak times. The PSC requires additional staff in case of an emergency, and the ASP program provides a revenue-generating activity that makes sustaining this adequate workforce economical.

Response: The ASP program takes utility workers away from work they should be performing. As a result, it sometimes takes several days for them to respond to utility service calls that should be attended to immediately.

Opposing Argument

Consumers Energy was not being forced to terminate the ASP program; it simply had to change how the program operated so that it was competing on a level playing field with other HVAC businesses. The code of conduct was formulated to ensure fair competition among service providers. The bill grants an exception for one company. If Consumers wants to offer the ASP program to its customers, it should do so under the rules that apply to independent businesses. Unlike entrepreneurs who invest in a business, Consumers was able to break into the HVAC business without the element of risk. The company can use employees it already has and does not need to invest in vehicles or other necessary equipment, or pay other start-up costs that people in the private sector pay when starting from scratch. Consumers has a monopolistic advantage over small and independent businesses, and it is impossible for them to compete against an entity that can switch between regulated and unregulated activities at will.

Consumers claims its ASP program generates a 41% profit, in stark contrast to the 3% profit that most HVAC businesses make for similar services. If the program truly is so successful, it easily should be able to stand on its own; Consumers could find a way to continue operating the program under the code of conduct.

Response: Neither the PSC nor the courts have found evidence of cross-subsidization in Consumers Energy's ASP program. The program generated \$13.7 million in ratepayer benefits in 2002 because the PSC offsets revenue that exceeds the program's cost against the operating costs on which Consumers' natural gas rates are based. These facts do not support the

conclusion that the company unfairly is leveraging its regulated activities or that it is eliminating competition and choice. There are more than 3,000 businesses in Michigan that provide HVAC services despite the fact that Consumers Energy has offered the ASP program for 15 years.

Opposing Argument

Consumers Energy has an advantage over independent HVAC businesses because it can draw from its extensive database of utility customers to target for ASP program advertising.

Response: Consumers has discontinued the practice of including promotional inserts or printing program advertising on monthly bills.

Legislative Analyst: Julie Koval

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Maria Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.