In the matter, on the Commission’s own motion, to require THE DETROIT EDISON COMPANY to show cause why it should not be found in violation of the code of conduct adopted in Case No. U-12134.

At the March 29, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On June 5, 2000, the Customer Choice and Electricity Reliability Act, 2000 PA 141, MCL 460.10 et seq. (Act 141), took effect. Section 10a(4) of Act 141, MCL 460.10a(4), required the Commission to establish a code of conduct that would apply to every electric utility and alternative electric supplier (AES) operating in Michigan. The purpose of the code of conduct was to prevent electric utilities and AESs from engaging in cross-subsidization, information sharing, and preferential treatment between their regulated and unregulated services. On December 4, 2000, in Case No. U-12134, the Commission adopted the code of conduct (amended on rehearing on October 29, 2001).
On November 17, 2003, Sandra Wotli submitted an informal complaint to the Commission alleging violations of the code of conduct by DTE Energy Company (DTE), as the corporate parent of The Detroit Edison Company (Detroit Edison) and Michigan Consolidated Gas Company (Mich Con). Specifically, Ms. Wotli complained that DTE sent her, in the form of a bill insert in both her business and residential gas bills for October of 2003, an advertisement for an unregulated appliance repair program known as Home Protection Plus (HPP). On December 12, 2003, Daniel R. Squires submitted a letter to the Commission also alleging that Detroit Edison violated the code of conduct by placing an advertisement for the HPP program in his electric-only billing invoice during the fall of 2003.

Based upon these two complaints and information submitted by Detroit Edison, the Commission Staff (Staff) recommended initiating a proceeding to investigate Detroit Edison’s use of bill inserts to promote the HPP program. The present docket was opened, and, in an order issued in this matter on March 16, 2004, the Commission directed Detroit Edison to demonstrate its compliance with the code of conduct adopted by the Commission in Case No. U-12134 or to show cause why it should not be found in violation of the code of conduct. The Commission afforded Mr. Squires and Ms. Wotli, as well as other persons with similar complaints, an opportunity to participate in the show cause proceeding.

A prehearing conference was held on June 15, 2004 before Administrative Law Judge Mark E. Cummins (ALJ). Detroit Edison, the Staff, and Mr. Squires participated in the prehearing. The same parties participated in a second prehearing on August 10, 2004. At the second prehearing, the ALJ granted a request by Peter Cervini, a person with a similar complaint, to make a statement of position pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure, R 460.17207. Ms. Wotli also subsequently decided to have the Commission treat her previously-
submitted information as a statement of position under R 460.17207, rather than becoming a party to this case.

On November 18, 2004, an evidentiary hearing was conducted by the ALJ, in which Detroit Edison, the Staff, and Mr. Squires offered testimony and exhibits, Ms. Wotli’s statement of position was admitted, and all parties waived cross-examination. All of the offered testimony and exhibits were received into evidence. The Staff, Detroit Edison, and Mr. Squires filed briefs on December 9, 2004, and reply briefs on December 22, 2004. The ALJ issued a Proposal for Decision (PFD) on January 31, 2005. Exceptions to the PFD were filed by Detroit Edison on February 14, 2005, and replies to the exceptions were filed by the Staff and Mr. Squires on February 24, 2005.

II.

BACKGROUND FACTS

The Commission received the two aforementioned complaints regarding bill inserts from Ms. Wotli and Mr. Squires in late 2003. Ms. Wotli complained that DTE sent her an advertisement for the HPP service in October of 2003, in the form of a bill insert in both her business and residential gas bills. On August 4, 2004, Ms. Wotli submitted additional information to the Commission, which was introduced into this proceeding as a statement under Rule 207, R 460.17207, with the effect that her information constitutes a statement of position and is not taken under oath or subject to cross-examination. See, Tr 66-72. Her statement reiterates her complaint regarding the bill inserts.

On December 12, 2003, Mr. submitted a letter to the Commission also alleging that Detroit Edison violated the code of conduct by placing an advertisement for the HPP program in his electric-only billing invoice during the fall of 2003. Both of the bill inserts submitted by Ms.
Wotli and Mr. Squires show an advertisement for “DTE Energy’s Home Protection Plus®, owned and administered by MichCon, a DTE Energy Company,” which offers appliance repair service year-round. Exhibit DRS-1; Tr 69. Mr. Squires is an electric-only customer of Detroit Edison, and this advertisement came with his electric-only bill.

Based upon these two complaints and information submitted by Detroit Edison, the Commission opened this show cause proceeding. At the second prehearing, Mr. Cervini stated that he saw an advertisement for the HPP service when he went to DTE’s website to pay his bill online. Tr 43-44.

At the evidentiary hearing, Mr. Squires testified that Detroit Edison enclosed an insert in his electric-only bill during the fall of 2003 entitled “[F]eeling lucky? You will with Home Protection Plus.” This bill insert provided a detailed description of Mich Con’s HPP program and the price of the program. See, Exhibit DRS-1. The bill insert does not contain any disclaimers regarding the use of the DTE logo. Mr. Squires further testified that when he attempted to pay his bill online on June 9, 2004, he found a hyperlink to Mich Con’s HPP program. Mr. Squires offered an exhibit showing the hyperlink as it appeared on his electronic bill invoice. See, Exhibit DRS-2.

Mr. Squires further testified that he received a bill insert in October 2004 entitled “Customer Connections” which recommended that Detroit Edison’s customers arrange to have home heating inspections conducted “by MichCon or a local contractor,” and recommends that, where a carbon monoxide leak is suspected, customers should call Mich Con “or your natural gas provider or a local heating contractor” for an inspection. See, Exhibit DRS-5.
III.

POSITIONS OF THE PARTICIPANTS AND PROPOSAL FOR DECISION

Mr. Squires contends that all three of the instances detailed in his testimony – the fall 2003 bill insert, the hyperlink, and the October 2004 bill insert – constitute violations of the code of conduct, Sections II.H., II.K., and II.L., resulting in nine total violations. As such, he requests that the Commission impose the maximum fine of $20,000 for a total of six of the alleged violations, and impose the maximum fine of $40,000 for a second offense for a total of three of the alleged violations. MCL 460.10c(1)(a). Mr. Squires further requests that the Commission order Detroit Edison to reimburse him for all reasonable attorney fees and costs incurred in this matter, and order Detroit Edison to cease and desist from all future violations of the code of conduct. MCL 460.10c(1)(c), (e).

Section II.H. of the code of conduct provides that an electric utility and its affiliates or other entities within the corporate structure offering both regulated and unregulated services or products, “shall not engage in joint advertising, marketing or other promotional activities related to the provision of regulated and unregulated services.” The HPP program is an unregulated appliance repair service provided by Mich Con. Mich Con is an affiliate of Detroit Edison, both of which are regulated entities and wholly-owned subsidiaries of DTE.

Section II.K. of the code of conduct provides that an electric utility or AES offering regulated service “shall not allow its affiliates to use its logo unless the affiliate includes, in a clearly visible position and easily readable by customers, the following statement: ‘(Affiliate name) is not regulated by the Michigan Public Service Commission.’” Section II.L. of the code provides that, if an electric utility, its affiliate, or other entity within the corporate structure offers an unregulated service, any use of its logo “shall include the following statement: ‘(Service) is not regulated by
the Michigan Public Service Commission.’” The bill insert and the website displayed the Detroit Edison logo, and also advertised the unregulated HPP service offered by Mich Con. Neither contained the disclaimer required by these sections of the code of conduct.

Detroit Edison argues that it has not committed a violation of the code of conduct because, as of January 1, 2003, it is no longer in the appliance repair business. On that date, Detroit Edison’s appliance repair business was transferred to Mich Con, a separate legal entity from Detroit Edison. Detroit Edison contends that since Mich Con is a gas utility and not an electric utility, its actions are not governed by the code of conduct, and so no violation has taken place. Detroit Edison characterizes its own involvement in these actions as simply “non-objection to the use of its jointly utilized bill mailing system.” Tr. 103. Detroit Edison further argues that the use of the bill insert to advertise the HPP program did not violate the code, because Mich Con reimbursed Detroit Edison for the costs of doing the mailing.

Detroit Edison indicates that the hyperlink on the website has been removed, and therefore should not form the basis of any violation. As to the October 2004 bill insert, Detroit Edison argues that this document provided a public service, by doing nothing more than reminding customers that the winter heating season was approaching and that they may need their heating equipment inspected. The October 2004 bill insert invited customers to call their “local heating contractor.”

Detroit Edison contends that an award of attorney fees is unwarranted because Mr. Squires chose to participate in this matter, and chose to engage a lawyer rather than representing himself. Detroit Edison further argues that there can be no imposition of a fine in this case because no party has shown that anyone has been damaged as a result of the alleged violations. Section 10c of Act 141, MCL 460.10c(1), provides that the Commission “shall order such remedies and penalties as
necessary to make whole a customer or other person who has suffered damages as a result of the violation.” Such remedies include fines, refunds, reasonable attorney fees, and issuance of cease and desist orders. MCL 460.10c(1). Detroit Edison argues that none of these remedies is available to the Commission without proof of damages, and that neither Mr. Squires nor any other party has incurred any damage.

The Staff contends that there is no question that Detroit Edison violated the code of conduct. The Staff contends that the fall 2003 bill insert clearly constituted joint advertising of both a regulated and an unregulated service. The Staff further argues that, by providing Mich Con with the names and addresses of its electric-only customers, while not doing the same for any other provider of appliance repair services, Detroit Edison also violated Section III.A. of the code. That section provides that an electric utility that offers, through itself or its affiliates, both regulated and unregulated services “shall not provide any affiliate or other entity within its corporate structure, preferential treatment or any other advantages” that are not offered to other suppliers of those same services within the same service territory. The Staff believes that the issue of the hyperlink is moot, because the hyperlink has been removed from the website.

Because it is Detroit Edison’s first offense, the Staff recommends that the Commission order Detroit Edison to pay the maximum fine for a single offense of $20,000, pay Mr. Squires his reasonable attorney fees, and issue an order requiring Detroit Edison to cease and desist from further use of its customer information and billing system to promote Mich Con’s HPP program.

Beginning with the fall 2003 bill insert, the ALJ found Detroit Edison’s argument regarding reimbursement of the costs of the mailing to be unpersuasive. The ALJ found that there was uncontroverted evidence that the bill insert had gone to electric-only customers, and that the bill insert advertised an unregulated service provided by an affiliate. As such, the ALJ found that the
bill insert constituted “joint advertising, marketing, or other promotional activities” in direct violation of Section II.H. of the code of conduct. The ALJ found the issue of who paid for the mailing to be irrelevant to whether there was a violation or not.

The ALJ further found that the fall 2003 bill insert violated Section III.A. of the code of conduct as asserted by the Staff, because it clearly provided preferential treatment to an affiliate, and Detroit Edison offered no evidence to show that this advertising service was provided to other appliance repair contractors.

Finally, the ALJ found that this bill insert made use of the utility’s logo without the required disclosure of the fact that the HPP service is not regulated by the Commission, thereby violating Section II.L of the code of conduct. The ALJ found that Section II.K. is not applicable to this proceeding, because the disclaimer in II.K. would constitute a false statement, since Mich Con is, in fact, a regulated utility.

Turning to the hyperlink, the ALJ found that the hyperlink also violated Sections II.H., II.L., and III.A. of the code of conduct, based upon the uncontroverted evidence that the hyperlink was displayed on the same screen as the electronic billing invoices for electric-only customers, and that it did not display the requisite disclaimer. Thus, the hyperlink also constituted joint advertising, provided preferential treatment, and failed to disclose that the HPP program is not regulated by the Commission, in violation of those sections.

Addressing the October 2004 bill insert, the ALJ found that this bill insert did not violate the code of conduct. This bill insert addressed the problem of carbon monoxide buildup, and merely instructed customers to call Mich Con or “your natural gas provider or a local heating contractor to have an emergency inspection” if they suspected a problem. Likewise, the section of the bill insert addressing winter heating simply recommends that customers call Mich Con “or a local
contractor” for a home heating inspection. The ALJ found that this language did not constitute either preferential treatment or joint advertising, and therefore did not violate the code of conduct.

The ALJ found that, because no facts in evidence revealed whether the hyperlink preceded the fall 2003 bill insert or vice versa, he could not determine which violation came first and which constituted a second violation. The ALJ recommended that, because these were Detroit Edison’s first violations of the code of conduct, any fine should be in the midrange, and therefore imposed a fine of $10,000 for each of the two occurrences, for a total of $20,000. MCL 460.10c(1). The ALJ further recommended that Mr. Squires be awarded his reasonable costs and attorney fees associated with participation in this proceeding. The ALJ also recommended that a cease and desist order issue.

IV.

EXCEPTIONS AND REPLIES TO EXCEPTIONS

In its exceptions to the PFD, Detroit Edison repeats its argument that it was not conducting any appliance repair service at the time of the alleged violations, because it had transferred that service to a separate legal entity, Mich Con, and the code of conduct does not apply to Mich Con. Detroit Edison further argues that the billing system that was used is the only billing system available to Mich Con. Detroit Edison contends that a single billing system saves money, Mich Con pays for its use, and therefore Mich Con should be able to utilize the billing system for advertising. Detroit Edison avers that the same arguments apply to the electronic billing function on the website as well. Detroit Edison also argues that HPP is actually not an unregulated service, because, while the Commission does not determine HPP’s rate schedule, the costs and revenues associated with the HPP program may be taken into consideration when setting base rates.
Detroit Edison contends that the bill inserts in issue are not code violations but rather are seasonal public safety messages. Detroit Edison argues that, if the Commission finds that the code has been violated, the Commission should not impose fines or other remedies, but should take this opportunity to provide guidance to Detroit Edison and the other parties. Finally, Detroit Edison contends that there can be no award of remedies in this case without proof of damage, and that no party has shown that anyone was damaged as a result of either the bill inserts or the hyperlink. Detroit Edison argues that, under MCL 460.10c(1), damage is a mandatory prerequisite to the imposition of fines or fees, and that Mr. Squires’ voluntary participation does not constitute damage. Detroit Edison points out that the Commission merely invited Mr. Squires to participate, and that such an invitation cannot form the basis for an award of fees.

In its reply to Detroit Edison’s exceptions, the Staff contends that, given that it is uncontested that Mich Con’s advertisement for the HPP program appeared in the bill of an electric-only customer, the functional separation between Detroit Edison and its affiliate that is required by the code of conduct has been breached. The Staff asserts that the important factor here is the conduct of Detroit Edison, not the conduct of Mich Con; and it was Detroit Edison that shared its mailing lists and authorized use of its billing system to advertise Mich Con’s HPP program. The Staff agrees with all of the ALJ’s recommendations, and supports the imposition of the maximum penalty.

In his reply to Detroit Edison’s exceptions, Mr. Squires likewise contends that the focus must be on Detroit Edison, and that Detroit Edison controls the content of its own electric-only bills. Finally, Mr. Squires avers that he was ordered by the Commission to present evidence in the show cause proceeding. Mr. Squires argues that parties will not be willing to bring forth allegations of violations of the code of conduct unless their attorney fees are reimbursed to them by the violator.
V. DISCUSSION

The Commission agrees with the ALJ that both the fall 2003 bill insert and the hyperlink violated the code of conduct, Sections II.H., II.L., and III.A. No evidence was presented to controvert the fact that the advertisement for the HPP program appeared in the fall 2003 bill insert of an electric-only Detroit Edison customer, and appeared on the website of DTE’s electronic billing screen, which could easily be accessed by electric-only customers as well. Hence, in both instances, a customer of the electric utility was subjected to advertising for an unregulated appliance repair program as part of that customer’s bill-paying experience. It is erroneous to argue that the conduct in issue was all the responsibility of Mich Con. A Detroit Edison customer brought these violations to light, in the course of attempting to pay an electric-only bill. Detroit Edison offered, with both the fall 2003 bill insert and with the hyperlink, to jointly sell regulated and unregulated services. Section II.D. of the code of conduct permits an electric utility and its affiliate to share computer hardware and software provided there is documented protection to prevent discriminatory access to competitively sensitive information, but this exemption does not permit the joint selling of regulated and unregulated services. Moreover, Detroit Edison made no attempt to argue that this same advertising capability had been offered to any entity other than Mich Con.

The Commission is not persuaded that HPP is a regulated entity. Detroit Edison has cited no statute or regulation that authorizes the Commission to regulate appliance repair services, and the Commission is aware of none. There may be several entities within the DTE corporate structure which provide unregulated products or services, and these entities may have an impact on the revenues of Detroit Edison. There are times when the Commission must consider the costs and
revenues associated with unregulated conduct that affects the overall financial outlook of a regulated entity. However, that does not put the Commission in the business of regulating that unregulated conduct. As Detroit Edison repeatedly points out, the Commission does not regulate the rates charged by Mich Con for the HPP program. Section I of the code of conduct defines a service as regulated if the Commission has authority to set the price for the service. Indeed, complaints concerning provision of this service would not be entertained by the Commission. Moreover, Mich Con is an affiliate of Detroit Edison, and they are both owned and operated by DTE. Mich Con admits that it used the billing system and billing records of its affiliate Detroit Edison in the fall of 2003 for these bill inserts. Tr 110.

The Commission agrees with the ALJ’s recommendations with respect to remedies. Joint marketing and advertising of this type constitutes anti-competitive behavior that hurts not just others who offer appliance repair services, but also all of the utilities’ customers who may someday need appliance repair services.

In this case, Detroit Edison has committed two violations of a flagrant nature, particularly in light of Detroit Edison’s apparent awareness of the Commission’s holdings in previous cases involving Consumers Energy Company under similar facts. See, Case No. U-13830 (September 21, 2004), and Case No. U-13089 (February 20, 2003). The Staff recommends the imposition of the maximum penalty for a first time offense. However, because these are Detroit Edison’s first two violations, the Commission is prepared to consider a mid-range penalty, and adopts the ALJ’s recommendation of $10,000 per violation. MCL 460.10c(1)(a). The Commission further adopts the ALJ’s recommendation with respect to the issue of Mr. Squires’ attorney fees. While it is a mischaracterization to say that Mr. Squires was ‘ordered to present

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1 Detroit Edison cites these cases several times in its briefing.
evidence’ in this proceeding, the Commission believes that the participation of the public in monitoring the electric utilities’ compliance with the code of conduct is vital, and the Commission wishes to encourage members of the public to come forward with complaints as they arise.

Mr. Squires and Ms. Wotli were the catalysts for the Commission’s decision to open this proceeding and to issue the order for Detroit Edison to show cause. Ms. Wotli chose to participate in a more limited way; Mr. Squires chose to hire counsel and provide testimony and briefing. The Commission finds that Mr. Squires should be reimbursed by Detroit Edison for his reasonable attorney fees expended in this matter. Mr. Squires has not yet provided the Commission with an accounting of his attorney fees, so the Commission is constrained from including any specific amount in the order in this matter. The Commission’s reservation of jurisdiction will ensure that further disputes as to attorney fees will be reviewed by the Commission.

The Commission FINDS that:


b. Detroit Edison’s fall 2003 bill insert and billing webpage hyperlink advertising the HPP service provided by Mich Con violated the code of conduct adopted by the Commission pursuant to MCL 460.10a(4) in Case No. U-12134, Sections II.H., II.L., and III.A. Detroit Edison should pay a fine of $10,000 for the fall 2003 bill insert, and a fine of $10,000 for the billing webpage hyperlink.

c. Detroit Edison should reimburse Mr. Squires for his reasonable attorney fees expended in this matter.
d. Detroit Edison should cease and desist from further use of its customer information and billing system to promote Mich Con’s HPP program.

THEREFORE, IT IS ORDERED that:

A. Within thirty days of the issuance of this order, The Detroit Edison Company shall pay to the State of Michigan fines totaling $20,000 for violations of the code of conduct adopted by the Commission pursuant to MCL 460.10a(4) in Case No. U-12134, Sections II.H., II.L., and III.A., by delivering a check in that amount to the Commission’s Executive Secretary.

B. Within thirty days of the issuance of this order, Daniel Squires shall present The Detroit Edison Company with an itemized bill of costs and fees and, within sixty days of the issuance of this order, The Detroit Edison Company shall reimburse Daniel Squires for his reasonable attorney fees expended in this matter.

C. The Detroit Edison Company shall cease and desist from further use of its customer information and billing system to promote the Home Protection Plus program.

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/ J. Peter Lark
Chairman

( SE A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 29, 2005.

/s/ Mary Jo Kunkle
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 March 29, 2005.

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Its Executive Secretary