

IN THE MATTER OF  
CMS ENERGY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3877. Complaint, June 2, 1999--Decision, June 2, 1999*

This consent order, among other things, permits CMS Energy Corporation's acquisition of natural gas pipelines from Pan Energy Corp. and Texas Eastern Corp., subsidiaries of Duke Energy Company, prohibits CMS from restricting or eliminating interconnection capacity available to the pipelines that compete with Panhandle and Trunkline, and requires CMS to post information regarding the capacity, shipments and throughput of the system on an electronic bulletin board.

*Participants*

For the Commission: *Frank Lipson, Mark Menna, Constance Salemi, Stephen Sockwell, Phillip Broyles, Joseph Eckhaus, Roberta Baruch, William Baer, Jeffrey Fischer, and Kenneth Kelly.*

For the respondent: *C. Benjamin Crisman, Skadden, Arps, Slate, Meagher & Flom, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondent CMS Energy Corporation ("CMS"), a corporation, and Duke Energy Company ("Duke"), a corporation, have entered into a stock purchase agreement whereby CMS proposes to acquire all voting securities of Panhandle Eastern Pipe Line Company ("Panhandle"), Panhandle Storage Company, and Trunkline LNG Company ("Trunkline"), now held by Duke, its subsidiaries or affiliates, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. RESPONDENT

1. Respondent CMS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 330 Town Center Drive, Dearborn, Michigan.

2. Respondent CMS is a holding company for its principal subsidiary, Consumers Energy Company ("Consumers Energy"). Consumers Energy is a combination electric and gas utility company that serves consumers in broad sections of Michigan. Consumers Energy generates, purchases, transmits and distributes electricity throughout Michigan. Consumers Energy purchases, transports, stores and distributes natural gas to Michigan consumers.

3. Respondent CMS is, and at all times relevant herein has been, engaged in interstate commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## II. THE PROPOSED ACQUISITION

4. Respondent CMS entered into a Stock Purchase Agreement dated as of October 31, 1998, with Pan Energy Corp. and Texas Eastern Corp., subsidiaries of Duke, to acquire voting securities currently held by Duke for \$1.9 billion plus the assumption of \$300 million in debt.

## III. TRADE AND COMMERCE

5. A relevant line of commerce in which to analyze the effects of the acquisition is the pipeline transportation of natural gas into Consumers Energy's natural gas service area (the "Service Area"). The Service Area includes all or portions of 54 counties in the lower peninsula of Michigan. Principal cities served include Bay City, Flint, Jackson, Kalamazoo, Lansing, Pontiac, and Saginaw.

6. Consumers Energy owns and operates an intra-state natural gas transmission system that delivers natural gas to residential, commercial and industrial customers in the Service Area. Consumers Energy is required by the Michigan Public Service Commission to transport gas for others on its transmission system.

7. Consumers Energy's intra-state natural gas transmission system is the only transmission system from which customers in the Service Area receive natural gas. Many customers within the Service Area

can buy their own natural gas from suppliers, but need access to Consumers Energy's transmission system.

8. Natural gas consumed in the Service Area is transported to Consumers Energy's natural gas transmission system by pipelines owned by Duke (Trunkline and Panhandle), ANR Pipeline Co. ("ANR"), Great Lakes Transmission, L.P. ("Great Lakes"), Michigan Consolidated Gas Co. ("MichCon") and other companies. Each of these pipelines has one or more points of interconnection with Consumers Energy's transmission system.

9. The maximum rates that can be charged by Trunkline, Panhandle, ANR, Great Lakes, and MichCon to transport gas to interconnection points with Consumers Energy are established by the Federal Energy Regulatory Commission ("FERC") or the Michigan Public Service Commission ("MPSC"). Competition between these pipelines has resulted in actual prices for transportation significantly below the maximum established rates.

10. It is within Consumers Energy's discretion to establish an interconnection with another pipeline or to terminate, or reduce the capacity of, existing pipeline interconnections.

11. The cost for the pipeline transportation of gas into Consumers Energy's transmission system is a significant component in the cost of natural gas sold to customers in the Service Area.

12. Consumers Energy, as an electric utility, competes with self-generators of electricity in the Service Area who depend upon natural gas as a feedstock. An increase in the cost of gas transportation would increase the cost of self-generation of electricity.

#### IV. EFFECTS OF THE PROPOSED TRANSACTION

13. After the acquisition set forth in paragraph four, CMS would have an incentive to terminate, or reduce the capacity of, the interconnections with non-CMS pipelines. CMS would have such an incentive because the likely results of such action would be to increase volume and tariffs on Panhandle and Trunkline pipelines.

14. An anticompetitive effect of the acquisition set forth in paragraph four is to increase the likelihood that Panhandle and Trunkline will charge higher tariffs to shippers.

15. A second anticompetitive effect of the acquisition set forth in paragraph four is to increase the likelihood that natural gas prices will increase to customers in the Service Area.

16. A third anticompetitive effect of the acquisition set forth in paragraph four is to increase the likelihood that the price of electricity will increase for industrial customers located in the Service Area that can self-generate electricity.

17. It is unlikely that regulation by the Federal Energy Regulatory Commission or the Michigan Public Service Commission could prevent the likely anticompetitive effects of the acquisition.

#### V. STATUTES VIOLATED

18. The Stock Purchase Agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

19. The acquisition described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

#### DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of Panhandle Eastern Pipe Line Company ("Panhandle"), Panhandle Storage Company, and Trunkline LNG Company ("Trunkline"), now held by Duke Energy Company, its subsidiaries or affiliates, by CMS Energy Corporation ("CMS"), and it now appearing that CMS, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent CMS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 330 Town Center Drive, Dearborn, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

##### I.

*It is ordered*, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*CMS*" means CMS Energy Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CMS, including but not limited to Consumers Energy Company, a wholly-owned subsidiary of CMS Energy Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Adjusted Designated Capacity*" means Designated Capacity less the amount by which capacity is reduced for maintenance or force majeure.

C. "*Amount Confirmed*" means the Amount Nominated that Consumers Energy Company matches to corresponding recipients (*i.e.*, customers, brokers, marketers, or storage accounts) at an Interconnection Point.

D. "*Amount Nominated*" means the amount of natural gas that a shipper proposes to deliver to Consumers Energy Company at an Interconnection Point.

E. "*Available Interconnection Capacity*" means the amount of natural gas that Consumers Energy Company is ready, willing, and able to receive at an Interconnection Point.

F. "*Commission*" means the Federal Trade Commission.

G. "*Consumers Energy System*" means the natural gas transmission system of Consumers Energy Company.

H. "*Designated Capacity*" means the capacity for each Interconnection Point as stated in Exhibit A.

I. "*Interconnection Point*" means the eight interconnection points listed in Exhibit A, as points where Consumers Energy Company receives gas into its system.

J. "*MPSC*" means the Michigan Public Service Commission.

K. "*Recorded Throughput*" means the data obtained electronically by Consumers Energy Company from its Supervisory Control And Data Acquisition system units located at each Interconnection Point.

## II.

*It is further ordered, That:*

A. Respondent shall provide information on an electronic bulletin board showing for each Interconnection Point: (i) the Designated Capacity; (ii) the Adjusted Designated Capacity, identifying the cause of the adjustment and the planned date the adjustment is expected to end; (iii) the Available Interconnection Capacity; (iv) no later than the second business day of each month (a) the Amounts Nominated and (b) the Amounts Confirmed; and (v) the Recorded Throughput for the previous month.

B. If respondent declines any shipper's nomination of gas into the Consumers Energy System at any Interconnection Point because Available Interconnection Capacity is less than Adjusted Designated Capacity, respondent shall afford the shipper two alternatives: (i) if the shipper is able to nominate its shipments to another pipeline interconnection point into the Consumers Energy System at no additional cost to the shipper, respondent will accept the gas at such other pipeline interconnection point; (ii) if the shipper provides a certification in the form set forth in Exhibit B hereto stating that the shipper is unable to nominate its shipments to another pipeline interconnection point into the Consumers Energy System at no additional cost to the shipper, then respondent shall provide gas from its own supply of gas and without interruption on the Consumers

Energy System for the shipper's account equal to the volume of gas nominated by the shipper that could not be transferred through any of the Interconnection Points by reason of the Available Interconnection Capacity being less than Adjusted Designated Capacity.

C. If the shipper exercises the option set out in paragraph II.B. (ii), respondent may require the shipper to return to respondent the volume of gas respondent had provided on the shipper's behalf, but no earlier than the end of the calendar month following the month in which Available Interconnection Capacity was less than the Adjusted Designated Capacity. Respondent shall give shipper the option to return the gas at any pipeline interconnection point into the Consumers Energy System. Respondent shall not charge an unauthorized gas usage charge to any shipper who replaces the gas by the end of the calendar month following the month in which the shipper's Amount Confirmed was less than the shipper's Amount Nominated because the Available Interconnection Capacity was less than the Adjusted Designated Capacity.

D. If respondent declines a shipper's nomination of gas that the shipper is obligated to return to respondent under paragraph II.C. because the Available Interconnection Capacity is less than Adjusted Designated Capacity, respondent shall again afford the shipper options (i) and (ii) in paragraph II.B., including the provision in paragraph II.C. regarding suspension of the unauthorized gas usage charge.

E. Respondent shall amend the tariffs it has filed with the MPSC to incorporate its obligations under paragraph II. of this order. Respondent shall incorporate its obligations under paragraph II. into any of its contracts with shippers.

F. The purpose of this paragraph II. of this order is to prevent the substantial lessening of competition from the acquisition, as alleged in the complaint.

### III.

*It is further ordered, That:*

Ninety (90) days from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph II. of this order.

## IV.

*It is further ordered, That:*

A. Respondent shall notify the Commission at least thirty (30) days before any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

B. Upon consummation of the acquisition, respondent shall cause the merged entity to be bound by the terms of this order.

## V.

*It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:*

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

## VI.

*It is further ordered, That this order shall terminate on June 2, 2009.*

EXHIBIT A

CONSUMERS ENERGY COMPANY  
DESIGNATED CAPACITY BY INTERCONNECT BY MONTH

| INTERCONNECT LOCATION        | NOTES | MMCF/D      |             |             |             |             |             |             |             |             |             |             |             |
|------------------------------|-------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
|                              |       | JAN         | FEB         | MAR         | APR         | MAY         | JUNE        | JUL         | AUG         | SEPT        | OCT         | NOV         | DEC         |
| ANR-STAG LAKE                |       | 150         | 150         | 150         | 150         | 150         | 150         | 150         | 150         | 150         | 150         | 150         | 150         |
| OTISVILLE                    |       | 175         | 175         | 175         | 300         | 300         | 300         | 300         | 300         | 300         | 300         | 175         | 175         |
| ANR-OVERISEL                 |       | 0           | 0           | 0           | 200         | 200         | 200         | 200         | 200         | 200         | 200         | 0           | 0           |
| GREAT LAKES-CHIPPEWA         |       | 300         | 300         | 300         | 300         | 300         | 300         | 300         | 300         | 300         | 300         | 300         | 300         |
| GREAT LAKES-BIRCH RUN        |       | 70          | 70          | 70          | 70          | 70          | 70          | 70          | 70          | 70          | 70          | 70          | 70          |
| MICHCON-GOOSE CREEK/KALKASKA | 1     | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 | 130/<br>160 |
| MERCURY-BLUE LAKE "36"       |       | 50          | 50          | 50          | 50          | 50          | 50          | 50          | 50          | 50          | 50          | 50          | 50          |
| MICHCON-NORTHVILLE           |       | 250         | 250         | 250         | 250         | 250         | 250         | 250         | 250         | 250         | 250         | 250         | 250         |

1 Goose Creek has capacity of 130 MMcf/d, and Kalkaska has capacity of 160 MMcf/d. The total simultaneous capacity of these interconnects cannot exceed 160 MMcf/d. The Kalkaska interconnect is not currently being used.

## EXHIBIT B

## EXHIBIT B

CERTIFICATION OF  
(Name)

\_\_\_\_\_ hereby certifies:

1. I am \_\_\_\_\_ at \_\_\_\_\_ ("Shipper").  
(Title) (Name of company)
2. With respect to Shipper's nomination on \_\_\_\_\_ of  
(Date)

\_\_\_\_\_ MMbtu of natural gas into Consumers Energy Company's ("Consumers Energy") gas transmission system at \_\_\_\_\_,  
(Name of Interconnection Point)\*

Shipper is unable to nominate the quantity of natural gas not accepted by Consumers Energy to another interconnection point into Consumers Energy's gas transmission system without incurring additional cost to Shipper.

\_\_\_\_\_  
(NAME)

\_\_\_\_\_  
Listed in Original Sheet No. F-7.00, Subsection F11, M.P.S.C. No. 1 - Gas,  
Consumers Energy Company

IN THE MATTER OF  
GOTTSCHALKS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS  
LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3878. Complaint, June 3, 1999--Decision, June 3, 1999*

This consent order, among other things, prohibits Gottschalks, Inc., a California-based retailer, from advertising any textile fiber product or wool product in any mail order catalog or mail order promotional material without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

*Participants*

For the Commission: *Eleanor Durham, Charles Harwood, Carol Jennings, and Elaine Kolish.*

For the respondent: *Warren Williams*, in-house counsel, Fresno, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gottschalks, Inc., ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a California corporation with its principal office or place of business at 7 River Park Place E., Fresno, California.
2. Respondent is a retail seller that has advertised, offered for sale, sold, and distributed to the public various products, including textile products subject to the requirements of the Textile Act, and wool products subject to the requirements of the Wool Act.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, various products, including products subject to the requirements of the Textile Act and the Wool Act.