

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
CMS MARKETING, SERVICES AND TRADING)
COMPANY, a Michigan corporation, for a) Case No. U-11485
certificate of public convenience and necessity)
to render electric service to certain customers.)
_____)

At the July 24, 1998 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On August 6, 1997, CMS Marketing, Services and Trading Company (MST) filed an application for a certificate, pursuant to 1929 PA 69 (Act 69), to serve specified customers under the Rate DA program of Consumers Energy Company (Consumers) approved by the Commission in its November 14, 1996 order in Cases Nos. U-10685, U-10754, and U-10787 (November 14 order). These customers are: (1) Cannon Muskegon Corporation in the City of Norton Shores in Muskegon County; (2) the City of Wyoming's Donald K. Shine Treatment Plant located in Park Township in Ottawa County; (3) the Great Lakes Tissue Company in the City of Cheboygan in Cheboygan County; and (4) Essroc Materials, Inc., in the City of Essexville in Bay County.

Pursuant to due notice, a prehearing conference was held on October 1, 1997, at which time the interventions of the Association of Businesses Advocating Tariff Equity (ABATE), Attorney General Frank J. Kelley (Attorney General), Consumers, and Competitive Utility Tariffs, Inc. (CUT) were granted. The Commission Staff (Staff) also participated.

On October 29, 1997, ABATE, the Attorney General, and CUT filed a Joint Motion for Summary Disposition (Joint Motion). On November 5, 1997, oral argument on the Joint Motion was conducted before Administrative Law Judge Theodora M. Mace (ALJ). Thereafter, the ALJ issued an oral Proposal for Decision (PFD) finding that the application should be dismissed because MST is an affiliate of Consumers and the Commission's April 10, 1997 order in Cases Nos. U-10685, U-10754, and U-10787 (April 10 order) prohibited affiliates of Consumers from participating in the Rate DA program. On November 14, 1997, MST filed exceptions to the PFD. Replies to exceptions were filed by ABATE, the Attorney General, and CUT.

MST argues that a finding that it is an affiliate of Consumers for purposes of the Rate DA program would not further the purpose of that program. According to MST, the purpose of prohibiting Consumers' affiliates from participating in the Rate DA program was to prevent Consumers from avoiding a ban on its own participation in the program by operating through an affiliate. According to MST, this concern is obviated by the restrictions imposed by the Federal Energy Regulatory Commission (FERC), which require that (1) MST's operations not be subsidized by Consumers; (2) MST maintain its own books, records, and accounting system; (3) neither MST nor Consumers give undue preference to third parties; (4) no employee of MST or Consumers state or imply that undue preference will be given; and (5) to the extent practicable, MST's and Consumers' facilities and offices be physically separate. MST states that it will not purchase power for Rate DA from Consumers and that its source of power will be supplied from its diversified portfolio.

Because it will not be selling power purchased from Consumers, MST argues that it should not be considered an affiliate.

ABATE counters that throughout the November 14 and April 10 orders, the Commission consistently used the term “affiliate” in its normal business sense to mean companies with a corporate affiliation. According to ABATE, at no point in either order did the Commission use the term “affiliate” in a manner that suggests that the source of power was the determinant. ABATE indicates that discovery in this case demonstrates that:

1. Consumers and MST have common ownership. MST is a wholly-owned subsidiary of CMS Enterprises Company, which is a wholly-owned subsidiary of CMS Energy Corporation. Consumers is a wholly-owned subsidiary of CMS Energy Corporation.
2. MST and Consumers are subject to common control. The Chairman of the Board, President, and Chief Executive Officer of MST reports to William T. McCormick, Jr., who is also Chairman of the Board of Consumers.

The Attorney General argues that MST’s participation would allow CMS Energy to further concentrate and enhance its market power and would not promote competition. According to the Attorney General, it “doesn’t take a rocket scientist to realize that [MST]’s exceptions and arguments have no merit whatsoever.” Attorney General’s reply to exceptions, p. 1.

CUT argues that, in the October 20, 1997 order in Case No. U-11130, the Commission found that the test of affiliate relationship is common ownership or common control, both of which are present in the relationship between Consumers and MST. According to CUT, the FERC tariff would not prohibit the functional equivalent of Consumers re-marketing its own power.

Discussion

In the November 14 order, the Commission precluded Consumers from acting as an eligible supplier for the Rate DA program. In response to a request by The Dow Chemical Company, the Commission in the April 10 order clarified that this prohibition applied to Consumers' affiliates as well:

The Commission agrees that Consumers' affiliates should not be permitted to act as third-party suppliers for any part of the 100 MW reserved for Rate DA. The effect is to maximize the competition between Consumers and unaffiliated third-party suppliers, and is consistent with the rationale for setting aside the 100 MW.

Order, pp. 12-13.

From the above, it is clear that the purpose of the restriction is to promote competition between Consumers and suppliers who have no affiliation with Consumers. The Commission's use of the term "affiliate" was intended to have its normal business meaning. It was not, as MST contends, an unfortunate shorthand method of indicating a common source of power supply. If the Commission had intended to refer to "those who obtain their power supply from Consumers," it could easily have done so.

In this case, the parties to the Joint Motion contend that Consumers and MST have common ownership and are subject to common control--conditions that the Commission had found to be indicative of an affiliate relationship in its October 20, 1997 order in Case No. U-11130. MST does not deny that it and Consumers have common ownership and are subject to common control. Accordingly, the Commission finds that Consumers and MST are affiliates.

That being said, the Commission is not convinced that prohibiting Consumers' affiliates from participating in Rate DA under all circumstances is necessarily the best policy. The purpose of the prohibition is to allow non-affiliated power suppliers an opportunity to compete in the market. If

Consumers' affiliates were allowed to participate, the limited capacity available for Rate DA would be diverted, thereby restricting the potential for a competitive market to develop. Thus, the purpose underlying the restriction was to prevent the limited Rate DA capacity from being diverted to Consumers' affiliates, not necessarily to prevent those affiliates from participating.

Accordingly, the Commission finds that MST should be allowed to participate only if Consumers agrees that the capacity will not be counted as part of the limited capacity available for Rate DA. This will allow MST to participate on equal terms with other potential suppliers while accomplishing the intended purpose. Consumers should notify the Commission within 20 days of its decision on whether to allow MST to participate under these conditions. If Consumers chooses to have MST participate, then the matter will be returned to the ALJ for further hearings, as required by law if MST desires to pursue an Act 69 certificate for these customers.¹ Future applications for MST to participate in Rate DA will be treated in the same manner.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1929 PA 69, as amended, MCL 460.501 et seq.; MSA 22.141 et seq.; 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. MST is an affiliate of Consumers.

¹Because the Commission has previously granted Act 69 certificates for other suppliers to serve these customers, the issue may be moot.

c. MST should be allowed to participate in the Rate DA program only if Consumers agrees that the capacity will not be counted as part of the limited capacity available for Rate DA.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company shall notify the Commission within 20 days if it chooses to have CMS Marketing, Services and Trading Company participate in the Rate DA program consistent with the terms of this order.

B. If Consumers Energy Company chooses not to allow its affiliate to participate, then the application for a certificate of public convenience and necessity filed by CMS Marketing, Services and Trading Company is denied.

C. If Consumers Energy Company chooses to allow its affiliate to participate and CMS Marketing, Services and Trading Company still seeks a certificate of public convenience and necessity to serve any of the customers identified in the application, the case is remanded to the Administrative Law Judge.

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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ John C. Shea
Commissioner, dissenting in a separate opinion.

/s/ David A. Svanda
Commissioner

By its action of July 24, 1998.

/s/ Dorothy Wideman
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Suggested Minute:

“Adopt and issue order dated July 24, 1998 specifying terms under which CMS Marketing, Services and Trading Company may participate as a third party supplier under Rate DA, as set forth in the order.”

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DISSENTING OPINION OF COMMISSIONER JOHN C. SHEA

(Submitted on July 24, 1998 concerning order issued on same date.)

I believe that the November 14, 1996 order in Cases Nos. U-10685, U-10754 and U-10787 clearly expresses the unanimous view of this Commission as to the definition of entities eligible to sell power under the DA program: “The Commission . . . concludes that the definition of eligible third-party supplier should be expanded to encompass all sources of power, both within and without Michigan, with the exception of Consumers itself.” *Id.* at 83 [emphasis added].

Despite the novel interpretation placed on this passage in the April 10, 1997 order in the above-referenced docket, the ruling quoted above is and remains the considered expression of three commissioners on this issue and the ruling quoted above excludes no one except Consumers Energy Company itself. CMS Marketing, Services and Trading Company should therefore be eligible to participate in the DA program unconditionally, so long as “Consumers itself” is not the source of power.

I therefore respectfully dissent.

John C. Shea, Commissioner