

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
CONSUMERS ENERGY COMPANY for a)	
determination of net stranded costs and for)	Case No. U-13380
approval of net stranded cost recovery charges.)	
_____)	

At the July 10, 2002 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

ORDER

On April 22, 2002, Consumers Energy Company (Consumers) filed an application pursuant to 2000 PA 141 (Act 141), MCL 460.10a et seq., seeking a Commission determination of the company's net stranded costs and approval of net stranded cost recovery charges to recover those costs, pursuant to MCL 460.10a. At that time, Consumers also filed testimony for Michael A. Torrey and William E. Garrity and exhibits that each witness would sponsor.

On June 5, 2002, the Commission Staff (Staff) filed a motion to strike a portion of an exhibit referenced as MAT-1, which is to be sponsored by Mr. Torrey. The Staff took the position that Mr. Torrey's testimony and exhibit improperly included costs associated with Consumers' achieving compliance with the federal Clean Air Act.¹ In the Staff's view, those costs are recoverable, if at all, pursuant to MCL 460.10d(3) [Section 10d(3)].

¹42 USC 7401 et seq., as amended.

On June 7, 2002, Energy Michigan, Inc., filed a response to the Staff's motion to strike, in which Energy Michigan argued that the motion should be expanded. Energy Michigan took the position that the provisions in Section 10d(3) require that all capital expenditures made after the imposition of the rate freeze established by Act 141 (not just expenditures for Clean Air Act compliance) should be excluded from consideration in this case. Those expenditures, Energy Michigan argued, are to be accrued and deferred for recovery following the conclusion of the rate freeze.

On June 10, 2002, Consumers filed a response to the Staff's motion.

On June 12, 2002, a hearing was held before Administrative Law Judge James N. Rigas (ALJ) to address, among other things, the Staff's motion to strike. After hearing the arguments of the parties, the ALJ denied the motion based on his opinion that granting it would effectively grant summary disposition on an issue for which the Commission might benefit from a more complete record and an opportunity to review full arguments of the parties.

On June 13, 2002, the Staff filed an application for leave to appeal the ALJ's ruling denying its motion to strike. On June 17, Energy Michigan filed an application for leave to appeal the ALJ's ruling. By June 19, Attorney General Jennifer M. Granholm (Attorney General) and the Association of Businesses Advocating Tariff Equity (ABATE) each filed a response in support of the applications for leave to appeal.

On June 26, 2002, Consumers filed an answer to the applications for leave to appeal.

Legal Framework

MCL 460.10a(1) provides:

No later than January 1, 2002, the commission shall issue orders establishing the rates, terms and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric

supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission.

MCL 460.10a(10) provides:

The commission shall consider the reasonableness and appropriateness of various methods to determine net stranded costs, including, but not limited to, all of the following:

- (a) Evaluating the relationship of market value to the net book value of generation assets and purchased power contracts.
- (b) Evaluating net stranded costs based on the market price of power in relation to prices assumed by the commission in prior orders.
- (c) Any other method the commission considers appropriate.

MCL 460.10d(3) provides:

Beginning January 1, 2004, annual return of and on capital expenditures in excess of depreciation levels incurred during and before the time period described in subsection (2)² and expenses incurred as a result of changes in taxes, laws, or other state or federal actions incurred by electric utilities during the period described in subsection (2), shall be accrued and deferred for recovery. After notice and hearing, the commission shall determine the amount of reasonable and prudent costs, if any, to be recovered and the recovery period, which shall not exceed 5 years, and shall not commence until after the expiration of the period described in subsection (2).

(Footnote added.)

Positions of the Parties

Staff

The Staff argues that the appropriate vehicle for Consumers to recover federal Clean Air Act-related costs is the mechanism provided in Section 10d(3), pursuant to which recovery may not commence until after January 1, 2004. Because that mechanism provides for deferred recovery of

²Subsection (2) provides a period during which the rates of electric utilities having more than 1 million customers as of May 1, 2000 are frozen.

those costs, the Staff submits that they should not be included in Consumers' stranded cost calculations in the present case. The Staff argues that its motion is consistent with the Commission's orders in Case No. U-12639, in which the Commission recognized that the methodology for calculating stranded cost is an evolving process and specifically deferred certain issues.

The Staff requests the Commission to reverse the ALJ's ruling denying its motion to strike the portion of Consumers' calculations that include costs associated with the Clean Air Act and to require Consumers to modify and resubmit its calculations, excluding those costs. The Staff argues that its motion presents a legal issue for which the full evidentiary record envisioned by the ALJ would provide no reasonable assistance. Rather, the Staff argues, if the Commission does not reverse the ALJ's ruling, the Staff and the other intervenors will be required to prepare testimony and exhibits to refute Consumers' filing, and then later argue that these costs should be removed. The Staff argues that the case would thereby be delayed unnecessarily.

Energy Michigan

Energy Michigan argues that Section 10d(3) requires removal of all of the capital expenditures for additional generating plant assets, not just those associated with Clean Air Act compliance. It states that Consumers has added significantly more production plant investment since commencement of the rate freeze created by MCL 460.10d(2). It asserts that Consumers' answer to an Energy Michigan discovery request reflects that Consumers had added about \$89 million in total production plant and CWIP (construction work in progress) between June 5, 2000 and the end of 2000. For 2001, Energy Michigan says, Consumers reports an additional \$322.85 million of added net plant. Thus, Energy Michigan states, the issue involves the proper method to recover \$412 million in plant investment.

Energy Michigan argues that the plain and clear meaning of the statutory language renders the requirements of Section 10d(3) mandatory, not permissive. It argues that if resolution of this issue is delayed, Consumers will be required to re-file or revise its case at a later date, thus potentially creating substantial delay in the conclusion of the case.

Energy Michigan argues that its position does not prejudice Consumers because there is a mechanism for the company to request full recovery of and on all expenditures excluded from this case. According to Energy Michigan, the difference is that the recovery would occur in a time frame that would permit a review for reasonableness and prudence and the costs would potentially be spread across all customers, not just open access customers.

Attorney General

The Attorney General asserts that the applications for leave to appeal raise an important legal question concerning the relationship between Section 10d(3) and the scope of net stranded costs proposed by Consumers in this case. She urges the Commission to consider and address that legal question at this time.

In the Attorney General's view, Section 10d(3) mandates recovery of the annual return of and on capital expenditures in excess of depreciation levels incurred during and before the time period of the statutory rate freeze through accrual and deferral. She continues that the same treatment is required for costs associated with meeting changes in taxes, laws, or other state or federal governmental actions. She concludes that because Section 10d(3) establishes a mandatory procedure to recover the costs listed in it, the Commission should grant leave to appeal and require Consumers to remove costs from its calculations that are within the scope of that section.

ABATE

ABATE argues that all cost items recoverable pursuant to Section 10d(3) should be excluded from this case. It further argues that these applications for leave to appeal involve legal questions that should be decided at the outset of the case to prevent the parties from wasting resources dealing with the disputed costs. If the Commission excludes these costs, ABATE argues, it will materially advance a timely resolution of the proceeding.

Consumers

Consumers initially argues that Energy Michigan's application for leave to appeal is procedurally defective. It argues that Energy Michigan never filed a motion before the ALJ, but rather a response to the Staff's motion. Consumers points out that Energy Michigan never served a notice of hearing with the document it now seeks to characterize as a motion, contrary to the provisions of R 460.17335. Consumers further argues that the ALJ could not properly rule on a motion that had not been properly filed and noticed for hearing. Therefore, Consumers argues, the only ruling that is properly before the Commission is the ALJ's denial of the Staff's motion to exclude Clean Air Act compliance costs from stranded costs.

Consumers argues, as it did before the ALJ, that the Staff's motion to strike evidence is essentially a motion for summary disposition of the issue concerning whether these costs may be recovered through the stranded cost process. It argues that such a motion can only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment or partial judgment as a matter of law. Consumers argues that the Staff failed to support either of these bases for granting the motion.

Consumers further argues that the Staff seeks relief that is inconsistent with the Commission's orders in Case No. U-12639. In the December 20, 2001 order, Consumers argues, the Commission

indicated that, in this proceeding, the utilities would be free to offer and support adjustments, consistent with the methodology adopted in that order for calculating stranded costs. Consumers argues that even if the Commission intended that other parties could suggest adjustments, any proposed adjustments must be consistent with the method adopted. It asserts that the Staff's case, which the Commission adopted in Case No. U-12639, required that all generation-related expenses be included because those costs are subject to being stranded. Moreover, Consumers argues that the calculation adopted by the Commission in Case No. U-12639 expressly included about \$130 million in costs related to compliance with the Clean Air Act. Consumers argues that rejection of these costs from the stranded cost calculation in this case amounts to a "rejection and wholesale modification of the Commission's U-12639 methodology, rather than a simple refinement." Consumers' response, p. 4.

Consumers argues that granting Energy Michigan's motion would change the methodology that the Commission approved in Case No. U-12639 so that it no longer measures the extent to which Consumers is recovering the generation-related costs that it has actually incurred to provide service to customers. It argues that the only thing mandatory about Section 10d(3) is that the Commission must permit recovery of the costs to which that subsection applies. Consumers argues that there is nothing in 2000 PA 141 that prevents costs from being recoverable both because they are covered by Section 10d(3) and because they are deemed stranded costs for purposes of MCL 46010a(1), (5), (9), and (10). Rather, Consumers asserts Section 10d(3) merely provides an alternative mechanism for recovery of these costs.

In fact, Consumers argues, Section 10d(3) was intended to assure the recovery of certain utility investments and expenses incurred during the statutory rate freeze period, even if they could not be characterized as stranded costs. It argues that the existence of Section 10d(3) as an alterna-

tive cost recovery mechanism does not allow the re-characterization of costs eligible for recovery pursuant to the stranded cost methodology elected by the Commission.

In answer to the Attorney General's response supporting the Staff's and Energy Michigan's motions, Consumers argues that the Attorney General is incorrect in suggesting that costs must have been incurred prior to industry restructuring before they can be considered stranded. That argument, Consumers insists, conflicts with the statutory mandate that the Commission permit full recovery of all stranded costs, without limitation as to time. Consumers argues that as long as it has an obligation to serve customers, it must maintain generation resources necessary to fulfill that obligation. As long as customers may choose an alternate supplier, Consumers says, the investment in those resources is at risk of being stranded.

In its conclusion, Consumers states that its application contemplates the deferral of recovery of a portion of the stranded costs determined by the Commission's methodology. Thus, Consumers states, it is not averse to such a deferral. However, Consumers is concerned that the parties arguing for removal of recoverable costs from this case will argue in a later case that the same costs are not recoverable pursuant to Section 10d(3). Therefore, Consumers requests that if the Commission grants the motion, it provide sufficient regulatory assurance of recovery that Consumers may legitimately record a regulatory asset for these costs.

Discussion

The Commission finds that the Staff's application for leave to appeal should be granted and the ALJ's ruling reversed for the reasons advanced in the Staff's application. The Commission is persuaded that the issue is one of law that may be decided without the need to resolve any factual disputes. Moreover, the Commission rejects Consumers' argument that the Commission should deny the application as inconsistent with the orders in Case No. U-12639. The issue of costs

associated with Clean Air Act compliance was not raised in that case. The fact that intervenors in that case did not raise this issue does not require that the Commission continue to include costs that the statute requires be removed and treated differently.

Recovery of capital expenditures for compliance with the Clean Air Act and other statutory or regulatory requirements is expressly provided for in Section 10d(3). Contrary to Consumers' arguments, the language of that section is mandatory with regard to such costs. The Commission is not persuaded that it may legitimately read into the statutory framework a legislative intention to provide an alternate means of recovering costs that might fit in two categories. Rather, the statute provides that expenses incurred by electric utilities described in Section 10d(3) shall be accrued and deferred for recovery. That section specifically deals with the costs at issue in the Staff's application for leave to appeal, unlike the general provision governing recovery of stranded costs. Even if these costs were to be considered stranded costs, Section 10d(3) provides for special treatment for them, which the Commission is bound to follow.

Finally, the Commission finds Consumers' argument well taken that Energy Michigan's application for leave to appeal is not properly before the Commission at this time. Energy Michigan did not file a motion or serve a notice of hearing on its motion. Rather, it filed a response to the Staff's motion, in which it argued that the Staff's motion should be expanded. The ALJ's decision did not specifically reference Energy Michigan's motion, but denied the Staff's motion. The Commission therefore finds that Energy Michigan made no motion that was ruled upon by the ALJ and it cannot file an application for leave to appeal on the matter. The Commission will take up Energy Michigan's arguments only after it has met the procedural requirements.

For a similar reason, it would be premature to rule on Consumers' request that the Commission grant the accounting and ratemaking approvals necessary to account for Clean Air

Act expenditures as regulatory assets. This request was made in Consumers' answer to the applications for leave to appeal and the other parties have not had an opportunity to respond. Consumers should file an appropriate application for accounting authority if it wishes to have this matter addressed.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The application for leave to appeal filed by the Staff should be granted and the ALJ's ruling reversed.

c. The application for leave to appeal filed by Energy Michigan should be denied.

THEREFORE, IT IS ORDERED that:

A. The application for leave to appeal filed by the Commission Staff is granted.

B. The application for leave to appeal filed by Energy Michigan, Inc., is denied.

C. Consumers Energy Company shall modify and resubmit its calculations so as to exclude costs associated with complying with the federal Clean Air Act.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle

Chairman

(S E A L)

/s/ David A. Svanda

Commissioner

/s/ Robert B. Nelson

Commissioner

By its action of July 10, 2002.

/s/ Dorothy Wideman

Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Case No. U-13380

Suggested Minute:

“Adopt and issue order dated July 10, 2002 granting the application for leave to appeal filed by the Commission Staff and denying the application for leave to appeal filed by Energy Michigan, Inc., as set forth in the order.”