

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
THE DETROIT EDISON COMPANY to)	
implement the Commission's stranded cost recovery)	Case No. U-13350
procedure and for approval of net stranded cost)	
recovery charges.)	
_____)	

At the December 18, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

ORDER DENYING REHEARING

On July 31, 2003, the Commission issued an order that required The Detroit Edison Company (Detroit Edison) to maintain its existing retail open access transition charge of zero during 2003. The basis for this determination was the finding that Detroit Edison had not incurred net stranded costs during 2000 and 2001. The order further required Detroit Edison to fund the offsets to the securitization and tax surcharges and the rate reduction equalization credits on its retail open access customers' bills with excess securitization savings.

On September 2, 2003, Detroit Edison filed a petition for rehearing. On or before September 23, 2003, the Kroger Co., Energy Michigan, Inc., the Association of Businesses Advocating Tariff Equity (ABATE), and Attorney General Michael A. Cox (Attorney General) filed answers.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing.

Special Contracts

Detroit Edison argues that the Commission erred by adopting the adjustment to impute revenues for special contract discounts. Detroit Edison contends that the adjustment deprives it of the negotiated benefits of its bargaining leading up to the contracts, in which it agreed to receive less revenues as the only possible means of retaining the load and fixed cost contribution of those customers. It says that the contracts are anticompetitive only if it is under an obligation to concede its business to alternative electric suppliers. It argues that the adjustment violates its right in MCL 460.10a(1) to a full recovery of its net stranded costs and is an unconstitutional taking of its property.

In reply, Energy Michigan says that Detroit Edison's position would effectively force all retail open access customers to pay for the discounts, without regard to whether they had previously entered into special contracts. Energy Michigan and the Attorney General argue that the basis for the adjustment was Detroit Edison's failure to meet the conditions imposed for rate recovery of the discounts in the March 23, 1995 order in Case No. U-10646. Energy Michigan claims that Detroit Edison is making a collateral attack on the decisions in Case No. U-10646.

Detroit Edison is essentially repeating arguments it has already made in this proceeding. The Commission finds that the arguments do not meet the standard for rehearing set forth in Rule 403. Although the Commission does not ordinarily address arguments premised upon an unconstitutional taking of property, it notes a flaw in Detroit Edison's constitutional analysis. Detroit Edison voluntarily accepted the stringent criteria for rate recovery that the Commission imposed as conditions of its approval of the special contracts in Case No. U-10646 and similar cases. Detroit Edison has not met those conditions and therefore has no legitimate claim of expectation that it will recover the discounts through future rate proceedings. The conditions stated in the Commission's orders explicitly negate any expectation that Detroit Edison might have held. Detroit Edison cannot point to "existing rules or understandings that stem from an independent source such as state law" as the basis for asserting a property interest protected from governmental taking by due process. Bd of Regents of State College v Roth, 408 US 564, 577; 92 S Ct 2701, 2709; 33 L Ed 2d 548, 561 (1972), quoted in City of Kentwood v Sommerdyke Estate, 458 Mich 642, 650; 581 NW2d 670 (1998).

Methodology

Detroit Edison argues that the order's failure to adopt a definitive methodology for calculating and contemporaneously recovering stranded costs is causing it to experience financial harm and uncertainty. Detroit Edison complains that the apparent purpose of the temporary methodology used in this case to set a zero transition charge is to subsidize its competitors. Detroit Edison says that its inability to recover actual stranded costs comes at a time when its retail open access load is expanding rapidly and its net income and cash flow are declining. (It asks the Commission to take administrative notice of its recent financial results.) Detroit Edison claims that retail open access load growth since 2001 means that it is currently losing \$70 million more per year in revenue

contribution toward the recovery of its fixed production costs (comparing 2003 to 2001). Detroit Edison contends that the Commission's stated objective of equivalency in treatment between it and Consumers Energy Company is inappropriate in light of the much greater penetration of retail open access in its service territory.

Detroit Edison contends that the failure to eliminate the two-year lag between the time it incurs and recovers stranded costs worsens the situation. Detroit Edison argues that it was unfair for the Commission to reject proposals to use projected numbers to set a transition charge that would have recovered stranded costs contemporaneously, but then to use estimated securitization savings for the same periods to fund the securitization offsets and rate reduction equalization credits. Detroit Edison claims that deferred accounting is inadequate to mitigate the adverse effects of the timing difference, as a regulatory asset does not provide it with a current cash return, but it impairs its cash flow and requires it to borrow money. Detroit Edison further claims that the deferral makes an eventual recovery contingent, that recovery is not certain in light of retail open access customers' right to return to full utility service, and that uncertainty stands as an obstacle to recording regulatory assets. It argues that requiring it to defer stranded costs violates its right in MCL 460.10a(1) to recover its stranded costs in full and is inconsistent with the true-up procedure set forth in MCL 460.10a(10).¹

In reply, Energy Michigan and the Attorney General assert that a loss of revenue is not the same as stranded costs. They claim that the recently reported decline in Detroit Edison's earnings is attributable to mild weather, storm damages, and the write-off of a non-utility investment. ABATE contends that Rule 403 does not allow subsequently issued financial reports to be a basis for rehearing. Energy Michigan asserts that the methodology used in the July 31, 2003 order

¹ Citations to subsections in MCL 460.10a conform to the statute as recently amended by 2003 PA 214.

establishes that stranded costs were in fact negative, although it believes that the Commission should have taken the next step and calculated exact amounts. Both Energy Michigan and the Attorney General argue that the historical approach used to determine stranded costs is entirely consistent with MCL 460.10a. Energy Michigan says that the basis for Detroit Edison's financial projections of positive balances in the years after 2001 is conjecture and unsubstantiated assumptions.

Detroit Edison misapprehends the findings in the July 31, 2003 order. The methodology used was less than definitive in the sense that the Commission would not rely on it to compute a precise balance of net stranded costs or to project stranded costs in future years. However, it was more than sufficient to establish that any stranded cost calculation based on the record would be a negative outcome for 2000 and 2001. This much is definitive. The methodology did not deprive Detroit Edison of its rights under MCL 460.10a(1).

Nor is it apparent that the determinations made in the July 31, 2003 order are directly causing Detroit Edison's financial situation to deteriorate. One basis for this claim is financial reports issued after the record closed in this case. Even if these matters were appropriate considerations, it would not be appropriate to infer as a factual matter that the direction of earnings and cash flow is related to stranded costs.

The Commission is not persuaded that it should have adopted one of the changes proposed to eliminate the lag in time before stranded costs can be collected. The proposals relied on future years' projections for statistical inputs that can be volatile in actual practice. The estimates of excess securitization savings are more stable. Granting rehearing to reconsider the historical methodology for determining stranded costs is not appropriate under Rule 403.

Securitization and Rate Reduction Equalization

Detroit Edison objects to the Commission's decision to continue the securitization offsets and rate reduction equalization credits for retail open access customers. Detroit Edison claims that, notwithstanding the assertion in the July 31, 2003 order that using excess securitization savings to fund these credits protects the utility from financial loss, the order harms Detroit Edison by subsidizing customer choice, artificially stimulating retail open access sales, and increasing stranded costs.

Detroit Edison contends that the excess securitization savings come at the expense of its full service customers, who thereby forego additional rate reductions. It claims that the savings of securitization cannot be attributed to retail open access customers, who do not pay the bundled rates that recover the generation costs that are subject to securitization. It argues that the offsets and credits violate MCL 460.10d(6), which prohibits the Commission from reallocating cost responsibility among different customer classes. Detroit Edison adds that some retail open access customers are receiving rate reduction equalization credits that are more than their unbundled distribution charges, so that it is in effect being forced to pay those customers not to use its bundled service.

Detroit Edison argues that the offsets and credits are a misuse of the authority granted in MCL 460.10d(6) to apply excess securitization savings to reduce stranded costs. Detroit Edison claims that the credits have the effect of creating an unfunded liability on its part to cover additional charges that are rightfully owed by retail open access customers. Detroit Edison further claims that diverting the excess securitization savings for these purposes is an unconstitutional taking of its property.

Detroit Edison argues that the securitization offset violates the requirement in MCL 460.10k(2) that securitization charges be nonbypassable. It contends that the elimination of the offset once the Commission established a transition charge was a condition of Detroit Edison's acceptance of the financing order.

Detroit Edison says that the rate reduction equalization credits give customers of unbundled distribution service the benefit of a rate reduction calculated on the basis of the full cost of service paid by a bundled customer. It claims that the Commission is discriminating against full service customers by giving proportionately greater rate reductions to unbundled customers, in violation of MCL 460.10d(6).

In reply, Energy Michigan says, the net effect of the charges and credits issued to both bundled and unbundled customers is the same, so that they do not reallocate costs among customer classes. Kroger adds that the credits put bundled and unbundled customers on an equal footing. Energy Michigan contends that the securitization charges being paid by bundled and unbundled customers are subject to the same offsets and are nonbypassable in either case. It suggests that there is no evidence of any retail open access customers that actually receive more in rate reduction equalization credits than they pay in distribution charges. But even if there were a few, it says, those customers would be no better or worse off than bundled customers with the same load characteristics. Kroger says that the excess securitization savings do not belong to Detroit Edison and that using them to fund the credits is appropriate, given that retail open access customers do not use the generation services that produced the securitized costs.

The Attorney General agrees with Detroit Edison that extending the securitization offsets and rate reduction equalization credits to retail open access customers is an unlawful reallocation of costs among customer classes. According to the Attorney General, the securitization offsets are

appropriate for full service customers during the rate freeze because otherwise those customers would pay for the securitized costs twice, once through the generation component of their frozen rates and again through the securitization charge. Because retail open access customers pay only an unbundled distribution rate, the Attorney General says, giving them the same credits is not necessary either to avoid a double recovery of securitized costs or to ensure that they receive the same percentage of base rate reduction. The Attorney General proposes to eliminate the securitization offsets from the retail access service tariff and to reduce the rate reduction equalization credits to an amount equal to 5% of the unbundled distribution charges.

Detroit Edison is not raising any new arguments that would merit rehearing under Rule 403. The July 31, 2003 order addressed its arguments in opposition to the securitization offsets and rate reduction equalization credits. Although Detroit Edison and the Attorney General expand on the view that the offsets and credits reallocate costs in violation of MCL 460.10d(6), the Commission rejected that argument as follows:

The Commission is persuaded that the securitization offsets should be accorded a similar treatment as in [the December 20, 2002 order in] Case No. U-13380. In other words, the offsets will be funded by securitization savings pursuant to Section 10d(6). The Commission is also persuaded that the rate reduction equalization credits should remain in effect and should be funded in the same manner. The original rationale articulated for rate reduction equalization in the November 2, 2000 order in Case No. U-12478, at 32-33—to ensure that choice customers receive the same benefit from the rate reduction that bundled customers received when Section 10d of Act 141 became operative—is no less valid at this time.

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Because both bundled and unbundled customers are currently receiving securitization offsets through their rate structures, it is difficult to see merit in Detroit Edison's contention that continuing the offsets for unbundled customers perpetuates discrimination or reallocates cost responsibility. Both types of customers are required to pay in equal measure for the costs of servicing the securitization bonds, even though only the service provided to bundled customers makes direct operational use of the bulk of assets that Detroit Edison securitized.

Moreover, the rate reduction equalization credit enables choice customers to receive rate benefits that are comparable to bundled customers.

Order in Case No. U-13350, at 26-27, 28. Moreover, the Court of Appeals recently upheld the Commission on this point in affirming the December 20, 2001 and May 16, 2002 orders in Case No. U-12639 in Consumers Energy Co v Michigan Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket Nos. 241990, 241991), slip op at 4-5.

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, 1999 AC, R 460.17101 et seq.

b. Detroit Edison's petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing is denied.

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
issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of December 18, 2003.

/s/ Mary Jo Kunkle
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated December 18, 2003 denying a petition for rehearing filed by The Detroit Edison Company with respect to the July 31, 2003 order that approved a zero transition charge in 2003, as set forth in the order.”