

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of )  
**THE REGENTS OF THE UNIVERSITY** )  
**OF MICHIGAN** against **THE DETROIT** )  
**EDISON COMPANY.** )  
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Case No. U-13534

At the November 4, 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

**OPINION AND ORDER**

**I.**

**HISTORY OF PROCEEDINGS**

On September 4, 2002, The Regents of the University of Michigan (U of M) filed a complaint against The Detroit Edison Company (Detroit Edison). The complaint alleges that Detroit Edison improperly withheld rate equalization reductions under the rate securitization program adopted by the Commission in Case No. U-12478. U of M alleges that the rate equalization reductions amount to 0.28¢ per kilowatt-hour (kWh) and have been granted to all other Detroit Edison retail and electric choice customers after March 2001. As of the date of the complaint, U of M contends that this amounts to over \$800,000 and is a violation of 1929 PA 69 (Act 69) and 2000 PA 141 (Act 141) as well as several Commission orders pursuant to Act 141. Detroit Edison denied the allegations.

On January 8, 2003, a prehearing conference was conducted by Administrative Law Judge James N. Rigas (ALJ). At that conference, counsel for U of M and Detroit Edison indicated that they would attempt to submit a stipulation of facts, thereby dispensing with the need for testimony. The Commission Staff (Staff) made an appearance.

On February 25, 2003, U of M and Detroit Edison entered into a stipulation of facts and agreed to waive the presentation of any testimony and to submit this case on briefs.

On March 14, 2003, U of M and Detroit Edison filed briefs. U of M filed a reply brief on April 4, 2003 followed by a Detroit Edison reply brief on April 9, 2003. The Staff did not file briefs in this proceeding.

On May 15, 2003, the ALJ issued a Proposal for Decision (PFD) in which he recommended that the Commission grant in part the complaint of U of M against Detroit Edison.

On May 29, 2003, U of M filed exceptions to the PFD. Detroit Edison filed replies to exceptions on June 9, 2003.

## II.

### **POSITIONS OF THE PARTIES**

Detroit Edison has two separate retail access programs with two separate tariffs for service. The Experimental Retail Access Service Tariff (EC-1) is Detroit Edison's tariff for an experimental program that expires on June 30, 2004. This program's transition charges were established by tariff and approved by the Commission. The Retail Access Service Tariff (EC-2) is Detroit Edison's tariff for its full retail access program. This program initially had transition charges set through a bidding process and then subsequently by Commission order.

## U of M

Commencing September 2000, U of M has been taking service under Detroit Edison's EC-1 tariff. As an EC-1 customer, U of M asserts that it has paid charges of \$0.0043977/kWh to cover stranded costs related to Financial Accounting Standard (FAS) 106, FAS 109, and Fermi 2. At current levels of usage, U of M alleges that it pays approximately \$900,000 per year in these stranded cost charges.

U of M argues that Detroit Edison is authorized to use securitization to reduce its stranded costs and that Detroit Edison did so in March 2001. Detroit Edison used the securitization savings to reduce rates for bundled retail sales customers, special contract customers, and EC-2 customers, but did not reduce the rates for EC-1 customers. U of M contends that this is particularly unfair because it, along with all other Detroit Edison customers, is obligated to pay securitization bond and tax charges. U of M states that the rate reduction for EC-2 customers was 0.28¢ per kWh and that it too should receive this reduction back to March 2001.

U of M argues that these rate reductions are mandated under Section 10d(6) of Act 141, MCL 460.10d(6).<sup>1</sup> U of M contends that a 5% rate reduction must be achieved for all Detroit Edison customers before Detroit Edison could fund a low-income and energy efficiency (LI and EE) program. Furthermore, Section 10d(6) requires that where the Commission orders securitization credits, it must do so in a manner that does not result in a reallocation of cost responsibility among the different customer classes. U of M argues that when Detroit Edison gave a 5% reduction in stranded costs to all customers except EC-1 customers, EC-1 customers were made to shoulder a disproportionate share of the remaining stranded costs.

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<sup>1</sup> Provisions of 2000 PA 141, including Section 10d, were later amended and renumbered by 2002 PA 609, effective December 20, 2002. Consequently, original Sections 10d(5) and (6) are now Sections 10d(6) and (7).

U of M also contends that Detroit Edison's refusal to provide the securitization reductions is in violation of Commission orders in Case No. U-12478 directing all retail open access customers to receive the reductions. U of M insists that Detroit Edison has inappropriately interpreted these orders as only applying to EC-2 customers and not EC-1 customers. U of M also insists that Detroit Edison's behavior is discriminatory in violation of MCL 460.557(4). The complainant requests the Commission to order the reductions back to March 2001 along with interest and reasonable attorney fees.

#### Detroit Edison

Detroit Edison contends that it was never required, either by statute or Commission order, to modify its EC-1 tariff to provide the equalization reductions. Furthermore, it argues that to provide U of M with the reductions retroactively now would constitute unlawful retroactive ratemaking.

Detroit Edison argues that U of M could have switched to the EC-2 tariff and received the benefit of the equalization reductions. Detroit Edison argues, however, that U of M made an affirmative decision to stay with the EC-1 tariff and lock in savings due to a fixed transition charge through 2004. Detroit Edison contends that it is not appropriate for U of M to obtain both the benefit of the equalization reductions afforded EC-2 customers and the benefit of the fixed transition charge afforded EC-1 customers. Each program has its relative merits.

Detroit Edison states that it provided the equalization adjustment to all commercial and industrial customers under the EC-2 tariff beginning April 14, 2001. Detroit Edison did so pursuant to the Commission's orders of January 4, 2001 in Case No. U-12478 and December 20, 2001 in Cases Nos. U-12489 and U-12639. Detroit Edison states that the Commission never ordered the same reductions to the EC-1 tariff. In support of its position, Detroit Edison even

sought clarification and confirmation from the Commission that its application of the adjustment was correct. On November 21, 2000, Detroit Edison submitted a petition for rehearing in which Detroit Edison graphically and numerically described its understanding of how the adjustment was to be applied as a reduction to the “initial bid charge,” as directed in the Commission’s order. Detroit Edison contends that it clearly showed on rehearing that the adjustment was only being applied to the EC-2 program.

Detroit Edison argues that it did not apply the reduction to the EC-1 program because those customers were never subject to an “initial bid charge.” Consequently, Detroit Edison contends that when the Commission directed it to use the adjustment to reduce the “initial bid charge,” the Commission was not including EC-1 program customers in that directive. Detroit Edison states that the Commission confirmed this interpretation when the Commission issued its January 4, 2001 order and stated, “The Commission therefore approves the implementation of that adjustment as described in Detroit Edison’s petition for rehearing.” January 4, 2001 order, Case No. U-12478, p. 6. Detroit Edison argues that the Commission further endorsed this interpretation when the Commission issued its December 20, 2002 order and directed Detroit Edison to maintain the equalization adjustments just as they were. December 20, 2001 order, Case No. U-12639, p. 25. After each order, Detroit Edison submitted conforming tariffs reflecting its interpretation and argues that it properly and lawfully billed customers according to those tariffs.

### **III.**

#### **PROPOSAL FOR DECISION**

The ALJ recommended that the Commission grant in part the complaint of U of M against Detroit Edison. The ALJ suggested that although Detroit Edison did not act unreasonably or discriminatorily and was in compliance with Commission orders, the Commission could now

order Detroit Edison's EC-1 tariff to include the equalization adjustment. The ALJ recommended that the Commission make this change retroactive to September 4, 2002, the date of the filing of U of M's complaint.

In reaching this conclusion, the ALJ began his analysis by examining whether Detroit Edison was required or ordered to provide the equalization adjustment to EC-1 customers. The ALJ concluded that the Commission's orders in Case No. U-12478 directed Detroit Edison to apply the equalization adjustments to EC-2 customers only. The ALJ believed that the Commission confirmed this order when Detroit Edison requested clarification and the Commission acknowledged Detroit Edison's application of the equalization adjustment to reduce the initial bid charge for EC-2 customers. The ALJ further believed that the Commission re-confirmed this position in its December 20, 2002 order in Case No. U-12639 when the Commission required Detroit Edison to maintain the existing application of the equalization adjustment.

The ALJ agreed with Detroit Edison that the use of the term "retail open access" (ROA) is ambiguous. At times, ROA has been used generically to refer to all ROA customers while at other times only referring to EC-2 customers. The ALJ concluded that his examination of the Commission's order on rehearing in Case No. U-12478 showed that ROA was used to address only EC-2 customers. Consequently, the ALJ concluded that Detroit Edison had correctly interpreted the Commission's orders and acted appropriately in not applying the equalization adjustment to EC-1 customers.

The ALJ further observed that U of M argued that Detroit Edison acted unreasonably in not applying the adjustments to EC-1 customers in light of Section 10d(7) of PA 141, as amended. That provision requires that where securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then for six years, the excess savings (up to 2% of certain

utility revenues) shall be used to fund the LI and EE Fund. U of M contends that Detroit Edison funded the LI and EE program without having first given EC-1 customers the required 5% rate reduction. The ALJ concluded, however, that Detroit Edison neither acted unreasonably nor discriminatorily in this regard. The ALJ reasoned that Detroit Edison acted in compliance with Commission orders and that Detroit Edison is not free to implement credits that are not in compliance with Commission orders.

The ALJ further reasoned that EC-1 customers were not deprived of the rate reduction by virtue of the existence of the EC-2 tariff. The ALJ concluded that the rate reduction was available to all EC-1 customers through the EC-2 tariff. In fact, the other two existing EC-1 customers chose to switch to the EC-2 tariff once the Commission ordered these benefits to the EC-2 tariff. Only U of M chose to remain on the EC-1 tariff despite the apparent cost of doing so. The ALJ concluded that U of M could have switched to the EC-2 tariff to receive the benefit of the equalization adjustment and that it was not unreasonable for Detroit Edison to believe that U of M would eventually do so. The ALJ reasoned that U of M's decision to continue on the EC-1 tariff did not, therefore, cause Detroit Edison to be in violation of PA 141.

Next, the ALJ addressed U of M's request to apply the equalization adjustment retroactively. The ALJ recommended that, even if the Commission decides that the adjustment should now be applied to the EC-1 tariff, the Commission should not apply it retroactively to March 2001. Instead, the ALJ recommends that the adjustment be applied back to the date of U of M's complaint. To apply the adjustment back any further, the ALJ concluded, would penalize Detroit Edison for charging a prescribed rate and violate prohibitions against retroactive ratemaking.

Additionally, the ALJ opined that U of M failed to pursue its concerns in a timely manner. He noted that U of M waited over 16 months before questioning the application of the equalization

adjustment. Because of that, the ALJ stated that it would be unreasonable to now require Detroit Edison to retroactively apply the adjustment all the way back to March or April 2001.

Lastly, the ALJ recommended against awarding U of M its requested attorney fees and was silent on the issue of interest. The ALJ believed that an award of attorney fees is a penalty that should not be applied in a case where Detroit Edison has not been found to be in violation of PA 141 or any Commission orders.

U of M filed several exceptions to the PFD. First, U of M argues that it was not reasonable for Detroit Edison to believe that denying securitization reductions to EC-1 customers was proper. Second, U of M asserts that the ALJ erroneously determined that no Commission order specifically required Detroit Edison to provide the reductions to EC-1 customers. Third, U of M claims the ALJ erred in concluding that Detroit Edison's refusal to grant the reductions to EC-1 customers was made lawful by the availability of the reductions through the EC-2 tariff. Fourth, it argues that the ALJ incorrectly interpreted the law relating to retroactive rate relief. Fifth, U of M claims that the ALJ failed to recommend that refunds be retroactive to April 2001, the date when the reductions were provided to all other customers. Sixth, it asserts that the ALJ erroneously denied the award of attorney fees and failed to address the issue of interest.

Detroit Edison filed a reply to each of U of M's exceptions. In each instance, Detroit Edison argues that it agrees with the ALJ's findings.

#### **IV.**

#### **DISCUSSION**

The Commission agrees with the ALJ's conclusion that Detroit Edison has not been ordered to apply the equalization adjustments to EC-1 customers. Upon review of the series of Commission orders involving the equalization reductions, in Cases Nos. U-12478 and U-12639, it is clear that

the Commission repeatedly references using the equalization reductions to reduce the “initial bid charge.” Because only EC-2 customers were subject to an initial bid charge, it was reasonable for Detroit Edison to conclude that the Commission was only ordering the adjustments for EC-2 customers. As discussed by the ALJ, the Commission confirmed this interpretation and application of the adjustments on two separate occasions. Consequently, Detroit Edison has acted reasonably in not applying the equalization adjustments to the EC-1 tariff.

U of M, however, has also raised statutory grounds for the application of the equalization adjustments to EC-1 customers. Section 10d(6) of Act 141, as amended, requires that the Commission allocate securitization charges “in a manner that does not result in a reallocation of cost responsibility among the different customer classes.”

U of M contends that when stranded cost payments for all other Detroit Edison customers were reduced through the use of equalization reductions, the remaining cost responsibility for these assets was inappropriately reallocated to EC-1 customers. U of M asserts that it pays \$0.0043977/kWh to cover stranded costs related to FAS 106, FAS 109 and Fermi 2 and that Detroit Edison was permitted to use securitization bonding to reduce these costs. Once Detroit Edison completed its securitization, it implemented the 5% reduction or (0.28¢/kWh) for all customers except EC-1 customers. U of M argues that this omission results in reallocation of stranded cost responsibility to EC-1 customers in violation of Act 141.

Furthermore, Section 10d(7) of Act 141, as amended, requires that all customers receive a 5% rate reduction before excess securitization savings are used to fund the LI and EE Fund. Section 10d(7) states, “If securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings . . . shall be allocated to the low-income and energy efficiency fund administered by the commission.”

The Commission finds U of M's statutory arguments persuasive. EC-1 customers' failure to receive the 5% rate reduction could be found to violate Sections 10d(6) and (7) of Act 141, as amended. In order to remedy this matter, the Commission finds that it is appropriate to order Detroit Edison to apply the equalization reductions to its EC-1 tariff. Furthermore, since Section 10d(6) prohibits a reallocation of stranded cost responsibility and Section 10d(7) requires that all customers receive a 5% rate reduction prior to the funding of the LI and EE program, the Commission finds it appropriate to award U of M a 0.28¢/kWh rate reduction for all kWh used under the EC-1 program subsequent to March 2001.

The Commission concludes that awarding this retroactive relief does not violate any prohibitions on retroactive ratemaking. Prohibitions on retroactive ratemaking protect a party from being penalized for relying upon a lawful Commission order. See, Michigan Bell Telephone Co. v Public Service Comm, 314 Mich 533; 24 NW2d 200 (1946). Detroit Edison, however, is not being penalized by the Commission's decision because, to the extent that securitization savings are used, Detroit Edison suffers no financial harm as a result of the refund to U of M. Securitization reductions are funded through savings resulting from the sale of securitization bonds. These savings are paid into an account that is available for customer use and may not be retained by Detroit Edison for its own use. The use of these savings to fund rate reductions does not represent a loss of profit or income to Detroit Edison. Secondly, although Detroit Edison properly relied on lawful Commission orders, those orders did not address the application of Section 10d to EC-1 customers, which allows the Commission more latitude in allocating rate reductions than the relevant statute in Michigan Bell, supra.

In addition, a retroactive award is necessary to correct the potential violation of Act 141. If EC-1 customers are only provided prospective relief, then from March 2001 to date, the EC-1

customers suffered from a reallocation of stranded cost responsibility and did not receive the required 5% rate reduction required by Section 10d(7) of Act 141, as amended. Certainly, the Commission has the ability to remedy its own perceived errors. A prohibition on the Commission's ability to award retroactive relief in this instance would mean that the Commission is powerless to correct harm to EC-1 customers during the relevant time period. Administrative efficiency dictates that the Commission, when it perceives an error, has the ability to correct it without the need for further judicial intervention.

The Commission, however, declines to award interest and attorney fees in this case.

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 correctly interpreted and implemented the Commission's orders relating to securitization equalization reductions in Cases Nos. U-12478 and U-12639.
- c. Detroit Edison should change its EC-1 tariff to include the equalization adjustment and to file conforming tariffs with the Commission within 30 days.
- d. Detroit Edison should refund to U of M 0.28¢/kWh for its electric usage under the EC-1 program subsequent to March 2001. Detroit Edison should be allowed to use available securitization savings in making this refund.

THEREFORE, IT IS ORDERED that:

A. The Detroit Edison Company shall change its Experimental Retail Access Service Tariff to include the equalization adjustment and shall file conforming tariffs with the Commission within 30 days.

B. The Detroit Edison Company shall refund to The Regents of the University of Michigan 0.28¢ per kilowatt-hour for all electric usage under the Experimental Retail Access Service Tariff, subsequent to March 2001. Detroit Edison is authorized to use available securitization savings in making this refund.

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

Chair

( S E A L )

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of November 4, 2003.

/s/ Robert W. Kehres

Its Acting Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Chair

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Commissioner

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Commissioner

By its action of November 4, 2003.

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Its Acting Executive Secretary

In the matter of the complaint of )  
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Suggested Minute:

“Adopt and issue order dated November 4, 2003 granting in part the complaint of The Regents of the University of Michigan and ordering The Detroit Edison Company to apply securitization equalization reductions to its Experimental Retail Access Service Tariff and to refund to The Regents of the University of Michigan 0.28¢ per kilowatt-hour for its electric usage subsequent to March 2001, as set forth in the order.”