S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of **MICHIGAN SCHOOLS ELECTRIC COOPERATIVE** against **THE DETROIT EDISON COMPANY.**	))))	Case No. U-13589

At the September 11, 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 16, 2002, the Michigan Schools Electric Cooperative (MISEC) filed a complaint against The Detroit Edison Company (Detroit Edison). The complaint alleges that Detroit Edison improperly overcharged certain school districts for service under the Electric Choice Program. MISEC alleged that the overcharges occurred between January 1, 2002 and April 26, 2002 and amount to nearly $20,000. Detroit Edison denied the allegations.

On January 22, 2003, pursuant to due notice, a prehearing conference was conducted by Administrative Law Judge Barbara A. Stump (ALJ). At that conference, counsel for MISEC 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 March 12, 2003, MISEC and Detroit Edison filed a stipulation of facts and agreed to waive the presentation of any testimony and to submit this case on briefs.

On April 4 and 25, 2003, MISEC and Detroit Edison filed briefs and reply briefs. The Staff did not file briefs in this proceeding.

On May 14, 2003, the ALJ issued a Proposal for Decision (PFD) in which she found that Detroit Edison appropriately charged MISEC's members for electric service. She recommended that the Commission dismiss with prejudice the complaint of MISEC against Detroit Edison.

On May 28, 2003, MISEC filed exceptions to the PFD. Detroit Edison filed replies to those exceptions on June 9, 2003.

II.

POSITIONS OF THE PARTIES

The issue in this proceeding is whether rates charged to single-phase electric customers by Detroit Edison between January 1, 2002 and April 26, 2002 were lawful.

MISEC

MISEC[1] complains that Detroit Edison inappropriately overcharged certain members for electric service. MISEC asserts that this overcharge violates Commission orders in Case No. U-12489 and Section 10d(1), the rate-freeze provision, of the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141), MCL 460.10d(1).

Specifically, MISEC claims that Detroit Edison began charging MISEC members 2.88¢ per kilowatt-hour (kWh) as measured by energy only meters instead of the $3.42 per kilowatt (kW) rate as estimated by demand conversion tables. Historically, Detroit Edison charged its single-

[1]MISEC is the entity that receives and is authorized to pay Detroit Edison for Electric Choice distribution services on behalf of its members.

phase electric customers $3.42/kW, as estimated by demand conversion tables. MISEC asserts that in Case No. U-12489, however, Detroit Edison requested that the Commission change the distribution billing rates for these customers to 3.01¢/kWh measured by energy only meters.[2] MISEC argues that in response to claims that Detroit Edison's request would result in a rate increase in violation of Section 10d(1) of Act 141, the Commission determined that a better solution was to retain existing meter reading requirements and price structure, while permitting Detroit Edison to implement its proposal as an optional service. MISEC asserts that, in the December 20, 2001 order, the Commission explicitly ordered Detroit Edison to retain its existing price structure and terms of service for its metering and system use charge as part of its retail access service tariff (RAST). MISEC admits, however, that the Commission also stated in its December 20, 2001 order that customers seeking to take service under that existing price structure would require the installation of interval demand meters.

MISEC claims that when Detroit Edison filed its new RAST to comply with the Commission's order, Detroit Edison did not, in fact, retain the metering and system use charges in effect prior to December 20, 2001. Instead, MISEC asserts that Detroit Edison changed its tariff to require the installation of interval demand meters to continue to utilize the pre-existing $3.42/kW system use charge. No longer were single-phase customers with energy meters able to have their demand estimated through the use of demand conversion tables. MISEC asserts that this violated the Commission's intent to retain the existing price structure while offering Detroit Edison's proposed rate as an optional service.

MISEC argues that Detroit Edison unilaterally chose to alter the rates charged to MISEC members. MISEC asserts that Detroit Edison took it upon itself to move single-phase customers

[2]The Staff proposed a lower rate of 2.88¢/kWh, which the Commission adopted.

from the rate of $3.42/kW of demand estimated by conversion tables to a new rate of 2.88¢/kWh measured by energy meters. MISEC asserts that Detroit Edison should have notified customers of their ability to choose one of the pricing options. MISEC claims that by failing to provide notice to affected customers, Detroit Edison effectively denied customers from selecting an option. MISEC alleges that Detroit Edison's unilateral change resulted in rate increases to its members that are prohibited under Section 10d(1), the rate freeze provision, of Act 141.

In support of its position, MISEC points to the events on rehearing of the December 20, 2001 order. MISEC asserts that Energy Michigan raised similar arguments in its petition for rehearing. Energy Michigan argued that Detroit Edison's new RAST should return to its original format as it related to customers with loads of less than 20 kW because to not do so would result in a rate increase in violation of Act 141, Section 10d(1). (MISEC alleges that customers with loads of less than 20 kW are similar to some of its members.) MISEC asserts that even Detroit Edison, in responding to Energy Michigan's proposal, argued that because the Commission interpreted Section 10d(1) as establishing a price freeze, the statute precludes the Commission from making any pricing changes, including adopting the Staff's proposed 2.88¢/kWh rate. MISEC complaint, p. 3, citing Detroit Edison's January 22, 2002 petition for rehearing, Case No. U-12489, p. 5. MISEC asserts that on rehearing, the Commission agreed with Energy Michigan and Detroit Edison and ordered that the RAST should provide for billing of single-phase customers at $3.42/kW of demand as established by demand conversion tables, as was done prior to December 20, 2001.

As a result, MISEC is requesting that it be recompensed for its damages stemming from this rate increase. MISEC alleges that prior to filing this complaint, it requested a refund from Detroit Edison for these overcharges, but Detroit Edison refused. Now, not only is MISEC seeking the

$19,732.04 in excess charges, but is also seeking reasonable attorney fees and interest under Section 10c(1)(c) of Act 141. MISEC argues that Section 10c(1)(c) permits the Commission to award the necessary relief to make a complainant whole. MISEC asserts that if the Commission fails to award its attorney fees and interest, MISEC will not be made whole because the benefit of any damage award would be reduced by such costs and the loss of the time value of money.

Detroit Edison

Detroit Edison asserts that MISEC is not entitled to a retroactive adjustment of its members' distribution service bills. Detroit Edison argues that it was not required, or ordered, to modify its RAST retroactively or to provide refunds. Detroit Edison further argues that to be ordered to provide refunds would constitute unlawful retroactive ratemaking.

Detroit Edison argues that it was merely complying with the Commission's December 20, 2001 order when it billed MISEC's members at the new RAST rate. Citing MCL 462.25 and Michigan Consolidated Gas Co v Public Service Comm, 389 Mich 624; 209 NW2d 210 (1973), Detroit Edison argues that it is entitled to rely upon the Commission's orders and argues that those orders are presumed to be lawful and reasonable.

In support of its position that ordering refunds would constitute unlawful retroactive ratemaking, Detroit Edison cites Michigan Bell Telephone Co v Public Service Comm, 315 Mich 533; 24 NW2d 200 (1946). Detroit Edison asserts that the Commission's orders must be applied prospectively. Detroit Edison contends that it has consistently and appropriately billed MISEC's members pursuant to the Commission approved tariff. Detroit Edison asserts that when the Commission ordered its tariff changed, the Commission did not order the company to re-bill affected consumers. Additionally, Detroit Edison argues that when the Commission ordered the tariff to be changed, the Commission explicitly ordered the change to take effect April 27, 2002

and not January 1, 2002. Detroit Edison claims that to order re-billing at this time would be unlawful and would erode confidence in the reliability of Commission orders.

Detroit Edison further contends that it appropriately charged MISEC's members the RAST energy-only metered rate, because they were energy metered customers. Detroit Edison argues that MISEC's members could have requested the installation of interval demand meters and received the $3.42/kW rate, but not a single customer chose to do so. Had MISEC's members requested interval demand meters, Detroit Edison notes, they could have received the rate they are now seeking. Detroit Edison maintains that, pursuant to Section B-2.4, Choice of Rates, of Detroit Edison's rules and regulations of service, where there is an option of rates available to customers, it is the responsibility of the customer to be aware of the option and select the desired rate. Detroit Edison contends that it was under no obligation to notify consumers.

Finally, Detroit Edison states that an award of attorney fees is not warranted in this case because Detroit Edison has not violated a Commission order. Detroit Edison asserts that Section 10c(1)(c) of Act 141, authorizing an award of attorney fees, is a penalty provision that should not be applied in this case. Additionally, Detroit Edison contends that it complied with Act 141 and all orders issued under Section 10 through 10bb of Act 141 that could give rise to such an award. In any event, Detroit Edison asserts that it has complied with Act 141 because its RAST is not subject to the rate freeze provision of Act 141.

III.

PROPOSAL FOR DECISION

In her PFD, the ALJ recommended that MISEC's complaint against Detroit Edison should be dismissed. She found that MISEC failed to prove that Detroit Edison violated the Commission's orders or Act 141. She reasoned that the Commission's December 20, 2001 order determined that

single-phase customers should be given an option of taking service under Detroit Edison's existing rate structure. Electing that option, however, would require the installation of demand meters. She reasoned that none of MISEC's members requested that option and, consequently, during the period from January 1, 2002 through April 26, 2002, Detroit Edison properly billed them at the approved system use charge of 2.88¢/kWh.

The ALJ agreed with Detroit Edison's position that it is the customer's responsibility to request the desired option provided for in the Commission's order, pursuant to Detroit Edison's rules and regulations for service. The ALJ reasoned that none of MISEC's members made this election and "Detroit Edison had the right to charge them the energy-metered rate." PFD, p. 8.

The ALJ further reasoned that MISEC's members had not been denied one of the two options, because no member requested such service. The ALJ was not concerned with the lack of notice to the affected customers because, as she reasoned, these customers are not residential customers who may not be familiar with utility tariffs or Commission orders. In so doing, she noted that the affected customers were represented by experienced legal counsel familiar with Detroit Edison's retail open access cases and therefore, the customers should have been aware of their obligation to request the desired pricing structure.

The ALJ also rejected MISEC's argument that Detroit Edison unilaterally implemented a rate increase that was not authorized by the Commission. She reasoned that Detroit Edison was entitled to rely upon the Commission's December 20, 2001 order and "had no other choice but to implement those Commission approved rates and bill customers accordingly." PFD, p. 9. The ALJ discounted the fact that Detroit Edison argued on rehearing of the December 20, 2001 order that the new rates were likely in violation of Act 141.

The ALJ also rejected MISEC's reliance on Northern Michigan Water Co v Public Service Comm, 381 Mich 340; 161 NW2d 584 (1968). In that case, a water company implemented a rate increase prior to obtaining Commission authorization. The Commission ordered refunds to customers because the rate increase had not been approved. The water company appealed. The Michigan Supreme Court held that while the Commission could not retroactively order refunds for charges previously approved, the Commission could lawfully order refunds collected without such approval. The ALJ reasoned that Detroit Edison had approval for the rates it charged MISEC's members between January 1, 2001 and April 26, 2002 and therefore refunds were not appropriate.

The ALJ further reasoned that this position is consistent with the Court's earlier decision in Michigan Bell Telephone Co v Public Service Comm, 315 Mich 533; 24 NW2d 200 (1946). In Michigan Bell, the Court held that when the Commission approved a rate, but subsequently decides that the rate should be reduced, the Commission cannot penalize the utility for collecting that rate during the time between the date of the order approving the rate and the order reducing the rate. The ALJ reasoned that the Commission would be engaged in retroactive ratemaking if it were to order Detroit Edison to make refunds to MISEC.

As mentioned above, exceptions and replies to exceptions were filed. MISEC argued that, notwithstanding the ALJ's conclusion, it proved that Detroit Edison's actions violated the rate freeze provision of Act 141. Additionally, MISEC argued that refunds are appropriate because Detroit Edison did not have specific prior approval for its conduct. Detroit Edison argued that it was merely following Commission orders and at no time did it act unreasonably or in bad faith. It argued that MISEC members could have obtained the $3.42/kW rate, if they requested the installation of interval demand meters, but did not do so. Detroit Edison supported the ALJ's

conclusion that ordering refunds to MISEC members would represent unlawful retroactive ratemaking.

IV.

DISCUSSION

The Commission is persuaded that MISEC and its members experienced an unlawful rate increase as a result of the implementation of Detroit Edison's RAST between January 1, 2002 and April 26, 2002. Section 10d(1) of 2000 PA 141 stated the following:[3]

> Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on the effective date of this amendatory act that added this section and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003, unless otherwise reduced by the commission under subsection (4).

The Commission interprets this provision as establishing specific rate freezes for Detroit Edison's customers through December 31, 2003, unless the Commission reduces rates as a result of securitization financing. See, the December 20, 2001 order in Case No. U-12489. The Commission has also previously found that Detroit Edison's RAST is subject to this rate freeze provision. *Id.* MISEC has established that the implementation of Detroit Edison's tariff increased rates for certain customers.

Indeed, in the Commission's April 26, 2002 rehearing order in Case No. U-12489, the Commission found that Detroit Edison's RAST should provide for billing of single-phase customers at $3.42/kW of demand as estimated using demand conversion tables, as was done prior to December 20, 2001. The Commission stated that this "will have the effect of returning all customers to the

[3]This statutory provision has since been amended by 2002 PA 609, effective December 20, 2002, and is codified at MCL 460.10d(1).

pre-December 20, 2001 status quo, thus removing any potential for violating Section 10d(1) of Act 141." April 26, 2002 order, Case No. U-12489, p. 7.

Detroit Edison relies upon Michigan Bell, supra, to support its position that refunds are not permissible. In that case, Michigan Bell was charging rates that had been approved by the Commission several years prior. In 1944, the Commission initiated an excess profits case and, after a hearing, ordered the telephone company to reduce its revenues for the year and to refund money to customers. The telephone company appealed. The Michigan Supreme Court determined that Michigan Bell's rates were lawful because the rates were Commission authorized. The Court reasoned that, once the Commission prescribed a rate to be charged, the Commission could not penalize the utility for collecting that rate until it was changed.

The Commission finds that Michigan Bell does not dispose of this case. In Michigan Bell, the Commission authorized a rate to be charged that was both just and lawful at the time it was approved. Neither party in Michigan Bell questioned the lawfulness of the rate. It was not until many years later when Michigan Bell began earning excessive profits, that the authorized rate was determined to be unjust.

Unlike Michigan Bell, the Commission ordered Detroit Edison to make changes to its RAST pricing structure in a way that was unlawful at the time of the order. The Commission corrected its error on rehearing. The interim change to Detroit Edison's tariff, however, resulted in a rate increase for certain customers in direct violation of the rate freeze provision of Act 141. Clearly, the Commission does not have authority to approve a rate increase in violation of a state statute.[4]

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[4]Indeed, the Michigan Constitution requires that final agency decisions be "authorized by law." See, Const 1963, Art 6 § 28 and Attorney General v Public Service Comm, 237 Mich App 82, 88; 602 NW2d 225 (1999). Where an agency decision violates a state statute or the constitution, it is not authorized by law. See, Northwestern National Casualty Co v Insurance Comm, 231 Mich App 483; 586 NW2d 563 (1998).

By definition, such a rate increase would be unjust. Consequently, the Commission's order directing the price structure change was legally infirm at the time it was made. While a lawfully established rate is not subject to refund under Michigan Bell, the Commission finds that the rate at issue in this proceeding was not lawfully established.

Furthermore, the Court in Michigan Bell determined that the Commission could not order refunds because the Commission did not have the statutory authority to order refunds. "There is no express or reasonably implied statutory provision authorizing the commission to alter or readjust telephone rates or charges retroactively." Michigan Bell, supra, at 545. Today, however, the Commission has been statutorily provided the ability to award refunds "of any excess charges." See, MCL 460.10c(1)(b). The Commission concludes that it was not lawful for Detroit Edison to charge a rate that violates a state statute, even if the Commission erroneously approved that rate.

Moreover, the Commission believes that a return of the excess charges is equitable. Detroit Edison should not benefit from the Commission's error in directing Detroit Edison to change its RAST as it did and collect higher rates in spite of the applicable rate freeze. By returning the excess charges to MISEC members, the Commission is placing the parties back in the positions that they would have been in prior to December 20, 2001. Regardless of the notice, or lack thereof, to MISEC members, customers cannot elect to waive their protection from statutory provisions.

The Commission, however, declines to award interest and attorney fees in this case. Section 10c(1) of Act 141 authorizes the Commission to award interest and reasonable attorney fees, however, the Commission finds that an award of interest and attorney fees is not warranted under the facts of 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. MISEC has demonstrated that its members experienced a rate increase in violation of Act 141 as a result of Detroit Edison's implementation of its RAST between January 1, 2002 and April 26, 2002.

c. Detroit Edison should retroactively re-bill the system use charge for MISEC's members identified in MISEC's complaint, resulting in a refund of $19,732.04.

d. MISEC's request for interest and attorney fees should be denied.

THEREFORE, IT IS ORDERED that:

A. The Detroit Edison Company shall retroactively re-bill the system use charge for The Michigan Schools Electric Cooperative's members identified in its complaint, resulting in a refund of $19,732.04.

B. The Michigan Schools Electric Cooperative's request for interest and attorney fees 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 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 September 11, 2003.

/s/ Robert W. Kehres
Its Acting Executive Secretary

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

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Chair

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Commissioner

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Commissioner

By its action of September 11, 2003.

_____
Its Acting Executive Secretary

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	)	

Suggested Minute:

> "Adopt and issue order dated September 11, 2003 granting the complaint of the Michigan Schools Electric Cooperative and ordering The Detroit Edison Company to refund $19,732.04, as set forth in the order."