

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
CHERRYLAND ELECTRIC COOPERATIVE)	
for authority to implement a large resort)	Case No. U-13716
service (LRS) rate.)	
_____)	

At the September 30, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

OPINION AND ORDER GRANTING LEAVE TO APPEAL, BUT DENYING THE RELIEF REQUESTED

On February 24, 2003, Cherryland Electric Cooperative (Cherryland) filed an application for authority to implement a tariffed rate for large resort service. Consumers Energy Company (Consumers), Traverse City Light and Power and the City of Traverse City (collectively TCLP), and the Commission Staff (Staff) filed comments on April 18, 2003.

On May 27 and June 3, 2003, respectively, TCLP and Consumers filed petitions to intervene. On June 6, 2003, Cherryland filed objections to both petitions to intervene.

At the June 10, 2003 prehearing conference, Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ), granted the interventions. In so doing, the ALJ stated:

This case really is, I think, unique in several respects. I think it's unique first off, because there's three utilities ready, willing and able to serve this particular customer. This request involves a tariff for LRS rate and on its face, it's arguably broad enough to serve other customers. But it appears as though there is only one customer, at the present time, that it would serve. The Commission in Case

No. U-10787 looked at this whole idea of competitors to say that a financial interest is not enough. Well, is there more going on here than the financial interest with regard to Consumers and Traverse City? I think there is. I think what's going on is we're in an era of changing dynamics with regard to customer choice. And I think in that respect the Commission is going to be asked in this proceeding to not only look at the tariff, but also the framework under which these sorts of tariffs may be granted or denied. I think there's an interest with regard to whether there's a level playing field, whether it's a just and reasonable use of tariff structure. For those reasons, I think the petitions to intervene should be granted.

Tr. pp. 33-34.

On June 17, 2003, Cherryland filed an application for leave to appeal the ALJ's ruling permitting intervention. Cherryland argued that neither Consumers nor TCLP meet the two-prong test for standing established by the United States Supreme Court in Association of Data Processing Service Organizations, Inc v Camp, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970). It also argued that permissive intervention should be denied.

The first prong of the standing test is demonstration of an injury-in-fact. Cherryland contends that Consumers' and TCLP's argument that they cannot effectively compete with the tariff rate is not enough to satisfy the injury-in-fact requirement. Cherryland asserts that the injury must be real and immediate, not speculative. Further, it argues that standing is not conferred because of precedent or an issue of first impression.

The second prong of the standing test is demonstration of being within the zone of interests that are protected by the applicable statute. Cherryland argues that the rate-setting statute was not designed to protect competitors; therefore, the intervenors, competitors of Cherryland, are not within the zone of interests protected by the statute. Cherryland further states that the rate statutes focus on a utility and its customers, not its competitors. Cherryland further alleges that allowing competitors to intervene in rate cases is not good policy.

Cherryland asserts that permissive intervention should also be denied. Cherryland contends that as competitors, the intervenors only wish to gather information, impede competition, settle disappointed-bidder claims, and confuse the proceeding. Cherryland maintains that permissive intervention is only appropriate in investigations or legislative-type proceedings. Cherryland asserts that the Staff is capable of protecting the interests of the public and gathering information.

On June 30, 2003, Consumers filed a response to Cherryland's appeal of the ALJ's ruling permitting intervention. Consumers asserts that the large resort service rate that Cherryland is seeking is designed to serve only one particular customer, which could have been served by either Consumers or TCLP. Consumers argues that, as such, it has an interest in this case. Consumers also stresses that it should be allowed permissive intervention because it has access to important information regarding the case. Consumers alleges that the large resort service rate proposed is below cost, which will require other customers to subsidize the rate. Consumers also maintains that Cherryland used inducements to secure an unfair competitive advantage.

On July 1, 2003, TCLP filed its response to Cherryland's application for leave to appeal. TCLP maintains that it has an interest to be protected as a competitor, a customer, and a municipality. As a competitor, TCLP objects to alleged predatory business practices. TCLP claims to have already lost one customer to Cherryland's unfair business practices. TCLP insists that competitive injury is an injury-in-fact. TCLP also asserts an injury-in-fact as a customer of Cherryland. TCLP alleges that the rate proposed by Cherryland is below cost, and it fears having to subsidize the rate. As a municipality, TCLP claims a right to intervene to investigate the rates of Cherryland. TCLP points out that this case involves novel questions of law and could be setting important precedent. TCLP also alleges that it has important information that Cherryland used inducements to secure an unfair competitive advantage. TCLP insists any negative effects of

intervention are outweighed by the benefit of its participation. It alleges that Cherryland refused to remove and relocate lines and poles unless the large resort service customer took power from Cherryland. TCLP contends that Cherryland also threatened to sue the large resort service customer to enjoin TCLP from providing service, further impeding competition.

Rule 337 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.
2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

Cherryland contends that immediate review is appropriate because if the interventions are denied, it will result in a more timely resolution of the proceeding. Cherryland also contends the appeal would prevent substantial harm by avoiding the time and cost of defending issues raised by the interveners. Also, it states that the Commission routinely grants review when a party disagrees with an ALJ's intervention ruling.

After considering Cherryland's request for review, the Commission finds immediate review is appropriate because it could result in a more timely resolution of the proceeding. However, the Commission rejects Cherryland's arguments to deny intervention of TCLP and Consumers.

There is ample support for the ALJ's June 10, 2003 ruling granting permissive intervention. TCLP and Consumers both have vital information that may be relevant to this proceeding. Further, the case could set important precedent given the "unique" nature of this case as outlined by the ALJ. Finally, this case is more than a simple rate case because it involves allegations of unfair and predatory business practices.

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. Cherryland's application for leave to appeal the ALJ's ruling permitting intervention should be granted.

c. The ALJ's ruling permitting intervention by Consumers and TCLP should be affirmed.

THEREFORE, IT IS ORDERED that:

A. Cherryland Electric Cooperative's application for leave to appeal the June 10, 2003 ruling permitting intervention is granted.

B. The June 10, 2003 ruling permitting intervention by Consumers Energy Company, Traverse City Light and Power, and the City of Traverse City is affirmed.

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

By its action of September 30, 2003.

/s/ Robert W. Kehres
Its Acting Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

By its action of September 30, 2003.

Its Acting Executive Secretary

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Case No. U-13716

Suggested Minute:

“Adopt and issue dated September 30, 2003 affirming the Administrative Law Judge’s June 10, 2003 ruling, permitting intervention by Consumers Energy Company, Traverse City Light and Power, and the City of Traverse City, as set forth in the order.”