

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
WABASH VALLEY POWER ASSOCIATION, INC.,)
for a power supply cost recovery reconciliation) Case No. U-13564-R
proceeding for the 12-month period ended)
December 31, 2003.)
_____)

At the December 2, 2004 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

On March 31, 2004, Wabash Valley Power Association, Inc. (Wabash), filed an application for reconciliation of its power supply cost recovery (PSCR) revenues and expenses for the 12-month period ended December 31, 2003. Midwest Energy Cooperative (Midwest) intervened in the proceeding. The Commission Staff (Staff) also participated.

On June 29, 2004, the Federal Energy Regulatory Commission (FERC) issued an order in Dockets Nos. ER04-789-000 and ER04-802-000, which authorized Wabash to charge its 27 member-cooperatives for services pursuant to FERC-approved tariffs commencing July 1, 2004. Prior to that time, Wabash was a borrower under the Rural Utilities Service (RUS) loan program. On June 30, 2004, Wabash paid off the balance of its RUS loan. Because Wabash is no longer a borrower under the RUS loan program, jurisdiction for ratemaking was transferred to the FERC.

On August 10, 2004, Wabash filed a request to have its 2003 PSCR reconciliation proceeding dismissed. In so doing, Wabash argued that Wolverine Power Supply Cooperative (Wolverine), which came under the FERC's ratemaking authority in 1997, was not required to reconcile its 1997 PSCR revenues and expenses.¹

On August 17, 2004, the Staff opposed the request to have this matter dismissed. According to the Staff, although Wabash is currently regulated by the FERC, that agency's rate regulation of Wabash is only prospective in nature. Because this proceeding involves reconciliation of Wabash's 2003 PSCR expenses and revenues, the Staff insisted that the reconciliation must be completed under 1982 PA 304; MCL 460.6j et seq. (Act 304). The Staff also maintained that the treatment of Wolverine and its members-cooperatives is readily distinguishable because the orders issued in Cases Nos. U-11190-R and U-11539-R had no precedential value as they involved the approval of settlement agreements. Furthermore, the Staff stressed that in Case No. U-11190-R, which involved reconciliation of Wolverine's 1997 PSCR revenues and expenses, Wolverine had refunded its 1997 PSCR overcollection to its member-cooperatives, which means that Wolverine did not attempt to evade the Commission's Act 304 jurisdiction.

On August 18, 2004, Administrative Law Judge Barbara A. Stump (ALJ) rejected Wabash's request to dismiss this proceeding. In so doing, the ALJ observed:

As I said, I think the main point here is that this reconciliation relates to past power supply costs from 2003, and the Commission has an obligation under Act 304 to reconcile those 2003 power supply costs. So I am going to deny the petition, and we'll go ahead and set a schedule.

2 Tr. 17.

¹See, the September 11, 1998 order in Case No. U-11190-R and October 28, 1999 order in Case No. U-11539-R.

On August 31, 2004, Wabash filed an application for leave to appeal the ALJ's ruling to the Commission.

On September 14, 2004, the Staff and Midwest filed answers in opposition to Wabash's application for leave to appeal.

On November 3, 2004, the Staff filed a motion to compel Wabash to comply with the Staff's request to audit Wabash's books and records in conjunction with the 2003 PSCR reconciliation.

On November 12, 2004, Wabash filed a response in opposition to the Staff's motion to compel.

On November 16, 2004, the ALJ granted the Staff's motion to compel compliance with the audit request.

On November 24, 2004, Wabash filed a second application for leave to appeal to challenge the ALJ's ruling on the Staff's motion to compel.

Discussion

Rule 337 of the Commission's Rules of Practice and Procedure 1999 AC, R 460.17337 (Rule 337), 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 only reverse an ALJ's ruling if the Commission finds that a different result is more appropriate.

In its brief in support of the August 31 application for leave to appeal, Wabash states that it sought to dismiss this case because the Commission no longer has jurisdiction to grant relief to Wabash or to allow Wabash to recover the \$1,010,369 PSCR underrecovery it experienced during 2003. Wabash insists that reconciliation of its 2003 PSCR case by the Commission would be directly contrary to the “filed rate” doctrine.² According to Wabash, it has filed a FERC tariff containing a rider allowing recovery of its 2003 PSCR underrecovery.³ Therefore, Wabash argues, the Commission may not review the costs reflected in that tariff by holding a prudence review or by adjusting Wabash’s rates. Moreover, citing the June 19, 2000 order in Case No. U-11800-R, wherein the Commission dismissed Detroit Edison’s 1999 PSCR reconciliation because the utility’s rates were frozen by Section 10d(1) of 2000 PA 141 (Act 141), MCL 460.10d(1), Wabash insists that the Commission has recognized that it is improper to conduct a PSCR reconciliation if the Commission lacks authority to adjust rates. Wabash also stresses that the Court of Appeals affirmed dismissal of Detroit Edison’s PSCR reconciliation case because the Section 10d(1) rate freeze precluded any adjustment of rates. See, Attorney General v Public Service Comm, 249 Mich App 424; 642 NW2d 691 (2002).

In response, the Staff concedes that Wabash is now regulated by the FERC. However, the Staff contends that until July 1, 2004 the Commission regulated Wabash’s rates for its service to Midwest. Because this proceeding involves reconciling 2003 PSCR costs, the Staff maintains that it must be completed in order for the Commission to carry out its obligations pursuant to Act 304. According to the Staff, Wabash’s contention that the filed rate doctrine prohibits the Commission from reconciling Wabash’s 2003 PSCR revenues and expenses ignores the fact that the rate

²The filed rate doctrine requires that interstate power rates filed with FERC must be given binding effect by a state utility commission.

³See, Exhibit 1, the relevant pages of Wabash’s FERC filed tariff.

charged by Wabash to Midwest in 2003 was regulated by the Commission pursuant to Act 304, not the FERC, and remains subject to reconciliation pursuant to Act 304.

The Staff also insists that Wabash's reliance on the Commission's June 19, 2000 order in Case No. U-11800-R is misplaced. According to the Staff, the Commission's dismissal of Detroit Edison's pending PSCR reconciliation is distinguishable because the Commission dismissed the pending PSCR reconciliation to avoid a surcharge that was not permitted under Act 141. Here, the Staff insists, Act 304 applies and reconciliation of Wabash's 2003 PSCR revenues and expenses is required.

Midwest maintains that the Commission should deny Wabash's application for leave to appeal. In so doing, Midwest concedes that Wabash's FERC rates, which were established in FERC Dockets Nos. ER04-789-000 and ER04-802-000, include a fuel and purchased power regulatory asset charge amortization rider allegedly designed to collect certain costs incurred prior to its transition to the FERC's jurisdiction.⁴ On June 29, 2004, FERC accepted Wabash's proposed rates subject to refund and set Wabash's rate application for hearing. See, Wabash Valley Power Assn, 107 FERC ¶ 61,327 (2004). Beginning on July 1, 2004, therefore, Midwest began paying Wabash's FERC rates, including the fuel and purchased power regulatory asset charge amortization rider.

According to Midwest, under Act 304, Wabash was allowed to incorporate a PSCR clause into its rates and was required to annually file a complete PSCR plan. Citing Section 6j of Act 304, Midwest maintains that "the commission *shall* commence a proceeding, to be known as a power supply cost recovery reconciliation, as a contested case" at which "the commission *shall* reconcile

⁴Midwest states that it protested application of Wabash's temporary rate riders to it, arguing that the riders violated the rule against retroactive ratemaking. See, Midwest's Supplemental Protest and Motion to Reject, FERC Docket Nos. ER04-789; ER04- 802 (filed June 15, 2004).

the revenues recorded pursuant to the power supply cost recovery factors and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility with the amounts actually expensed and included in the cost of power supply by the utility.” MCL 460.6j(12) [emphasis added]. Midwest argues that the statute’s plain language obligates the Commission to conduct a reconciliation proceeding.

Finally, Midwest asserts that Wabash’s fuel and purchased power regulatory asset charge amortization rider is based solely on Wabash’s accounting, which will not be subject to an audit by the FERC. Therefore, Midwest argues, a reconciliation proceeding is necessary to review the accuracy of Wabash’s purported undercollection. Moreover, Midwest maintains that the results of the Commission’s review in this case could provide Midwest with the ability to pursue a remedy at the FERC under Section 206 of the Federal Power Act. See, 16 USC 824e.

The Commission finds that Wabash’s August 31 application for leave to appeal should be denied. It is irrefutable that the FERC did not acquire jurisdiction over Wabash’s rates until July 1, 2004. It is equally clear that the reconciliation at issue in this proceeding involves Wabash’s PSCR revenues and expenses for 2003. As such, nothing in this proceeding impinges on the FERC’s jurisdiction or affects a post-July 1, 2004 filed rate. The Commission agrees with the ALJ that this proceeding is required pursuant to Act 304.

The Commission considers its determination on the issue of Wabash’s first application for leave to appeal to be equally dispositive of its second application, which involves the same underlying dispute. Accordingly, the Commission finds that both of Wabash’s applications for leave to appeal should be denied.

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.; 1982 PA 304, as amended, MCL 460.6h 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. Wabash's August 31 and November 24, 2004 applications for leave to appeal should be denied.

THEREFORE, IT IS ORDERED that the August 31, 2004 and November 24, 2004 applications for leave to appeal filed by Wabash Valley Power Association, Inc., are denied.

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

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 2, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary

The Commission finds that:

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b. Wabash's August 31 and November 24, 2004 applications for leave to appeal should be denied.

THEREFORE, IT IS ORDERED that the August 31, 2004 and November 24, 2004 applications for leave to appeal filed by Wabash Valley Power Association, Inc., are denied.

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MICHIGAN PUBLIC SERVICE COMMISSION

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By its action of December 2, 2004.

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