

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
THE DETROIT EDISON COMPANY)
for reconciliation of its power supply cost)
recovery plan for the 12-month period ending) Case No. U-13808-R
December 31, 2004.)
_____)

In the matter of the application of)
THE DETROIT EDISON COMPANY to implement)
the Commission's final order in Case No. U-13808) Case No. U-14474
concerning Inter Alia, 2004 Net Stranded Costs)
and the provisions of Section 10a(16) and (17).)
_____)

At the August 16, 2005 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

OPINION AND ORDER

On March 31, 2005, The Detroit Edison Company (Detroit Edison) filed an application for reconciliation of its 2004 power supply cost recovery plan (Case No. U-13808-R) and an application for reconciliation of its 2004 stranded costs (Case No. U-14474), which included an *ex parte* motion for entry of a temporary order maintaining net stranded cost surcharges ordered in

Case No. U-13808 during the pendency of the stranded cost reconciliation proceeding. Only Detroit Edison's *ex parte* motion is at issue here.¹

In its *ex parte* motion, Detroit Edison argued that the Commission's order, issued November 23, 2004 in Case No. U-13808 (November 23 order), authorized the utility to collect \$43.6 million in historical stranded costs, plus interest, and that the November 23 order further permitted Detroit Edison to continue to collect stranded costs "until any additional stranded costs incurred during the remainder of 2004 are determined." November 23 order, pp. 96-97. Detroit Edison claimed that although it expected to have completely amortized the \$43.6 million in costs that had been specifically authorized by the November 23 order by the third quarter of 2005, it nevertheless had substantial additional stranded costs for 2004 that were not covered by the order. Moreover, Detroit Edison maintained that even with a continuation of the existing stranded cost recovery surcharges through 2005, it will not fully recover its 2004 production fixed cost net stranded costs. Finally, Detroit Edison contended that because a continuation of the stranded cost recovery surcharge would not result in a rate increase, *ex parte* relief was appropriate. Detroit Edison's motion was supported by an affidavit from Terry S. Harvill, its Director of Regulatory Affairs, who stated that Detroit Edison had incurred \$99 million in net stranded costs in 2004.

On April 1, 2005, Attorney General Michael A. Cox (Attorney General) filed a request for a hearing and notice of intervention in Case No. U-14474. The Attorney General argued that MCL 460.10a(16) mandates a contested case proceeding on Detroit Edison's request and that, unlike MCL 460.6j(8) and (9), MCL 460.10a(16) does not empower the Commission to issue a temporary order. Moreover, the Attorney General argued that maintaining stranded cost recovery surcharges during the pendency of the stranded cost proceedings would constitute either a rate

¹On May 17, 2005, Case No. U-13808-R and Case No. U-14474 were consolidated under Case No. U-13808-R.

increase or an amendment in rates that would result in an increase in cost of service for some customers. The Attorney General argued that in either circumstance a hearing was required under MCL 460.6a(1). In the alternative, the Attorney General claimed that if Detroit Edison were not requesting an extension beyond the Commission-approved date, then Detroit Edison's motion was unnecessary.

Also in response to Detroit Edison's *ex parte* motion, Energy Michigan filed a petition on May 18, 2005 requesting a hearing on the motion. Energy Michigan claimed that because the final order in Case No. U-14474 was not expected until April 2006, it would be improper to permit Detroit Edison to continue to collect stranded cost surcharges where there was no basis for the continuation. Furthermore, Energy Michigan argued that Detroit Edison's interpretation of the November 23 order was in error. Energy Michigan claimed that the Commission intended to permit the collection of the \$43.6 million in authorized stranded costs until fully collected, or, if earlier, until 2004 stranded costs were determined in the rate reconciliation proceeding. Finally, Energy Michigan claimed that the continuation of the surcharges would be a *de facto* rate increase for electric choice customers and that therefore a hearing is required.

Detroit Edison objected to Energy Michigan's petition on procedural grounds, noting that the utility had directed its *ex parte* motion to the Commission because only the Commission could issue an order implementing temporary electric rates. However, Detroit Edison claimed that Energy Michigan improperly directed its request for a hearing on the *ex parte* motion to Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ), who is presiding over Case Nos. U-13808-R and U-14474. Moreover, Detroit Edison argued that because Energy Michigan had already agreed to the scheduling order in Case Nos. U-13808-R and U-14474, which did not provide for a hearing on the *ex parte* motion, its request for a hearing was untimely. Finally,

Detroit Edison claimed that Energy Michigan did not have “the procedural authority to arrange for a hearing on an Ex Parte Motion filed by Detroit Edison,” nor did Energy Michigan’s request comport with R 460.17335(4), which provides that “Motions shall be noticed for hearing at the time designated by the commission or presiding officer,”² or R 460.17335(1)(b), which provides that motions shall “State with particularity the grounds and authority on which the motion is based.” Detroit Edison requested that the ALJ issue an order canceling the June 2, 2005 hearing and otherwise deny Energy Michigan’s motion with prejudice. Detroit Edison also requested that Energy Michigan be sanctioned for what it deemed a frivolous motion.³

On June 13, 2005, Energy Michigan filed a “Request for Partial Summary Disposition” of Detroit Edison’s *ex parte* motion, pursuant to R 460.17323. Energy Michigan requested that the Commission deny Detroit Edison’s *ex parte* motion to continue collection of stranded costs. Energy Michigan claimed that Detroit Edison had determined that it would complete collection of the \$43.6 million in stranded costs, plus seven percent interest, as provided for in the November 23 order, in November 2005 and that the proceedings in Case No. U-14474 would not conclude until March or April 2006. Energy Michigan reiterated that that the Commission’s intent in the November 23 order was that the approved stranded cost charges would stay in effect until they were collected, or, if earlier, when stranded costs for the remainder of 2004 were determined and could be added or subtracted from the \$43.6 million authorized by the order. Energy Michigan

²Apparently, Energy Michigan’s motion had attached to it a Notice of Hearing to take place on June 2, 2005. Detroit Edison claims that Energy Michigan failed to contact it to determine whether the June 2 date and time were convenient.

³On May 31, 2005, the ALJ sent an electronic mail to all parties informing them that there would be no motion hearing on June 2, 2005 and that “the subject matter of the proposed motion is, I believe (at this point in time) subject matter properly addressed directly to the Commission.” (E-mail dated 5/31/2005 from Daniel E. Nickerson, Jr. to . . . Jon P. Christinidis [counsel for Detroit Edison, and] . . . E.J. Schneidewind [counsel for Energy Michigan] attached as Exhibit 3 to Energy Michigan’s request for partial summary disposition, 6/13/05).

further asserted that values contained in Detroit Edison's Summer 2005 Capacity Plan filed in Case No. U-14414 demonstrated that Detroit Edison was actually losing far fewer customers to electric choice than had been projected when the November 23 order was issued. As a result, Energy Michigan concluded that Detroit Edison had less, rather than more, net stranded costs than had been contemplated by the November 23 order and that it would therefore be "both unfair and unlawful to continue collecting transition charges."

In response, Detroit Edison argued that Energy Michigan's request for partial summary disposition was procedurally improper because R 460.17323 grants authority to the presiding officer (i.e., the ALJ), not the Commission, to grant summary disposition where there is no genuine issue of material fact. Moreover, Detroit Edison claimed that Energy Michigan had failed to request a hearing on its motion for partial summary disposition, thereby depriving Detroit Edison of due process.

MCL 460.6a(1) provides that, "An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing." In applying this provision, the Commission notes that "'[s]hall' is generally used to designate a mandatory provision while 'may' designates a provision which grants discretion." *Law Dep't Employees Union v City of Flint*, 64 Mich App 359, 368; 235 NW2d 783 (1975). Thus, even assuming that maintaining stranded cost recovery charges would not constitute a rate increase, as Detroit Edison claims, the Commission nevertheless has the discretion to order a contested case. *See also*, R 460.17301(1), which provides: "A contested case proceeding shall be held where required by statute and may be held when the commission so directs."

In the instant case, the Commission is not persuaded that relief in the form of an *ex parte* order authorizing maintenance of net stranded cost recovery charges beyond the time authorized by the November 23 order, specifically until Detroit Edison has collected \$43.6 million in net stranded costs, is reasonable or in the public interest. Rather, the Commission finds that the merits of Detroit Edison's request should be addressed in the contested case proceeding that will take place in the consolidated dockets.

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. The *ex parte* motion filed by Detroit Edison requesting entry of a temporary order maintaining net stranded cost transition charges during the pendency of the stranded cost reconciliation proceeding should be denied.
- c. The merits of Detroit Edison's request should be addressed in the contested case proceeding that will take place in these consolidated dockets.

THEREFORE, IT IS ORDERED that:

- A. The *ex parte* motion filed by The Detroit Edison Company requesting entry of a temporary order maintaining net stranded cost transition charges during the pendency of the stranded cost reconciliation proceeding is denied.

B. The merits of The Detroit Edison Company's March 31, 2005 *ex parte* motion for entry of a temporary order shall be addressed in the contested case proceeding that will take place in these consolidated cases.

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
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of August 16, 2005,

/s/ Mary Jo Kunkle
Its Executive Secretary

B. The merits of The Detroit Edison Company's March 31, 2005 *ex parte* motion for entry of a temporary order shall be addressed in the contested case proceeding that will take place in these consolidated cases.

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MICHIGAN PUBLIC SERVICE COMMISSION

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By its action of August 16, 2005.

Its Executive Secretary