

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of )  
**THE DETROIT EDISON COMPANY** to increase )  
rates, amend its rate schedules governing the )  
distribution and supply of electric energy, implement )  
power supply cost recovery plans, factors, and )  
reconciliations in its rate schedules for jurisdictional )  
sales of electricity, and for miscellaneous accounting )  
authority and regulatory asset recovery. )  
\_\_\_\_\_ )

Case No. U-13808

At the June 30, 2005 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman  
Hon. Robert B. Nelson, Commissioner  
Hon. Laura Chappelle, Commissioner

**ORDER DENYING REHEARING**

On November 23, 2004, the Commission issued the final order in this rate proceeding. On December 22, 2004, the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM) filed a petition for rehearing and reconsideration of the Commission's treatment of issues surrounding the spent nuclear fuel (SNF) surcharge. On January 10, 2005, Attorney General Michael A. Cox filed an answer to the petition in which he states that he does not take a position on the arguments raised by MEC/PIRGIM, but desires to reserve the right to subsequently challenge the lawfulness or reasonableness of any relief granted by the Commission pursuant to the petition. On January 12, 2005, The Detroit Edison Company (Detroit Edison) filed an answer opposing MEC/PIRGIM's petition for rehearing.

In the November 23 order, the Commission briefly addressed the SNF surcharge as follows:

MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of [SNF] fees by finding that the matter should not be considered in this proceeding.

The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. See, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771.

Order, p. 120.

MEC/PIRGIM state their understanding that this case presented many complex issues, besides the SNF surcharge, that required prompt and focused attention. However, they argue, now that the major work of producing the final order in the rate case is complete, the Commission should take this opportunity to consider the evidence and arguments presented on SNF issues. They argue that the present case, which combined a general rate proceeding with power supply cost recovery (PSCR) issues, encompasses almost all of the regulatory authority the Commission possesses with respect to an electric utility's recovery of costs. Therefore, they argue, the Commission may require further regulatory investigations, make findings relative to base rates and PSCR factors, and even inquire into nuclear decommissioning issues, as they relate to SNF costs and rate effects.

MEC/PIRGIM argue that the Commission violated its duties to determine rate issues in accordance with its enabling statutes, the Michigan Administrative Procedures Act (APA), MCL 24.201 *et seq.*, and due process. They argue that the Commission actually issued a non-decision concerning SNF costs, despite the presence of "extensive expert testimony and exhibits concerning SNF and cost issues" and full briefing of those issues. Petition, p. 2.

MEC/PIRGIM argue that the Commission's decision fails to comply with the notice and hearing requirements established in its enabling statutes. They argue that MCL 460.6a required

prior notice and hearing in cases involving utility rate increase applications. They state that those requirements are applicable to SNF costs, as Detroit Edison included its SNF fees and other costs for recovery in this case. They argue that if Detroit Edison may include these costs for recovery, then intervenors must be permitted to seek meaningful review and consideration of those costs.

MEC/PRIGIM argue that the Commission has the jurisdiction, authority, and duty under its enabling acts to require Detroit Edison to file a full and complete case regarding its SNF costs, and to thereafter undertake a full review of those costs, and to impose appropriate remedies. They argue that due process rights include the right to an agency decision that makes findings and states conclusions based upon the record as a whole.

MEC/PIRGIM further argue that the Commission should consider additional protective remedies in addition to investigation and review and potential rate disallowance, including a separate SNF decommissioning trust fund, establishment of bond requirements, and inquiry into insurance or additional protection for decommissioning funds. They assert that the Commission should adopt its proposed “enhanced review” of SNF related costs and their recovery, as described by their witness, Ronald Callen.

Further, MEC/PIRGIM argue that the Commission should reject rate recognition of SNF fees because Detroit Edison failed to provide a basis upon which those costs may be deemed reasonable and prudent. They argue that these costs should not be included in rates based on a presumption of reasonableness. Moreover, MEC/PIRGIM assert, Detroit Edison has failed to be reasonable and prudent in continuing to pay the fees without creating a contingency plan for the probable failure of the federal government to supply a storage facility within any reasonable time. They assert that Detroit Edison failed to demonstrate the reasonableness and prudence of its enforcement actions with regard to the standard contract for SNF disposal.

Moreover, MEC/PIRGIM argue, although Detroit Edison may continue to pay the SNF fee as a matter of management prerogative, the Commission has an independent duty to protect ratepayers by making appropriate rate adjustments. They argue that the Commission need not incorporate the SNF fees in Detroit Edison's rates. MEC/PIRGIM insist that the Commission is not preempted by federal law from disallowing recovery of these fees.

MEC/PIRGIM further argue that the citation to Case No. U-13771 as a forum for issues related to SNF is not comforting, because that proceeding has motions pending before the administrative law judge and the Commission, and no hearings have been scheduled. Moreover, MEC/PIRGIM argue, they seek a different remedy here, the disallowance of SNF fees from rates. They argue that the Commission, on rehearing, has an opportunity to fully consider Detroit Edison's SNF costs and rate issues, including nuclear decommissioning issues.

Detroit Edison responds that MEC/PIRGIM merely restate their arguments from this and prior cases, expressing disagreement with the Commission's consistent rejection of those arguments. Thus, Detroit Edison argues, the petition for rehearing does not meet the Commission's standards for granting rehearing.

Detroit Edison goes on to argue that no law requires what MEC/PIRGIM demand, and asserts that Detroit Edison's presentation concerning base rates met any reasonable standard of completeness and demonstrated prudent company strategies and actions. The utility argues that MEC/PIRGIM merely rehash their failed appellate attacks on the Commission's rejection of their arguments, citing *MEC v Public Service Comm*, unpublished opinion *per curiam* of the Michigan Court of Appeals, decided May 11, 2004 (Docket Nos. 244354 and 246744), that affirmed the Commission's order in Case No. U-12725. Detroit Edison provides a history of the cases in which

the SNF issues have arisen and been rejected. *See*, Detroit Edison response to MEC/PIRGIM, p. 4-8.

Moreover, Detroit Edison argues, the SNF arguments raised by MEC/PIRGIM have fatal defects, which the Commission has repeatedly recognized when rejecting them. Detroit Edison states that because federal law requires it to pay these SNF charges and fees, the Commission is preempted from preventing Detroit Edison from recovering these costs in its rates. Detroit Edison argues that the Commission should reject the argument that the utility should be held accountable if the United States Department of Energy fails to meet its statutory duty to obtain and construct a SNF storage facility. In Detroit Edison's view, there is no element of discretion involved as to whether it must make these payments. It argues that adopting the remedies suggested by MEC/PIRGIM will not bring about a speedier resolution to the SNF storage issues. Rather, it would simply penalize Detroit Edison for the failure of a governmental agency over which Detroit Edison has no control, a penalty without legal or factual basis.

Detroit Edison affirmatively states that it has been reasonable and prudent with respect to its SNF costs, and the relief requested by MEC/PIRGIM would result in an unconstitutional taking. US Const, Am V; Const 1963, art 10, § 2.

Detroit Edison goes on to argue that MEC/PIRGIM has failed to allege or demonstrate any credible basis for finding that SNF costs are unreasonable or imprudent. It asserts that its costs are presumed to be reasonable and prudent, and beyond that, the utility has taken reasonable and prudent actions with regard to its SNF costs. To withhold the payments required by federal law, Detroit Edison states, would risk the loss of Fermi 2's license. Detroit Edison points out that, in previous cases, Detroit Edison has demonstrated its substantial actions regarding SNF costs.

Finally, Detroit Edison argues, MEC/PIRGIM seek relief that is outside the Commission's authority and jurisdiction.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission finds that the petition for rehearing should be denied, as the petition does not meet the standards for granting rehearing. MEC/PIRGIM merely raises again the same arguments that the Commission should involve itself in judging the reasonableness of costs assessed by federal statute. The Commission finds that Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise.

As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time.

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. The petition for rehearing filed by MEC/PIRGIM of the November 23, 2004 order should be denied.

THEREFORE, IT IS ORDERED that the December 22, 2004 petition for rehearing filed by the Michigan Environmental Council and the Public Interest Research Group in Michigan 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

Chairman

( S E A L )

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of June 30, 2005.

/s/ Mary Jo Kunkle

Its Executive Secretary

b. The petition for rehearing filed by MEC/PIRGIM of the November 23, 2004 order should be denied.

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MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of June 30, 2005.

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Its Executive Secretary