

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,	)	
regarding administration and operation of the	)	Case No. U-13129
Low-Income and Energy Efficiency Fund.	)	
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At the March 18, 2009 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman  
Hon. Monica Martinez, Commissioner  
Hon. Steven A. Transeth, Commissioner

**ORDER**

On November 20, 2001, the Commission issued an order (November 20 order) pursuant to former Section 10d(6) of the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141). Section 10d(6) (later renumbered to Section 10d(7)) required that a portion of the cost savings from the issuance of securitization bonds be used as a source of funding for the Low-Income and Energy Efficiency Fund (LIEEF or Fund). The November 20 order established the procedural framework that the Commission has used to establish and administer the LIEEF. Appended to that order as Attachment A were the procedures that have been followed in considering specific grant proposals.

The original source of funds for these grants was the excess securitization savings from the Commission's orders in Case Nos. U-12478 (for The Detroit Edison Company (Detroit Edison)) and U-12505 (for Consumers Energy Company (Consumers)). When securitization savings were

no longer available, the funding of LIEEF was continued through base rates. November 23, 2004 order in Case No. U-13808; November 21, 2006 order in Case No. U-14547; *Attorney General v Public Service Comm*, 276 Mich App 216, 229-230; 740 NW2d 685 (2007); *In re Consumers Energy Co*, 279 Mich App 180, 190-191; 756 NW2d 253 (2008). On July 18, 2008, the Legislature approved \$80,000,000 for LIEEF funding for the fiscal year ending September 30, 2009. *See*, Section 114 of 2008 PA 251.<sup>1</sup>

On January 13, 2009, the Commission issued an order (January 13 order) amending the procedures for administering the LIEEF to permit the direct funding of services that are aimed at the activities associated with the “Clean, Renewable, and Efficient Energy Act,” 2008 PA 295 (Act 295), MCL 460.1001 *et seq.* The Commission amended Attachment A to the November 20 order to allow for up to 10% of the monies in the Fund to be used directly for funding contractual services that are related to low-income assistance, energy efficiency, energy technology, and the objectives of Act 295, including renewable energy, energy optimization, and distributed generation projects.

#### ABATE’s Petitions

On January 22, 2009, the Association of Businesses Advocating Tariff Equity (ABATE) filed a petition to intervene. ABATE contends that its members have a substantial interest in these proceedings because the Commission lacks statutory authority to impose surcharges on its members to fund the LIEEF, and because the surcharges will “impact the economic viability” of its members.

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<sup>1</sup>House Bill 4444 (2009), p. 15, proposes \$90,000,000 for LIEEF funding for the fiscal year ending September 30, 2010.

On January 22, 2009, ABATE also filed a petition for rehearing of the Commission's January 13 order, on grounds that the order contains erroneous conclusions of law and will have the unintended consequence of causing companies to cease doing business in Michigan. ABATE argues that since the statutory authority to fund the LIEEF program was eliminated by the amendments to Act 141 contained in 2008 PA 286 (Act 286), the Commission has no statutory authority to continue any surcharges to fund the LIEEF. ABATE contends that the Legislature has spoken by eliminating MCL 460.10d(7) in Act 286, and that the Commission has responded by expanding a program that no longer exists. ABATE contends that funding of the LIEEF will hurt Michigan's economy rather than help it.

ABATE further argues that funding of the LIEEF through surcharges conflicts with the provisions of Section 11 of Act 286, MCL 460.11, that require the Commission to move rates towards the cost of service. ABATE contends that discounted rates are available only to seniors and low-income customers, demonstrating that the Legislature created specific exceptions to the cost of service mandate. ABATE points out that the LIEEF-related surcharges move the rates of its members away from the cost to serve them, and that such an exception from the cost of service mandate was not enacted by the Legislature.

On February 12, 2009, the Commission Staff (Staff) filed a response to the petitions for intervention and rehearing. The Staff opposes the petition to intervene on grounds that this is not a contested case docket. The Staff further argues that, if this were a contested case, ABATE lacks standing to intervene, and ABATE has not demonstrated good cause for its late-filed petition to intervene.

The Staff argues that this proceeding was initiated on the Commission's own motion to consider public comments on the process for awarding grants and is legislative in nature. The

Staff further argues that ABATE lacks standing to intervene because this docket has not been used to impose surcharges, but rather to process and award grant money. The Staff points out that funding of the LIEEF has been accomplished through Legislative appropriations, and through orders in the dockets dealing with securitization savings and (later) the operation and maintenance (O&M) expenses in Consumers' and Detroit Edison's rate cases. The Staff points out that this docket does not address the setting of rates, and ABATE's members are not seeking any grants from the LIEEF. The Staff contends that ABATE fails to meet the long-standing two prong test for intervention because ABATE will suffer no injury in fact resulting from the award of a grant, and is not within the zone of interests affected by the administration of the LIEEF.

The Staff also opposes the petition for rehearing. The Staff points out that ABATE is not a party to this proceeding and thus cannot request rehearing. *See*, December 18, 2007 order in Case No. U-14800 *et al.*, p. 10. The Staff further argues that, even if ABATE could petition for rehearing, the petition should be denied because the Commission is acting within its authority to continue administration of the LIEEF. The Staff points out that the Commission's funding of the LIEEF has been upheld by the Michigan Court of Appeals, and that ABATE was an appellant in *In re Consumers*. The Staff points to the Legislature's appropriation of funds for the LIEEF through September 30, 2009.

Further, the Staff argues, the current funding for the LIEEF is already included in Consumers' and Detroit Edison's rates, which were approved before the January 1, 2009 effective date of MCL 460.11. The Staff contends that, even if Section 11 of Act 286 were in effect at the time the rates were set, that section is not violated by funding the LIEEF through a utility's base rates as an O&M expense, because ensuring that rates are cost based "involves functionalizing costs and then allocating those costs to particular customer classes. No reason exists that the LIEEF O&M costs

cannot be functionalized and allocated like any other cost in a utility's next rate case." Staff's response, p. 8.

### Discussion

The Commission finds that ABATE does not have standing to intervene in this proceeding. As the Staff correctly points out, this proceeding is legislative in nature. This docket has been used solely for the purpose of adopting procedures for the receipt and review of grant applications, and for the purpose of awarding grants. The order for which ABATE seeks review modified the procedures used to administer the LIEEF by allowing 10% of the already existing funds to be used in a new way. The order did not affect rates, surcharges, or any costs or expenses associated with the Fund, nor the size of the Fund. The size of the Fund is determined by the Legislature, and the effect of the LIEEF on rates is determined in rate cases.

ABATE has failed to satisfy the Commission's two-prong test for standing that requires a prospective intervenor to show (i) that it will suffer an injury in fact, and (ii) that the interests allegedly endangered are within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *See, Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970) (*Data Processing*); *Drake v The Detroit Edison Company*, 453 F Supp 1123, 1127 (WD Mich, 1978). An injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *National Wildlife Federation v Cleveland Cliffs Iron Co*, 468 Mich 944; 664 NW2d 222 (2003); May 22, 2007 order in Case No. U-15166, p. 13. ABATE has shown no injury in fact, either to itself or its members, as a result of the Commission's January 13 order; nor has it shown that it has interests within a constitutionally or statutorily

protected zone of interests that are allegedly endangered by the modification of the procedures used to administer the LIEEF.

Having found that ABATE lacks standing to intervene, the Commission need not address the petition for rehearing. *See*, December 18, 2007 order in Case No. U-14800 *et al.*, p. 10. The Commission notes that ABATE's objections to the continued existence and funding of the LIEEF may be addressed in rate cases and the appeal process attendant thereto.

THEREFORE, IT IS ORDERED that the petition to intervene 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, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

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Orjiakor N. Isiogu, Chairman

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Monica Martinez, Commissioner

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Steven A. Transeth, Commissioner

By its action of March 18, 2009.

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Mary Jo Kunkle, Executive Secretary