

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
WISCONSIN ELECTRIC POWER COMPANY)
for authority to increase its rates for the sale of)
electricity in the State of Michigan.)
_____)

Case No. U-15981

At the October 13, 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 October 6, 2008, Governor Jennifer M. Granholm signed Public Act 286 of 2008 (Act 286), amending Public Act 3 of 1939; MCL 460.6 *et seq.* Section 6a(1) of the Act sets out certain requirements and procedures for electric utility rate cases. Section 6a(1) provides:

If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. . . . For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges.

Section 6a(1) further provides that such implementation may not take place prior to the commencement of the projected test year (if a projected test year has been used in developing the requested rates and charges), and that, if the implemented rate exceeds the rate authorized in the final order, the excess shall be refunded to customers with interest. MCL 460.6a(1).

On July 2, 2009, Wisconsin Electric Power Company (We Energies) filed an application requesting authority to increase its rates by approximately \$42 million annually. In the application, We Energies also stated that should the opportunity to self-implement occur, it may opt to limit the amount of the self-implemented relief to approximately 50% of the full rate increase requested. At the prehearing conference on August 18, 2009, Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ) granted petitions to intervene filed by Tilden Mining Company L.C., Empire Mining Partnership, and Louisiana-Pacific Corporation. The ALJ also granted the joint request of Tilden Mining Company L.C. and Empire Mining Partnership (the Mines) for a schedule that included proceedings regarding the self-implementation rate before We Energies' self-implementation date.

On September 1, 2009, We Energies filed an application for leave to appeal the August 18 ruling by the ALJ granting the Mines' request. On September 15, 2009, Louisiana-Pacific, the Mines, and the Commission Staff (Staff) filed responses opposing We Energies' application for leave to appeal.

In its application, We Energies argues that the proceedings added to the schedule are not consistent with its right to self-implement under MCL 460.6a, conflicts with previous Commission orders, and may cause filings, proceedings, and arguments that are beyond the proper scope of the hearing on self-implementation. We Energies further argues that the proceedings will "waste the resources of the parties and the Commission and may adversely affect the parties' efforts to litigate the request for final rate relief in the time frame required by MCL 460.6a, as amended." Leave to Appeal Application, p. 1. The parties responding to the application disagree and argue the ALJ was trying to anticipate the need for such proceedings and prevent amending the schedule to accommodate additional proceedings, if needed.

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. Rule 337(2) provides that an appellant must establish one of the following conditions before the Commission will grant review:

- (a) 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.
- (b) 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.
- (c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order.

We Energies advances all of the above grounds for granting the request for leave to appeal. We Energies argues that items added to the schedule restore interim relief hearing rights that intervenors had prior to Act 286 becoming law. We Energies also believes the additional items will cause unnecessary filings and proceedings that would waste the time, effort, and expenses of the parties. Also, We Energies argues that the ALJ's August 18 ruling is inconsistent with prior Commission orders. We Energies requests the Commission to vacate the ALJ's August 18, 2009 ruling setting procedures for the self-implementation rate or, in the alternative, to schedule a hearing for self-implementation that is consistent with its orders in prior cases.

The Commission finds that vacating the ALJ's ruling will not assist in resolving this case in a more timely fashion or prevent substantial harm. Further, the Commission does not agree that the ALJ's ruling is inconsistent with previous Commission orders or gives intervenors rights that Act 286 eliminated. By including a hearing regarding the proposed self-implementation relief, the ALJ was upholding the statutory opportunity, if needed, for parties to present evidence and arguments showing "good cause" why the Commission should block We Energies from instituting

its self-implementation rate. The Commission finds that the August 18, 2009 ruling should not be vacated in its entirety.

By law, on December 29, 2009, absent an order from the Commission that either prevents or delays self-implementation, We Energies may self-implement up to the full amount of its proposed rate increase. Act 286 established extremely short timeframes for concluding rate cases. The Commission finds that a decision on whether there is good cause to prevent or delay the implementation of new rates should not be made in the absence of additional information.

Prior to the enactment of Act 286, existing rates were conclusively deemed to be just and reasonable, and any unapproved rate increase implemented *ex parte* was conclusively unreasonable and unlawful. *Northern Michigan Water Co v Public Service Comm*, 381 Mich 340, 352-353; 161 NW2d 584 (1968). Act 286 has radically revised the regulatory paradigm. Although the Commission still has an obligation to “hear and pass upon” all matters relating to electric utility regulation under MCL 460.6a, Act 286 appears to have grafted a modified “file and use” approach for proposed rates absent “good cause” for the Commission to either prevent or delay the use of filed rates by the utility.

The Commission recognizes We Energies has filed the tariffs it proposes to self-implement between December 29, 2009, and July 2, 2010. All parties will be able to respond to the proposed tariffs, if they so choose, in responses to be filed no later than October 28, 2009.

In addition, the Commission finds that the schedule for self-implementation proceedings set by the ALJ is in need of revision. The self-implementation schedule should be revised to eliminate the filing of testimony, rebuttals, motions to strike, briefs, and reply briefs. The ALJ should conduct the hearing scheduled for 9:00 a.m. on October 29, 2009. At the hearing, We Energies is directed to provide one witness to support the reasonableness of the proposed tariffs

and shall provide evidence regarding the effect of the statutory rate design option and reasonable alternatives thereto. Other parties may be prepared to present one witness each, if they so choose. The time allotted to each party will be set by the ALJ at the hearing.

THEREFORE, IT IS ORDERED that:

- A. Wisconsin Electric Power Company's application for leave to appeal is granted in part and denied in part.
- B. Parties shall have an opportunity to respond to Wisconsin Electric Power Company's tariff filing by October 28, 2009.
- C. A hearing shall be held at 9:00 a.m. on October 29, 2009. At the hearing, Wisconsin Electric Power Company shall provide a witness to support the reasonableness of the proposed tariffs and shall provide evidence regarding the effect of the statutory rate design option and reasonable alternatives thereto.
- D. The remaining items on the self-implementation proceeding schedule shall be cancelled.

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

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of October 13, 2009.

Mary Jo Kunkle, Executive Secretary