

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
of the election by the Board of Directors of)	
CHERRYLAND ELECTRIC COOPERATIVE to)	Case No. U-15983
become member-regulated in accordance with)	
2008 PA 167, MCL 460.34.)	
_____)	

At the July 16, 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

DETERMINATION

On April 20, 2009, the Board of Directors of Cherryland Electric Cooperative (Cherryland) adopted a resolution to become member-regulated in accordance with 2008 PA 167, MCL 460.31 *et seq.*, the Electric Cooperative Member-Regulation Act (Act 167). *See*, MCL 460.34.

“Member-regulation” means that the Board of Directors of Cherryland is charged with establishing, maintaining, and applying all rates, charges, accounting standards, billing practices, and terms and conditions of service. MCL 460.32(f). Section 6(2) of Act 167 provides that:

Notwithstanding the provisions of this act, the commission shall retain jurisdiction and control over all member regulated cooperatives for matters involving safety, interconnection, code of conduct . . . , customer choice including, but not limited to, the ability of customers to elect service from an alternative electric supplier . . . , and the member-regulated cooperative's rates, terms, and conditions of service for customers electing service from an alternative electric supplier, service area, distribution performance standards, and quality of service, including interpretation of applicable commission

rules and resolution of complaints and disputes, except any penalties pertaining to performance standards and quality of service shall be established by the cooperative's members.

MCL 460.36(2). In addition, Section 9 of Act 167 provides that the Commission retains jurisdiction over certificates of need, and enforcement of 1999 AC, R 460.3411, which deals with areas served and line extensions. MCL 460.39(1).

By letter dated April 21, 2009, Cherryland informed the Commission of the resolution, and indicated that "the board also adopted the Michigan Public Service Commission's billing rules and all current rates in effect."¹ The Commission's Executive Secretary did not physically receive a copy of the letter from Cherryland until June 1, 2009, although an electronic version of the notice came to the attention of other members of the Commission Staff (Staff) via e-mail on May 15, 2009.

On June 2, 2009, the Commission issued an order on its own motion to address the notification from Cherryland. In so doing, the Commission directed Cherryland to file documentation in this docket within seven days of the date of the order showing compliance with the notice and hearing requirements of Section 4(a)-(f) of Act 167. MCL 460.34(a)-(f). The requested documentation was filed on July 5, 2009.

In the June 2 order, the Commission also directed Cherryland and the Staff to begin meetings with the Staff no later than June 15, 2009 to discuss issues related to the transition and to establish an orderly process for the transition of Cherryland to member-regulation. The Staff was directed to report to the Commission by July 10, 2009 on the results of its discussions with Cherryland.

¹In an affidavit dated June 3, 2009, which was filed June 5, 2009, Cherryland's General Manager, Tony Anderson, stated that on April 21, 2009, he "caused to be mailed to the Executive Secretary of the Commission a written notice of the action taken by the board of directors to become member regulated." According to Mr. Anderson, "[t]he notice was dated April 21, 2009, and addressed to Ms. Mary Jo Kunkle, Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, Lansing, Michigan 48909, and sent by regular U.S. mail." Affidavit, p. 2.

On June 10, 2009, Great Wolf Lodge of Traverse City, LLC., (GWL) filed a petition for leave to intervene in this proceeding. In its petition, GWL alleges that it currently is a member-consumer of Cherryland. According to GWL, the resort that it operates within the cooperative's service territory may be Cherryland's single largest customer. GWL states that it is currently being charged under Cherryland's tariffed Large Commercial and Industrial Rate. GWL adds that the rate and classification of the electric service provided by Cherryland to GWL is the subject of litigation pending before the Michigan Court of Appeals. GWL also maintains that it will be harmed in various ways due to the switch from Commission regulation of rates to member-regulation of rates. Accordingly, GWL contends that it should be given adequate notice and be allowed to participate in the meetings with the Staff and the cooperative. GWL also maintains that the Commission should delay or prevent member-regulation by Cherryland.

GWL alleges three procedural irregularities that support continued Commission regulation of the cooperative's rates. First, GWL asserts "on information and belief" that no one at the resort or at GWL received a copy of the notice of Cherryland's Board of Directors' intent to address member-regulation at its April 20, 2009 meeting. GLW raises this point because Section 4(b) of Act 167, MCL 460.34(b), specifies that written notice of the time and place of the Board of Director's meeting must be given to all members of the cooperative. However, the Legislature provided that the cooperative could choose to either send the notice by first-class mail or "publish the notice in a periodical issued by an association of cooperative electric utilities and mailed to each member of record of the cooperative." MCL 460.34(b). The notice was published in the cooperative's *Country Lines* magazine, which was mailed to Cherryland's member-consumers on or about March 5, 2009.

Next, GWL again asserts “on information and belief” that no one at the resort or at GWL received a copy of the June 4, 2009 edition of *Country Lines* containing the minutes of the April 20, 2009 meeting. GWL raises this point because MCL 460.34(e) requires the minutes of the meeting at which the Board of Directors acts to adopt member-regulation must be sent to its member-consumers in the same manner as the original meeting notice.

Finally, GWL asserts that the notice to the Commission that is required by MCL 460.34(f), which was described in the Commission’s June 2, 2009 order as being received by the Commission’s Executive Secretary on June 1, 2009, means that the earliest date for member-regulation would be August 29, 2009, not July 20, 2009.

On June 15, 2009, Cherryland filed a response in opposition to GWL’s petition for leave to intervene. Cherryland stresses that GWL’s petition should be denied because (1) this docket is not intended as a contested case docket and does not lend itself to interventions; (2) GWL is improperly attempting to leverage its interests in this docket to achieve independent and unrelated goals that it failed to achieve in other dockets and forums; and (3) GWL’s intervention petition is based on various factual misrepresentations. Specifically, Cherryland maintains that none of the factual assertions in GWL’s intervention petition is supported by a verified affidavit. Cherryland contends that because GWL’s representations were couched as being based “on information and belief” without the support of any affidavits, they should be discounted by the Commission.

Cherryland concludes by arguing:

Technically, the Commission need not have initiated this docket because 2008 PA 167 is self-executing, i.e., once the steps required by Section 4 of the Act have been met, Cherryland is member-regulated. The fact that the Commission initiated this docket to confirm that the necessary steps have been taken should not be interpreted as an invitation for GWL to obfuscate, delay, leverage or threaten. GWL’s intervention should be rejected.

Based on its very constructive meeting with the Commission Staff on June 12, 2009, Cherryland believes that it has met all of the procedural steps set out in the Act – and that the Staff’s July 10, 2008 [sic] submission will so provide. GWL’s intervention petition should be denied.

Cherryland’s response, p. 9.

On July 10, 2009, the Staff filed its report. In so doing, the Staff states that employees from all of the Commission’s relevant divisions met with representatives of Cherryland on June 12, 2009. Additionally, the Staff notes that there were subsequent phone conversations to clarify specific issues.²

The Staff states that issues related to the cooperative’s times interest earned ratio (TIER) ratemaking mechanism, its prior period power supply cost recovery (PSCR) reconciliations, and the filing of future PSCR plan cases were discussed. According to the Staff, citing *Wabash Valley Power Assn, Inc. v Public Service Comm*, unpublished per curiam opinion of the Court of Appeals issued December 15, 2005,³ Cherryland maintains that after commencement of member-regulation by the cooperative, the Commission will have no authority to regulate rates via the TIER or PSCR mechanisms. Consequently, the Staff reports that “Cherryland does not intend to file PSCR plans beginning with the one that would otherwise be due in September of this year.” Staff report, p. 2. With regard to Cherryland’s pending PSCR reconciliation for 2008 in Case No. U-15410-R, which also includes the cooperative’s annual TIER review, the Staff indicates that a prehearing conference is scheduled in that proceeding for July 30, 2009. The Staff anticipates that the issue

²The Commission notes that GWL was not included in these dialogues.

³A copy of the Court of Appeals’ unpublished opinion may be viewed at: <http://www.michbar.org/opinions/appeals/2005/121505/29849.pdf>

of prior period reconciliations (including the stub PSCR period covering the beginning months of 2009) will be addressed in that contested case rather than through this docket.⁴

Regarding the issue of the effective date of member-regulation by the cooperative, the Staff opines that its discussions with Cherryland have rendered GWL's objections "moot and of purely academic interest for this proceeding." Staff report, p. 3. The Staff explains that it has reached an agreement with Cherryland to avoid any uncertainties with the effective date of member-regulation due to the questions raised by GWL. The Staff reports that, at the Staff's suggestion, "Cherryland has agreed that it will make no ratemaking changes prior to August 30, 2009," the date GWL maintains is the earliest date possible for member-regulation to begin. Staff report, p. 3.

On the issue of billing practices, the Staff reports that Cherryland intends to adopt, as its own, the Commission's current billing practices. According to the Staff, Cherryland will be responsible for enforcement of its billing practices and all future changes thereto. Additionally, Cherryland, not the Commission, will deal with all complaints.

On the issue of ratemaking, the Staff reports that Cherryland has asserted that it will exercise complete authority over all aspects of ratemaking, including fees, charges, penalties, pole attachment rates, etc. However, adds the Staff, Cherryland will continue to use the existing Commission-approved rates and charges until new ones are approved by the cooperative. The Staff notes that "Cherryland intends to take the issue of penalties for distribution performance standards and quality of service to its members at the 2010 annual meeting. Until then, the cooperative will continue to apply the Commission-approved penalties." Staff report, p. 3. According to the Staff, whenever Cherryland makes changes to any ratemaking matter, the cooperative will provide notice of the change to the Commission.

⁴The Commission notes that GWL has filed an appearance in Case No. U-15410-R.

Next, the Staff points out that Cherryland will continue to abide by the Code of Conduct adopted by the Commission pursuant to MCL 460.10a(4).

With regard to safety issues, the Staff's report indicated the following:

There was general agreement that the Commission's safety regulation will continue to apply to Cherryland. However, unlike the situation for gas utilities, where safety regulation is encompassed in a single document, electric safety regulation is contained in a variety of requirements. Consequently, it will be necessary to work out what encompasses safety regulation on a case-by-case basis in the future.

Staff report, p. 4.

Finally, the Staff suggests that even though the Commission's order did not provide for responses, "it would be fruitful if Cherryland filed a response indicating its agreement or disagreement." Staff report, p. 4.

In response to the Staff's suggestion, on July 13, 2009, Cherryland filed a response indicating its agreement with the Staff on the issues of whether (1) Cherryland will adopt its own billing practices and be responsible for their enforcement, (2) Cherryland will have full authority over all aspects of ratemaking and will notify the Commission any time it changes ratemaking, (3) Cherryland's agreement that the Code of Conduct will still apply to Cherryland, and (4) that the Commission's safety regulations will continue to apply to Cherryland.

However, Cherryland emphatically insists that there should be no uncertainty over the date on which the cooperative will transition to member-regulation. Citing *Stacey v Sankovich*, 19 Mich App 688, 694; 173 NW2d 225 (1969), Cherryland maintains that court precedent in Michigan "creates a legal presumption that the Commission received notice." Cherryland's response, p. 3. Because no party has rebutted this presumption, which Cherryland points out is bolstered by an affidavit from the Michigan Electric Cooperative Association that confirms receipt of a copy of the letter on or about April 23, 2009, there is no justification for any conclusion other than that "the

Commission received notice of the board of directors' vote on April 21, 2009, and Cherryland's transition to member-regulation is effective on July 20, 2009." Cherryland's response, p. 3. In any event, Cherryland also indicates that "[n]otwithstanding the above, by e-mail dated July 9, 2009, Cherryland's counsel informed the Commission Staff that Cherryland would agree that under member-regulation, it does not intend to make effective/bill at non-currently-approved MPSC rates before August 30, 2009, i.e., no member-reg rate change would take effect/be billed before August 30, 2009. This should in no way be interpreted as acknowledgement or agreement that the notification letter was sent after April 21, 2009." Cherryland response, p. 5.

Finally, Cherryland stresses that because the Commission's jurisdiction over the cooperative's rates will be extinguished on July 20, 2009, "then, the Commission will no longer have jurisdiction over Cherryland's PSCR reconciliation and TIER proceedings." Cherryland's response, p. 5.

Discussion

At the outset, the Commission wishes to express its agreement with Cherryland that the opening of this docket by the Commission on its own motion was never intended to be a forum for challenging the cooperative's decision to opt for member-regulation. The Commission is a creature of statute. Through passage of Act 167, the Legislature crafted an opportunity for cooperatives to become excluded from several aspects of Commission-ordered regulation. It is beyond the Commission's jurisdiction to thwart the Legislature's action in this regard. Act 167 does not require or contemplate that the Commission weigh, review, or approve a cooperative's decision to become member-regulated. Accordingly, the Commission will not grant GWL any of the forms of relief requested in its petition for leave to intervene.

Rather, the purpose of the Commission's June 2, 2009 order was to assure an orderly transition for Cherryland to member-regulation and to provide guidance to Cherryland and other

similarly situated cooperatives on how the Commission intends to exercise its remaining authority over a member-regulated cooperative in hopes of avoiding potential disputes that could arise absent a dialogue of the sort that has taken place.

Under the circumstances, which include the Staff's investigation into the matter, the Commission is persuaded that Cherryland has met all of the prerequisites for exercising authority over its rates, charges, accounting standards, billing practices, and terms and conditions of service as permitted by MCL 460.32(f). Section 4 of Act 167, MCL 460.34, specifies the procedures that the cooperative's Board of Directors must follow in order to trigger the cooperative's statutory right to act alone in certain specific rate-related activities. Notwithstanding the bare, unsupported allegations in GWL's intervention petition, the Commission is persuaded that Cherryland has complied with all of the notice requirements of Section 4 of Act 167. Accordingly, upon the commencement of member-regulation by Cherryland, the Commission will cease asserting any authority over the cooperative's right to determine its rates, charges, accounting standards, billing practices, and terms and conditions of service.

THEREFORE IT IS DETERMINED that:

A. Cherryland Electric Cooperative has complied with the requirements in the Commission's June 2, 2009 order to file documentation showing compliance with the requirements of MCL 460.34(a)-(f).

B. Cherryland Electric Cooperative has complied with the requirements of MCL 460.34(a)-(f).

C. Cherryland Electric Cooperative and the Commission Staff have complied with the requirements in the Commission's June 2, 2009 order to discuss issues regarding the orderly transition of the utility to member-regulation.

D. The Commission Staff has complied with the requirements in the Commission's June 2, 2009 order by filing its report to the Commission on the results of discussions with Cherryland Electric Cooperative on July 10, 2009.

E. The objection raised by Great Wolf Lodge of Traverse City, LLC., to the effective date of the transition by Cherryland Electric Cooperative to member-regulation is moot.

F. Great Wolf Lodge of Traverse City, LLC., is not entitled to any of the forms of relief requested in its June 10, 2009 petition for leave to intervene.

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

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of July 16, 2009.

Mary Jo Kunkle, Executive Secretary