

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of)	
ACME BUILDERS LLC against)	Case No. U-15735
DTE ENERGY COMPANY.)	
_____)	

At the July 1, 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 GRANTING REHEARING AND DENYING REQUESTED RELIEF

Procedural History

On November 12, 2008, Acme Builders LLC (Acme) filed a complaint against DTE Energy Company (DTE) alleging that DTE had violated the “Consumer Standards and Billing Practices for Electrical and Gas Residential Service,” (Billing Rules), 1999 AC, R 460.10 *et seq.* A hearing was conducted on February 26, 2009 (February 26 hearing) before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ) during which the ALJ issued an oral proposal for decision (PFD). On April 16, 2009, the Commission issued an order adopting the PFD and dismissing Acme’s complaint with prejudice (April 16 order). Acme filed a petition for rehearing on April 29, 2009. On May 14 and May 20, 2009, the Commission Staff (Staff) and DTE filed responses to Acme’s petition for rehearing, respectively.

Position of the Parties

In its petition for rehearing, Acme argues that the Commission erred in claiming that no party filed exceptions to the PFD. Acme requests a rehearing because the Commission's order "wholly ignores the factual and legal issues presented and substantiated in the Petitioner's Exceptions dated and filed at MPSCdockets@michigan.gov on 3-27-09." Petition for rehearing, p. 1. Acme requests that the Commission grant the petition for reconsideration, issue a revised opinion that upholds the petition, and order that utility service be restored to Acme's property.

Acme submitted three exceptions to the PFD on March 27, 2009. In the first exception, Acme claims that the ALJ's analysis of the term "for residential purposes" contained in Rule 2(II) of the Billing Rules, 1999 AC, R 460.102(II), is unsubstantiated and illogical. Acme argues that the term "residential purposes" has the same meaning as the term "residential purposes" as used in the City of Ypsilanti's Zoning Code, qualifying Acme for residential service under the Commission's rules. Acme requests that the Commission reject the ALJ's analysis and grant Acme's request for utility service pursuant to Rule 6.

In the second exception, Acme claims that the ALJ's definition of "residential" is erroneous because no definition of "residential" appears in Black's Law Dictionary, as claimed by the ALJ. In addition, Acme states that the Michigan Supreme Court adopted the term "residential" in reference to multiple residences in *Bloomfield Estates Improvement, Ass'n v City of Birmingham*, 479 Mich 206, 215 (2007). Acme also alleges that DTE has a working definition of "residential" that does not require the party requesting utility service to be a natural person residing at the property served. Acme requests that the Commission find that the ALJ's definition of "residential" is erroneous, adopt the definition of "residential" found in the *Bloomfield Estates* case, and order DTE to grant Acme's request for utility service pursuant to Rule 6(2).

In the third exception, Acme claims the ALJ's statement "David Kircher is the organizer (ie, incorporator) of Huron Valley Corporation (Huron Valley), and that David Kircher is also the person who is identified with Acme Builders" is a misstatement of the record. Exceptions, p. 11. Acme argues that the record shows that Mr. Kircher is the organizer of Acme and the *resident agent* of Huron Valley. Acme requests that the Commission find the PFD erroneous and order DTE to grant Acme's request for utility service based on Rule 6(2).

In response to Acme's petition for rehearing, the Staff agrees that the April 16 order mistakenly states that no party filed exceptions to the PFD when Acme did file exceptions. However, the Staff contends that it was an inadvertent error, it was not material to the disposition of the case, and it does not warrant rehearing of the case. The Staff argues that the Commission order does not claim that Acme had waived any alleged error by failing to file exceptions. In any event, the Staff states that the Commission addressed all of Acme's arguments in the order.

The Staff argues that Acme's petition does not meet the requirements for a rehearing for two reasons. First, the petition does not specify any findings of fact or conclusions of law that are erroneous, it does not claim newly discovered evidence or facts and circumstances arising after the record was closed, and it does not claim unintended consequences flowing from the order. Second, the Staff argues that Acme's petition reiterates the same issues set forth in its exceptions.

In response to Acme's exceptions, the Staff argues that the ALJ correctly interpreted R 460.102(11); the ALJ's quote regarding the definition of "residential" has little, if any effect, on whether a 15-unit apartment building is a residential or non-residential customer; and Acme's relationship to Huron Valley is irrelevant because Acme incorrectly filed its complaint under the Commission's residential billing rules.

In response to Acme's petition for rehearing, DTE agrees with the Staff that the Commission's error does not warrant rehearing. DTE states that once the error is corrected, the decision of the Commission remains the same: Acme failed to meet its burden of proving that DTE violated the rules for providing residential utility service. DTE argues that Acme's petition for rehearing does not meet the requirements for a rehearing because Acme merely reargues the same issues addressed by the Commission in its April 16 order.

In addition, DTE states that Acme's argument that it is not legally obligated to assume the debts of Huron Valley is misplaced. According to Rule 25(1)(j) of the Commission's rules on "Billing Practices Applicable to Non-residential Electric and Gas Customers," 1999 AC, R 460.1625 (Rule 25), a utility may deny or shut-off service to a commercial customer for "non-payment of unpaid balances on any other non-residential accounts incurred by the customer under a different account name by the customer's predecessor in interest, or by any other entity, the debt of which the customer is legally obligated to assume." DTE argues that the record evidence shows that Mr. Kircher controlled both Acme and Huron Valley and that service could be denied to Acme until the debts owed by Huron Valley were paid.

Discussion

Rule 403 of "Practice and Procedure Before the Commission," 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. As the Commission has often stated, a petition for rehearing is not merely another opportunity for a party to argue a position or 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 rehearing.

The Commission finds that the April 16 order incorrectly stated that “no party filed exceptions to the PFD.” Acme did file exceptions to the PFD on March 27, 2009. Therefore, the Commission grants Acme’s petition for rehearing based on the error in the April 16 order, thus allowing the Commission to consider Acme’s exceptions.

After reviewing Acme’s exceptions, the Commission finds that Acme reiterates the same arguments made during the February 26 hearing and addressed by the Commission in the April 16 order. The Commission upholds the April 16 order, which found the PFD reasonable, adopted the PFD, and dismissed Acme’s complaint with prejudice. The ALJ correctly determined that Acme is a *commercial* customer and that it failed to meet its burden of proof that DTE violated the Commission’s *residential* billing rules.

In addition, the Commission finds that, had Acme filed its complaint under the correct commercial billing rule, Rule 25(1)(j), Acme still would have failed to meet its burden of proof. 1999 AC, R 460.17515 states that the “complainant generally shall have the burden of proof as to matters constituting the basis for the complaint.” Therefore, pursuant to Rule 25(1)(j), Acme had the burden of proving that it was not legally obligated to assume the debts of Huron Valley.

During the February 26 hearing, Acme did not subpoena or examine any of its own witnesses. The attorney for Acme called two of DTE’s witnesses to testify: Inez Chavez and Maria Brothers, employees of DTE familiar with the accounts for Acme and Huron Valley. According to Ms. Brothers, DTE denied Acme utility service after she examined the Articles of Incorporation for Acme and Huron Valley and determined that Mr. Kircher was the incorporator for both companies.

In addition, the two witnesses sponsored admission of Exhibits C-1 through C-7. Exhibit C-2 shows D.J. Kircher as the resident agent for Huron Valley. Exhibit C-4 shows D.J. Kircher as the resident agent for Acme. Exhibit C-5 is a quitclaim deed from David J. Kircher, whose address is 50 S. Summit, Ypsilanti, MI 48197 quitclaiming property located at 413 Washtenaw Ave., Ypsilanti, MI 48197 to Acme Builders, whose address is 50 S. Summit, Ypsilanti. Exhibit C-7 is a letter from the Internal Revenue Service addressed to Acme indicating that Mr. Kircher is the sole member.

After reviewing the testimony and exhibits, the Commission finds that Acme failed to prove that it is not legally obligated to assume the debts of Huron Valley. Acme did not present evidence or testimony sufficient to prove that Acme and Huron Valley are *not* a common entity. In fact, the evidence supports DTE's determination that Acme and Huron Valley were organized and controlled by Mr. Kircher as demonstrated by Exhibits C-2, C-4, C-5, and C-7.

THEREFORE, IT IS ORDERED that:

- A. Acme Builders LLC's petition for rehearing is granted.
- B. The Commission's April 16, 2009 order adopting the proposal for decision is affirmed.
- C. Acme Builders LLC's request that the Commission order DTE Energy Company to grant Acme Builders LLC's request for utility service 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

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of July 1, 2009.

Mary Jo Kunkle, Executive Secretary