

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

**In the Matter of the Application of
The Detroit Edison Company for a Power Supply
Cost Recovery Plan Factor for the Year 2000.**

Case No. U-12121

**THE DETROIT EDISON COMPANY'S BRIEF IN ANSWER TO MEC
AND PIRGIM'S MOTION FOR REHEARING AND RECONSIDERATION**

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INTRODUCTION

This case concerned an application by The Detroit Edison Company (“Edison”) to implement a power supply cost recovery (“PSCR”) plan in 2000. On June 5, 2000, the Customer Choice and Electricity Reliability Act, 2000 PA 141 (“Act 141”) became effective. Accordingly, on June 19, 2000, this Commission issued an Opinion and Order dismissing Edison’s application with prejudice because that application sought relief that was inconsistent with Act 141. On July 19, 2000, the Michigan Environmental Council (“MEC”) and Public Interest Research Group in Michigan (“PIRGIM”) filed nearly-identical motions for rehearing and reconsideration in Case Nos. U-11495 and U-12121. In response, Edison submits this answer in Case No. U-12121, explaining that rehearing and reconsideration should be denied. Edison is submitting a separate answer in Case No. U-11495.

STANDARD OF REVIEW

Rule 403 of the Commission’s Rules of Practice and Procedure, R 460.17403 provides:

“(1) A petition for rehearing after a decision or order of the commission shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. The petition shall be accompanied by proof of service on all other parties to the proceeding.”

Further guidance is provided by MCR 2.119(F)(3), which states:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

DISCUSSION

I. THROUGH ACT 141, THE LEGISLATURE HAS EFFECTIVELY FROZEN EDISON'S RATES.

This Commission properly dismissed Edison's application because the application sought relief that would be inconsistent with Section 10d(1) of Act 141. That section expressly provides for a five percent (5%) reduction of Edison's residential rates that were authorized or in effect on May 1, 2000, and a hard freeze of those reduced rates and all other rates existing on that date until December 31, 2003:

"Unless otherwise reduced by the commission under subsection (4) [providing securitization], the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on the effective date of the amendatory act that added this section [June 5, 2000] and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003, unless otherwise reduced by the commission under subsection (4)." (Emphasis added).

This provision necessarily disallows rate proceedings that would be inconsistent with the Legislature's rate cut and freeze. The legislative directive is clear, and must be enforced according to its plain meaning. Lorencz v Ford Motor Co, 439 Mich 370, 376; 483 NW2d 844 (1992). The Legislature is presumed to have intended the plain meaning of its mandate, which should not be treated as surplusage nor rendered nugatory. Attorney General v Sanilac County Drain Comm'r, 173 Mich App 526, 531; 434 NW2d 181 (1988). All of MEC/PIRGIM's arguments fail because they are inconsistent with the Legislature's clear directive for a rate cut and freeze.

Moreover, the Legislature is presumed to have been well aware of the law. Lenewee County Gas & Electric Co v City of Adrian, 209 Mich 52, 64; 176 NW 590 (1920). The Legislature cut and froze rates "[n]otwithstanding any other provision of law or commission order." There is no merit in MEC/PIRGIM's reliance on laws or orders that the Legislature superseded. MEC/PIRGIM's claim (e.g., brief, pp 4-7) that the legislation lacks specificity is untrue, as demonstrated by the legislation's plain language and the necessary effects of that language. There is no merit in MEC/PIRGIM's attempt to ignore or evade the Legislature's plain language to achieve a more "harmonious" result. Instead, the quoted language is clear and controlling, so it must be given effect. Therefore the Commission properly dismissed Edison's application, and MEC/PIRGIM's motion for rehearing and reconsideration should be denied.

II. AS A RESULT OF ACT 141, THIS CASE IS MOOT.

The Legislature has fully and conclusively resolved the matter before the

Commission, so Edison's application is moot. An issue is moot when an event occurs that renders it impossible for the decisionmaker, if it should decide in favor of the complainant, to grant any relief. Swinehart v Secretary of State, 27 Mich App 318, 320; 183 NW2d 397 (1970), lv den 384 Mich 801 (1971). Courts generally dismiss cases presenting only abstract questions that do not rest on existing facts or rights. B P 7 v Bureau of State Lottery, 231 Mich App 356, 359; 586 NW2d 117 (1998) (dismissing appeals because issue presented became moot when Legislature amended statute). See also International Union v Michigan, 211 Mich App 20, 29; 535 NW2d 210 (1995) (dismissing claims that had been rendered moot by subsequent developments); Plumbers and Pipefitters Local Union No 190 v Wolff, 141 Mich App 815, 818; 369 NW2d 237 (1985) (declining to address moot issues).

Ratemaking is a legislative function, and the Commission exercises its power solely by delegation from the Legislature. See, for example, Detroit Edison Co v Public Service Comm, 221 Mich App 370, 373; 562 NW2d 224 (1997), lv den 458 Mich 864 (1998); City of Detroit v Public Utilities Comm, 288 Mich 267, 287-89; 286 NW 368 (1939). The Legislature, which is the ultimate determiner of rates, has cut and frozen rates, through legislation that restructures Michigan's electric utility industry. Edison's application to implement a PSCR plan, which is designed to adjust rates for changes in the costs of fuel and purchased power, is obsolete under the new statutory framework for utility rates and regulation.

The Commission properly recognized that it would be inappropriate to conduct a PSCR plan case in light of the new and controlling legislation. The law changed before Edison's application was decided, so the Commission properly dismissed that

complaint. There is no merit in MEC/PIRGIM's contention that they have been deprived of their right to due process (brief, pp 14-15). The establishment of rates does not affect ratepayer property interests protected by due process. Public Utilities Comm of California v United States, 356 F2d 236, 241 (CA 9, 1966), cert den 385 US 816; 87 S Ct 35; 17 L Ed 2d 54 (1966); Georgia Power Project v Georgia Power Co, 409 F Supp 332 (ND GA, 1975); Holt v Yonce, 370 F Supp 374 (1973), aff'd without opinion 415 US 969; 94 S Ct 1553; 39 L Ed 2d 867 (1974); Sellers v Iowa Power & Light Co, 372 F Supp 1169, 1172 (1974); Consolidated Aluminum Corp v Tennessee Valley Authority, 462 F Supp 464 (1978); Hartford Consumer Activists Ass'n v Hausman, 381 F Supp 1275 (1974); Wood v Public Utilities Comm, 4 Cal 3d 288; 481 P2d 823 (1971).

Further, the Court of Appeals has upheld the Commission's authority to suspend a PSCR clause, and rejected arguments that a hearing is needed to explore speculative assertions. Midland Cogeneration Venture v Public Service Comm, unpublished opinion *per curiam* of the Court of Appeals, decided June 9, 2000 (Docket Nos. 209549, 209550, 209560, 209578 and 209579 (Slip Opinion attached as Appendix 1, at pp 7-8). The Court followed Attorney General v Public Service Comm, 231 Mich App 76, 79-82; 585 NW2d 310 (1998), lv den 590 NW2 577 (1999) ("Northern States"), which followed Attorney General v Public Service Comm, unpublished opinion *per curiam* of the Court of Appeals, decided January 20, 1998 (Docket Nos. 191496, 192000, 192001 and 192515) (attached as Appendix 2). The Midland Cogeneration Venture Court also recognized that the Attorney General's argument regarding Edison's PSCR clause was moot (Appendix 1, p 8).

III. MEC/PIRGIM ARE IMPROPERLY ATTEMPTING TO EXPAND THE SCOPE OF THE PSCR PROCEEDINGS.

Edison's application concerned only a PSCR plan for 2000. MEC/PIRGIM are now attempting, in effect, to transform Edison PSCR plan case into a vehicle to attack or evade Act 141. There is no authority to expand a case on rehearing. There are no "errors of law" or "unintended consequences" as required to meet the standard for rehearing. The law simply changed, and the Commission appropriately followed the new law by dismissing Edison's application.

MEC/PIRGIM erroneously proposes (brief, p 9) that, notwithstanding Act 141, the Commission should perform a non-rate review under MCL 460.6j(a)(3) through (7); MSA 22.13(6j)(a)(3) through (7) of Act 304. MEC/PIRGIM ignores the fact that subsections (3) and (4) plainly state that they are relevant only: "In order to implement the power supply cost recovery clause. . . ." Similarly, subsection (5) plainly states that it only applies: "If a utility files a power supply cost recovery plan and a 5-year forecast as provided in subsections (3) and (4)," in which case, the Commission shall conduct a power supply and cost review "to implement a power supply cost recovery clause incorporated in the electric rates or rate schedule of the utility." Subsection (6) plainly concerns only the Commission's ratemaking power to "approve, disapprove or amend the power supply cost recovery plan." Finally, subsection (7) merely provides that the Commission "may also indicate any cost items in the 5-year forecast that . . . the Commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future."

Since Act 304 concerns only ratemaking, and Act 141 has now cut and frozen rates, there is no factual basis for further Act 304 proceedings before the Commission on Edison's application for approval of a PSCR plan for 2000. Similarly, as a matter of law, the Commission's power is limited by statute, and the Commission lacks the non-ratemaking power to make the utility management decisions that MEC/PIRGIM proposes, so further Act 304 proceedings would be unauthorized and pointless here. Consumers Power Co v Public Service Comm, 460 Mich 148; 596 NW2d 126 (1999). MEC/PIRGIM's attempt (brief, pp 9-14) to expand the scope of these proceedings based on the testimony of its witnesses similarly fails as factually irrelevant and legally incorrect. Even before Act 141, that testimony was not proper in this PSCR case. Judge Rigas struck Martin G. Kushler's testimony because it was irrelevant to these proceedings (U-12121; 4/17/2000 TR 431-32). MRE 401, 402. Mr. Kushler essentially proposed that the Commission order Edison to implement demand side management ("DSM") programs. The Commission lacks the authority to mandate Edison to implement Mr. Kushler's proposals. Detroit Edison v Public Service Comm, 221 Mich App 370, 386-88; 562 NW2d 224 (1997), lv den 458 Mich 864 (1998) ("The PSC's power to fix and regulate rates does not carry with it, explicitly or implicitly, the power to make management decisions. . . The PSC here exceeded its ratemaking authority by, in effect, requiring Detroit Edison's management to adopt the DSM program the PSC thought best.").

The testimony of MEC/PIRGIM witness Ronald C. Callen is similarly flawed for any appropriate purpose in this case. Federal law requires Edison to collect a 1.0 mil

per kilowatt hour charge on electricity generated by Fermi 2. 42 USC § 10222(2). The Nuclear Waste Policy Act of 1982 assigned to the U.S. Department of Energy (“DOE”) Office of Civilian Radioactive Waste Management, the responsibility of building and placing into operation a permanent geologic repository for commercially generated spent nuclear fuel. MEC/PIRGIM essentially proposes that Edison should be held responsible for the DOE’s repeated delays in constructing such a facility. MEC/PIRGIM’s proposal is illegal and unfair. Edison has no option, short of violating federal law (and jeopardizing its Fermi 2 license), but to pay the federally-mandated charge.

Dr. Hsieh further explained, through MEC/PIRGIM cross examination in Case No. U-12121, that (1) the federal government has failed to take possession of any spent nuclear fuel, (2) Edison has joined several legal actions attempting to require the federal government to do so, and (3) Edison participated in a private spent nuclear fuel storage initiative and continues to actively monitor related industry events (U-12121, 2T 33-68). Mr. Callen merely adds the unsupported and incorrect proposition that Edison should be required to violate federal law, or have its shareholders guarantee the actions of the federal government. This proposition lacks merit and cannot properly form the basis for any decision by this Commission, for the reasons outlined above and more fully explained in (1) Edison’s April 10, 2000 motion to strike testimony of Messrs. Callen and Kushler filed on behalf of MEC/PIRGIM in Case No. U-12121, and (2) Edison’s May 15, 2000 response to motion for immediate consideration and for order to receive witness evidence and emergency application for leave to appeal filed on behalf of MEC/PIRGIM in Case No. U-12121, which Edison

incorporates by reference.

MEC/PIRGIM's attempt to expand the scope of this PSCR case was inappropriate before Act 141, and even more inappropriate as a purported basis for rehearing and consideration. To the extent that MEC/PIRGIM might have any issues that the Commission should hear, MEC/PIRGIM cannot be heard to complain (brief, p 11) about Act 141 or the lack of a forum to present their views, since the Commission's June 19, 2000 Opinion and Order in this case encouraged MEC/PIRGIM to participate in Case No. U-12487 and any subsequent cases involving the energy efficiency fund. On July 21, 2000, MEC/PIRGIM filed a petition to intervene in U-12478. Thus, in accordance with Act 141, it appears that MEC/PIRGIM now has, and is using, an alternative forum to present at least some of its views, which are completely outside the proper scope of this PSCR case.¹ Act 141 also sets forth provisions for future proceedings on matters that are relevant under the new statutory framework, as further explained below.

IV. MEC/PIRGIM'S RELIANCE ON ACT 141 IS MISPLACED.

MEC/PIRGIM cite sections 10d(2), (4), (5) and (7) of Act 141 (brief, p 7, n 2; pp 10-11, n 4) in an apparent attempt to suggest that the Legislature's clear and controlling directive in Section 10d(1) (quoted and explained above), somehow left room for alternative interpretations (which, tellingly, even MEC/PIRGIM cannot articulate). Instead, Section 10d(1) specifies a rate cut and freeze, which the

¹Edison reserves all rights and does not acknowledge any merit in MEC/PIRGIM's positions, but simply notes as a matter of fact that the positions are being presented in at least one other case.

Legislature reconfirmed in Sections 10d(2) and (7), subject to securitization under Sections 10d(4) and (5).

MEC/PIRGIM apparently contends that the Commission should conduct extensive proceedings and issue findings regarding stranded costs in this PSCR case. This contention fails for the reasons explained above, and also because MEC/PIRGIM ignore Section 10a(5), which reaffirms the Commission's prior stranded cost orders by relevantly providing:

"The orders issued by the commission before the effective date of the amendatory act that added this section that allow customers of an electric utility to choose an alternative electric supplier, including orders that determine and authorize recovery of net stranded costs and implementation costs and that confirm any voluntary commitments of electric utilities, are in compliance with this act and enforceable by the commission."

MEC/PIRGIM also ignore Section 10a(9), which provides for true-up proceedings in future 12-month periods:

"The commission shall, after a contested case proceeding, issue annually an order approving for each electric utility a true-up adjustment to reconcile any overcollections or undercollections of the preceding 12 months to ensure the recovery of all amounts of net stranded costs. The rates for customers remaining with an incumbent electric utility will not be affected by the true-up process under this subsection. The commission shall review the electric utility's stranded cost recovery charges and securitization charges implemented for the preceding 12 months, and adjust the stranded cost recovery charge, by way of supplemental surcharges or credits, to allow the netting of stranded costs."

Sections 10a(5) and 10a(9) expressly reaffirm the Commission's prior orders regarding stranded costs, and establish a procedure for Edison's recovery of

stranded costs on a going-forward basis. MEC/PIRGIM's apparent contention that the Commission should reopen this PSCR case to conduct such proceedings is unfounded and contrary to statutory language.

CONCLUSION AND RELIEF

The Commission properly dismissed Edison's application because that application sought relief that would be inconsistent with the plain language of Act 141. Edison's application is moot, and there is no authority to expand the scope of this PSCR case to essentially initiate new proceedings seeking to attack or evade Act 141. There is no legal error or unintended consequence that could justify rehearing. Therefore, The Detroit Edison Company respectfully requests that the Commission deny MEC/PIRGIM's motion for rehearing and reconsideration.

Respectfully submitted,

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