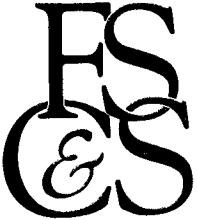


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August 9, 2000

Via Hand Delivery

Dorothy A. Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way, Suite 7
P. O. Box 30221
Lansing, MI 48909

Dear Ms. Wideman:

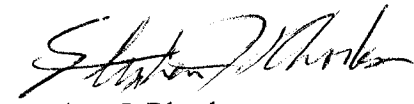
Re: The Detroit Edison Company, PSCR Plan, Case No. U-12121

Enclosed for filing are the original and four copies of The Detroit Edison Company's Brief in Answer to MEC and PIRGIM's Motion for Rehearing and Reconsideration, and Appendices. These document have also been filed electronically on the Commission's website. A Proof of Service is also enclosed.

Please contact me if you have any questions.

Sincerely,

FOSTER, SWIFT, COLLINS & SMITH, P.C.


Stephen J. Rhodes

SJR:jkc
Enclosures

cc: Parties of Record

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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**

FOSTER, SWIFT, COLLINS & SMITH P.C.
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By: Bruce R. Maters (P28080)
Jon P. Christinidis (P47352)

Dated: August 9, 2000

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

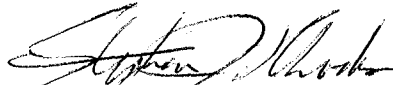
The Commission properly dismissed Edison's application because that application sought relief that would be inconsistent with the plain language of Act 141. Edison's application is moot, and there is no authority to expand the scope of this PSCR case to essentially initiate new proceedings seeking to 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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Attorneys for The Detroit Edison Company

Dated: August 9, 2000

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STATE OF MICHIGAN

AUG 01 2000

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

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

August 9, 2000

1. 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).
2. 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).

ATT. 1

STATE OF MICHIGAN
COURT OF APPEALS

MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP,

UNPUBLISHED
June 9, 2000

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, and THE
DETROIT EDISON COMPANY,

No. 209549
MPSC
LC Nos. 011290, 011451,
011452, 011453, 011454

Appellees/Cross-Appellees,

and

ATTORNEY GENERAL, STATE OF
MICHIGAN, ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY,
RESIDENTIAL RATEPAYERS CONSORTIUM,
MICHIGAN POWER LIMITED PARTNERSHIP,
ENERGY MICHIGAN, MICHIGAN
COMMUNITY ACTION, INDIANA MICHIGAN
POWER COMPANY, DOW CHEMICAL
COMPANY, MICHIGAN ELECTRIC COOP, and
NORTH AMERICAN NATURAL RESOURCES,
INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,
MICHIGAN SOUTH CENTRAL POWER
AGENCY, and THE CITY OF DETROIT

Cross-Appellants.

ATTORNEY GENERAL, STATE OF
MICHIGAN,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, and THE
DETROIT EDISON COMPANY,

No. 209550

MPSC

LC Nos. 011290, 011449,
011451, 011452, 011453,
011454

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY,
RESIDENTIAL RATEPAYERS CONSORTIUM,
MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP, MICHIGAN
COMMUNITY ACTION, INDIANA MICHIGAN
POWER COMPANY, MICHIGAN POWER
LIMITED PARTNERSHIP, DOW CHEMICAL
COMPANY, MICHIGAN ELECTRIC COOP, and
NORTH AMERICAN NATURAL RESOURCES,
INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

NORTH AMERICAN NATURAL RESOURCES,
INC.,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, and THE
DETROIT EDISON COMPANY,

No. 209560

MPSC

LC Nos. 011290, 011449,
011451, 011452, 011453,
011454, 011456

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, ATTORNEY
GENERAL, STATE OF MICHIGAN,
RESIDENTIAL RATEPAYERS CONSORTIUM,
MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP, ENERGY
MICHIGAN, MICHIGAN COMMUNITY
ACTION, INDIANA MICHIGAN POWER
COMPANY, and MICHIGAN ELECTRIC COOP,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

MICHIGAN POWER LIMITED PARTNERSHIP,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, and THE
DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, ATTORNEY
GENERAL, STATE OF MICHIGAN,
RESIDENTIAL RATEPAYERS CONSORTIUM,
MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP, MICHIGAN
COMMUNITY ACTION, INDIANA MICHIGAN
POWER COMPANY, MICHIGAN ELECTRIC
COOP, and NORTH AMERICAN NATURAL
RESOURCES, INC.,

Appellees,

and

No. 209578

MPSC

LC Nos. 011290, 011451,
011453, 011454

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

RESIDENTIAL RATEPAYERS CONSORTIUM,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, and THE
DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, MICHIGAN
POWER LIMITED PARTNERSHIP, MIDLAND
COGENERATION VENTURE LIMITED
PARTNERSHIP, ENERGY MICHIGAN,
INDIANA MICHIGAN POWER COMPANY,
DOW CHEMICAL COMPANY, MICHIGAN
ELECTRIC COOP, and NORTH AMERICAN
NATURAL RESOURCES, INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

No. 209579

MPSC

LC Nos. 011290, 011449,
011453

I. Facts

In these five consolidated appeals¹ filed by Midland Cogeneration Venture Limited Partnership (MCV), the Attorney General (AG), North American Natural Resources, Inc., Michigan Power Limited Partnership, and Residential Ratepayers Consortium (RRC), and cross-apps, appellants challenge a series of orders entered by the Michigan Public Service Commission (PSC) restructuring the electric utility industry in Michigan to provide for the separation or "unbundling" of electric power/energy and transmission/distribution services. We affirm in part and reverse in part.

In 1995 the PSC ordered the implementation of a retail wheeling program in Michigan on a limited, experimental basis. The term "retail wheeling" refers to a local utility's delivery of power to a customer, also known as an "end-user," in its service area. Retail wheeling differs from traditional electric service in that the customer makes arrangements for the purchase of power from another company, also known as a "third-party provider." That power is transmitted to the customer through the local utility's system.

While the PSC's initial order implementing retail wheeling was on appeal, the PSC conducted further proceedings and issued further orders. The PSC Staff outlined a proposed framework for restructuring the electric utility industry to provide for retail wheeling. After holding public hearings, the PSC adopted in part and modified in part the Staff recommendation on industry restructuring. The PSC ordered a gradual transition to full retail wheeling over a five-year period, requiring Consumers Energy Company (CE) and The Detroit Edison Company (DE) to increase their retail wheeling service periodically until the year 2002, at which time all of the utilities' retail customers would be eligible for the service. All third-party power suppliers whose electricity would be wheeled by the utilities would be required to provide reciprocal transmission service in their own territories. The PSC's order also provided for CE and DE to recover their so-called "stranded" costs resulting from the industry restructuring. Temporary surcharges, chargeable to customers receiving retail wheeling service through December 31, 2007, were established to recover stranded costs.

Thereafter, the PSC initiated various contested cases to address the utilities' proposals for implementing retail wheeling. The PSC then issued a series of orders adopting with modification the utilities' revised retail wheeling tariffs, adopting a "true-up" mechanism, i.e., a mechanism for adjusting for differences between estimated and actual market prices for power, applicable to stranded cost recoveries, and granting the utilities' requests to suspend their power supply cost

¹ Originally, this Court consolidated nine separate appeals in this matter. However, on July 1, 1999, this Court unconsolidated and dismissed three appeals filed by Detroit Edison company (Docket Nos. 204489, 209185, and 209900), pursuant to Detroit Edison's motion for voluntary dismissal. On October 29, 1999 this Court unconsolidated and dismissed the principal appeal filed by Consumers Energy Company pursuant to Consumers' motion for voluntary dismissal. The issues that Detroit Edison and Consumers Energy had raised are still before the court in the appeal filed by the Michigan Attorney General.

recovery (PSCR) clauses in their existing rates. Subsequently, the PSC issued orders responding to motions for rehearing and clarification.

In *In re Retail Wheeling Tariffs*, 227 Mich App 442; 575 NW2d 808 (1998), another panel of this Court affirmed the PSC's initial order implementing an experimental retail wheeling program. We held that the PSC had the statutory authority to implement the program, and that the PSC's order did not infringe on the right of the utilities to control their management activities.

After briefs were filed in the instant appeals, the Supreme Court decided *Consumers Power Co v Public Service Comm*, 460 Mich 148; 596 NW2d 126 (1999), in which it reversed our decision in *In re Retail Wheeling Tariffs*, *supra*. The Supreme Court held that the PSC's statutory authority to regulate rates and charges of utilities does not encompass the power to make management decisions. The decision to provide retail wheeling is a managerial decision; thus, the PSC has no authority to require the implementation of a retail wheeling program. *Id.* at 168. The decision did not determine whether the PSC has the authority to regulate retail wheeling programs which utilities adopt on a voluntary basis.

Following the Supreme Court's decision, the PSC requested that the parties submit briefs explaining the effect of the decision on the restructuring orders at issue in these appeals. The AG filed a motion for remand in the instant appeals, arguing that the PSC had no authority to reconsider its restructuring orders in light of the Supreme Court's decision, unless and until we remanded the cases to the PSC. We denied the AG's motion to remand. The PSC issued an order reasoning that while the Supreme Court's decision in *Consumers Power*, *supra*, 460 Mich 148, prohibited the mandating of retail wheeling programs, it did not prohibit the regulation of such programs offered on a voluntary basis. An appeal of that order is currently pending before this Court.

II. Analysis

All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of establishing by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. The substantial evidence standard of review does not apply to those aspects of a PSC order which involve a legislative, policy-making decision rather than an adjudication of disputed issues of fact. *Consumers Power Co v Public Service Comm*, 226 Mich App 12, 21, 32; 572 NW2d 222 (1997). We defer to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney General v Public Service Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994).

Statutory interpretation is a question of law subject to *de novo* review. Generally, we will defer to the construction placed on a statute by the governmental agency charged with interpreting it, unless the agency interpretation is clearly erroneous. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party's burden of proving by

clear and convincing evidence that the PSC's interpretation is unlawful or unreasonable. *In re MCI Telecommunications Complaint*, 229 Mich App 664, 681-682; 583 NW2d 458 (1998), *aff'd* in part and *rev'd* in part 460 Mich 396; 596 NW2d 164 (1999); *Attorney General v Public Service Comm*, 227 Mich App 148, 155; 575 NW2d 302 (1997).

The issues raised in the principal appeals and the cross-appeals can be grouped into four categories: (1) challenges to the PSC's decision mandating a transition to retail wheeling unbundling of electricity services; (2) challenges to the PSC's suspension of the utilities' PSCR clauses as part of the transition process; (3) challenges by the qualifying facilities (QFs) to the December 31, 2007 cut-off date established by the PSC for the recovery of certain power costs as part of the stranded costs resulting from the transition; and (4) miscellaneous matters.

1. Transition to Retail Wheeling

The issue of the PSC's authority to mandate the implementation of a retail wheeling program was decided by the Supreme Court in *Consumers Power, supra*, 460 Mich 184. Thus, those issues in the instant appeals challenging the PSC's authority in this regard require little discussion. The Supreme Court concluded that because the decision to provide retail wheeling service is a managerial decision, and because the PSC's statutory authority to regulate rates and charges does not include the power to make management decisions, the PSC was without authority to mandate the implementation of a retail wheeling program, even on a limited, experimental basis. *Id.* at 157-159. Therefore, the PSC was without the statutory authority to order restructuring of the electric industry to accommodate retail wheeling. Accordingly, we reverse the PSC's orders to the extent that those orders require utilities to provide retail wheeling service and mandate restructuring of the electric industry to provide for retail wheeling. We note that in its order issued after the decision in *Consumers Power, supra*, 460 Mich 184, the PSC acknowledged that it could not require utilities to provide retail wheeling.

In light of the Supreme Court's decision in *Consumers Power, supra*, 460 Mich 148, we deem it unnecessary to reach appellants' remaining issues challenging the PSC's authority to mandate retail wheeling on other grounds.

2. PSCR Clause Suspension

Initially, the AG, RRC, and cross-appellants argue that the PSC lacked express or implied authority to suspend PSCR clauses previously implemented under MCL 460.6j(2); MSA 22.13(6j)(2). We disagree. In *Attorney General v Public Service Comm*, 231 Mich App 76; 585 NW2d 310 (1998) (hereinafter referred to as "*Northern States*"), another panel of this Court held that the authority to temporarily suspend PSCR clauses is implicit in the PSC's authority under MCL 460.6j; MSA 22.13(6j) to incorporate PSCR clauses. *Northern States, supra* at 78-80. The Supreme Court has repeatedly held that the statutory authority of administrative boards and commissions such as the PSC may be established by necessary or fair implication. See, e.g., *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 147; 428 NW2d 322 (1988). *Northern States, supra*, is consistent with this authority; thus, we decline the AG's invitation to invoke the conflicts rule. MCR 7.215(H).

Furthermore, while the PSC noted that suspending the utilities' PSCR clauses during the transition to retail wheeling would protect ratepayers in the event of a power supply cost increase, the PSC rejected the argument that PSCR clauses can be suspended only if the evidence established that rates would be lower than if the clauses remained in place. The PSC may suspend a PSCR clause without conducting a contested case hearing if the suspension does not result in a rate increase. *Northern States, supra* at 81-82. Indeed, if the potential loss of a rate decrease is insufficient to require the PSC to conduct an evidentiary hearing before suspending a PSCR, *id.*, it follows that evidence that suspending a PSCR clause will not result in the loss of a future rate decrease is not required for the PSC to suspend a PSCR clause.

Moreover, contrary to the AG's assertion, the PSC's decision to grant rehearing relief and change the threshold for implementation of the PSCR clause suspensions, and its subsequent decision to accept CE's immediate PSCR suspension proposal, was not based upon mere reconsideration of arguments previously addressed and rejected. The PSC has "full power and authority to grant rehearings and to alter, amend or modify its findings and orders." MCL 460.351; MSA 22.111. The decision to change the threshold for implementing the PSCR clause suspensions was based on changes in the certainty of the utilities' retail wheeling access transition schedules. The decision to adopt CE's new proposal for an immediate suspension of its PSCR clause was made in light of new authority from this Court holding that MCL 460.6j(2); MSA 22.13(6j)(2) does not require the holding of a contested case hearing when the suspension would not result in a rate increase. *Northern States, supra* at 81. The PSC did not abuse its discretion or act unreasonably or unlawfully by granting rehearing relief.

Next, we hold that annual reconciliations of power supply costs and revenues under 1982 PA 302 are not required after a utility's PSCR clause has been suspended. MCL 460.6k(3); MSA 22.13(6k)(3) provides that a utility's power supply costs are subject to annual reconciliation; however, MCL 460.6k(1); MSA 22.13(6k)(1) specifically provides that the section governs the "initial filing and implementation" of a PSCR plan. We defer to the PSC's interpretation and application of MCL 460.6k; MSA 22.13(6k), and decline to conclude that the PSC's decision was unlawful or unreasonable simply because the statute is subject to another plausible interpretation. *Attorney General, supra*, 227 Mich App at 155.

Finally, we conclude that the AG's argument that the PSC's decision to suspend DE's PSCR clause constituted an unlawful modification of prior settlement agreements affecting the PSCR clause is moot. DE has indicated that it no longer desires suspension of the PSCR clause, and has requested that the PSC vacate its suspension order.

3. Stranded Cost Recovery

Various appellants argue that by establishing a December 31, 2007 cut-off date for recovery of stranded costs, including QF capacity costs arising under CE's thirty-five year power purchase agreement with MCV, the PSC failed to specifically provide for the recovery of previously approved capacity costs after December 31, 2007. Appellants assert that this failure violates the PSC's previous orders in other proceedings, which approved recovery of costs arising over the entire term of the agreement between CE and MCV. Appellants contend that to the extent that the PSC has restricted recovery of costs after 2007, it has violated the prohibition in

1981 PA 81 against reconsideration of approved QF capacity charges during the first seventeen and one-half years of the power purchase agreement.

These issues are not ripe for appellate review. In an order responding to motions for clarification, the PSC specifically reiterated that it was not modifying previously approved capacity charges, or otherwise affecting the rights of QFs under existing contracts. Even assuming arguendo that the PSC's statement that utilities could "seek" recovery of costs after 2007 could be interpreted as suggesting that some costs might be disallowed, such a ruling would constitute mere speculative dicta that is not subject to judicial review. *Attorney General v Public Service Comm*, 235 Mich App 308, 316-317; 597 NW2d 264 (1999). No unequivocal disallowance of any costs has been made. Cf. *ABATE v Public Service Comm*, 219 Mich App 653, 662-663; 557 NW2d 918 (1996). Moreover, in a subsequent order, the PSC acknowledged the decision of the United States District Court for the Western District of Michigan in *North American Natural Resources, Inc, et al v Michigan Public Service Comm*, Case No. 5:98-CV-22, which prohibited the PSC from enforcing portions of its restructuring orders in a manner contrary to the requirements of the Public Utility Regulatory Policies Act of 1978, 15 USC 3201 *et seq*. The PSC emphasized that it would comply with the federal court decision, but correctly noted that no actual controversy regarding recovery of costs could occur until the year 2008 at the earliest.

4. Miscellaneous Issues

The AG argues that the PSC lacks the power to authorize CE and DE to recover stranded costs because no statute specifically grants such power. We disagree. No statute expressly authorizes the recovery of costs that have become stranded due to regulatory changes; however, the Legislature has broadly authorized the PSC to consider all relevant factors in determining rates. Such factors may include the cost of a utility's prudent expenditures and investments which later prove to be unusable or obsolete. The recovery of costs need not be contemporaneous with the period in which the expenditures are made. *ABATE v Public Service Comm*, 208 Mich App 248, 258-260; 527 NW2d 533 (1994).

Next, the AG argues that the PSC's reciprocity requirement imposed on competitors for retail wheeling transmission customers is unlawful as an impermissible burden on interstate commerce. This issue is rendered moot by our reversal of those portions of the PSC's orders which mandate restructuring of the electricity utility industry. The federal commerce clause, US Const, art 1, § 8, cl. 3, is a restraint on state action, and is not implicated in private, voluntary action not mandated by state law. Therefore, if utilities, acting on a private, voluntary basis, condition retail wheeling on reciprocity, the commerce clause is not violated.

Finally, cross-appellants argue that the PSC acted unlawfully by failing to conduct earlier proceedings in accordance with the Administrative Procedures Act, MCL 24.201 *et seq*; MSA 3.560(101) *et seq*., and then making substantive decisions affecting industry reform based on those earlier, defective proceedings. We disagree. A contested case hearing is not required when the PSC merely creates a framework for deciding matters in future contested case proceedings. *Attorney General, supra*, 227 Mich App at 148.

We reverse those portions of the PSC's orders that mandate restructuring of the electric utility industry to accommodate retail wheeling, but hold that the remaining aspects of the restructuring program, i.e., PSCR suspension and stranded cost recovery, can be applied to any retail wheeling activity in which the utilities voluntarily decide to engage. In all other respects, the PSC's orders are affirmed.

Affirmed in part and reversed in part.

/s/ Donald E. Holbrook, Jr.

/s/ Michael R. Smolenski

/s/ Jeffrey G. Collins

STATE OF MICHIGAN
COURT OF APPEALS

ATT. 2

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and WISCONSIN ELECTRIC POWER
COMPANY,

Defendant-Appellees.

UNPUBLISHED

January 20, 1998

No. 191946

Public Service Commission

LC No. 00010994

MICHIGAN COMMUNITY ACTION AGENCY
ASSOCIATION,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and WISCONSIN ELECTRIC POWER
COMPANY,

Defendant-Appellees.

No. 192000

Public Service Commission

LC No. 00010944

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and EDISON SAULT ELECTRIC COMPANY,

Defendant-Appellees.

No. 192001

Public Service Commission

LC No. 00010923

MICHIGAN COMMUNITY ACTION AGENCY
ASSOCIATION,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and WISCONSIN ELECTRIC POWER
COMPANY,

No. 192515
Public Service Commission
LC No. 00010970

Defendant-Appellees.

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

In these consolidated cases, appellants Attorney General and Michigan Community Action Agency Association appeal as of right from orders of the Michigan Public Service Commission (PSC) allowing appellees Wisconsin Electric Power Company and Edison Sault Electric Company to suspend their Power Supply Cost Recovery (PSCR) clauses. We affirm the orders of the PSC.

In docket numbers 191946 and 192000, appellants argue that the PSC erred by suspending Wisconsin Electric's PSCR clause without a contested case hearing and that the PSC erred by determining that the suspension of the PSCR clause would not result in a rate increase to customers. In docket number 191946, appellant also argues that the PSC unlawfully allowed Wisconsin Electric to withdraw its 1996 PSCR plan case after it suspended use of the PSCR clause. In docket number 192515, appellant raises a similar issue about the propriety of the PSC allowing Wisconsin Electric to withdraw its PSCR plan. In docket number 192001, appellant argues the PSC does not have authority to suspend a PSCR clause without a contested case hearing, as it did with Edison Sault's PSCR clause; that because it raised a question as to whether Edison Sault's application was going to result in a rate increase, a hearing should have been held; and that the PSC does not have authority to implement a price caps approach to ratemaking¹. In these consolidated cases, the issues are more succinctly stated as follows: whether the PSC may suspend a PSCR clause without a contested case hearing; whether the PSC erred by determining that the suspension of the PSCR clauses in these cases would not result in rate increases; whether the PSC had authority to allow Wisconsin electric to withdraw its 1996 PSCR plan case; and whether the PSC has authority to implement a price caps approach to ratemaking.

First, the PSC had authority to suspend the PSCR clauses without holding contested case hearings, contrary to appellants claims. MCL 460.6a; MSA 22.13(6a) provides:

- (1) When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall

be given within the service area to be affected . . . After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. . . . An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing.

Under the statute, the PSC had authority to act without a hearing if suspension of the PSCR clauses would not result in rate increases. We reject appellants' arguments that MCL 460.6j(2); MSA 22.13(6j)(2) requires a contested case hearing for the suspension of a PSCR clause. That provision makes clear the PSC *may* incorporate PSCR clauses, but is not required to do so. If it chooses to do so, it must hold a contested case hearing. The provision speaks only to the discretionary inclusion of a PSCR clause.

In this case, the utilities folded the current PSCR reduction into their base rates after the PSCR clauses were suspended. Because the current reductions were folded into the base rates, there is no question that the change did not result in an increase in the cost of service. Therefore, the PSC had authority to approve the suspension without notice or a hearing. MCL 460.6a; MSA 22.13 (6a).

Appellants also argue, however, that without the PSCR clause, future rate reductions that may have resulted by a further decline in the PSCR factor will be eliminated, resulting in increased costs to customers. For that reason, they argue a contested case hearing was required. The PSC disagreed because the possibility of future increased costs was too speculative to merit a contested case hearing. We agree. Our review of the PSC's orders is limited. In reviewing decisions of the PSC, we must give due deference to its administrative expertise and may not substitute our judgment for that of the PSC. *Attorney General v PSC*, 206 Mich App 290, 294; 520 NW2d 636 (1994). Appellants bear the burden of proving by clear evidence that the orders of the PSC are unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). A potential reduction in a PSCR factor does not constitute an increase so as to warrant a hearing under the statute. In *Attorney General, supra*, the plaintiffs argued that an order regarding Consumer Power Company's rates should be reversed because it increased the cost of service without notice and an opportunity for hearing. The order provided that the company was to spend at least \$200 million on O & M expenses, or pay certain refunds. This Court rejected the plaintiff's argument, finding that a *potential* refund does not increase the rate charged to customers. *Id.* at 295 (emphasis added). "The order approving the agreement did not increase the rates." *Id.* Similarly, we find that a potential reduction in a PSCR factor, which may result in a future rate reduction, does not constitute an increase under the statute. There is no evidence, other than by speculation, to support a finding that the PSC's order was unlawful or unreasonable or resulted in increased rates. Because there is no authority limiting the PSC's ability to suspend a PSCR clause and because MCL 460.6(a)(1); MSA 22.13(6a)(1) allows the PSC to approve rate changes without a hearing when no increase in costs of service to customers will result, contested case hearings were not necessary in these cases.

We also note that if power supply costs decline in the future, appellants have the ability to complain to the PSC that the utilities rates are unjust, inaccurate or improper. MCL 460.58; MSA 22.8, MCL 460.557; MSA 22.157. The PSC must then conduct an investigation into the matter.

Next, appellants argue that the PSC erred when it allowed Wisconsin Electric to withdraw its 1996 PSCR plan, which was filed prior to its application to suspend its PSCR clause. The plan was withdrawn only after the PSC allowed Wisconsin Electric to suspend its PSCR clause. Given that it was not going to be using a PSCR clause, there was no need for the PSC to conduct a hearing with regard to the PSCR plan for Wisconsin Electric for the upcoming years. The proceeding was moot given the suspension of the use of a PSCR clause and no purpose would have been served by conducting a hearing with regard to that plan.

Appellants also argue that the PSC did not have authority to allow Edison Sault to implement a price caps approach to ratemaking. We disagree. The PSC has the "power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of 'public utilities'." MCL 460.6; MSA 22.13(6). See also MCL 460.6a(1); MSA 22.13(6a)(1), which makes the PSC responsible for setting electrical utility rates. While, the PSC is statutorily responsible for setting such rates, there is no statute that requires the PSC to use a specific method to calculate rates. Appellants cite to no authority prohibiting the PSC from implementing flexible ratemaking procedures, such as the one at issue. The PSC determined that Edison Sault's proposal was reasonable and in the public interest. The rates under the proposal were equal to existing rates. Appellants have not produced evidence that the rates or ratemaking structure were unreasonable or unlawful. Therefore, we find no error requiring reversal or remand. Moreover, we note that should Edison Sault wish to increase its rates under the new ratemaking procedure, it must, pursuant to the PSC order, file an application seeking an increase. MCL 460.6a; MSA 22.13(6a) requires notice and hearing under such circumstances.

Finally, we note that ratemaking is a legislative function rather than a judicial function, and the concepts of res judicata and collateral estoppel do not preclude the PSC from changing methods for determining proper rates. See *Pennwalt Corp v PSC*, 166 Mich App 1, 9; 240 NW2d 156 (1988).

Affirmed.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White

¹ We also note that appellant argues in docket number 192001 that it should not be barred from intervening and challenging the actions of the PSC even though it did not do so in a timely manner. This issue is moot because, although appellant did not timely object to the initial order of the PSC in this case, the PSC subsequently allowed appellant to intervene and it then decided the issues on the merits.

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-12121

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

I declare that the statements above are true to the best of my information, knowledge and belief.

Julia ~~K~~. Carlson

SERVICE LIST

MPSC Case No. U-12121

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