

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 OPPOSING MEC AND
PIRGIM'S MOTION TO STRIKE PORTIONS OF EDISON'S BRIEF
IN ANSWER TO MEC AND PIRGIM'S MOTION FOR
REHEARING AND RECONSIDERATION**

**FOSTER, SWIFT, COLLINS & SMITH P.C.
Attorneys for The Detroit Edison Company
313 S. Washington Square
Lansing, MI 48933-2193
(517) 371-8100**

**By: William K. Fahey (P27745)
Stephen J. Rhodes (P40112)**

**THE DETROIT EDISON COMPANY
2000 Second Avenue, Room 688 WCB
Detroit, MI 48226-1203
(313) 235-8340**

**By: Bruce R. Maters (P28080)
Jon P. Christinidis (P47352)**

Dated: August 23, 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 a motion for rehearing and reconsideration. On August 9, 2000, Edison filed an answer explaining that rehearing and reconsideration should be denied.

MEC/PIRGIM now move to strike pages 7-8 of Edison’s brief. In response, Edison submits this brief explaining the motion should be denied. Edison notes that MEC/PIRGIM’s brief in support of its motion to strike is primarily a reply brief supporting MEC/PIRGIM’s motion for rehearing and reconsideration. Edison declines to specifically respond to that reply brief, since it merely rehashes arguments that fail for the reasons outlined in Edison’s August 9, 2000 brief, and the additional authorities and filings cited therein. Edison’s reliance on its prior filings and avoidance of repetition should not be deemed to constitute an acceptance of MEC/PIRGIM’s positions in any way.

DISCUSSION

THERE IS NO BASIS TO STRIKE EDISON’S RESPONSIVE ARGUMENTS.

MEC/PIRGIM move to strike two pages of Edison’s brief, claiming that Edison’s

arguments are “premature”, “inappropriate”, and “beyond the scope” of MEC/PIRGIM’s motion, and that Edison is attempting to “sandbag” MEC/PIRGIM (motion to strike, ¶¶ 1-5, and supporting brief). MEC/PIRGIM mischaracterizes Edison’s response. MEC/PIRGIM’s brief in support of its motion for rehearing and reconsideration devoted six pages (9-14) to an attempt to expand the scope of these proceedings, based on the testimony of MEC/PIRGIM witnesses, Martin G. Kushler and Ronald C. Callen. Edison had a right to respond under Rule 403 of the Commission’s Rules of Practice and Procedure, R 460.17403(2). Edison could have presented a detailed response to MEC/PIRGIM’s allegations. Instead, Edison outlined in just two pages (three paragraphs, at brief, pp 7-8) that (1) Judge Rigas struck Mr. Kushler’s testimony as irrelevant (U-12121; 4/17/00 TR, pp 431-32) and (2) both Mr. Kushler’s and Mr. Callen’s proposals fail as a matter of law, since it would be inappropriate or unauthorized for the Commission to order Edison to undertake various activities such as violating federal law. See generally Detroit Edison v Public Service Comm, 221 Mich App 370, 386-88; 562 NW2d 224 (1997), lv den 458 Mich 864 (1998).

The brevity of Edison’s response in relation to MEC/PIRGIM’s wide-ranging allegations demonstrates that there is no merit in MEC/PIRGIM’s pending motion to strike. Indeed, MEC/PIRGIM’s brief in support of that motion devotes another 6 pages (6-11, for a total of 12 pages) to the testimony of MEC/PIRGIM’s witnesses. Edison stands on its prior brief and declines to further digress on this matter. To dispose of the motion to strike, it is sufficient to observe that MEC/PIRGIM cannot be heard to complain about Edison’s two-page response to arguments that

MEC/PIRGIM raised in its own voluminous filings.

MEC/PIRGIM's attempt to raise a due process issue similarly lacks merit (motion to strike, ¶ 4). Edison previously explained (August 9, 2000 brief, p 5) that the establishment of rates does not affect ratepayer property interests protected by due process. MEC/PIRGIM does not dispute this principle. Instead, MEC/PIRGIM claims "substantive procedural" rights that somehow arise and exist apart from the ultimate relief possible in these proceedings (motion to strike, ¶ 4, and supporting brief, pp 4-5). MEC/PIRGIM's allegations fail because 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. Further proceedings would be unauthorized and pointless in light of the new and controlling legislation (See Edison's brief opposing motion for rehearing and reconsideration, pp 2-9).

Since Act 141 controls the outcome of this proceeding, there is no due process issue, and MEC/PIRGIM's motion for rehearing and reconsideration and motion to strike lack merit and are moot. See In re Sprint Complaint, 234 Mich App 23, 42; 592 NW2d 825 (1999) (rejecting due process argument where the Commission indicated that its decision would have been the same irrespective of whether the Commission considered additional evidence); Attorney General v Public Service Comm, 173 Mich App 47, 50; 433 NW2d 816 (1988) (affirming Commission's denial of motion to strike for lack of merit on the record).

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, Edison respectfully requests that the Commission deny MEC/PIRGIM's motion for rehearing and reconsideration. In accordance with that denial, Edison further requests that the Commission deny MEC/PIRGIM's motion to strike for mootness and lack of merit.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for The Detroit Edison Company



By:

William K. Fahey (P27745)
Stephen J. Rhodes (P40112)

313 S. Washington Square
Lansing, MI 48933-2193
(517) 371-8100

THE DETROIT EDISON COMPANY

By: Bruce R. Maters (P28080)
Jon P. Christinidis (P47352)
2000 Second Avenue, Room 688 WCB
Detroit, MI 48226-1203
(313) 235-7481

Dated: August 23, 2000