S T A T E   O F   M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition of **CONSUMERS ENERGY COMPANY** to rescind the Commission's June 12, 1992 Opinion and Order in Case No. U-9586 and to approve an alternative capacity solicitation process.	)	Case No. U-12148
In the matter of the petition of **THE DETROIT EDISON COMPANY** to establish a revised procedure for future capacity solicitations.	)	Case No. U-12177

At the April 11, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On September 30, 1999, Consumers Energy Company (Consumers) filed a petition in Case No. U-12148 requesting that the Commission rescind the June 12, 1992 order in Case No. U-9586 and approve an alternative capacity solicitation process. On October 25, 1999, The Detroit Edison Company (Detroit Edison) filed a similar petition in Case No. U-12177 requesting that the Commission rescind the July 22, 1992 order in Cases Nos. U-8869-DE and U-9798 and approve an alternative capacity solicitation process.

Consumers and Detroit Edison propose that the Commission approve essentially the same process:

1. The utility would file annually a report outlining its expected summer generating capacity needs and the manner in which it expects to meet those needs. Interested persons would have an opportunity to comment, but there would be no hearing on the report.

2. To the extent the utility proposed to meet its capacity needs by entering into contracts with a term in excess of one year, it would use a standard request for proposal (RFP), which was attached to the application.

3. The utility would make available to the Commission Staff (Staff) for its review all offers received in response to the RFP and all contracts entered into as a result of the RFP, although it proposes to do so in a manner that would not result in the public disclosure of the terms of the offers. To the extent that approval of the contracts is required pursuant to Section 6j of 1982 PA 304 (Act 304), MCL 406.6j; MSA 22.13(6j), it would seek those approvals.

Energy Michigan and Attorney General Jennifer M. Granholm (Attorney General) filed objections to Consumers' petition. Energy Michigan, the Attorney General, and the Association of Businesses Advocating Tariff Equity (ABATE) filed objections to Detroit Edison's petition and requests to intervene. On December 16, 1999, the Commission issued an order on each petition concluding that a contested case hearing was not required and establishing a schedule for interested parties to file comments on the proposals.[1]

On January 18, 2000, Energy Michigan, ABATE, and the Attorney General filed comments on Consumers' and Detroit Edison's proposals. The Attorney General's filing also sought rehearing of the December 16, 1999 order with respect to Detroit Edison. On February 1, 2000, Consumers

[1]The captions for those orders included the case numbers from the prior orders that approved the capacity solicitation process because Consumers had filed its petition with the prior case number and it ensured notice to the parties to the prior cases.

and Detroit Edison filed reply comments.[2] On February 8, 2000, ABATE filed responses to Consumers and Detroit Edison. Also on February 8, 2000, the Staff filed comments in both dockets and motions for the Commission to accept those comments.[3]

Petition for Rehearing

The Attorney General argues that, pursuant to MCL 462.24; MSA 22.43,[4] the Commission cannot approve the petitions without first conducting a hearing because the utilities seek the rescission of prior orders. That section cannot be read in isolation. MCL 460.6a; MSA 22.13(6a) authorizes the Commission to issue an order without notice or a hearing when the result will not be an increase in the cost of service. The later, specific statute that created the Commission and authorizes it to act without providing notice or an opportunity for a hearing prevails over the earlier, more general statute that created a predecessor agency. The Attorney General argues that the Commission cannot say that rescinding the prior orders will not cause an increase in rates or the cost of service, but the rescission of the prior orders has no immediate effect on the rates or the cost of service for either utility. If a utility seeks to recover the costs of new capacity, that will likely occur in a power supply cost recovery (PSCR) case or a general rate case, both of which are conducted as contested cases. If a utility seeks recovery in another context, the Attorney General can renew the request for a hearing at that time.

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[2]In its reply comments, Detroit Edison suggested that the Attorney General's request for rehearing was untimely. On February 4, 2000, the Attorney General filed a response to that claim. The Attorney General's petition for rehearing was timely because the date for filing fell on a weekend and was therefore extended to the next business day. MCL 8.6; MSA 2.217.

[3]The Commission grants the Staff's motions.

[4]"The commission may, at any time . . ., and upon at least 10 days' notice . . . and after opportunity to be heard . . . rescind, alter or amend any order . . .."

Contrary to the Attorney General's argument, the Administrative Procedures Act (APA), MCL 24.201 et seq.; MSA 3.560(101) et seq., does not require a hearing. Section 3 of the APA does not create a right to a hearing, but rather defines a contested case as a proceeding "required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3); MSA 3.560(103)(3). As discussed above, the law does not require an evidentiary hearing on these petitions. Section 87 of the APA, MCL 24.287; MSA 3.560(187), also does not require a hearing. The petitions filed by Consumers and Detroit Edison are not petitions for rehearing of the prior orders within the scope of Section 87 because they were not filed within the time to appeal the original orders. The petitions are new applications seeking approval of a new capacity solicitation process. Section 87 therefore does not govern.[5]

Need for a New Process

Consumers and Detroit Edison assert that there have been significant changes since 1992 that render the capacity solicitation process approved at that time no longer suitable. The commenting parties do not seriously contend that there have been no changes in circumstances. Rather they argue that the proposed alternative process is deficient, as discussed below, or cannot be approved outside the context of a contested case, as discussed above.

The Commission concludes that the changes in the regulatory and operating environment are sufficient to warrant approval of more flexible procedures for utilities to obtain new capacity.

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[5]The Attorney General's argument on rehearing, if accepted, would prevent the Commission from approving even a reduction in rates without a hearing, contrary to MCL 460.6a; MSA 22.13(6a), because the reduction would be an amendment to, or rehearing of, the prior order that approved the rates being reduced. The Commission's longstanding practice has been to issue an order in a new docket that supersedes the prior order. For that reason, there is no need to rescind or vacate the prior orders that approved the capacity solicitation process. Those orders, and the process they approved, are superseded by this order and the new process.

After it issued the orders in 1992, the Commission commenced the restructuring of the electric industry and approved a retail wheeling experiment for both companies, Rate DA for Consumers, and a program for full retail open access for both companies. Implementation of retail open access is now underway. The Federal Energy Regulatory Commission has taken steps to promote wholesale competition and access to the transmission system, and Congress has enacted legislation to promote competition as well. Although the Commission is not satisfied with the pace at which competition is developing in Michigan, it is also not persuaded that retention of the prior capacity solicitation process, which relied extensively upon contested case proceedings, will promote competition. Accordingly, subject to the discussion below, the Commission concludes that the utilities should be permitted to implement their proposals. Approval of the new process does not relieve the utilities of responsibility for obtaining sufficient capacity to meet the needs of their customers. If anything, the greater flexibility granted to the utilities increases their responsibility for successfully obtaining any needed capacity.

Comments

The Staff asks the Commission to rule that the new process will apply to all capacity additions. Energy Michigan asks the Commission to rule that the new process will apply to all contracts with a term of more than six months and that the utilities cannot roll over short-term contracts to avoid that requirement. The Attorney General says that the process is deficient in failing to address contracts with a term of one year or less. The Commission concludes that the process should apply equally to all plans to obtain new capacity, whether purchased or constructed, because the same concerns are implicated whether the utility plans to purchase or construct capacity.[6] Therefore, the process will apply to all contracts with a term of more than one year and to all construction that adds capacity. The Commission concludes that extending the process to short-term contracts, especially those that become available on short notice, would impose regulatory burdens and would impair the utility's ability to take advantage of short-term contracts without creating an offsetting gain.[7] The Commission does not intend this greater flexibility to be used to evade the new process. Accordingly, the burden will be on the utility to show that a series of short-term contracts should not be treated as a long-term contract. Furthermore, the exclusion from the process of short-term purchases does not affect the requirement of Act 304 that the Commission must disapprove all capacity charges associated with power purchased for more than six months unless the utility has obtained prior approval or the requirement of Act 304 that the Commission must review all power supply costs, which addresses ABATE's concern that the Commission should review all contracts with a term of two to five years.

Energy Michigan asks the Commission to rule that the utilities may not purchase any capacity from affiliates or at least that it will not approve the purchase of capacity from affiliates that use transferred utility assets unless the transfer resulted from the affiliate's making the highest bid in a public auction. ABATE asks the Commission to rule that the utilities may not purchase from affiliates or that such purchases will be subject to contested case proceedings and that any excess

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[6]Construction is not limited to new facilities, but includes repowering retired facilities and altering existing facilities to increase their capacity.

[7]The process applies to contracts with a term of more than one year even if they become available on short notice. This is not likely to become an issue because the utilities say they do not plan to enter into long-term contracts. In any event, the Commission does not find it appropriate to exclude from the process all contracts that become available on short notice.

of the contract price over the market price will be imputed to the utility as revenue for ratemaking purposes. The Staff recommends contested case proceedings to review any purchase from an affiliated exempt wholesale generator (EWG). The Attorney General also expresses concern about affiliate transactions. The parties fail to cite any statutory provision that empowers the Commission to prohibit the purchase of capacity from an affiliate. If a utility seeks to recover the costs of capacity obtained from an affiliate, the Commission will examine all of the circumstances in determining whether the costs may be passed through to customers. Furthermore, federal law requires a utility to obtain Commission approval to purchase energy from an affiliated EWG, 15 USC 79z-5a(k), and Commission approval to transfer utility assets to an EWG, 15 USC 79z-5a(c). The Commission cannot rule that it would never approve such requests under any circumstances and will not rule that a contested case proceeding is always required. On the other hand, the Commission's approval of the new capacity solicitation process is not the prior approval needed under federal law for a utility to purchase energy from an affiliated EWG. The Commission will address affiliate transactions, and fashion any needed remedies, as the issue arises in the context of future applications. As in the past, the Commission will not countenance an affiliate transaction designed to bypass the capacity solicitation process.

Energy Michigan asks the Commission to rule that the terms of all bids will be publicly disclosed and that there be full disclosure of the winning bids. ABATE asks the Commission to rule that the utilities must disclose the price of all purchased capacity. The Attorney General has a concern about the nondisclosure of information. The Commission does not conclude that public disclosure of bids or contracts is always required. The Staff will have access to all bid and contract information, and it is not obvious that further disclosure is necessary or appropriate if the utility is not seeking to recover the costs of a contract.[8] When a utility seeks to recover the costs, the Commission will protect the competitively sensitive information from disclosure to the extent the utility's request for nondisclosure is appropriate and complies with the law. On the other hand, the Commission also recognizes that a vibrant competitive marketplace is dependent on accurate and timely pricing information, and will assure that such information is available to those attempting to participate in the marketplace.

ABATE asks the Commission to rule that the utilities may not enter into contracts with a term of more than five years and that none of the capacity obtained under the new process can result in stranded costs. The Commission declines to so rule. Both utilities say that they are not likely to enter into long-term contracts at this time, but also seek greater freedom to decide the terms under which they will obtain capacity. With greater freedom to obtain capacity comes greater responsibility for the consequences of those decisions. Accordingly, a utility must decide for itself the term of the contracts it will sign. If it nevertheless enters into a long-term contract, or enters into a contract that it claims created stranded costs, the utility is free to seek recovery of the costs. The Commission will consider all of the circumstances in deciding whether the utility incurred the costs through reasonable and prudent management decisions and, with respect to additional stranded costs, will place a heavy burden of proof on the utility.

The Attorney General says that the process permits the utilities to satisfy a long-term need for capacity with short-term contracts without regard to the economic consequences and provides the utilities with total discretion without adequate standards for review. The Commission disagrees

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[8] Consumers' PSCR factor was frozen through 2001 pursuant to the October 29, 1997 order in Case No. U-11453 and the February 11, 1998 order in Case No. U-11290. On March 31, 2000, Consumers filed an application to reinstate its PSCR clause.

because any request by a utility to recover the costs of additional capacity will be reviewed for reasonableness and prudence in a contested case proceeding.

Energy Michigan asks the Commission to rule that if the utility fails to follow the approved process, the utility must redetermine the winning bidder and compensate the losing bidders for their time and effort in preparing their bids and that if the utility fails to award the contract to the lowest bidder, it cannot recover any costs of the accepted bid until it complies. The Commission declines to go as far as Energy Michigan suggests. It does not cite authority for the Commission to require a utility to compensate unsuccessful bidders or to deny all recovery. The Commission does have authority to determine the costs that the utility may recover from its customers, and will exercise that authority.

Energy Michigan asks the Commission to set a schedule that will provide sufficient time for potential bidders to respond to an RFP. The Commission agrees that a utility should routinely announce the need for capacity with a lead time that permits a meaningful response, but the timing of each RFP must depend on the circumstances. The circumstances surrounding the issuance of an RFP will be evaluated for their reasonableness and the effect on the costs that the utility seeks to recover.

ABATE says that there must be a process for addressing any objections that the Staff may raise regarding the results of the bidding process. The Commission does not agree that greater specificity is required at this time. Energy Michigan asks the Commission to rule that all RFP documents must be reviewed and approved by the Commission. The Commission does not agree at this time. The concerns of both ABATE and Energy Michigan have merit. However, at this time, the Commission is prepared to accept that the utilities will design processes and documents that are open and fair to all interested parties. If this trust is misplaced, the issues will be revisited in the future.

The Attorney General says that Consumers' agreement in Case No. U-10127 to implement the capacity solicitation process approved in Case No. U-9586 bars its request to implement a new process. The Commission does not agree. The language in the settlement agreement cannot fairly be read as the Attorney General proposes and, in any event, does not prevent the Commission from approving a new process.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1982 PA 304, as amended, MCL 460.6h et seq.; MSA 22.13(6h) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The capacity solicitation process proposed by Consumers and Detroit Edison should be approved as modified by this order.

THEREFORE, IT IS ORDERED that the capacity solicitation process and the standard request for proposals proposed by Consumers Energy Company and The Detroit Edison Company, as modified by this order, are approved.

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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of April 11, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

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By its action of April 11, 2000.

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Its Executive Secretary

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Suggested Minute:

"Adopt and issue order dated April 11, 2000 approving with modification the capacity solicitation process proposed by Consumers Energy Company and The Detroit Edison Company, as set forth in the order."