

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of	)	
CONSUMERS ENERGY COMPANY to recover	)	
implementation costs for the 12-month period	)	Case No. U-12358
ended December 31, 1999.	)	
_____	)	

At the July 23, 2002 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On August 8, 2001, Consumers Energy Company (Consumers) filed a petition seeking rehearing of the Commission's July 11, 2001 order (the July 11 order) that approved Consumers' deferred recovery of \$25,156,000 for expenditures made during the 12-month period ended December 31, 1999 to implement a retail open access program in accordance with previous orders of the Commission in Cases Nos. U-11290 et al.

On August 31, 2001, the Association of Businesses Advocating Tariff Equity (ABATE) filed a response to Consumers' petition.

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACS, R460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party

to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

Conditional Recovery

Consumers insists that the Commission has no basis for making recovery of any amount of the implementation costs contingent upon additional events or further reviews. Further, Consumers argues that it is entitled to recover an additional \$4,996,000 of labor expenses, employee retraining costs, and other related expenditures that it incurred during 1999.

According to Consumers, all \$30,152,000 of its expenditures to implement a retail open access program should be fully recoverable from its ratepayers without further review. Citing the June 5, 1997 order in Cases Nos. U-11290 et al. and Section 10a(1) of 2000 PA 141 (Act 141), MCL 460.10a(1), Consumers contends that it would be confiscatory to determine the prudence of such expenditures, which it made in good faith, on an after the fact basis. Consumers maintains that the proper application of a prudence review ignores end results and that the case of Ass'n of Businesses Advocating Tariff Equity v Public Service Comm, 208 Mich App 248; 527 NW2d 533 (1994), establishes that prudently incurred costs may include amounts spent on investments that prove to be unsuccessful in the long run. Therefore, Consumers insists that the Commission cannot re-review its implementation expenditures at some later date and disallow costs then determined to be ineffective, inefficient, or unworkable. Indeed, Consumers argues that the July 11 order infringes on its constitutional rights and ignores Consumers' voluntary reliance on past Commission pronouncements regarding its ability to recover the implementation costs. Accordingly, Consumers asserts that the Commission should amend the July 11 order by striking all provisions that make recovery of its 1999 implementation costs subject to further review.

ABATE contends that the Commission properly determined that Consumers' right to recover its 1999 implementation costs should be subject to further review by the Commission. Citing the October 24, 2000 order in Case No. U-11955, ABATE maintains that the Commission explicitly placed Consumers on notice that subsequent events could foreclose recovery of its implementation costs. In any event, ABATE argues that Consumers' petition for rehearing should be denied because it does not meet the standards set forth in Rule 403. According to ABATE, Consumers' rehearing arguments are simple restatements of positions that were considered and rejected by the July 11 order.

The Commission finds that Consumers' arguments regarding alleged illegality of the Commission's conditional approval of the recovery of its 1999 implementation costs are not well taken. As noted in the July 11 order, the October 24, 2000 order in Cases Nos. U-11955 and U-11956, which concerned review of the 1997 and 1998 implementation expenses of Consumers and The Detroit Edison Company (Detroit Edison), respectively, explicitly indicates that the incurrence of implementation costs for activities that prove to be ineffective, inefficient, or unworkable may not entitle a utility to recover the costs of those activities. Further, although approving deferred recovery of implementation expenses by Consumers in the amount of \$15,376,000, the Commission clearly indicated that its determination was conditional and subject to additional review. Indeed, the Commission recently reiterated its ruling in this regard in its December 20, 2001 order in Case No. U-12639:

The Commission rejects Consumers' and Detroit Edison's proposals to use a portion of the securitization savings to pay implementation costs. The Commission has addressed the recovery of implementation costs in prior orders, and finds no reason to change those determinations at this time. The Commission has ruled that recovery of implementation costs is conditioned upon the success of the utilities in implementing the ROA programs. July 11, 2001 order, Case No. U-12358, p. 10, and October 24, 2000 order, Cases Nos. U-11955 and U-12956, p. 5. The record in this case does not provide a basis for concluding that the utilities' programs have been sufficiently successful to merit full recovery of previously

reviewed implementation costs, much less costs that are at issue in pending cases or costs that have not even been incurred.

The Commission reaffirms that it will permit the utilities to recover prudently incurred implementation costs as provided for in the Commission's prior orders. It expects to provide recovery at the conclusion of the rate freeze. Except for any costs that should be assigned solely to ROA customers, implementation costs will be recovered from all customers. The Commission may provide for residual securitization savings to fund all or a portion of the recovery.

December 20, 2001 order in Case No. U-12639, pp. 28-29. Accordingly, the Commission finds that the July 11 order should not be revised to delete the references to the conditional nature of the Commission's determination. However, nothing in the July 11, 2001 order or in this order should be viewed as foreclosing Consumers from seeking a determination from the Commission at an appropriate time in the future that assures recovery of all or a portion of its implementation costs at the conclusion of the rate freeze. To seek such a determination, Consumers should file an application and supporting documentation that provides the Commission with a factual basis for reviewing the success of Consumers' implementation efforts. Specifically, the Commission is looking for evidence that any component, system, or procedure that is necessary for a retail access program to fully function is in place, completely operational, and capable of seamlessly performing its role in conjunction with the other necessary components, systems, and procedures. Simply spending funds on a new component, system, or procedure is not sufficient to demonstrate that the expenditure furthered the utility's ability to conduct a retail access program in a manner that promotes customer choice and fair competition among suppliers. Notice of the application should be provided in accordance with the directions of the Commission's Executive Secretary. Any interested party may request a hearing as provided in the notice.

Labor Expenses

Consumers argues that the Commission erred in denying recovery of implementation costs totaling \$3,369,000 for certain labor costs. In so doing, Consumers raises myriad issues.

Consumers insists that rebuttal evidence proffered in this proceeding by Carl A. Gilzow, its electric restructuring implementation project manager, contains a detailed hourly labor analysis that was not presented in Cases Nos. U-11955 and U-11956, which it maintains is adequate support for a finding that the disputed labor costs were incremental.

Consumers also complains that the Commission erroneously denied recovery of these expenses on the basis of inappropriate and unlawful standards adopted subsequent to the occurrence of the expenditures. Specifically, Consumers maintains that the first hint that the Commission intended to use Consumers' overall company headcount as the basis for determining whether labor costs might be recoverable came in the October 24, 2000 order in Cases Nos. U-11955 and U-11956. Moreover, Consumers insists that the July 11 order in this proceeding ignores the guidelines established in the October 24, 2000 order in Cases Nos. U-11955 and U-11956 for whether implementation expenditures are recoverable.

Further, Consumers argues that the Commission effectively found that labor costs can never be incremental unless overall operation and maintenance (O&M) expense is higher and the number of employees is at a level greater than at the time that its base rates were established. Consumers also contends that comparison of its 1996 and 1999 staffing levels constitutes a form of retroactive ratemaking and violates the statutory rate freeze imposed by Section 10d(1) of Act 141, MCL 460.10d(1). According to Consumers, its employee count and O&M expense levels in 1996 are not proper criteria for determining whether labor costs incurred during 1999 for implementation of retail open access are incremental. Rather, Consumers insists that the Commission may

only consider whether (i) the labor costs would not have been incurred but for restructuring and (ii) represent activities that would not have been performed but for restructuring.

In response, ABATE contends that Consumers' arguments on rehearing mirror the arguments previously considered and rejected in the July 11 order. According to ABATE, Consumers' petition for rehearing is nothing more than an attempt at a second bite of the apple. In any event, ABATE insists that the rationale underlying the disallowance of the implementation costs set forth by the Commission Staff supports the determination contained in the July 11 order.

The Commission finds that Consumers' argument should be rejected. The rebuttal testimony of Mr. Gilzow that was received into evidence in this proceeding was thoroughly discussed in the July 11 order. In rejecting Mr. Gilzow's contention that all of the disputed costs were incremental, the Commission reaffirmed the observation made in its October 24, 2000 order in Cases Nos. U-11955 and U-11956 that the mere redeployment of members of any large organization's workforce is a routine occurrence and that such a redeployment in the context of Consumers' restructuring efforts could reflect efficiencies attained in preexisting work functions or the elimination of redundant positions. Moreover, the Commission notes that in Cases Nos. U-11955 and U-11956 it was determined that in order to be recoverable, implementation costs should be limited to non-recurring costs necessary to accomplish the changes required by restructuring that a public utility incurs in addition to the operational costs that it already recovers in its base rates. In so doing, the Commission stated that "a utility not only must demonstrate that its labor expenditures were reasonably and prudently incurred in furtherance of its implementation program, but also must prove that such labor expenditures are not already being recovered in its existing rates." July 11 order, p. 6.

In the July 11 order, the Commission observed that Consumers' attempts to recover labor costs in Case No. U-11955 and in this proceeding were similar. In Case No. U-11955, at 4 Tr. 523, Mr. Gilzow supported recovery of labor costs associated with new employees that were added to fill new positions. Mr. Gilzow made the same claim at 3 Tr. 63-64 of this proceeding. In both cases, Consumers sought recovery of labor costs associated with moving existing employees from their current jobs and backfilling those positions with replacements.¹ The same is true of Consumers' claims for recovery of chargeback² hours and overtime.³ Finally, the other two types of labor costs described by Mr. Gilzow in this proceeding--transferring one employee from Consumers' Gas Division to its electric restructuring project and utilizing existing employees whose existing tasks were either deferred, performed by other existing employees, or subject to non-paid overtime--involve a redeployment of its workforce that the Commission determined in Cases Nos. U-11955 and U-11956 "is more properly classified as the type of expense assigned to base rates." October 24, 2000 order, Cases Nos. U-11955 and U-11956, p. 10.

The primary rationale underlying the October 24, 2000 order in Cases Nos. U-11955 and U-11956 and the July 11 order is the need to ensure that the utility's ratepayers will not be required to compensate the utility twice for the same expense. Nothing in the Commission's prior orders in Cases Nos. U-11290 et al. or Act 141 suggests that double recovery of labor costs by a utility would be appropriate under any circumstance.

¹ See, Case No. U-11955 at 4 Tr. 523 and Case No. U-12358 at 3 Tr. 64.

² Chargeback labor is performed by Consumers' internal support organizations, which then charge the cost of their labor to the electric restructuring project.

³ See, Case No. U-11955 at 4 Tr. 524 and Case No. U-12358 at 3 Tr. 64-65.

Finally, because the Commission's ruling in this case did not change Consumers' rates, Consumers' arguments concerning retroactive ratemaking and the alleged violation of the rate freeze imposed by Section 10d(1) of Act 141 lack merit.

Therefore, the Commission is not persuaded that its prior determination regarding the \$3,369,000 of labor costs should be reversed.

Employee Impact Expenses

Consumers also argues that it should be entitled to recover all of the \$1,481,000 associated with the labor and non-labor components of Consumers' 1999 employee impact expenses.⁴ According to Consumers, its 1999 employee impact costs relate to two initiatives. One involved the retention of certain critical electric transmission controllers. The other involved the retention, relocation, and associated expenses related to elimination of a traveling repair crew (TRC).

With regard to the transmission controllers, Consumers asserts that the Commission's rejection of Consumers' recovery of such costs is not supported by record evidence. Rather, Consumers maintains that the record establishes that (i) on December 31, 1996, Detroit Edison gave Consumers notice of its intent to terminate their electric coordination agreement, (ii) the existence of electric restructuring necessitated a program to retain critical employees, (iii) as a result of electric restructuring, jobs of energy controllers are more complex and more in demand, (iv) the 28 employees who were part of this initiative have highly specialized skills that are critical to the transmission function of the Michigan Electric Power Coordination Center, (v) in order to assure retention through 2001, it was necessary to offer a comprehensive retention package, and (vi) these costs are directly related to electric restructuring and are incremental.

⁴"Employee impact expense" is Consumers' terminology and refers to costs associated with the retention, retraining, and relocation of its employees.

In rejecting Consumers' arguments, the Commission stated:

Additionally, the Commission is not convinced that Consumers should be permitted to recover the \$344,000 in signing and retention bonuses and additional compensation paid to the 28 employees with expertise in the scheduling and controlling of bulk power flows. The Commission finds that the ability of these employees to command higher salaries is not related to Consumers' implementation of a retail open access program. Rather, the Commission concludes that these employees were performing preexisting work functions and that the expenses of retaining them more properly should be assigned to base rates.

July 11 order, p. 8.

In reaching this determination, the Commission was not persuaded by Mr. Gilzow's contention that Consumers' need to use incentives to retain these employees was caused in any way by Consumers' implementation of a retail open access program. Mr. Gilzow attributed the increase in demand for these employees to the general reconfiguration of the electric industry that is occurring due to electric restructuring programs being implemented in other states, which would affect Consumers regardless of whether Consumers was also in the process of restructuring. The Commission concluded that these employees became more valuable because demand for their specialized services increased independently of whether Consumers implemented retail open access. The Commission finds that nothing in Consumers' petition for rehearing presents a basis for changing that conclusion.

With regard to the TRC issue, Consumers maintains that the Commission's rejection of Consumers' recovery of \$924,000 associated with elimination of the TRC is an error of law and fact. Consumers insists that the Commission erred by rejecting Mr. Gilzow's testimony that the TRC employees were retrained and transferred to other activities because the move to retail open access "has resulted in changing the way outages are scheduled." 3 Tr. 68. Further, Consumers maintains that the Commission improperly observed that recent Commission investigations indicated that Consumers abandoned year-round scheduled outages due to the tight summertime

electric supply situation in this state during recent years. Moreover, Consumers asserts that the retraining and relocation expenses associated with Consumers' elimination of the TRC involve exactly the types of costs that the Legislature envisioned in Section 10p(1) of PA 141, MCL 460.10p(1), when it referred to a worker transition program that would provide skills upgrades and in Section 10p(2), MCL 460.460.10p(2), when it referred to employee retraining programs. The Commission disagrees.

In rejecting Mr. Gilzow's testimony regarding the TRC expenses, the Commission stated:

Section 10p(2) of Act 141 does not guarantee the recovery of all of a utility's employee retraining and relocation costs. Rather, this legislation is limited to "audited and verified employee-related restructuring costs that are incurred as a result of the amendatory act that added this section or as a result of prior commission restructuring orders, including employee severance costs, employee retraining programs, early retirement programs, outplacement programs, and similar costs and programs, that have been approved and found to be prudently incurred by the commission." MCL 460.10p(2); MSA 22.13(10p)(2), (emphasis added). Nothing in Act 141 or the Commission's prior restructuring orders in any way obligates an electric utility to alter its methodology for performing scheduled outages. Further, the Commission is not persuaded by Mr. Gilzow's testimony that the commencement of electric restructuring constituted the impetus for Consumers' 1999 decision to eliminate its TRC. It is more likely, based on evidence developed in other Commission proceedings,³ that Consumers abandoned year-round scheduled outages due to the tight summertime electric supply situation in this state during recent years.

³ See, the April 14, 1998 orders in Cases Nos. U-10840, U-11677, and U-11678, the January 19, 1999 order in Case No. U-11889, the January 19, 2000 order in Case No. U-12292, and the November 2, 2000 order in Case No. U-12702.

July 11 order, p. 7, (emphasis in original).

Additionally, citing the October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission indicated that it would be appropriate to reject Consumers' recovery of the \$924,000 for the retraining and relocation expenses because of Consumers' ongoing responsibility to its ratepayers to implement efficiency measures to reduce its cost of service prior to restructuring. Indeed, in Cases Nos. U-11955 and U-11956, the Commission observed that the advent of

restructuring did not relieve Consumers of that responsibility and that absent requiring a utility to demonstrate that restructuring caused the costs to be incurred, a utility could use restructuring as an opportunity to recoup out-of-pocket costs for efficiency measures that it would have otherwise undertaken in any event.

The Commission is not required to rely upon a witness's testimony, if the Commission's experience, technical competence, and specialized knowledge are at odds with the testimony. Moreover, the courts have repeatedly upheld the Commission's reliance on information available in its records.⁵ In the July 11 order, the Commission explained why it rejected Mr. Gilzow's opinion regarding his company's motivation for eliminating the TRC, and nothing in Consumers' petition for rehearing convinces the Commission that it should reverse that determination.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. Consumers' petition for rehearing should be denied.

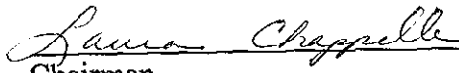
THEREFORE, IT IS ORDERED that the petition for rehearing filed by Consumers Energy Company on August 8, 2001 is denied.

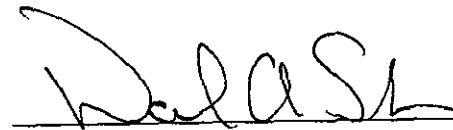
The Commission reserves jurisdiction and may issue further orders as necessary.

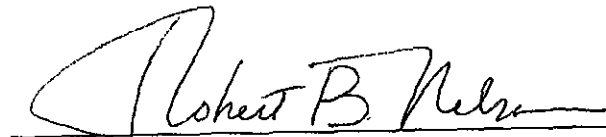
⁵ See, City of Ishpeming v Public Service Comm, 370 Mich 293; 121 NW2d 462 (1963); Ass'n of Businesses Advocating Tariff Equity v Public Service Comm, 173 Mich App 647; 434 NW2d 648 (1988); and Attorney General v Public Service Comm, 136 Mich App 52, 355 NW2d 640 (1984).

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION


Chairman


Commissioner


Commissioner

By its action of July 23, 2002.


Its Executive Secretary

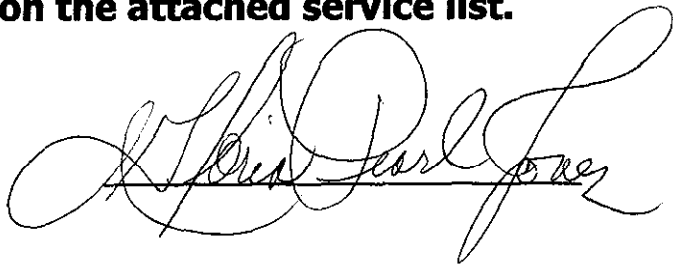
PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-12358

County of Ingham)

Gloria P. Jones being duly sworn, deposes and says that on July 24, 2002, A.D. she served a copy of the attached Order by mailing copies thereof by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

A handwritten signature in cursive script, appearing to read "Gloria P. Jones", written over a horizontal line.

Subscribed and sworn to before me
this 24th day of July 2002

A handwritten signature in cursive script, appearing to read "Sharon A. Allen", written over a horizontal line.

Notary Public, Ingham, County, Michigan
My Commission expires August 16, 2004