STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of WISCONSIN ELECTRIC POWER COMPANY and EDISON SAULT ELECTRIC COMPANY for approval of its plan to implement 2000 PA 141.	)	Case No. U-12649 (e-file)
In the matter of the application of WISCONSIN PUBLIC SERVICE CORPORATION and UPPER PENINSULA POWER COMPANY for approval of their plan to implement 2000 PA 141.	)	Case No. U-12650 (e-file)
In the matter of the application of NORTHERN STATES POWER COMPANY-WISCONSIN d/b/a Xcel Energy, for approval of it plan to implement 2000 PA 141.	)	Case No. U-12651 (e-file)
In the matter of the application of INDIANA MICHIGAN POWER COMPANY d/b/a AMERICAN ELECTRIC POWER, for approval of its plan to implement 2000 PA 141.	)	Case No. U-12652 (e-file)
In the matter of the application of ALPENA POWER COMPANY for approval of its plan to implement 2000 PA 141.	)	Case No. U-12655 (e-file)

INDIANA MICHIGAN POWER COMPANY'S
RESPONSE TO
EMERGENCY APPLICATIONS FOR LEAVE TO APPEAL

I. INTRODUCTION

Pursuant to Rule 337, R 460.17337, 1992 MR 3, Indiana Michigan Power Company, which does business in Michigan as American Electric Power ("AEP"), responds to the Emergency Joint Application for Leave to Appeal of the Michigan Environmental Counsel

("MEC") and the Public Interest Research Group in Michigan ("PIRGIM") and the Michigan Community Action Agency Association ("MCAAA") Emergency Application for Leave to Appeal. Both applications seek to overturn the Administrative Law Judge ("ALJ") April 4, 2001 ruling granting motions to strike of the Michigan Public Service Commission Staff ("Staff"). The ruling of the ALJ is lawful and well reasoned, consistent with the proper scope of the proceedings. The Michigan Public Service Commission ("Commission") should deny the applications or, if granting consideration to the applications, upon review, affirm the decision of the ALJ.

These applications seek review of an evidentiary ruling that proffered testimony and exhibits are beyond the proper scope of these proceedings and therefore are irrelevant and immaterial. The MEC/PIRGIM and MCAAA would have these proceedings be open to any issues arguably found in 2000 PA 141 ("Act 141); to establish rates, terms and conditions of utility service, including the establishment of new programs and new requirements. These proceedings, however, are more limited. Matters properly at issue involve review of Section 10a implementation plans to establish rates, terms and conditions of service to permit customers to choose an alternative electric supplier. See, Opinion and Order, Case No. U-12464 (June 19, 2000). Allowing intervenor parties to introduce irrelevant and immaterial evidence not only threatens to expand improperly the established scope of the proceedings but also creates undue burdens on the other parties and the Staff. Admission of irrelevant evidence violates the Staff and utilities rights. The appeals are predicated upon a misconstruction as to the proper issues to be addressed in these proceedings and therefore the ALJ's ruling should be affirmed.

II. ARGUMENT

A. STANDARDS FOR INTERLOCUTORY APPEAL

Rule 337 of the Rules of Practice and Procedure before the Commission, 1992 AACS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. An appealing party must establish one of the following conditions:

1. A decision on the ruling before submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding.

2. A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large.

3. A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order.

The applications fail to meet any of the Rule 337 conditions.

This Commission has recognized that when a schedule is set to allow the Commission to issue an order in a timely manner, a decision on discovery or evidentiary dispute must be made promptly. See, Re City Signal, Case No. U-10647 (November 23, 1994), Re Consumers Power Co, Case No. U-10625, p 6 (October 25, 1994). See also, Re The Detroit Edison Co, Case No. U-11175 (December 12, 1996). In this case, there was no error and hence, no need for further prompt determination by the Commission. Rather, the ALJ's ruling materially advances the timely resolution of the proceedings.

As set forth below, there is no ALJ error and there can be no harm to the MEC/PIRGIM and MCAAA or the public at large. In contrast, if MEC/PRIGIM and MCAAA are allowed to present evidence based on their erroneous view of this case, they will expand these proceedings into considering the establishment of new DSM programs, new energy efficiency programs and new charges and review of utility actions concerning nuclear plant decommissioning and spent nuclear fuel. Other parties and AEP will be forced to incur the time and expense to directly confront MEC/PIRGIM's and MCAAA's proffered evidence on these issues. Thus, on balance there is substantial harm to the other parties in this case if the requested relief is granted.

Finally, affirming the ALJ's evidentiary ruling is consistent with the criteria established in the Commission's June 19, 2000 order. See e.g., Re Consumers Power Co, Order Granting Leave to Appeal But Denying the Relief Requested, Case No. U-11180 (April 24, 1997).

B. STANDARD FOR REVIEW OF EVIDENTIARY RULINGS

Ordinarily, evidentiary rulings are reviewed on an abuse of discretion standard. See Kulhanjian v The Detroit Edison Co, 73 Mich App 347 at 351 (1977). In Spalding v Spalding, 355 Mich 382 (1959), the Supreme Court said:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

Viewed under the abuse of discretion standard, the ALJ's ruling is proper. Even under a more liberal view of an abuse of discretion espoused by Justice Levin in People v Talley, 410 Mich 378, 398-400 (1981) the ALJ's ruling should be affirmed. Justice Levin explained that the standard abuse of discretion in Spalding, supra, did not intend to "imply a review which would reverse only in the most egregious cases" and the Spalding standard does not "serve as a substitute for reasoned analysis" on appeal. Id, at 400.

> More than a talismanic reference to Spalding is called for. The facts, the equities, the rights of the parties, and the interests of the judicial system should all be examined and weighed carefully when reviewing a discretionary decision.
>
> * * *
>
> This is not to say, of course, that review of a discretionary decision is not fundamentally different than review of a question of law. In the latter instance a

> reviewing court may substitute its judgment whenever, after full analysis, it decides the judge erred. Id. (Emphasis added.)

Justice Levin cited the definition in Langnes v Green, 282 US 531 (1931), as a "more balanced view of judicial discretion":

> "The term 'discretion' denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Id, at 398, quoting Langnes, supra, at 541 (Emphasis added.)

Justice Levin's analysis in Talley has since been cited with approval and applied by the Supreme Court. See, e.g., Bosak v Hutchinson, 422 Mich 712, 737 (1985). Additionally, in appeals to the Commission an additional threshold has been applied infrequently. The Commission has reversed an ALJ's ruling if the Commission finds that "a different result is more appropriate." See, Re Consumers Power Co, Case No. U-10625, p 6 (October 25, 1994).

In this case, the ALJ's ruling was reasoned, based on a proper interpretation of the Commission’s orders and MRE 403. No different result is more appropriate. The ALJ fully explained his decision as to the proper scope of the case:

> I find that the scope of these proceedings is defined by the Commission order in U-12464 dated June 19, 2000, and the notice of hearings. The scope of these proceedings is not defined by the prefiled testimony. Rather, the testimony is to fit what the scope of these proceedings are as defined by the Commission order in U-12464.
>
> The relevant section of Public Act 141 is specifically 10a, which has been identified by counsel. I think this scope defines the relevant testimony to be considered in this case. (Tr 142-143.)

The ALJ specifically considered timeliness and balanced matters of relative harm among the parties:

> I'd like to address for a minute the argument raised that it's premature to rule on the motion at this time with the idea that the companies will be filing on June 5, 2001.
>
> I happen to agree with Mr. Aaron. I think there's a harm of not granting the motion inasmuch as the companies would have to expend time and energy to prepare responses to the testimony. There's other remedies available to MEC and MCAAA in the event the companies' filings on June 5, 2001 are outside of the scope of these proceedings. The parties can file written motions to strike testimony just as Staff has already done in this particular matter. (Tr 143.)

The ALJ applied the test of relevance:

> Now, the issues raised by MEC and MCAAA certainly are worthwhile, important, they're fundamental, they're even critical. But the test is whether or not they're relevant to these proceedings.
>
> When I looked at the testimony of witness Callen, it was particularly striking in the language that was used in that testimony. Throughout the testimony Mr. Callen referred to expanding looking at the terms, the rates and the conditions, enhancing the protection of collection from ratepayers, an increasing need for protection of ratepayers, a failed response to ongoing management issues. There was a comparison of at-site and decommissioning costs. There was reference to the federal program failing and that there needed to be more adequate remedies to protect ratepayers. And I saw a similar slant in the testimony of witness Kushler and Crandall. Again, I think all of this testimony is beyond the scope of these proceedings. (Tr 144.)

The ALJ's ruling shows a clear determination based upon balancing competing considerations and rational application of the law. The matters to be considered established by the Commission's order and evidence is measured by relevance to those matters. Under any standards of review, exclusion of MEC/PIRGIM's and MCAAA's proffered testimony and exhibits was proper and lawful.

C. THE ALJ PROPERLY DETERMINED THE PREFILED TESTIMONY AND EXHIBITS TO BE IRRELEVANT

1. The scope of matters at issue in these proceedings is limited to Sections 10a(1) and (5) of Act 141.

MEC/PIRGIM claims that the ALJ’s ruling is unlawful and unreasonable. Unlawful has been defined as an erroneous interpretation of the law. Associated Truck Lines, Inc v PSC, 377 Mich 259 (1966). Unreasonable is a determination unsupported by evidence.[1] Id. As to the application of law, MEC/PIRGIM and MCAAA assert that the information sought to be introduced is relevant to the scope of the proceedings. Accordingly, resolution of this issue turns on: (i) the proper scope of these proceeding and (ii) whether the information is relevant and necessary to the matters properly at issue in the proceedings.

The ALJ's ruling determined whether the prefiled testimony and exhibits were relevant. MRE 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The rule requires an answer to the question of whether an item of evidence possesses sufficient probative value to justify receiving it with factual probability being the test. Relevance thus involves a relation between an item of evidence and a matter properly provable in the case. See, Detroit Iron and Steel Co v Detroit Great Iron Foundry Co, 240 Mich 677 (1927), and White v Bailey, 10 Mich 155 (1862). While administrative agencies "may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their

[1]The ALJ’s ruling is a determination based on law not evidence. Hence, reviewing the ALJ’s ruling against a reasonableness test is not possible. To the extent the Commission considers the “unreasonable” claim, it should do so in the context of the assertions that the ruling was arbitrary, as discussed below.

affairs", Rule 325(1), 1992 AACS, R 460.17325(1); the legal test of relevance (that is its relation to a matter properly in the case) is not thrown out by the lesser standard. Since the purpose of testimony and exhibits in these proceedings is to address relevant and material issues on matters properly at issue, the question of admission still turns on whether the proffered information tends to throw light on the merits and aid in the correct resolution of the issues. 11 MLP, Evidence §41, p 184. MEC/PIRGIM's and MCAAA's prefiled testimony and exhibits did not address matters at issue in this case.

Whether a matter is properly provable in a case is measured by the scope of the proceeding. MEC/PIRGIM and MCAAA contend that this proceeding concerns the implementation of all of Act 141 and therefore anything that Act 141 concerns is relevant to the scope of this case. As the ALJ ruled, the scope of these proceedings is not so broad.

Here, the scope is set by the Commission's June 19, 2000 Opinion and Order. The Commission's June 19, 2000 Opinion and Order in Case No. U-12464 quoted subsections 10a(1) and 10a(5) of Act 141, and then stated on page 2:

> To implement these provisions of the act, each investor owned utility, other than Consumers Energy Company and The Detroit Edison Company, shall file, no later than October 2, 2000, a restructuring plan in compliance with the act that permits all of its retail customers to choose an alternative electric supplier no later than January 1, 2002. (Emphasis added.)

In the ordering section of the Order, the Commission said:

> A. Each investor owned electric utility, other than Consumers Energy Company and The Detroit Edison Company, shall file, no later than October 2, 2000, a restructuring plan in compliance with 2000 PA 141 that permits all of its retail customers to choose an alternative electric supplier no later than January 1, 2002.

The ALJ properly recognized no where is there an express intent on the Commission's part, or in the order, a desire to address all issues with respect to implementing Act 141.[2]

Hence, the only provisions of the Act to be implemented in these proceedings are subsections 10a(1) and (5).

Subsections (1) and (5) of Section 10a provide in part:

> (1) No later than January 1, 2002, the commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission.
>
> * * *
>
> (5) 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. <u>An electric utility that has not had voluntary commitments to provide customer choice</u> previously approved by orders of the commission <u>shall file a restructuring plan to allow customers to choose an alternative electric supplier no later than the date ordered by the commission</u>. The plan shall propose a methodology to determine the electric utility's net stranded costs and implementation costs. (Emphasis added.)

Clearly, the proceedings focus on restructuring plans to establish rates, terms and conditions to allow retail customers to choose an alternative electric supplier. The intervening parties' attempt to address new energy efficiency, new DSM, and new nuclear decommissioning and spent nuclear fuel issues or to include any issue found in Act 141 is wrong.

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[2]The ordering sections reference "in compliance with 2000 PA 141" does not encompass all aspects of Act 141 because it is qualified to restructuring plans to permit choice; nothing more. MEC/PIRGIM and MCAAA focus their claims on the reference to Act 141 without regard to the clear limit to implementing Section 10a(1) and 10a(5).

The appealing parties point to AEP's October 2, 2000 restructuring plan which discusses net stranded costs and implementation costs, and from that argue because those issues do not involve terms and conditions to permit a customer to choose an alternate electric supplier, it is appropriate for their new and additional issues to be considered. The fallacy in this argument is that the orders and the statute clearly contemplate addressing a utility's net stranded costs and implementation costs in the implementation plan under subsections 10a(1) and 10a(5). In fact, subsection 10a(1) provides that the Commission shall issue orders establishing the rates, terms and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier and directs:

> The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the Commission.

Furthermore, Subsection 10a(5) directs utilities to file a restructuring plan to "allow customers to choose an alternative electric supplier no later than the date ordered by the Commission" and directs that:

> The plan shall propose a methodology to determine the electric utility's net stranded costs and implementation costs.

Hence, it is required and entirely appropriate for AEP's restructuring plan to address and discuss net stranded costs and implementation costs.

Even MEC/PIRGIM's and MCAAA's own efforts to establish relevance demonstrate that the issues are beyond the scope of Sections 10a(1) and (5). Many facts, in order to be introduced and subject to consideration as evidence, must first be preceded by "foundation" proof. Herd v Northern Accident Co, 116 Mich 53 (1910). The foundational statements of each of MEC/PIRGIM's and MCAAA's witnesses as to the purpose and subject to their testimony alone demonstrates that irrelevance to subsections 10a(1) and (5). The prefiled direct testimony of Ronald C. Callen states:

> The proceedings are aimed at restructuring tariffs relative to the terms and conditions of service to provide for open access by end-users to alternative sources of generation, and to establish tariffs for a number of unbundled services to as to give customers more choice in obtaining services. I believe, that in completing this task, <u>the Commission must be cognizant of the need to</u> preserve, and <u>expand, the protections relative to past and future collections from ratepayers and end-users for</u> the 1 mill/kwh fee which is collected for spent nuclear fuel (SNF) disposable under the Nuclear Waste Policy Act (NWPA of 1982) (Pages 6 & 7.) (Emphasis added.)

Mr. Callen goes on to critique the utilities responses to federal action to justify an "increased need for commission action to protect ratepayer collections" (Pages 9 & 10). Additionally, Mr. Callen proposes to discuss problems with transmission ownership transfer. (Pages 15-17.) He then proposes that the Commission adopt remedies to require enhanced protections and list options including rates and PSCR case investigations, adjustments and generic reporting requirements escrowing of fees and collections from ratepayers or partials escrows of funds and requiring a performance bond, requiring additional forms of financial assurance, liability insurance or security and additional protections. (Pages 19-22.) Clearly, these examples demonstrate that Mr. Callen's testimony has nothing to do with establishing the terms and conditions which will allow a utility customer to choose an alternative electric supplier. The testimony stricken by the ALJ unquestionably addresses issues that have nothing to do with the relevant matters to be considered in this case.

The prefiled written direct testimony of Martin Kushler likewise fails on its foundational purpose. Mr. Kushler states:

> The purpose of my testimony, on behalf of the Michigan Environmental Council (MEC) and the Public Interest Research Group in Michigan (PIRGIM), is to provide information <u>in support of establishing tariffs which include funding support for energy efficiency programs</u>. Ensuring the funding of such programs

> would provide opportunities for customers to lower their energy costs, enjoy a more reliable electric system, and achieve access to the types of customer service available in numerous other states. (Pages 2 & 3.) (Emphasis added.)

None of the matters Mr. Kushler addresses have any bearing on a matter relevant to establishing terms and conditions of service that allow a utility customer to choose an alternative electric supplier. The ALJ properly saw that Mr. Kushler is proposing <u>new</u> programs be established.

Finally, the prefiled written direct testimony of Geoffrey C. Crandall fails for the very same reasons. The foundational purpose of his testimony demonstrates its irrelevance. Mr. Crandall describes the purpose of his testimony as:

> The purpose of my testimony is to discuss the provision of electric energy efficiency and load management as part of the implementation strategy of PA 141. I conclude that the activities that were formerly referred to as demand side management (DSM) when implemented by the utilities have a continuing role to help ensure that all persons in Michigan are afforded safe, reliable electric power at a reasonable rate which is an express purpose of PA 141. Sec. 10(2)(d). (Page 3.)

Mr. Crandall refers to an entirely different section of Act 141 than those to be implemented here and proposes new charges and new programs[3] to be implemented. None of these issues bear on implementing Sections 10a(1) and (5).

2. The ALJ's ruling was based on reason.

In addition to the claims discussed above, MEC/PIRGIM and MCAAA also assert that the ALJ's ruling was arbitrary and capricious. To be arbitrary, a decision must be without reference to principles, circumstances or significance. <u>In Re Kurzyniec Estate</u>, 207 Mich App

[3]MCAAA claims it is not introducing "new" energy efficiency programs because such programs are under way in other states where the utilities are operating. The question, however, is not what programs exist in other states but whether MCAAA is proposing new programs and new charges in Michigan. Considered in that light, the programs are new to Michigan. Moreover, the existence of energy efficiency programs in other states bears no reasonable relationship to designing rates, terms and conditions to allow customer choice.

531 (1994). If a determination is rationally related to a legitimate purpose it is neither arbitrary nor capricious. Blank Dept of Corrections, 222 Mich App 385 (1997). The ALJ properly rejected MEC/PIRGIM's claim that the scope of the proceeding is established by all of Act 141. The ALJ explained that the scope of the proceeding is governed by the Commission's order and notices of hearing, and in this case Sections 10a(1) and (5). This determination was sound, rational and furthered the principles of due process by properly limiting matters and issues to be considered to those of which the parties have been apprised. MCL 24.271.

MEC/PIRGIM contend that the ALJ's ruling denies them their rights to a full and complete hearing and due process rights. Nothing could be further from the truth. The Commission's order establishing these proceedings and the notices of hearing put all parties on notice as to the issues and matters to be considered. MEC/PIRGIM have, as intervenors, the right to present evidence relevant to those issues, but no right to introduce evidence on whatever other agenda they may wish to further. They have no right, statutory or constitutional, to present irrelevant evidence. See, e.g., Michigan v Paquette, 114 Mich App 773 (1982) and Michigan v Adamski, 198 Mich App 133 (1993).

3. The ALJ's ruling was timely and balanced.

MEC/PIRGIM further contested the ALJ's ruling was premature. In essence, they contend that the prefiled testimony and exhibits will eventually be material to the case. The ALJ did not act prematurely. The decision by the ALJ now prevents substantial harm to other parties of having to incur the time and expense of confronting the material. When the prefiled testimony and exhibits contain irrelevant information, it is proper to the ALJ to strike it. Rather than being premature, the timely ruling of the ALJ advanced resolution of these proceedings.

MEC/PIRGIM claim the ALJ's ruling fails to balance the interests of all parties by prematurely determining the issues. To the contrary, the ALJ's ruling properly recognizes that the issues were already framed, consistent with principles of due process. On balance when comparing interests, MEC/PIRGIM's lack of a right to raise irrelevant matters gives way to the overwhelming rights of the other parties.

III. CONCLUSION

Based on the forgoing arguments and the record, American Electric Power Company requests that the Commission:

(i) deny the applications for leave to appeal, or

(ii) grant consideration of the applications and deny the relief requested by affirming the ALJ's ruling.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

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Dated: May 2, 2001

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PROOF OF SERVICE

Cynthia M. Lenneman, being first duly sworn, deposes and says that on May 2, 2001, Indiana Michigan Power Company's Response To Emergency Applications For Leave To Appeal was served on the following parties by U.S. first class mail:

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Cynthia M. Lenneman

Cynthia M. Lenneman

Subscribed and sworn to before me
this 2nd day of May, 2001

Michelle L. Swan

Michelle L. Swan, Notary Public
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My commission expires: 10-28-04
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