38

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MICHIGAN PUBLIC SERVICE COMMISSION
JAN 11 2002
FILED

Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
PO Box 30221
Lansing, MI 48909

Re: MPSC Case No. U-12970

Dear Ms. Wideman:

Enclosed for filing, please find an original and four copies of ABATE'S REPLY BRIEF and accompanying Proof of Service in reference to the above-captioned matter.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

CLARK HILL PLC

Michael P. Calabrese

MPC:pgs

Enclosures

cc: Parties of Record

DETROIT 3142509v1
07411/083743

38

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY *for approval of the unbundling of its* commercial and industrial rate schedules.	)	Case No. U-12970

ABATE'S REPLY BRIEF

The Association of Businesses Advocating Tariff Equity ("ABATE"), by its attorneys, Clark Hill P.L.C., pursuant to the schedule set in this proceeding by the Administrative Law Judge ("ALJ"), hereby files its Reply Brief.

I. INTRODUCTION

On June 5, 2001, pursuant to the requirements of §10b(2) of 2000 PA 141, Consumers Energy Company ("Consumers") filed its Application in the instant matter to unbundle its existing commercial and industrial rate schedules and separately charge for its discrete services. On September 24, 2001, ABATE, which had been admitted in this case as an intervenor, filed a motion to require Consumers to support its Application with an unbundled cost-of-service study based on the most recent available data.[1] ABATE reasoned that an accurate unbundling of rates could not proceed on the basis of a cost-of-service study that had been performed in the mid-1990's, and that new data was required to show the current cost contribution of various services to Consumers' current bundled rates. The ALJ denied the motion at an October 4, 2001 hearing.

[1] ABATE had requested in discovery that Consumers provide current cost-of-service data, which Consumers refused to do, objecting that it had not performed any cost-of-service studies more recent than the one it submitted with its Application. ABATE argued that, in the context of this case, Consumers was required to produce that data upon a proper discovery request even though it might entail a significant undertaking for Consumers. Thus, ABATE's motion was cast as a motion to compel discovery.

ABATE appealed that denial under Rule 337 of the Commission's Rules of Practice and Procedure on October 18, 2001, which appeal is now pending before the Commission. Meanwhile, the case proceeding to hearing on November 28, 2001,[2] and Consumers filed its Initial Brief on December 19, 2001.

II. ARGUMENT

A. The Commission is Not Bound to Grant Consumers' Requested Relief.

Consumers' Initial Brief, after summarizing the history of this proceeding and the evidence, concludes, "Since the Company's unbundling presentation is the only evidence of record on the subject, it should be approved by the Commission. Indeed, there is no evidentiary basis for the Commission to do otherwise." Consumers' Initial Brief, p 4. This conclusion stems from a fundamental misunderstanding of the law.

Indeed, ABATE believes that Consumers' Application should be denied. Because Consumers has not presented to the Commission an unbundling presentation based on the most current available data, Consumers' has not supported its Application with "competent, material and substantial evidence," as it must to receive relief under MCL 24.306(1)(d). MCL 460.10b(2), the statute under which this proceeding was initiated, requires that Consumers "unbundle its existing commercial and industrial rate schedules and separately identify and charge for their discrete services." §10b(2) does not require that the rates themselves be changed, and indeed those rates are currently frozen under §10d of 2000 PA 141 and thus will

[2] ABATE, having been denied the data that would have formed the basis of any evidentiary presentation or cross-examination it might have offered, did not attend the hearing.

remain based upon Consumers' mid-1990's cost-of-service study.[3] Nonetheless, there is no warrant for basing the unbundling of rates, which seeks not to set the rates but to allocate the proportional contribution to those rates of various component services, on long-obsolete data. Yet Consumers has presented the Commission with "evidence" to support this allocation that is so old that there is no basis for inferring that it bears any relationship to the current cost contribution to overall rates of various component services. Tellingly, Consumers' witnesses did not even purport to claim that there is any such relationship.[4]

Consumers' claim that "there is no evidentiary basis" for the Commission to deny it the relief it seeks does not, as Consumers would have the Commission believe, box the Commission into a corner. Although it is true that no party presented evidence supporting a different form of relief than what Consumers' sought, this does not mean that Consumers necessarily met its burden of providing adequate support for its requested relief. The fact that there is evidence on the record and that evidence is unrebutted does not alone make that evidence "competent, material and substantial" under MCL 24.306(1)(d). Rather, it is entirely possible for a party to make a presentation to the Commission that is flawed in any number of ways that will be apparent to the Commission despite the fact that those flaws are not discussed in an evidentiary presentation made by another party. For example, the evidence may be based upon an erroneous understanding of the law, unacceptably sparse on one or more crucial points, or simply not credible. In such a case, the Commission may not grant the requested relief. Consumers' suggestion to the contrary is without merit.

[3] The study upon which Consumers has based its Application was approved by the Commission on November 14, 1996, in Case No. U-10685. 3 TR 52.

[4] Because these issues largely track those presented in its Motion to Compel, which has already been decided by the ALJ and is currently before the Commission, ABATE will not belabor them in this Reply Brief.

This is such a case. Consumers has sought to support its Application with ancient data that reflects not the current costs of various components of its bundled rates, but rather what those costs might have been approximately seven years ago. The tenuousness of the relationship between Consumers' evidence and its requested relief is apparent *prima facie*. There is nothing in the Administrative Procedures Act or anywhere else that would require the Commission to ignore what it can see for itself.

Moreover, the function in which the Commission is engaged in this case is a ratemaking function.[5] Ratemaking, as this Commission and the Michigan courts have long recognized, is essentially a legislative function, and thus requires not only an examination of the evidence and application of the law, but also important policy choices. See Attorney General v Michigan Public Service Commission, 463 Mich 911, 913 (2000); City of Niles v Michigan Gas & Electric Co, 273 Mich 255, 263 (1935); In the Matter of the Restructuring of the Electric Utility Industry, MPSC Case No U-11290 et al, Order dated August 17, 1999, p 36. If the Commission believes, as ABATE does, that the legislatively dictated priority of effective choice can best be served by sending the newly competitive market accurate price signals through unbundling, then the Commission is free to exercise its legislative authority to require that §10b(2) be implemented in a manner consistent with that policy. Indeed, the Commission itself in a recent order recognized and forcefully stated the need to implement §10b(2) in a manner that will give electric customers accurate, complete information so that they can have "meaningful choice." As the Commission stated, "Act 141 was enacted to, among other things, ensure that affected customers 'have a choice of electric suppliers.' Section 10(2)(a). *Meaningful choice will be thwarted if the*

[5] While ABATE recognizes, as stated above, that Consumers' overall rates are frozen and will not be changed in this case, it is nonetheless true that this case involves an investigation by the Commission of the costs of various services in order to authorize charges for those services on utility customers' bills. This is quintessential ratemaking.

provisions of Act 141, specifically Section 10b, are ignored." In the Matter of the Application of the Detroit Edison Company to Unbundle its Retail Electric Rates, MPSC Case No. U-12966, Order dated December 20, 2001, p 6 (emphasis supplied). Thus, the Commission rightly rejected the unbundling application of a utility where granting that application would have "thwart[ed] the development of a competitive market by depriving customers of essential information." Id., p 4. To effectuate the Legislature's and the Commission's policy of giving electric customers "meaningful choice," by allowing them to make decisions in light of all "essential information," it is imperative that customers be sent price signals that reflect reality as it stands today, not as it stood seven years ago. And, since Consumers' has proposed an unbundling scheme that is not consistent with that policy, the Commission should exercise the discretion inherent in its legislative authority by denying Consumers' Application.

B. Customers' Bills Must Fully Reflect Unbundled Rates.

Finally, Consumers' presentation contains an ambiguity that must be rectified. As Mr. Yehl testified at 3 TR 66, Consumers has not proposed "that the level of detail contained in the unbundled rate sheets be incorporated into the bill format now utilized by the Company." The omitted information would include "the billing demand charge, maximum demand charge, and kilowatt-hour charge." Rather, Mr. Yehl has suggested that "the most valuable information that the Company could provide to its commercial and industrial customers would be each customer's average rate for generation." Consumers reiterates this point at page 4 of its Initial Brief, stating that Consumers' intent is to "add to customer bills the average rate for generation costs that is reflected in each rate schedule, but not to include on those bills the same level of detail that is included in the tariff sheets."

These statements could be construed to mean that Consumers intends to add information to customers' bills that would "separately identify and charge for" generation service, but would not delineate amounts for transmission service, distribution service, customer charges, or Consumers' proposed "regulatory adjustment." Such a method of "unbundling" would be fundamentally inconsistent with the requirement of §10b(2) that all of a utility's "discrete services," not just one, be unbundled. The Commission has previously ruled, in the context of guiding the unbundling of gas rates, that each discrete component service must be separately identified. See In the Matter of Voluntary Gas Customer Choice Programs, MPSC Case No U-12550, Order dated July 11, 2001, p 7 (identifying seven different services to be studied for possible unbundling).

Indeed, ABATE doubts that it was Consumers' intent to identify only generation charges on customers' bills. Rather, ABATE believes that Consumers intended to present fully unbundled bills reflecting charges for each service (generation, transmission, distribution, customer, and regulatory adjustment), and that the quoted passages merely reflect that Consumers did not intend to have bills break down "subcomponents" of those discrete services. However, because Consumers' testimony, and more particularly its Initial Brief, is ambiguous on this point, ABATE believes that the Commission's order should make clear that all customers' bills should identify, at a minimum, generation charges, transmission charges, distribution charges, customer charges, and any regulatory adjustment.

III. RELIEF REQUESTED

WHEREFORE, ABATE respectfully requests that the Commission issue an order consistent with the positions set forth in this Reply Brief.

Respectfully submitted,

CLARK HILL P.L.C.

By: ______________________________

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Dated: January 11, 2002

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY for approval of the unbundling of its commercial and industrial rate schedules.	)))))	Case No. U-12970

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS:
COUNTY OF INGHAM)

Patricia G. Sass, being duly sworn, deposes and says that she is an employee of Clark Hill PLC, and that on January 11, 2002, a copy of the ABATE'S REPLY BRIEF was served upon:

See attached service list.

Service was accomplished via e-mail and by depositing same in a regular mail depository, enclosed in envelopes bearing postage fully prepaid and addressed properly and via electronic mail.

Patricia G. Sass

Patricia G. Sass

Subscribed and sworn to before me
this 11th day of January, 2002.

Haran C Rashes

Haran C. Rashes, Notary Public
Washtenaw County, Michigan acting in
Ingham County, Michigan
My Commission Expires: September 18, 2003

DETROIT 3142509v1
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U-12970

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