FOSTER, SWIFT, COLLINS & SMITH, P.C.

ATTORNEYS AT LAW

Walter S. Foster
1878-1961
Richard B. Foster
1908-1996
Theodore W. Swift
1928-2000
John L. Collins
1926-2001

Webb A. Smith
Allan J. Claypool
Gary J. McRay
Robert J. McCullen
Stephen I. Jurmu
William K. Fahey
Stephen O. Schultz
William R. Schulz
David H. Aldrich

Scott A. Storey
Charles A. Janssen
Charles E. Barbieri
James B. Jensen, Jr.
Scott L. Mandel
Michael D. Sanders
Sherry A. Stein
Brent A. Titus
Brian A. Kaser
Robert E. McFarland
Stephen J. Lowney
Kenneth T. Brooks
Patricia A. Calore
Michael J. Bommarito
Jean G. Schtokal
Glen A. Schmiege
Brian G. Goodenough
Matt G. Hrebec

Mark H. Canady
Eric E. Doster
Stephen J. Rhodes
Melissa J. Jackson
Steven H. Lasher
Nancy L. Kahn
Deanna Swisher
Mark J. Burzych
Alan G. Gilchrist
Thomas R. Meagher
Douglas A. Mielock
Scott R. Forbush
Peter R. Albertins
Christopher A. Ballard
Scott A. Chernich
Donald E. Martin
Jennifer M. Van Horn
Paul J. Millenbach

Dirk H. Beckwith
Bruce A. Vande Vusse
Anne M. Seurynck
Richard L. Hillman
Alan T. Rogalski
Andrea J. Hool
Steven L. Owen
John M. Naber
Francis J. O'Donnell
Rebecca S. Davies
Barbara J. Oyer
Claire V. Groen
Jennifer Kildea Dewane
John P. Nicolucci
Michael D. Homier
Molly L. Chan
Keith A. Castora
Kirsten M. McNelly

Robert M. Hartley
Johanna M. Novak
Emily L. Matthews
Benjamin J. Price
Ronald D. Richards Jr.
Joseph E. Kozely
Pamela C. Dausman
Terrence G. Quinn
Jacqueline E. Bayley
Ethan E. Rii
Dana M. Bennett
Tina M. Sellers

Of Counsel
Thomas G. McGurrin, Jr.
Lawrence B. Lindemer
John W. Ester
David VanderHaagen
Michael G. Harrison
Allan O. Maki
Frederick B. Bellamy
Gilbert M. Frimet
Deborah J. Williamson

RECEIVED
APR 8 2004
MICHIGAN PUBLIC SERVICE COMMISSION

Writer's Direct Phone: 517-371-8138

April 6, 2004

Via Hand Delivery

Clerk of the Court
Michigan Supreme Court
Hall of Justice
925 W. Ottawa
P.O. Box 30052
Lansing, MI 48909

Dear Clerk:

RE: The Detroit Edison Company v Michigan Public Service Commission
Supreme Court Case No. 125629
(Court of Appeals Case Nos. 241990 and 241991)
(MPSC Case No. U-12639)

Enclosed for filing please find the original and seven copies of The Detroit Edison Company's Reply Supporting Its Application for Leave to Appeal, and Appendices to the Detroit Edison Company's Application for Leave to Appeal and Reply Supporting Its Application for Leave to Appeal. Also enclosed for filing is a Certificate of Service. Please date stamp the extra copies of the documents, and return them with our courier.

Thank you for your assistance. If you have any questions, please call.

Very truly yours,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Stephen J. Rhodes

/mkr
Enclosures
cc w/enc: Counsel of Record
Bruce R. Maters
Jon P. Christinidis

S:\122\SJR\EDISON\12639\Supreme\125284-85\Clerk-040604.wpd

LANSING:
313 S. Washington Square
Lansing, MI 48933-2193
PH: 517.371.8100
FX: 517.371.8200

FARMINGTON HILLS:
32300 Northwestern Hwy.
Suite 230
Farmington Hills, MI 48334
PH: 248.539.9900
FX: 248.851.7504

STATE OF MICHIGAN
IN THE SUPREME COURT

FILED

APR - 7 2004

MICHIGAN PUBLIC SERVICE COMMISSION

APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN COURT OF APPEALS

BEFORE: O'Connell, P.J., and Jansen and Wilder, J.J.

THE DETROIT EDISON COMPANY,

Appellant,

Supreme Court No. 125629

v

Court of Appeals No. 241991

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee

/

In the matter, on the Commission's own Motion, to implement the provisions of Section 10a(1) of 2000 PA 141

MPSC Case No. U-12639

/

THE DETROIT EDISON COMPANY'S REPLY SUPPORTING ITS APPLICATION FOR LEAVE TO APPEAL

Dated: April 6, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THE COMMISSION VIOLATED THE STATUTORY MANDATE THAT ELECTRIC UTILITIES "SHALL" OBTAIN A "FULL RECOVERY" OF THEIR NET STRANDED COSTS AND IMPLEMENTATION COSTS. 2

II. THE COMMISSION'S CUSTOMER CHOICE SUBSIDIES ARE UNLAWFUL AND UNREASONABLE. 6

RELIEF 7

TABLE OF AUTHORITIES

Cases

Consumers Energy Co v Public Service Comm, __ Mich App ___; ___ NW2d (2004) 1, 3-5, 7
Detroit Edison Co v Public Service Commission, __ Mich App ___; __ NW2d __ (2004) 1, 3-5, 7

Statutes

MCL 460.10a 2
MCL 460.10a(1) 2, 5, 6, 7
MCL 460.10d(2) 4, 5

Other Authorities

MCR 7.302(G)(1) 7

INTRODUCTION

On February 18, 2004, The Detroit Edison Company ("Edison") filed its application for leave to appeal. On March 16, 2004, the Michigan Public Service Commission ("MPSC" or "Commission") and the Attorney General filed briefs opposing Edison's application. Edison now files this combined reply.

Edison's application largely anticipated and addressed the MPSC's and Attorney General's arguments. Therefore, this reply will focus on new matters – particularly two published opinions addressing the identical issues presented by this appeal, authored by Judge Saad and issued by the Court of Appeals on April 1, 2004:

- Detroit Edison Co v Public Service Commission, __ Mich App ___; __ NW2d __ (2004) (Slip Opinion attached as Appendix 10);[1] and
- Consumers Energy Co v Public Service Comm, __ Mich App ___; ___ NW2d (2004) (Slip Opinion attached as Appendix 11).

Since the Court of Appeals in these published cases reached exactly the opposite result from the unpublished opinion in this case, only this Court can now correct the result in this case and make it conform with the Court of Appeals' more recent and published authority.

A decision or peremptory order by this Court is necessary because the Court of Appeals' unpublished decision in this case failed to remedy the Commission's unlawful deferral of its statutorily-mandated obligation to grant Edison "full recovery" of its net

[1] To avoid confusion, Edison's Appendices are numbered sequentially. Appendices 1-9 are attached to Edison's application. Appendices 10 and 11 are attached to this reply.

stranded costs and implementation costs. Accordingly, remedial relief similar to that granted in the above cases should also be granted here.

ARGUMENT

I. THE COMMISSION VIOLATED THE STATUTORY MANDATE THAT ELECTRIC UTILITIES "SHALL" OBTAIN A "FULL RECOVERY" OF THEIR NET STRANDED COSTS AND IMPLEMENTATION COSTS.

MCL 460.10a(1) mandates that the Commission "shall provide for the full recovery" of Edison's "net stranded costs and implementation costs:"

> **"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." (Emphasis added).

Edison previously explained in its Application for Leave to Appeal that the Commission unlawfully and unreasonably failed to provide for the full recovery of Edison's implementation costs (Application, pp 11-20) and net stranded costs (Id, pp 20-27). The Commission's response (Brief, pp 10-13) collectively addresses implementation costs and net stranded costs. The Commission essentially just repeats its own earlier rulings, and contends that the Court should simply defer to the Commission's assertion that it has complied with the controlling statute. The Attorney General's arguments (Brief, pp 15-17, regarding implementation costs; Brief, pp 17-18, regarding net stranded costs) similarly assert an overly-deferential standard of review, and attempt to re-write MCL 460.10a(1) to merely require the Commission to issue some kind of order by

January 1, 2002, but to allow the Commission to defer any decision on implementation costs and net stranded costs indefinitely.

On April 1, 2004, the Court of Appeals issued two published decisions that directly reject the arguments that the Commission and Attorney General now present to this Court.[2] Judge Saad, writing for the Court, rejected the Commission's "indefinite deferral" of any decision on the recovery of utilities' implementation costs, which effectively resulted in the frustration of judicial review:

> "**MCL 460.10(1)** [sic, MCL 460.10a(1)] **requires** the PSC to issue orders no later than January 1, 2002, and to establish the rates, terms and conditions of service that allow all retail customers to choose an alternative electric supplier. The Legislature requires that these orders provide for a full recovery of implementation costs. The **PSC has instead deferred, indefinitely, any decision regarding recovery of implementation costs. We do not believe the Legislature intended such an indefinite deferral when it required that orders be issued by January 1, 2002. Moreover, the decision of the PSC does not provide sufficient information to allow this Court to perform its task of judicial review.**" (Appendix 10, Slip Opinion, p 3, emphasis added)

On April 1, 2004, the Court of Appeals also issued a published decision in an analogous appeal concerning Consumers Energy Company's ("Consumers") 1999 implementation costs (attached as Appendix 11). In addition to being similar to Edison's appeal regarding its 2000 implementation costs, the Consumers opinion is also significant

---

[2] The Court issued one opinion, Detroit Edison Co v Public Service Comm, ___ Mich App ___, __ NW2d ___ (2004) (Appendix 10), in Edison's appeal from the Commission's decision in Case No. U-12892 (See Application, p 19, and n 9, referencing Case No. U-12892, where the Commission's own Staff audited Edison's implementation costs, and calculated those costs to be $27,225,289 for 2000). The Court issued the second decision in connection with Commission proceedings involving Consumers Energy Company's 1999 implementation costs. Consumers Energy Co v Public Service Comm, ___ Mich App ___; __ NW2d ___ (2004) (Appendix 11).

because the Court expressly rejected arguments (like those maintained by the Commission and echoed by Attorney General in this case) that the Commission has the discretion to determine that the amount of a utility's "full recovery" may depend on the Commission's hindsight review of past expenditures in light of whether the Customer Choice program is successful in the future.

Judge Saad, again writing for the Court, expressly addressed the Court of Appeals' unpublished opinion in this case, and rejected the Commission's assertions regarding the timing and amount of implementation cost recovery:

> "Nonetheless, **we conclude that in requiring that the PSC 'provide for full recovery' of implementation costs in an order adopted by January 1, 2002, the Legislature did not intend to allow the PSC to adopt a methodology that would indefinitely defer the determination of the amount to be allowed. An approval made contingent on future unknown facts that may indeed eradicate the initial approval is not a provision for full recovery.** We note that in *Consumers Energy Co* v *MPSC*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket Nos. 241990 and 241991), this Court held that deferral of ROA implementation expenses was proper since the evidence was insufficient to allow the PSC to accurately determine the proper amount of implementation costs and whether those costs were prudently incurred. However, at oral argument in this case, the PSC did not dispute that its intent was to defer making a determination until the rate freezes imposed by MCL 460.10d(2) had expired. Under this statute, a freeze is in effect until January 1, 2005 for commercial and manufacturing customers, and until January 1, 2006 for residential customers. **Moreover, at oral argument, the PSC took the position that it had the authority to defer the determination of implementation costs virtually indefinitely. We conclude that this is inconsistent with legislative intent, and that the Legislature contemplated that the PSC would make a timely determination regarding Consumers' implementation costs.** Accordingly, we find it necessary to remand so that the PSC can make such a determination. (Appendix 11, p 3,

> emphasis added); It should be noted that the rate freeze for large commercial and industrial customers expired January 1, 2004. MCL 460.10d(2)).

In light of the Court of Appeals' more recent, published decisions, only this Court can now correct the result in this case, to make it consistent with the established authority in the Court of Appeals' published opinions.[3] This Court should note that the Court of Appeals' published decisions addressed Edison's implementation costs for the year 2000 and Consumers' implementation costs for the year 1999. This Application concerns the recovery of all of Edison's implementation costs, whenever expended. Guidance from this Court, similar to that provided by the Court of Appeals, would presumably resolve the utilities' recovery of implementation costs, and avoid successive appellate proceedings from yearly implementation cost cases.

In addition, relief from this Court is still necessary with respect to the utilities' net stranded costs. Although the published Court of Appeals decisions (Appendices 10 and 11) directly address implementation costs, the identical statutory provision and the same statutory language also address net stranded costs. MCL 460.10a(1)'s requirement that the Commission "shall provide" for "full recovery" applies to both implementation costs and net stranded costs. Judge Saad's explanation that the Commission may not indefinitely defer a decision on implementation costs applies equally to Edison's net stranded cost recovery, and demonstrates that the Commission's actions are contrary to MCL 460.10a(1), and unreasonable. Therefore, to remedy the Commission's indefinite deferral of its decision on Edison's net stranded cost recovery, this Court should grant

[3] Edison previously requested rehearing from the Court of Appeals in this case, which was denied (Appendix 4).

relief similar to that granted in Judge Saad's opinions with respect to implementation costs.

II. THE COMMISSION'S CUSTOMER CHOICE SUBSIDIES ARE UNLAWFUL AND UNREASONABLE.

Edison previously explained that the Securitization Offset and Rate Reduction Equalization Credits are unlawful and unreasonable (Application, pp 28-39). The Commission's response makes broad assertions, but avoids specific analysis (Brief, pp 13-18). The Attorney General (Brief, pp 18-20) acknowledges that Edison's legal positions "may be true," but asserts that Edison should have appealed in Case No. U-12478, where the Commission originally established the transition credits. The Commission's and Attorney General's positions lack merit because the transition credits were merely temporary credits that existed under a different stranded cost recovery framework that was to expire by January 1, 2002, when the Commission was to set a transition charge in the order(s) required by MCL 460.10a(1) (see Application, pp 28-31). The Commission's December 20, 2001 order (Appendix 1, pp 19-20) set the transition charge at $0, so the transition credits should have expired (see Application, p 31).[4]

The Commission eliminated the Rate Reduction Equalization Credits through its January 15, 2004 Opinion and Order in Case No. U-13933, and the Commission eliminated the Securitization Offset in its February 20, 2004 Order Granting Interim Relief in Case No. U-13808. Neither the Commission nor the Attorney General mention these facts, however, nor do they assert that the subsidies may be (or have become) moot.

[4] Edison's avoidance of repetition, and corresponding decision not to separately address each of the MPSC's and Commission's arguments should not be deemed to constitute an acceptance of any argument. Edison stands ready to provide any additional briefing or materials as directed by the Court.

Also, various parties to those cases seek to re-implement the subsidies, including through petitions for rehearing that are pending before the Commission in Case No. U-13808. Accordingly, Edison maintains its position, and further notes the uncertainty (and concomitant inability for courts to engage in informed judicial review) arising from the Commission issuing orders affecting Edison at various times in various cases.

RELIEF

Edison incorporates by reference the relief set forth in its application for leave to appeal, and further requests in the alternative, that the Court enter a peremptory order pursuant to MCR 7.302(G)(1) remanding this case to the Commission with detailed directions in accordance with Judge Saad's well-reasoned requirements for statutory compliance and effective judicial review (Appendix 10, pp 3-4; Appendix 11, p 4).

In his April 1, 2004 opinions regarding Edison's and Consumers' implementation costs, Judge Saad set forth a detailed procedure on remand to the Commission, "[t]o ensure that the Legislature's intent, expressed in MCL 460.10a(1) is not frustrated by endless delays, and to ensure that the PSC's orders are sufficiently comprehensive and detailed to allow for informed judicial review. . . ." (Appendix 10, p 3; Appendix 11, p 4). There has been a similar frustration of judicial review in this appeal, both before the Court of Appeals, and now in this Court. To ensure compliance with the timely and full recovery mandates of MCL 460.10a(1), and to avoid further appellate proceedings, Edison requests (in the alternative to Edison's prior request that this Court grant leave to appeal) that this Court remand this case with directions similar to Judge Saad's detailed remand procedure, both with respect to implementation costs and net stranded costs.

Respectfully submitted,

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

Dated: April 6, 2004 By: _____

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

S:\122\SJR\EDISON\12639\Supreme\REPLY SUPPORTING APPLICATION FOR LEAVE.WKF.doc

STATE OF MICHIGAN
IN THE SUPREME COURT

FILED

APR - 7 2004

MICHIGAN PUBLIC SERVICE COMMISSION

APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN COURT OF APPEALS

BEFORE: O'Connell, P.J., and Jansen and Wilder, J.J.

THE DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee

/

In the matter, on the Commission's own Motion, to implement the provisions of Section 10a(10) of 2000 PA 141

/

Supreme Court No. 125629

Court of Appeals No. 241991

MPSC Case No. U-12639

APPENDICES TO THE DETROIT EDISON COMPANY'S APPLICATION FOR LEAVE TO APPEAL AND REPLY SUPPORTING ITS APPLICATION FOR LEAVE TO APPEAL

Dated: April 6, 2004

INDEX OF APPENDICES TO THE DETROIT EDISON COMPANY'S APPLICATION FOR LEAVE TO APPEAL, AND REPLY SUPPORTING ITS APPLICATION FOR LEAVE TO APPEAL **

1. December 20, 2001 Michigan Public Service Commission Opinion and Order in Case No. U-12639.

2. May 16, 2002 Michigan Public Service Commission Opinion and Order in Case No. U-12639.

3. Consumers Energy Co v Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket Nos. 241990 and 241991).

4. January 7, 2004 Order of the Court of Appeals denying reconsideration in Docket No. 241991.

5. July 23, 2003 Michigan Public Service Commission Opinion and Order in Case No. U-12892.

6. November 2, 2000 Michigan Public Service Commission Opinion and Order in Case No. U-12478.

7. Edison's November 22, 2000 Petition for Rehearing in Case No. U-12478.

8. January 4, 2001 Michigan Public Service Commission Opinion and Order in Case No. U-12478.

9. January 5, 2001 letter in Case No. 12478.

10. Detroit Edison Co v Public Service Comm, ___ Mich App ___; ___ NW2d ___ (2004)

11. Consumes Energy Co v Public Service Comm, ___ Mich App; ___ NW2d ___ (2004)

** Appendices 1-9 are attached to Edison's Application for Leave to Appeal, filed February 18, 2004, Appendices 10-11 are attached hereto.

STATE OF MICHIGAN

COURT OF APPEALS

DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, ABATE, and ATTORNEY GENERAL,

Appellees.

FOR PUBLICATION
April 1, 2004
9:00 a.m.

No. 243268
PSC
LC No. 00-012892

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

SAAD, J.

I.

Detroit Edison appeals the Public Service Commission's order that approved deferred recovery of implementation expenses of $27,225,289 that Detroit Edison incurred during the year 2000 to establish the retail open access ("ROA") program. Detroit Edison appeals the PSC's order because the PSC deferred ultimate recovery of the 2000 implementation costs pending further reviews by the PSC. We remand for further proceedings.[1]

II.

Initially, the PSC established the ROA, under which retail customers of electric utilities may purchase electricity from alternate suppliers. After our Supreme Court found that the PSC exceeded its authority in establishing ROA, *Consumers Power Co v Public Service Comm*, 460 Mich 148; 596 NW2d 126 (1999), the Legislature authorized the program in the Customer Choice and Electricity Reliability Act ("Act"), 2000 PA 141 and 2000 PA 142. The Act provides that previous PSC orders concerning alternative electricity providers are enforceable by the PSC. MCL 460.10a(5).

[1] See our Court's similar remand decision in *Consumers Energy v MPSC*, ___ Mich App ___; ___ NW2d ___ (2004).

In prior cases, the PSC developed procedures for allowing utilities to recover stranded costs, which include implementation costs. Moreover, and most importantly, the Legislature specifically provided for a full recovery of net stranded costs and implementation costs:

> 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. [MCL 460.10a(1)].

In its prior case, MPSC U-12639, the PSC held proceedings to determine net stranded costs, including implementation costs, as required by the statute. As with previous decisions,[2] the PSC ruled that the recovery of implementation costs was conditioned upon the success of utilities in implementing the ROA programs. According to the PSC, the record provided was insufficient to determine whether the programs were sufficiently successful to merit full recovery of implementation expenses. The PSC reaffirmed that it would permit recovery of "prudently incurred" implementation expenses as provided for in its prior orders, and again, conditioned recovery on the success of the ROA program. This Court affirmed the earlier decision of the PSC, finding in part that the lack of information supported the decision of the PSC to defer the recovery. *Consumers Energy Co v PSC*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket Nos. 241990 & 241991).

Edison filed this application for recovery of year 2000 ROA implementation costs, and presented evidence that it had incurred $28,269,326 in costs during the calendar year. A PSC staff auditor recommended that $1,044,037 in non-incremental labor costs be disallowed. The audit concerned financial data only, found the costs incurred were fair and reasonable, but did not include an evaluation of the ROA program.

Citing its previous decisions that made its approval conditional and subject to further review, the PSC found that implementation costs should be conditionally approved, subject to the success of the utility in implementing the ROA program. The PSC also concluded that the costs should be recovered at the conclusion of the rate freeze mandated by MCL 460.10d, and directed Edison to file an application with supporting documentation that provides the commission with a factual basis for reviewing the success of the program. The PSC stated that it was specifically looking for evidence that all the necessary parts are in place for the ROA program to fully function.

Under well-established Michigan law, appellate review of PSC orders is narrow in scope, and all rates, fares, regulations, practices and services prescribed by the PSC are deemed prima facie to be lawful and reasonable. MCL 462.25. The party that challenges an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). A decision of the PSC is unlawful if it involves an erroneous interpretation or application of the law and it is unreasonable if it is unsupported by the evidence.

---

[2] MPSC U-12358, MPSC U-11955 and MPSC U-12956.

ABATE v PSC, 219 Mich App 653, 659; 557 NW2d 918 (1996). This Court gives due deference to the administrative expertise of the PSC, and will not substitute its judgment for that of the PSC. *Id.* However, the Court may not abandon or delegate its responsibility to interpret statutory language and legislative intent. *In re Pelland Against Ameritech Michigan*, 254 Mich App 675, 682-683; 658 NW2d 849 (2003).

On appeal, Detroit Edison argues that the decision of the PSC fails to provide the timely recovery of implementation costs required by MCL 460.10a(1). Edison asserts that MCL 460.10a(1) imposes a new time requirement on the PSC, and precludes the PSC from deferring a recovery of implementation expenses. The PSC maintains that it cannot allow the recovery of implementation costs until it is able to determine whether the costs were prudently incurred. Although the PSC says the success of the program should be used as evidence to show that the implementation costs were prudently incurred, Detroit Edison maintains that factors outside of its control could cause the program to fail. Further, Detroit Edison correctly maintains that it does not have the benefit of hindsight in accruing costs, and the PSC must review the utility's expenses in light of the knowledge that was available at the time the expenditures were made. *ABATE v PSC*, 208 Mich App 248, 257-258; 527 NW2d 533 (1994).

MCL 460.10(1) requires the PSC to issue orders no later than January 1, 2002, and to establish the rates, terms, and conditions of service that allow all retail customers to choose an alternative electric supplier. The Legislature requires that these orders provide for a full recovery of implementation costs. The PSC has instead deferred, indefinitely, any decision regarding recovery of implementation costs. We do not believe the Legislature intended such an indefinite deferral when it required that orders be issued by January 1, 2002. Moreover, the decision of the PSC does not provide sufficient information to allow this Court to perform its task of judicial review.

To ensure that the Legislature's intent, expressed in MCL 460.10a(1), is not frustrated by endless delays, and to ensure that the PSC's orders are sufficiently comprehensive and detailed to allow for informed judicial review, we remand for further proceedings as follows:

III.

Procedure After Remand

A. Hearing and Orders. The PSC will (1) convene a hearing no later than 90 days from the release of this Opinion and (2) no later than 60 days after the conclusion of the hearing, issue an order which provides for full recovery of Edison's implementation costs including a comprehensive and detailed analysis that supports its conclusions and findings and that permits informed judicial review. To the extent certain implementation costs are disallowed under applicable law, the PSC will again provide a comprehensive and detailed analysis and rationale for its determination with sufficient detail and clarity to allow for informed appellate review.

B. Information Regarding Implementation Costs. Because the PSC has said that it does not have sufficient data to make its determination regarding implementation costs, within 30 days from the release of this Opinion, the PSC will serve upon Edison, its request for data that

sets forth with reasonable detail all the data the PSC needs to conduct a hearing and a prudency review. Within 30 days of receipt of this request, Edison will serve the PSC with all the information requested by the PSC (to the extent it is within Edison's ability to do so), and will also serve on the PSC any other relevant information that Edison believes is germane to the issue of its right to recover its implementation costs. The PSC and Edison may supplement its request for and submission of data, respectively, as is reasonable, during the course of the hearing.

C. Time Deadlines. The PSC and Edison, may agree and thus stipulate to extensions of time to (1) request data, (2) supply data, (3) conduct a hearing and (4) issue an order, but there shall be no more than one adjournment of any date and for no longer than 30 days.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Richard A. Bandstra

STATE OF MICHIGAN

COURT OF APPEALS

CONSUMERS ENERGY COMPANY,

Petitioner-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Respondent-Appellee,

and

ABATE, ENERGY MICHIGAN, INC., and ATTORNEY GENERAL,

Appellees.

FOR PUBLICATION
April 1, 2004
9:05 a.m.

No. 243360
PSC
LC No. 00-012358

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

SAAD, J.

I.

Consumers Energy Company ("Consumers") appeals from the Michigan Public Service Commission's order that approved the 1999 implementation expenses incurred by Consumers to establish a retail open access ("ROA") program, but which deferred recovery and held that these implementation expenses could be adjusted upon further review. We remand for further proceedings.[1]

II.

Under the ROA program, retail customers of electric utilities can choose to purchase electricity from suppliers other than Consumers. However, the electricity generated by these alternative suppliers would be transmitted to the customer through the existing system. The PSC

[1] See our Court's similar decision in *Detroit Edison v MPSC*, ___ Mich App ___; ___ NW2d ___ (2004).

originally initiated the ROA program, but in *Consumers Power Co v PSC,* 460 Mich 148, 168; 596 NW2d 126 (1999), our Supreme Court held that the PSC "lacks statutory authority to order a utility to transmit a third-party provider's electricity through its system to a customer. Thus, the PSC lacked the statutory authority to implement the experimental [ROA] program." The Legislature responded to our Supreme Court's invalidation of the PSC-imposed ROA program by enacting the Customer Choice and Electricity Reliability Act, 2000 PA 141 and 142; MCL 460.10 et seq. This legislation authorized the ROA program and established some basic guidelines. MCL 460.10a(1), a provision of this Act, provides:

> (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.* [Emphasis added.]

Consumers filed an application seeking PSC authorization to recover its 1999 implementation costs. The PSC held that "[i]mplementation costs of $25,156,000 incurred by Consumers during 1999 should be approved for deferred recovery, subject to the conditions stated in this order." The condition at issue provided that the PSC "reserves the right to undertake another review of Consumers' 1999 implementation expenditures" because the PSC anticipated that it would acquire additional information that would help it evaluate the implementation of the ROA program. The PSC also noted that MCL 460.10d(1) had imposed a rate freeze, and indicated that it would permit recovery of prudently incurred implementation costs at the end of the rate freeze. The PSC further directed:

> 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.

Consumers contends that "full recovery" by January 1, 2002, as mandated by the Legislature in MCL 460.10a(1) means that the PSC had to approve the amount to be recovered by that date without making this determination conditional on a future review.[2] The PSC argues that this statute "requires only that the commission determine a methodology for recovery of implementation costs by January 1, 2002."

---

[2] Consumers has not argued that the PSC was required to issue an order that provided for actual recovery by January 1, 2002. Thus, we need not, and therefore do not, address whether implementation expenses, as qualified expenses under MCL 460.10h(g), could have been recovered through securitization under MCL 460.10i.

While a PSC order is presumed to be lawful, it is unlawful if it is based on an erroneous interpretation or application of the law. *In re Complaint of Pelland Against Ameritech Michigan,* 254 Mich App 675, 681-682; 658 NW2d 849 (2003). Considerable deference is generally shown to an administrative agency for longstanding interpretations of statutes. Although some deference is afforded to the PSC due to its institutional position when initially interpreting a new statute, the deference afforded is less. *In re Procedure & Format for Filing Tariffs Under the Michigan Telecommunications Act,* 210 Mich App 533, 538-539; 534 NW2d 194 (1995). This Court may not abandon or delegate its responsibility to interpret statutory language and legislative intent. *In re Complaint of Pelland, supra.*

The language "shall provide for full recovery of . . . implementation costs" is subject to varying interpretations. It could mean an order that establishes a specific dollar amount that represents the full recovery to which the utility will be entitled, or, it could mean an order providing a method for determining implementation costs. The PSC points out that implementation costs will be incurred after January 1, 2002. Therefore, the PSC argues that it could not enter an order by January 1, 2002 that would provide a set sum representing "full recovery" of all implementation costs. In response, Consumers correctly responds that this proceeding concerns only 1999 implementation costs.

Consumers argues that the PSC had already made a determination of the methodology for determining a full recovery of implementation costs because, in its earlier orders, it had provided for annual prudence reviews of these costs. Consumers maintains that these earlier orders must be enforced under MCL 460.10a(5). However, this provision states that "orders that determine and authorize recovery of . . . implementation costs . . . are in compliance with this act and enforceable by the commission." The PSC had not issued any orders determining and authorizing recovery of 1999 implementation costs before enactment of the statute. Previous orders providing for annual prudence reviews do not necessarily constitute orders determining and authorizing recovery of implementation costs.

Nonetheless, we conclude that in requiring that the PSC "provide for full recovery" of implementation costs in an order adopted by January 1, 2002, the Legislature did not intend to allow the PSC to adopt a methodology that would indefinitely defer the determination of the amount to be allowed. An approval made contingent on future unknown facts that may indeed eradicate the initial approval is not a provision for full recovery. We note that in *Consumers Energy Co v MPSC,* unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket Nos. 241990 and 241991), this Court held that deferral of ROA implementation expenses was proper since the evidence was insufficient to allow the PSC to accurately determine the proper amount of implementation costs and whether those costs were prudently incurred. However, at oral argument in this case, the PSC did not dispute that its intent was to defer making a determination until the rate freezes imposed by MCL 460.10d(2) had expired. Under this statute, a freeze is in effect until January 1, 2005 for commercial and manufacturing customers, and until January 1, 2006 for residential customers. Moreover, at oral argument, the PSC took the position that it had the authority to defer the determination of implementation costs virtually indefinitely. We conclude that this is inconsistent with legislative intent, and that the Legislature contemplated that the PSC would make a timely determination regarding Consumers' implementation costs. Accordingly, we find it necessary to remand so that the PSC can make such a determination.

To ensure that the Legislature's intent, expressed in MCL 460.10a(1), is not frustrated by endless delays, and to ensure that the PSC's orders are sufficiently comprehensive and detailed to allow for informed judicial review, we remand for further proceedings as follows:

III.

Procedure After Remand

A. Hearing and Orders. The PSC will (1) convene a hearing no later than 90 days from the release of this Opinion and (2) no later than 60 days after the conclusion of the hearing, issue an order which provides for full recovery of Consumers' implementation costs including a comprehensive and detailed analysis that supports its conclusions and findings and that permits informed judicial review. To the extent certain implementation costs are disallowed under applicable law, again, the PSC will provide a comprehensive and detailed analysis and rationale for its determination with sufficient detail and clarity to allow for informed appellate review.

B. Information Regarding Implementation Costs. Because the PSC has said that it does not have sufficient data to make its determination regarding implementation costs, within 30 days from the release of this Opinion, the PSC will serve upon Consumers, its request for data that sets forth with reasonable detail all the data the PSC needs to conduct a hearing, and a prudency review. Within 30 days of receipt of this request, Consumers will serve the PSC with all the information requested by the PSC (to the extent it is within Consumers' ability to do so), and will also serve on the PSC any other relevant information that Consumers believes is germane to the issue of its right to recover its implementation costs. The PSC and Consumers may supplement its request for and submission of data, respectively, as is reasonable, during the course of the hearing.

C. Time Deadlines. The PSC and Consumers, may agree and thus stipulate to extensions of time to (1) request data, (2) supply data, (3) conduct a hearing and (4) issue an order, but there shall be no more than one adjournment of any date and for no longer than 30 days.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Richard A. Bandstra