

S T A T E O F M I C H I G A N
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of GREAT WOLF	)	
LODGE OF TRAVERSE CITY, LLC , against	)	Case No. U-14593
CHERRYLAND ELECTRIC COOPERATIVE.	)	
	)	

At the May 25, 2006 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

OPINION AND ORDER

History of Proceedings

On July 13, 2005, Great Wolf Lodge of Traverse City, LLC (GWL) filed a two-count complaint against Cherryland Electric Cooperative (Cherryland). In Count I, GWL alleged that in November 2004, Cherryland began charging for service under the cooperative's large commercial and industrial (LCI) tariff rather than at the large resort services (LRS) rate that it had previously been charged under an agreement that the parties entered into on March 31, 2003. GWL claimed that the rate increase violated the Commission's July 22, 2004 order in Case No. U-13716 (July 22 order) and MCL 460.552, which permits electric utilities to charge only Commission-approved

rates for electric service.¹ GWL requested a partial refund of its electric bill and asked that the Commission fine Cherryland for violating the Commission's order. GWL also requested that the Commission order Cherryland to stop charging GWL the unauthorized LCI rate and return it to the LRS rate.

In Count II of the complaint, GWL requested that the Commission declare that after the termination of GWL's agreement with Cherryland, GWL could elect to receive all components of its electrical service from any provider it chose. GWL also requested that the Commission require Cherryland to cooperate in the transfer of distribution and transmission facilities to a new provider and that the Commission order Cherryland to execute a contract with GWL reflecting the requirements in the Commission's order.

On August 30, 2005, in lieu of an answer, Cherryland filed a motion for summary disposition. Cherryland argued that Count I of the complaint should be dismissed because GWL had failed to meet the threshold load requirement for the LRS rate. Specifically, Cherryland claimed that under the March 30, 2003 special agreement, GWL was eligible to receive the LRS rate if the lodge had greater than a 50% load factor and at least a 1,500 kilowatt (kW) per month load.² According to Cherryland, it switched GWL to the LCI rate because the lodge consistently failed to meet the minimum load requirement for the LRS rate. Cherryland further asserted that it risked the imposition of additional fines from the Commission if it failed to charge GWL pursuant to a

¹In Case No. U-13716, Cherryland applied for Commission approval to implement a tariff rate for LRS. At that time, only GWL was eligible for the proposed LRS tariff, which was based on the cost to serve GWL. In its July 22 order, the Commission denied Cherryland's request on grounds that it was imprudent to approve a generally available tariff based on the incremental costs of serving a single customer and recommended that Cherryland and GWL enter into a special contract. Nevertheless, the Commission approved the continuation of the LRS rate for GWL for one year or until the parties signed a special contract, whichever occurred first.

² The LRS energy charge was \$0.0496 per kilowatt hour for usage other than outside lighting.

Commission-approved tariff that reflected GWL's actual load. Cherryland therefore claimed that it was entitled to summary disposition of Count I of GWL's complaint.

Regarding Count II of the complaint, Cherryland argued that while GWL could receive generation services from an alternative electric supplier (AES), GWL's request that the Commission declare that it could elect to receive transmission and distribution services from any provider of its choosing was inconsistent with Michigan statutes and prior Commission orders.

On September 8, 2005, Administrative Law Judge Mark L. Eyster (ALJ) heard oral arguments on Cherryland's motion for summary disposition. At the close of the hearing, the ALJ requested that GWL and the Staff submit supplemental briefs addressing whether GWL had met the 1,500 kW load requirement and the parties complied on September 16, 2005. On October 24, 2005, the ALJ ruled in favor of GWL on Count I and recommended that Count II of the complaint be dismissed. The ALJ ordered the parties to file a stipulation regarding the difference between what GWL had been charged under the LCI tariff and the charges GWL would have paid had it been charged under the LRS rate.³ On November 7, 2005, GWL and Cherryland appealed the ALJ's ruling on the motion for summary disposition. The parties and the Staff filed responses to these appeals on November 21, 2005.

On December 21, 2005, the ALJ heard arguments on damages related to Count I of the complaint. On February 22, 2006, the ALJ issued his Proposal for Decision (PFD). Cherryland, GWL, and the Staff filed exceptions and replies to exceptions on March 15 and March 29, 2006 respectively.

³The parties were unable to agree on a stipulation for damages.

Positions of the Parties

The parties agreed that the central issue to be resolved in Count I was whether the Commission's July 22 order referred to the LRS rate only or whether it included the minimum load requirement of the temporary agreement and the proposed LRS tariff. Cherryland argued that under the special customer agreement in place at the time of the July 22 order, the LRS rate would be available if GWL had greater than a 50% load factor and at least a 1,500 kW load for usage other than outside lighting. The special agreement also provided that after its termination, GWL could choose a new power supplier, but Cherryland would remain responsible for transmission and distribution services.

Cherryland observed that GWL did not intervene in its LRS tariff case, Case No. U-13716, and that the Staff supported the proposed tariff with minor modifications. The Commission, however, rejected the proposal and recommended that Cherryland negotiate a special contract with GWL for Commission approval. The Commission also fined Cherryland for implementing a rate without Commission approval and ordered Cherryland to continue the rate for one year or until a special contract was in place, whichever came first. Cherryland noted that it subsequently filed an application for approval of a special contract with GWL in Case No. U-14240. According to Cherryland, despite diligent efforts, the parties were unable to agree on contract terms, and the Commission dismissed the case. *See*, October 14, 2004 order in Case No. U-14240.

Cherryland argued that its decision to charge GWL under the Commission-approved LCI rate, which was applicable to GWL's actual usage, was a good-faith effort to avoid the imposition of additional fines that the Commission could impose if Cherryland continued to charge GWL an unauthorized rate. Cherryland observed that nowhere in the July 22 order did the Commission authorize it to charge the LRS rate without enforcing the other terms and conditions of that rate.

When the parties failed to agree on special contract terms in a timely manner, Cherryland claimed that it had no choice but to switch GWL to an approved tariff that reflected GWL's actual usage. Thus, Cherryland concluded that it was entitled to summary disposition on Count I of GWL's complaint.

Regarding Count II of the complaint, Cherryland argued that GWL's request that the Commission declare that the lodge "has, by law, full choice of electric providers not only for generation service but also for transmission and distribution service,"⁴ and its request that the Commission order Cherryland to cooperate in the transfer of its distribution facilities to a new provider were inconsistent with Michigan statutes and Commission orders. Cherryland observed that under MCL 460.10q and 10x(1), a customer may choose an AES for the generation of electric power, but may not choose the supplier of distribution and transmission services. Moreover, Cherryland asserted that under 1999 AC, R 460.3411 (Rule 411), existing customers like GWL are not permitted to transfer from one utility to another.⁵ Cherryland concluded that a Commission order allowing GWL to transfer distribution and transmission services to another provider would violate Rule 411.

Finally, Cherryland argued that the Commission has never approved a special contract that would allow a customer choice in distribution or transmission services and that GWL had provided no authority for such approval in its pleadings. Cherryland concluded that it was therefore entitled to summary disposition on Count II of the complaint.

GWL took the position that Cherryland ignored the distinction that the Commission drew between the rate Cherryland was currently charging the lodge, which the Commission temporarily

⁴Complaint, ¶ 45.

⁵Rule 411 regulates the manner in which distribution services by electric utilities under the Commission's jurisdiction may be extended and outlines the process by which the appropriate utility is permitted to serve new customers.

approved, and the proposed tariff, rejected by the Commission, which contained a minimum load requirement in addition to a rate. GWL asserted that a tariff sets forth all of the terms and conditions of an available utility service, and a rate is only one of those terms. GWL noted that the Court of Appeals discussed “rate” in the context of utility practice and observed that the Court determined that “‘rate’ means simply ‘price.’” *Sullivan v Public Service Comm’n*, 93 Mich App 391, 396; 287 NW2d 188 (1979). Thus, according to GWL, the Commission authorized the utility to continue only the rate or price charged but did not incorporate the additional terms and conditions embodied in the proposed tariff.

Alternatively, GWL argued that even if the 1,500 kW load requirement were part of the “rate currently charged” and authorized by the July 22 order, Cherryland had failed to establish that GWL had failed to meet the load threshold.⁶ GWL argued that Cherryland’s evidence of usage by the lodge did not clearly show that GWL failed to meet the peak load requirement of 1,500 kW and that the lodge had no opportunity for discovery to refute Cherryland’s evidence. Therefore, according to GWL, summary disposition in favor of Cherryland would be premature.

Regarding Count II of the complaint, GWL argued that when the lodge facility was built, it had full choice of providers for all electric service components because it was not an existing customer of Cherryland. GWL chose Traverse City Light and Power (TCL&P), a municipal utility, to provide its electrical service, but its choice was frustrated when Cherryland refused to remove its service drop from the property unless GWL accepted service from Cherryland. GWL maintained that Cherryland’s refusal to remove its service at the lodge’s request in 2002 was illegal and that GWL’s request was simply for the Commission to put the lodge back in the position it would have been in had Cherryland complied with the lodge’s request in 2002.

⁶GWL’s Supplemental Memorandum Opposing Summary Disposition of Count I of Complaint, p. 6.

GWL argued that, contrary to the positions of Cherryland and the Staff, Rule 411 does not apply to this situation, where a customer elects to use a municipal provider for electric service. According to GWL, a municipal electric provider, such as TCL&P is not a “utility” under Rule 411, and therefore Rule 411(2), which prohibits the transfer of a customer from one utility to another, is not violated. GWL further argued that the Commission is bound by the Grand Traverse Circuit Court’s (Circuit Court) interpretation of MCL 124.3,⁷ which determined that a new customer is created when the buildings formerly served by one utility are removed and replaced by new ones that may be served by a municipal electric service provider.⁸ GWL asserted that the Commission cannot disregard the Circuit Court’s interpretation under the doctrine of collateral estoppel.⁹ Moreover, GWL argued that because the Circuit Court’s interpretation has the force of law in Grand Traverse County, and because the Commission does not have the authority to interpret or enforce MCL 124.3, summary disposition of Count II of the complaint should be granted in favor of GWL.

The Staff supported Cherryland’s positions on both issues adding that, in its view, the Commission’s reference to “the rate currently charged” in the July 22 order meant the LRS tariff rate proposed by Cherryland even though the Commission rejected the proposed LRS tariff rate as a generally available tariff rate. The Staff took the position that the Commission approved the LRS tariff, as originally filed by Cherryland in Case No. U-13716, for up to one year for GWL.

⁷MCL 124.3 provides for the extension of electrical services when the provider is a municipal utility.

⁸*See, Cherryland Electrical Coop v Traverse City Light and Power*, opinion issued June 27, 2002 by Judge Thomas G. Power, Circuit Court for the County of Grand Traverse (File No. 01-21871-CZ) attached as Exhibit B to Cherryland’s appeal from summary disposition ruling.

⁹Because Cherryland was a party in the Circuit Court case and because the issue of what a “customer” is under MCL 124.3 was addressed in that case, GWL argues that under the doctrine of collateral estoppel, the issue is precluded from review by the Commission.

According to the Staff, in so doing the Commission approved all of the terms and conditions of service included in the LRS tariff, including the minimum 1,500 kW per month load requirement.

Regarding Count II of the complaint, the Staff concurred with Cherryland's position and argued that under both Rule 411 and MCL 124.3, GWL was an existing customer of Cherryland and therefore could not switch distribution providers – at all under Rule 411 – or without Cherryland's permission under MCL 124.3. The Staff also argued that the Circuit Court's decision was erroneous because the Circuit Court failed to recognize that the "customer" includes not only the building but the premises as well.¹⁰ Moreover, the Staff claimed that under the Circuit Court's interpretation of the statute, regulated utilities have less protection than municipal utilities.

Summary Disposition Ruling and Proposal for Decision

In a written ruling issued on October 24, 2005, the ALJ determined that when the Commission approved continuation of "the rate currently charged" in the July 22 order, it intended to maintain the status quo pending the execution and approval of a special contract between GWL and Cherryland. The ALJ found that when the Commission issued its order, Cherryland was not enforcing the minimum load requirement and that therefore the status quo that the Commission sought to maintain did not include the minimum load requirement of 1,500 kW per month. Accordingly, the ALJ ordered the parties to file a stipulation as to the amount GWL would have paid if it was charged the LRS rate for one year after the July 22 order compared to what it actually paid under the LCI rate that it was charged for several months during that period.

The ALJ found that Count II was in part a request for a declaratory ruling from the Commission that GWL has full choice of electric providers for generation, transmission, and distribution

¹⁰See 1999 AC, R 460.3102(k) (Rule 102(k)) and Case Nos. U-14193 and U-13764.

service under Rule 411, MCL 124.3, and 2000 PA 141 (Act 141) MCL 460.10¹¹ *et seq.* The ALJ observed that the Commission dismissed Cherryland's application for approval of a special contract with GWL because GWL disagreed with certain contract terms. *See*, October 14, 2004 order in Case No. U-14240. The Commission nevertheless indicated that the parties could petition to seek resolution of any disputed issues in the special contract, "to the extent that the subject matter of the dispute falls within the Commission's jurisdiction." The ALJ found that while the Commission can issue a declaratory ruling regarding the application of Rule 411, it has no authority to determine the application of MCL 124.3, which applies to municipal utilities outside the Commission's jurisdiction. Furthermore, the ALJ observed that GWL provided no authority for its proposition that it has full choice of providers for all components of its electric service and that he was unaware of any circumstances under which the Commission could declare that GWL had full choice of providers for distribution and transmission services.

In the event that GWL elects to receive electric service from another provider, it also requested that the Commission order Cherryland to cooperate in the transfer of service and facilities to the new provider. The ALJ recommended that the Commission deny this request on grounds that it was not ripe. The ALJ found that GWL's request for relief was premised on a hypothetical business decision to switch providers at some point in the future. The ALJ thus recommended that the Commission dismiss Count II of the complaint.

In a PFD issued February 22, 2006, the ALJ found that the Commission's July 22 order was unambiguous: the Commission ordered Cherryland to charge GWL the LRS rate for up to one year after the order was issued, that is, until July 22, 2005. The ALJ found that this resulted in an overcharge of \$72,550.16 that should be refunded to GWL.

¹¹Act 141 provides for customer choice in electric generation suppliers for utilities under the Commission's jurisdiction.

Furthermore, the ALJ found that it was appropriate to include interest, at a composite rate of 5.61%, with the refund. The ALJ determined that Cherryland's application of the LCI rate instead of the LRS rate was not a billing error under 1999 AC, R 460.2101 but instead resulted from the application of a rate schedule other than the one ordered by the Commission.

The ALJ also agreed with GWL that under the circumstances it would be appropriate for the Commission to levy a total fine of \$44,250.00, or \$150.00 per day for the time that Cherryland commenced violating the Commission's July 22 order until July 22, 2005. The ALJ found that Cherryland's imposition of the LCI rate was "a purposeful and flagrant" violation of the Commission's order and that under MCL 460.558, Cherryland could be fined up to \$300.00 per day for its conduct.

Exceptions and Replies to Exceptions

Cherryland argues that the ALJ erred in granting summary disposition in favor of GWL on Count I of the complaint. Cherryland claims that the only issue before the Commission in Case No. U-13716 was the LRS tariff, which, Cherryland notes, contained a rate along with certain terms and conditions, including a minimum load requirement. Cherryland argues that in its July 22 order the Commission approved the LRS tariff for temporary use and that Cherryland was therefore required to enforce the conditions in the tariff and switch GWL to an appropriate tariff when the lodge failed to meet the minimum load requirement of the LRS tariff.

Alternatively, Cherryland argues that even if the Commission's July 22 order was based on the parties' special agreement, the ALJ erred in finding that Cherryland had waived the 1,500 kW load requirement. Cherryland noted that both of the special customer agreements signed by the parties contained threshold load requirements and "no waiver" clauses. Cherryland argues that the high burden of proof – clear and convincing evidence of the parties' mutual intent to modify the

agreement – could not be shown by the conduct here. Cherryland further asserts that even if its conduct demonstrated an intention to waive the 1,500 kW load requirement on a month-to-month basis, there was insufficient evidence to show that the parties intended to permanently waive the requirement.

Cherryland agrees that the ALJ properly dismissed Count II of the complaint but requested that the Commission clarify that GWL cannot elect to receive electric distribution services from any other utility, including a municipal utility. Cherryland argues that because it is the proper service provider to GWL under Rule 411, neither jurisdiction nor ripeness questions affect the Commission's determination of this matter. Furthermore, Cherryland requests that the Commission expressly state that it will not approve a special contract containing terms proposed by GWL, which would permit GWL to elect to receive distribution and transmission services from the provider of its choice. Cherryland maintains that Act 141 provides for choice in electric generation services but that transmission and distribution services remain regulated monopolies, not open to competitive suppliers.

Cherryland also disagrees that it owes a refund to GWL. Alternatively, Cherryland argues that if the Commission determines that a refund is appropriate, Cherryland asserts that it should not be required to pay interest or a fine in addition to the refund. Cherryland claims that the ALJ erred in finding that Cherryland's charge of the LCI rate to GWL was a deliberate violation of a Commission order and not simply a billing error. In the case of a billing error, Cherryland asserts that there is no statute that specifically authorizes the Commission to award interest. Cherryland points to 1999 AC, R 460.3404, the rule that governs billing errors, and observes that the rule provides that a billing error may be adjusted, refunded, or credited, but it does not provide for the payment of interest.

Finally, Cherryland argues that the ALJ's recommendation that a fine be imposed was punitive and wholly unsupported by evidence in the record. Cherryland takes specific exception to the ALJ's inference that Cherryland's notice to GWL of the change in the lodge's rate was a "cynical and malicious attempt by Cherryland to exhort [sic] GWL into signing an addendum for a special contract rate."¹²

In its exceptions to the PFD, GWL argues that the ALJ erred in limiting the refund period to one year after the Commission's July 22 order. GWL claims that the ALJ ignored the Commission's intent and that the ALJ's literal reading of the order rewards Cherryland for its wrongdoing. GWL asserts that the Commission did not anticipate that Cherryland would change the rate that it was charging GWL to the LCI rate or that Cherryland would refuse to negotiate a reasonable special contract. Therefore, GWL concludes, the Commission should continue the LRS rate until a special contract is approved.

GWL also objects to the ALJ's recommendation that the Commission dismiss Count II of the complaint. GWL asserts that the ALJ misconstrued its request, claiming that the lodge had not asked the Commission for a declaratory ruling on the application of MCL 124.3 because the statute has already been interpreted by the Circuit Court.¹³ GWL claims that it is simply asking the Commission to follow the Circuit Court's ruling and recognize that GWL at one time had full choice of service providers. Because Cherryland unlawfully usurped that choice, GWL requests that the Commission merely determine its legal right not to be bound in the future by Cherryland's past unlawful acts which resulted in Cherryland providing electrical service to the lodge today. GWL also argues that a failure to recognize its right to choose its provider, particularly in light of

¹²Cherryland's exceptions, p. 9.

¹³See, note 5, *supra*.

Cherryland's coercive behavior, would be bad public policy and would effectively reward Cherryland for its egregious conduct.

GWL further argues that the Commission has broad discretion to approve or disapprove special contract terms and that in cases where parties fail to agree to terms, the Commission may decide which terms are acceptable. Therefore, GWL concludes that the Commission may approve special contract terms that would permit GWL to select another provider for transmission and distribution services.

GWL takes exception to the ALJ's recommendation that the Commission impose a fine of \$150.00 per day when the statute provides for a maximum penalty of \$300.00 per day. GWL claims that the ALJ's determination of the fine was error in light of his finding that Cherryland's violation of the July 22 order was "purposeful and flagrant." GWL therefore requests that the Commission impose the maximum fine on Cherryland. Furthermore, GWL argues that the period for which the fine is imposed should continue until Cherryland reinstates and charges the LRS rate to the lodge.

The Staff objects to the ALJ's conclusion that the July 22 order did not include the 1,500 kW load requirement. The Staff claims that the ALJ first found that the Commission's order was unambiguous and therefore "judicial construction is not allowed." Despite this finding, the Staff asserts that the ALJ then engaged in judicial construction by determining that what the Commission meant by "the rate currently charged" was the rate only and not the terms and conditions of the temporary contract or the proposed tariff, including the 1,500 kW threshold load requirement. The Staff maintains that the ALJ's reasoning went beyond the four corners of the Commission's order and that because Cherryland's application in Case No. U-13716 included the 1,500 kW load requirement, the Commission's clearly stated intent in the July 22 order was to include all of the

terms and conditions of the special contract. The Staff also argued that the ALJ's finding, that the parties had waived the 1,500 kW load requirement when the Commission issued the July 22 order, was error. The Staff argues that Cherryland was in no position to either enforce or waive the load requirement because the special agreement that Cherryland entered into with GWL, without Commission approval, was void.

The Staff further argues that GWL failed to introduce sufficient evidence to show that the parties' conduct waived the requirement that the agreement could only be altered in writing. The Staff points out that while Cherryland has consistently maintained that the load requirement was part of the rate approved in the July 22 order, and GWL argued that the rate approved did not include the 1,500 kW load requirement; neither party argued that the parties mutually waived the 1,500 kW provision. In the alternative, the Staff argues that Cherryland should not be penalized for its reasonable interpretation of the Commission's order: that the "rate currently charged" meant both the rate and the other terms and conditions of the agreement.

The Staff takes the position that Cherryland is the lawful provider of electrical services to GWL because GWL agreed that Cherryland would provide both generation and distribution services when the parties made the first special agreement. Furthermore, the Staff notes that the allegations made by GWL here (i.e., that because of Cherryland's misconduct in initially securing an agreement to serve GWL, it should not be permitted to serve the lodge in the future) were considered and rejected by the Commission in Case No. U-13716. Therefore, the Staff urges that the Commission not reverse its position in this case.

The Staff also argues that the ALJ erred in awarding interest on grounds that interest on the award, like the award itself, was not supported by competent, material, and substantial evidence.

Discussion

In its July 22 order, the Commission stated:

[T]he Commission agrees with the ALJ's finding that individual contract language is inappropriate in a general tariff, which lends support to the Commission's finding that Cherryland's proposed tariff should be rejected. However, because the Commission agrees that the LRS rate is in the public interest as applied to GWL, the rate shall be authorized for up to one year or until a special contract is approved.

Thus, the plain language of the order provided that Cherryland continue to charge the LRS rate for up to one year. The Commission intended to preserve the status quo between the parties while they worked out the terms of a special contract. Incorporated in the application filed in Case No. U-13716, and never questioned by the parties, was the assumption that GWL was in compliance with all of the terms and conditions of the LRS rate. Therefore, the Commission finds that Cherryland should have continued charging the LRS rate to GWL until July 22, 2005 as stated in the order. Cherryland's subsequent concerns about charging GWL an inappropriate rate are recognized. However, in the unique circumstances of this case, Cherryland should have sought clarification of the July 22 order. Cherryland failed to do so and instead switched GWL to its LCI rate, which, although Commission-approved, was not the rate approved in the July 22 order. As a result, the Commission agrees with the ALJ's finding that Cherryland should refund \$72,550.16 to GWL for the period during which GWL was charged at the higher LCI rate.

Nevertheless, because the issue of additional terms and conditions of the proposed tariff and special agreement were not before the Commission in Case No. U-13716, the Commission agrees with the Staff that Cherryland's interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to GWL.

The Commission also finds that under the plain language of the July 22 order, the LRS rate was only available to GWL until a special contract was signed, or for one year, whichever

occurred first. July 22 order, p. 12. Because a special contract was never signed by the parties, Cherryland has properly charged GWL a Commission-approved rate since July 22, 2005 and should continue to do so until a special contract is executed and approved.

The Commission also agrees with the ALJ, the Staff, and Cherryland that GWL's request for a declaratory ruling that would permit the lodge to elect to receive all elements of electric service from a provider other than Cherryland should be denied. Rule 411 describes the procedures for the extension of electrical service for utilities regulated by the Commission. The purpose of Rule 411 is to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service. The definition of "customer" in Rule 411 distinguishes between the parent corporation that may own a facility or property at a site, and the site itself. Rule 411(1)(a) provides that the site itself is the "customer," not the corporation or individual who owns the site nor a particular building on the site. Thus, a change in ownership does not create a new customer, nor does the loss or addition of a building, as the customer is also the "facilities." Furthermore, once a utility has extended service to a customer, the utility then has the right to serve the entire premises, even if a portion of the load is closer to another utility's distribution facilities. *See*, June 7, 2005 order in Case No. U-14193, pp. 17-18.

It is undisputed that the GWL premises was an existing customer of Cherryland under Rule 411 in 2001. Cherryland had provided service to a farmhouse located on the GWL premises for many years before GWL purchased the property. GWL now argues that the Commission should declare that GWL is free to select a different service provider for all aspects of electric service after the March 31, 2003 agreement ends.

The parties agree that under Act 141, GWL has the right to select an AES for generation services. Although the Commission may order a utility to transfer distribution services to another

utility, it has only done so to remedy a Rule 411 violation; i.e., to restore the customer's service to the distribution utility that was entitled to provide service under the rule. *See, e.g.* April 20, 2004 order in Case No. U-13764 and June 7, 2005 order in Case No. U-14193. In the instant case, however, it appears that Cherryland did not violate Rule 411. Therefore, the Commission declines to grant the relief that GWL requests. Moreover, to the extent that this dispute centers on GWL's right to seek service from TCL&P, Rule 411 is not directly applicable. Rule 411 does not purport to alter the rights or obligations of a non-jurisdictional utility.¹⁴

GWL further argues that the Commission is bound by the Circuit Court's interpretation of "customer" under MCL 124.3 and that under that interpretation, GWL had a choice of electric service providers in 2001. According to GWL, because that choice was thwarted by Cherryland's refusal to remove the service drop, the Commission should now declare that GWL has full choice in transmission and distribution services. The Commission disagrees. GWL has not cited any legal authority as a basis for the Commission to grant the relief sought under the circumstances of this case.

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, 1999 AC, R 460.17101 *et seq.*

b. GWL should have been charged the LRS rate by Cherryland from July 22, 2004 until July 21, 2005.

¹⁴*See*, 1999 AC, R 460.3102(m), which defines "utility" for the purposes of Rule 411 as "operat[ing] under the jurisdiction of the commission."

c. Cherryland should be required to refund \$72,550.16 to GWL, representing the difference between what GWL paid for electric service under the LCI rate and what it should have paid under the LRS rate.

d. Under Rule 411, Cherryland should be found to be the proper service provider to GWL.

e. Count II of the complaint should be dismissed.

THEREFORE, IT IS ORDERED that:

A. Cherryland Electric Cooperative shall refund \$72,550.16 to Great Wolf Lodge of Traverse City, LLC.

B. Under 1999 AC, R 460.3411 Cherryland Electric Cooperative is the proper service provider to Great Wolf Lodge of Traverse City, LLC.

C. Count II of the complaint is dismissed.

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

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of May 25, 2006.

/s/ Mary Jo Kunkle
Its Executive Secretary

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 May 25, 2006.



Its Executive Secretary

P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-14593

County of Ingham)

Patricia A. Fronta being duly sworn, deposes and says that on May 25th 2006, A.D. she served a copy of the attached Commission order by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

Patricia
A. Fronta

Digitally signed by
Patricia A. Fronta
DN: CN = Patricia A.
Fronta, C = US, O = Case
Management, OU =
MPSC
Date: 2006.05.26
14:40:27 -04'00'

Patricia Fronta

Subscribed and sworn to before me
this 25th day of May 2006

Gloria Pearl
Jones

Digitally signed by Gloria Pearl
Jones
DN: CN = Gloria Pearl Jones, C =
US, O = DLEG/MPSC, OU =
Executive Secretary
Date: 2006.05.26 13:32:41 -04'00'

Notary Public, Eaton County, Michigan
Acting in Ingham, County, Michigan
My Commission expires June 5, 2007

SERVICE LIST FOR DOCKET # U – 14593
DATE OF PREPARATION: 05/26/2006

CASE #

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