

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the <i>ex parte</i> application of)	
CONSUMERS ENERGY COMPANY and)	
DTE ELECTRIC COMPANY for cost deferral)	Case No. U-21310
accounting and a regulatory asset for the costs)	
to restore allegedly defective work performed by)	
Toshiba on the Ludington Pumped Storage Plant.)	
_____)	

At the May 18, 2023 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner

ORDER

On November 7, 2022, Consumers Energy Company (Consumers) and DTE Electric Company (DTE Electric) (collectively referred to as the Owners of the Ludington Pumped Storage Plant (Ludington Plant)), filed an application, with a supporting affidavit, seeking *ex parte* approval of cost deferral accounting and a regulatory asset for the costs incurred with restoring allegedly defective work performed by Toshiba America Energy Systems Corporation (TAES)¹ at the Ludington Plant, together with a request for an opportunity to seek appropriate recovery and ratemaking treatment for the amounts recorded in the regulatory asset in a future rate case or other

¹ TAES, Toshiba International Corporation (TIC), and Toshiba Corporation are collectively referred to as Toshiba in this matter. As indicated in the application, the Owners initially signed a contract for work with TIC, which later assigned its interest in the contract to TAES, and Toshiba Corporation, the parent company of TIC and TAES, provided a parent guaranty warranting the work of its subsidiaries under the contract. Owners' application, p. 4.

proper proceeding. Although litigation has commenced against Toshiba,² the Owners state that litigation could take years to resolve, and given the likely duration of litigation and lead time necessary to plan and prepare for repairs and/or replacements, the Owners indicate the importance of starting the engineering, procurement, and design work for the Ludington Plant in the near term before litigation concludes. The Owners thus seek, in the interim, to defer cost recovery through a regulatory asset for all costs incurred with the Toshiba defects, including all litigation costs—total costs which the Owners acknowledge will be substantial but which the Owners will seek to offset with proceeds received through litigation. The Owners also assert that this accounting request will not result in an increase in the cost of service to customers and thus may be approved without notice or hearing pursuant to MCL 460.6a(3). Owners’ application, pp. 1, 8-10.

On November 29, 2022, the Association of Businesses Advocating Tariff Equity (ABATE) filed a petition to intervene (petition) requesting that the Commission either grant its petition to be treated as a party in this matter or only approve the Owners’ application consistent with the clarifications and contingencies set forth in the petition—namely concerning the scope of the proceed amounts used as an offset to the regulatory asset (i.e., that the proceeds not be limited to only those received directly through ongoing litigation but should also include amounts paid to the Owners via the contractual liquidated damages clause with Toshiba) and the passthrough of any remaining amounts in the regulatory asset onto customers. ABATE’s petition, pp. 4-8.

On December 16, 2022, the Owners filed a response to ABATE’s petition wherein the Owners asked that the Commission deny ABATE’s request to intervene as a party to this case, grant the

² See, *DTE Electric Company v Toshiba America Energy Systems Corporation*, Case No. 2:22-cv-10847-PDB-JJCG (United States District Court for the Eastern District of Michigan).

Owners' application, and clarify, consistent with an alternative request set forth by ABATE, that by approving a regulatory asset in this matter the Commission is not prejudging the reasonableness of any costs recorded in the regulatory asset. Owners' response, p. 11.

On December 23, 2022, ABATE responded to the Owners' response and sought to clarify its primary request related to the scope of the proceed amounts used as an offset to the regulatory asset, which ABATE stated the Owners' response failed to address. So long as the Commission provides the clarification it requests, ABATE agreed that its intervention in the matter is not required at this time. ABATE's response, pp. 4-5.

On January 13, 2023, the Owners filed a motion to reply, along with their reply, to ABATE's response clarifying, among other things, that no money has yet been paid by Toshiba to the Owners for their liquidated damages claim and that the Owners have no intention of double-collecting from customers any amounts recovered from Toshiba through litigation, including amounts owed as liquidated damages. Owners' reply, pp. 1-2.

On February 21, 2023, the Owners and ABATE filed a joint stipulation wherein the Owners clarify the costs and offset amounts to be recorded in the regulatory asset and wherein ABATE with this clarification states that it does not oppose the application and agrees that its intervention in the case is not necessary. Specifically, the Owners clarify as follows:

Consumers Energy and DTE [Electric] clarify that all costs associated with Toshiba's defective work at the Ludington Plant that have not previously been reviewed by the Commission and approved for incorporation into rates will be placed into the proposed regulatory asset. Consumers Energy and DTE [Electric] further clarify that all amounts recovered from Toshiba in connection with this defective work, via the pending federal litigation or otherwise, will also be placed into the proposed regulatory asset as an offset to corresponding costs. Such amounts will include any and all unresolved liquidated damages awarded to Consumers Energy and DTE [Electric] under their contract with Toshiba, and any

other damages for Toshiba's defective work, as determined with legal finality by a court, settlement, or otherwise.

Joint stipulation, pp. 1-2. In their joint stipulation, the Owners and ABATE further reserve "all rights to address, in one or more later Commission proceedings, the proper ratemaking treatment for any amounts recorded in the regulatory asset." *Id.*, p. 2.

The Commission has reviewed the application and finds that the application, as clarified by the joint stipulation, is reasonable, in the public interest, and should be approved. The Commission, however, underscores that the approval in this case is granted for accounting purposes only. Recovery of reasonable and prudent costs, as well as appropriate carrying costs, will be considered in future rate case proceedings because an *ex parte* case is not the correct venue to address possible future recovery of capital costs and other project costs. The Commission notes that by granting approval of the accounting authority in this case it is not reducing the evidentiary burden the companies must meet before they may recover these costs in a future rate case proceeding. In other words, the accounting approval provided in this case is no indication, or guarantee, of a favorable outcome as to a future cost recovery request of any amounts remaining in the regulatory asset following litigation.

In addition, in order to provide greater transparency and understanding about the magnitude of costs being deferred, the Commission also finds it prudent to require reporting as to the amount of the regulatory asset and other relevant information. The Commission therefore directs the Owners to file an annual report in this docket on or before the last business day of each year detailing the amount of the regulatory asset and any material developments relating to the ongoing litigation with TAES that are likely to impact the total amount of cost exposure. The Commission further

directs the Owners to work with the Commission Staff on both the form and specific elements to be included in this annual report.

Finally, given the clarified approval in this case, the Commission finds that it is no longer necessary to rule on ABATE's request to intervene. Joint stipulation, p. 2.

THEREFORE, IT IS ORDERED that:

A. The application of Consumers Energy Company and DTE Electric Company seeking approval of cost deferral accounting and a regulatory asset for the costs incurred with restoring allegedly defective work performed by Toshiba America Energy Systems Corporation at the Ludington Pumped Storage Plant is approved as set forth and clarified in this order.

B. Consumers Energy Company and DTE Electric Company are authorized to place into the regulatory asset all costs associated with the allegedly defective work performed by Toshiba America Energy Systems Corporation at the Ludington Pumped Storage Plant that have not previously been reviewed by the Commission and approved for incorporation into rates.

C. Consumers Energy Company and DTE Electric Company are authorized to place into the regulatory asset, as an offset to corresponding costs, all amounts recovered from Toshiba America Energy Systems Corporation in connection with its allegedly defective work via the pending litigation or otherwise. Such amounts shall include all associated liquidated damages awarded to Consumers Energy Company and DTE Electric Company under their contract with Toshiba America Energy Systems Corporation, and any other damages for Toshiba America Energy Systems Corporation's allegedly defective work, as determined with legal finality by a court, settlement, or otherwise.

D. Consumers Energy Company and DTE Electric Company shall file an annual report in this docket on or before the last business day of each calendar year detailing the amount of the regulatory asset and any material developments relating to the ongoing litigation with Toshiba America Energy Systems Corporation that are likely to impact the total amount of cost exposure relating to restoring the allegedly defective work at the Ludington Pumped Storage Plant.

E. Consumers Energy Company and DTE Electric Company shall work with the Commission Staff on both the form and specific elements to be included in this annual report.

F. Through this order, the Commission does not foreclose, or predetermine, the right of any interested person to file (or petition to intervene in) a future case addressing the proper ratemaking treatment for any amounts recorded to the regulatory asset.

G. Through this order, the Commission is not prejudging the reasonableness and prudence of any costs to be recorded in the regulatory asset.

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, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of Attorney General – Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General – Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Katherine L. Peretick, Commissioner

By its action of May 18, 2023.

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

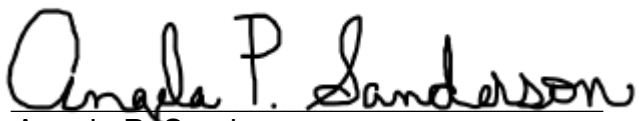
Case No. U-21310

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on May 18, 2023 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).


Brianna Brown

Subscribed and sworn to before me
this 18th day of May 2023.



Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

Service List for Case:**U-21310**

Name	On Behalf of	Email Address
Consumers Energy Company (1 of 2)	Consumers Energy Company	mpsc.filings@cmsenergy.com
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