

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion,	)	
to consider the restructuring of the electric	)	Case No. U-11290
utility industry.	)	
_____	)	
	)	
In the matter of the application of	)	
THE DETROIT EDISON COMPANY for	)	
authority to suspend implementation of its power	)	Case No. U-11449
supply cost recovery clause and related relief.	)	
_____	)	
	)	
In the matter of the request of	)	
CONSUMERS ENERGY COMPANY	)	
for approval of a retail open access tariff.	)	Case No. U-11451
_____	)	
	)	
In the matter of the request of	)	
THE DETROIT EDISON COMPANY	)	Case No. U-11452
for approval of a direct access tariff.	)	
_____	)	
	)	
In the matter of the request of	)	
CONSUMERS ENERGY COMPANY	)	Case No. U-11453
for authority to suspend its power supply	)	
cost recovery clause and related relief.	)	
_____	)	
	)	
In the matter of the request of	)	
CONSUMERS ENERGY COMPANY and	)	
THE DETROIT EDISON COMPANY for	)	Case No. U-11454
approval of a true-up mechanism in connection	)	
with the recovery of stranded costs.	)	
_____	)	

In the matter of the request of)
CONSUMERS ENERGY COMPANY for)
approval of a performance-based ratemaking) Case No. U-11456
mechanism and changes in standby rates.)
_____)

At the August 17, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

The Commission issued orders (the customer choice orders) in one or more of the above-captioned cases on June 5, 1997, October 29, 1997, January 14, 1998, February 11, 1998, and March 8, 1999. Collectively, those orders established rates, terms, and conditions by which electric customers of Consumers Energy Company (Consumers) and The Detroit Edison Company (Detroit Edison) would be able to purchase power from alternative electric suppliers and have the local utility deliver that power for a fee—a process known by various names, including customer choice, open access, direct access, and retail wheeling. The customer choice orders established a schedule for customers to choose alternative electric suppliers, if they wish to do so, beginning with 2½% of each utility's retail load on September 20, 1999 and ending with all customers being eligible to choose by January 1, 2002.

Prior to issuing the customer choice orders, the Commission had established a retail wheeling experiment in orders issued on April 11, 1994 and June 19, 1995 in Cases Nos. U-10143 and U-10176.

On June 29, 1999, the Michigan Supreme Court issued a decision in Consumers Power Company v Public Service Commission, __ Mich __ (1999), S Ct Docket Nos. 111482, 111483, 111486, 111487, 111719-111726. That decision vacated the Commission orders approving the retail wheeling experiment. On June 30, 1999, the Commission issued a scheduling order requesting briefs from any interested party concerning the effect of the Supreme Court's decision on the customer choice orders. Briefs were filed by Consumers; Detroit Edison; the Association of Businesses Advocating Tariff Equity (ABATE); Attorney General Jennifer M. Granholm (Attorney General); Energy Michigan; Indiana Michigan Power Company, d/b/a American Electric Power (AEP); Michigan Cogeneration Venture Limited Partnership (MCV); Michigan Electric Cooperative Association (MECA); Michigan Electric and Gas Association (MEGA); Michigan Independent Power Producers Association (MIPPA); Michigan Petroleum Association/Michigan Association of Convenience Stores (MPA/MACS); Michigan Power Limited Partnership and Ada Cogeneration Partnership (partnerships); Michigan Public Power Agency, Michigan South Central Power Agency, the City of Detroit and its Public Lighting Department, and Michigan Municipal Electric Association (municipals); Michigan United Conservation Clubs (MUCC); North American Natural Resources, Inc., Commonwealth Power Company, Hubbardston Hydro Company, Central Wayne Recovery Limited Partnership, Cadillac Renewable Energy, LLC, Granger Electric Company, Adrian Energy Associates, LLC, Michigan Cogeneration Systems, Inc., Sumpter Energy Associates Limited Partnership, and Riverview Energy Systems Partnership (generators); and Unicom Energy, Inc. (Unicom). Reply briefs were filed by Consumers, Detroit Edison, ABATE, the Attorney General, Energy Michigan, MCV, MIPPA, MPA/MACS, the Midwest Independent Power Suppliers Coordination Group (MWIPS), PG&E Corporation, and Unicom.

II.

POSITIONS OF PARTIES

Consumers

Consumers indicates that, prior to the Michigan Supreme Court's decision, it was proceeding to implement the customer choice orders. Consumers states that it is willing to continue implementation on a voluntary basis and contends that there is nothing in the Michigan Supreme Court decision that prevents a voluntary retail open access program from going forward.

In its reply brief, Consumers contends that MCR 7.208(A) does not prevent the Commission from modifying the customer choice orders because such action is authorized by law and the Commission's continuing jurisdiction has been recognized by the courts. In addition, Consumers contends that it is ludicrous to argue that the Commission is prohibited from complying with the Michigan Supreme Court decision until all appeals of existing customer choice orders are completed.

Consumers contends that a voluntary program would be enforceable because it will be entering into contracts with customers. According to Consumers, Energy Michigan offers an "intriguing theory" regarding the use of consent orders to establish customer choice. Consumers argues that consent orders cannot be used to confer jurisdiction upon the Commission because jurisdiction cannot be conferred by consent. Consumers indicates that it would be willing to consent to a package of future reasonable Commission ratemaking actions that might be the logical consequence of a unilateral company decision to terminate retail open access service. However, Consumers indicates that it would do so conditioned upon the outcome of issues in its 1996 and 1997 power supply cost recovery (PSCR) reconciliation

proceedings and its request for ratemaking treatment regarding the proposed sale of MCV power to PECO Energy Company (PECO). Consumers indicates that it supports:

A comprehensive but conditional resolution of the ratemaking issues in these cases, combined with Consumers Energy's consent to a Commission order(s) which stated that modifications to the ratemaking treatment accorded in those cases would be forthcoming in the event of Consumers Energy's unilateral termination of the [retail open access] program, which would allow [retail open access] to proceed on a de facto enforceable basis. Consumers Energy also re-emphasizes to the Commission that the Company has consistently taken the position throughout the development of the [retail open access] program that a general rate freeze was appropriate during at least the initial years of the [retail open access] program. A more comprehensive resolution of issues surrounding the Company's general electric rate levels would allow the Company to focus its resources on making the [retail open access] program work.

Consumers' reply brief, pp. 6-7.

Consumers argues that the Commission can authorize stranded costs under a voluntary program because there "is certainly nothing in the Supreme Court decision which suggests that the Commission's ratemaking authority disappears with respect to a service voluntarily offered by an electric utility."

Consumers' reply brief, p. 7. According to Consumers, "regardless of the Commission's ability to mandate the implementation of [a retail open access] program, there should be no doubt over the Commission's ability to set rates necessary to allow utilities to recover costs incurred to provide service."

Consumers' reply brief, p. 8. Consumers notes that the Commission's broad ratemaking authority has been repeatedly affirmed by the courts.

Consumers indicates that no action needs to be taken regarding MUCC's proposal for environmental disclosure and portfolio requirements since these were not included in the customer choice orders and the purpose of this proceeding is to explore the impact of the court decision on those orders.

Consumers states that although the U.S. District Court for the Western District of Michigan, in North American Natural Resources, Inc. v Michigan Public Service Commission (Case Nos. 5:98-CV-21 to 24) held that the Commission may not enforce orders that deny recovery of avoided cost payments to a qualifying facility (QF) pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA), the Commission has not done so in the customer choice orders.

Consumers denies that voluntary programs will result in fragmented implementation of open access in Michigan because utilities will not be immune from market forces and the Michigan Legislature will have the final word on the subject.

Finally, Consumers indicates that it has incurred significant implementation costs and opposes the proposal to dismiss the stranded cost true-up proceeding.

Detroit Edison

Detroit Edison indicates that the Michigan Supreme Court decision clarified that the Commission can encourage a specific utility management decision through exercise of its ratemaking power and that the Commission's authority to approve, encourage, and regulate a voluntary retail wheeling program remains intact. Detroit Edison indicates that it remains committed to implementing open access for its customers and continues to move forward to implement retail choice through its voluntary program. Detroit Edison notes that it previously agreed to abide by the provisions of the customer choice orders as a condition for the accelerated amortization of its Fermi 2 nuclear power plant authorized by the Commission in its order of December 28, 1998 in Case No. U-11726 (Fermi order).

According to Detroit Edison, the "law is established that if a utility voluntarily undertakes to offer a new service, then the Commission has the authority to set rates for that service." Detroit Edison's brief,

p. 7. As support for this contention, Detroit Edison cites not only Consumers v PSC, *supra*, but also “Detroit Edison Co v Public Service Comm, 221 Mich App 370; 562 NW2d 224 (1997), *lv den* 458 Mich 864 (1998), in which the Court of Appeals upheld the Commission’s authorization of rates to recover [Detroit] Edison’s demand-side management (“DSM”) program.” *Ibid*.

Detroit Edison argues that the Commission has the authority and duty to permit utilities to recover their stranded costs. Detroit Edison indicates that the U.S. District Court decision in North American v PSC, *supra*, held that the customer choice orders are preempted by PURPA to the extent that they prohibit any utility from recovering from its customers any avoided costs to be paid to QFs.

Detroit Edison also contends that the Commission has the authority to require reciprocity as a condition of participating in a retail wheeling program. In addition, Detroit Edison argues that the Commission has authority to suspend a utility’s PSCR clause, although it admits that this issue is moot because Detroit Edison has withdrawn its request to do so.

In its reply brief, Detroit Edison argues that MCR 7.208(A) does not prevent the Commission from amending its customer choice orders because the Commission is authorized by law to do so. In addition, Detroit Edison argues that the separation of powers principle does not permit the courts to promulgate rules applicable to the executive branch of government. Further, Detroit Edison contends that the courts have determined that rate proceedings are legislative in nature and that the Commission retains continuing jurisdiction.

Detroit Edison contends that the Commission has the authority to establish rates, terms, and conditions of a voluntary open access program. According to Detroit Edison:

The law is established that if a utility voluntarily undertakes to offer a new service, then the Commission has the authority to set rates for that service. The Commission’s

traditional ratemaking authority includes the ability to regulate the terms and conditions of a voluntary retail open access program.

Detroit Edison's reply brief, p. 6.

Similarly, Detroit Edison argues that the Commission's traditional ratemaking powers allow it to provide recovery of the utility's stranded costs. Detroit Edison contends that stranded costs do not depend on whether a program is mandatory or voluntary. In addition, Detroit Edison states that a true-up mechanism is necessary for an accurate determination of stranded costs and opposes the proposal to discontinue the true-up proceeding.

Detroit Edison opposes the recommendations of ABATE and the Attorney General that the Commission modify the Fermi order. Detroit Edison claims that the Commission has jurisdiction to issue that order since it falls within the Commission's ratemaking authority.

Detroit Edison opposes MIPPA's suggestion that utilities be required to file formal applications if they wish to implement a voluntary retail open access program. According to Detroit Edison, this would have the effect of starting over and would ignore all the years of hard work by interested parties in establishing the customer choice program. For the same reason, Detroit Edison also objects to proposals for additional commitments from the utility prior to the initiation of a voluntary open access program. Detroit Edison indicates that it would support legislation to codify what the Commission is already doing, but would oppose any additional legislation because the Commission already has sufficient authority under existing statutes and case law to set rates, terms, and conditions for a voluntary open access program.

Detroit Edison contends that the Commission has the authority to enforce a voluntary open access program. Detroit Edison claims that its retail open access program will be implemented through contracts

and the Commission has jurisdiction over those contracts pursuant to Section 11 of the Railroad Act, MCL 462.11, MSA 22.30.

ABATE

ABATE argues that, absent legislation, the Commission does not have the jurisdiction or authority to oversee an open access program, as a result of the Michigan Supreme Court ruling that the Commission's jurisdiction does not include the statutory authority to implement the experimental retail wheeling program.

According to ABATE:

In the wake of the Supreme Court's decision in the Consumers case, the [Commission] should stop open access implementation of the broad programs and request that the Governor and the Legislature enact the appropriate legislation to confer specific powers on the [Commission] to order and regulate **in every material aspect**, [sic] retail open access. Unless the [Commission] is given specific powers to prevent market abuses, etc., customers will be at the mercy of unregulated monopolies.

ABATE's brief, pp. 5-6, emphasis in the original.

In addition, ABATE argues that the Commission should reverse its decision in the Fermi order and reduce Detroit Edison's rates by \$170 million. ABATE also contends that the Commission should order Detroit Edison to refund \$114.6 million on an annual basis to its customers.

Finally, ABATE contends that, as a result of the Michigan Supreme Court decision, the utilities have no stranded costs. Therefore, there are no stranded costs at issue in the true-up proceeding, Case No. U-11955, and the Commission should dismiss that case on its own motion.

In its reply brief, ABATE contends that a voluntary open access program would not be in the best interests of the state for several reasons. First, it argues, the Commission lacks authority to curb utility abuses of market power. Second, the utilities oppose the Commission requirement for mitigation and

netting of stranded costs in the true-up proceedings. Third, the Commission lacks authority to provide customer protections needed in an open access program. Fourth, because the Commission lacks enforcement powers, the utilities will be able to extract major financial incentives in exchange for their voluntary program. Fifth, ABATE claims that the track records of Consumers and Detroit Edison in their good faith implementation of promises or negotiations with the Commission and its Staff have been dismal. Sixth, ABATE contends that the Commission lacks jurisdiction to allow recovery of stranded cost. Seventh, ABATE argues that the theory underlying the concept of stranded costs relies upon some form of compulsory government action. Hence, by definition, there can be no stranded costs under a voluntary program. Finally, ABATE claims that suppliers will not enter into the Michigan market with the uncertainty associated with a voluntary program.

ABATE denies the claim that the Michigan Supreme Court decision permits a voluntary open access program. ABATE cites language by the Court that it is the Legislature that must weigh the economic and social costs and benefits of restructuring. According to ABATE, because this responsibility rests with the Legislature, there is no legal basis to permit voluntary open access programs. ABATE also rejects the argument that a voluntary program could be accomplished through special contracts under Section 11 of the Railroad Act because that is an alternative method of implementing the jurisdiction granted to the Commission.

Finally, ABATE argues that the existing pilot programs should be allowed to continue because they permit the gathering of data and experience.

Attorney General

The Attorney General contends that, pursuant to MCR 7.208(A), once a Commission order has been appealed, the Commission no longer has authority to set aside or amend the order. The Attorney General notes that the Commission has issued final orders, a rehearing order, and a clarification order in the customer choice cases and they have been appealed to the Court of Appeals. According to the Attorney General, the Commission is therefore constrained from modifying the customer choice orders while the appeals are pending.

In addition, the Attorney General argues that the customer choice orders must be vacated because of the Michigan Supreme Court ruling that the Commission lacks statutory authority over retail wheeling. Moreover, the Attorney General contends that the Commission lacks subject matter jurisdiction to implement voluntary direct access programs for three reasons. First, the Attorney General argues that there is no statute that clearly empowers the Commission to approve such programs. Second, according to the Attorney General, subject matter jurisdiction cannot be conferred by waiver or consent. Third, the Attorney General contends that a voluntary program would not be just and reasonable.

The Attorney General also argues that, as a result of the Michigan Supreme Court decision, the Commission lacks subject matter jurisdiction to approve recovery of stranded costs. According to the Attorney General:

[O]n a practical level a cost cannot be “stranded” if utilities are not forced to give up sales to competitors or if utilities do not in fact experience sales below levels which were assumed in building generation assets. Since the Supreme Court has now ruled that the [Commission] cannot force [Consumers] and [Detroit Edison] to give up sales by allowing wheeling or direct access service for third-party suppliers or their customers, the Supreme Court’s order means that the [Commission] lacks jurisdiction to allow recovery of so-called stranded costs. Furthermore, [Consumers] and [Detroit Edison] consistently

challenged the [Commission's] jurisdiction via rehearing petitions and appeals; therefore, they are not entitled to claim recovery based upon estoppel.

Attorney General's brief, p. 15.

Since the Commission lacks jurisdiction to allow recovery of stranded costs, the Attorney General argues that it also lacks jurisdiction to true-up those costs. Accordingly, the Attorney General requests that the Commission dismiss the true-up proceedings in Cases Nos. U-11955 and U-11956.

Furthermore, the Attorney General also contends that, because the customer choice orders must be vacated as a result of the Michigan Supreme Court order, Consumers' PSCR clause must be reinstated.¹ Therefore, the Attorney General requests that the Commission conduct PSCR reconciliations for 1998 and 1999 in order to comply with the statute.

The Attorney General also argues that the Commission should amend the Fermi order to rescind the authorization for accelerated amortization and should order additional rate reductions of \$114.6 million.

Finally, the Attorney General contends that the Commission should dismiss Consumers' request in Case No. U-11941 for ratemaking approvals associated with the company's proposed sale of power purchased from the MCV to PECO. The Attorney General argues that this sale is tied to the concept of stranded cost recovery and Consumers' application should therefore be denied.

In her reply brief, the Attorney General rejects the arguments that the Michigan Supreme Court decision would allow a voluntary program because that issue was not before the Court and was not decided by it. In addition, the Attorney General argues that the proposal to implement voluntary open access through special contracts under the Railroad Act is unlawful because the Michigan Supreme Court

¹Consumers' PSCR clause was suspended in the February 11, 1998 order in Case No. U-11290 et al.

decision ruled that that act does not empower the Commission to order retail wheeling service. The Attorney General argues that jurisdiction cannot be conferred by consent, and the willingness of the utilities to implement a voluntary program does not make those programs lawful.

The Attorney General also contends that the Commission may not allow recovery of stranded costs because, under a voluntary program, costs will not be stranded within the ordinary meaning of that term.

With regard to the issue of reciprocity, the Attorney General states that that issue is currently under appeal and is unaffected by the Michigan Supreme Court decision.

With regard to the U.S. District Court decision, the Attorney General points out that: (1) the decision is not final and can be appealed, (2) the decision is moot because there are no valid stranded costs for recovery, and (3) the obligations of Consumers and Detroit Edison are contingent rather than fixed obligations so that a defined present value cannot be estimated. Because the PURPA contracts are contingent obligations, the Attorney General opposes MIPPA's request to establish contract-life, present value amounts for each PURPA contract.

Finally, the Attorney General supports the proposal by MPA/MACS to require comprehensive rate cases for Consumers and Detroit Edison.

Energy Michigan

Energy Michigan argues that a voluntary tariff or implementation plan for retail open access submitted by a utility is subject to the broad ratemaking and enforcement powers of the Commission. According to Energy Michigan:

The factual background of this case . . . demonstrates beyond all doubt that Retail Open Access tariffs and implementation plans were submitted voluntarily to the jurisdiction of the Commission by Detroit Edison and Consumers Energy. Moreover, those

utilities specifically accepted rulings of the Commission modifying their rates and evidenced their acceptance by filing the modified rates as their own on March 22, 1999.

Once filed, the open access tariffs and rates become subject to the enforcement powers of the Commission which are applicable to any rates that are approved under the Commission's jurisdiction.

Energy Michigan's brief, pp. 4-5.

Energy Michigan argues that the customer choice orders and other orders collectively constitute a series of consent orders that are binding on the Commission, Consumers, and Detroit Edison. According to Energy Michigan, these orders include approval of retail open access tariffs, suspension of Consumers' PSCR clause, the approval of accelerated amortization in the Fermi order, and initiation of a stranded cost true-up proceeding. Energy Michigan concludes that both Consumers and Detroit Edison have entered into a series of consent orders that constitute a voluntary decision by utility management rather than a mandate by the Commission.

Accordingly, Energy Michigan contends the utilities may not withdraw from retail open access without forfeiting the benefits that induced them to accept retail open access. These benefits include the accelerated amortization of Fermi for Detroit Edison and revenues from the frozen PSCR factor for Consumers.

Energy Michigan argues that Consumers and Detroit Edison should clarify their position on unilateral termination of open access programs. Energy Michigan notes that suppliers must expend considerable sums of money to prepare to participate in a competitive market and thus require a degree of certainty that the programs will continue.

In its reply brief, Energy Michigan contends that, since the Commission has authority to approve voluntary open access programs, implementation and enforcement of those programs may continue

without additional legislative authority. However, Energy Michigan supports legislation that would take a more aggressive stance on electric restructuring issues, such as calculation and true-up of stranded costs, elimination or mitigation of utility market power, enforcement of customer protection measures, and adoption of a streamlined marketer licensing program.

Energy Michigan denies that the program authorized in the customer choice orders is compulsory, noting that Consumers and Detroit Edison have voluntarily submitted tariffs. Accordingly, Energy Michigan contends that the Michigan Supreme Court order applies only to the mandatory retail wheeling experiment, not to the voluntary program in the customer choice orders. According to Energy Michigan, “the Supreme Court has clearly held: a) that utility management may voluntarily propose retail wheeling service to the Commission and b) if such service is proposed it then comes under the rate making jurisdiction of the Commission.” Energy Michigan’s reply brief, p. 7. Energy Michigan argues that the Commission’s jurisdiction to regulate the rates, terms, and conditions of a voluntary retail wheeling program comes from the Commission’s statutory authority rather than from the consent of the utilities. According to Energy Michigan, “the act of voluntary tariff submission by a utility does not establish jurisdiction but, rather, meets the statutory criteria found by the Supreme Court to exist within the Railroad Act and the Electric Transmission Act.” Energy Michigan’s reply brief, p. 9, emphasis in the original.

Energy Michigan contends that the Commission has adequate legal authority to regulate and enforce a voluntary open access program under the Railroad Act, MCL 462.2 et seq.; MSA 22.21 et seq., the Electric Transmission Act, MCL 460.551 et seq.; MSA 22.151 et seq., and through the use of consent orders.

Energy Michigan indicates that there is no reason to consider the impact of the U.S. District Court decision in this proceeding. If the Commission wishes to consider the impact of that decision, Energy Michigan suggests that the Commission issue a separate notice and opportunity for comment.

Finally, Energy Michigan contends that the arguments regarding MCR 7.208(A) are moot because the customer choice orders do not need to be set aside or amended because they comply with the ruling of the Michigan Supreme Court.

AEP

AEP argues that “the Commission should issue an order indicating that the previous restructuring orders no longer generally apply to all utilities and suspend further proceedings initiated under those orders.” AEP’s brief, p. 3. AEP indicates that the Michigan Supreme Court decision does not rule out a voluntary open access program, but, in AEP’s opinion, a voluntary program would lead to an unstable and potentially unbalanced competitive environment and a determination of what is voluntary will inevitably end up in the courts. AEP favors action by the Legislature and indicates that the Commission’s previous orders and the records in those proceedings can serve as a basis for legislative study.

MCV

MCV argues that “if Consumers and [Detroit] Edison voluntarily agree to engage in retail wheeling it is incumbent upon the Commission to set rates for the voluntary program.” MCV’s brief, p. 3. In setting these rates, MCV contends that the Commission must recognize the rights of MCV and other QFs under PURPA. MCV argues that North American v PSC, supra, “specifically held that the Commission’s current restructuring orders are preempted by PURPA and the Supremacy Clause of the United States

Constitution to the extent that they prohibit a utility from recovering from its customers any charge for avoided costs under PURPA.” MCV’s brief, p. 4.

In its reply brief, MCV contends that the Commission is required to allow recovery of stranded costs for QFs under PURPA.

MCV challenges Energy Michigan’s assertion that Consumers and Detroit Edison have voluntarily complied with the customer choice orders. MCV contends that it would be bad public policy for utilities to ignore and not implement Commission orders to avoid the appearance of consenting to those orders.

Finally, MCV states that it agrees with the comments of MIPPA and MPA/MACS.

MECA

MECA indicates that it had anticipated completing an analysis of customer choice by July 31, 1999, but that analysis will now be delayed until December 31, 1999.

MEGA

MEGA indicates that electric customer choice can be accomplished on voluntary basis only if utility management elects to do so. MEGA argues that if management of a utility elects to implement a customer choice program, then the Commission retains its existing regulatory authority over the ratemaking aspects of that program. MEGA supports the need for legislation and recommends addressing the multi-jurisdictional issues of those utilities that serve in more than one state.

MPA/MACS

MPA/MACS indicate that the decisions of the Michigan Supreme Court and the U.S. District Court greatly affect the viability of the customer choice orders. MPA/MACS argue that an agency’s jurisdic-

tion and authority cannot be expanded by agreement or consent of parties appearing before an agency.

In addition, the U.S. District Court decision could significantly increase stranded costs and may require the Commission to continue PSCR cases for Consumers and Detroit Edison as long as QF contracts for those companies remain in effect.

MPA/MACS note that the Commission retains considerable ratemaking powers pursuant to its various enabling acts and should use those powers to reinstitute Consumers' PSCR clause and initiate base rate cases for both companies. If Consumers and Detroit Edison voluntarily choose to implement customer choice, MPA/MACS contend that the utilities should be required to implement all aspects of the program rather than picking and choosing among favorable and unfavorable terms.

Finally, MPA/MACS argue that the Commission should refrain from proceeding with important details of customer choice until legislation is finally approved.

In their reply brief, MPA/MACS state that the U.S. District Court "had before it essentially a hypothetical question as to whether the [Commission] could utilize the 2007 cut-off date established in the restructuring orders as a mechanism to cut-off PURPA contract rights previously established by PURPA contracts or [Commission] orders establishing 'avoided cost' rates." MPA/MACS's reply brief, p. 4. MPA/MACS argue that the Court determined that the customer choice orders could not impair previously approved QF contracts, but did not decide any issues regarding the definition, calculation, or amount of stranded cost. MPA/MACS contend that the Commission did not intend to impair or rescind previous QF avoided cost determinations and the Commission could simply state such in a future order. Alternatively, MPA/MACS suggest that "instead of trying to conduct at present a speculative review of bloated stranded cost claims of QFs (and utilities), the [Commission] could simply rid itself of the 2007

date relative to QFs costs, and provide a mechanism to separately identify and cover QFs costs until the QFs contracts expire.” MPA/MACS’s reply brief, pp. 4-5.

Partnerships

The partnerships claim that, since the customer choice orders are on appeal, any action taken by the Commission must be consistent with MCR 7.208(A).

MIPPA

According to MIPPA, under the Michigan Supreme Court decision, the Commission cannot mandate that utilities provide retail wheeling to customers, but if the utilities voluntarily choose to do so, then it is the responsibility of the Commission to establish rates, terms, and conditions that are just, reasonable, and in the public interest. MIPPA notes that Consumers and Detroit Edison have announced that they will voluntarily implement a customer choice program, but MIPPA is concerned that the utilities may choose to alter their decision once Commission approval of rates has been obtained. According to MIPPA:

At this point, it is difficult for MIPPA or any other party to comment on the offers by Consumers Energy and Detroit Edison because there are no details available regarding what they are proposing to do or what specifically the Commission will be asked to approve. The Commission’s first step toward rectifying this situation should be to direct the two utilities to file a formal application stating precisely what they seek approval to implement. Then parties to this proceeding can file meaningful comments regarding whether the proposed programs are just, reasonable and in the public interest. Further, this Commission could institute additional evidentiary hearings as necessary where findings of fact are required. Anything else including the currently docketed proceedings is a further waste of time.

MIPPA’s brief, p. 4.

In addition, MIPPA indicates that the Commission should require Consumers and Detroit Edison to file revised stranded cost estimates consistent with the U.S. District Court decision.

In its reply brief,

MIPPA asserts that the [Commission's] options are clear. The [Commission] can (a) halt retail open access and continue with rate-of-return/revenue deficiency monopoly regulation, thus allowing QF contracts to run their term; (b) wait until it has been granted the necessary legislative authority and attendant powers to continue implementing retail open access; or (c) go forward with a voluntary open access tariff upon application of the investor owned utilities. Either [sic] way, because of the U.S. District Court's ruling, purchase power contracts with a basis in PURPA take precedent over restructuring orders. As such, to avoid a violation of the Court's Order, the Commission must allow full recovery of previously approved purchase power agreements and the attendant avoided cost rates and it must accelerate the recovery of those costs if it intends to end stranded cost recovery in the year 2007 or anytime before the contracts have run.

MIPPA's reply brief, p. 7.

Municipals

The municipals claim that, although the Michigan Supreme Court decision directly affects only the experimental retail wheeling program, it is clear that the customer choice orders also exceed the Commission's authority. In addition, the municipals contend that it would be imprudent for the Commission to allow a voluntary program to go forward for the following reasons: (1) it is doubtful whether a voluntary program is lawful under the Michigan Supreme Court decision, (2) a voluntary program would allow utilities to pick and choose among various aspects of the customer choice program, (3) a voluntary program would grant the utilities special benefits without corresponding obligations, and (4) a voluntary program would undermine the arguments for stranded cost recovery.

MUCC

MUCC argues that environmental disclosure and implementation of a renewable resource portfolio are statutorily permissible, rate regulating functions of the Commission and that the Commission should include them in any retail open access program.

Generators

The generators argue that, pursuant to MCR 7.208(A), the Commission may not set aside or amend the customer choice orders.

Unicom

Unicom supports the adoption of legislation to establish a customer choice program in Michigan. Unicom is opposed to any voluntary program because it would be “subject to many possible interruptions and is a shaky reed upon which to base multi-million dollar investments in Michigan.” Unicom’s brief, p. 4.

In its reply brief, Unicom notes that the principal proponents of a voluntary program are Consumers and Detroit Edison. According to Unicom, a voluntary program has too many defects to justify investment in an open access program. Unicom indicates that utilities may renege on their voluntary agreement if they disagree with any action taken by the Commission. Unicom states that a voluntary program is poor public policy and the “cards are all in the possession of the incumbent utility.” Unicom’s reply brief, p. 4.

Unicom argues that legislation is necessary to dispel the cloud of uncertainty created by the Supreme Court decision. Unicom indicates that Energy Michigan’s suggestion to use consent decrees “is a creative

but, at best, untested theory.” Unicom’s reply brief, p. 5. Unicom notes that jurisdiction cannot be lawfully conferred.

MWIPS

In its reply brief, “MWIPS agrees with those parties who have concluded that the Commission lacks the authority to issue orders necessary to achieve electric restructuring.” MWIPS’s reply brief, p. 3.

MWIPS believes that a voluntary program would not foster true competition and should be rejected.

MWIPS indicates that:

The Commission should be aware that a competitive electric supplier that chooses to enter the market in a new state, at the retail or wholesale level, incurs significant expenses. Developing the infrastructure to serve retail customers and to comply with applicable state laws and regulations is costly, as is the development and construction of new generating capacity. The necessary investments are likely to be limited to those states which have taken steps to (1) address the concerns of competitive electric suppliers about threshold issues such as mitigation of the market power of incumbent utilities, and (2) provide a high degree of certainty that, once adopted, the state restructuring plan will remain in place for a period long enough to allow competitive suppliers to obtain the benefit of their investments.

MWIPS’s reply brief, pp. 3-4.

MWIPS indicates that it supports legislation that would require: (1) structural separation between utilities and affiliates, (2) codes of conduct, (3) requirements to join a regional transmission organization, (4) recovery of legitimate and quantifiable stranded costs, (5) unbundling of prices, (6) consumer protection and education, and (7) customer choice by January 1, 2001.

PG&E

In its reply brief, PG&E indicates that it agrees that the Commission lacks authority to implement restructuring. PG&E argues that competitive suppliers will not incur the significant expense to enter the

market in a state unless the market power of incumbent utilities is mitigated and there is a high degree of certainty that the program will continue.

PG&E indicates that it supports legislation that would require: (1) market power mitigation, (2) codes of conduct, (3) reliability-related issues, (4) consumer protection provisions, (5) provisions for stranded cost calculation and recovery, and (6) provisions for timing and implementation of choice for all customers.

III.

AUTHORITY TO AMEND PRIOR ORDERS

Several parties contend that, pursuant to MCR 7.208(A), the Commission lacks jurisdiction to amend the customer choice orders because those orders are under appeal. That court rule provides, in pertinent part:

After a claim of appeal is filed . . . the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation, **or as otherwise provided by law.**

MCR 7.208(A), emphasis added.

By its own terms, the application of MCR 7.208(A) is limited. Orders may be amended if any one of three conditions are met: (1) by order of the Court of Appeals, (2) by stipulation, or (3) if provided by law. With respect to Commission orders, the Michigan Legislature has provided by law, specifically, MCL 460.351; MSA 22.111, that the Commission has full power and authority to alter, amend or modify its findings and orders:

The Michigan public utilities commission^{2]}, in any proceeding which may now be pending before it or which shall hereafter be brought before it, shall have full power and authority to grant rehearings and alter, amend or modify its findings and orders.

This authority is further underscored by MCL 462.24; MSA 22.43, which provides:

The Commission may, at any time upon application of any person or any common carrier, and upon at least 10 days' notice to the parties interested, including the common carrier, and after opportunity to be heard as provided in section 22, rescind, alter or amend any order fixing any rate or rates, fares, charges or classifications, or any other order made by the Commission, and certified copies shall be served and take effect as herein provided for original orders.

The foregoing broad grants of statutory authority clearly indicate that the Legislature intended that the Commission be fully authorized to re-examine its prior orders and take appropriate actions. In Lansing v Public Service Commission, 330 Mich 608; 48 NW2d 133 (1951), the Michigan Supreme Court reviewed the lawfulness of a Commission amendatory order in the context of MCL 460.351; MSA 22.111. After noting that “a commission retains continuing jurisdiction over rates” (330 Mich at 612), the Supreme Court stated:

The commission being clothed, as it is, with statutory powers to fix rates in the first instance and to regulate them and thereafter to rescind, alter or amend any rate-fixing order, and **being vested with continuing power and jurisdiction over such rates which are, accordingly, always subject to commission revision**, it is manifest that immediately following its order of April 7th approving increased rates, it would have been competent for the commission to have entertained a new rate case in the premises based on the facts and circumstances arising after the previous hearing.

330 Mich at 313, emphasis added.

The Commission is authorized by law to modify its prior orders and this authority has been upheld by the Michigan Supreme Court. Moreover, this authority is wholly consistent with the principle that

²The rights, powers and duties of the Public Utilities Commission were transferred to the Public Service Commission by MCL 460.4; MSA 22.13(4).

ratemaking is a legislative function that has been entrusted to the Commission. Thus, it is clear that the Commission is fully authorized to undertake or legislate changes in the rates in response to changed conditions. Indeed, in recognition of this continuing authority, each of the customer choice orders expressly stated: “The Commission reserves jurisdiction and may issue further orders as necessary.”

IV.

VOLUNTARY PROGRAM

Two fundamental questions have been raised by the parties regarding a voluntary open access program:

1. Can a voluntary program lawfully be commenced in light of the Michigan Supreme Court decision?
2. If so, would it be good public policy and in the public interest for the Commission to authorize a voluntary program to commence?

Is a Voluntary Program Lawful?

Several parties contend that a voluntary customer choice program is not lawful based upon the following line of reasoning. The Supreme Court has ruled that the Commission’s jurisdiction does not include the “statutory authority to implement the experimental retail wheeling program.” Consumers v PSC, supra, at 21. The customer choice orders are premised on the same jurisdictional arguments as the retail wheeling experiment, so that the jurisdictional ruling on retail wheeling applies to the customer choice program. The Commission is a creature of statute with no common law powers. The Commission’s subject matter jurisdiction cannot be conferred by waiver or consent of the parties. Therefore, because the Commission lacks subject matter jurisdiction over retail wheeling, it cannot obtain that jurisdiction by consent through a utility’s voluntary agreement.

The flaw in this line of reasoning is that it begins with an incorrect premise regarding the Supreme Court decision. The Supreme Court did not determine that the Commission has no authority over any aspect of retail wheeling. To the contrary, the Supreme Court recognized that the Commission has broad ratemaking authority over retail wheeling, but found that the Commission lacks statutory authority to mandate retail wheeling if a utility does not offer that service. The Supreme Court went to great lengths to distinguish between the ratemaking function for an existing service over which the Commission has clear and unmistakable jurisdiction and the managerial decision to offer a new service, as follows:

The [Commission] initially characterizes its retail wheeling program as ratemaking, thus falling within its authority under §7 of the electric transmission act, MCL 460.557; MSA 22.157, and §22 of the railroad commission act, MCL 462.22; MSA 22.41. See also MCL 460.6a; MSA 22.13(6a). The challenged portion of the order does not, however, involve ratemaking. **Although retail wheeling has a ratemaking component, i.e., the establishment of the rate a third-party provider must pay to transmit power through a local utility's system, appellants do not challenge that aspect of the experimental program.** Instead, appellants contend that the [Commission] cannot order local utilities to transmit electricity from a third-party provider's system through its own system to an end-user. **This aspect of retail wheeling is simply not ratemaking.**

Consumers v PSC, *supra*, at 10, emphasis added.

Thus, it is clear that the Commission's unquestioned ratemaking authority over retail wheeling was not at issue in the Supreme Court decision. What was at issue was the Commission's jurisdiction over the decision to offer a new service, which the Supreme Court determined to be a management decision, as follows:

In this case, the [Commission] attempts to **compel utilities to provide a new service**—the transmission of electricity from a third-party provider's system to an end-user who is not directly connected to that system. Retail wheeling would require that utilities accept power from suppliers chosen not by management, but by an end-user, and necessitate the negotiation of new interconnection agreements or modification of existing ones. Further, the utility would have to adjust its own production and purchases of

power to ensure sufficient capacity to transmit the third-party provider's electricity. Absent a statute clearly conferring on the [Commission] the power to order such service, the **decision to provide the service lies within the province of the utility's management**, not the [Commission].

Consumers v PSC, *supra*, at 11-12, emphasis added.

The Supreme Court has drawn a clear distinction between the regulatory authority of the Commission and the decision-making authority of utility management. If the utility does not currently offer a service, the decision to offer that new service is the sole responsibility of utility management. The Commission may not order the utility to offer a new service that it does not currently offer, although the Supreme Court has ruled that the Commission "can encourage a specific management decision through the exercise of its ratemaking power, but it may not directly order the utility to make the decision." Consumers v PSC, *supra*, at 11. The Supreme Court has drawn a bright line between the functions of utility management and those of the Commission. The decision to offer a new service rests solely with utility management, although the Commission can use its ratemaking authority to encourage that decision. Once utility management decides to offer a new service, ratemaking authority to set rates, terms, and conditions for that service rests with the Commission.³

Accordingly, the Commission finds that it has jurisdiction to approve rates, terms, and conditions for retail wheeling service if a utility chooses to offer that service.

Is a Voluntary Program in the Public Interest?

Numerous parties answer "No." The reason for this answer is that, in their view, customers and suppliers would not be able to rely on a voluntary program. In order for suppliers to build generating

³See, for example, Detroit Edison Company v Public Service Commission, 221 Mich App 370.

capacity and other infrastructure in Michigan, they will need to be assured that there will be an ongoing program regulated by the Commission to assure a fair and competitive market. Customers and suppliers are concerned that under a voluntary program, the utility will hold all the cards and will be able to extract unreasonable rates by threatening to shut-off service anytime that the Commission issues a ratemaking decision that is not to the utility's liking.

The Commission agrees that a voluntary program, which a utility could end at any time, would not be in the public interest. Before suppliers and customers will participate in a customer choice program, they will need to be assured that the program will continue and will do so on rates, terms, and conditions that allow a fair competitive market to develop.

Although a voluntary program that could be unilaterally ended by a utility at any time would not be in the public interest, there is no need for the Commission to address that sort of a program further because such a program would not comply with the Supreme Court decision. As the quotations cited above indicate, the Supreme Court was careful to state that utility management has discretion over the decision to offer a new service and that the Commission has no authority to compel a utility to offer a new service that the utility does not currently offer. Nowhere does the Court suggest in any way that a utility is free to cease offering a service that it currently offers simply because the utility is unhappy with a rate decision that the Commission has issued. Indeed, had the Supreme Court intended to extend its decision to allow a utility to unilaterally cease offering an existing service it would have explicitly so stated because a utility decision to cease offering service would put the utility in a position of being able to dictate rate terms in direct contravention to the Commission's unquestioned ratemaking authority. Once utility management

has made a decision to offer a service, the Commission has approved rates, terms, and conditions for that service, and customers have begun taking that service, it can no longer be deemed a new service.

Accordingly, the Commission finds that a voluntary program can be in the public interest. Whether a particular voluntary program is in the public interest depends upon the specific details of the program. Both Consumers and Detroit Edison have indicated that they are willing to undertake a voluntary retail open access program, although the nature of that program is unclear from their filings. Nowhere in either filing do the utilities specifically indicate whether they intend to implement the program in the customer choice orders or some other program. The Commission finds that the utilities should clarify their intent with respect to a voluntary program. Two options are possible.

First, if the management of Consumers or Detroit Edison chooses to implement the customer choice program contained in the Commission's orders, the Chief Executive Officer of the utility should file a statement to that effect by September 1, 1999.⁴ Included in that filing should be an affirmation that any necessary approvals by the Board of Directors have been obtained. It should be understood that this decision is irrevocable. Once customers have begun taking open access service, that is no longer a new service under the terms of the Supreme Court decision in Consumers v PSC, *supra*.

The Commission recognizes that there is an argument that Detroit Edison has already provided this notice with its filing of January 15, 1999 in Case No. U-11726. However, that filing was made prior to the decision of the Michigan Supreme Court and there may be some question whether the company's management was fully aware of its legal options because those had not yet been decided by the Court.

⁴The time frame for the filing is dictated by the fact that the customer choice program is scheduled to begin on September 20, 1999.

Second, if utility management elects not to offer open access service, then the decision of whether to require it to do so will rest with the Legislature, not the Commission.

V.

OTHER ISSUES

U.S. District Court Decision

Some parties argued at great length about the meaning of the decision of the U.S. District Court in North American v PSC, *supra*. There is no need for the Commission to address those arguments at this time. Obviously, the Commission will comply with the Court's decision, assuming that it is not reversed on appeal or not superseded by further federal legislation, but the decision involves a hypothetical circumstance that cannot exist until 2008, at the earliest. The Commission will address the impact of that decision at the appropriate time.

Consent Orders

Energy Michigan suggests the concept of consent orders as a means to provide assurances to all parties. Other parties have characterized the use of consent orders as an intriguing theory or as a creative but untested theory.

The Commission supports further exploration of the use of consent orders if they meet the needs of utilities, suppliers, customers, and other stakeholders. Obviously, a consent order would require the consent of the parties to it. The Commission has consistently supported efforts to resolve cases by settlement and the consent order concept is fully consistent with that policy.

Other Ratemaking Issues

Some parties contend that the Commission should rescind the accelerated amortization for Fermi authorized in Case No. U-11726 and the suspension of Consumers' PSCR clause in Case No. U-11453. Those matters are not directly affected by the Supreme Court decision, although they could be affected by the filings of Consumers and Detroit Edison in response to this order. If it proves to be necessary, the Commission will address those issues at the appropriate time. For example, if a viable customer choice program does not develop as a result of the voluntary filings of the utilities, the Commission may wish to revisit these issues.

VI.

FUTURE ACTIVITIES

The Commission recognizes that various parties have asserted that legislation may be necessary to address certain aspects of electric restructuring, even if a voluntary program is initiated. They contend that there are issues beyond the reach of existing Commission authority that need to be addressed in the legislative process. Moreover, both Consumers and Detroit Edison have indicated in their comments that they would support legislation, even if it were merely a codification of Commission authority over retail wheeling. We do not, by our action today, intend to foreclose a legislative review of all issues necessary for the creation of a competitive electric market in Michigan.

If Consumers and Detroit Edison file to voluntarily implement the prior Commission orders, that will bring to a close the initial phase of developing a customer choice program. In a little more than a month, we will be in a position to begin judging whether the program is accomplishing the fair and vibrant competitive marketplace that was intended. Customer choice was developed as a means to make Michigan's electric rates, and thereby the state's economy, more competitive. It is that result by which

the program must be judged. The Commission intends to closely monitor the results and make future pragmatic adjustments to assure that fair electric competition develops in Michigan.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. If Consumers chooses to implement the program in the customer choice orders, it should notify the Commission by September 1, 1999, in accordance with the terms of this order.
- c. If Detroit Edison chooses to implement the program in the customer choice orders, it should notify the Commission by September 1, 1999, in accordance with the terms of this order.

THEREFORE, IT IS ORDERED that:

A. If Consumers Energy Company chooses to implement the customer choice program contained in the orders of June 5, 1997, October 29, 1997, January 14, 1998, February 11, 1998, March 8, 1999, and August 17, 1999 in the above-captioned cases, it shall file a statement of the Chief Executive Officer of its electric business unit to that effect by September 1, 1999.

B. If The Detroit Edison Company chooses to implement the customer choice program contained in the orders of June 5, 1997, October 29, 1997, January 14, 1998, February 11, 1998, March 8, 1999,

and August 17, 1999 in the above-captioned cases, it shall file a statement of its Chief Executive Officer to that effect by September 1, 1999.

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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand

Chairman

(S E A L)

/s/ David A. Svanda

Commissioner

/s/ Robert B. Nelson

Commissioner

By its action of August 17, 1999.

/s/ Dorothy Wideman

Its Executive Secretary



COMMISSIONERS

John G. Strand, Chairman
David A. Svanda
Robert B. Nelson

CONTACTS

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LANSGING, August 17. The Michigan Public Service Commission today set a deadline of September 1, 1999 for The Detroit Edison Company and Consumers Energy Company to notify the Commission if they choose to voluntarily implement the customer choice program previously ordered by the Commission in six orders issued between June 5, 1997 and August 17, 1999. Today's order follows the June 29, 1999 Michigan Supreme Court ruling in which the Court overturned the Commission's authority to mandate that the companies offer an experimental retail wheeling program, a new service. The Supreme Court concluded that the decision to provide a new service lies within the province of the utility's management, not the Commission. On June 30, 1999, the Commission requested briefs on the impact of the Supreme Court decision on the Commission-approved electric customer choice program. Under the Commission authorized program, customers would be allowed to begin choosing alternative electric suppliers by September 20, 1999.

Today's order provides Detroit Edison and Consumers Energy with two options. If either company chooses to voluntarily implement the customer choice program, the utility's Chief Executive Officer must file a statement by September 1, 1999 to that effect, including an affirmation that its Board of Directors have approved the implementation. Once customers have begun taking open access service, this service is no longer a new service under the Michigan Supreme Court decision and the Commission can regulate the rates, terms and conditions of service. If either company chooses not to implement the customer choice program, then the decision of whether to require the companies to do so will rest with the Michigan Legislature.

Detroit Edison and Consumers Energy provide electric service to about 2 million and 1.6 million customers respectively.

The MPSC is an agency within the Department of Consumer and Industry Services.

Case No. U-11290 et al.

August 17, 1999

(Detroit Edison and Consumers Energy to indicate voluntary compliance with customer

choice programs)