

Via E-File

November 12, 2004

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909

Re: ***Wabash Valley Power Association, Inc.,
Case No. U-13564-R, 2003 PSCR Reconciliation***

Dear Secretary Kunkle:

Enclosed for filing in the above-referenced matter is Wabash Valley Power Association, Inc.'s Response in Opposition to the Michigan Public Service Commission Staff's Motion to Compel Compliance with Audit. Also enclosed is a Proof of Service. These documents have been filed electronically with the Commission.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By: _____
Daniel L. Stanley

Enclosures

c: Hon. Barbara A. Stump (w/encls.)
Patricia S. Barone, Esq. (w/encls.)
Albert Ernst, Esq./Christine Mason Soneral, Esq. (w/encls.)
Mr. Daniel J. Blair (w/encls.)
Mr. Don F. Morton (w/encls.)

LAN_A.121484.1

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of WABASH VALLEY POWER)	
ASSOCIATION, INC.'S Power Supply Cost)	
Reconciliation Proceeding for the)	Case No. U-13564-R
twelve-month period ending December 31, 2003.)	
_____)	

WABASH'S RESPONSE IN OPPOSITION TO THE MPSC STAFF'S MOTION TO COMPEL COMPLIANCE WITH AUDIT

I. INTRODUCTION

Wabash Valley Power Association, Inc. ("Wabash"), opposes the Michigan Public Service Commission ("Commission") Staff's Motion to Compel Compliance With Audit (the "Motion to Compel") filed with the Commission on November 3, 2004. Staff's Motion to Compel is completely without merit. Staff has not served a discovery request nor identified what specific materials it seeks, so a Motion to Compel is premature. Furthermore, Staff's attempt to rely upon MCL 460.56 as authority for its Motion to Compel must fail since that statute only applies to public utilities subject to the Commission's jurisdiction, and Wabash is no longer under the Commission's jurisdiction. MCL 460.56 does not apply to utilities that were formerly under the Commission's jurisdiction.

II. STATEMENT OF FACTS

Wabash is a generation and transmission cooperative headquartered in Indiana and incorporated under the Indiana Not-For-Profit Corporation Act for the purpose of providing electric wholesale energy to its 27-member systems. Twenty-two of Wabash's member-cooperatives are located in Indiana, one is located in Ohio, three are located in Illinois and one, Midwest Energy Cooperative, is located in Michigan.

Wabash filed this 2003 PSCR reconciliation case on March 31, 2004. In its Application, Wabash sought to recover a PSCR underrecovery for 2003 of \$1,010,369. See Application at ¶6. On June 30, 2004, Wabash paid to the Rural Utilities Service (“RUS”) the balance of its existing loans. Since Wabash is no longer a borrower under the RUS loan program, ratemaking jurisdiction is now with the Federal Energy Regulatory Commission (“FERC”).¹

On June 29, 2004, the FERC issued an Order in Docket Nos. ER04-789-000 and ER04-802-000 making Wabash’s FERC rate tariff effective as of July 1, 2004. Because FERC has exclusive jurisdiction over Wabash’s rates, Wabash filed a Petition to Withdraw its Application in this case on August 10, 2004. Wabash sought to dismiss the case because the Commission no longer has jurisdiction to grant relief to Wabash and allow recovery of the \$1,010,369 underrecovery for 2003.

On August 18, 2004, the Administrative Law Judge (“ALJ”) ruled on the Petition to Withdraw, despite the fact that the Petition had not been noticed for hearing on that date and over the objection of Wabash’s counsel. The ALJ orally denied the Petition to Withdraw, finding the Commission still had jurisdiction to reconcile Wabash’s 2003 PSCR costs even though the Commission’s rate jurisdiction over Wabash is preempted by federal law.

On August 31, 2004, Wabash appealed the ALJ’s decision and filed an Application for Leave to Appeal with the Commission. The Commission has not yet ruled on the Application for Leave to Appeal.

On November 3, 2004, Staff filed a Motion to Compel Compliance with Audit. In its Motion to Compel, Staff does not specify what materials it seeks but seeks *carte blanche* to force

¹ When a cooperative retires its RUS debt, it becomes a “public utility” under the Federal Power Act and its wholesale electric rates are subject to FERC regulation. See *In re Central Electric Cooperative, Inc, et al.*, 77 FERC ¶61,076 (1996).

Wabash to provide “any audit materials requested by Staff” and “any necessary discovery materials. . . .” *See* Motion to Compel at ¶10. Staff alleges its Motion to Compel is supported by MCL 460.6j(12) and 460.56. Neither statute supports Staff’s position.

III. ARGUMENT

A. MCL 460.6j(12) Is Inapplicable Because There Is No Outstanding Discovery Request And Staff Does Not Specify What Materials It Seeks To Have Wabash Produce.

Staff’s Motion to Compel is premature and totally lacking in merit because Staff seeks to “compel” Wabash to provide discovery materials when Staff has not even filed a discovery request or designated what specific materials it seeks to compel. As authority for its Motion to Compel, Staff points to MCL 460.6j(12), which provides that “[r]easonable discovery shall be permitted before and during [a] reconciliation proceeding. . . .” Staff’s Motion to Compel at ¶5.

MCL 460.6j(12) provides no support here, where Staff has not even served a discovery request and has not even identified the materials it seeks to compel. The Commission’s Rules of Practice and Procedure provide that discovery shall be conducted in the same manner as in the circuit courts pursuant to the Michigan court rules. *See* Rule 317. Under the Michigan Court Rules, a discovery request must be served before a Motion to Compel can be filed. *See* MCR 2.313(2). Since Staff has not served a discovery request upon Wabash, a Motion to Compel is premature and without legal support.

Further, even if Staff had served a discovery request, it would have to identify the specific material it seeks to compel and show why that material is relevant in order to give the ALJ a basis for compelling production. *See* MCR 2.302(B)(1) (providing that only relevant material is discoverable). Staff has failed to do so.

B. MCL 460.56 Is Inapplicable Because The Commission Lacks Jurisdiction Over Wabash.

Staff alleges that Wabash must provide whatever materials Staff desires under the provisions of MCL 460.56, which gives the Commission authority to examine the books and records of utilities under its jurisdiction. That statute is inapplicable because the Commission lacks jurisdiction over Wabash.

MCL 460.56 provides that the “Commission shall have authority to examine, or cause to be examined, the books, accounts and records kept on behalf of a public utility subject to the jurisdiction thereof.” (emphasis added). It is clear that this provision is inapplicable because the Commission has no jurisdiction over Wabash.

It is clear that rate jurisdiction over Wabash is now vested in the FERC. It is also clear that state regulation over Wabash is preempted. FERC regulation of wholesale electric rates is exclusive and state commissions may not regulate the rates of utilities whose rates are set by FERC. *Mississippi Power & Light Co v Mississippi*, 487 US 354 (1988); *Nantahala Power and Light Co v Thornburg*, 476 US 953 (1986).

Reconciliation of Wabash’s 2003 PSCR case by the Commission would be directly contrary to the “filed rate” doctrine. The filed rate doctrine requires that interstate power rates filed with FERC must be given binding effect by state utility commissions. *Nantahala, supra*, at 962. State commissions may not second guess such tariffs and may not independently determine the reasonableness and prudence of the elements of a FERC-filed tariff or agreement. *Mississippi Power & Light Co, supra*, 487 US at 376; *Entergy Louisiana, Inc v Louisiana Pub Serv Comm’n*, 539 US 39, 49-50 (2003).

Wabash has filed a FERC tariff containing a rider allowing recovery of its 2003 PSCR underrecovery. The Commission may not “second-guess” the costs reflected in that tariff by holding a prudence review nor may the Commission adjust Wabash’s rates. Simply stated, the Commission is without authority to allow recovery of those amounts or disallow recovery of those amounts because either action would run directly counter to the FERC tariff. *Nantahala, supra*, at 968.²

The Commission and the Michigan Court of Appeals have recognized that a PSCR clause cannot be reconciled once the Commission lacks authority to alter the rates of the subject utility. In Case No. U-11800-R, the Commission dismissed Detroit Edison’s 1999 PSCR reconciliation case based on the fact that Detroit Edison’s rates were frozen by subsection 10d(1) of 2000 PA 141. The Commission held that, because of that provision, Edison’s “retail rates now in effect may not be changed until at least December 31, 2003 except to reflect the effects of securitization. A PSCR reconciliation, which is designed to adjust rates for an over- or underrecovery of the costs of fuel and purchased power, is inconsistent with subsection 10d(1).” *In re Detroit Edison*, Opinion and Order, Case No. U-11800-R, p 2 (June 19, 2000) (emphasis added).

² Further, it is clear that the Commission’s jurisdiction is preempted even if FERC does not rule on the prudence of Wabash’s 2003 PSCR underrecovery. The filed rate doctrine preempts state commission review with respect to matters within FERC’s jurisdiction, even if FERC did not make a determination on the issue that the state commission seeks to review. *See Mississippi Power & Light, supra*, at 374 (“The Mississippi Supreme Court erred in adopting the view that the preemptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings.”). It is clear that the reasonableness of rates regulated by FERC may not be collaterally attacked in state proceedings. “The only appropriate forum for such a challenge is before the [FERC] or a court reviewing the [FERC’s] order.” *Id.* at 375.

The Court of Appeals affirmed dismissal of Detroit Edison's PSCR reconciliation case. The Court held that the rate freeze of subsection 10d(1) precludes any adjustment of rates beyond the terms of Act 141 and that a PSCR reconciliation would have the effect of adjusting rates. *Attorney General v MPSC*, 249 Mich App 424, 427; 642 NW2d 691 (2002).

The Commission's holding in Case No. U-11800-R – that a PSCR reconciliation case must be dismissed when the Commission no longer has authority to change the subject utility's rates – is applicable to this case as well. The Commission no longer has jurisdiction to alter Wabash's rates and, therefore, this case must be dismissed.

Further, the Commission has recognized that PSCR reconciliation proceedings are not required when a wholesale cooperative transfers to FERC rate jurisdiction in its prior decision regarding Wolverine Power Supply Cooperative ("Wolverine"). On December 31, 1997, Wolverine, a wholesale cooperative like Wabash, paid off the balance of its RUS loans and came under FERC rate jurisdiction. *See In re Wolverine Power Supply Cooperative, Inc*, 81 FERC ¶840,803; 1997 WL 840803 (1997). Wolverine had a PSCR factor in place for 1997 but no reconciliation to its costs took place after Wolverine became subject to FERC exclusive rate jurisdiction.³

³ Wolverine filed a 1997 PSCR plan case and a 1998 PSCR plan case on behalf of itself and its member cooperatives. See June 25, 1997 Order in Case No. U-11190, approving the 1997 PSCR plan case, and the January 28, 1998 Order in Case No. U-11539, approving the 1998 PSCR plan case. As a result of those cases, the Commission approved separate factors for Wolverine and each of its members. Although reconciliation proceedings were held in the 1997 and 1998 PSCR plan cases in which Wolverine was previously a party, the reconciliation orders issued by the Commission indicate that they only affected Wolverine's *members*, not Wolverine. See September 11, 1998 Order in Case No. U-11190-R and October 28, 1999 Order in Case No. U-11539-R. Thus, Wolverine's 1997 PSCR factor was never reconciled by the Commission after Wolverine became subject to FERC jurisdiction.

MCL 460.56 is only applicable to public utilities under the jurisdiction of the Commission. It is not applicable to public utilities that were formerly under the jurisdiction of the Commission.

IV. CONCLUSION

Staff's Motion to Compel has no merit and should be denied.

WABASH VALLEY POWER ASSOCIATION, INC.

Daniel J. Demlow (P-12666)
Daniel L. Stanley (P-57052)
Honigman Miller Schwartz and Cohn LLP
222 N. Washington Square, Ste. 400
Lansing, MI 48933-1800
(517) 377-0700

Dated: November 12, 2004
LANSING.135204.1

**STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

In the Matter of WABASH VALLEY POWER)	
ASSOCIATION, INC.'S Power Supply Cost)	Case No. U-13564-R
Reconciliation Proceeding for the)	
twelve-month period ending December 31, 2003.)	
_____)	

PROOF OF SERVICE

Cynthia M. Lenneman, being first duly sworn, deposes and says that on November 12, 2004, a copy of Wabash Valley Power Association, Inc.'s Response in Opposition to the Michigan Public Service Commission Staff's Motion to Compel Compliance with Audit was served on the following parties via electronic mail and via hand delivery:

Albert Ernst, Esq.
Christine Mason Soneral, Esq.
Dykema Gossett, PLLC
124 W. Allegan
Lansing, MI 48933

Patricia S. Barone, Esq.
Assistant Attorney General
Public Service Division
Lansing, MI 48911

Hon. Barbara A. Stump
Administrative Law Judge
Michigan Public Service Commission
6545 Mercantile Way, Ste. 14
Lansing, MI 48911

Cynthia M. Lenneman

Subscribed and sworn to before me
this 12th day of November, 2004

Lisa Joseph Hausermann, Notary Public
Clinton County, Acting in Ingham
My commission expires: 4-23-08