

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of )  
**THE DETROIT EDISON COMPANY** for )  
accounting authority to defer extraordinary ) Case No. U-13935  
outage expense. )  
\_\_\_\_\_ )

At the September 21, 2004 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. J. Peter Lark, Chair  
Hon. Robert B. Nelson, Commissioner  
Hon. Laura Chappelle, Commissioner

**ORDER**

On October 23, 2003, The Detroit Edison Company (Detroit Edison) filed an application for authority to defer recognition of the expenses associated with the August 14, 2003 blackout. On November 14, 2003, the Commission Staff (Staff) filed an appearance.

On December 16, 2003, Administrative Law Judge James N. Rigas (ALJ) conducted a prehearing conference and granted the Association of Businesses Advocating Tariff Equity (ABATE), Attorney General Michael A. Cox (Attorney General), and Energy Michigan intervenor status.

On May 17, 2004, the ALJ conducted an evidentiary hearing. Detroit Edison presented five witnesses who testified regarding its efforts to restore power after the blackout, expenses incurred due to the blackout, Commission precedent addressing deferred accounting, and the relief Detroit

Edison seeks in this proceeding. The record consists of 200 transcript pages and 9 exhibits that were admitted into evidence.

On June 11, 2004, the Attorney General, ABATE, Energy Michigan, Detroit Edison, and the Staff filed briefs. On June 25, 2004, ABATE, Detroit Edison, and the Staff filed reply briefs. On June 28, 2004, the Attorney General filed a reply brief.

Detroit Edison argued that it incurred \$26.8 million of extraordinary one-time expenses related to the blackout including: emergency equipment, generation unit repair, replacement parts, incremental labor, and incremental power supply costs. Further, Detroit Edison stated that its response to the blackout was reasonable and prudent.

Next, Detroit Edison argued that there is precedent for deferred recovery of extraordinary expenses. Citing the June 21, 2002 order in Case No. U-11588, the August 19, 1981 order in Case No. U-6569, the December 30, 1980 order in Case No. U-6163, and the November 29, 1976 order in Case No. U-5081, Detroit Edison pointed out that the Commission has authorized deferred cost accounting for restoration expenses several times due to storm damage. Detroit Edison contended that like an extraordinary storm, the blackout was extraordinary in terms of severity and the additional costs incurred.

Finally, Detroit Edison stated that the rate freeze imposed by Section 10d of 2000 PA 141 (Act 141), MCL 460.10d, does not prevent deferred accounting because the Commission has deferred costs even during a rate moratorium. See, the December 8, 1992 order in Case No. U-10040. Indeed, Detroit Edison noted that the rate freeze should not prohibit recovery of extraordinary expenses in a later period when rates can be raised. Detroit Edison insisted that its request would not change the rates for electric service from June 5, 2000 through December 31, 2003, and because the rate freeze ended on December 31, 2003, it is not relevant to these

proceedings. Detroit Edison stated that even if the Commission were to consider its power supply cost recovery (PSCR) over-recoveries from 2001 through 2003, Detroit Edison's net income is well below the authorized rate of return of 11%.

Detroit Edison stated that it properly calculated power costs based on the difference between costs actually incurred and the costs that would have normally been incurred had there been no blackout. Detroit Edison stated that it is only seeking to recover extraordinary restoration expenses, not the substantial lost electricity sales.

The Attorney General asserted that Detroit Edison's additional losses due to the blackout couldn't be deferred. Citing Financial Accounting Standard 71 (FAS 71), the Attorney General argued that there must be an assurance of recovery before a company may book a regulatory asset. The Attorney General also argued that approval of deferred accounting would only be proper if the Commission also agreed to allow Detroit Edison to recover the amount being deferred. Further, the Attorney General argued that under Act 141 there is a rate freeze in effect that must be applied notwithstanding any other provision of law or Commission order. The Attorney General insisted that Detroit Edison cannot bypass Act 141 through deferred accounting.

Further, the Attorney General argued that approval of blackout expenses would be unlawful retroactive ratemaking. The Attorney General asserted that the Commission does not approve future rate adjustments even where past periods were unjust and unreasonable. See, the July 11, 2001 order in Case No. U-12342. The Attorney General insisted that in the rare case for which the Commission has approved deferral of extraordinary storm damage expenses, the Commission approved recognition for accounting purposes only. Finally, the Attorney General declared that utilities are only entitled to a reasonable opportunity to earn a profit not a guaranteed profit. The Detroit Edison Co v Public Service Comm, 127 Mich App 499; 342 NW2d 273 (1983).

The Staff agreed that Act 141 precludes recovery. The Staff asserted that the storm damage cases are irrelevant because they predate Act 141. In fact, the Staff states that where the language of a statute is plain, certain, and unambiguous, no contrary interpretation is permitted. Citing the maxim *expressio unius est exclusio alterius* (the express mention in a statute of one thing implies exclusion of similar things), the Staff maintained that the Legislature identified certain exceptions to the rate freeze, and “extraordinary expenses” was not one of them. By expressly identifying certain exceptions, the Staff asserted that the Legislature by implication excluded any others not mentioned. Further, the Staff insists that the rates set during the rate freeze are all the compensation the utilities are entitled to receive to recover costs incurred during the period of the rate freeze.

The Staff also contended that Detroit Edison’s expenses are not extraordinary. The Staff indicated that Detroit Edison’s PSCR revenues still exceeded its PSCR expenses in 2001, 2002, and 2003. Further, the Staff stated that restoration costs do not pose a significant financial burden on Detroit Edison, and costs are not outside the range of normal storm damage expenses.

Energy Michigan stated that Detroit Edison’s average price analysis is biased. Energy Michigan claimed that Detroit Edison had certain call options, which were set up ahead of time to be used as a source of additional power and should not be considered extraordinary. Further, Energy Michigan claimed that there is uncertainty in the amount of power Detroit Edison actually received, and Detroit Edison is still negotiating with its suppliers about which power purchases were delivered and how much is actually due. Therefore, Energy Michigan claimed that Detroit Edison’s claims were inflated and premature.

ABATE argued that Detroit Edison’s rate of return is established through a number of formulas that include an aspect of business risk. ABATE argued that Detroit Edison is asking the Commission to make Detroit Edison’s business risk free by having customers pay Detroit Edison’s

losses. ABATE contended that blackouts are a known risk that Detroit Edison is in a better position to contend with than its customers who have suffered their own losses due to the blackout. ABATE agreed with the Attorney General and the Staff that under Act 141 and FAS 71, Detroit Edison cannot collect blackout costs from its customers. ABATE also agreed that collecting blackout expenses would amount to illegal retroactive ratemaking.

On July 29, 2004, the ALJ issued a Proposal for Decision (PFD) recommending that the application of Detroit Edison for accounting authority be dismissed. On August 12, 2004, Detroit Edison and the Attorney General filed exceptions. On August 23, 2004, the Staff, ABATE, Detroit Edison, and the Attorney General filed replies to exceptions.

The ALJ agreed with the Staff and the Attorney General that Act 141 prevents the Commission from granting the accounting authority Detroit Edison seeks in this case. The ALJ found that under FAS 71, Detroit Edison may book a regulatory asset only after Commission approval of future recovery. Although Detroit Edison has attempted to distinguish between rates in effect and underlying costs, the ALJ was persuaded that “the rates in place during the rate freeze are all the compensation Detroit Edison is entitled to receive to recover costs incurred during the period of the rate freeze.” PFD, p. 12. Therefore, the ALJ found that the application of Detroit Edison for accounting authority to defer extraordinary outage expenses should be dismissed.

Detroit Edison reiterates that it expended extraordinary incremental expense to restore electric service as quickly as possible after the blackout. Detroit Edison maintains that the rate freeze has expired, and Act 141 does not prevent recovery of costs incurred during the freeze. Detroit Edison continues to insist that in the past, the Commission has allowed companies to recover extraordinary expenses through future rate recovery.

Detroit Edison contends that because the Attorney General was not adversely affected by the PFD, the Attorney General's exceptions are a waste of time and improper under the Michigan Administrative Procedures Act, MCL 24.281(1). Detroit Edison states that deferral of extraordinary storm expenses does not amount to retroactive ratemaking. Detroit Edison points out a similar case where the Michigan Court of Appeals held that ". . . no retroactive ratemaking occurred when the PSC allowed Detroit Edison to defer 1997 extraordinary storm-related expenses and to amortize them during 1998 and 1999." Attorney General v MPSC, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (2004).

The Attorney General agrees that Act 141 precludes relief but files exceptions to bring up an alternative basis for dismissing Detroit Edison's application. The Attorney General continues to assert that rates established by the Commission must be prospective only. In The Detroit Edison Co v Public Service Comm, 416 Mich 510, 523; 331 NW2d 159, 164 (1982), the Court summarized the rule as follows:

[T]he essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the MPSC can take is to prospectively revise rates in an effort to set more appropriate ones.

Therefore, the Attorney General concludes that since FAS 71 does not permit Detroit Edison to defer costs without ratemaking assurance, and ratemaking assurance would constitute unlawful retroactive ratemaking, the Commission cannot authorize deferred accounting measures in this proceeding.

The Staff maintains that Act 141's rate freeze prevents Detroit Edison from creating a regulatory asset and approving future rate recovery. Also, the Staff insists that Detroit Edison's expenses were not extraordinary.

ABATE agrees that if the Commission defers costs incurred during a rate freeze for future recovery it would illegally eviscerate the rate freeze.

The Commission finds that the PFD is well-reasoned, in the public interest, and should be approved. The Commission finds that the costs incurred during the blackout could only be recovered through the rates in place during the rate freeze.

The Commission agrees with the Staff that because the Legislature identified certain exceptions to Act 141's rate freeze, and "extraordinary expenses" was not one of them, the Legislature by implication excluded "extraordinary expenses" and other items not specifically mentioned. The Commission will not circumvent the rate freeze by now allowing Detroit Edison to recover costs incurred during Act 141's rate-freeze period. The Commission notes that Detroit Edison benefited from the rate freeze when it was over-earning and over-recovering its power supply costs in 2000. Detroit Edison cannot now be heard to complain that its profits are lower than expected. The Commission finds that the application of Detroit Edison for accounting authority to defer extraordinary outage expenses should be denied.

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. Detroit Edison's application for accounting authority to defer extraordinary expenses should be denied.

THEREFORE, IT IS ORDERED that The Detroit Edison Company's application for accounting authority to defer extraordinary outage expenses is denied.

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

Chair

( S E A L )

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its Action of September 21, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary

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