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 authority to implement a power supply cost recovery plan in its rate schedules for 1997 metered jurisdictional sales of electricity.	))))))	Case No. U-11175

At the April 29, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

ORDER GRANTING IN PART AND DENYING IN PART APPLICATION FOR LEAVE TO APPEAL

On March 13, 1997, Attorney General Frank J. Kelley (Attorney General) and the Residential Ratepayer Consortium (RRC) filed an application for leave to appeal several February 27, 1997 rulings of Administrative Law Judge James N. Rigas (ALJ). The rulings involve the ALJ's adoption of a protective order proposed by The Detroit Edison Company (Detroit Edison) and his sustaining of objections to cross-examination questions posed to Detroit Edison's witnesses on the ground that the subject matter of those questions encompassed data subject to the protective order. On March 27, 1997, Detroit Edison filed its answer to the application for leave to appeal.

Rule 337 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application

merits immediate review; an appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.

2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

Detroit Edison maintains that the Attorney General's and the RRC's application for leave to appeal does not satisfy the requirements of Rule 337. The Commission does not agree. The issues presented in the application for leave to appeal are directly related to the ability of the Attorney General and the RRC to participate in the proceedings. Therefore, a decision on their application is necessary in order to ensure that their ability to present their positions to the Commission has not been substantially harmed by the ALJ's rulings.

The application for leave to appeal raises three issues. The first issue concerns the argument that paragraph 3(b) of the protective order unreasonably and unlawfully allows Detroit Edison to designate materials as confidential without first complying with the requirements of Michigan Court Rule (MCR) 2.302(C), which obligates the party seeking such protection to make a motion for a protective order. The Attorney General and the RRC insist that the protective order reverses the process by obligating them to make a motion to remove information from the scope of the protective order. Further, citing Monty v Warren Hospital Corp, 422 Mich 138; 366 NW2d 198 (1985), they contend that the Commission should modify the

protective order to encompass only the specific discovery requests that were at issue as a result of Detroit Edison's appeal of the ALJ's January 22, 1997 ruling denying the utility's request for a protective order.[1]

In response, Detroit Edison argues that paragraph 3(b) is reasonable. According to Detroit Edison, having already convinced the Commission that a protective order is necessary to ensure the confidentiality of trade secrets and commercially sensitive information, it should not be required to seek a new protective order each time an intervenor seeks additional information. The Commission agrees.

The process established in paragraph 3(b) of the protective order does not deny the Attorney General or the RRC the right to protest Detroit Edison's classification of information as confidential or to seek a hearing on the merits of the issues involved. Rather, it merely places the burden of bringing the issue to the ALJ's attention on them, rather than on Detroit Edison. Given the Commission's prior determination that a protective order is required, the Commission concludes that such a minor procedural requirement will not have any significant effect on the ability of the Attorney General or the RRC to participate in these proceedings. Accordingly, the first objection to the ALJ's adoption of Detroit Edison's protective order is rejected.

Next, the Attorney General and the RRC argue that the second sentence of paragraph 9(b) of the protective order effectively precludes them from using an expert to review some of the protected information, notwithstanding their willingness to execute and abide by the restrictions contained in the protective order and

[1]The Commission's February 11, 1997 order in Case No. U-11175 granted Detroit Edison's application for leave to appeal and remanded the matter to the ALJ for the approval of an appropriate protective order.

the nondisclosure certificate.[2] According to the Attorney General and the RRC, because the materials identified by Detroit Edison as containing highly sensitive competitive information include most, if not all, of the information pertinent to whether Detroit Edison's fuel cost projections are reasonable and prudent and because a witness lacking the experience described in paragraph 9(b) would be unlikely to be able to meaningfully review and offer expert testimony regarding coal purchase contracts, transportation agreements, railcar leases, and coal blend test reports, the protective order creates the illusion of making the protected information available to parties when, in reality, it denies the parties the opportunity to use any person who has meaningful expertise to evaluate and provide testimony regarding the information. For that reason, they request substitution of the language in paragraph 18 of the Attorney General's proposed protective order for that contained in paragraph 9(b) of the protective order approved by the ALJ.

In response, Detroit Edison maintains that the Attorney General and the RRC are complaining about a very minor aspect of the protective order. Indeed, Detroit Edison seeks to portray the dispute over the second sentence of paragraph 9(b) as so trivial that the Attorney General actually abandoned the issue at the hearing. Moreover, Detroit Edison maintains that the need for the protection provided by paragraph 9(b) is well

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[2]Paragraph 9(b) of the protective order states:

> If a Reviewing Representative's scope of employment includes the marketing, purchase or sale of either coal, coal transportation or electric power, the direct supervision of any employee or employees whose duties include the marketing, purchase or sale of either coal, coal transportation or electric power, or the provision of consulting services to any person whose duties include the marketing, purchase or sale of either coal, coal transportation or electric power, such Reviewing Representative may not use information contained in any Protected Materials to give any Participant or any competitor of any Participant a commercial advantage. Certain Protected Materials contain highly sensitive competitive information and shall not be disclosed in any manner to such Reviewing Representative. These Protected Materials are listed on Appendix A attached hereto.

February 27, 1997 protective order, p. 3.

established by the record. Detroit Edison says that the law firm representing the Association of Businesses Advocating Tariff Equity (ABATE) also represents National Steel Corporation, which Detroit Edison alleges is an open-market participant. Further, Detroit Edison is concerned that GDS Associates, the consulting firm retained by the RRC, might also be retained by its competitors. Detroit Edison therefore maintains that only individuals who have a need to know information about its PSCR costs should be given access to that information. Further, with respect to highly sensitive competitive information, Detroit Edison asserts that it is entirely appropriate that disclosure be limited to individuals whose scope of employment does not include an opportunity to use that information against Detroit Edison. Finally, Detroit Edison maintains that the Attorney General and the RRC have not cited any persuasive authority for their position and that they have failed to identify any specific use that they might have for the information.

The Commission finds that the arguments raised by the Attorney General and the RRC have merit and that the protective order should be revised to delete the provision that prevents a reviewing representative described in the first sentence of paragraph 9(b) from being able to obtain access to highly sensitive competitive information simply due to the reviewing representative's employment status or other professional activities. The American judicial system has never recognized an absolute right to the confidentiality of information in judicial proceedings. In Federal Open Market Committee v Merrill, 443 US 340, 362; 99 S Ct 2800; 61 L Ed 2d 587 (1979), the United States Supreme Court stated:

> As with most evidentiary and discovery privileges recognized by law, "there is no absolute privilege for trade secrets and similar confidential information."
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> "The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection." [Citations omitted.]

The U.S. Supreme Court noted in Federal Open Market Committee that "orders forbidding any disclosure of trade secrets or confidential commercial information are rare" and that, more commonly, courts use protective orders to restrict disclosure to counsel or the parties. 443 US at 362.

Detroit Edison's concern over the confidentiality of its proprietary information and trade secrets must be balanced against the intervenors' right to the assistance of legal counsel and qualified experts. The Commission is persuaded that paragraph 9(b) of the protective order unjustifiably infringes upon the right of the intervenors to select and obtain the assistance of qualified expert witnesses. If an intervenor desires expert assistance regarding data classified by Detroit Edison as highly sensitive, the intervenor cannot employ a reviewing representative whose scope of employment includes the type of professional activities that give rise to the expertise necessary to evaluate coal purchase contracts, transportation agreements, or electric power transactions. Further, an expert engaged in such activities would be disqualified even though he or she may never encounter one of Detroit Edison's competitors. Accordingly, the Commission finds that the ban is overbroad, unreasonable, and unnecessary in light of the prohibitions contained in the protective order against a reviewing representative's disclosure or use of information contained in the protected materials.

In rejecting Detroit Edison's arguments on this issue, the Commission finds that the difficulties presented by the second sentence of paragraph 9(b) are neither minor nor trivial. Most cases that come before the Commission regarding power supply costs involve the testimony of expert witnesses. Accordingly, a party's inability to use an expert witness would effectively doom that litigant's ability to present its position to the Commission.

The Commission also rejects Detroit Edison's contention that this issue was effectively abandoned at the hearing. Detroit Edison's argument in this regard is based upon a representation made by the Attorney General that he could agree to the inclusion of the second sentence of paragraph 9(b) from Detroit Edison's protective order as an amendment to paragraph 18 of his proposed protective order. The Commission finds

that the Attorney General's offer does not constitute the abandonment of this issue. Obviously, the Attorney General's offer was conditioned upon adoption of his proposed protective order. Accordingly, Detroit Edison's position that the Attorney General abandoned the issue is without merit. Moreover, that position simply overlooks the fact that the RRC also objected to the second sentence of paragraph 9(b) at the hearing and has not abandoned the issue.

Finally, because the party seeking to preclude disclosure of allegedly confidential information has the burden of establishing the necessity and the reasonableness of the proposed restrictions, it was necessary for Detroit Edison to establish the need for the second sentence of paragraph 9(b). The Commission is not persuaded that the unusual level of protection afforded by that sentence has been justified by Detroit Edison's allegations of potential abuse.[3] Detroit Edison's concerns regarding the potential abuses that might develop due to the ABATE/National Steel and the RRC/GDS Associates relationships are speculative and undocumented. Accordingly, the Commission finds that the concept embodied in the second sentence of paragraph 9(b) of the protective order should be stricken.[4]

In their third argument, the Attorney General and the RRC maintain that the ALJ erred in precluding cross-examination of Detroit Edison's witnesses concerning the issue of whether any of Detroit Edison's coal contracts contain maximum or minimum take provisions.[5] They contend that the ALJ's rulings violate

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[3]Indeed, the Commission notes that protective orders in telecommunication matters, which involve a marketplace that is far more competitive than the electric utility industry, do not contain provisions similar to the second sentence of paragraph 9(b).

[4]For consistency, the third sentence of paragraph 9(b) and Appendix A of the protective order should also be stricken.

[5]At 6 Tr. 376, counsel for the Attorney General asked "Could you tell me what is the minimum and maximum entitlement in tonnage under the agreement with supplier no. 1?" and at 6 Tr. 394, he asked "Do you have the ability to reduce takes below the level of 5,249,000 tons shown for supplier no. 9?" In both instances, the ALJ sustained an objection by Detroit Edison to the question on the ground that the questions asked for a response pertaining to confidential information covered by the protective order.

Michigan Rule of Evidence (MRE) 402, which states that all relevant evidence is admissible. They also maintain that the rulings exceed the scope of the ALJ's power to issue protective orders.

According to the Attorney General and the RRC, an evidentiary privilege simply does not exist justifying the total exclusion of relevant evidence on the ground that the evidence is confidential information. Arguing that the rules of evidence must be liberally construed to promote discovery of all relevant facts and circumstances, the Attorney General and the RRC insist that the Commission should reverse the ALJ's rulings that the protective order constitutes sufficient justification for precluding answers to relevant questions. Further, they contend that 1982 PA 304, MCL 460.6h et seq.; MSA 22.13(6h) et seq., (Act 304) specifically requires the Commission to consider the terms of all major contracts in resolving the reasonableness and prudence of Detroit Edison's 1997 PSCR plan. Because minimum and maximum take provisions must be examined to determine whether Detroit Edison could have saved by maximizing purchases from one supplier while minimizing purchases from another, the Attorney General and the RRC argue that the ALJ's rulings are illegal and must be reversed.

In response, Detroit Edison maintains that the Attorney General's and the RRC's attempts to circumvent the protective order through cross-examination must be rejected. According to Detroit Edison, it is well established that courts have authority to preclude disclosure of confidential information and trade secrets. Detroit Edison characterizes the arguments by the Attorney General and the RRC as the legal equivalent of an attempt to seek a rehearing of the Commission's February 11, 1997 decision, which directed the ALJ to adopt an appropriate protective order.

The Commission finds that the concerns raised by the Attorney General and the RRC are well taken. To the extent that the protective order prohibits legitimate cross-examination of relevant issues, it cannot be sustained. MCL 460.6j(3); MSA 22.13(6j)(3) obligates Detroit Edison to describe all significant aspects of its fuel supply contracts and to provide the Commission with an explanation of the actions taken to minimize the

cost of fuel. Further, MCL 460.6j(6); MSA 22.13(6j)(6) requires the Commission to determine whether Detroit Edison has taken all appropriate actions to minimize the cost of fuel in determining the reasonableness and prudence of its PSCR plan. Because the vast majority of Detroit Edison's native generation comes from coal-fired generating units, a thorough understanding of the provisions in its coal supply contracts is essential to a determination of whether Detroit Edison has managed its coal procurement activities in such a way as to minimize the cost of fuel. Accordingly, the Commission agrees with the Attorney General and the RRC that a knowledge of the maximum and minimum take provisions in the contracts is as important to the Commission's review of Detroit Edison's PSCR plan as the information regarding the quantities of coal that Detroit Edison has forecast that it will purchase from each of its suppliers. Absent the ability to review contractual maximum and minimum take provisions, the Commission will effectively be foreclosed from determining whether the decisions underlying Detroit Edison's 1997 PSCR plan are reasonable and prudent.[6]

Furthermore, by completely barring the Attorney General's attempts to inquire into the maximum and minimum take provisions in Detroit Edison's coal supply contracts, the ALJ selected the harshest measure that could have been imposed to ensure the confidentiality of that information. The parties had already protected the identities of Detroit Edison's suppliers and generating facilities through use of code numbers. The ALJ could have cleared the hearing room of unnecessary spectators and participants and directed that the transcript of the hearing be sealed. The record does not disclose to what extent the ALJ considered these or other measures.[7]

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[6]Although this case does not involve application of the Freedom of Information Act, 1976 PA 442, as amended, MCL 15.231 et seq.; MSA 4.1801(1) et seq., (FOIA), the Commission notes that the state policy expressed in Section 13(1)(g) of the FOIA exempts trade secrets or commercial or financial information from disclosure only if such information was not submitted "as a condition of receiving a governmental contract, license, or other benefit." MCL 15.243(1)(g)(iii); MSA 4.1801(13)(1)(g)(iii).

[7]Some of the other measures that may be taken to protect the confidentiality of trade secrets or commercially sensitive information include the in-camera assessment by the ALJ of the information to

Accordingly, the Commission finds that this case should be remanded to the ALJ to allow the Attorney General and the RRC to complete cross-examination of Detroit Edison's witnesses. Prior to cross-examination, the ALJ shall determine if any special measures are necessary for the cross-examination to be conducted in a manner that will balance the Commission's and the intervenors' needs with regard to the disclosure of information with Detroit Edison's desire to protect its confidential information and trade secrets.[8] Finally, the ALJ shall amend the February 27, 1997 protective order to be consistent with the Commission's order in this proceeding.

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.; 1982 PA 304, as amended, MCL 460.6h et seq.; MSA 22.13(6h) 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 AACS, R 460.17101 et seq.

b. The application for leave to appeal filed by the Attorney General and the RRC should be granted in part and denied in part.

THEREFORE, IT IS ORDERED that:

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determine the probability of a breach of confidence by a lawyer or an expert witness, limiting access to retained counsel and experts in the event that a party's in-house counsel or experts are involved in competitive decisionmaking, and the complete closure of the hearing to the public. Examples of procedures for closing a hearing to the public are contained in Re Iowa Freedom of Information Council, 724 F 2d 648 (1983) and Barron v Florida Freedom Newspapers, Inc., 50 So 2d 113 (1988).

[8] As the proponent of nondisclosure, Detroit Edison has the burden of persuasion with regard to the reasonableness of the special measures, if any, to be adopted by the ALJ.

A. The application for leave to appeal filed by Attorney General Frank J. Kelley and the Residential Ratepayer Consortium is granted in part and denied in part.

B. The request by Attorney General Frank J. Kelley and the Residential Ratepayer Consortium for the Commission to disapprove the provision in the protective order that allows Detroit Edison to initially designate the materials that are to remain confidential is denied.

C. The request by Attorney General Frank J. Kelley and the Residential Ratepayer Consortium for the Commission to disapprove the second sentence in paragraph 9(b) of the protective order is granted.

D. The request by Attorney General Frank J. Kelley and the Residential Ratepayer Consortium for the Commission to overturn the rulings that precluded Attorney General Frank J. Kelley from cross-examining The Detroit Edison Company's witnesses with regard to the maximum and minimum take provisions in its fuel supply contracts is granted.

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

MICHIGAN PUBLIC SERVICE COMMISSION

John G. Strand
Chairman

(SEAL)

John C. Shea
Commissioner

David A. Svanda
Commissioner, concurring in part, and
dissenting in part, in a separate opinion.

By its action of April 29, 1997.

Dorothy Wideman
Executive Secretary

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

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner, concurring in part, and
dissenting in part, in a separate opinion.

By its action of April 29, 1997.

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Its Executive Secretary

In the matter of the application of	)	
THE DETROIT EDISON COMPANY for	)	
authority to implement a power supply cost	)	Case No. U-11175
recovery plan in its rate schedules for 1997	)	
metered jurisdictional sales of electricity.	)	
_____	)	

Suggested Minute:

> "Adopt and issue order dated April 29, 1997 granting in part and denying in part the application for leave to appeal filed by Attorney General Frank J. Kelley and the Residential Ratepayer Consortium, as set forth in the order."

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 authority to implement a power supply cost recovery plan in its rate schedules for 1997 metered jurisdictional sales of electricity.	))))))	Case No. U-11175

SEPARATE OPINION OF COMMISSIONER DAVID A. SVANDA
CONCURRING IN PART, AND DISSENTING IN PART

(Submitted on April 29, 1997 concerning order issued on same date.)

Today my colleagues approved an order granting in part and denying in part an application for leave to appeal filed by Attorney General Frank J. Kelley and the Residential Ratepayer Consortium in Case No. U-11175. Although I concur with the portions of the order granting some of the relief requested, I disagree with the majority opinion (paragraph B, p. 12) that there is a need to designate materials as confidential in the first place.

As I stated in my dissenting opinion of February 11, 1997, I do not believe that The Detroit Edison Company has shown that the disclosure previously ordered by Administrative Law Judge James N. Rigas on January 22, 1997 would result in clearly defined and serious injury. Absent a competitive market, and noting that protective orders tend to disadvantage parties in power suppy cost recovery proceedings, I must continue to dissent.

MICHIGAN PUBLIC SERVICE COMMISSION

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Commissioner