S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **DTE ELECTRIC COMPANY** for approval of certificates of necessity pursuant to MCL 460.6s, as amended, in connection with the addition of a natural gas combined cycle generating facility to its generation fleet and for related accounting and ratemaking authorizations.	)	Case No. U-18419

At the July 12, 2017 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

MCL 460.6s, which was added to 1939 PA 3; MCL 460.1 *et seq*., by 2008 PA 286 (Act 286), was amended effective April 20, 2017 by enactment of 2016 PA 341 (Act 341). MCL 460.6s concerns the issuance of a certificate of necessity (CON) to "[a]n electric utility that proposes to construct an electric generation facility, make a significant investment in an existing electric generation facility, purchase an existing electric generation facility, or enter into a power purchase agreement for the purchase of electric capacity for a period of 6 years or longer may submit an application to the commission seeking a certificate of necessity for that construction, investment, or purchase if that construction, investment, or purchase costs $100,000,000.00 or more and a

portion of the costs would be allocable to retail customers in this state." MCL 460.6s(1). This proceeding is the first application to be processed following the effective date of Act 341.

In an order issued on December 23, 2008, in Case No. U-15896, the Commission adopted standard application filing forms and instructions for use in all CON requests. In another order issued May 11, 2017, in Case No. U-15896, the Commission updated those CON filing requirements to include, among other things, a filing announcement requirement that provides**:**

> In order to facilitate the scheduling and preparation of certificate of necessity proceedings, a utility intending to file an application for a certificate of necessity shall file a filing announcement, in a new docket, at least 30 days prior to filing the application. The filing announcement, along with a proof of service, shall be served on the Commission and all parties granted intervention in the utility's last two general rate cases and its most recent integrated resource plan case. If the application for a certificate of necessity is not filed within 120 days after filing of the filing announcement, the filing announcement shall be considered withdrawn.
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> The filing announcement shall include:
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> 1. Statement of intent to file for a certificate(s) of necessity;
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> 2. A brief description of the facilities or power purchase agreement for which the certificate(s) will be sought; and
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> 3. Any additional information the utility finds relevant to provide notice.

On June 30, 2017, DTE Electric Company (DTE Electric) filed a notice of its intent to file a CON application in this docket.

MCL 460.6s, as amended by Act 341, has not yet been subject to scrutiny or interpretation by the Commission. For this reason, and because certain provisions of the amended version of MCL 460.6s involve novel procedural requirements, the Commission finds that it should comment on these new provisions and provide direction to Administrative Law Judge Suzanne D.

Sonneborn (ALJ), DTE Electric, the Commission Staff (Staff), potential intervenors, and other interested persons.[1]

MCL 460.6s(4) provides that the Commission shall issue a final order approving or rejecting a CON application within 270 days after the filing of the application.[2] MCL 460.6s(4) also specifies that a CON application shall be reviewed by the Commission in a contested case proceeding conducted under Chapter 4 of the Michigan Administrative Procedures Act of 1969 (APA), 1969 PA 306, MCL 24.271 *et seq*.[3]

Whereas the version of MCL 460.6s(4) extant prior to passage of Act 341 simply provided that "[t]he commission shall allow intervention by interested persons," the combination of MCL 460.6s(4), which was revised by Act 341 and MCL 460.6s(13), which was added by Act 341, introduced markedly different intervention and participation criteria. MCL 460.6s(4) now provides, in pertinent part:

> The commission may allow intervention by persons under the rules of practice and procedure of the commission and shall allow intervention by existing suppliers of electric generation capacity under subsection (13), persons allowed to intervene in the contested case under section 6t, and interested persons.

And, MCL 460.6s(13) further states:

> An existing supplier of electric generation capacity currently producing at least 200 megawatts of firm electric generation capacity resources located in the independent system operator's zone in which the utility's load is served that seeks

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[1] MCL 460.6h(1)(e) defines "interested persons" to mean "the attorney general, the technical staff of the commission, any intervenor admitted to 1 of the utility's 2 previous general rate cases, any intervenor admitted to 1 of the utility's 2 previous reconciliation hearings, or any association of utility customers which meets the requirements to intervene in a reconciliation hearing under the rules of practice and procedure of the commission as applicable."

[2] For an MCL 460.6s application filed together with an integrated resource plan (IRP) under MCL 460.6t, which was added by Act 341, the final orders for both proceedings are to be issued concurrently. MCL 460.6s(4).

[3] These provisions of MCL 460.6s(4) were not modified in any significant way.

> to provide electric generation capacity resources to the utility may submit a written proposal directly to the commission as an alternative to the construction, investment, or purchase for which the certificate of necessity is sought under this section. The entity submitting an alternative proposal under this subsection has standing to intervene and the commission shall allow reasonable discovery in the contested case proceeding conducted under this section. In evaluating an alternative proposal, the commission shall consider the cost of the alternative proposal and the submitting entity's qualifications, technical competence, capability, reliability, creditworthiness, and past performance. In reviewing an application, the commission may consider any alternative proposals submitted under this subsection. This subsection does not limit the ability of any other person to submit to the commission an alternative proposal to the construction, investment, or purchase for which a certificate of necessity is sought under this section and to petition for and be granted leave to intervene in the contested case proceeding conducted under this section under the rules of practice and procedure of the commission. This subsection does not authorize the commission to order or otherwise require an electric utility to adopt any alternative proposal submitted under this subsection.

The Commission's intervention standards, which are referenced in the initial portion of the above-quoted sentence of MCL 460.6s(4), are embodied in R 792.10410 to R 792.10413 of the Commission's Rules of Practice and Procedure, R 792.10401 *et seq*., and have been implemented for several decades via application of the "Two-Prong Test" from *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970). That test requires a proposed party to show (1) that it will suffer an "injury in fact" and (2) that the interest allegedly damaged is within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. Further, the Commission has discretion to permit anyone to intervene if the Commission is persuaded that the intervenor will add something to the case in question. Ordinarily, persons seeking to intervene in a proceeding at the Commission must file their petitions to intervene not less than seven days before the initial prehearing conference. R 792.10410(1).

At first blush, the latter portion of the above-quoted sentence of MCL 460.6s(4), when combined with MCL 460.6s(13), involves several deviations from established practices and

protocols with regard to interventions and the ability of the Commission to process a contested case proceeding in a CON application in accordance with the requirements of the APA. The Commission does not always allow competitors to intervene in a contested case proceeding.[4] However, under MCL 460.6s(4) and (13), any interested person, intervenors in a concurrently pending proceeding filed under MCL 460.6t, and competitive electric suppliers are permitted to seek intervention status. Further, the first two sentences of MCL 460.6s(13) clearly guarantee the right of any electric supplier having at least 200 megawatts (MW) of firm electric generation capacity resources in the Midcontinent Independent System Operator, Inc.'s (MISO) Zone 7 to participate in any CON proceeding filed by DTE Electric. But, the Commission is persuaded that all intervenors, including those guaranteed intervention by the first two sentences of MCL 460.6s(13), those able to demonstrate their right to intervene under the "Two-Prong Test" from *Association of Data Processing Service Organizations, Inc. v Camp, supra,* and those granted permissive intervention by the ALJ, must be required to abide by the Commission's Rules of Practice and Procedure and the contested case provisions embodied in Chapter 4 of the APA.

Among other things, the APA and the Commission's Rules of Practice and Procedure provide all parties with the opportunity to cross-examine a witness, including the author of a document prepared by, on behalf of, or for use by the agency and offered in evidence, and all parties may submit rebuttal evidence. MCL 24.272(4) and R 792.10427(3). Witnesses are required to testify under oath. MCL 24.274. Reasonable discovery is permitted. MCL 460.6s(4) and (13). The

[4] At times, the Commission has followed the *Ashbacker* doctrine, based on *Ashbacker Radio Corp v Federal Communications Comm,* 326 US 327; 66 S Ct 148; 90 L Ed 108 (1945), which is applicable if two or more entities have competing proposals pending before an administrative agency. But, the *Ashbacker* doctrine is clearly not applicable to this proceeding as MCL 460.6s(13) does not authorize the Commission to order or otherwise require DTE Electric to adopt an alternative proposal submitted by a competitor.

rules of evidence applicable to non-jury civil trials in circuit court are to be followed to the extent practicable. MCL 24.275 and R 792.10427(1). The ALJ and the Commission may also "admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." Id. The Commission is required to base its decision in a contested case on record evidence. MCL 24.285. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, must be offered and made a part of the record. MCL 24.276. Accordingly, an intervenor, including an existing supplier of electric generation capacity currently producing at least 200 MWs of firm electric generation capacity resources located in MISO's Zone 7, shall submit a petition to intervene in accordance with R 792.10410 to be considered a party to this proceeding and to have its evidence considered by the Commission in accordance with the APA and the Commission's procedural rules.

At the initial prehearing conference the ALJ shall address all petitions for intervention in accordance with the instructions set forth in this order and approve a schedule that will permit the Commission to issue a final order approving or denying DTE Electric's application within 270 days of its filing. In so doing, the ALJ shall (a) set a schedule that provides DTE Electric up to 150 days after the initial filing of the application to update its cost estimates if they have materially changed[5] in accordance with MCL 460.6s(4)(c); (b) specifically explain and provide for all parties, including existing suppliers currently producing at least 200 megawatts of firm electric generation capacity resources in MISO's Zone 7, to propose alternatives to DTE Electric's CON proposal in accordance with MCL 460.6s(13); and (c) resolve all concerns raised by the parties

[5] MCL 460.6s(4)(c) provides that "[n]o other aspect of the initial filing may be modified unless the application is withdrawn and refiled."

regarding the protection of confidential information through use of protective orders and non-disclosure agreements.

THEREFORE, IT IS ORDERED that:

A. Administrative Law Judge Suzanne D. Sonneborn shall conduct the contested case proceeding required to process the application for a certificate of necessity to be filed by DTE Electric Company in this docket in accordance with Chapter 4 of the Michigan Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.271 *et seq*., the Commission's Rules of Practice and Procedure, R 792.10401 *et seq*., and the requirements of MCL 460.6s as interpreted more fully in the body of this order.

B. DTE Electric Company shall publish a notice of hearing in newspapers of general circulation throughout its service territory in accordance with instructions to be provided by the Commission's Executive Secretary.

C. DTE Electric Company shall serve copies of this order on all existing suppliers of electric generation capacity currently producing at least 200 megawatts of firm electric generation capacity resources located in Zone 7 of the Midcontinent Independent System Operator, Inc., all entities recently sent requests for proposals by the utility for the acquisition of natural gas-fired facilities and/or power purchase agreements, all intervenors in the company's currently pending general rate case, Case No. U-18255, and all intervenors in its currently pending power supply cost recovery plan proceeding, Case No. U-18143. Proof of its compliance with this requirement shall be filed in this docket by July 21, 2017.

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

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of July 12, 2017.

Kavita Kale, Executive Secretary