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

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **UPPER PENINSULA POWER COMPANY** for authority to reconcile 2016 power supply costs and revenues.	)))))	Case No. U-17911-R

At the March 15, 2018 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

Procedural History

On March 28, 2017, Upper Peninsula Power Company (UPPCo) filed an application, with supporting testimony and exhibits, requesting approval of its reconciliation of power supply cost recovery (PSCR) costs and revenues for the 12-month period ended December 31, 2016, pursuant to Section 6j of 1982 PA 304 (Act 304), MCL 460.6j.[1]

A prehearing conference was held on June 7, 2017, before Administrative Law Judge Suzanne D. Sonneborn (ALJ). The ALJ granted petitions for leave to intervene filed by Michigan

[1] The Commission authorized UPPCo's PSCR clause in its rate schedules for the sale of electricity in the March 19, 1985 order in Case No. U-7814, and UPPCo's 2016 PSCR plan was approved in the September 23, 2016 order in Case No. U-17911 (September 23 order).

Technological University and Citizens Against Rate Excess (CARE). UPPCo and the Commission Staff (Staff) also participated in the proceeding.

An evidentiary hearing took place on November 1, 2017. On December 1, 2017, CARE, UPPCo, and the Staff filed initial briefs, and on December 18, 2017, CARE and UPPCo filed reply briefs. On January 17, 2018, the ALJ issued a Proposal for Decision (PFD). On February 7, 2018, CARE filed exceptions to the PFD, and on February 21, 2018, UPPCo filed replies to exceptions.

The record consists of 190 pages of transcript and 12 exhibits admitted into evidence.

Proposal for Decision

The ALJ provided a detailed review of the testimony and positions of the parties on pages 4-21 of the PFD, which will not be repeated here. In summarizing the parties' positions, the ALJ identified the following disputed issues requiring resolution: (1) what effect Commission precedent has on CARE's continued argument regarding UPPCo's exclusion of the real time market pricing (RTMP) customer from UPPCo's PSCR mechanism; (2) whether UPPCo's subtraction of RTMP revenue credits from its total power purchase and generation costs increases the costs for non-RTMP customers, warranting disallowance; and (3) whether UPPCo's line-loss and company-use volume expense in its 2016 PSCR reconciliation was appropriately allocated to only non-RTMP customers.

Exceptions and Replies

In light of the objections to the PFD, the Commission will address CARE's exceptions, UPPCo's replies to exceptions, and the Commission's decision by addressing each of the above-referenced disputed issues requiring resolution *ad seriatim* below.[2]

[2] In addition to the exceptions detailed in the body of this order, CARE also provided two clarifications—the first regarding page 1 of the PFD and the other concerning a calculation in its

Discussion

1. Commission Precedent and its Effect

CARE takes exception to the ALJ's recommendations that its challenge in this case need not be relitigated and reconsidered by the Commission, based on Commission precedent, case law, and the express language of MCL 460.6j(12), and that, accordingly, CARE's proposed disallowances also be rejected.

In its first exception, CARE argues that the doctrines of res judicata and collateral estoppel are inapplicable and do not preclude the Commission from approving CARE's proposed disallowances in this case, because rates are always subject to review and revision, and prior Commission orders are not binding precedent.

Second, CARE contends that, given the distinct and independent requirements set forth in the subsections in MCL 460.6j pertaining to PSCR plans, five-year forecasts, and PSCR reconciliations, the Commission cannot preclude an issue in PSCR cases, because doing so would run contrary to legislative intent and nullify statutory language.

Third, CARE claims that, regardless of the corresponding PSCR plan case, the reasonableness and prudence of expenditures is always relevant in PSCR reconciliation cases, with the burden being on the utility to provide justification for the utility's actions and costs.

---

briefs. As for the PFD, the Commission finds that no correction to page 1 is needed, because the procedural history started with the application filed by UPPCo, with the original numbers contained therein, and the PFD then discussed revisions to those numbers thereafter. As for the calculation within CARE's briefs, however, the Commission accepts the clarification that CARE's average cost per megawatt-hour (MWh) comparison should have resulted in a proposed disallowance of $2,199,046, versus $2,182,784 as stated in its briefs.

And fourth, CARE contends that, because the merit of its argument has not been previously addressed or resolved based on actual cost numbers, its proposed disallowances in this case should not be precluded.

In its replies to exceptions, UPPCo first argues that CARE's theory that a party can never be barred from relitigating an issue before the Commission "is a wholesale misrepresentation of longstanding Michigan law." UPPCo's replies to exceptions, p. 3. According to UPPCo, per those cases cited in the PFD and by CARE in its exceptions, it is clear that, because CARE did not introduce new evidence or evidence of changed circumstances with regard to UPPCo's exclusion of the RTMP customer from its PSCR rate-base and loss-factor calculations, CARE is "therefore barred from rehashing its old, contrary arguments in this case." *Id*.

Next, UPPCo asserts that CARE's argument in its second exception is frivolous, given the express preclusive language within MCL 460.6j(12) concerning issues adequately considered in prior PSCR plan cases, which UPPCo claims is broader than the doctrine of administrative collateral estoppel addressed in *In re Application of Consumers Energy Co For Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010). UPPCo further contends that CARE's claim "flies in the face of abundant precedent," in that "[i]f the Commission were statutorily precluded from ever applying issue preclusion to cost-recovery and cost-recovery reconciliation proceedings, that would make a nullity of multiple previous and longstanding Commission opinions holding to the contrary." UPPCo's replies to exceptions, p. 6.

UPPCo further argues that, while the reasonableness of actual expenditures may always be relevant in PSCR reconciliation cases, CARE admits that it is not disputing UPPCo's actual expenses in this case. UPPCo additionally highlights that CARE's methodology argument in this case was addressed and rejected by the Commission in the September 23 order, which CARE did

not appeal. Therefore, pursuant to MCL 462.26 and MCL 460.6j(12), UPPCo avers that CARE is bound by the decision in the September 23 order, and for CARE to claim a position otherwise, based on actual expenditures versus projections to support its position, is "fallacious." UPPCo's replies to exceptions, p. 7. As stated by UPPCo:

> This is a distinction without a difference as the Commission has sanctioned the ***method*** for excluding the RTMP customer from the PSCR process. . . . If CARE is allowed to prevail on its position that its objection is new because it is based on ***actual*** data, then CARE will raise this objection in each-and-every PSCR reconciliation from here-in-out at great expense to the Company, Staff and the Commission.

Id.

And lastly, UPPCo argues that CARE's assertion that there is no precedent on this issue because actual expenses have not been previously addressed is also "a distinction without a difference," because the crux of CARE's challenge relates to UPPCo's methodology, not the numbers used, whether projected or actual. *Id*., p. 8. For these reasons, UPPCo asserts that the Commission should adopt the PFD and find that CARE's argument in this case is expressly precluded by MCL 460.6j(12).

The Commission agrees with UPPCo and the ALJ and finds that CARE's challenge to UPPCo's PSCR methodology, as it relates to the RTMP customer, was adequately considered by the Commission in the September 23 order, along with the May 22, 2007 order in Case No. U-15224 (May 22 order) and the September 8, 2016 order in Case No. U-17895. As a result, there being, even now, no compelling reason to deviate from past decisions and absent any appellate direction to the contrary, the Commission finds that, under MCL 460.6j(12), further consideration of this issue is not necessary in this case. See also *In re Application of Consumers Energy Co For Rate Increase*, 291 Mich App at 122.

Nevertheless, and even though UPPCo's PSCR methodology addressing RTMP customers has remained the same since inception of the RTMP tariff (see 2 Tr 42, 49), the Commission will address the other issues requiring resolution to respond to CARE's claims that UPPCo's PSCR methodology discriminates against non-RTMP customers.

2. Subtraction of Real Time Market Pricing Revenue Credits and its Effect

CARE objects to the ALJ's finding that its proposed disallowance relative to the RTMP revenue credit shortfall is without evidentiary support and therefore cannot be sustained.

In its fourth exception, CARE contends that "comparing the $48.51 per MWh average with the $38.34 [sic] per MWh average is the overwhelming reason why the $48.51 per MWh average from line 55 became an average of $52.43 per MWh to be allocated to non-RTMP customers in line 76 of Revised Exhibit A-2." CARE's exceptions, p. 13. Relying on this, CARE then claims that "[t]his new evidence shows that the RTMP revenue credit reduction mechanism approved in Case Nos. U-15224, U-17895, and U-17911 actually increases the cost UPPCO allocates to non-RTMP customers because of the RTMP discount." *Id*.

Next, CARE argues that the ALJ erroneously concluded that it provided no legal support for its proposed disallowance. To support this objection, CARE contends that the Commission, in its May 22 order, implicitly concluded that approval of the RTMP tariff would not be reasonable if doing so would increase costs for other customers. CARE further states that it cited Commission orders setting forth this same rationale on pages 23-24 of its initial brief, which the ALJ failed to consider.

CARE further contends that the proposed alternative comparison, provided by UPPCo's witness and used by the ALJ to conclude that CARE's proposed disallowances were erroneous, should be rejected because UPPCo's proposed alternative comparison to arrive at $43.92 per MWh

versus $35.88 per MWh is an apples-to-oranges comparison and is mathematically unsupported by the figures reported in Revised Exhibits A-1 and A-2.

Next, CARE first argues that "the PFD seems to admit that CARE's disallowances are based upon UPPCO's revised testimony and exhibits as well as cross examination[,] [s]o CARE's disallowances are based on evidence that the Commission must consider as a part of the whole record under MCL 24.285." CARE's exceptions, p. 16. CARE further states that its final recommended disallowances in its briefs differ from those presented by its witness because the evidence provided by its witness was prepared and based on UPPCo's original evidence, before UPPCo's original evidence was revised and cross-examined. Nevertheless, according to CARE, evidence includes the party's case-in-chief and cross-examination, which the ALJ failed to discuss in whole.

In CARE's next exception, CARE claims that its proposed disallowance of $2,199,046, for costs not fully recovered by the RTMP revenue credits to service RTMP customers, is supported by the record and based on the difference between the figures reported in UPPCo's Revised Exhibit A-2 (i.e., ($48.51-$36.34) x 180,694 MWhs).

In its last exception, CARE contends that it is not recommending that the Commission shift this recovery shortfall to RTMP customers. Rather, according to CARE, "the Commission should not authorize UPPCO to recover cost increases resulting from deducting RTMP revenue credits that do not equal or exceed actual average expense identified from Revised Exhibit A-2, line 55." CARE's exceptions, p. 22.

In its replies to exceptions, UPPCo chiefly argues that, if CARE is not estopped from relitigating its challenge to UPPCo's PSCR methodology and actual expenses are found to

constitute new evidence warranting further discussion in this case, the Commission should adopt the ALJ's finding that CARE failed to meet its evidentiary burden to substantiate its position.

Next, addressing each exception separately, starting with CARE's fourth exception, UPPCo agrees with CARE that the $48.51 to $38.34 to $52.43 per MWh comparison, on page 13 of CARE's exceptions, is indeed new evidence, because this is the first time CARE has made this argument. UPPCo therefore asserts that, because CARE offered no evidence to substantiate the same, this newly-conceived claim lacks credible support. UPPCo further states that "this declaration is a head-scratcher, and although, this claim was not made to the ALJ, it is certainly consistent with the ALJ's observations . . . finding that CARE's proposed disallowance of $2,182,784 based on an alleged revenue credit shortfall is without evidentiary support and therefore cannot be sustained." UPPCo's replies to exceptions, pp. 9-10. Taking this and relying on unrefuted testimony regarding the average 2016 PSCR cost, if capacity costs are removed, and that average being less than the average RTMP credit, UPPCo then addresses CARE's next exception by stating that, because this shows that there is no RTMP discount, "there was absolutely no reason for the PFD to have taken up CARE's call for consideration of Commission cases regarding rate discounts." *Id*., p. 10.

UPPCo next contends that CARE's assertion in its sixth exception is meritless, because the ALJ did not solely rely on this comparison as the basis for her recommendation. And, UPPCo states that its witness did not propose to actually remove the capacity cost of $9,959,391 from the PSCR reconciliation. Rather, as stated by UPPCo, its witness was making an apples-to-apples comparison when testifying *if* this capacity cost were removed for comparison purposes, since this capacity cost only applies to PSCR customers. UPPCo further argues that $1,369,348 was also not

removed from its calculations but was rather credited to PSCR customers, as shown in Revised Exhibit A-1, page 2, line 13.

Regarding CARE's next exception, UPPCo contends that CARE's claim that the ALJ's recommendations are not supported by the record is also meritless. And, with respect to the next exception, UPPCo states:

> In its Exception No. 8, CARE's attorney again provides his narrative interpretation and mathematical calculations of Exhibit A-2 without support of his witness and reaches a conclusion inconsistent with Mr. Wallin's testimony. It was Mr. Wallin's unimpeached testimony that (i) the RTMP customer received electricity at the LMP [locational marginal price] and UPPCO charged the RTMP customer the LMP plus $1.00 per MWh for electric service, and (ii) UPPCO did not provide the RTMP customer with energy from any other source other than MISO (2 Tr 53-62). As such, it was Mr. Wallin's testimony that there was no revenue shortfall from the RTMP customer at the expense of the PSCR customer. CARE's alleged revenue shortfall of what it now claims is $2,199,046 is once again made without the aid of a credible witness. CARE's witness took the stand and sponsored testimony into the record which supported an alleged RTMP revenue credit shortfall of $827,900 (2 Tr 176-177). Although CARE was in possession of UPPCO's revised exhibits prior to taking the stand, CARE chose not to have Mr. Jester revise/update his testimony. Additionally, this alleged revenue shortfall of $2,199,046 as asserted by CARE in its Exceptions, is different from the alleged shortfall of $2,182,784 made in its initial and reply briefs presented to the ALJ. This inconsistency provide [sic] further reason and support for the legal policy of having the benefit of witnesses sponsor evidence and conducting cross-examination so as to eliminate errors.

UPPCo's replies to exceptions, p. 12 (footnote omitted).

And lastly, UPPCo claims that CARE's last exception is irrelevant and not a proper exception, because CARE does not cite a finding or recommendation in the PFD regarding cost shifting, as required by Mich Admin Code, R 792.10435.

The Commission agrees with the ALJ and finds that CARE's proposed disallowance of $2,199,046 is not only lacking in evidentiary support but is also misguided. Per Mich Admin Code, R 792.10427(2) (Rule 427(2)), "[e]vidence, including records and documents in the possession of the commission, that a party desires or intends to rely on *shall* be offered and made a

part of the record in the proceeding and other factual information or evidence *shall not* be considered in the determination of the case, except as otherwise permitted by law." (Emphasis added.) As a result, because the calculations to support CARE's proposed disallowance of $2,199,046 are not part of the record (i.e., in testimony or in the exhibits admitted into evidence), the same cannot be considered by the Commission. Further, although CARE continues to blame UPPCo's revised evidence as the reason why its record evidence does not mirror its final proposed disallowances, a review of this proceeding shows that: (1) CARE agreed to the admission of UPPCo's revised testimony (see 2 Tr 18) and had no objection to the admission of UPPCo's exhibits, including Revised Exhibits A-1 and A-2 (see 2 Tr 155); (2) despite acknowledging UPPCo's revisions, CARE's witness did not update his testimony or exhibits to address the same (see 2 Tr 166); (3) at the end of the evidentiary hearing, the ALJ asked if there was anything further from anyone, to which there was no response from any party, including CARE (see 2 Tr 189); and (4) although having the right to do so, per Rule 427(3), CARE did not request permission to file surrebuttal evidence in this case.

That being said, even if the record evidence in this case included the calculations to support CARE's position, the Commission is not convinced that CARE's proposed disallowance of $2,199,046 would be warranted. More specifically, on direct, UPPCo's witness explained the company's PSCR process, and in rebuttal, UPPCo's witness stated, in part, that other retail customers do not subsidize RTMP customers by absorbing a portion of RTMP customers' transmission or energy costs. See 2 Tr 52-53. According to UPPCo, it is merely an intermediary for the RTMP customer to take service directly from the transmission system; therefore, transmission and energy costs applicable to the RTMP customer are passed through to the RTMP

customer and are then removed from UPPCo's PSCR calculations. UPPCo's witness additionally stated in rebuttal:

> **Q. On page 8 of his pre-filed testimony, Mr. Jester appears to claim that UPPCO did not recover the cost to deliver energy to the RTMP customer because the $/MWh average charged to the RTMP customer is less than the average $/MWh cost on line 55 of Revised Exhibit A-2 (ALW-2). Is Mr. Jester's assertion correct?**
>
> A. Not at all. Mr. Jester bases his opinion on simplistic and erroneous analyses that compares the revenue received from the RTMP customers on a $/MWh basis to the $/MWh cost of all energy purchased and energy generated and claims that the cost difference cannot be explained. However, competent analyses will easily explain the cost differential between energy delivered to RTMP customers and energy delivered to PSCR customers.
>
> **Q. Please continue.**
>
> A. As I have previously explained, the RTMP customer is charged for its energy use at the hourly LMP at the time the energy is delivered plus $1/MWh and other associated market charges. The RTMP customer is also charged for transmission based on its share of the UPPCO load ratio share of ATC [American Transmission Company]. All the energy for the RTMP customer is procured at RT [real time] LMP whereas the energy for PSCR customers is procured at DA [day ahead] LMP and contract prices net of revenues received for market generation and short-term contracts. Simply based on the timing and nature in how purchases are made to supply the RTMP customer as opposed to the timing of generation and purchases for PSCR customers, the average costs for these customer groups should never be the same save for coincidence. However, the main cause for any difference between the price charged to the RTMP customer and the average price charged to PSCR customers is the cost of capacity. In 2016, UPPCO paid $9,959,391 for capacity under the terms of a full requirements contract. None of this capacity cost is charged to the RTMP customer. If the capacity costs on line 15 of Revised Exhibit A-2 (ALW-2) are removed from line 55 on Revised Exhibit A-2 (ALW-2), the total purchases and generation cost is reduced to $28,297,183 and the resulting cost for the 788,710 MWhs generated or purchased is only $35.88/MWh. This is $8.04/MWh less than the $43.92/MWh price charged to the RTMP customer.
>
> **Q. Why does the RTMP customer not pay a share of the cost of capacity like it does transmission costs?**
>
> A. The RTMP customer is interruptible and as such UPPCO does not plan capacity expansions or purchases for this customer nor is UPPCO required to show that is has sufficient capacity resources for the RTMP load in the annual MISO auction process. Therefore, in accordance with cost causation principles, the

> RTMP customer is not charged for capacity because it does not cause these charges to be incurred.

2 Tr 61-63. Moreover, while UPPCo's witness, on cross, agreed that the deductions in lines 57-74 on Revised Exhibit A-2 mathematically led to the difference between line 55 ($48.51/MWh) and line 76 ($52.43/MWh) on that same exhibit, UPPCo's witness did not say that the deductions discriminate against non-RTMP customers in favor of RTMP customers, as postulated by CARE. See 2 Tr 85. Rather, "[c]onsistent with Commission orders, past practice and cost causation principles[,] the PSCR[-]related revenues from [RTMP] sales are treated as a reduction to the PSCR costs, which directly offset the costs that are incurred in the PSCR to provide these services to RTMP customers." 2 Tr 40-41. Therefore, even if the calculations to support CARE's proposed disallowance of $2,199,046 were in the record in this case, the Commission finds that the same would not justify this proposed disallowance.

3. Allocation of Line-Loss and Company-Use Volume Expense

CARE takes exception to the ALJ's recommendation that its proposed disallowance of $495,795, concerning allocation of line-loss and company-use expense, is unsupported by record evidence and cannot be sustained.

In its ninth exception, CARE contends that the source of the volumes in UPPCo's Revised Exhibit A-1, p. 2, line 6, are not identified elsewhere but claims that UPPCo's witness testified, citing 2 Tr 103-105, that the volume amounts include line-loss and company-use expense due to RTMP sales, which were then, according to CARE, not recovered in the RTMP credits. After mathematically computing the same, CARE thus asserts that, by applying the applicable line-loss and company-use expense that should be allocated to RTMP sales, a shortfall of $495,795 should be disallowed. And, in addressing the ALJ's finding that these calculations were unaccompanied by witness testimony or evidence contained in the record, CARE again indicates that its witness'

testimony and exhibits were submitted before UPPCo's evidence was revised and cross-examined, the latter being necessary to ascertain if a line-loss/company-use disallowance was appropriate. CARE therefore claims that it was not able to present evidence on this proposed disallowance until the briefing stage.

In response, UPPCo argues that CARE's claim is baseless, because CARE had sufficient time to prepare its case and failed to address two key findings made by the ALJ on pages 35-36 of the PFD—that line-loss and company-use expense, allocated at the distribution level, is inapplicable to the RTMP customer, who is directly connected to the transmission system, and that UPPCo's witness rejected CARE's attorney's calculations with regard to such expense.

The Commission again agrees with the ALJ and finds that CARE's proposed disallowance of $495,795 is likewise not only lacking in evidentiary support but is also mistaken. Once more, a review of the proceeding shows that the calculation to arrive at $495,795 is not in the record. Further, despite CARE claiming that it was unable to present evidence on this proposed disallowance until it filed its initial brief, it appears that, in addition to the review of the proceeding discussed above, a discovery response received prior to the hearing is what led to CARE's line of questioning pertaining to UPPCo's line-loss and company-use expense (see 2 Tr 103-105), thereby putting CARE on notice about a potential disallowance claim that it may want to place in the record.

Nevertheless, even if there was evidentiary support, while UPPCo's witness testified that the 2016 actual MWh dispatch numbers in line 55 (788,710 MWhs) and line 76 (590,328 MWhs) in Revised Exhibit A-2 both include line losses and company use, UPPCo's witness did not say that expense for the same was due to RTMP sales. See 2 Tr 104. To the contrary, both figures include line losses and company use because both include volumes for PSCR customers, who receive

service via UPPCo's distribution system, and, as noted in the PFD, pp. 34-35, line-loss and company-use expense is only applicable at the distribution level. Therefore, even if, again, the calculations to support CARE's proposed disallowance of $495,795 were in the record in this case, the Commission finds that the same would also not justify this proposed disallowance.

In conclusion, the Commission finds that, after incorporating the Staff's two undisputed adjustments to UPPCo's power supply costs (see the Staff's initial brief), UPPCo experienced a 2016 PSCR net underrecovery of $282,447, inclusive of interest.

THEREFORE, IT IS ORDERED that:

A. The application for a power supply cost recovery reconciliation for calendar year 2016 filed by Upper Peninsula Power Company is approved, as modified by this order.

B. Upper Peninsula Power Company's net underrecovery balance of $282,447, inclusive of interest, shall be reflected as the company's 2017 power supply cost recovery reconciliation beginning balance.

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

Any person 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. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

_____
Sally A. Talberg, Chairman

_____
Norman J. Saari, Commissioner

_____
Rachael A. Eubanks, Commissioner

By its action of March 15, 2018.

_____
Kavita Kale, Executive Secretary