

STATE OF MICHIGAN

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 January 23, 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

On July 31, 2017, following notice of its intent to file, DTE Electric Company (DTE Electric) filed an application, with supporting testimony and exhibits, requesting that the Commission issue certificates of necessity (CONs) pursuant to Section 6s of 2016 PA 341, MCL 460.6s, and the Commission’s May 11, 2017 order in Case No. U-15896, for the construction of a natural gas fueled combined cycle electric generation facility at DTE Electric’s Belle River Power Plant site.

A prehearing conference was held on September 7, 2017, before Administrative Law Judge Suzanne D. Sonneborn (ALJ). The ALJ granted intervenor status to the Michigan Department of the Attorney General (Attorney General); Midland Cogeneration Ventures Limited Partnership; International Transmission Company; the Michigan Environmental Council (MEC); the Natural

Resources Defense Council (NRDC); the Sierra Club; the Association for Businesses Advocating Tariff Equity (ABATE); the Ecology Center; the Environmental Law and Policy Center; the Solar Energy Industries Association; the Union of Concerned Scientists; Vote Solar; Energy Michigan, Inc.; the Michigan Energy Innovation Business Council; and the City of Ann Arbor. The Commission Staff (Staff) also participated in the proceeding.

On December 1, 2017, the Staff filed a motion requesting that the schedule in this case, aside from the 150-day update filing deadline, be extended by four weeks. On December 7, 2017, the MEC, NRDC, and the Sierra Club (collectively, MEC/NRDC/SC); ABATE; and DTE Electric each filed a response to the Staff's motion.

Following oral argument on December 11, 2017, the ALJ issued a ruling granting the Staff's motion on December 13, 2017 (December 13 ruling). Consistent with the December 13 ruling, a revised schedule was also issued by the ALJ that same day (December 13 scheduling order).

On December 21, 2017, DTE Electric filed an application for leave to appeal the ALJ's December 13 ruling. In its application, in which it also seeks expedited consideration due to the short statutory deadline in this case, DTE Electric specifically requests that the Commission reverse the ALJ's December 13 ruling, establish a schedule to provide for a timely decision that complies with MCL 460.6s(4), and consider reading the record, as authorized under MCL 24.281, in order to comply with the 270-day statutory deadline provided under MCL 460.6s(4). In support of its application, DTE Electric argues that its request "plainly satisfies" the standard for leave to appeal under Mich Admin Code, R 792.10433(2)(a) (Rule 433(2)(a)) because "[g]ranted the [a]pplication will 'materially advance a timely resolution of the proceeding' by allowing the Commission to decide this case in 270 days." DTE Electric's application, p. 4 (emphasis omitted). DTE Electric further asserts that the ALJ's December 13 ruling was unlawful, claiming that

“MCL 460.6s(4)’s plain language must be applied as written,” and “[t]he statute uses the term ‘shall,’ which denotes a mandatory duty imposed by the Legislature and excludes the idea of administrative discretion.” *Id.*, p. 6 (footnotes omitted). DTE Electric additionally avers that the ALJ erred in her reliance on prior case law and Commission orders, the ALJ’s reasoning that a statutory deadline is not a requirement unless there are sanctions for delay is “unsound,” and “the Commission should remain committed to addressing this case in a timely manner,” quoting the Court of Appeals’ adage, “Justice delayed is justice denied.” *Id.*, pp. 9, 11, citing *Ass’n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 430 Mich 33, 40, n 6; 420 NW2d 81 (1988). In refuting some additional suggested reasons to deviate from the 270-day statutory deadline, DTE Electric further asserts that, since it did not file any cost updates on December 19, 2017, the basis for the Staff’s extension request is now moot; at the time the Staff filed its motion to extend, “DTE Electric [had] answered nearly 1,000 discovery requests with an average turnaround time of 6.91 business days;” and, contrary to the ALJ’s December 13 ruling, “DTE Electric is prejudiced not just by the ‘minimal delay’ . . . but [also] by the uncertainty of the Ruling building a statutory violation into this proceeding before the Commission even has a chance to reach the merits,” should the matter be appealed. DTE Electric’s application, p. 14 (emphasis omitted). And lastly, DTE Electric disputes that the December 13 ruling supports the public’s interest, arguing that it instead creates doubt about the law, in that “270 days does not really mean 270 days.” *Id.*, p. 16.

On January 3, 2018, MEC/NRDC/SC filed a response opposing DTE Electric’s application. MEC/NRDC/SC contend that there are three reasons why DTE Electric’s application should be denied. First, MEC/NRDC/SC claim that the ALJ appropriately relied on case law and prior Commission orders holding that statutory timeframes very similar to the one in this case are

directory goals versus mandatory requirements. In likening this case specifically to *Detroit Edison Co v Pub Serv Comm*, 127 Mich App 499; 342 NW2d 273 (1983), as relied upon by the ALJ, MEC/NRDC/SC assert that “the present proceeding [also] involves a wide array of complex issues that a plethora of parties are engaged in.” MEC/NRDC/SC’s response, p. 4. MEC/NRDC/SC therefore claim that, given the complexities of this CON case, particularly being the first application considered under the new 2016 PA 341 paradigm, on top of procedural requirements that must be followed under the Administrative Procedures Act of 1969, 1969 PA 306, “it was fully lawful and justified for the ALJ to provide a short extension of the schedule in order to help ensure a fully developed evidentiary record in this proceeding.” *Id.*, p. 5. Second, MEC/NRDC/SC contend that DTE Electric’s claims of prejudice are “similarly unavailing,” arguing that “the Commission does not lose jurisdiction or authority to act simply because the deadline has passed” and that DTE Electric’s “vague references to the importance of certainty . . . [do] not provide[] any basis to conclude that the four-week extension . . . would detrimentally impact the Company’s decisions around a gas plant that is not planned to come online until 2022.” *Id.*, p. 7 (footnote omitted). In this context, MEC/NRDC/SC also state that DTE Electric did not initially provide the parties with its Strategist modeling files, critical information which was not then made available until after two motions were decided. Third, MEC/NRDC/SC argue that DTE Electric’s request to forgo a Proposal for Decision (PFD) in this matter and have the Commission read the record would “undermine the thorough review and vetting of the record that the PFD/Exceptions process can provide.” *Id.*, p. 8. MEC/NRDC/SC further assert that, in referencing prior Commission orders pertaining to requests to read the record, “[n]o such showing of economic harm, much less extraordinary circumstances, has been made by DTE [Electric] here

...” to warrant the granting of DTE Electric’s request to have the Commission read the record in this case. *Id.*, p. 9.

On January 4, 2018, the Staff filed a response opposing DTE Electric’s request. The Staff argues that, “[g]iven the magnitude of the request, the issues related to discovery, and the need for a thorough record, a 4-week extension is prudent and in order.” Staff’s response, p. 1. The Staff further contends that “this is not an appropriate case to request the Commission to read the record, given the volume of the record and the need for adequate time for the Commission to deliberate.” *Id.* The Staff additionally asserts that DTE Electric has failed to prove the leave to appeal conditions under Rule 433(2)(a) and (b) and that, contrary to DTE Electric’s application, no statutory violation has been built into the December 13 ruling. The Staff therefore claims that there is no need to read the record in this case, arguing that a robust record, with the thorough consideration that a PFD can offer, will be beneficial to the public. Lastly, the Staff states that DTE Electric has provided “no evidence to suggest that delaying this case by 4 weeks will somehow make [it] unable to proceed with adequate provision of energy in Michigan,” additionally arguing that “DTE [Electric] also refuses to admit that it has delayed this case by being less than transparent with information that only it possesses.” *Id.*, p. 7.

On January 4, 2018, ABATE also filed a response, likewise opposing DTE Electric’s application. ABATE contends that the relief requested by DTE Electric is not warranted, claiming that “[i]t is an understatement that discovery in this proceeding has not gone smoothly because ABATE and other parties were forced to file a Joint Motion to Compel Discovery; which was followed by a Joint Motion to Enforce Ruling and Alter Schedule.” ABATE’s response, p. 1. In questioning DTE Electric’s CON requests in this case, ABATE asserts that “[t]he Commission should only grant certificates of necessity upon the strongest evidence that the expenditures will be

prudent and result in needed utility assets” and accordingly argues that the decision in the December 13 ruling to extend the schedule in this case was therefore reasonable and prudent. *Id.*, p. 2. ABATE further claims that DTE Electric’s entire analysis is now “rendered suspect” due to the passage of the Tax Cuts and Jobs Act of 2017 and the Commission’s corresponding December 27, 2017 order in Case No. U-18494, an Act which ABATE further claims supports reasonable adjustment to the schedule in this proceeding. More specifically, ABATE contends that “DTE[] [Electric’s] coal retirement analysis, which is the basis for the need for additional capacity, should be re-run to identify the impact of the new 21% federal corporate income tax rate on DTE [Electric].” *Id.* And lastly, like the Staff, ABATE argues that DTE Electric has failed to prove the leave for appeal conditions under Rule 433(2)(a) and (b), inversely arguing that “any substantial harm would be visited on the general public if this case were rushed to judgment.” *Id.*

On January 4, 2018, the Attorney General also filed a response opposing DTE Electric’s application. The Attorney General argues that DTE Electric’s arguments that the extension was unlawful and that the Commission should now read the record “lack merit and run contrary to the pursuit of building a complete record needed for the Commission to make a fully informed decision.” Attorney General’s response, p. 1. The Attorney General points out that DTE Electric “voluntarily filed its Certificate of Necessity applications as part of an ambitious proposal to construct a state-of-the-art combined cycle natural gas plant totaling approximately \$1 billion.” *Id.*, pp. 1-2. The Attorney General therefore posits that, given the magnitude and long-term impacts of this request, a thorough approach to discovery has rightfully been taken by the parties in this case, discovery of which the Attorney General contends has unfortunately been met with hurdles leading to two modest extensions in the case. In light of this backdrop, along with the ALJ’s proper reliance on case law, particularly *Detroit Edison Co*, the Attorney General argues

that DTE Electric's application should be denied. The Attorney General further avers that the statutory interpretation cases cited by DTE Electric do not specifically address statutory deadlines in highly complex cases, such as this one, and with regard to DTE Electric's request to forgo a PFD in this case, the Attorney General asserts that the PFD and exceptions stage is a vital part of a case of this magnitude, which will allow the parties "to vet the core issues for the Commission's ultimate disposition." *Id.*, p. 3.

The Commission, as discussed in further detail below, finds that DTE Electric's application should be granted, the December 13 ruling should be reversed, and the December 13 scheduling order should be modified to allow the Commission to read the record and issue an order in this case by April 27, 2018.

Discussion

Rule 433 of the Commission's Rules of Practice and Procedure 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:

- a. 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.
- b. 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.
- c. A decision on the ruling before submission of the full case to the Commission for final decision is consistent with other criteria that the Commission may establish by order.

Rule 433(2)(a)-(c). 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.

Here, the governing statute at issue states that “[w]ithin 270 days after the filing of an application under this section, . . . the commission shall issue an order granting or denying the requested certificate of necessity.” MCL 460.6s(4). In this regard, because the Commission finds it critically important to adhere to the statutory timeframe in this particular case and further finds that going beyond timeframes should be the exception, the Commission finds that DTE Electric’s application should be granted under Rule 433(2)(a), since a review of the December 13 ruling will materially advance a timely resolution of the proceeding in this case, within the timeframe set forth in MCL 460.6s(4).

Having said that, and in order to meet the 270-day statutory timeframe and issue an order by April 27, 2018, the Commission will read the record in this case. Further, the December 13 scheduling order is approved by the Commission with the following exceptions, to accommodate the Commissioners’ schedules and to afford the parties more time to fully develop the record:

SCHEDULED FILING

Initial Briefs

Reply Briefs

NEW DATES

March 2, 2018

March 12, 2018

SCHEDULED HEARING

Cross-Exam Scheduled

February 14-16, 2018, at 9:00 a.m.

Lastly, as noted by DTE Electric in its application, the Commission previously stated, “At the initial prehearing conference[,] the ALJ shall . . . 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.” July 12, 2017 order in Case No. U-18419, p. 6. Given this explicit direction, the Commission emphasizes that it is disappointed to find that the most prudent course now, to ensure that an order is issued within the statutory timeframe set forth under MCL 460.6s(4), is to forgo the aforementioned benefits of a PFD and its corresponding filings. The Commission

further notes that this decision to read the record in this case is not intended to set precedent for future cases.

THEREFORE, IT IS ORDERED that:

A. DTE Electric Company's application for leave to appeal is granted.

B. The Ruling Granting Staff's Motion to Request a Schedule Extension Beyond 270 days, issued on December 13, 2017, is reversed.

C. The revised scheduling order, issued on December 13, 2017, is modified as set forth herein, and because the Commission intends to read the record in this case, the Administrative Law Judge assigned to this matter does not need to prepare a Proposal for Decision.

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. 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 pungpl@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 January 23, 2018.

Kavita Kale, Executive Secretary