

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the request of ALGER DELTA)	
COOPERATIVE ELECTRIC ASSOCIATION,)	Case No. U-21414
CHERRYLAND ELECTRIC COOPERATIVE,)	
CLOVERLAND ELECTRIC COOPERATIVE,)	
GREAT LAKES ENERGY COOPERATIVE,)	
HOMEWORKS TRI-COUNTY ELECTRIC)	
COOPERATIVE, MIDWEST ENERGY &)	
COMMUNICATIONS, ONTONAGON COUNTY)	
RURAL ELECTRIFICATION ASSOCIATION,)	
PRESQUE ISLE ELECTRIC & GAS CO-OP, and)	
THUMB ELECTRIC COOPERATIVE, individually)	
and collectively, for a declaratory ruling.)	
_____)	

At the July 7, 2023 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner

DECLARATORY RULING

On May 4, 2023, Alger Delta Cooperative Electric Association, Cherryland Electric Cooperative, Cloverland Electric Cooperative, Great Lakes Energy Cooperative, HomeWorks Tri-County Electric Cooperative, Midwest Energy & Communications, Ontonagon County Rural Electrification Association, Presque Isle Electric & Gas Co-op, and Thumb Electric Cooperative,

individually and collectively, (together, the member-regulated cooperatives or MRCs¹) filed a request for a declaratory ruling interpreting the applicability of Mich Admin Code, R 460.744 (Rule 44) of the Commission's Service Quality and Reliability Standards for Electric Distribution Systems (service quality rules) to an actual state of facts. The request was filed pursuant to MCL 24.263 and Mich Admin Code, R 792.10448 (Rule 448). Rule 448(3) allows for declaratory rulings to be issued at the discretion of the Commission.

The Commission recently revised the service quality rules. The MRCs' petition seeks a declaratory ruling on whether the newly-revised Rule 44 applies to the MRCs. Rule 44 provides in pertinent part as follows:

R 460.744 Customer accommodation for failure to restore service after sustained interruption due to gray sky and catastrophic conditions.

Rule 44. (1) Unless an electric utility or cooperative requests a waiver pursuant to part 5 of these rules, an electric utility or cooperative that fails to restore service to a customer within 96 hours after the start of a sustained interruption that occurred during the course of catastrophic conditions shall provide any affected customer with a bill credit on the customer's bill within 90 days. The amount of the credit provided to a residential customer is the greater of a rate of \$35.00 for each sustained interruption over 96 hours, plus an additional \$35.00 for each day thereafter or the customer's monthly customer charge. The amount of the credit provided to any other distribution customer is the customer's minimum bill prorated on a daily basis. The rate of \$35.00 is subject to an annual adjustment pursuant to subrule (3) of this rule.

(2) Unless an electric utility or cooperative requests a waiver pursuant to part 5 of these rules, an electric utility or cooperative that fails to restore service to a customer within 48 hours after the start of a sustained interruption that occurred during the course of gray sky conditions shall provide any affected customer with a bill credit on the customer's bill within 90 days. The amount of the credit provided to a residential customer is the greater of a rate of \$35.00 for each sustained interruption over 48 hours, plus an additional \$35.00 for each day thereafter or the customer's monthly customer charge. The amount of the credit provided to any other distribution customer is the customer's

¹ In this order, "MRCs" refers to the parties who filed the request for a declaratory ruling. The Commission uses the term "member-regulated cooperatives" when speaking generically.

minimum bill prorated on a daily basis. The rate of \$35.00 is subject to an annual adjustment pursuant to subrule (3) of this rule.

(3) No sooner than September 1, 2022, and by October 1 every year after, the commission shall issue an order adjusting the prevailing customer accommodation rate.

Thus, Rule 44 mandates that a \$35 bill credit be paid by the utility or cooperative to a customer for failure to restore service within the prescribed time period.² Rule 44 was revised in 2023 to make it applicable to cooperatives; and, in the title and text of the rule, the term “penalty” was changed to “customer accommodation.” *See also*, Mich Admin Code, R 460.701(1). “Cooperative” is defined in Mich Admin Code, R 460.702(h) to mean that term as defined in MCL 460.32. “Cooperative” is defined in MCL 460.32 to mean a utility organized as a cooperative under MCL 450.98 to 450.109. The latter definition encompasses all cooperatives, whether member-regulated or not. Thus, Rule 44, as written, applies to all cooperatives.

The MRCs contend that Rule 44 does not apply to them because they are member-regulated. Request for declaratory ruling, pp. 8-13. They also argue that requiring the non-profit MRCs to pay a penalty is poor public policy. *Id.*, p. 14.

Discussion

Rule 448 provides as follows:

- (1) Any person may request a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the commission or of a rule or order of the commission, pursuant to the provisions of sections 33 and 63 of the act, MCL 24.201, MCL 24.328. A request for a declaratory ruling shall contain, or by attached exhibits show, all of the following:

² Under Mich Admin Code, R 460.702(c), “catastrophic conditions” include severe weather that results in a sustained service interruption for 10% or more of the utility’s or cooperative’s customers or events that result in an official state of emergency. Under Mich Admin Code, R 460.702(j), “gray sky conditions” are conditions that result in a sustained interruption for 1-10% of customers.

- (a) A complete, accurate, and concise statement of the facts or situation upon which the request is based.
 - (b) A concise statement of the issues presented.
 - (c) Specific reference to all statutes, rules, and orders to which the request relates.
 - (d) An analysis by the person's legal counsel of the issues presented and a proposed conclusion, or the person's analysis of the issues presented and a proposed conclusion.
- (2) The commission may require that notice of the request for declaratory ruling be provided and may require a contested case proceeding instead of issuing a declaratory ruling.
- (3) The decision to issue a declaratory ruling is within the discretion of the commission.

As Rule 448(3) indicates, whether to issue a declaratory ruling, to decline to issue such a ruling, or to order a contested case are decisions within the discretion of the Commission. *See*, September 26, 2006 order in Case No. U-14702, p. 12; October 11, 2001 order in Case No. U-12979, p. 1. The usefulness of a declaratory ruling is limited by the fact that the ruling is binding only on the party requesting it and the agency issuing it. MCL 24.263.

The Commission finds that the application is appropriate for a declaratory ruling and agrees with the MRCs' contention that Rule 44 does not apply to them as member-regulated cooperatives.

In Public Act 167 of 2008 (Act 167), the Legislature created a mechanism for an electric cooperative to become member-regulated, meaning that the cooperative sets its own rates. *See*, MCL 460.32(f) and 460.36(1). The MRCs argue that they are not subject to Rule 44 because they are member-regulated and thus are not subject to the Commission's jurisdiction with regard to penalties. The argument is based on the statutory difference between member-regulated cooperatives and electric cooperatives whose rates continue to be regulated by the Commission.

The Commission's authority to adopt service quality rules lies in Section 10p of Public Act 141 of 2000 (Act 141), MCL 460.10p(5), which requires the adoption of such rules for "electric

utilities and other entities subject to [the Commission’s] jurisdiction.” Under MCL 460.10p(12), the Commission “may levy financial incentives and penalties upon any jurisdictional entity which exceeds or fails to meet the service quality and reliability standards.” Under MCL 460.10p(13), “jurisdictional entity” means “a jurisdictional regulated utility as that term is defined in section 6q.” “Section 6q” refers to MCL 460.6q(12)(b), which defines “jurisdictional regulated utility” to mean “a utility whose rates are regulated by the commission.” Thus, Act 141 provides that the Commission may not levy financial incentives and penalties (via the service quality rules) on a utility whose rates are not regulated by the Commission.

Act 167 echoes this concept. Under MCL 460.32(f), “‘Member-regulation’ means the board of directors of the cooperative is charged with establishing, maintaining, and applying all rates, charges, accounting standards, billing practices, and terms and conditions of service[;]” and under MCL 460.36(1), a cooperative that elects to become member-regulated “shall, by board action, establish, maintain, and apply all rates, charges, accounting standards, billing practices, and terms and conditions of service[.]” The latter provision is immediately followed by a carve-out under which the Commission retains authority over several aspects of member-regulated cooperatives’ operations such as safety, interconnection, and service quality. Specifically, under MCL 460.36(2):

the commission shall retain jurisdiction and control over all member-regulated cooperatives for matters involving . . . quality of service, including interpretation of applicable commission rules and resolution of complaints and disputes, *except any penalties pertaining to performance standards and quality of service shall be established by the cooperative’s members* when voting on the proposition for member-regulation or at an annual meeting of the cooperative.

MCL 460.36(2) (emphasis added). The Legislature created an exception to the Commission’s jurisdiction over the service quality offered by member-regulated cooperatives, and that exception dovetails with the exclusion of jurisdiction based on rate regulation status contained in Act 141.

The MRCs' petition is accompanied by affidavits from each MRC attesting that they have not adopted any penalties related to performance. Request for declaratory ruling, Exhibit B.

The Commission finds that, taken together, Act 141 and Act 167 exhibit a clear intent by the Legislature to exclude member-regulated cooperatives from the Commission's jurisdiction with respect to imposing service quality related incentives or penalties. Although not addressed in the MRCs' petition, the Commission notes that judicial precedent indicates that a bill credit is a penalty and/or an incentive. In *Mich Electric Coop Ass'n v Mich Pub Serv Comm*, 267 Mich App 608, 620-622; 705 NW2d 709 (2005), the Michigan Court of Appeals refers to the bill credit in Rule 44 (for \$25 at that time) as a penalty and as an incentive.

Based on this analysis the Commission finds that Rule 44 does not apply to the MRCs.³

THEREFORE, IT IS ORDERED that the request for declaratory ruling is granted, and the Commission finds that Mich Admin Code, R 460.744 does not apply to Alger Delta Cooperative Electric Association, Cherryland Electric Cooperative, Cloverland Electric Cooperative, Great Lakes Energy Cooperative, HomeWorks Tri-County Electric Cooperative, Midwest Energy & Communications, Ontonagon County Rural Electrification Association, Presque Isle Electric & Gas Co-op, and Thumb Electric Cooperative.

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

³ The Commission observes that Rule 448 requires specificity with regard to the request for a declaratory ruling and so the Commission does not address the other service quality rules that cover the same topic as Rule 44.

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 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

Daniel C. Scripps, Chair

Katherine L. Peretick, Commissioner

By its action of July 7, 2023.

Lisa Felice, Executive Secretary


PROOF OF SERVICE

STATE OF MICHIGAN)

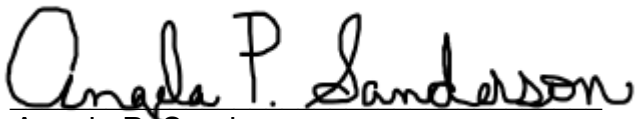
Case No. U-21414

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on July 7, 2023 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).


Brianna Brown

Subscribed and sworn to before me
this 7th day of July 2023.



Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

Service List for Case: U-21414

Name	On Behalf of	Email Address
Richard J. Aaron	Michigan Electric Cooperative Association (MECA)	raaron@dykema.com