Legislative Analysis

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PSC APPROVAL OF ELECTRIC GENERATING PLANT SALE

House Bill 5520
Sponsor: Rep. Fred Miller
Committee: Energy and Technology

Complete to 12-11-07

A SUMMARY OF HOUSE BILL 5520 AS INTRODUCED 12-4-07

The bill would add a new section (MCL 460.6q) to the Public Service Commission Law to require an electric utility to obtain the approval of the Public Service Commission (PSC or Commission) for a proposed sale of any electric generating plant with a capacity of at least 200 megawatts used to provide regulated electric utility service in Michigan. The term "sale" would include a single transaction carried out through a series of transfers over a 12-month period.

Required application materials. An electric utility would apply to the Commission for approval of such sale with the following information:

- A concise summary of the terms and conditions of the proposed transaction.
- Copies of the material transaction documents, if available.
- A summary of the projected impacts of the transaction on rates and regulated utility service in Michigan.
- Pro forma financial statements relevant to the transaction.
- Copies of the parties' public filings with other state or federal regulatory agencies regarding the same transaction and any regulatory orders issued by those agencies regarding the transaction.

60-day comment period. Within 60 days from the filing of an application, interested parties could file comments with the PSC regarding the transaction.

180-day period for PSC approval or rejection. Within 180 days from the filing of an application, the PSC would issue an order approving or rejecting the proposed transaction.

Mandatory approval of the sale if alternative supplier available. If retail customers of an applicant are eligible to take retail generation service from an alternative electric supplier, the PSC would be required to approve the sale of the electric utility.

Relevant factors when alternative supplier not available. If retail customers are *not* eligible to take service from an alternative electric supplier, the PSC would have to approve the proposed transaction unless it found one of the following:

- The proposed transaction is likely to have a material adverse impact on the rates of Michigan customers regulated by the Commission under Section 6a (MCL 460.6a).
- The proposed transaction is likely to have a material adverse impact on the safety, reliability, or adequacy of electric service in Michigan.
- The proposed transaction is likely to significantly impair the regulated utility's ability to raise capital or maintain a reasonable capital structure.
- The proposed transaction is likely to have a material adverse impact on competition in Michigan.

Confidentiality of documents. Non-public information and materials submitted by an electric utility "clearly designated by the person as confidential" would be exempt from disclosure under the Freedom of Information Act. The Commission would have to issue protective orders as necessary to protect information designated by a utility as confidential.

Tie-bars. The bill is tie-barred to the following bills, meaning that it will not take effect unless all are enacted:

House Bill 5521 (Gaffney) (PSC certifications)
House Bill 5522 (LaJoy) ("rate deskewing")
House Bill 5523 (Clemente) (rate increases effective unless PSC approves in 90 days)
House Bill 5524 (Accavitti) (modify choice program)
House Bill 5525 (Angerer) (energy efficiency)
House Bill 5548 (Mayes) (renewable portfolio standards)
House Bill 5549 (Palsrok) (renewable portfolio alternatives)
House Bill 5383 (Brown) (allow electricity co-ops to set rates without PSC approval)
House Bill 5384 (Nofs) (loosen restrictions on municipal utility joint action agencies)

FISCAL IMPACT:

House Bills 5520-5525 are expected to be tie-barred to other pending bills in both the House and Senate, so this analysis is preliminary. This group of six bills is expected to require the addition of 25 to 30 staff to the Michigan Public Service Commission to administer the new programs and standards and the resulting caseload. The cost of this additional staff is estimated to be $1.5 million to $1.8 million, assuming that this many staff can be added to the existing MPSC office space.

BACKGROUND INFORMATION:

A bill to authorize the PSC to review certain stock sales, controlling interest transfers, asset sales and other transactions involving regulated gas and electric utilities (House Bill 6358 of 2006), sponsored by Rep. John Proos, passed the House and was on general orders in the Senate at the conclusion of the last legislative session. Supporters of that bill asserted that Michigan was one of only three states that did not grant specific authority to its public utility commission to review merger and acquisition activity relating to regulated gas or electric utilities.

State review of transactions involving the sale of regulated utility companies or assets must be understood in the context of recent changes in federal energy law. The federal Energy Policy Act of 2005 repealed the longstanding Public Utility Holding Company Act of 1935 (PUHCA 1935), effective February 2006, replacing it with the more limited PUHCA 2005, under which Federal Energy Regulatory Commission (FERC) and the states are empowered to regulate utility sales and mergers. PUHCA 1935 was enacted in response to abuses that had occurred in the gas and electric industries during the first quarter of the 20th century. The law broke up the nation's gas and electric utility holding companies and limited their ability to recombine. According to the SEC, "the abuses [leading to passage of PUHCA] included misuse of the holding company structure, inadequate disclosure of the financial position and earning power of holding companies, unsound accounting practices, excessive debt issuances, and abusive affiliate transactions." Many utility companies went bankrupt during this era.

PUCA 2005 removed limitations on the permissible types of combinations and ownership structures. Utility companies are now freer to merge with geographically remote utilities, including foreign corporations, and can diversify beyond utilities. Companies outside of the industry, moreover, can now purchase regulated utilities. Multi-state, or even multi-national, gas and electric companies or combined gas/electric companies are now allowed. A critical 2005 report by the American Public Power Association offered this prediction of the impact on electric utilities:

> The effect will be greater consolidation of the electric industry, greater concentration of ownership, more complex company structures, and more opportunities for the exercise of market power. Current wholesale electric markets are not fully competitive and cannot be until underlying structural issues are addressed. Greater concentration in ownership of generating assets will only add to the structural problems, increasing the potential for market manipulation. The increased number of affiliate relationships and large and complex corporate structures will make it more difficult for regulators to monitor financial transactions between affiliates.

Supporters of PUHCA 2005 say that it will lead to an economically efficient consolidation of the electric and gas industries and stimulate additional capital investment in energy infrastructure. The old law, they said, was outmoded, and that in the six decades since PUHCA was enacted, other federal and state regulations have been enacted to protect the interests of consumers, rendering PUHCA unnecessary at best and, at worst, an impediment to the upgrading of the nation's energy system.

A savings clause in the new federal law permits states to protect utility consumers via legislation. Most states have armed their public utility commissions with specific merger and acquisition review authority. According to the PSC, 23 state commissions have clear authority within their statutes to approve or deny merger and acquisition activity. Another 18 state commissions have the authority to approve a merger or acquisition prior to the transaction, but authority to outright deny a merger is not explicit. All 41 of these states have the authority to deny certificates of public convenience and necessity or place

conditions on utility merger and acquisition activity within their jurisdiction, or both. Five more states have partial review authority for certain utility groups, but do not appear to have authority to deny a merger. One state, Nebraska, appears to have review authority for "public utility" merger and acquisition activity, but has no utilities that qualify, as it has only municipal and consumer-owned utilities. Michigan is one of only three states (Michigan, Florida, and Montana) with no specific statutory review authority at all.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.