STATE OF MICHIGAN

COURT OF APPEALS

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES.

PHIL FORNER,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee.

FOR PUBLICATION
October 21, 2021
9:00 a.m.

No. 354384
Public Service Commission
LC No. 00-020697

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

SWARTZLE, J.

In the past, Phil Forner has sought to challenge how Consumers Energy Company allocates funds for its appliance-service program by attempting to intervene in Consumers Energy's general-rate cases before the Michigan Public Service Commission. These challenges have been rejected because the Commission and this Court have held that these types of claims should be raised in a complaint proceeding, not a general-rate case. See, e.g., *In re Application of Consumers Energy Co to Increase Rates*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2018 (Docket No. 334276). The Legislature substantially modified the Commission's enabling act, MCL 460.1 *et seq.*, including the former Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq.*, with 2016 PA 341.

After Act 341 became effective, Forner again sought to intervene in a Consumers Energy general-rate case and raise the issue of how Consumers Energy allocates costs for its appliance-service program. The administrative law judge and the Commission both concluded that Act 341

still requires that these types of claims be raised in a complaint proceeding rather than a general-rate case. The administrative law judge and the Commission are correct; Act 341 does not permit a challenge to the allocation of costs for appliance-service programs in a general-rate case. Rather, the challenge must be made in a complaint proceeding. Consequently, we affirm the Commission's order denying Forner's motion to intervene.

I. BACKGROUND

Forner has a lengthy history of seeking to intervene in Consumers Energy's general-rate cases. These attempts have failed, with the most recent being this Court's affirmance of the denial of his motion in 2016 to intervene in a Consumers Energy general-rate case in *In re Application of Consumers Energy Co to Increase Rates*, unpub op. The matter appeared settled until the Legislature substantially amended the Commission's enabling act with Act 341. With the change in law, Forner moved to intervene in another Consumers Energy general-rate case, leading to this appeal.

Consumers Energy sought to increase the rates it charged for electricity in a general-rate case in February 2020. As part of that case, Consumers Energy did not seek recovery of any expenses related to the appliance-service program, or any other value-added programs and services. Nevertheless, Forner filed a motion to intervene based on his concerns regarding Consumers Energy's cost calculations and allocations regarding Consumers Energy's appliance-service program in 2018. Forner argued that Consumers Energy violated the Commission's code of conduct, Mich Admin Code, R 460.10101 *et seq.*, by failing to allocate properly the costs of appliance-service programs and other value-added programs and services.

The administrative law judge denied Forner's motion to intervene, concluding that the proper forum for his claim was a complaint proceeding, not a general-rate case. The administrative law judge also specifically addressed Act 341, concluding that despite the substantial changes it enacted, "the overall purpose of the law remains the same—to prevent subsidization of non-regulated utility programs or services by regulated utilities." Consequently, the administrative law judge held that—as in Forner's previous cases—his claim should have been brought in a complaint proceeding, not as a motion to intervene in Consumers Energy's general-rate case. Forner appealed the administrative law judge's decision to the Commission, which affirmed the administrative law judge's ruling on the same grounds. He then moved for rehearing, which was denied. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

As previously explained by this Court in an earlier case brought by Forner against Consumers Energy:

> The standard of review for [Commission] orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the [Commission] are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv*

> *Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the [Commission] has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a [Commission] order is unlawful, the appellant must show that the [Commission] failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the [Commission's] administrative expertise, and should not substitute its judgment for that of the [Commission]. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).
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> A final order of the [Commission] must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the [Commission] exceeded the scope of its authority is a question of law that is reviewed de novo. [*In re Consumers Energy Application for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574, 577 (2010).]

B. PRINCIPLES OF STATUTORY INTERPRETATION

Forner, the Commission, and Consumers Energy dispute Act 341's meaning. Forner argues that it permits him to challenge the allocation of Consumers Energy's appliance-service program costs in a general-rate case; the Commission and Consumers disagree and contend that he must do so through a complaint proceeding. These arguments require us to interpret Act 341's meaning, which necessarily involves the principles of statutory interpretation.

This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

Furthermore, "rules of statutory construction require that separate provisions of a statute, where possible, should be read as being a consistent whole, with effect given to each provision." *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). "Also, where a statute contains a general provision and a specific provision, the specific provision controls." *Id*.

Particularly pertinent here, "courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."

Bush v Shabahang, 484 Mich 156, 166-168; 772 NW2d 272 (2009). "This is especially the case when the statutory language and history confirm that the change is a substantive one, and not merely a recodification of existing law." *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 559; 912 NW2d 593 (2018). Consequently, when examining a statute that has been amended, cases interpreting earlier versions of the statute may have only limited precedential value depending on the scope of an amendment. See *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 119-120; 667 NW2d 880 (2003). The language of the new statute controls over caselaw interpreting an earlier version of a statute, but the changes in an act "must be construed in light of preceding statutes and the historical legal development[s]." *Id*.

C. STATE OF THE LAW AFTER ACT 341

As discussed, the Commission and this Court have repeatedly concluded that Forner must raise his appliance-service program claims in a complaint proceeding, not by intervening in a general-rate case. See *In re Consumers Energy Application for Rate Increase*, 291 Mich App at 121; *In re Application of Consumers Energy Co to Increase Rates*, unpub op (Docket No. 334276), p 8-9. But Act 341 substantially amended the Commission's enabling act. Accordingly, we must examine Act 341 to determine whether it permits a rate payer, such as Forner, to intervene in a general-rate case to dispute the allocation of appliance-service costs.

The parties focus much of their briefs on interpreting MCL 460.10ee to determine whether Forner can intervene in this case. In doing so, they fail to address the statutory provision addressing complaints, MCL 460.58. We are mindful that, when interpreting statutes, "[t]he paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *PNC Nat'l Bank Ass'n*, 285 Mich App at 506. In doing so we are not bound by the parties' arguments. Consequently, before addressing the statutory provisions the parties focused on in their briefs, we first consider general-rate cases and complaint proceedings generally.

1. GENERAL-RATE CASES AND COMPLAINT PROCEEDINGS

We begin by addressing the two types of proceedings at issue in this case: general-rate cases and complaint proceedings. A utility cannot increase its rates "without first receiving commission approval"; that approval comes through a general-rate case proceeding. MCL 460.6a(1). A "general rate case" is statutorily defined as "a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service." MCL 460.6a(16)(b).[1] In a general-rate case,

> The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. The commission shall require notice to be given to all

[1] Before Act 341 this definition was found at MCL 460.6a(2)(b), see MCL 460.6a as amended by 2008 PA 286, but Act 341 moved it to MCL 460.6a(16)(b). The actual definition, however, was unchanged. Compare MCL 460.6a(2)(b) as amended by 2008 PA 286 with MCL 460.6a(16)(b) as amended by 2016 PA 341.

> interested parties within the service area to be affected, and all interested parties shall have a reasonable opportunity for a full and complete hearing. A utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges. [MCL 460.6a(1).]

A "full and complete hearing" is statutorily defined as "a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing." MCL 460.6a(16)(a).

We additionally note that general-rate cases have strict procedural requirements, such as the rule that

> if the commission fails to reach a final decision with respect to a completed petition or application to increase or decrease utility rates within the 10-month period following the filing of the completed petition or application, the petition or application is considered approved. If a utility makes any significant amendment to its filing, the commission has an additional 10 months after the date of the amendment to reach a final decision on the petition or application. If the utility files for an extension of time, the commission shall extend the 10-month period by the amount of additional time requested by the utility. [MCL 460.6a(5).]

Consequently, general-rate cases have a strict time limit that requires the Commission to rule on applications and petitions to increase and decrease rates within 10 months unless certain exceptions apply.

In summary, a utility can increase its rates only by filing an application to do so with the Commission. This application initiates a general-rate case. During the general-rate case, the utility must provide the Commission with facts supporting its application and the Commission must notify "all interested parties within the service area to be affected" of the general-rate case. Those parties "shall have a reasonable opportunity for a full and complete hearing" that provides interested parties an opportunity to present evidence and argument "relevant to the specific element or elements of the request that are the subject of the hearing." Finally, all of this must be accomplished in 10 months unless an exception applies; if the Commission does not rule on the utility's application to increase rates within 10 months, then the application is automatically approved.

Complaint proceedings, in contrast, are statutorily established by MCL 460.58,[2] which provides:

> Upon complaint in writing that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter. The procedure to be followed in all such cases shall be

[2] Act 341 did not amend MCL 460.58.

> prescribed by rule of the commission: Provided, however, That in all cases reasonable notice shall be given to the parties concerned as to the time and place of hearing. An investigation of any such complaint, and the formal hearing thereon, if such is deemed necessary, may be held at any place within the state and by any member or members of the commission, or by any duly authorized representative thereof. Witnesses may be summoned and the production of books, and records before the commission, or the member, or any duly authorized representative thereof conducting the hearing, may be required. Any witness summoned to appear or to produce papers at any such hearing, who neglects or refuses so to do shall be deemed guilty of a contempt. It shall be competent for the commission in any such case to make application to any circuit court of the state setting forth the facts of the matter. Thereupon said court shall have the same power and authority to punish for the contempt and to compel obedience to the subpoena or order of the commission as though such person were in contempt of such court or had neglected or refused to obey its lawful order or process. The taking of testimony at such hearing shall be governed by the rules of the commission: Provided, That at the request of either party a record of such testimony shall be taken and preserved. Upon the completion of any such hearing, the commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of, shall be removed, modified or altered, as the commission deems just, equitable and in accordance with the rights of the parties concerned. For attending on any such hearing, any witness summoned by the commission shall be entitled to the same fees as are, or may be, provided by law for attending the circuit court in any civil matter or proceedings, which said fees shall be paid out of the general fund in the treasury of the state. All claims for such fees shall be approved by the secretary, or by some member of the commission, and shall be audited and allowed by the board of state auditors.

Complaint proceedings, therefore, must be initiated by a "complaint in writing." Complaint proceedings address whether "any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant" and require the Commission to "investigate the matter." Consequently, complaint proceedings address a utility's "rate . . . charged," which means that they address rates that already have been established, presumably after the completion of a general-rate case. This differentiates complaint proceedings from general-rate cases. General-rate cases address the creation of a rate and complaint proceedings address, among other things, whether an already established rate prejudices a rate payer. Finally, complaint proceedings do not have a time limit like general-rate cases do.

2. THE CODE OF CONDUCT

Forner argues that MCL 460.10ee establishes that he can intervene in this case. MCL 460.10ee(1) directs the Commission to establish a code of conduct governing the interplay between a utility's regulated and unregulated services. Regulated services are electric, steam, and natural gas utilities; unregulated services are value-added programs and services, which include appliance-service programs. MCL 460.10ee(16). The Commission duly promulgated a code of conduct addressing those issues. Mich Admin Code, R 460.10101- 460.10113.

The code of conduct regulates how utilities can offer value-added programs and services. In doing so, it does not address general-rate cases. Rather, code of conduct violations are addressed in complaint proceedings. Mich Admin Code, R 460.10112; MCL 460.10c; MCL 460.10ee(14). Indeed, the statutory scheme as a whole establishes that code-of-conduct violations should be addressed by the Commission on its "own motion" or through a complaint, which, as discussed, can be filed by any individual prejudiced by a utility's "rate, classification, regulation or practice charged." MCL 460.10c; MCL 460.58. Code of conduct violations, therefore, are not generally addressed in general-rate cases.

3. MCL 460.10ee

MCL 460.10ee is substantially similar to former MCL 460.10a and, as such, we need not address every subsection here.[3] MCL 460.10ee, however, added language specifically addressing formal and informal proceedings to determine whether a utility violated the rules regarding value-added programs and services. See MCL 460.10ee(2)-(5). These provisions refer to complaint proceedings. By adding this language in Act 341, therefore, the Legislature provided direction to the Commission and interested parties about how to proceed if a utility's value-added programs and services violated rules established by the Legislature and the Commission.

We additionally note that MCL 460.10ee(15) added a requirement that a utility offering a value-added program or service must file an annual report with the Commission addressing, among other things, "a detailed accounting of how the costs for the value-added programs and services were apportioned between the utility and the value-added programs and services." This subsection places additional restrictions on utilities, but it does not affect the distinction between general-rate cases and complaint proceedings. The requirement that a utility file an annual report would clearly make enforcing the provisions of MCL 460.10ee and the new code of conduct easier than if no annual report was required—as was the case before Act 341. Yet again, however, we note that these provisions addressing enforcement implicate complaint proceedings, not general-rate cases. As a whole, these subsections of MCL 460.10ee address requirements a utility must comply with if it offers value-added programs and services. They do not address general-rate cases or complaints. Subsections (8) and (12), however, are relevant to those issues.

Subsections (8) and (12) provide:

> (8) All utility costs directly attributable to a value-added program or service allowed under this section shall be allocated to the program or service as required by this section. The direct and indirect costs of all utility assets used in the operation of the program or service shall be allocated to the program or service based on the proportional use by the program or service as compared to the total use of those assets by the utility. The cost of the program or service includes

[3] Compare former MCL 460.10a(4) and (5) with MCL 460.10ee(1); former MCL 460.10a(6) with MCL 460.10ee(6) and (7); former MCL 460.10a(7) with MCL 460.10ee(8); former MCL 460.10a(8) with MCL 460.10ee(9); former MCL 460.10a(9) with MCL 460.10ee (10); former MCL 460.10a(10) with MCL 460.10ee(12); former MCL 460.10a(11) with MCL 460.10ee(13).

> administrative and general expense loading to be determined in the same manner as the utility determines administrative and general expense loading for all of the utility's regulated and unregulated activities.
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> (12) Except as otherwise provided in this subsection, the commission shall include only the revenues received by a utility to recover costs directly attributable to a value-based program or service under subsection (8) in determining a utility's base rates. The utility shall file with the commission the percentage of additional revenues over those that are allocated to recover costs directly attributable to a value-added program or service under subsection (8) that the utility wishes to include as an offset to the utility's base rates. Following a notice and hearing, the commission shall approve or modify the amount to be included as an offset to the utility's base rates.

Subsection (8) establishes how value-added program or service costs should be allocated. Subsection (12) addresses how the Commission should consider these costs when establishing a utility's base rates. Neither subsection addresses or appears to contemplate complaint proceedings. Subsection (12) does, however, address how value-based programs and services should be considered when the Commission determines a utility's base rates. Consequently, under Subsections (8) and (12), value-added program or service costs can certainly be included in a general-rate case. Indeed, a general-rate case addresses whether a utility's base rates should be increased "based on the utility's total cost of providing service." MCL 460.6a(16)(b). As can be seen with MCL 460.10ee, if a utility offers a value-added program or service, then its "total cost of providing service" necessarily includes determining whether costs for its value-added programs and services are allocated correctly.

Subsections (8) and (12), therefore, establish that value-added programs and services must be addressed in a general-rate case if a utility offers value-added programs and services. But just because these issues must be addressed in a general-rate case, that does not mean every issue related to value-added programs and services can be addressed in a general-rate case. Indeed, subsections (8) and (12) do not actually change general-rate cases or complaint proceedings. Each type of proceeding remains the same as it was before Act 341.

D. APPLICATION TO THIS CASE

Forner argues that he should be permitted to intervene in Consumers Energy's general-rate case to ensure it properly allocates funds for its appliance-service program. Consumers Energy and the Commission both argue that—as this Court and the Commission have repeatedly ruled before Act 341's enactment—Forner's claim should be addressed in a complaint proceeding instead of in Consumers Energy's general-rate case. Indeed, a Consumers Energy employee—Steven McLean—has averred that Consumers Energy does not seek "recovery of any expenses related to the [appliance-service program], or any other [value-added programs and services], in this electric rate case filing." McLean further averred that Consumers Energy complied with the code of conduct and MCL 460.10ee when "allocat[ing] electric expenses related to the [appliance-

service program]." As explained by McLean, "This allocation ensures that the electric utility customers are not paying costs attributed to the [appliance-service program]."

Forner essentially argues that he does not believe McLean's statement that Consumers Energy complied with MCL 460.10ee and the code of conduct when allocating appliance-service program costs and that he should be permitted to intervene in Consumers Energy's general-rate case to test his theory. But a general-rate case is the proper forum to determine whether the rate sought by a utility is appropriate, not whether it complies with the rules and regulations regarding appliance-service programs. McLean averred that Consumers Energy fully complied with MCL 460.10ee and the code of conduct when allocating costs for its appliance-service program. The proper forum to contest that statement is a complaint proceeding. Complaint proceedings are intended to address whether a utility has complied with the code of conduct and MCL 460.10ee. That is exactly the type of issue presented here. Indeed, Forner alleged in his motion to intervene that Consumers Energy violated MCL 460.10ee and the code of conduct. These allegations should be addressed in a complaint proceeding, not a general-rate case. A general-rate case's focus should be on the calculation regarding a new electric rate while complaint proceedings address a utility's potential violations of rules and regulations. Forner alleges that Consumers Energy violated rules and regulations. Thus, his claim should be addressed in a complaint; not in a general-rate case.

Thus, Forner must raise his claim in a complaint proceeding; the administrative law judge and the Commission did not err by denying Forner's motion to intervene.

III. CONCLUSION

Act 341 substantially amended the Commission's enabling act, but it did not affect the issue presented in this case. Issues regarding whether a utility complies with rules and regulations should be addressed through complaint proceedings, not general-rate cases. Consequently, we affirm the Commission's order denying Forner's motion to intervene. Consumers Energy, as the prevailing party, may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro