

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION  
and THE DETROIT EDISON COMPANY,

Defendants-Appellees.

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UNPUBLISHED

September 25, 1998

No. 197052

Public Service Commission

LC No. 10427 R

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff Attorney General appeals as of right from orders entered on April 10, 1996, and July 16, 1996, by defendant Michigan Public Service Commission (PSC) rejecting proposed secondary effects adjustments regarding lost profits from off-system sales and changes in the blending percentages of coal burned at facilities operated by defendant Detroit Edison in 1994, and denying rehearing, respectively. We affirm.

Detroit Edison's Fermi 2 nuclear power plant is subject to a performance standard, approved in Case No. U-8789, that provides for the imposition of a disallowance in Detroit Edison's annual power supply cost recovery (PSCR) reconciliation proceeding. Under the standard, the amount of the disallowance should be equal to the net incremental cost of power, including capacity and energy, that Detroit Edison was required to purchase or produce in order to compensate for any production shortfall at Fermi 2.

On December 25, 1993, Fermi 2 experienced a failure in its turbine generator. The plant did not return to service until 1995. The outage required Detroit Edison to change the fuel blends at its Monroe and River Rouge plants in order to accommodate the higher loads produced at those facilities.

Detroit Edison's 1993 PSCR reconciliation proceeding, Case No. U-10103-R, presented the first opportunity to implement the Fermi 2 performance standard. In an order entered in that case on September 8, 1994, the PSC approved a settlement agreement in which the Attorney General and the Residential Ratepayers' Consortium (RRC) agreed that the methodology set forth in the testimony of

Detroit Edison witness James Byron, the company's director of operations, should be used to determine the net incremental cost of replacement power for Fermi 2.

The present case involves Detroit Edison's 1994 PSCR reconciliation proceedings. The first phase of the case resulted in a settlement order that provided for the calculation of the 1994 Fermi 2 performance standard disallowance using the methodology approved in Case No. U-10103-R. The second phase involved a hearing concerning several issues, including the calculation of Detroit Edison's 1994 net incremental cost for replacement power as required under the Fermi 2 performance standard. Detroit Edison witness James Byron presented testimony concerning the company's calculation. The RRC's witnesses jointly proposed adjustments to Detroit Edison's calculation.

On November 6, 1995, the administrative law judge issued a proposal for decision concluding that Detroit Edison's methodology for determining net incremental costs was accurate and reasonable, but that the company's proposed Fermi 2 performance standard disallowance of \$55,046,000 should be adjusted by \$4,196,000. The adjustment was based on the RRC's proposals to factor in Detroit Edison's increased coal costs as a result of changing fuel blends at the Monroe and River Rouge plants, as well as the company's lost profits from off-system sales attributable to the Fermi 2 outage.

In a decision entered on April 10, 1996, the PSC agreed with the ALJ's finding that Detroit Edison's methodology for determining net incremental costs was accurate and reasonable. However, the Commission concluded that the secondary effects adjustments (for the increased costs of coal and the off-system profits) should not be adopted. Reasoning that these costs were non-Fermi 2 power costs not governed by the performance standard, the PSC therefore rejected the ALJ's recommended disallowance of \$4,196,000. The Attorney General subsequently filed a petition for rehearing under 1992 AACRS, R 460.17403 (Rule 403) reiterating its substantive arguments. The PSC denied the petition in an order dated July 16, 1996, indicating that a rehearing under Rule 403 does not provide a party a second opportunity to put forth an argument.

On appeal, the Attorney General first argues that under Rule 403, the PSC should have granted rehearing to allow re-argument of the parties' respective positions. A party aggrieved by an order of the PSC bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The term "unlawful" has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d 515 (1966). In this case, the PSC's denial of the petition for rehearing was not unlawful or unreasonable.

The Attorney General's position is that the PSC cannot reject claims of error raised in a petition for rehearing solely for the reason that the claims relate to issues decided in the order from which rehearing is sought. No statute, rule, or case supports the Attorney General's position. MCL 460.351; MSA 22.111 authorizes the PSC to grant a rehearing and to alter or amend a decision, but it does not mandate that the Commission do so. Rule 403(1) requires that a petition for rehearing based on a claim of error in the decision must specify the findings of fact and conclusions of law claimed to be erroneous, and must briefly state the basis of the error. It does not require the PSC to address the merits of any claim raised in a petition for rehearing. Our Supreme Court has stated that while the PSC has the

authority to grant rehearing, it cannot be assumed that it will do so “capriciously, without good cause shown.” *Lansing v Public Service Comm*, 330 Mich 608, 613; 48 NW2d 133 (1951). Thus, the decision to grant a petition for rehearing is within the discretion of the PSC. Were we to accept the Attorney General’s position, the PSC would be required to grant rehearing in every case in which a petition is filed, and to restate its ruling from its previous decision even if no changes were made to those rulings – a complete abdication of its discretionary authority. Finally, it should be noted that the Attorney General is not without a remedy; a party claiming error is entitled to appellate review of the PSC’s underlying decision as of right. MCL 462.26(1); MSA 22.45(1). We therefore conclude that the PSC’s order is not unlawful or unreasonable.

The Attorney General next claims that the PSC’s order rejecting the ALJ’s recommended disallowance of \$4,196,000 for power supply costs based on the 1994 Fermi 2 outage is unlawful or unreasonable. RRC witnesses recommended adjusting the methodology used to calculate the net incremental cost of replacement power for Fermi 2 to capture secondary effects in the form of increased costs incurred by virtue of changing coal blends at two facilities and lost profits resulting from decreased off-system sales. However, the testimony of Detroit Edison witness Byron supported the PSC’s finding that the company accurately and consistently followed the methodology for calculating the net incremental cost of replacement power for Fermi 2 established in the settlement agreement in Case No. U-10103-R, and that that methodology did not address the capture of secondary economic effects as proposed by the RRC witnesses. We defer to the PSC’s administrative expertise in interpreting and applying the settlement agreement in Case No. U-10103-R to these proceedings. *Yankoviak v Public Service Comm*, 349 Mich 641, 648; 85 NW2d 75 (1957). Furthermore, the PSC’s finding - that the proposed adjustments for secondary effects were unrelated to the cost of replacement power for Fermi 2 - was supported by Byron’s testimony. Although the testimony given by Byron was contradicted by that given by RRC witnesses, the PSC was entitled to choose between differing views and rely on the testimony presented by Byron. *Great Lakes Steel Div of Nat’l Steel Corp v Michigan Public Service Comm*, 130 Mich App 470, 481; 344 NW2d 321 (1983). We are therefore satisfied that the PSC’s order was not unlawful or unreasonable.

Finally, the Attorney General argues that the PSC unlawfully or unreasonably shifted the burden of proof by concluding that Detroit Edison used the methodology approved in Case No. U-10103-R, when the data provided to RRC were inadequate to allow it to verify the company’s claim. Again, we disagree. The contention by RRC witness George Evans that RRC consultants were not given sufficient information to allow them to verify the accuracy of Detroit Edison’s computation methodology was directly contradicted by Byron, who testified that the consultants were given all necessary information. The PSC was entitled to choose between the differing views and to rely on the testimony given by Byron. *Great Lakes Steel, supra*. Moreover, the evidence supported the PSC’s decision to accept Detroit Edison’s methodology for calculating replacement power costs for Fermi 2. Byron testified that the company’s method of calculating costs comported with the method approved in Case No. U-10103-R, and that RRC’s alternative method was less accurate than that used by the Detroit Edison. Again, we defer to the PSC’s exercise of its administrative expertise in this area, *Yankoviak, supra*. Accordingly, we conclude that the Commission’s order accepting Detroit Edison’s methodology for calculating replacement power costs for Fermi 2 was not unlawful or unreasonable.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Richard A. Bandstra

/s/ Stephen J. Markman