STATE OF MICHIGAN

COURT OF APPEALS

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, ATTORNEY GENERAL, ABATE, MICHIGAN POWER LIMITED PARTNERSHP, and RESIDENTIAL RATEPAYERS CONSORTIUM,

Defendant-Appellees.

UNPUBLISHED
May 21, 1999

No. 203734
Public Service Commission
LC No. 10445

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Midland Cogeneration Venture Limited Partnership (MCV) appeals by right the May 22, 1997 opinion and order of the Public Service Commission, entered in the reconciliation phase of Consumer Power Company's electric power supply cost recovery case (PSCR) for 1994. We affirm.

MCV is a limited partnership formed to construct and operate a gas-fired cogeneration plant at the site of Consumer Power Company's abandoned nuclear plant in Midland. The plant is a qualifying cogeneration facility under the Public Utility Regulatory Policies Act (PURPA), 15 USC 3201 *et seq.* The Federal Energy Regulatory Commission has promulgated rules to enforce the act. Under the statute and rules, electric utilities are required to purchase power from qualifying facilities at full avoided cost. The parties have extensively litigated the amount and cost of power purchased by Consumers from MCV, and reached a comprehensive settlement agreement. The history of these proceedings is reflected in a series of opinions from this Court, i.e., *Consumers Power Co v PSC No. 1,* 196 Mich App 436; 493 NW2d 902 (1992); *ABATE V PSC,* 216 Mich App 8; 548 NW2d 649 (1996), and *ABATE V PSC,* 219 Mich App 653; 557 NW2d 918 (1996).

Appellate review of PSC orders is narrow in scope. All rates, fares, regulations, practices, and services prescribed by the PSC are deemed prima facie to be lawful and reasonable. MCL 462.25; MSA 22.44. The party challenging an order of the PSC bears the burden of proving by clear and

satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26 (8); MSA 22.45(8). A decision of the PSC is unlawful when it involves an erroneous interpretation or application of the law and it is unreasonable when it is unsupported by the evidence. *ABATE V PSC,* 219 Mich App 653, 659; 557 NW2d 918 (1996). To the extent that the decision is based on findings of fact, the challenger must show that those findings are not supported by competent, material, and substantial evidence on the whole record. *Id.*

The instant case concerns three operating procedures of the Midland plant, relating to the change in capacity of the plant between peak and non-peak hours. The first situation is ramping, in which MCV increases its output from 750.3 MW to 915 MW in the hour prior to the on-peak period, and decreases its output in the hour after the on-peak period. The second situation arises out of the fact that MCV capacity is modular, and cannot hold its generation steady at all operating levels. To accommodate this constraint, Consumers allowed MCV to exceed the dispatch level by up to 50 MW of differential energy. The third situation involves the tendency of a generating plant to drift off of its load point. Consumers and MCV agreed to certain bandwidths, which allowed MCV to exceed its load point by 20 MW during on-peak hours, 40 MW during ramping hours, and 10 MW during all other times. Consumers sought to recover variable and fixed energy costs and capacity charges for each of these situations. It argued that the operating practices arose out of legitimate technical characteristics of the MCV plant design, and revisions of those practices in accordance with the requirements imposed under previous rate cases.

The PSC found that the purpose of the operating practices was to maximize the recovery of MCV payments through standards that permit energy deliveries above the caps without regard to whether they are economical. The PSC disallowed the five mill capacity charge for all three situations. The PSC also disallowed variable energy charges for the ramping period, finding that Consumers did not take that energy on the basis of criteria that would facilitate an economic dispatch in comparison to other alternatives. The commission found it difficult to quantify more precisely the effect of dispatching that energy instead of less expensive sources of energy. The settlement in case U-10127 did not create a right to recover payments for energy that is not economically dispatched above the off-peak cap.

MCV has failed to show that the PSC order is unlawful or unreasonable. As the PSC observed, each of the three operating procedures was designed to maximize the output of MCV. While it may be necessary to gradually ramp up MCV output to reach the capacity, the PSC could reasonably conclude that the ramp up time could occur within the peak hours, rather than prior to the peak. There is nothing in the prior orders which indicates that MCV could be fully compen-sated for exceeding the off-peak capacity limits to arrive at the on-peak capacity limit at the first authorized time. Similarly, there is no showing that operating procedures should be designed to allow MCV to drift above jurisdictional capacity in order to assure full utilization. The pro-cedures used by Consumers and MCV were not adopted to ensure the most economical dispatch of power, but to maximize the utilization and charges to MCV to the absolute limits provided by the prior decisions of the PSC.

While MCV argues that part of the result is that it is denied full avoided cost recovery for certain periods when it was the most economically dispatched power, the PSC found that due to the operating procedures adopted by Consumers and MCV, it could not readily make the determination

when that power was the most economically dispatched. MCV does not establish that the contested power was economically dispatched. The fact that Consumers plants also ramp up their capacity is not dispositive of the question. The wisdom of the operating practice is not being questioned; it is only the rate consequences that are at issue. Appellant has failed to cite any evidence which would show that the decision of the PSC is not supported by competent, material, and substantial evidence on the record. Where appellant has failed to show that it was not compensated for full avoided costs, there is no PURPA violation. *ABATE*, *supra* at 663.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra