

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MPSC, CONSUMERS ENERGY COMPANY,
MICHIGAN POWER LIMITED PARTNERSHIP
and MIDLAND COGENERATION VENTURE,

Defendants-Appellees.

UNPUBLISHED
October 27, 2000

No. 213296
Public Service Commission
LC No. U-011527

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff Attorney General appeals by right from the June 26, 1998 opinion and order of the Public Service Commission [MPSC] terminating proceedings regarding defendant Consumers Energy Company's power supply cost recovery [PSCR] plan for 1998. We affirm.

On September 30, 1997, Consumers filed an application seeking approval of its PSCR factor and plan for 1998. The application sought to impose a PSCR factor of \$0.00285 per kilowatt hour [kWh] on Consumers' customers, during each month of 1998. However, because Consumers' request for suspension of its PSCR clause was concurrently pending before the MPSC in a different case, the application noted that the document had been filed to fulfill statutory requirements in the event that Consumers' PSCR clause was not suspended.

Because the MPSC did not enter a final or temporary order within three months of the date when Consumers filed its PSCR plan, Consumers was authorized to self-adjust its monthly rates to incorporate all or part of its requested PSCR factors, subject to a prompt refund to consumers in the event that the requested rate was higher than the rate eventually established in the MPSC's final order. MCL 460.6j(9); MSA 22.13(6j)(9). In late December, 1997, Consumers informed the MPSC that it intended to implement the PSCR factor of \$0.00285 per kWh, as proposed in its PSCR application, during the month of January, 1998. In late January, 1998, Consumers informed the MPSC that it planned to implement the same PSCR factor for the month of February, 1998. It is not disputed that Consumers charged its customers this amount for the months of January and February, 1998.

On October 29, 1997, the MPSC issued a series of orders that, among other things, authorized the suspension of PSCR clauses for Consumers and other utilities and established an interim rate of \$0.0027 per kWh. However, the orders were indefinite with regard to the date when the suspension would be effective. Subsequently, the commission granted rehearing and issued orders dated January 14 and February 11, 1998, clarifying its orders dated October 29, 1997. In the January and February orders, the MPSC affirmed the interim rate of \$0.0027 per kWh and suspended Consumers' PSCR clause.

Shortly after the MPSC suspended Consumers' PSCR clause, Consumers filed a motion to terminate the 1998 PSCR plan case. The Attorney General and other interested parties filed exceptions to the hearing referee's recommendation that the case be terminated, arguing that the commission was statutorily required to conduct a contested case hearing to review the 1998 PSCR plan and to establish the appropriate PSCR factor for at least the months of January and February, 1998. They further argued that in the absence of a contested case hearing and plan order, Consumers was required to refund all the money collected under the self-implemented PSCR factor. Consumers responded that it had already agreed to refund the amount by which the revenues collected exceeded the amount that would have been collected under the rate authorized by the January 14, 1998 order. Further, Consumers argued that remaining issues could be addressed in the context of the 1997 PSCR reconciliation case.

On June 26, 1998, the MPSC issued an opinion and order granting the motion to terminate Consumers' 1998 PSCR plan case, finding that the 1997 reconciliation case provided the forum in which it would determine the fuel and purchased power costs that Consumers would be authorized to recover in base rates for the period that the PSCR clause was suspended. The Attorney General then filed this appeal, arguing that MCL 460.6j(5); MSA 22.13(6j)(5) required the MPSC to conduct a power supply and cost review as a contested case. We disagree.

This Court's review of an order of the MPSC is limited. All rates, fares, charges, classification and joint rates fixed by the MPSC and all regulations, practices, and services prescribed by the MPSC are presumed, *prima facie*, to be lawful and reasonable. MCL 462.25; MSA 22.44; *Attorney General v Public Service Comm*, 231 Mich App 76, 77; 585 NW2d 310 (1998). A party challenging an order of the MPSC bears the burden of demonstrating by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Attorney General, supra*, 231 Mich App 77-78. "An order is unlawful if it is based on an erroneous interpretation or application of the law, and it is unreasonable if it is not supported by the evidence." *Id.* at 78. Further, this Court will accord deference to the MPSC's administrative expertise and will not substitute its judgment for that of the MPSC. *Attorney General v Public Service Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994); *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666, 677; 523 NW2d 483 (1994); *Residential Ratepayer Consortium v Public Service Comm*, 198 Mich App 144, 151; 497 NW2d 558 (1993).

This Court has already held that the MPSC has the authority to suspend a PSCR clause without holding a contested case hearing, if the suspension will not result in a rate increase. *Attorney General, supra*, 231 Mich App 78-81; MCL 460.6a; MSA 22.13(6a). The Attorney General has not argued

that the suspension of the PSCR clause in this case resulted in a rate increase. Furthermore, it is clear from the record that all parties were on notice that the MPSC intended to authorize suspension of Consumers' PSCR clause as early as October 29, 1997. The MPSC orders dated January 14, 1998, and February 11, 1998, merely clarified the orders issued in October, 1997. The fact that Consumers charged its customers \$0.00285 per kWh during January and February while awaiting clarification of the MPSC's decision does not require a contested case hearing because it is not disputed that the difference between the PSCR factor of \$0.00285 and the interim base rate of \$0.0027 for January and February was refunded to Consumers' customers in April, 1998. Thus, we are not persuaded by the Attorney General's argument that utility customers were charged a rate that was never approved by the commission. That argument fails to acknowledge the subsequent refund, which rendered the effective rate charged for January and February equal to the interim base rate of \$0.0027 set by the MPSC.

The Attorney General argues in her reply brief that a contested case hearing regarding Consumers' energy rates for January and February, 1998, is required because the MPSC denied her the opportunity to conduct discovery with regard to the actual rates paid for power by Consumers in 1998. This argument implies the Attorney General's belief that the actual cost of power for January and February, 1998, was lower than \$0.0027 per kWh. Our reading of the record reveals that the Attorney General sought to discover the projected costs of power Consumers might pay during the entirety of 1998, not for the purpose of challenging the charges to customers in January and February, but for the purpose of arguing that these future costs should be taken into account to determine the base rate in effect during the period that the PSCR clause was suspended. The MPSC rejected this argument on the ground that it had already decided that the interim base rate for the initial period following the suspension of Consumers' PSCR clause would be set using the actual cost of power during 1997, rather than projected costs for 1998. The Attorney General has failed to demonstrate that the practice of using actual costs for determining future base rates is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Attorney General, supra*, 231 Mich App 77-78.

Finally, the Attorney General claims that the MPSC's decision in Case No. U-10994 regarding the suspension of Wisconsin Electric Company's PSCR clause supports its arguments. Initially, it should be noted that a decision of the MPSC is not binding on this Court. In addition, a reading of the MPSC's opinion in that case reveals that the factual situation was quite different from that in the instant case. Although Wisconsin Electric's PSCR clause was suspended effective December 15, 1995, the MPSC conducted a reconciliation proceeding for revenues collected during 1995. The Attorney General claims that this case compels the conclusion that when a PSCR factor is imposed for any part of a year, a reconciliation proceeding must be conducted. However, in this case the difference between Consumers' self-implemented PSCR factor and the interim base rate was refunded to ratepayers for the entire time it was collected during 1998, essentially canceling out the portion of the charge in excess of the interim base rate.

Because no such refund occurred in the case cited by the Attorney General, the argument is unpersuasive.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski