

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN ELECTRIC COOPERATIVE
ASSOCIATION, ALGER DELTA
COOPERATIVE ELECTRIC ASSOCIATION,
CHERRYLAND ELECTRIC COOPERATIVE,
CLOVERLAND ELECTRIC COOPERATIVE,
GREAT LAKES ENERGY COOPERATIVE,
HOMEWORKS TRI-COUNTY ELECTRIC
COOPERATIVE, MIDWEST ENERGY
COOPERATIVE, ONTONAGON COUNTY
RURAL ELECTRIFICATION ASSOCIATION,
PRESQUE ISLE ELECTRIC & GAS
COOPERATIVE, and THUMB ELECTRIC
COOPERATIVE,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN ALLIANCE FOR FAIR
COMPETITION, DETROIT EDISON
COMPANY, ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, ENERGY
MICHIGAN, INC., CONSUMERS ENERGY
COMPANY, WISCONSIN PUBLIC SERVICE
CORPORATION, UPPER PENINSULA POWER
COMPANY, WISCONSIN ELECTRIC POWER
COMPANY, d/b/a WE ENERGIES, and
NORTHERN STATES POWER COMPANY
WISCONSIN, d/b/a XCEL ENERGY,

Appellees.

CONSUMERS ENERGY COMPANY,

Appellant-Cross-Appellee,

and

UNPUBLISHED
August 17, 2004

No. 244425
MPSC
LC No. 00-012134

MICHIGAN STATE UTILITY WORKERS
COUNCIL,

Intervenor-Cross-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and MICHIGAN ALLIANCE FOR FAIR
COMPETITION,

Appellees-Cross-Appellees,

and

DETROIT EDISON COMPANY, ASSOCIATION
OF BUSINESSES ADVOCATING TARIFF
EQUITY, ENERGY MICHIGAN, INC.,
WISCONSIN PUBLIC SERVICE
CORPORATION, UPPER PENINSULA POWER
COMPANY, WISCONSIN ELECTRIC POWER
COMPANY, d/b/a WE ENERGIES, NORTHERN
STATES POWER COMPANY, d/b/a XCEL
ENERGY, and MICHIGAN ELECTRIC
COOPERATIVE ASSOCIATION,

Appellees.

DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN ALLIANCE FOR FAIR
COMPETITION, MIDLAND COGENERATION
VENTURE LIMITED PARTNERSHIP,
ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, ENERGY
MICHIGAN, INC., CONSUMERS ENERGY
COMPANY, WISCONSIN PUBLIC SERVICE
CORPORATION, UPPER PENINSULA POWER
COMPANY, WISCONSIN ELECTRIC POWER
COMPANY, d/b/a WE ENERGIES, NORTHERN
STATES POWER COMPANY WISCONSIN,

No. 244429

MPSC

LC No. 00-012134

No. 244531

MPSC

LC No. 00-012134

d/b/a XCEL ENERGY, and MICHIGAN
ELECTRIC COOPERATIVE ASSOCIATION,

Appellees.

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

In these consolidated cases appellants Michigan Electric Cooperative Association (MECA), Consumers Energy Company (CEC), Michigan State Utility Workers Council, and Detroit Edison Company (DEC) appeal as of right orders entered by appellee Michigan Public Service Commission (PSC) approving compliance plans and granting in part and denying in part the utilities’ requests for waivers. We affirm in each case.

I. Underlying Facts and Proceedings

DEC and CEC agreed to adhere to provisional codes of conduct designed to govern their relationships with their affiliates in connection with their retail open access programs.¹ Subsequently, the PSC initiated a contested case proceeding pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, to determine what modifications, if any, should be made to the codes of conduct. Prior to the issuance of a final order in the case, 2000 PA 141, the Customer Choice and Electricity Reliability Act (Act 141), MCL 460.10 *et seq.*, became effective. Act 141 required the PSC to establish a code of conduct applicable to all electric utilities. MCL 460.10a(4) provided:

Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utilities regulated and unregulated services, whether those services are provided by the utility or the utility’s affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.

After conducting further hearings, the PSC adopted a new code of conduct applicable to all electric utilities and alternative electric suppliers. The PSC concluded that the language of

¹ Retail open access refers to the ability of a utility’s customers to purchase electric power from either a competitive affiliate of the utility or an alternative electric power supplier, and to have the utility deliver the power to the point of use.

MCL 460.10a(4) indicated that the Legislature intended the code of conduct to apply beyond those services directly related to retail open access.²

Appellants filed compliance plans and requests for waivers from various sections of the code of conduct. The PSC approved the compliance plans, and granted in part and denied in part the waiver requests. The waiver orders contained guidelines to which appellants were required to adhere to maintain full functional separation between regulated and unregulated activities.

II. Analysis

A party aggrieved by an order of the PSC must prove by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

We give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). A reviewing court must give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer. *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998).

The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. A question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995). The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997).

In these appeals of the compliance and waiver orders entered pursuant to the code of conduct, appellants raise the following arguments: the PSC exceeded its statutory authority by requiring compliance with a code of conduct for nonregulated activities not directly related to retail open access and by denying waiver requests for such activities; the PSC acted unlawfully by denying waiver requests and requiring adherence to guidelines pursuant to a code of conduct

² DEC, MECA, AND CEC appealed the PSC's orders, arguing that: the PSC exceeded its authority by imposing a code of conduct on unregulated activities not related to retail open access; the PSC violated the APA by failing to promulgate the code of conduct as a rule; the code of conduct improperly usurps management activities; the code of conduct is unconstitutionally vague; the code of conduct is invalid at least in part because it is preempted by federal law; and the code of conduct violates various provisions of the United States Constitution. In *Detroit Edison Co v Public Service Comm*, 261 Mich App 1; 680 NW2d 512 (2004), another panel of this Court rejected appellants' arguments and affirmed the PSC's orders.

that was not promulgated under the rulemaking provisions of the APA; the code of conduct and the waiver orders unlawfully usurp management decisions; the code of conduct is unconstitutionally vague in that it fails to give adequate notice of what conduct is prohibited, and the waiver orders are unlawful because they do not exempt utilities from complying with the code of conduct; the code of conduct, at least in part, is preempted by federal law; and the code of conduct violates various constitutional provisions.

Each of these arguments was raised and rejected in appellants' appeals of the PSC's orders adopting the code of conduct. *Detroit Edison Co, supra*.³ In that case we held as follows: the Legislature's use of expansive language in MCL 460.10a(4) to describe the code of conduct provided the PSC a legislative mandate to adopt a code of conduct that applied to utilities' unregulated activities not directly related to retail open access, *id.* at 9-10; the code of conduct is not a rule that must be promulgated pursuant to the APA because it comes within the parameters of the exception to the definition of a rule in MCL 24.207(f), *id.* at 11-12; the PSC's implementation of the code of conduct does not intrude on management decisions of regulated utilities, *id.* at 12-13; the code of conduct is not unconstitutionally vague, and uses terms that are as reasonably precise as possible under the circumstances, *id.* at 15-16; the code of conduct is not preempted by federal law, *id.* at 13-14; and the claim that the code of conduct violated various constitutional provisions is speculative and not ripe for review, *id.* at 16.⁴

The law of the case doctrine requires that we adhere to the holdings in that decision in these appeals, *Reeves, supra*; *Webb, supra*, and to conclude that the PSC's compliance and waiver orders are not unlawful or unreasonable. MCL 462.26(8). The PSC had the statutory authority to require appellants to conduct unregulated activities in compliance with the code of conduct, *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1995), and did not exceed its authority by denying appellants' requests for waivers for unregulated activities not directly related to retail open access. The contested case proceeding

³ That decision sets out the substantive law for each argument raised by appellants in these appeals.

⁴ At oral argument, appellants argued that there exists a conflict between *Michigan Electric v MPSC*, 252 Mich App 254; 652 NW2d 1 (2002), and *Detroit Edison, supra*. We disagree. The primary distinction between the two cases is statutory nomenclature. In the earlier *Michigan Electric* case, we found that the MPSC intentionally avoided prescribed rulemaking procedures by instituting a "contested case" against nobody in particular and invited concerned companies to intervene. *Michigan Electric, supra*, at 267-268. We said that the action was not a bona fide "contested case," so the resulting order was improperly adopted absent the MPSC's adherence to ordinary rulemaking strictures. *Id.* In *Detroit Edison* we did not even approach this issue because the MPSC clearly named a party, and it was truly a "contested case." *Detroit Edison, supra*, at 11. Therefore, the order produced was not a "rule," MCL 24.207(f), that would require the MPSC to follow rulemaking procedure. Rather, it was an order from a contested case that acts as binding precedent. *Id.* Because the latter denomination applies to the instant "contested case" just as it did in *Detroit Edison*, *Michigan Electric* is distinguishable.

afforded all participants due process of law, see *Westland Convalescent Center v BCBSM*, 414 Mich 247, 269; 324 NW2d 851 (1982), and produced a code of conduct and waiver orders that were supported by the requisite evidence. Const 1963, art 6, § 28. Furthermore, because the code of conduct does not usurp management prerogatives and is neither unconstitutionally vague nor preempted by federal law, the waiver orders, which determine whether and in what manner the code of conduct applies to specific activities undertaken by the utilities but do not require utilities to either cease any activities or commence engaging in particular activities, are similarly valid. Finally, the constitutional claims have been afforded no further development, and continue to be without factual context and to lack ripeness.

III. Conclusion

For the reasons stated above, we affirm the decision of the PSC in each case.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell