STATE OF MICHIGAN

COURT OF APPEALS

ADRIAN ENERGY ASSOCIATION, L.L.C., CADILLAC RENEWABLE ENERGY, L.L.C., GENESEE POWER STATION, L.P., GRAYLING GENERATING STATION, L.P., HILLMAN POWER COMPANY, L.L.C., TES FILER CITY STATION, L.P. VIKING ENERGY OF LINCOLN, INC., and VIKING ENERGY OF MCBAIN, INC.,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, MIDLAND COGENERATION VENTURE, L.P., and ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Appellees.

UNPUBLISHED
April 1, 2008

No. 261718
Public Service Commission
LC No. 00-013917

ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, ADRIAN ENERGY ASSOCIATION, L.L.C., CADILLAC RENEWABLE ENERGY, L.L.C., GENESEE POWER STATION, L.P., GRAYLING GENERATING STATION, L.P., HILLMAN POWER COMPANY, L.L.C., TES FILER CITY STATION, L.P., VIKING ENERGY OF LINCOLN, INC., VIKING ENERGY OF MCBAIN, INC., and MIDLAND COGENERATION VENTURE, L.P.,

No. 261747
Public Service Commission
LC No. 00-013917

Appellees.

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY,

Appellees.

No. 264860
Public Service Commission
LC No. 00-013917

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

These three consolidated appeals arise from the Public Service Commission's February 28, 2005, order in response to Consumers Energy Company's application for approval of a power supply cost recovery (PSCR) plan, and for authorization of monthly PSCR factors for 2004. We affirm.

I. Underlying Facts

The federal Public Utility Regulatory Policies Act (PURPA)[1] encourages the development of alternative power sources in the form of cogeneration and small power production facilities, and authorizes the promulgation of rules to require electric utilities to offer to purchase electricity from qualifying cogeneration facilities (QFs). 16 USC 824a-3(a)(2).

18 CFR 292.304(a)(1) states that rates for such purchases must be reasonable and nondiscriminatory. Subsection (a)(2) specifies that no utility will have to pay more than its avoided costs. See also 16 USC 824a-3(b)(2). "Avoided costs" are "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR 292.101(b)(6). See also 16 USC 824a-3(d).

A PSCR factor is "that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost

---

[1] PL 95-617; 92 Stat 3117.

recovery clause incorporated in the rates or rate schedule of an electric utility." MCL 460.6j(1)(b). A PSCR clause is

> a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices. [MCL 460.6j(1)(a).]

In Docket No. 261718, appellants, QFs who produce electricity from renewable sources which they sell to Consumers Energy through power purchase agreements (PPAs), appeal as of right from the PSC's decision to allow Consumers to calculate avoided costs on the basis of the sub-bituminous coal of which it has made increasing use in recent years, instead of the more-expensive bituminous coal that the parties envisioned when they first executed their agreements.

In Docket No. 261747, the Attorney General appeals as of right from the PSC's order insofar as it approved a higher PSCR factor despite a rate cap, and allowed appellee Consumers to recover through a PSCR clause the costs of purchasing transmission services.

In Docket No. 264860, appellants Michigan Environment Council (MEC) and Public Interest Research Group in Michigan (PIRGIM) echo the Attorney General's objections to allowing Consumers to raise its PSCR clause despite statutory rate caps, and additionally take issue with the PSC's having allowed Consumers to recover, through its PSCR clause, its costs relating to disposal of spent nuclear fuel.

II. Standards of Review

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. MCL 462.25. See also *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC 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 PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, *supra*, 460 Mich 396, 427; 596 NW2d 164 (1999).

A reviewing court should defer to the PSC's administrative expertise, and not substitute its judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). Discovery decisions are reviewed for an abuse of discretion. See *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658

NW2d 849 (2003). Contract interpretation likewise presents a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp,* 466 Mich 402, 408; 646 NW2d 170 (2002).

III. Docket No. 261718

A. Avoided Costs

The QFs first assert that the PSC concluded that they had negotiated something other than avoided costs, and argue that the evidence did not support this conclusion. However, review of the record reveals that the PSC did not, in fact, state that the parties bargained for something other than avoided costs, but instead that the PSC recognized that the method for determining avoided energy costs in this instance depended on contract language.

The PPAs for most of the QFs state that the "energy payment rates to be paid by Consumers are based on the concept of 'avoided costs' as now described in Section 10 of [PURPA]" and applicable rules. All the PPAs include a detailed formula for determining energy charges, including that the various factors would be based on "[e]ach coal-fired plant or portion of a coal-fired plant (. . . Base Plant . . .) . . . which are owned wholly or partially, directly or indirectly by Consumers," being connected to the electrical grid and having specified capacity. The energy charge rates include one constituting "[t]he average cost per kilowatthour . . . for fuel inventory at the Base Plants during the Most Recent Calendar Year," for which "fuel inventory cost" is to be calculated on the basis of "Consumers' total fuel related expenses at the Base Plants as set forth in its Power Supply Cost Recovery (PSCR) Monthly Reports or successor documents . . . for the Most Recent Calendar Year."

The various parts of a contract should be read together. See, e.g., *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999). Accordingly, we understand the specific methodology for establishing energy charges to represent the parties' plan for determining avoided costs.

In the proposal for decision, the administrative law judge (ALJ) observed that "parties are free to enter into a contract that provides for payment based on something other than avoided costs," then went on to conclude that "the parties agreed to a <u>contractual</u> method for calculating the energy charge, rather than a pure theoretical application of avoided costs" (underscoring in the original). The ALJ thus indicated not that the parties contracted for other than avoided costs, but for something other than the methodology the QFs now urge for calculation of avoided costs.

The QFs protest that the ALJ "**concluded that 'Consumers' avoided costs . . . are irrelevant** in resolving this dispute" (boldface type and ellipsis in the original). However, the full version of the statement in question is "Consumers' avoided costs *of high sulfur coal or eastern bituminous coal* are irrelevant in resolving this dispute" (our emphasis). Again, the ALJ was not concluding that the concept of avoided costs was not relevant, but was instead recognizing that this was a question of contract language, and rejecting the QFs' interpretation of it.

The Commission in turn stated that "the ALJ's characterization that the QFs are seeking 'something other than avoided costs" was "not material to the outcome of this proceeding,"

because at issue was "the intent of the parties with regard to the payment of avoided energy costs." This language, at worst, exaggerated the position of the ALJ in the course of declaring it irrelevant.

The label attached to the payment methodology at issue hardly bears on the real issue, which is what the parties in fact agreed upon. QFs and electric utilities are free to contract to buy and sell power at any rates of their choosing. 18 CFR 292.301. The PPAs' declarations that the "energy payment rates to be paid by Consumers are based on the concept of 'avoided costs' as now described in Section 10 of [PURPA]" and applicable rules invokes the general concept of avoided costs, not any specific methodology for calculating them.

For these reasons, we reject the QFs' characterization of "avoided costs" as the strict equivalent to "the costs of high-sulfur, bituminous coal," and join the PSC in looking to the PPAs themselves to determine what the parties agreed upon as the methodology for calculating avoided costs.

B. Bituminous or Sub-Bituminous Coal

The QFs argue that, because their proxy for purposes of calculating avoided costs was a bituminous-coal burning plant, the PSC erred in allowing Consumers to switch from bituminous to sub-bituminous coal as the proxy for avoided energy costs. We disagree.

The QFs' argument, that having decided upon a bituminous-coal-burning plant as the proxy for determining avoided capacity costs, the PSC forever required that attendant avoided energy costs be calculated on the basis of bituminous coal, is a strained one. Avoided capacity costs are determined all at once, while the PPAs call for determination of avoided energy costs on the basis of ongoing, actual coal consumption, as indicated by contractual language referring to "fuel inventory at the Base Plants during the Most Recent Calendar Year," and "Consumers' total fuel related expenses at the Base Plants . . . for the Most Recent Calendar Year." The parties were free to contract to determine capacity and energy costs in ways not entirely compatible with each other. As the PSC noted, had the parties intended that one particular type of coal be "locked in" for the duration of the PPAs, regardless of actual coal consumption at the base plants, it would have been easy so to specify.

The Commission's order acknowledges that in earlier orders it "was careful to reject all contentions that Consumers' avoided capacity cost payments could be based on one type of plant while its avoided energy cost payments could be based on another," but explained that the instant case raised no such concern, because the same proxy facility was referenced for determining both avoided capacity and avoided energy costs. We agree that the rule against "split proxies" does not prevent a consistent arrangement such as the instant one, but an arrangement such as using a coal-fired plant to determine capacity payments and a nuclear-fueled plant to determine energy payments.

We further hold that the PSC had a reasonable evidentiary basis for concluding that the parties, at the time they entered into their respective PPAs, expressed no agreement concerning one kind of coal as opposed to another, and that this conclusion comports with the PURPA.

The PPAs' references to "[t]he average cost per kilowatthour . . . for fuel inventory at the Base Plants during the Most Recent Calendar Year," for which "fuel inventory cost" is to be calculated on the basis of "Consumers' total fuel related expenses at the Base Plants as set forth in its Power Supply Cost Recovery (PSCR) Monthly Reports or successor documents . . . for the Most Recent Calendar Year" plainly suggest a concern for actual coal costs, not what use of any particular kind of coal would cost.

Although 18 CFR 292.304(a)(1) sets forth the concept of "avoided costs," the rule does not require that avoided costs be calculated any specific way. 18 CFR 292.301(b)(1) provides that nothing in the applicable rules limits "the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required . . . ."

Because the PPAs call for calculating avoided energy costs on the basis of actual coal consumption at base plants, we approve the PSC interpretation reflecting a recognition that fuel costs change constantly, and that avoided energy costs are best determined by tying them to actual energy consumption costs as incurred over time.

The QFs assert that the PSC "erred in ignoring the unrebutted evidence that its prior orders accepted and ratified the Renewable QFs' election to have their avoided costs calculated 'up front' for the entire term of their PPAs," and that it also "accepted and ratified the Renewable QFs' election to lock in avoided costs." However, the PSC examined an earlier order involving Consumers[2] and correctly noted that it did not specify bituminous or any other kind of coal, and the QFs point to no other provision from that order that does. Instead, the order in question refers to "a rolling average of the cost of fuel and operation and maintenance expenses at Consumers' coal-fired generating units," which suggests actual, ongoing coal costs.[3] Interpreting the instant PPAs as continuing to look to those actual, ongoing, coal costs as the basis for determining its avoided energy cost payments harmonizes that past decision with the instant one.

For these reasons, no conflict with the PSC's earlier decisions, or with the PPAs' references to the PURPA, resulted from interpreting the PPAs as basing avoided energy costs on actual coal costs, regardless of the kind of coal.

C. Ambiguity

The QFs argue that their PPAs were ambiguous for having left key terms undefined, and for setting forth terms beyond their four corners by incorporating by reference the PURPA and

---

[2] Case No. U-8871 (1989).

[3] Moreover, we can hardly disagree with the PSC's statement that "the Commission is in a far superior position viv-à-vis the ALJ, the QFs, or Consumers, to state exactly what was intended by the Commission's prior orders."

attendant regulations, and that the PSC improperly made selective use of extrinsic evidence to resolve the ambiguities. We disagree.

"Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). A written contract is ambiguous if, after reading the entire document, its language can reasonably be understood in differing ways. See *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991).

The QFs assert that "[t]he ALI and MPSC . . . found the PPAs to be ambiguous for purposes of considering and accepting Consumers' parol evidence but not for purposes of considering and accepting the renewable QFs' parol evidence," citing two passages in the proposal for decision.

In the first instance cited, the ALJ stated that she "agrees with Consumers that merely recognizing the fact that a party has a differing interpretation of a contract provision does not create a reasonable ambiguity." Although the ALJ then goes on to mention witness testimony, the context shows that this was done not to resolve an ambiguity, but rather to confirm what the ALJ perceived as plain meaning.

In the second instance cited, the ALJ set forth testimony from Consumers' Director for Electric Transaction Strategies, and expressly afforded it "significant weight" as reflecting Consumers' experience in connection with the reasonableness of any expectations that Consumers would have continued to burn the same kind of coal for the life of the PPAs. Again, this was less to resolve an ambiguity than to confirm the conclusion that the PPAs' methodology was consistent with the PSC's previous avoided-cost determinations.

The PSC's order states that the PSC "is not persuaded the power purchase agreement language pertaining to avoided energy cost payments is unclear or ambiguous," and declares that the parties' intent "is easily determined from a review of the four corners of the document." Accordingly, the PSC declined to resort to any contract interpretation principles appropriate for resolving ambiguities. In arguing this issue, the QFs point to no reliance on extrinsic evidence in that decision. Their argument that the PSC made improper selective use of extrinsic evidence is thus without merit.

The QFs assert that Consumers' Director for Electric Transaction Strategies admitted that the PPAs were ambiguous. In fact, in the testimony in question, that witness merely agreed that a person could urge a meaning other than what he understood. In particular, when asked if "someone could assert that their understanding of the term 'base plants' means base plants . . . as configured at the time the QFs and Consumers signed the Power Purchase Agreements and burned the type of fuel that they were then burning," the witness replied, "Well, I suppose someone could assert that." That response was not an assertion that ambiguity existed, but rather a qualified agreement that controversy could exist. However, "that each party is advocating a definition that supports its desired outcome in a case of first impression does not make a phrase ambiguous." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 355 n 3; 596 NW2d 190 (1999).

To the extent that the PPAs state their intention to determine energy payment rates on the basis of "avoided costs" as described in the PURPA and attendant regulations, those references comport with the PPAs' own detailed terms for calculating avoided costs and the PSC's earlier decisional law. Neither authority demands locking in bituminous coal as the only fuel considered for calculating avoided energy costs. The federal authorities are referenced in the PPAs not to introduce additional contract terms, but to declare an intention to comport with applicable law. Those references do not establish that the PPAs' own terms are not self-sufficient.

Nor are we persuaded by the argument that, because "coal" is not defined in the PPAs, reasonable persons could differ on whether the parties used that term strictly to refer to the bituminous coal then exclusively in use, or any of the various forms of coal including the less-expensive sub-bituminous variety. The word "coal" is not subject to different definitions. One dictionary defines it as "[a] natural dark-brown to black solid used as a fuel, formed from fossilized plants and consisting of amorphous carbon with various organic and some inorganic compounds." *American Heritage Dictionary* (2d college ed, 1985), p 285. This concept is general enough to admit of variations in fuel efficiency and pollution potential. Bitumen is "[a]ny of various mixtures of hydrocarbons and other substances, occurring naturally or obtained by distillation from coal or petroleum . . . ." *Id.* at 183. Bituminous coal is a "mineral coal that burns with a smoky, yellow flame, yielding volatile bituminous constituents." *Id.* "Coal" is thus a general term, "bituminous coal" being one of the particulars under that broad umbrella. The presumption that contracting parties express their intent through the ordinary meanings of words, see *Haywood, supra*, means that the parties intended to speak broadly of "coal," in all its varieties, not that they used that general term to designate specifically "bituminous coal."

A tribunal need not resort to extrinsic evidence to take judicial notice that little is static in the energy production industry, in light of ever-changing or developing markets and legal rules.

For these reasons, the PSC correctly held that the PPAs are unambiguous, and thus that no resort to extrinsic evidence was appropriate to interpret them.

D. Consumers' Witness

The QFs argue that the PSC erred in accepting testimony from Consumers' Director for Electric Transaction Strategies. We disagree.

That witness testified that he had worked for Consumers as an engineer since 1976, and that, since 1997, he was responsible for developing strategies to manage Consumers' exposure to financial risks connected with its generating units and purchases of capacity from others.

The QFs emphasize that the witness admitted that he had no involvement in the negotiation, drafting, or execution of the PPAs in question. However, the PSC's interpretation of the PPAs did not depend on that witness's testimony concerning the parties' understanding during negotiations, but rather took into account the witness's testimony from his administrative perspective, providing background information on behalf of his employer. The ALJ specifically characterized that testimony as reflecting "Consumers' actual experience," not the witness's own.

For these reasons, we conclude that the PSC properly denied a motion to strike the testimony in question.

E. Funds Dating from 1998 to 2003

The order appealed from includes the following:

> [W]ith regard to the QFs' complaint . . . that the ALJ completely ignored their argument that Consumers unjustly enriched itself over a period of six years at the expense of the QFs, it is sufficient to note that this proceeding is limited to Consumers' 2004 PSCR plan and the period of time covered by the QFs' unjust enrichment argument relates to 1998 to 2003. Accordingly, the ALJ properly ignored this issue. The Commission, however, is not in a position to abrogate the contractual commitments of parties, even if this proceeding did address the 1998-2003 timeframe.

The QFs, citing equitable principles, argue that Consumers obtained a windfall from its ratepayers from 1998 to 2003, by collecting from them funds to cover the costs of bituminous coal while in fact compensating the QFs at a rate or rates based on less expensive sub-bituminous coal, and demand the equitable remedy of a constructive trust.

However, the QFs cite no authority for the proposition that the PSC is empowered to provide any equitable remedy. The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The caselaw consistently recognizes that, where some aspect of an order of the PSC demands equitable relief, the circuit court retains that power. See *City of Marshall v Consumers Power Co*, 206 Mich App 666, 680-681; 523 NW2d 483 (1994); *Attorney General*, *supra*, 165 Mich App at 235-236. Accordingly, even if the QFs could establish that it was entitled to some equitable relief in connection with their PPAs, the PSC properly held that it "is not in a position to abrogate the contractual commitments of parties. . . ."

The QFs additionally complain that the PSC required them to litigate this issue in this 2004 case, but then refused to decide it because it related to the several years preceding 2004. We disagree with that characterization of what transpired below.

The QFs filed a motion to strike and to limit the scope of proceedings on December 12, 2003, and attached their first amended complaint then pending in circuit court, which set forth the allegation that, since 1998, Consumers was underpaying the QFs for the reasons we rejected above concerning the kind of coal referenced in determining avoided costs. The motion requested that the PSC, in deference to the circuit court action, "deny Consumers' request for declaratory ruling and strike its supplement to application and supporting testimony and exhibits." The ALJ denied the motion, and the PSC denied leave to appeal.

Citing this history, the QFs assert that they were required to litigate their issues from years preceding 2004 in the instant case. However, the QFs acknowledge in their brief that MCL 460.6j does not authorize the PSC to resolve the QFs' claims for 1998 through 2003 in a 2004 PSCR case.

In fact, the ALJ's denial of the motion to limit the scope of proceedings anticipated the circuit court's decision to dismiss the action before it in deference to the PSC's primary jurisdiction. This Court's subsequent determination that the circuit court should stand prepared to resolve all claims not decided by the PSC, *Adrian Energy Assoc v Consumers Energy Co*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 2005 (Docket No. 255319), slip op at 1, harmonizes with the ALJ's determination not to narrow the issues before it in deference to the circuit court.

In fact, this Court's earlier decision addressed the pre-2004 issues:

> The MPSC expressly declined to dispose of plaintiffs' claims arising between 1998 and 2003, as the proceedings then before it only involved defendant's proposed PSCR plan for 2004. It appears from the record that the MPSC's determination that defendant did not under-compensate plaintiffs eliminates any support for plaintiffs' claims. However, the trial court should make that determination upon a more comprehensive review. [*Id.*, slip op at 8.]

This Court's earlier approval of the PSC's eschewing of the 1998-2003 issues, while noting that if they had any merit it would be for the circuit court eventually to determine, now stands as the law of the case.

F. Nature of the Proceeding

The QFs argue that ALJ violated their due process right to notice in sua sponte converting a proceeding for a declaratory ruling into a contested case proceeding. We disagree.

Proceedings before the PSC in this case began when Consumers filed an application for approval of a PSCR plan and monthly PSCR factors for 2004. A supplemental application followed two weeks later, announcing the existence of a contract dispute, and seeking "a declaratory ruling, pursuant to Rule 701 of the MPSC's Rules of Practice and Procedure, R 460.17701, confirming that Consumers Energy is properly calculating the energy charges payable pursuant to certain power purchase agreements between Consumers Energy and various qualifying facilities. . . ."

At a motion hearing before the ALJ, the QFs recounted, "This case originally started out as a PSCR case. And then Consumers, two weeks later, files . . . a declaratory judgment case asking to do both the PSCR and the declaratory ruling case." This case then proceeded to the ALJ's proposal for decision on October 7, 2004, and the PSC's final order in the matter of February 28, 2005.

In denying the QFs' motion to limit the scope of proceedings, the PSC stated as follows:

> The Commission finds that it has broad statutory authority to determine payment methods important to PSCR plan cases. The rate that Consumers pays the QFs is a relevant factor in determining Consumers' power cost; therefore, it is relevant in this case.

> The Commission finds that the QFs have not been deprived of due process. The original application and testimony filed by Consumers gave the QFs notice that their contracts were at issue in this case.
>
> Therefore, the Commission agrees with the ALJ's findings that the cost of power purchased from the QFs is relevant to the determination of the PSCR plan and properly before the Commission. The Commission also finds that the QFs were given proper notice and an opportunity to be heard. . . . The issuance of a declaratory ruling, as requested by Consumers, is not required because the cost of QFs power was properly noticed.

The QFs cite authority for the proposition that a party is entitled to notice, and opportunity to respond, in connection with proceedings involving that party, but do not say how much time, beyond the many months between proceedings as described above, they needed to adjust to having the subject matter of the request for a declaratory ruling merged into the PSCR case, or what opportunities were lost because of deficient notice, or otherwise explain why the notice they actually received concerning the progress of this case prejudiced their ability to present their position. "A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Because the QFs fail to show that they lost any opportunities, or otherwise lacked adequate time to participate gainfully in these proceedings, as the result of the ALJ's and PSC's decision to consider all issues before it in the context of a PSCR case, we reject this claim of error.

G. Discovery

The QFs make an issue of the denial of three motions to compel discovery, but provide little indication what the substance of any such motions were, or why they were denied. Moreover, in challenging the PSC's decision to deny leave to appeal the ALJ's decision in that regard, the QFs rely on mere generalizations, taking issue with none of the PSC's specific findings. Nothing in QFs' brief even attempts to describe, or make an offer of proof concerning, what relevant facts the QFs were unable to address because discovery was limited. As with the previous issue, this argument fails for want of proper presentation. A party may not leave it to the appellate court to "'unravel and elaborate for him his arguments . . . .'" *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). See also *In re Toler*, *supra*. Because the QFs merely announce that their rights were violated, without explaining precisely how, we must reject this claim of error.

IV. Federal Law

The QFs initially asserted that they were reserving issues relating to federal law for adjudication in a federal forum. The United States district court dismissed their federal claims in this matter without prejudice, on the ground that it expected the adjudication in this state to comport with federal requirements. The Sixth Circuit Court of Appeals in turn affirmed the decision not to exercise jurisdiction, but remanded the case to the district court with instructions to stay the proceedings until the conclusion of the state litigation. *Adrian Energy Assoc v Michigan Public Service Comm*, 481 F3d 414, 416 (CA 6, 2007). The Sixth Circuit declared that

"[p]laintiffs' pending state court action, along with the stay of the federal action, gives plaintiffs an adequate judicial forum to air their grievances, including any federal claims." *Id.* The court additionally declared as follows:

> We briefly address plaintiffs' claim that the Michigan Public Service Commission's February 28 Order conflicts with the Federal Power Act, the [PURPA] and regulations of the Federal Energy Regulatory Commission, and is therefore void by virtue of the Supremacy Clause of the United States Constitution. We agree, of course, that the Supremacy Clause bars states from acting within a zone of *exclusive* federal jurisdiction. However, none of the issues raised by plaintiffs in their complaint concerning the February 28 Order fall within the mandatory jurisdiction of the [FERC] or the federal courts. Plaintiffs do not contend in their complaint that the State of Michigan has improperly implemented the Acts in conflict with federal law; instead they challenge only the Michigan Public Service Commission's *interpretation* of the terms of the Power Purchase Agreements. Such challenges to a State's interpretation of a [PPA] are generally not preempted by federal law or regulations. Moreover, the state courts are fully competent to, and often do, address and correctly apply relevant federal law or regulations to the cases in their courts. [*Id.* at 420 n 6 (italics retained, citation omitted).]

The Sixth Circuit thus noted that the QFs did not allege any actual conflicts with federal law, but instead raised issues of only contract interpretation, which the PSC was fully competent to decide.

The QFs then successfully moved this Court to withdraw their issues from federal court and submit them with this appeal. After oral argument, this Court granted the QFs' motions for supplemental briefing specifically addressing their federal claims. The QFs put forward four arguments: (1) that the PSC erroneously declared that the PURPA and attendant regulations were irrelevant and immaterial, (2) that the PSC improperly subjected the PPAs to review for reasonableness and prudence, (3) that the PSC improperly revised its earlier orders relating to the PPAs, and (4) that the decision below resulted in unlawful discrimination against the QFs.

A. Relevance of Federal Law

The PSC did not, in fact, declare federal law to be irrelevant or immaterial in this matter. Instead, as discussed in Part III-A, *supra*, the PSC never lost sight of any applicable federal authority, but instead recognized that the federal authorities allowed utilities and QFs to contract for energy purchases, including how avoided costs would be calculated, and thus that the language of the PPAs, instead of regulatory default rules, governed in this instance.

The QFs emphasize that 18 CFR 292.304(d)(2) calls on QFs to decide between basing rates on (1) "avoided costs calculated at the time of delivery," or (2) "avoided costs calculated at the time the obligation is incurred." The QFs further note that their PPAs reference a fixed proxy plant for purposes of calculating avoided capacity costs, and argue that avoided fuel costs must likewise reflect the election to calculate costs on the basis of what existed when the contracts were executed. However, 18 CFR 292.301(b)(1) provides that nothing in the applicable rules

limits "the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required. . . ."

The QFs again emphasize that most of the PPAs expressly refer to "avoided costs" as set forth in the PURPA and attendant regulations, suggesting that the PPAs contained a regulatory formulation for determining them, despite the detailed contractual language covering that ground. However, those PPAs do not strictly invoke "avoided costs" as spelled out in the regulations, but rather "the concept of avoided costs." That broader wording indicates that the PPAs were intended to comport with the regulations, not that the specific, agreed-upon contractual terms were to be forfeited to regulatory default methodology.

For these reasons, this issue has no merit.

B. Reasonableness and Prudence

The QFs point out that federal regulations afford the QFs considerable insulation from state regulation. See 18 CFR 292.602(C)(1)(i) ("Any qualifying facility shall be exempted . . . from State laws or regulations respecting . . . [t]he rates of electric utilities"). The QFs cite authority for the proposition that "[s]tate commissions may not review existing PURPA contracts for reasonableness and prudence, particularly when doing so would have the effect of over-ruling the FERC's avoided cost rule." Our review of the cases cited indicates that they stand for the more general rule that the PURPA preempts a state commission from using its regulatory authority to modify the terms of a contract for avoided costs that has already been approved and put into effect.

However, the FERC itself has stated,

> It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts. [*West Penn Power Co*, 71 FERC p 61,153, 61,495 (1995) (footnote omitted).]

In this case, the ALJ's proposal for decision included the statement, "the QFs' interpretation [of the PPAs, locking in bituminous coal for purposes of calculating avoided energy costs] would unreasonably restrict Consumers' ability to comply with its statutory obligation to take actions to minimize its cost of fuel, pursuant to MCL 460.6j(3) and (6)." The PSC in turn, in crediting Consumers' decision to place greater reliance on sub-bituminous coal, stated, "Consumers is legally obligated by [MCL 460.6j] to take all appropriate steps to minimize coal costs charged to its PSCR customers. Consumers' failure to pursue appropriate measures to reduce its PSCR expenses could be deemed unreasonable or imprudent conduct that could lead to the disallowance of costs . . . ." Previously, while asserting its jurisdiction in this matter, the PSC stated,

> The Commission has an obligation pursuant to [MCL 460.6j] to review the reasonableness and prudence of Consumers' plans to acquire fuel and purchased power to meet the needs of its retail customers during 2004. Therefore, the reasonableness and prudence of the prices to be paid to the QFs under their power purchase agreements with Consumers are clearly matters that the Commission may review in a PSCR plan proceeding. Moreover, under PURPA the Commission is charged with determining Consumers' avoided cost.

The PSC thus resorted to the reasonableness inquiry not to guide its interpretation of the PPAs, but to confirm the soundness of the chosen interpretation on its face. The PSC simply recognized the legitimacy of Consumers' shifting to greater reliance on sub-bituminous coal. The PSC's assertion of jurisdiction concerned an assessment of the reasonableness of a PSCR plan, not of the terms of existing PPAs.

The QFs assert that the PSC held that Michigan law "required Consumers to minimize its fuel costs and to calculate the Plaintiff QFs' energy rate on the basis of those minimized fuel costs, without regard to consumers' federal obligation to pay the Plaintiffs avoided costs. . . ." However, the PSC did not declare that state law, demanding reasonableness and prudence, *required* the interpretation of the PPAs that the PSC afforded, but instead simply noted that its interpretation of the language of the PPAs comported with that requirement. The QFs complaint that there has been some deviation from the requirement that the QFs be paid avoided costs, was discussed and rejected in Part III-B. We need not revisit it here.

C. Prior Orders and Discrimination

In arguing that the PSC improperly deviated from its earlier orders in allowing Consumers to pay energy costs based on the actual sub-bituminous coal in use, while maintaining capacity payments reflecting an unmodified bituminous-coal burning-plant, the QFs effectively reiterate their argument, rejected in Part III-B, that the result was to split the proxy.

16 USC 824a-3(e)(1) authorizes the FERC to "prescribe rules under which . . . [QFs] are exempted in whole or part from . . . State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, . . . if the Commission determines such exemption is necessary to encourage cogeneration and small power production." 18 CFR 292.602(c)(1), in turn, provides that QFs are indeed exempt from state laws or regulations governing the rates, or financial and organizational regulation, of electric utilities. Subsection (b)(2) provides that the rules thus prescribed, in requiring utilities to offer to purchase electricity from QFs, "shall not discriminate against qualifying cogenerators or qualifying small power producers."

Once a state commission has approved a PPA between a QF and a utility, as consistent with avoided costs, any action by the state commission to reconsider that approval, or to prevent the utility of passing those rates on to its customers, on the basis of state authority is preempted by federal law. See *Freehold Cogeneration Assoc, LP v Bd of Regulatory Comm'rs of NJ*, 44 F3d 1178, 1194 (CA 3, 1995).

In this case, the PSC did not superimpose state regulations concerning rates, or otherwise reinterpret, the PPAs in question. Instead, it simply recognized that those agreements based

avoided energy costs on rolling-average costs of coal actually consumed, while not limiting that calculation to any one of several kinds of coal.

As noted above, this constitutes no splitting of the proxy, because the same facility is referenced for determining both avoided capacity and avoided energy costs. What is prohibited is an arrangement such as using a coal-fired plant to determine capacity payments and a nuclear-fueled plant to determine energy payments. This concern does not arise in this instance.

Nor does the analysis change if these assertions concerning splitting the proxy are recast as discrimination against QFs who unsuccessfully sought more favorable interpretations of their contracts. All QFs in this action are treated identically in this regard.

D. Conclusion

The separate presentation and argument relating to federal authorities has added nothing of significance to the related discussions occurring earlier in this opinion. The QFs merely repeat their assertions that the applicable federal authorities favor their interpretation of "avoided costs" as used in the PPAs, while again failing to show that the decision below does not comport with those authorities. No appellate relief is warranted.

V. Docket No. 261747

A. Rate Caps and the PSCR Factor

The Attorney General first argues that the PSC incorrectly interpreted the statute capping residential, and small commercial and industrial, rates as allowing appellee Consumers Energy to adjust its PSCR factors upward provided that those customers' overall rates were not increased. Binding authority now holds otherwise.

MCL 460.10d(1) states that, but for an exception not applicable here,

> the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.

Subsection (2) continues as follows:

> On and after December 31, 2003, rates for an electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 shall not be increased until the earlier of December 31, 2013 or until the commission determines, after notice and hearing, that the utility meets the market test under

> [MCL 460.10f] and has completed the transmission expansion provided for in the plan required under [MCL 460.10v]. The rates for commercial or manufacturing customers of an electric utility with 1,000,000 or more retail customers with annual peak demands of less than 15 kilowatts shall not be increased before January 1, 2005. There shall be no cost shifting from customers with capped rates to customers without capped rates as a result of this section. In no event shall residential rates be increased before January 1, 2006 above the rates established under subsection (1).

The Attorney General reports that the PSC set a PSCR factor of $0.00257 per kilowatt hour (kWh) for Consumers' residential customers, and of $0.0027 per kWh for commercial and manufacturing customers with annual peak demands of less than 15 kilowatts. The PSC reports that Consumers requested approval of a PSCR factor for 2004 of $0.00449 per kWh for the purpose of recovering its power supply costs, but then sought approval for a modified PSCR factor of $0.00350 per kWh for residential customers, and of $0.00379 per kWh for small commercial and industrial customers, on the ground that the surcharge for the decommissioning of the Big Rock nuclear plant would expire at the beginning of 2004, and thus the PSCR factor to be applied to the capped customers should be increased by the amounts reflecting the former decommissioning surcharge.

The Attorney General protested that Consumers should not be allowed to increase the PSCR factors for residential or small commercial and industrial customers above the levels established in 2000 to balance the termination of the decommissioning surcharge.

In approving Consumers' plan and proposed PSCR factor, the PSC stated that the applicable rate cap did not foreclose netting increases against decreases, and reported the expectation that Consumers' customers would only be charged a PSCR factor that would recover as much of its PSCR expenses as was consistent with the rate caps.

The Attorney General argues that the term "rates" in MCL 460.10d(2) refers to each individual component of a rate charged by a utility, and that each component is thus capped under the statute. This Court recently rejected this argument as "untenable," on the ground that otherwise "the PSC could not change a utility's rate under any circumstances during the period in which the rate was capped." *In re Application of Detroit Edison Co*, 276 Mich App 216, 227; ___ NW2d ___ (2007), lv pending. This Court observed that MCL 460.10d(8) prohibits the PSC, for the period specified in subsection (2), from authorizing any fees or charges that would cause the residential rate reduction required under subsection (1) to fall below a specified percentage, and decreed that the PSC may "authorize raises in individual components of a rate as long as the raises do not increase an overall rate above the (reduced) rate mandated by the legislature as set forth in MCL 46010d(1) and the capped rate mandated by MCL 460.10d(2)." *Id.*

Because the latter case confirms the PSC's judgment as regards this issue, we reject this claim of error on that basis.

B. Transmission Costs

The Attorney General argues that the PSC erred in allowing Consumers to include transmission costs among those to be recovered through the PSCR factor. Binding authority again now holds otherwise.

This Court has held that "[n]either . . . MCL 460.6j nor any accounting rule prohibits an adjustment to a PSCR clause to account for transmission costs," and that, "[o]bviously, power must be transmitted for it to be distributed to a utility's customers." Accordingly, "[p]ayments made . . . for transmission costs, which are made to comply with federal law, are necessarily 'transportation costs,' and therefore are properly recoverable in a PSCR clause. *In re Application of Detroit Edison Co, supra* at 229, citing MCL 460.6j(1)(a). The PSC's practice of allowing a utility to recover transmission costs in a PSCR proceeding thus falls within its broad ratemaking authority. *Id*. The PSC's reassertion of authority to include transmission costs in the instant PSCR clause is appropriate.

The Attorney General alternatively asserts that if the PSC has the general authority to allow transmission costs to be included in PSCR calculations, it was nonetheless unreasonable to do so in this instance. All the Attorney General provides for this alternative position is general argument relating to policy considerations, not the particulars of this case

Because the PSC has the authority to allow recovery of transmission costs through a PSCR factor, and because the Attorney General fails to show that its decision to do so in this instance was unreasonable, we reject this claim of error.

VI. Docket No. 261747

A. Rate Caps and the PSCR Factor

The Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM) first present an argument parallel to that of the Attorney General concerning the PSC's decision to allow Consumers to adjust its PSCR factor by amounts commensurate with expired decommissioning surcharges. Because we resolved this issue in Part IV-A, we need not re-address it here.

Beyond general objections to "backfilling," as the parties occasionally call this practice, MEC/PIRGIM argue that, in this instance, the PSCR factor was increased without reference to any actual costs statutorily authorized for recovery through that mechanism. See MCL 460.6j(1). However, Consumers' Supervisor of Planning and Financial Analysis stated as follows:

> In my direct testimony, I explained that, although the Company proposed use of a $0.00449 per kWh PSCR factor, it would only apply that factor up to the appropriate caps for residential and small commercial and industrial . . . customers. I also noted that, to the extent any other, non-PSCR rate decreases took effect during 2004, this would affect the amount of the proposed $0.00449 per kWh PSCR factor that the Company would apply for the capped customers. Because the Big Rock nuclear decommissioning surcharge will no longer be in

> effect starting January 1, 2004, the amount of the PSCR factor that will be applied to the capped customers will increase by the amount of the terminated decommissioning surcharge. This will not result in an increase to the total rate, which is capped per 2000 PA 141.[4]

Appellants do not argue that Consumers wholly failed to support its initial position that a PSCR factor of $0.00449 per kWh was needed. Consumers' witness's testimony provided substantial evidence to support the conclusion that, under the rate caps, its PSCR factor was lower than would compensate Consumers' for its actual, otherwise recoverable, energy costs, and that the expiration of the decommissioning surcharge invited an upward adjustment in the PSCR factor so that it better reflected those costs.[5]

B. Costs of Spent Nuclear Fuel

MEC/PIRGIM argue that the PSC erred in striking substantial portions of the evidence offered by their expert concerning the management of spent nuclear fuel, then including the disposal costs of such fuel in the resulting rates. However, this Court has held that "in the absence of evidence that [the utility] acted unreasonably and imprudently with regard to the collection of [spent nuclear fuel] costs, [the PSC] had no authority to impose additional remedies such as those suggested by appellants." *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 375; 738 NW2d 289 (2007). See also *id.* at 379-380 ("Appellants cite no statute or caselaw that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the PSCR application to adopt remedies such as those suggested by appellants.").

Because this Court has held that consideration of appellants' recommendations and proposed remedies connected with disposal of spent nuclear fuel is beyond the scope of a PSCR proceeding, the PSC did not err by striking such recommendations and proposed remedies in this instance.

MEC/PIRGIM raise several additional issues in connection with how the PSC treated costs relating to the disposal of spent nuclear fuel, based on a contract with the federal Department of Energy. We need not address those issues here, however, because they have been decided, uniformly in favor of the PSC's position, in an earlier, binding case of this Court. *In re Application of Detroit Edison Co, supra* at 240-241, citing *In re Application of Indiana Michigan*

---

[4] 2000 PA 141, sometimes referred to as "Act 141," along with its companion, 2000 PA 142, amended the public service commission act, grafting onto it the Customer Choice and Electricity Reliability Act. MCL 460.10 *et seq.*

[5] The PSC reported on the basis for Consumers' general request for a factor of $0.00449 per kWh, and that the upward adjustments occasioned by the expiration of the decommissioning surcharges, as limited by the statutory overall-rate caps, brought residential customers a PSCR factor of $0.00350 per kWh, and small commercial and industrial customers a factor of $.00379, both falling below the $0.00449 for which Consumers demonstrated a need.

Power Co, supra. In this case, the PSC correctly disposed of these issues below by reiterating that questions relating to the costs of disposal of spent nuclear fuel were beyond the scope of its proceedings.

C. Precedents

MEC/PIRGIM argue that the PSC over-relied on nonbinding precedents in reaching its decision in this case. We disagree.

In discussing appellants' exceptions to the proposal for decision, the PSC cited two of its earlier cases, and this Court's unpublished opinion affirming them. The PSC expressed its intention to decide appellants' issues in harmony with those decisions.

This Court has recently reaffirmed that recourse to existing PSC decisions, and this Court's unpublished affirmances of them, is proper consultation of persuasive, though not binding, authority. *In re Application of Detroit Edison Co, supra* at 229 n 14 and accompanying text; *In re Application of Indiana Michigan Power Co, supra* at 380-381. Appellants cite no statement of the PSC that suggests that the PSC mistakenly treated this Court's unpublished decisions as mandatory, instead of persuasive, authority, and we have found none. The PSC thus did not err in deciding the instant case so as to comport with its earlier affirmed decisions.

VII. Conclusion

For the reasons discussed above, we affirm each of these three consolidated cases in its entirety.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto