STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY,

Appellees.

UNPUBLISHED
August 7, 2008

No. 275526
MPSC
LC No. 00-014526

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, ADA COGENERATION LIMITED PARTNERSHIP, and MICHIGAN POWER LIMITED PARTNERSHIP,

Appellees.

No. 275527
MPSC
LC No. 00-013917

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

In these consolidated cases, appellant Attorney General appeals as of right two orders of appellee Public Service Commission (PSC). Docket No. 275526 (PSC Case No. U-014526) concerns the PSC's determination of appellee Consumers Energy (Consumers) net stranded costs for 2004. Docket No. 275527 (MPSC Case No. U-013917) concerns the authorization of Consumers' power supply cost recovery (PSCR) reconciliation for 2004, and more specifically the PSC's decision to allow Consumers to use third-party wholesale revenues to offset its 2004 stranded costs. We affirm both orders.

I

A

In 1996, the PSC instituted the retail open access (ROA) program to allow retail customers of electric utilities to purchase electricity from alternate suppliers. This electricity would be generated by the alternate suppliers and transmitted to customers through the existing system. The ROA program began as an experimental program offered by Consumers and Detroit Edison under the PSC's direction. The PSC recognized that existing utilities would incur costs as a result of the restructuring and transition to a competitive electric supply environment, and determined that the utilities should be able to recover these costs. The PSC labeled these "stranded costs," and defined them as costs incurred during the regulated era that will be above market prices, and costs associated with the transition to competitive markets. It determined that these costs should include: "(1) regulatory assets, consisting of unrecovered costs of demand-side management programs and other similar costs, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retraining costs, and (5) costs related to the implementation of restructuring." *Consumers Energy Co v Pub Service Comm*, 268 Mich App 171, 181; 707 NW2d 633 (2005), citing *In re Electric Utility Industry Restructuring*, unpublished opinion and order of the PSC, issued June 5, 1997 (Case No. U-011290), pp 6-14.

After a number of orders were issued implementing the program, our Supreme Court found that the PSC had exceeded its statutory authority in establishing the program. *Consumers Power Co v Pub Service Comm*, 460 Mich 148; 596 NW2d 126 (1999). Partly in response to the Supreme Court's decision, the Legislature enacted the customer choice and electricity reliability act (CCERA), MCL 460.10 *et seq.* The act specifically provided that prior PSC orders concerning alternative energy providers are enforceable by the PSC, MCL 460.10a(12),[1] and contained additional provisions concerning stranded costs. MCL 460.10a(1) provided:

> No later than January 1, 2002, the commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission.

The act gave the PSC broad discretion to determine stranded costs:

> The commission shall consider the reasonableness and appropriateness of various methods to determine net stranded costs, including, but not limited to, all of the following:
>
> (a) Evaluating the relationship of market value to the net book value of generation assets and purchased power contracts.

[1] Previously MCL 460.10a(5).

(b) Evaluating net stranded costs based on the market price of power in relation to prices assumed by the commission in prior orders.

(c) Any other method the commission considers appropriate. [MCL 460.10a(17).[2]]

After the enactment of the act, the PSC adopted a methodology to determine net stranded costs, ultimately choosing the methodology advocated by the PSC Staff (Staff):

> The Commission finds that it should adopt the Staff's proposed methodology for determining net stranded costs. The Staff has proposed the most direct approach to determining net stranded costs, i.e., costs that would have been recovered under regulation that cannot be recovered under competition, offset by mitigation (such as market sales of capacity and energy that are freed up when customers choose alternative suppliers) and stranded benefits (such as generation assets with below-market costs). [*In re Implementation of Provisions of 2000 PA 141*, unpublished opinion and order of the PSC, issued December 29, 2001 (PSC Case No. U-012639), 10.]

The methodology advocated by the Staff was outlined in the order:

> The Staff proposed that the Commission annually compute net stranded costs on a historical basis. *Stranded costs would be the difference between each year's revenue requirement associated with fixed generation assets, generation-related regulatory assets, and capacity payments associated with (purchase power agreements) and that year's revenues available to cover those costs. . . . When the revenue requirement for a specific year exceeds the revenues available to cover those costs, the utility has stranded costs for that year.* [*Id*. at 4-5 (emphasis added).]

B

A utility is entitled to recover the reasonable costs incurred in generating electricity. MCL 460.6j(2) provides that the PSC may, but is not required to, incorporate a PSCR clause in the rate schedule of an electric utility. The 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). If the PSC has approved a PSCR clause for a utility, it collects its power costs on a yearly basis. Prior to the beginning of the year, the utility presents its plan to acquire power to serve its customers, either through its own generation or through power purchase contracts. The plan will indicate the company's expected sales and

[2] Previously MCL 460.10a(10).

propose a per-unit cost of electricity, the "PSCR factor", that it wishes to charge. MCL 460.6j(1)(b) & (3). A review is then conducted, as a "contested case" proceeding, and the PSC establishes PSCR factors. MCL 460.6j(5).[3] After the conclusion of the year, the PSCR calculation of costs is reconciled with the actual collection of costs in a "power supply cost reconciliation", and the PSC assesses whether the utility has acquired power in a reasonable and prudent manner. MCL 460.6j(12)-(16). If the utility is found to have overrecovered, it must refund or credit the overcollection, plus interest. MCL 460.6j(14) & (16). If it has underrecovered, it may surcharge its customers, and recover interest. MCL 460.6j(15) & (16).

However, as part of its effort to deregulate the electric power industry, the Legislature included a rate freeze provision in § 10d of the CCERA:

> (1) Except as otherwise provided under subsection (3) or unless otherwise reduced by the commission…, 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.
>
> (2) 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 section 10f and has completed the transmission expansion provided for in the plan required under section 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). [MCL 460.10d.]

Thus, as to residential customers,[4] the legislation resulted in a 5 percent reduction in rates. Those rates were to be frozen at that level until December 31, 2003, and capped at the reduced

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[3] PSC orders concerning PSCR factors can also be entered during a "general rate case," see MCL 460.6j(18). The instant proceeding does not involve such a case.

[4] MCL 460.10d(2) contemplates three classes of customers: manufacturing and commercial customers with annual peak demands of 15 or more kilowatts, manufacturing and commercial customers with annual peak demands of less than 15 kilowatts, and residential customers.

level until January 1, 2006. Previously, this Court noted the apparent conflict between the flexibility envisioned in the operation of PSCR clauses pursuant to MCL 460.6j and the rate freeze imposed by MCL 460.10d(1), and resolved it by concluding that "the clear intent of the Legislature was to temporarily supplant the usual PSCR process so as to implement the rate freeze…." *Attorney General v Pub Service Comm*, 249 Mich App 424, 432; 642 NW2d 691 (2002). Accordingly, MCL 460.10 did not repeal MCL 460.6j, "but rather suspend[ed] its operation for a specified period." *Id*., 249 Mich App at 433.

C

The two PSC cases that are consolidated in the instant appeal concern Consumers' PSCR reconciliation proceeding from 2004 (PSC Case No. U-013917) and Consumers' application for approval of a determination of its net stranded costs for the year 2004 (PSC Case No. U-014526). The Attorney General challenges the determination that Consumers had $23,775,000 in stranded costs for 2004, and the PSC's decision to apply a portion of the approximately $53 million in 2004 third-party wholesale revenues from outside sales of electricity to offset the calculated stranded costs, rather than to apply the entire amount to Consumers' PSCR calculations to increase the overrecovery in 2004 from Consumers' small and large commercial customers and to decrease the underrecovery in 2004 from Consumers' residential customers.

In the proceedings before the ALJ, Consumers offered evidence showing the calculation of its net stranded costs based on the application of the PSC's formula as enunciated in prior cases. The Attorney General asserted that simple application of the formula is insufficient, and that Consumers was required to produce additional evidence showing that the revenue shortfall was due to deregulation rather than other causes. The ALJ concluded that the PSC's definition of net stranded costs requires the showing advocated by the Attorney General, and issued a decision recommending that the PSC find that Consumers had no stranded costs for 2004 "because it has not shown it has any unrecovered costs due to competition." Both Consumers and the Staff challenged that part of the recommendation.

The PSC rejected the ALJ's interpretation of its prior decisions, and concluded that Consumers "followed the approved procedure and submitted the stranded costs data required by the Commission's prior cases." The PSC adopted the figure and netting process proposed by Consumers, and reiterated its finding expressed in Consumers' most recent rate case, that "Consumers' production fixed costs that had been stranded when customers moved to choice service have now been reallocated to customers in the bundled service rate classes. This reallocation of production fixed costs in this rate case now allows Consumers full recovery of its production fixed costs on a going forward basis. Therefore, production fixed costs cease to be stranded."

II

A

The Attorney General first argues that the PSC's decision to allow recovery of $23,775,000 in net stranded costs is contrary to MCL 410.10a(1) and (12), as well as to the PSC's own definition of stranded costs as set forth in Case No. U-012639, and that the PSC should have adopted the analysis of the Administrative Law Judge (ALJ) and found that, in order

to show it had net stranded costs, Consumers had to demonstrate not only that that its revenue requirements (costs) exceed revenue contributions, but that the underrecovery specifically resulted from competition, rather than from any other cause, including the rate cap. The Attorney General contends that an underrecovery incurred as a result of a legislative rate cap is not a cost "that would have been recovered under regulation that cannot be recovered under competition." Accordingly, it argues that the PSC's order is inconsistent with its own definition of stranded costs, and thus arbitrary and capricious.

B

In *In re Application of Detroit Edison Co*, 276 Mich App 216, 224-225; 740 NW2d 685 (2007), this Court explained:

> The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, 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. *Michigan Consolidated Gas Co v Pub 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 satisfactory 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 Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). And, of course, an order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Service Com*, 377 Mich 259, 279; 140 NW2d 515 (1966). In sum, a final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

The Supreme Court recently addressed "the proper standard, under Michigan law, for reviewing an agency's construction of a statute," in *SBC Michigan v Public Service Comm (In re Complaint of Rovas Against SBC Michigan)*, __ Mich __ ; __ NW2d __ (Docket Nos. 134493, 134500, filed 7/23/08), slip op at 13. There, the Court stated that the proper standard of review for agency statutory construction is found in *Boyer-Campbell v Fry*, 271 Mich 282; 260 NW 165 (1935), which addressed the proper construction of the General Sales Tax Act. "The *Boyer-Campbell* Court held that

> the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*Boyer-Campbell, supra* at 296-297 (internal citations and quotation marks omitted).]

> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.
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> *Boyer-Campbell* remains good law . . . [*SBC Michigan, supra,* slip op at 13-14.]

As this Court noted in *Consumers Energy Co v Pub Service Comm,* 268 Mich App 171, 180-181; 707 NW2d 633 (2005), there is "no express statutory definition of 'stranded costs,'" and "the Legislature granted the PSC broad power to determine stranded costs in MCL 460.10a(1)." Further, we observe that the ALJ was charged with the task of applying the PSC's prior rulings consistent with the act. The PSC's decision that the ALJ's recommendation was inconsistent with its prior cases defining net stranded costs is the decision entitled to "respectful consideration." *SBC Michigan, supra,* slip op at 13-14.

C

We reject the Attorney General's argument that the PSC was bound to any particular definition of net stranded costs. Although the portion of MCL 460.10a(12) upon which the Attorney General relies does indeed validate the PSC's prior orders, it does not establish them as the statutory standard. Rather, MCL 460.10a(17) gives the PSC broad latitude to determine stranded costs, specifically authorizing the PSC to consider any stranded cost determination method "the Commission considers appropriate." Nothing presented by the Attorney General suggests that the PSC is bound by prior methodologies when determining net stranded costs, and the PSC was not, as the Attorney General suggests, required to retain its initial 1997 method for determining stranded costs. We further observe that the PSC did not strictly adhere to its initial methodology when it decided PSC Case No. U-012639, over Consumers' objections in that case.

Further, although the Attorney General relies on certain language found in the PSC's prior discussion of the applicable standard, the order here is consistent with the PSC's order in Case No. U-012639, and the methodology actually used in that case and in later cases. As noted by the Staff in its exceptions to the proposal for decision below, the PSC did not accept the Staff's initial theory in PSC Case No. U-012639 that the calculation of stranded costs based on the revenue requirements method would be the "maximum level of stranded costs" and that the company would then have to justify its losses in a separate second step in order to recover these costs.[5] The PSC has instead consistently used the revenue requirements method "mathematically" to determine stranded costs. Thus, after reviewing the PSC's previous decisions concerning the calculation of net stranded costs, we find that the PSC's choice in the instant case to continue its use of the revenue requirements method without the imposition of a

[5] We find persuasive Consumers' contention that such a requirement would likely invite endless argument, because such a standard seems extremely difficult to apply consistently in a predictable manner.

second requirement advocated by the Attorney General is consistent with its previous decisions, and not unreasonable. The statute allows the PSC the discretion to employ this methodology.

While the PSC did not engage in a lengthy discussion of its reasoning, it clearly recognized the issue, stating each party's position, and observing that this is the first case involving the computation of net stranded costs under a partially functioning PSCR process, i.e., where the PSCR process has been reinstated after the rate freeze, but the caps are still operative. The PSC chose to continue to apply the formula it had previously employed, notwithstanding that some of the revenue shortfall might be attributed to the partial functioning of the PSCR process due to rate caps.

We reject the Attorney General's argument that this is contrary to the CCERA. Rate caps, a legislatively mandated component of restructuring under MCL 460.10d(2), arguably fall within one of the five categories of stranded costs established in PSC Case No. U-011290, namely, "costs related to implementing restructuring." With the earlier regulation, and a fully functioning PSCR process, Consumers would have been able to recover its actual costs for service. After the imposition of competition and the concurrent rate caps, it could not do so. More important, however, is that the Attorney General has not shown how the PSC's approach to computing net stranded costs in Case No. U-014526, and its allocation of those costs in the PSCR reconciliation proceeding, Case No. U-013917, have resulted in rates in violation of the statutory caps.

D

The Attorney General argues that the PSC's decision violates MCL 460.10d(2) "at least indirectly," but provides virtually no discussion of its contention that the PSC's decision to allow the underrecovery as stranded costs and apply $24 million of the third-party wholesale revenues against Consumers' stranded costs violated MCL 460.10d(2). "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham*, *supra*. Accordingly, we need not address this issue. *Wilson*, *supra.*

In any event, were this issue properly before us, the Attorney General has not shown a clear violation of MCL 460.10d(2). This Court has held that the overall rate is what is controlling when deciding whether a PSC order is in violation of MCL 460.10d. "The import of the language of MCL 460.10d(8)[6] is that the PSC may authorize raises in individual

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[6] MCL 460.10d(8) provides:

> Except as provided under subsection (3), until the end of the period described in subsection (2), the commission shall not authorize any fees or charges that will cause the residential rate reduction required under subsection (1) to be less than 5%.

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 460.10d(1) and the capped rate mandated by MCL 460.10d(2)." *In re Application of Detroit Edison Co, supra* at 227. Here, the Attorney General does not contend that Consumers' residential or small commercial customers' overall rate for electricity increased during 2004 in violation of the statute. Thus, the Attorney General has not shown a clear facial violation of MCL 460.10d(2).

III

The Attorney General also contends that the PSC erred when it allowed Consumers to offset its $23,775,000 in alleged stranded costs with revenues from third-party wholesale sales, arguing that the third-party revenues cannot be used to offset the stranded costs because they are not "mitigating revenues" generated due to the loss of Consumers' customers to the ROA market. Relying on language in a prior PSC opinion, the Attorney General argues that the PSC should have required that Consumers show that the third-party sales revenues were a result of Consumers customers using alternative suppliers.

The Attorney General argues that the PSC previously "defined" mitigation as "market sales of capacity and energy that are freed up when customers choose alternative suppliers" and thus contends that *only* those revenues that meet this definition may offset stranded costs. However, this language was used in PSC Case No. U-012639 as one example of a mitigating factor, not as an all-encompassing definition or standard. *In re Implementation of Provisions of 2000 PA 141, supra* at 10. The Attorney General seeks to elevate a parenthetical example of mitigation to stranded costs to a definition that would trump any other stranded cost methodology adopted by the PSC. The PSC's decision to follow Consumers' proposal concerning the allocation of third-party sales was consistent with its previous orders allocating such revenues to offset stranded costs during the rate freeze. See generally PSC Case Nos. U-012369, U-013380, U-013720, U-014098. The Attorney General does not address prior PSC decisions to allocate third-party revenues to offset stranded costs or discuss why the 2004 PSCR reconciliation should represent a change from these past cases.

We reject the Attorney General's assertion that the PSC's orders are clearly contrary to MCL 460.10a(1) and 460.10a(12). Neither provision requires the PSC to adopt a method that requires evidence that the third-party sales are related to the loss of customers to the ROA market before they can be allocated to offset stranded costs. To the contrary, MCL 460.10a(17) provides that the PSC can use any method that it considers appropriate when adopting a stranded cost calculation method.

In addition, even were we to accept that the PSC must find a relationship between a loss of customers to the ROA market and the generation of third-party whole sales, such a determination is supported by the evidence here. The Attorney General does not discuss what, if

not the ROA program, caused the excess capacity that was sold to third parties, or refute the testimony offered in support of the allocation.[7]

Thus, the Attorney General has failed to demonstrate that the PSC's decision to allocate a portion of the third-party wholesale sales to offset Consumers' stranded costs was clearly unlawful or unreasonable.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder

[7] While the PSC did not explicitly adopt the testimony of Energy Michigan's expert, the expert concluded that all third-party sales revenues were, in fact, created by the sale of power freed up by ROA sales. He maintained that if Consumers were required to provide full service to all ROA customers, the level and amount of net proceeds from third-party sales would not have occurred. This conclusion was predicted by the PSC in 2001, when it noted that "the revenues from third-party sales can be expected to increase as customers choose ROA service and the utilities sell the freed-up capacity and energy on the market." *In re Implementation of Provisions of 2000 PA 141*, *supra* at 18.