

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and MICHIGAN CONSOLIDATED GAS
COMPANY,

Appellees.

UNPUBLISHED

October 14, 2008

No. 275663

MPSC

LC No. 00-013898

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Appellant Attorney General appeals as of right from the December 21, 2006 order of appellee Michigan Public Service Commission (PSC) authorizing appellee Michigan Consolidated Gas Company (Mich Con) to add Uncollectible Expense True-up Mechanism (UETM) surcharges to the rates it charged customers for natural gas. We affirm.

The PSC adopted the UETM mechanism in an April 28, 2005 order in this case granting rate relief to Mich Con. The basic framework of that mechanism is as follows. The PSC estimates an amount of “uncollectible expense”¹ to include in setting Mich Con’s rates for a calendar year. After that calendar year has ended, the actual uncollectible expense for the year is determined and compared with the projection. If the actual uncollectible expense exceeds the estimate, UETM surcharges will be imposed on ratepayers to attempt to collect 90 percent of the difference between the actual and estimated uncollectible expense. Conversely, if the actual expense is less than estimated, credits will be applied to attempt to return 90 percent of the difference.² However, for the initial period in 2005 underlying this case, only the actual and estimated uncollectible expense from May to December was considered. The actual

¹ Uncollectible expense essentially refers to the amount of unpaid utility bills remaining after Mich Con has exhausted its collection efforts with regard to ratepayers unable or unwilling to fully pay those bills.

² The rationale for using 90 percent of the difference is to give Mich Con an incentive to maximize its collection efforts to reduce its uncollectible expense.

uncollectible expense for that period exceed the estimated expense included in Mich Con's rates. As a result, the PSC approved Mich Con's request for surcharges to its rates for 2007 in the December 21, 2006 order being appealed.

The Attorney General argues that the UETM mechanism is unlawful because it is not within the scope of the PSC's statutory authority but rather constitutes an impermissible retroactive ratemaking mechanism. We disagree.

Under MCL 462.25, rates prescribed by the PSC are presumed to be lawful and reasonable. *In re Application of Detroit Edison Co*, 276 Mich App 216, 224; 740 NW2d 685 (2007). A party aggrieved by a PSC order has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. *Id.* To establish the unlawfulness of a PSC order the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in exercising its judgment. *Id.* An order is unreasonable if unsupported by the evidence. *Id.* Further, the PSC "has broad ratemaking authority" and "is not bound by any single ratemaking formula, and may make pragmatic adjustments when warranted by the circumstances of the particular matter before it." *Id.* at 243. A rate-design decision should not be disturbed absent a showing that it is "arbitrary, capricious, or an abuse of discretion." *Id.*

This Court's opinion in *Attorney General v Michigan Pub Service Comm*, ___ Mich App ___, ___ NW2d ___ (Docket Nos. 275135 & 275198, issued April 10, 2008, approved for publication May 27, 2008), released after the filing of all the briefs on appeal in this case, requires rejection of the Attorney General's position that the UETM mechanism was outside the PSC's statutory authority and violated the rule against retroactive ratemaking. In that case the Attorney General contended, paralleling its contention regarding the UETM, that an "equalization mechanism" for pension and other post-employment benefits was improper as outside the PSC's authority and as constituting improper retroactive ratemaking. *Id.* at 1-2, 9. In its relevant aspects, the UETM mechanism at issue in this case parallels the equalization mechanism at issue in *Attorney General*. Specifically, both mechanisms involve the inclusion of an initial projection of the relevant expense (uncollectible expense in this case and pension and other post-employment expenses in *Attorney General*) in regulated rates with the actual such expense later being compared with that initial amount and a difference between the two rates being deferred for future recovery. See *id.* at 9.

This Court rejected the challenge to the equalization mechanism in *Attorney General*, stating:

The Attorney General asserts that approval of this equalization mechanism constituted prohibited retroactive ratemaking. The PSC concluded that pursuant to its general ratemaking powers it was authorized to adopt a ratemaking formula that included this equalization mechanism, which was designed to ensure, to the extent possible, that rates would match expenses. We note that the rate is presumed, *prima facie*, to be lawful and reasonable. *In re Detroit Edison Application, supra* at 224. The Attorney General has failed to overcome this presumption. In *Attorney General v Pub Service Comm*, 262 Mich App 649, 656; 686 NW2d 804 (2004), this Court held that deferred expenses were an expense of the year to which they were deferred, and were therefore prospective. Specifically, this Court noted, "when capitalized expenditures are amortized, the

amortization becomes a current expense even though it reflects expenditures that were capitalized in the past.’” *Id.*, quoting *Ass’n of Businesses Advocating Tariff Equity v Pub Service Comm*, 208 Mich 248, 261; 527 NW2d 533 (1994). There is no sound basis for distinguishing the equalization mechanism approved by the PSC in this case from deferred expenses affirmed in prior caselaw. Accordingly, the deferral of pension and other post employment benefit expenses to a subsequent year did not constitute retroactive ratemaking. [*Attorney General, supra* at 9.]

Applying this template to the present case, as with the equalization mechanism in *Attorney General*, the PSC acted within its general ratemaking powers in adopting the UETM mechanism to ensure that the portion of rates attributable to uncollectible expense would substantially match actual uncollectible expense. Further, the UETM mechanism as designed to defer 90 percent of the difference between initially projected and actual uncollectible expense for a given period of time to a future year does not involve retroactive ratemaking because the deferred expenses are deemed expenses of the year to which they are deferred and, thus, are recovered on a prospective basis. Particularly, under the rationale of *Attorney General*, the 2005 uncollectible expense deferred to 2007 under the order being appealed is a 2007 expense collected on a prospective, not retroactive, basis in 2007.

In light of our resolution of the merits of the substantive issue presented by the Attorney General, we need not consider whether the PSC erred in considering the Attorney General’s arguments to be barred as untimely.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly