STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, Appellants,	UNPUBLISHED November 20, 2008
v	No. 278798 Public Service Commission
MICHIGAN PUBLIC SERVICE COMMISSION and THE DETROIT EDISON COMPANY, Appellees.	LC No. 00-014702

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Appellants Michigan Environmental Council (MEC) and Public Interest Research Group in Michigan (PIRGIM) appeal a portion of the September 26, 2006, order of the Michigan Public Service Commission (PSC) that approved the 2006 power supply cost recovery (PSCR) plan filed by The Detroit Edison Company (Detroit Edison). We affirm.

I. Facts

This case arises from the PSC's orders in response to Detroit Edison's application for approval of a PSCR plan for 2006. 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. Before 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 such as those referenced above. The plan will indicate the company's expected sales and 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). 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 has been 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).

In the instant case, appellants entered the PSCR case below as intervenors. Among the issues raised by appellants concerning Detroit Edison's proposed PSCR plan, they offered evidence and testimony from two expert witnesses concerning alleged deficiencies in the PSCR plan due to the lack of any included demand-side management (DSM)[1] or usage reduction programs. Appellants also offered testimony concerning the effectiveness of energy efficiency programs, which allegedly could "ameliorate several costs claimed by utilities under Act 304, including costs of fuel, purchased power, transmission costs, and emission costs."[2]

However, Detroit Edison and the PSC Staff (Staff) subsequently filed motions to strike the testimony and exhibits of MEC/PIRGIM's witnesses. They argued that the PSC had previously been presented with testimony in the context of an Act 304 proceeding, albeit one involving a gas cost recovery proceeding, and had determined that evidence regarding energy efficiency measures that the utility could offer was not relevant in the context of an Act 304 case. Appellants responded with a request for a declaratory ruling. They claimed that the development and implementation of energy efficiency programs is both fully lawful under Act 304, and in fact should be regarded as an ongoing duty of any utility subject to Act 304, and that the development and implementation of energy efficiency programs is also directly relevant to the proper functioning of Act 304. The administrative law judge (ALJ), declined to rule on the request for a declaratory ruling, and granted the motions to strike appellants' evidence on the ground that it was not relevant in the context of an Act 304 proceeding.

The PSC subsequently approved Detroit Edison's PSCR plan and factors. It held that the PSCR plan was reasonable and prudent. As to the issues germane to this appeal, the PSC affirmed the ALJ's decisions with the following explanation:

> The Commission is persuaded that MEC/PIRGIM's application for leave to appeal is appropriate and should be granted. Because the motion for declaratory ruling was directed to both the ALJ and the Commission, and because all of the evidence offered by this intervenor has been stricken, the Commission finds that addressing these motions will advance the timely resolution of this proceeding. Rule 337(2)(a).

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[1] "Demand-side management is 'the planning and implementation of activities designed to influence customer use of electricity in ways that will produce changes in the time pattern and magnitude of a utility's load.' Such programs attempt to affect the demand for power and in theory can lessen the need to construct additional utility plants, thereby lowering the cost of power to all ratepayers." *Detroit Edison Co v PSC*, 221 Mich App 370, 383; 562 NW2d 22 (1997) (quotation omitted).

[2] "Act 304" refers to 1982 PA 304, the legislation authorizing the use of a PSCR clause.

> The Commission finds that the ALJ is correct in his interpretation of Rule 701: motions for declaratory ruling should be addressed to the Commission, and the decision to issue a ruling is within the Commission's discretion. The broad policy change sought by the declaratory ruling makes this case an especially inappropriate setting for a declaratory ruling, because numerous parties not participating here would undoubtedly wish to be heard on this issue. In this matter, like the ALJ, the Commission declines to rule.
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> The Commission also agrees with the ALJ that evidence directed entirely at addressing the general benefits of conservation and energy efficiency is not material to this PSCR plan proceeding. However, in affirming the ALJ's ruling on the motion to strike, the Commission notes that it does not intend to suggest that a party to an Act 304 case should be precluded from proposing a rate design solution that encourages the efficient use of energy or conservation measures by a utility's customers. Likewise, the preclusion of intervenor testimony regarding non-rate-design energy efficiency or conservation measures in an Act 304 proceeding does not apply to more appropriate forums, such as individual rate cases or special proceedings. . . . MEC/PIRGIM is encouraged to raise its energy efficiency and conservation concerns in a more appropriate forum and to tailor its proposals in the manner described in this order.

This appeal followed.

II. Standard of Review

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).

Our 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)*, 482 Mich 90, 103; 754 NW2d 259 (2008). 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 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. [quoting *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* at 103-104.]

Here, the ALJ was charged with the task of applying the PSC's prior rulings consistent with the act. Thus, the PSC's decision that the ALJ's recommendation was consistent with its prior cases is entitled to "respectful consideration." *SBC Michigan, supra* at 103.

III. Decision to Exclude Evidence Concerning Resource Planning

Appellants first assert that the PSC improperly considered itself powerless to include resource planning as a required portion of a reasonably prudent PSCR plan under Act 304. They maintain that the PSC has the power, and the duty, to disapprove rates based upon expenses it finds uneconomical, and to order a utility to implement DSM generally and to fund DSM in rates.

Appellants raised this issue unsuccessfully in *In re Application Of Consumers Energy Co Cost Recovery Plan* (*Michigan Environmental Council v MPSC & Consumers Energy Co*), ___ Mich App ___; ___ NW2d ___ (2008) (Docket No. 274471, issued October 21, 2008), in which a panel of this Court ruled adversely to appellants' position:

> Appellants first assert, according to their statement of the question presented, that the PSC declared itself "limited and powerless under statutory law to encourage the establishment of energy resource planning, and energy efficiency and conservation programs," and they then argue that the PSC erred in so declaring. In fact, we find no such declaration in the record. The PSC did, however, decline to condition approval of Consumers' PSCR plan on the existence of such a program within it, and in this regard it committed no error.

* * *

> The real issue … despite appellants' failure to frame it this way, is whether the PSC erred in declining to require that Consumers include an IRP or DSM program as part of its PSCR request. [*Id.* at slip op pp 3,4.]

On the substantive question whether the PSC erred in not requiring the utility to include planning programs as part of its PSCR plan, the Court ruled:

> Although MCL 460.6j(1)(a) authorizes the establishment of a PSCR clause for recovering the costs of generating or otherwise obtaining power "under reasonable and prudent policies and practices," the statute calls on the PSC to review generally for reasonableness and prudence what a utility has put forward; there is no implication in the statutory language that the PSC should use the PSCR process to require a utility to respond to an intervenor's recommendations, *or require any specific programs intended to promote conservation, energy efficiency, or demand-side management.*
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> The PSC is entitled to consider "all lawful elements" in determining rates. MCL 460.557(2); see also *Detroit Edison Co v Public Service Comm*, 221 Mich App 370, 385; 562 NW2d 224 (1997). Moreover, "(t)he PSC is not bound by any single formula or method and may make pragmatic adjustments when warranted by the circumstances." *Detroit Edison, supra* at 375. Accordingly, the PSC may authorize rates based on the reasonable costs of a DSM program, *id*. at 386, but "may not order [a] utility to follow particular principles of economic management," *id*. at 387. [*Id*. at slip op p 5; (emphasis added).]

We note that as a published opinion, the legal holdings in *In re Application Of Consumers Energy Co Cost Recovery Plan, supra*, are binding on this panel. MCR 7.215(C)(2). Moreover, to the extent that appellants' arguments here were not specifically addressed in this Court's earlier decision, we find them unpersuasive.

Here, as in *In re Application of Consumers Energy Cost Recovery Plan*, the PSC did not declare that it was "powerless" to encourage Detroit Edison to engage in conscientious resource planning, but instead declined to do so. The ALJ's initial determination that appellants' proffered evidence was irrelevant in the Act 304 proceeding was based on a belief that the PSC had previously determined that it was without authority to force a utility to engage in energy efficiency and conservation programs, and that such a conclusion was required in light of this Court's holding in *Detroit Edison Co, supra*.[3] Appellants assert that the PSC's power extends to requiring the inclusion of some sort of a conservation plan, at least one of the utility's own design, and that imposing such a requirement would be different from a proscribed implementation of a specific plan of the PSC's design such as that the PSC sought to compel in

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[3]The PSC argues on appeal that requiring Detroit Edison to adopt a DSM plan would be "questionable" under *Detroit Edison*.

Detroit Edison Co, supra. After reviewing *Detroit Edison*, *supra* at 386-388, as well as holdings by our Supreme Court, we find some merit in appellants' arguments. See *Consumer Power v PSC*, 460 Mich 148, 158; 596 NW2d 126 (1999); *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 148-149; 428 NW2d 322 (1988). Nevertheless, the fact that "the PSC can encourage a specific management decision through the exercise of its ratemaking power," *Consumer Power*, *supra* at 158, does not equate to a finding that its decision not to do so is unreasonable or unlawful. See *In re Application Of Consumers Energy Co Cost Recovery Plan*, *supra* at slip op p 5 ("the PSC was within its rights in discontinuing the requirement for IRP or DSM programs with PSCR plans in the first instance, and in declining to treat a PSCR plan as unreasonable or imprudent for want of such a plan in this instance").

Appellants point to various portions of MCL 460.6j to support their position that the PSC has authority, and a responsibility, to require inclusion of a DSM program in a utilities' PSCR plan. However, the PSC's actions do not clearly contradict the language of these provisions.

Although MCL 460.6j(1)(a) authorizes the establishment of a PSCR clause for recovering the costs of generating or otherwise obtaining power "under reasonable and prudent policies and practices," the statute calls on the PSC to review generally for reasonableness and prudence what a utility has put forward. Nothing in the statutory language of this provision dictates that the PSC should use the PSCR process to require a utility to respond to an intervenor's recommendations, or require any specific programs intended to promote conservation, energy efficiency, or demand-side management.

A perhaps stronger argument for appellants' position is found in the language of MCL 460.6j(6), which provides in pertinent part, "In evaluating the decisions underlying the power supply cost recovery plan, the commission shall consider . . . whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors." In the instant case, this would conceivably encompass appellants' proffered evidence that conservation programs would result in energy savings and a corresponding -albeit small[4]- reduction in the PSCR factor. Thus, the ALJ's determination that appellants' testimony was not "relevant" was arguably incorrect.

However, given the somewhat ambiguous language in 460.6j(6) above, appellants have failed to demonstrate by clear and satisfactory evidence under MCL 462.26(8) that the order is unlawful or unreasonable. The PSC's determination that the evidence was not "material" to this PSCR plan proceeding is supportable. Appellant's expert presented a "concrete" cost savings that he maintained could be realized by the imposition of DSM programs. This savings, however, was based upon the average energy reduction in three states analyzed in another witness' presentation, out of the apparently eighteen discussed, and the witness' "belief" that

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[4] According to one of appellants' experts, had Detroit Edison imposed an energy efficiency program having an 0.8% impact on the energy forecast for 2006, the 2006 PSCR rate would have been lowered from a projected $0.00499/kWh to $0.004708/kWh.

Detroit Edison could design, implement, and manage a similar program to obtain similar results. As a result, the calculated cost savings is speculative. In addition, apparently constrained by the prohibitions in *Detroit Edison*, *supra* at 386-387, appellants did not offer any specific plan they proposed to impose on Detroit Edison, but seem instead to suggest that the PSC treat a PSCR plan that lacks any resource planning programs unreasonable and imprudent on its face. Given this lack of specificity in appellants' evidence, the PSC did not clearly act in contravention of MCL 460.6j(6) in deciding not to consider the evidence material when determining whether Detroit Edison's PSCR plan should be approved.[5]

Moreover, the PSC's decisions for the past decade support its holding in the instant case. Since 1997, the PSC has decided not to require a DSM program as part of a PSCR plan. The decision in the instant case is consistent with these PSC holdings. Appellants acknowledge that the PSC discontinued its practice of requiring IRPs as a part of their PSCR plans, but do not explicitly state how that policy change was incorrect. Nor have they discussed the PSC's prior stated concern that requiring the publication of the particulars of these programs would disadvantage the utilities in the current competitive marketplace.

The PSC's decision that a general rate case is a more appropriate forum for reviewing proposed energy conservation programs also appears reasonable in light of the language of MCL 460.6c. In fact, *Detroit Edison*, *supra*, the case upon which appellants rely to claim that "DSM program costs can be collected in rates" and that a DSM program is directly related to power supplied by a utility (thus rendering evidence on the propriety of such a program relevant here), was a general rate case. *Detroit Edison*, *supra* at 372. Moreover, we note that appellants are currently presenting their DSM evidence in Detroit Edison's current general rate case, Case U-15244. Appellants do not adequately discuss how the PSC's preference to deal with DSM plans in general rate cases is clearly unreasonable in light of MCL 460.6c.

For these reasons, we agree with the holding and result in *In re Application Of Consumers Energy Co Cost Recovery Plan*, *supra*, and find that the appellants have not met their burden of proving by clear and satisfactory evidence that the order here is unlawful or unreasonable.

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[5] Nor does the language of MCL 460.6j(7) support a finding that the PSC's order was clearly unlawful. MCL 460.6j(7) provides in pertinent part that "[t]he commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future." Nothing in this section specifically mandate that the PSC require utilities to create DSM programs, or require the PSC to reject a utility's 5-year forecast on the basis that the utility has not started such a program. As with most of appellants' citations, this provision recognizes a power that the PSC can arguably use to influence the utility's behavior. It does not render the PSC's decision not to use that power clearly unreasonable or unlawful.

IV. Statutory and Constitutional Challenges

Appellants also argue that the proceeding below was improperly cut short when the PSC struck appellants' evidence as to how Detroit Edison might better fulfill its obligation to engage in resource planning and demand management. Appellants further contend that the PSC's decision to strike appellants' expert testimony and exhibits from the evidentiary record in this case violated several statutory and constitutional provisions, as well as the PSC's own rules.

In *In re Application Of Consumers Energy Co Cost Recovery Plan, supra,* the Court addressed a challenge by the appellant to the PSC's decision to exclude certain evidence relating to potential conservation, energy efficiency, and DSM projects that appellee Consumers Energy could have considered. The Court rejected the challenge, stating: "Because we concluded above that the PSC was within its rights in declining to require such projects as part of a PSCR plan, we conclude here that the PSC properly struck the evidence relating to them." *In re Application Of Consumers Energy Co Cost Recovery Plan, supra* at slip op p 6.

Because the Court in *In re Application Of Consumers Energy Co Cost Recovery Plan, supra*, did not provide a detailed analysis of the specific statutory and constitutional bases for the appellants' arguments, it is not clear from the opinion whether the same bases are at issue in the instant case. Therefore, we will more fully analyze appellants' claims below. To the extent these claims involve constitutional issues, we will review these issues de novo. See *Brinkley v Brinkley*, 277 Mich App 23, 26; 742 NW2d 629 (2007).

Appellants base their statutory claims that the PSC violated various statutory provisions under Act 304 and the Administrative Procedures code on the language of MCL 460.6a[6] and

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[6] MCL 460.6a provides in pertinent part:

> 1) When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief.
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(continued…)

MCL 24.285.[7] Their arguments are premised upon their claim above that the PSC erred in excluding relevant and material evidence. However, consistent with the holding in *In re Application Of Consumers Energy Co Cost Recovery Plan, supra*, we conclude above that, while appellants' proffered evidence is arguably relevant, at least under MCL 460.6j(6), the PSC did not clearly err in finding it immaterial in this PSCR proceeding. Thus, the PSC's actions were not clearly contrary to the statutory language of MCL 460.6a or MCL 24.285.

Nor do we find persuasive appellants' argument that the decision violated the constitutional requirement in Art 6, Section 28 of the Michigan Constitution that administrative decisions be made on the basis of the whole record. Here, the PSC's determination was, in fact, supported by the "whole record," which in this case does not include appellants' proffered evidence.

As to appellants' contention that the PSC's decision violated its own internal rules, in particular R 460.17701 *et seq.*, we note that appellants have provided virtually no analysis of their position, other than to claim that the PSC violated its rules for conducting ratemaking proceedings and to claim that appellants' substantial efforts in obtaining their witness testimony "was rendered a nullity by the draconian and unwarranted rulings striking all of their evidence."

(…continued)

> (a) "Full and complete hearing" means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing.

[7] MCL 24.285 provides:

> A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law," respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

Appellants provide no citation to specific provisions in the administrative rules that would support a claim for greater relief. "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." *Id.* Accordingly, we decline to address this issue. *Wilson, supra.* Even were we nevertheless to review this issue, we would find that appellants have not shown they are entitled to relief. R 460.17701(3) provides that "[t]he decision to issue a declaratory ruling is within the discretion of the commission." Because, as discussed above, the PSC's decision was within the scope of its authority, its decision to deny declaratory relief was not an abuse of discretion.

Appellants' equal protection and due process arguments rely on a premise that the PSC's decision was "highly illogical, one-sided, and arbitrary." However, as noted above, the PSC's decision was not clearly unreasonable, and comported with its decisions over the past decade concerning the scope of DSM evidence in PSCR cases.

We thus find that appellants have failed to demonstrate that the PSC's decision violated statutory, regulatory, or constitutional provisions.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette