STATE OF MICHIGAN

COURT OF APPEALS

In re Application of Consumers Energy for Authority to Reconcile Gas Revenue

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee.

UNPUBLISHED
July 29, 2014

No. 314270
MPSC
LC No. 00-016860

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

The Michigan Public Service Commission (PSC) issued an order approving the application of Consumers Energy Company (Consumers) for reconciliation of gas revenues associated with its energy optimization plan based on application of a pilot revenue decoupling mechanism (PRDM) for the period of June 1, 2010 through May 31, 2011, and authorized Consumers to collect an underrecovery of $15,650,182 plus interest. This included an underrecovery of $2.196 million from the Transportation class. The Association of Businesses Advocating Tariff Equity (ABATE) appeals as of right, arguing that the rate for transportation customers is unjust and unreasonable. We affirm.

I. LEGAL AND FACTUAL BACKGROUND

Part 2(B) of the Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 et seq. (CREEA), which became effective on October 6, 2008, requires that regulated electric and natural gas providers adopt energy optimization plans. See MCL 460.1005(e).

Generally, the PSC is required to allow providers whose rates are regulated by the PSC to recover the actual costs of implementing approved energy optimization plans. See MCL 460.1089(1). With respect to natural gas providers, MCL 460.1089(6) provides for an adjustment or reconciliation if rates collected for implementation of the energy optimization plan are greater or less than predicted:

> *The commission shall authorize a natural gas provider* that spends a minimum of 0.5% of total natural gas retail sales revenues, including natural gas commodity costs, in a year on commission-approved energy optimization programs *to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider's most recent rate case.* In determining the symmetrical revenue decoupling true-up mechanism utilized for each provider, *the commission shall give deference to the proposed mechanism submitted by the provider*. The commission may approve an alternative mechanism if the commission determines that the alternative mechanism is reasonable and prudent. . . . [Emphasis added.]

In its first gas utility rate case following the implementation of the CREEA, Consumers' application included a proposal for adoption of a revenue decoupling mechanism (RDM). The PSC described Consumers' proposed mechanism as follows:

> Consumers proposed an RDM that the company claims will sever its need for revenue recovery from volumetric sales levels. Consumers explained that when customers' natural gas usage decreases, gas commodity costs are likewise reduced, but the company's fixed distribution costs are unaffected. Consumers' gas distribution system is characterized by high fixed costs that do not significantly vary with changes in customer usage. When sales fall below the level used to establish the utility's rates in its last rate case, the utility is unable to collect its authorized level of revenue and may be denied a reasonable opportunity to earn its authorized rate of return.
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> Consumers proposed that its RDM would apply to all retail and transportation gas customers. The RDM would establish a baseline average annual usage per customer for each customer rate class as approved by the Commission in the most recent general rate case. Annually thereafter, Consumers would determine the actual annual average consumption per customer class and compare that to the baseline average for each rate class. If the actual average usage is below the baseline average usage, then Consumers would multiply the difference by the number of customers in that class as established in the most recent general rate case. The resulting volume would then be multiplied by the distribution charge approved by the Commission in the most recent rate case to calculate the total amount of revenue to be collected from that rate class. Consumers proposed to collect this amount through an equal per Mcf surcharge applied to all customers in that class over the subsequent twelve months following Commission approval. At the end of the twelve month period, Consumers would determine any over-collection or under-collection of the RDM amount and roll

> that amount into the determination of the next period RDM adjustment. If the actual average usage is higher than the baseline average usage for a rate class, then Consumers would use the same method to determine the overcollection of revenue and calculate a credit to be returned to customers in that class over a subsequent twelve-month period. [*In the Matter of the Application of Consumers Energy* Co, opinion and order of the Public Service Commission, entered May 17, 2010, (Case No. 15986), pp 44-45.]

The PSC adopted Consumers' proposed RDM, finding it reasonable and prudent, but held that it should be based on 15-year weather normalized sales rather than actual sales. Further, referring to it as a pilot decoupling mechanism, the PSC held:

> The pilot decoupling mechanism shall be symmetrical, shall reconcile non-GCR revenue, and shall be applied separately by customer class. In the utility's annual decoupling mechanism reconciliation proceeding, which shall be filed on or before September 1 of each year, Consumers' weather adjusted sales per customer by class during the 12-month period from June 1 to May 31 will be compared with the base sales per customer amount established in this case. Any sales per customer difference will be multiplied by the distribution charge per Mcf to obtain the non-GCR revenue difference per customer. This amount will be multiplied by the actual average monthly number of customers during the reconciliation period, as determined in the reconciliation proceeding, in order to obtain the total amount for refund or surcharge. Any overage or shortfall shall be credited or surcharged to customers in that rate class on a per Mcf basis calculated using the billing determinants for the 12-month period covered by the reconciliation until the refund or surcharge is recovered.
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> The company's annual decoupling mechanism reconciliation proceeding shall be conducted as a contested case and should be focused on the revenue difference and the calculation of the resulting charges or credits. In future proceedings, the Commission will examine, and may seek comments from parties, on the success of the pilot in facilitating utility provision of increased energy efficiency programs and recommendations for adjustment and evaluation of the pilot. [*In the Matter of the Application of Consumers Energy Co*, opinion and order of the Public Service Commission, entered May 17, 2010, (Case No. 15986), pp 52-53.]

In Consumers' next general natural gas rate proceeding, Consumers sought an adjustment of the PRDM so that actual as opposed to weather-normalized sales would be used as a starting point. The PSC held:

> The Commission finds that the pilot RDM that is currently in place for Consumers should continue until the Commission has had an opportunity to evaluate the efficacy of that mechanism. At this point, the Commission has limited information available to assess whether the pilot RDM is appropriate or whether adjustments to the mechanism should be made. [*In the Matter of the*

Application of Consumers Energy Co, opinion and order of the Public Service Commission, entered August 11, 2011 (Case No. 16418), p 20.]

Consumers filed the instant case to reconcile its natural gas revenues, representing that "the PRDM for this period results in a revenue deficiency for the residential, general service, and transportation customer classes; i.e., actual revenues . . . were less than the amounts established in the last rate case for these classes. The total amount recoverable pursuant to the PRDM for the period June 1, 2010 through May 30, 2011 is $15,650,182." Thomas A. Yehl, Consumers' principal rate analyst, calculated that "the Residential rate class was deficient by $6.349 million, the General Service rate class was deficient by $7.105 million, and the Transportation rate class was deficient by $2.196 million" for a "total amount of the decoupled revenue deficiency for the period" of $15.650 million. With interest, $6.354 million was to be collected from Residential customers, $7.110 million was to be collected from General Service customers, and $2.198 million was to be collected from Transportation customers.

ABATE argued that the amount to be collected from Transportation customers was not just and reasonable. It submitted the testimony of James T. Selecky, a consultant in the field of public utility regulation. He testified that there was a 9.764 million Mcf increase in Transportation sales resulting in $5.917 million in additional revenue from the transportation class. He testified that seeking more from the Transportation customers would be inconsistent with the objectives of a decoupling mechanism, which he represented "is typically created to remove the disincentive to the utility to having its customers be more efficient" and is designed "to transform the current regulatory paradigm that gives a utility a strong incentive to sell as much electricity as possible, without regard to the negative effects upon overall costs and individual customer bills." Further, he opined that "Consumers has not demonstrated that because of the mandated energy efficiency programs it is not receiving revenues from the Transportation customers less than the level authorized by the Commission," and that since the Transportation revenues had increased, the Transportation customers were due a refund. Alternatively, he recommended that Transportation customers be excluded from the RDM.

In a proposal for decision, the Administrative Law Judge (ALJ) noted that the PSC's order establishing the PRDM provided that a "per customer" methodology be used and concluded, in pertinent part, that Consumers' "average use per customer" method, as distinguished from ABATE's proposed "total revenue tracking mechanism," was consistent. Further, the ALJ concluded that "issues relating to modification, termination or continuation of the PRDM are better suited to a general gas rate case" and that the PSC's order in Case No. U-15986 "specifically requires this reconciliation to be based on the Average per Customer methodology and that methodology was properly applied by Consumers."

The PSC agreed with the ALJ. It concluded that "the PRDM order dictates the outcome of most of the issues in this reconciliation," that with the PRDM "the Commission mandated the average use per customer calculation method, the use of forecasted data in the calculation, and surcharges applied on a rate class basis," and that "no customer classes were excluded from the decoupler." *In the Matter of the Application of Consumers Energy* Co, opinion and order of the Public Service Commission, entered December 20, 2012 (Case No. U-16860), p 8. Further, the PSC agreed that "this reconciliation is not the appropriate forum for adopting major modifications to the PRDM." *Id.*, p 9.

II. STANDARD OF REVIEW

In *In re Application of Consumers Energy Company for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010) (case citations omitted), the Court stated:

> 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. 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. A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC.
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> 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. Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo.

Section 462.26(8) "requires a reviewing court to determine only whether an order is unlawful or unreasonable, not whether it is arbitrary and capricious." *Attorney General v Pub Serv Comm*, 206 Mich App 290, 296; 520 NW2d 636 (1994), quoted in *In re Application of Detroit Edison Company to Increase Rates*, 297 Mich App 377, 383; 823 NW2d 433 (2012), aff'd 495 Mich 884 (2013).[1]

III. WAIVER

Consumers and Appellee MPSC argue that ABATE waived this issue by failing to appeal the order in Case No. U-15986 by which the PRDM was established, or the order in Case No. 16418 by which the PRDM was continued. However, the PSC expressly said that the PRDM would be revisited in a future case and that adjustments would be considered in the future. In neither of these orders did the PSC expressly state that the future consideration would not be in an energy optimization reconciliation proceeding. Given that the rulings could be construed to mean that the possibility of revising the PRDM in a reconciliation proceeding was left open, we conclude that the issue was not waived by the failure to appeal the orders in these earlier cases.

IV. RECOVERY OF $2.196 MILLION FROM THE TRANSPORTATION CLASS

[1] To the extent ABATE argues that the PSC's decision should be reversed if it is arbitrary and capricious, this is only accurate to the extent that the decision is unlawful or unreasonable.

ABATE argues that the surcharge imposed on Transportation customers was unjust and unreasonable because the increase in Transportation customers resulted in an increase in revenues brought in by the Transportation sector. Given the increase in revenues, ABATE maintains that Transportation customers should not have been charged more. ABATE is not arguing that the PRDM was inaccurately applied such that the calculation of the surcharge was problematic, but that its application resulted in an unjust and unreasonable surcharge and that the PSC therefore should have adjusted the PRDM or excepted Transportation customers from its application. Further, ABATE argues that the PSC did not adequately explain why the surcharge was reasonable.

Preliminarily, ABATE asserts that the PRDM should have been modified in the context of this reconciliation case. Consumers posits that the purpose of a reconciliation is simply to apply mechanical calculations, not to debate the mechanism. However, in *In re Application of Mich Consol Gas Co for a Gas Cost Recovery Reconciliation*, 304 Mich App 155, 167; __ NW2d __ (2014), the Court looked at the interplay between rate cases and reconciliation cases, and noted that gas cost recovery (GCR) factors are established in contested GCR plan cases but can be altered in a reconciliation case. The Court stated:

> MCL 460.6h first sets forth provisions for establishing, approving, and implementing GCR factors, then sets forth provisions for reviewing such implementation in progress to determine if adjustments are in order. Again, MCL 460.6h(12) directs the PSC to "reconcile the revenues recorded pursuant to the gas cost recovery factor and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold," and to do so on the basis of the "reasonableness and prudence of expenses[.]" *The provision for reconciliation proceedings thus calls for refinement or enforcement of what was decided in the attendant plan proceedings.* Accordingly, we construe the command of MCL 460.6h(3) to minimize costs as bearing on both kinds of proceeding. [Emphasis added.]

Here, the PSC arguably did not say that the PRDM could not be revised during a reconciliation proceeding but merely opined that it was not the appropriate forum for major modifications. Regardless, while *In re Application of Mich Consol Gas Co for a Gas Cost Recovery Reconciliation* indicates that a reconciliation proceeding need not be so limited, ABATE has not carried its burden of showing by clear and convincing evidence that the PSC's order was unlawful or unreasonable. That the mechanism could have been altered does not establish that the mechanism used resulted in an unlawful or unreasonable order.

MCL 460.1089 indicates that the PSC is to determine an RDM and show deference to the utility unless it concludes that an alternative RDM would be reasonable and prudent. No party is arguing that the PSC lacked authority to adopt the PRDM or that the modification of Consumers' proposed RDM for weather-normalized sales was not reasonable and prudent. There has been no showing or argument that the PRDM was unlawful.

The crux of ABATE's argument is that application of the PRDM was unreasonable because, by bringing in more customers, the revenue from the Transportation class increased,

and yet application of the PRDM resulted in an underrecovery for this class. Had the PSC chosen to use a rate decoupling mechanism that tracked increased revenue, it may have been a reasonable approach. But that does not establish that the RDM adopted was unreasonable. Moreover, that the revenue was garnered by bringing in more customers meant that there were more customers who would need to be accommodated by the energy optimization plan. It therefore made sense to focus on the average use per customer, as opposed to the increased revenue. In this regard, it is noted that in *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254, 275; 820 NW2d 170 (2011), where ABATE was arguing that Transportation customers should not be surcharged for Consumers' energy optimization plan because they would not benefit from the plan, the Court referenced testimony establishing "that the gas transportation customers would be able to participate in Consumers Energy's nonresidential programs." Thus, ABATE has failed to show not only that the PRDM was unreasonable, but that *application* of the PRDM to the Transportation class was unreasonable.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens