STATE OF MICHIGAN

COURT OF APPEALS

In re Application of CONSUMERS ENERGY CO for Reconciliation of 2009 Costs.

TES FILER CITY STATION LIMITED PARTNERSHIP,

Appellant,

v

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION and ATTORNEY GENERAL,

Appellees.

FOR PUBLICATION
September 25, 2014

No. 305066
Public Service Commission
LC No. 00-015675

In re Application of CONSUMERS ENERGY CO for Reconciliation of 2009 Costs.

ATTORNEY GENERAL,

Appellant,

v

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee,

and

No. 305083
Public Service Commission
LC No. 00-015675

MICHIGAN PUBLIC SERVICE COMMISSION; CADILLAC RENEWABLE ENERGY LLC; GENESEE POWER STATION LIMITED PARTNERSHIP; GRAYLING GENERATING STATION LIMITED PARTNERSHIP; HILLMAN POWER COMPANY LLC; TES FILER CITY STATION LIMITED PARTNERSHIP; VIKING ENERGY OF LINCOLN, INC; and VIKING ENERGY OF MCBAIN, INC,

Appellees.

ON RECONSIDERATION

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

WHITBECK, J (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's conclusion in Docket No. 305066 that the administrative rules requiring generators to purchase NOx allowances were implemented in 2007. Accordingly, I would reverse with respect to the Public Service Commission's determination that the rules were implemented in 2007 and that T.E.S. Filer City Station Limited Partnership (T.E.S. Filer) was not entitled to recover its costs under MCL 460.6a(8). In all other respects, I concur in the majority's opinion.

I. STATUTORY INTERPRETATION

A. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation.[1]

B. LEGAL STANDARDS

If the plain and ordinary meaning of a statute's language is clear, we will not engage in judicial construction.[2] When interpreting a statute, our goal is to give effect to the intent of the

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[1] *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12; 795 NW2d 101 (2009).

[2] *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

Legislature.[3] The language of the statute itself is the primary indication of the Legislature's intent.[4] If the language of the statute is unambiguous, we must enforce the statute as written.[5]

C. APPLYING THE STANDARDS

T.E.S. Filer contends that the Public Service Commission erred because MCL 760.6a(8) provides that the $1,000,000 limit does not apply to costs incurred due to changes in the regulatory laws that are implemented after the effective date of that act. According to T.E.S. Filer, it could not have incurred its 2009 NOx allowance costs due to the Michigan Department of Environmental Quality's 2007 rules because those rules were not in effect at the time that T.E.S. Filer purchased its 2009 NOx allowances. I agree with T.E.S. Filer.

1. CHANGES IMPLEMENTED AFTER MCL 460.6a

The meaning of the word implemented is crucial to determining whether MCL 460.6a(8) applied to T.E.S. Filer because the application of MCL 460.6a(8)'s exception hinges on when new laws or regulations are implemented.

MCL 460.6a(8) provides that "[t]he total aggregate additional amounts recoverable by merchant plants . . . shall not exceed $1,000,000 per month for each affected utility." However, MCL 460.6a(8) also provides an exception to this limit:

> The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are *incurred due to changes* in federal or state environmental laws or regulations *that are implemented* after [October 6, 2008].[6]

T.E.S. Filer's argument hinges around the meaning of the word "implemented" in this exception. If the Legislature has chosen words that "have acquired a peculiar and appropriate meaning in the law," we construe those terms according to their legal meanings.[7] But when the Legislature does not define a term, we may consider a dictionary definition to determine the word's plain and ordinary meaning.[8] We presume that the Legislature is aware of existing

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[3] *United States Fidelity & Guaranty Co*, 484 Mich at 13.

[4] *Id*.

[5] *Id*. at 12-13.

[6] Emphasis added.

[7] *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006).

[8] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

statutes.[9] And "[t]he Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another."[10]

The word "promulgation" is a legal term of art. " 'Promulgation of a rule' means that step in the processing of a rule consisting of the filing of the rule with the secretary of state."[11] "To promulgate a rule the office of regulatory reform shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates."[12] "[A] rule becomes effective on the date fixed in the rule . . . ."[13]

Here, if the Legislature had meant "implemented" to have the meaning of the word "promulgated," the Legislature would have used the word "promulgated." We must presume that the Legislature was aware that the term existed. Indeed, it was defined in another statute: the Administrative Procedures Act, an act that sets out the procedures for rulemaking. Thus, promulgation is defined in a statute that bears directly on the subject of MCL 460.6a.

But here the Legislature did not choose to use the word promulgated. Instead, the Legislature used the general term "implemented." We may not presume that this choice was an error. Accordingly, I conclude that the Legislature did not mean MCL 460.6a to apply on the basis of when a rule was promulgated, but rather intended it to apply on the basis of when the rule was *implemented*.

When used as a transitive verb, implement means "to fulfill; carry out" or "to put into effect according to a definite plan or procedure."[14] Applying these definitions of the word "implemented," I read MCL 460.6a as stating that the $1,000,000 limit does not apply with respect to costs that are incurred due to changes in laws or regulations that are *put into effect* after October 6, 2008. I conclude that MCL 460.6a(8) controls, and it clearly provides that the limit does not apply to T.E.S. Filer if it incurred costs due to a rule change that was *put into effect* after October 6, 2008, the effective date of MCL 460.6a.

2. WHEN WAS THE RULE EFFECTIVE?

The question then becomes: Was the rule that required T.E.S. Filer to purchase NOx allowances put into effect before or after October 6, 2008? I conclude that the rule was not effective until 2009, and therefore the rule was not "implemented" until 2009.

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[9] *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993).

[10] *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

[11] MCL 24.205(9).

[12] MCL 24.246(1).

[13] MCL 24.247(1).

[14] *Random House Webster's College Dictionary* (2005).

The Michigan Department of Environmental Quality adopted the definitions of the Environmental Protection Agency when it promulgated the rule requiring NOx allowances.[15] The Environmental Protection Agency defined "CAIR NOx allowance" as "a limited authorization issued by a permitting authority . . . under provisions of a State implemental plan that are approved [by the Environmental Protection Agency] . . . ."[16]

On December 20, 2007, the Environmental Protection Agency approved the Michigan Department of Environmental Quality's 2007 state implementation plan rules on the condition that the Michigan Department of Environmental Quality would submit a corrected plan to the Environmental Protection Agency within one year.[17] The Michigan Department of Environmental Quality did not submit a corrected plan, and the conditional approval lapsed on December 20, 2008.[18] The Michigan Department of Environmental Quality "completed the State adoption process for the rules" on April 13, 2009.[19] It then submitted the revised state implementation plan to the Environmental Protection Agency for approval on June 10, 2009.[20] The Environmental Protection Agency approved the June 10, 2009 submittal in conjunction with the July 16, 2007 submittal, and declined to revisit the July 16, 2007 submittal on its own.[21]

I conclude that Rule 336.1803(3) was not effective until 2009. Rule 336.1803(3) adopted the federal definition of NOx allowance. The federal definition provided that such an allowance was a limited authorization *under the provisions of a state implementation plan*.[22] The Environmental Protection Agency did not approve Michigan's state implementation plan until 2009. Accordingly, there was no stated implementation plan under which NOx allowances existed. To put it another way, there were no limited NOx allowances under a state implementation plan because no such plan existed.

Given these provisions, I cannot conclude that the rule was "implemented" in 2007. I do not see how the rule can apply to T.E.S. Filer if the Michigan Department of Environmental Quality conditioned the rule on EPA approval, and the EPA did not approve the rule until August

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[15] Mich Admin Code, R 336.1803(3), incorporating by reference definitions in 40 CFR 97.102 and 40 CFR 97.302 (2007).

[16] 40 CFR 97.102.

[17] Environmental Protection Agency, *Approval of Implementation Plans of Michigan: Clean Air Interstate Rule*, 72 FR 72256, § I (December 20, 2007).

[18] Environmental Protection Agency, *Approval of Implementation Plans of Michigan: Clean Air Interstate Rule*, 74 FR 41637, § I (August 18, 2009).

[19] Id.

[20] Id.

[21] Id.

[22] 40 CFR 97.102.

18, 2009. The Michigan Department of Environmental Quality may have promulgated the rules in 2007, but the NOx limitations were not *implemented* until 2009.

II. CONCLUSION

I conclude that the word "implemented" in MCL 460.6a(8) does not have the same meaning as the word "promulgated." I also conclude that the NOx requirements were not implemented until 2009 because they were not effective until 2009. Therefore, the exception in MCL 460.6a(8) applied to T.E.S. Filer. I conclude that the Public Service Commission erred when it determined that T.E.S. Filer was not allowed to recover the costs of purchasing NOx allowances. I therefore respectfully dissent from the majority's contrary conclusion in Docket No. 305066.

/s/ William C. Whitbeck