

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.

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

ATTORNEY GENERAL,

Appellant,

v

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee,

and

FOR PUBLICATION
September 25, 2014
9:05 a.m.

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

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.

RONAYNE KRAUSE, P.J.

In these consolidated cases appellants TES Filer City Station Limited Partnership and the Attorney General claim appeals from an order of the Michigan Public Service Commission (PSC) in Consumers Energy Company's power supply cost recovery (PSCR) case. We affirm.

I. Underlying Facts and Proceedings

On March 31, 2010, Consumers filed an application with the PSC seeking approval of its PSCR and revenues for the calendar year 2009.¹ Consumers sought an underrecovery of \$34,378,062, including interest.²

¹ An electric utility can recover its power supply costs through either base rates, which are established in a general rate case, MCL 460.6a(2)(b), or a PSCR clause. A 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 or purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a).

² The following parties, among others, were granted intervenor status: the Attorney General; the Michigan Environmental Council; and Cadillac Renewable Energy, LLC; Genesee Power Station Limited Partnership; Grayling Generating Station Limited Partnership; Hillman Power Company, LLC; TES Filer City Limited Partnership; Viking Energy of Lincoln, Inc., and

The parties raised numerous issues at the hearing stage. However, these consolidated appeals focus on two issues: (1) the eligibility of TES Filer City to recover NOx costs; and (2) the transfer price calculation mechanism.

TES Filer City NOx Costs

Biomass plants generate electricity in whole or in part from wood waste. 2008 PA 286, which became effective on October 6, 2008, enacted provisions to allow biomass plants to recover fuel and operation and maintenance (O&M) costs that are not covered by existing contracts with electric utilities. The relevant subsections, MCL 460.6a(7) to (9), provide:

(7) If, on or before January 1, 2008, a merchant plant entered into a contract with an initial term of 20 years or more to sell electricity to an electric utility whose rates are regulated by the commission with 1,000,000 or more retail customers in this state and if, prior to January 1, 2008, the merchant plant generated electricity under that contract, in whole or in part, from wood or solid wood wastes, then the merchant plant shall, upon petition by the merchant plant, and subject to the limitation set forth in subsection (8), recover the amount, if any, by which the merchant plant's reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that the merchant plant is paid under the contract for those costs. This subsection does not apply to landfill gas plants, hydro plants, municipal solid waste plants, or to merchant plants engaged in litigation against an electric utility seeking higher payments for power delivered pursuant to contract.

(8) The total aggregate additional amounts recoverable by merchant plants pursuant to subsection (7) in excess of the amounts paid under the contracts shall not exceed \$1,000,000.00 per month for each affected electric utility. The \$1,000,000.00 per month limit specified in this subsection shall be reviewed by the commission upon petition of the merchant plant filed no more than once per year and may be adjusted if the commission finds that the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that those merchant plants are paid under the contract by more than \$1,000,000.00 per month. The annual amount of the adjustments shall not exceed a rate equal to the United States consumer price index. An adjustment shall not be made by the commission unless each affected merchant plant files a petition with the commission. As used in this subsection, "United States consumer price index" means the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics. If the total aggregate amount by which the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs determined by the commission exceed the amount that the merchant plants are paid under the contract by more

Viking Energy of McBain, Inc. (collectively referred to as the Biomass Merchant Plants [BMPs]).

than \$1,000,000.00 per month, the commission shall allocate the additional \$1,000,000.00 per month payment among the eligible merchant plants based upon the relationship of excess costs among the eligible merchant plants. 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 the effective date of the amendatory act that added this subsection. The \$1,000,000.00 per month payment limit under this subsection shall not apply to merchant plants eligible under subsection (7) whose electricity is purchased by a utility that is using wood or wood waste or fuels derived from those materials for fuel in their power plants.

(9) The commission shall issue orders to permit the recovery authorized under subsections (7) and (8) upon petition of the merchant plant. The merchant plant shall not be required to alter or amend the existing contract with the electric utility in order to obtain the recovery under subsections (7) and (8). The commission shall permit or require the electric utility whose rates are regulated by the commission to recover from its ratepayers all fuel and variable operation and maintenance costs that the electric utility is required to pay to the merchant plant as reasonably and prudently incurred costs.

Certain provisions in the Public Utility Regulatory Policy Act (PURPA), 16 USC 824 *et seq.*, are designed to encourage power production by small power production facilities. The legislation directs the Federal Energy Regulatory Commission (FERC) to promulgate rules requiring electric utilities to sell electricity to and purchase electricity from small facilities, also known as qualifying facilities. See 16 USC 824a-3(f). A regulation promulgated by FERC provides that “[n]othing in this subpart requires any electric utility to pay more than the avoided costs for purchases.” 18 CFR 292.304.³ The BMPs are qualifying facilities (QFs) under PURPA.

MCL 460.6a(8) provides that the \$1,000,000 per month payment limit did not apply with respect to costs “incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection.”⁴ TES Filer sought recovery of \$636,073, the cost of purchasing seasonal and annual NOx

³ The “incremental cost” limit was referred to in FERC regulations as “avoided cost” or “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 CFR 292.101(b)(6).

⁴ Federal law requires states to develop “State Implementation Plans” (SIPs). 42 USC 7410. These plans are approved by the Environmental Protection Agency. The Department of Environmental Quality (DEQ) sets state air quality standards. The Clean Air Interstate Rule (CAIR), which the EPA promulgated in 2005, required states to revise their SIPs to reduce emissions of NOx.

allowances in 2009. TES Filer claimed that its NOx allowance expenses resulted from Michigan's State Implementation Plan (SIP); TES Filer asserted that the SIP became effective on October 19, 2009, the date the EPA approved rules promulgated by the DEQ, or on November 30, 2009, the date by which generators of NOx emissions were required to have purchased seasonal allowances for 2009.⁵

The PSC concluded that TES Filer was not eligible to recover the costs of the NOx allowances that it purchased in 2009. The PSC acknowledged that the EPA did not approve Michigan's revised SIP (which required TES Filer to begin purchasing NOx allowances) until August 18, 2009; the changes to state environmental regulations took place on June 25, 2007, the date the revised rules were filed with the Secretary of State. The PSC concluded that Michigan implemented the CAIR requirements when the revised rules were filed with the Secretary of State; thus, the change in state law took place prior to October 6, 2008, the date that Act 286 was implemented.

Transfer Price Calculation

A utility may recover the incremental cost of renewable energy purchased pursuant to Act 295. A portion of those costs must be recovered through the PSCR process. MCL 460.1047(2)(b)(iv) establishes a price mechanism to be used for the allocation of renewable energy costs between PSCR and incremental costs. That subparagraph provides in pertinent part:

. . . After providing an opportunity for a contested case hearing for an electric provider whose rates are regulated by the commission, the commission shall annually establish a price per megawatt hour. In addition, an electric provider whose rates are regulated by the commission may at any time petition the commission to revise the price. In setting the price per megawatt hour under this subparagraph, the commission shall consider factors including, but not limited to, projected capacity, energy, maintenance, and operating costs; information filed under section 6j of 1939 PA 3, MCL 460.6j; and information from wholesale markets, including, but not limited to, locational marginal pricing. This price shall be multiplied by the sum of the number of megawatt hours of renewable energy and the number of megawatt hours of advanced cleaner energy used to maintain compliance with the renewable energy standard. The product shall be considered a booked cost of purchased and net interchanged power transactions under section 6j of 1939 PA 3, MCL 460.6j. For energy purchased by such an electric provider under a renewable energy contract or advanced cleaner energy product, the price shall be the lower of the amount established by the commission or the actual price paid and shall be multiplied by the number of megawatt hours of renewable energy or advanced cleaner energy purchased. The resulting value shall be considered a booked cost of purchases and net interchanged power under section 6j of 1939 PA 3, MCL 460.6j.

⁵ TES Filer asserted that "implemented" as used in MCL 460.6a(8) meant "completed, fulfilled, and put into effect."

The PSC refers to this price as the transfer price. The transfer price is established in annual renewable energy plan reconciliation proceedings. MCL 460.1049(3)(c).

Consumers presented evidence that its average transfer price in 2009 was \$44.798 per megawatt-hour (MWh), and asserted that it incurred \$90,000 in transfer costs. The Attorney General sought to reduce Consumers' transfer price calculation by \$39,715, arguing that the transfer price should reflect the prices forecast in the plan case and the actual prices Consumers paid during the plan period.

The PSC found that Consumers' calculation of its transfer price was consistent with prior orders and that no further price adjustment was warranted. In addition, the PSC found that it had no statutory authority to recalculate the transfer price in a PSCR case.

The PSC's order concluded as follows:

The Commission approves Consumers'[application for its 2009 PSCR reconciliation, with the following modifications: (1) a disallowance of \$2,140,882 related to the Whiting 3 outage; and (2) a disallowance of \$263,040 related to the deviation from the 2009 PSCR plan for spot and contract coal purchases. The Commission approves payments to the BMPs in the amount of \$14,838,711. In addition, Consumers is directed in its next plan case to provide an analysis of the economic dispatching of its generation assets, and, in its next case in which statutory payments to BMPs are considered, to explore possible objective criteria to apply to BMP costs in evaluating the reasonableness and prudence of those costs.

II. Standard of Review

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 Consol Gas Co v Public Serv 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 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 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). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

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; *Attorney General v Public Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Public Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). This Court gives respectful consideration to the PSC's

construction of a statute that the PSC is empowered to execute, and this Court will not overrule that construction absent cogent reasons. If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute by the PSC is not binding on us. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103-109; 754 NW2d 259 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. Analysis

Docket No. 305066

TES Filer is an electric-generating unit, R 336.1803(1)(a)(i), located in Filer City, Manistee County, Michigan. The 2007 rules did not place Manistee County in Michigan's grid zone, i.e., the geographical area to which the state and federal rules implemented in 2007 applied. R 336.1803(1)(c). However, the rules indicated that electric-generating units such as TES Filer that were located outside the fine grid zone would be subject to the rules for the 2009 NOx season. R 336.1803(1)(o). As a result, TES Filer incurred NOx allowance costs in the amount of \$636,073 in November and December of 2009.

On appeal, TES Filer argues that the PSC erred by ignoring the significance of the word "implemented" in MCL 460.6a(8). TES Filer asserts that the common meaning of the word "implemented" is "to have carried out, fulfilled, or effectuated a plan." TES Filer notes that the rules promulgated by the Michigan Department of Environmental Quality (MDEQ) in 2007 did not impose new regulations at that time, but were intended to do so in 2009; thus, the PSC should have concluded that the 2007 rules, even if in effect during the relevant period, were not implemented during that same period. The rules were implemented after MCL 460.6a(8) went into effect; therefore, TES Filer was entitled to recover its costs. We disagree.

TES Filer ignores the context surrounding the word "implemented" in the statutory scheme. This Court does not read statutory provisions in isolation, but instead considers them in context. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The NOx emission rules that were applicable to TES Filer did not change after October 6, 2008, the date that MCL 460.6a(8) went into effect. At issue in this case is not the meaning of the term "implemented," but rather on what date TES Filer was affected by the NOx emission rules. In context, MCL 460.6a(8) provides that the limit does not apply to specified costs "that are incurred *due to changes* in federal or state environmental laws or regulations that are *implemented after the effective date* of the amendatory act that added this subsection." MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules. It is undisputed that MCL 460.6a(8) went into effect on October 6, 2008. The MDEQ promulgated rules by filing them with the Secretary of State on June 25, 2007. MCL 24.246(1). The MDEQ's rules became effective prior to October 6, 2008.

Our dissenting colleague accurately points out that "promulgation" is a term of art, defined as "that step in the processing of a rule consisting of filing of the rule with the secretary of state." MCL 24.205(9). In turn, "[p]rocessing of a rule" means the action required or

authorized by this act regarding a rule that is to be promulgated, including the rule's adoption, and ending with the rule's promulgation." MCL 24.205(8). "Adoption of a rule' means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation." MCL 24.203(1). Obviously, then, promulgation is simply one step in a process. We cannot find any definition of "implemented" in any relevant statutes, but we agree with our dissenting colleague that it is reasonable to presume that it means something different from "promulgated." We do not, however, perceive any reason why promulgation and implementation cannot occur contemporaneously, particularly because promulgation does *not* establish when a rule goes into effect: absent exceptional circumstances, "a rule becomes effective on the date fixed in the rule, which shall not be earlier than 7 days after the date of its promulgation, or if a date is not so fixed then 7 days after the date of promulgation." MCL 24.247(1).

In other words, we agree with our dissenting colleague that a rule is not *necessarily* "implemented" when it is "promulgated," because by statute, promulgation is merely the final procedural stage of processing a rule to the point of filing it with the secretary of state. Because "implement" is not defined by statute, we consider it to have its common dictionary meaning. *Oakland Co Bd of Co Road Comm'rs v Michigan Property & Casualty Guarantee Assn*, 456 Mich 590, 604; 575 NW2d 751 (1998). As a verb, to "implement" means "to fulfill; carry out" or "to put into effect according to a definite plan or procedure." *Random House Webster's College Dictionary* (2001). We do not believe that any particular person or entity needs to feel the effect of a law or a rule for it to be "implemented." Rather, we conclude that the most principled way to determine when a rule or law has been "implemented" is to refer to the effective date thereof. It may be that this will often coincide with the date it is promulgated, but there is no reason why such contemporaneousness should be necessary. We therefore do not treat "implement" and "promulgate" as synonyms.

The MDEQ rule at issue, R 336.1803, was published in 2007 Michigan Register 12, on July 15, 2007. It states that "[t]hese rules were filed with Secretary of State on June 25, 2007" and that they would become effective immediately upon filing.⁶ Because the MDEQ's rules became effective in 2007, we conclude that the rules were "implemented" in 2007. The fact that TES Filer only became subject to those rules in 2009 does not affect when the rules were implemented because no substantive change to the rules occurred at that time. The rules were therefore implemented prior to October 6, 2008.

In our prior opinion, we neglected to make explicit mention of TES Filer's alternative argument, that the 2007 rules were not enforceable at the time it incurred its first NOx allowance cost, arguing that the 2007 rules were unenforceable until approved by the EPA, that the EPA disapproved the 2007 rules, and that the NOx costs were incurred pursuant to the revised 2009 rules. We granted reconsideration to correct this oversight. However, TES Filer's argument in part merely restates its previously discussed confusion between the date a law is changed and the

⁶ In fact, it also provides that rules adopted pursuant to MCL 24.233, MCL 24.244, or MCL 245a(6) become effective 7 days after filing, but those statutes are not at issue here.

date it becomes enforceable, and in fact by the time TES Filer incurred NOx costs, the EPA had explicitly approved the 2007 rules. See 74 Fed Reg 41640. In essence, TES Filer's "alternative" argument is simply a variation on its argument that the rules were "implemented" in 2009 because that was when TES Filer became subject to those rules. As discussed, we find that the rules were substantively changed in 2007, irrespective of when TES Filer became subject to them. Therefore, although we granted reconsideration to correct an erroneous omission of mentioning this argument, TES Filer's motion for reconsideration has not established a substantive palpable error, and our conclusions remain unchanged. We conclude that TES Filer was not entitled to recover its NOx emission costs.

Docket No. 305083

The Attorney General argues that the PSC erred by transferring more for RE costs than an amount that reflected actual PSCR expenses incurred during the reconciliation period. The PSC improperly calculated transfer costs that are recoverable under MCL 460.6j and incremental costs that are recoverable under MCL 460.1049(3)(c) and MCL 460.1045(2). The PSC must establish a transfer price in RE and PSCR case plans and a per MWh price in RE and PSCR reconciliation cases. We disagree.

The Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 *et seq.*, became effective on October 6, 2008. The Act created renewable energy portfolio standards that utilities such as Consumers were required to meet over the next 20 years. MCL 460.1027. Utilities can recover the incremental costs of the renewable energy program. MCL 460.1047(2)(b)(iv) allocates renewable energy costs between PSCR costs, and incremental costs through the establishment of a price mechanism. This subparagraph provides in pertinent part:

. . . After providing an opportunity for a contested case hearing for an electric provider whose rates are regulated by the commission, the commission shall annually establish a price per megawatt hour. In addition, an electric provider whose rates are regulated by the commission may at any time petition the commission to revise the price. In setting the price per megawatt hour under this subparagraph, the commission shall consider factors including, but not limited to, projected capacity, energy, maintenance, and operating costs; information filed under section 6j of 1939 PA 3, MCL 460.6j; and information from wholesale markets, including, but not limited to, locational marginal pricing. This price shall be multiplied by the sum of the number of megawatt hours of renewable energy and the number of megawatt hours of advanced cleaner energy used to maintain compliance with the renewable energy standard. The product shall be considered a booked cost of purchased and net interchanged power transactions under section 6j of 1939 PA 3, MCL 460.6j. For energy purchased by such an electric provider under a renewable energy contract or advanced cleaner energy contract, the price shall be the lower of the amount established by the commission or the actual price paid and shall be multiplied by the number of megawatt hours of renewable energy or advanced cleaner energy purchased. The resulting value shall be considered a booked cost of purchased and net interchanged power under section 6l of 1939 PA 3, MCL 460.6j.

The PSC refers to this price as the transfer price. The PSC establishes this price in a utility's annual renewable energy plan reconciliation proceeding. MCL 460.1049(3)(c). Consumers asserted that its transfer price was \$44.798 per MWh, and sought recovery of \$90,973 in transfer costs.

The Attorney General sought to reduce the amount recovered by Consumers by \$39,715. The Attorney General argued that the transfer price used by Consumers to determine PSCR costs in this case should be "reduced by 45% to reflect the difference between the locational marginal prices forecasted in the plan case and the actual prices paid during the plan period." The Attorney General took the position that, because Consumers was obligated to meet its economic dispatch requirements with the lowest cost energy available, and because transfer costs should not exceed the actual costs that Consumers would have incurred if renewable energy resources had not been available, the transfer price should be recalculated in the instant PSCR case to ensure that Consumers' PSCR customers were not subsidizing the recovery of renewable energy costs.

The Attorney General's arguments are without merit. The PSC found that Consumers' calculation of the transfer price was consistent with the method used in prior PSC orders, including the order entered in Consumers' renewable energy plan case (Case No. U-15805). The PSC correctly noted that the Act gave it no authority to change the already-approved transfer price in a PSCR proceeding. The Attorney General points to no statutory authority that requires the PSC to recalculate the transfer price in a PSCR proceeding. Essentially, the Attorney General argues that the PSC should have adopted the testimony of its expert witness regarding the interpretation and application of the relevant statutes rather than accepting the testimony of Consumers' witness. However, "the PSC can properly rely on the testimony of a qualified expert and that testimony constitutes competent evidence[.]" *Attorney General v Public Serv Comm*, 174 Mich App 161, 170; 435 NW2d 752 (1988). The Attorney General has not demonstrated the existence of cogent reasons that would support this Court overturning the PSC's application of the relevant statutes. See *Rovas*, 482 Mich at 103-109.

The PSC correctly rejected the Attorney General's assertion that the transfer price relied on by Consumers should be recalculated in the context of the instant PSCR case.

IV. Conclusion

In Docket No. 305066, we affirm that portion of the PSC's order that disallowed recovery of NOx allowances requested by TES Filer.

In Docket No. 305083, we affirm the PSC's rejection of the Attorney General's challenge to the calculation of the transfer price relied on by Consumers.

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald