STATE OF MICHIGAN

COURT OF APPEALS

In re Application of INDIANA MICHIGAN POWER COMPANY to Increase Rates.

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

INDIANA MICHIGAN POWER COMPANY,

Petitioner-Appellee.

FOR PUBLICATION
July 10, 2012

No. 299590
MPSC
LC No. 00-016180

Advance Sheets Version

In re Application of CONSUMERS ENERGY COMPANY to Increase Rates.

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MUNICIPAL COALITION, HEMLOCK SEMICONDUCTOR CORPORATION and ENERGY MICHIGAN, INC.,

Appellees,

and

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee.

No. 299591
MPSC
LC No. 00-016191

Advance Sheets Version

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

MURRAY, J. (*dissenting*).

The single issue presented to this Court for resolution is whether the Michigan Public Service Commission properly exercised its authority under MCL 460.6a(1) and MCL 460.11(1). Resolution of that issue depends on what authority was given to the commission under those statutes. As discussed below, because it is undisputed that the commission did not make a finding of good cause under MCL 460.6a(1), it was without authority to issue the interim orders, and so I dissent from the majority's decision to affirm.

The statutory language contained within these two sections is dispositive of this issue. First is MCL 460.6a(1), which in part addresses a utility's ability to implement temporary rate increases if the commission fails to issue a final order within 180 days of the filing of a complete application with the commission. MCL 460.6a(1) provides, in pertinent part:

> A gas or electric utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section. 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. The commission shall require notice to be given to all interested parties within the service area to be affected, and all interested parties shall have a reasonable opportunity for a full and complete hearing. A utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges. The commission shall notify the utility within 30 days of filing, whether the utility's petition or application is complete. A petition or application is considered complete if it complies with the rate application filing forms and instructions adopted under subsection (6). A petition or application pending before the commission prior to the adoption of filing forms and instructions pursuant to subsection (6) shall be evaluated based upon the filing requirements in effect at the time the petition or application was filed. If the application is not complete, the commission shall notify the utility of all information necessary to make that filing complete. If the commission has not notified the utility within 30 days of whether the utility's petition or application is complete, the application is considered complete. *If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates.* For a petition or application pending before the commission prior to the effective date of the amendatory act that added this sentence, the 180-day period commences on the effective date of the amendatory act that added this sentence. If the utility uses projected costs and revenues for a future period in developing its requested rates and charges, the utility may not implement the equal percentage increases or decreases prior to the calendar date corresponding to the start of the projected 12-month period. *For good cause, the commission may issue a temporary order preventing or delaying a utility from*

> *implementing its proposed rates or charges. If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order.* The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission. The rate of interest for refunds shall equal 5% plus the London interbank offered rate (LIBOR) for the appropriate time period. For any portion of the refund which, exclusive of interest, exceeds 25% of the annual revenue increase awarded by the commission in its final order, the rate of interest shall be the authorized rate of return on the common stock of the utility during the appropriate period. Any refund or interest awarded under this subsection shall not be included, in whole or in part, in any application for a rate increase by a utility. Nothing in this section impairs the commission's ability to issue a show cause order as part of its rate-making authority. [Emphasis added.]

The other subsection at issue, MCL 460.11(1), requires that the commission phase-in, over a five-year period, electric rates based on the cost of providing service to each customer class:

> This subsection applies beginning January 1, 2009. *Except as otherwise provided in this subsection, the commission shall phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years from the effective date of the amendatory act that added this section.* If the commission determines that the rate impact on industrial metal melting customers will exceed the 2.5% limit in subsection (2), the commission may phase in cost-based rates for that class over a longer period. The cost of providing service to each customer class shall be based on the allocation of production-related and transmission costs based on using the 50-25-25 method of cost allocation. The commission may modify this method to better ensure rates are equal to the cost of service if this method does not result in a greater amount of production-related and transmission costs allocated to primary customers. [Emphasis added.]

In determining the meaning of this statutory language, we are guided by our recent explication of statutory construction principles in the context of an administrative appeal set forth in *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129-130; 807 NW2d 866 (2011):

> The construction of a statute by a state administrative agency charged with administering it "'is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.'" *In re Complaint of Rovas*, 482 Mich [90,] 103 [754 NW2d 259 (2008)], quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935). Even so, "'[r]espectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used . . . ." *In re Complaint of Rovas*, 482 Mich at 108. Indeed, an

> administrative 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." *Id.* at 103; see also *Ins Institute of Mich* [*v Comm'r of the Office of Fin & Ins Servs*], 486 Mich [370,] 385 [785 NW2d 67 (2010)]. Thus, even a longstanding administrative interpretation cannot overcome the plain language of a statute. *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007).

Thus, if the statutes contain plain and unambiguous language, we cannot give even "respectful consideration" to the commission's view on what the statutes require, for it is the judicial branch's role to enforce the clear and unambiguous statutory language.

The answer to the question is clear when enforcing the plain and unambiguous language of these statutes. Under MCL 460.6a(1), if the commission does not issue a final rate order within 180 days of the application being filed, a utility is permitted to implement a temporary rate increase up to "the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates." Once this rate change occurs, the commission is powerless to stop it unless the commission finds good cause to do so, which did not occur in either case. Additionally, the statute clearly specifies what type of rate can be implemented, i.e., only those through "equal percentage" increases and decreases. Hence, the Legislature was not concerned with cost-based rates in the *initial* implementation of a temporary rate change. Instead, it appears that the policy of cost-based rates is effectuated at the conclusion of the temporary rate, as the statute provides a self-implementing remedy of returning the excess collected from customers if the ultimate rate approved is lower than that provided for in the temporary, equal-percentage rate change. Thus, because the commission did not issue a final order within 180 days of either application, nor did it find good cause to prevent or delay the temporary rate changes, the orders were illegal and must be vacated.

This conclusion is consistent with MCL 460.11(1). That statute requires the commission to implement over a five-year period "electric rates equal to the cost of providing service to each customer class . . . ." Enforcement of MCL 460.6a(1) does nothing to interfere with this phase-in obligation, as the commission can, in these cases and all other cases, ensure that the rates established in final orders meet the cost-based rate requirements of MCL 460.11(1). Just as importantly, if allowing these temporary rate increases by the utilities does interfere with the commission's obligation under MCL 460.11(1), nothing prohibits the commission from using that reason for establishing good cause to prohibit the temporary rate increases under MCL 460.6a(1). But where, as in these cases, the commission fails to both timely issue a final order and issue any order finding good cause to stop the temporary order, the utility is free to implement the temporary rate increases consistent with MCL 460.6a(1).

Finally, whether the temporary rate orders permitted under MCL 460.6a(1) actually interfere with the commission's obligation to phase-in cost-based rates is of no moment to our duty to enforce the plain statutory language contained in the statute. Given the specific time tables and remedies contained in these statutes, there can be little doubt that the Legislature has carefully crafted the obligations of both the commission and utilities. If enforcing these clear statutes does in fact substantially interfere with the commission's obligation for the five-year phase-in of cost-based rates, the Legislature can amend the provisions of MCL 460.6a(1). We

cannot do so by judicial fiat. *Moran v People*, 25 Mich 356, 364-365 (1872) (a court may not strain a statute by construction because this would be legislating by the judiciary).[1]

/s/ Christopher M. Murray

[1] Additionally, the commission cannot invoke as a canon of statutory construction what it perceives to be in the "public interest," i.e., Michigan's current economic climate. Instead, the "public interest" is set by the Legislature, and two clear statutes cannot be read to mean something they do not because of its perceived affect on the current economic climate.