

STATE OF MICHIGAN
COURT OF APPEALS

In re Application of DETROIT EDISON
COMPANY to Increase Rates.

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY,

FOR PUBLICATION
July 26, 2012

Appellant,

v

No. 302110
PSC

MICHIGAN PUBLIC SERVICE COMMISSION,

LC No. 00-016384

Appellee,

and

DETROIT EDISON COMPANY,

Petitioner-Appellee.

Advance Sheets Version

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

SAAD, J. (*dissenting*).

I respectfully dissent from the majority. We generally will not second-guess rulings by administrative agencies, but instead grant deference to them premised on their special expertise. Yet, when, as here, a ruling by an administrative agency defeats the public policy purposes and plain language of two key statutes, our Court must do its duty and prevent such a repudiation of the Legislature’s clear mandate. After all, in the final analysis, the administrative agency should uphold, not undermine, the law the Legislature passed.

Having said this, the express language of the Customer Choice and Electricity Reliability Act (Choice Act) makes clear its public purpose is to ensure that all Michigan customers of electric power “have a choice of electric suppliers.” MCL 460.10(2)(a). The Choice Act also says its aim is to encourage competition. MCL 460.10(2)(b). Also key to our review of the agency’s conduct here, the Choice Act specifically enumerates as one of its purposes to “encourage the Michigan public service commission to foster competition” *Id.* Thus, when the PSC deals with a customer of an electric utility that has exercised its legislatively encouraged

choice under the Choice Act to buy electricity from a competitor of Detroit Edison, the PSC must, in its decisions, be faithful to its statutory mission to “foster competition.”

In this case, a few of the primary customers¹ of Detroit Edison sought refunds of the actual amount that they overpaid Detroit Edison for electric power before they switched to buying electricity from another electric company. Their statutory right to a refund for those overpayments is set forth clearly in 2008 PA 286 (Act 286). The overpayments occurred because, for the first time in Michigan, Act 286 allows an electric utility to self-implement a rate increase, subject to later reduction by the PSC. The risk to the electric utility is that it will have to refund to its customers the amounts overpaid during this self-implementation period. Indeed, Act 286 expressly says that the utility “shall refund” customers if the PSC does not grant the full rate increase represented in the self-implemented rate. MCL 460.6a(1).

And, under applicable administrative law, the PSC generally determines how refunds will be calculated, but, importantly, Act 286 also sets forth how the PSC should calculate these refunds under the new self-implementation statute. With regard to all commercial and residential customers, roughly three million users, Act 286 affords the PSC its usual broad authority to adopt a methodology for refunds. Significantly, as to primary customers, Act 286 carves out a different way to calculate refunds, which makes it quite clear that these primary customers should simply be reimbursed for the actual amount they were overcharged. This is called the “historical approach.” In other words, these primary customers know exactly how much they overpaid each month and how much less they would have paid in light of the lesser increase granted by the PSC. It is this amount they seek as a refund—the amount they overpaid—and this is the amount and the methodology that the statute requires the PSC to use. Instead, the PSC ruled that it will use the “prospective refund methodology,” which means that the primary customers who were overcharged by Detroit Edison before they switched to competitors get no refund whatsoever. The PSC ruled that it will spread the total refunds to all Detroit Edison customers in the future by reducing their rates according to a formula that takes the total overcharges (the money that Detroit Edison charged over the rate eventually approved by the PSC) and spreading it among Detroit Edison customers. Thus, notwithstanding the specific refund calculation required by Act 286 for primary customers, those primary customers who overpaid and then switched electric suppliers will receive no refund. Therefore, the PSC ruling disincentivizes the very choice and competition the Choice Act expressly promotes and denies the very refunds Act 286 promised to primary customers. The net result is that in one fell swoop the PSC defeats the express language and public policy of two key statutes.

Under the umbrella of deference to the PSC, the majority endorses this ruling, with its counterintuitive result and its repudiation of the public policy underlying the Choice Act and Act 286. I strongly dissent because the largest users of electricity who make the move to a Detroit Edison competitor end up losing the most. The overcharges and overpayments are never refunded. This will serve to discourage “choice” and “competition” among the largest users of electricity in this state, the very legislative objectives at the center of the Choice Act.

¹ “Primary customers,” numbering roughly 3,000, are large purchasers of electricity.

Again, to justify this result, the PSC cites its discretion to adopt a methodology for refunds, despite the fact that Act 286 carves out a particular method for refunds to primary customers in connection with the new self-implementation program. The PSC further justifies its unfair methodology on the self-serving theory that primary customers should have known that the PSC has broad discretion and that it likely would not have granted primary customers a refund (despite the act's language which seems to guarantee a refund). According to the PSC, primary customers must have factored this in to their decisions to switch electric suppliers and, therefore, did not really lose anything at all by the PSC's decision not to give them refunds. Not only is this rationale a form of reasoning backward from a desired result but, again, it violates the clear language of two statutes. Under our system of laws, an administrative agency, while it has broad power, does not have plenary power and certainly does not have the power to trump the Legislature it serves by undermining two statutes, by discouraging competition, and by denying a refund to the largest utility customers in our state.

/s/ Henry William Saad