

STATE OF MICHIGAN
COURT OF APPEALS

CHAMPION'S AUTO FERRY, INC.,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

UNPUBLISHED

December 20, 1996

Nos. 185048; 187124

LC Nos. 00001282;

00001283

Before: MacKenzie, P.J., and Jansen and T.R. Thomas,* JJ.

PER CURIAM.

Champion's Auto Ferry (Champion) appeals as of right from two separate orders of the Michigan Public Service Commission (PSC) dated March 23, 1995 and June 5, 1995 in Docket Nos. 185048 and 187124, respectively. The PSC rejected Champion's requested rate increases in both orders. We affirm.

Champion provides year-round ferry service across the north channel of the St. Clair River between Harsens Island and Algonac. There are no other bridges or ferries linking the island to the mainland. Champion was founded in 1937 by the grandfather of the present owner, David Bryson. In December 1992, Bryson became the sole stockholder through a stock redemption. Shortly after Bryson obtained sole ownership, Champion commenced a series of tariff filings. Beginning on March 1, 1993, Champion requested its first of six requested rate increases. Some of those requested increases were approved by the PSC. On December 15, 1994, Champion filed Tariff No. 24 proposing a rate increase and this proposed rate increase was rejected by the PSC in an opinion and order dated March 23, 1995 (the subject of this appeal in Docket No. 185048). On April 10, 1995, Champion filed Tariff No. 25, once again seeking a variety of rate increases. In an opinion and order dated June 5, 1995, the PSC rejected the proposed rate increase (the subject of this appeal in Docket No. 187124).

* Circuit judge, sitting on the Court of Appeals by assignment.

On appeal, Champion raises the same six issues in both cases, although the subissues regarding issue I are slightly different in each case. We will consolidate the issues for greater efficiency on appeal.

I

We begin with the standard of review. A party aggrieved by a decision of the PSC must show by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 460.205; MSA 22.95; MCL 462.26(8); MSA 22.45(8). A decision is unlawful when it involves an erroneous interpretation or application of the law. *Attorney General v Public Service Comm*, 215 Mich App 356, 364; 546 NW2d 266 (1996). A decision is unreasonable when it is unsupported by the evidence. *Id.* Any factual determinations must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. The courts are to give due deference to the PSC's administrative expertise and may not substitute their judgment for that of the PSC. *Attorney General, supra*, p 364. The courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with its enforcement. *Id.*

A

Champion first argues that the PSC acted unreasonably and unlawfully in denying its requested tariff increase. In Docket No. 185048, Champion raises six subissues. First, it contends that the PSC has been derelict in establishing rules and regulations setting forth the criteria for evaluating water carrier rates and practices. Contrary to Champion's contention, there is no authority for its proposition that its rates and rules should be analyzed in light of the law applicable to motor carriers. There is nothing in the Motor Carrier Act, MCL 475.1 *et seq.*; MSA 22.531 *et seq.* which suggests that it is applicable to water carriers. Moreover, the Legislature has enacted a separate statutory scheme governing water carriers, the Carriers by Water Act, MCL 460.201 *et seq.*; MSA 22.91 *et seq.* In fact, since the August 2, 1993 opinion and order relating to Tariff No. 19, it should have been clear to Champion that the PSC was applying the standard cost-of-service principles to its requests. Champion has failed to show that the PSC acted arbitrarily or failed to adequately explain the principles it would apply to Champion's tariffs.

Second, Champion argues that the PSC misunderstood the import of its arguments regarding cash flow. Champion believes that it should be entitled to higher rates so that its cash flow is sufficient to cover expenses all year long, even during the months when revenues are too low to cover expenses. The PSC, on the other hand, states that it fully understands the seasonal nature of Champion's business. The PSC believes that as long as Champion's annual revenues are sufficient to cover all legitimate annual expenses, including interest on a bridge loan, with sufficient profit left over to begin the orderly replacement of capital, then higher rates are not necessary. We cannot say that the PSC's conclusion in this regard is unlawful or unreasonable.

Third, Champion contends that the PSC should not have used 1994 as the base year for projecting future revenues and expenses, but should have used the three-year period of 1992-1994.

Although using the three-year period may have been preferable, this Court may not substitute its judgment for that of the PSC. Champion has not shown that the PSC's decision in this regard was an erroneous interpretation or application of the law, or was unsupported by the evidence. We cannot conclude that the PSC's choice of a base period, which was the most recent year available when Champion requested the rate increase, was wholly unreasonable. Further, Champion's argument regarding the PSC's projection of future expenses based on a 3% across-the-board cost-of-living allowance was not unreasonable because Champion agreed below to that figure. Accordingly, we cannot conclude that the PSC erred in calculating the projected net operating income or profit for 1995 and 1996.

Fourth, Champion argues that the PSC erred in concluding that the amount of profits calculated for 1995 and 1996 is adequate for Champion to make progress toward replacing its assets. However, Champion has not adequately justified the amount of profits necessary or sufficient for purposes of capital replacement. Given the rather narrow standard of review, and the requirement that Champion must show by *clear and satisfactory evidence* that the PSC's decision is unlawful or unreasonable, Champion has not met its burden on appeal.

Fifth, Champion argues that the PSC denied its president and only shareholder, Bryson, of any return on his equity. The PSC did not so hold, but rather held that, under the circumstances, no return investment would be allowed. Bryson bought out his mother and brothers to become the sole shareholder and this resulted in negative equity to the company. Bryson had not invested any of his own capital in the company. Therefore, the PSC's decision in this regard is neither unlawful nor unreasonable.

Sixth, Champion contends that the PSC erred in denying its request to change the PSC's rule denying service to those who have outstanding account balances going back at least 180 days. The PSC rejected Champion's proposal because it failed to show that its bad debt situation had worsened or that the debt was large in absolute terms. The PSC noted that Champion's own projections for bad debt for 1995 and 1996 were only \$1,230 and \$1,226 respectively. Under these circumstances, we cannot conclude that the PSC acted unlawfully or unreasonably.

B

In Docket No. 187124, Champion raises three additional subissues. It first contends that the PSC erred in rejecting its argument that it had demonstrated a change in circumstances justifying approval of the tariff previously rejected. The PSC concluded that it was irresponsible of Champion to give Bryson a 24% pay raise and to incur attorney fees and accountant fees in the amount of \$76,353 for the period of January 1, 1995 to April 24, 1995. Moreover, even if all the additional expenses were reasonable and prudent, Champion would still realize a net profit of \$65,387 for 1995. Under these circumstances, we cannot conclude that the PSC's decision was unlawful or unreasonable.

Second, Champion argues that the PSC improperly denied rate relief because Champion failed to address two of the three issues deferred from the earlier case. However, Champion was on notice that the PSC had concerns regarding certain expenses that had not been properly documented. Thus, Champion cannot claim surprise at its failure to address these two issues. We find no error on the part of the PSC in this regard.

Third, Champion argues that the PSC erred in attributing any of its financial problems to the structure of Bryson's buyout of his mother's and brothers' interests. However, a review of the record indicates that the PSC did not deny Champion the rate increases because of the manner in which Bryson acquired the company. The PSC denied the rate increases because it calculated that Champion would be able to cover all legitimate expenses and still have enough to begin funding capital repair and replacement with its present rates. Accordingly, the PSC's decision in this regard was neither unlawful nor unreasonable.

II

Next, Champion argues that the actions of the PSC in regulating it violated Champion's right to equal protection. Champion contends that it is the only water carrier subject to regulation by the PSC even though other ferries operate in Michigan. Therefore, Champion argues that the PSC's scrutiny of its rates and regulations and lack of scrutiny of other ferries violates equal protection.

The Equal Protection Clause of the Fourteenth Amendment directs that all persons similarly situated shall be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987). However, the Equal Protection Clause does not require things which are different in fact or opinion to be treated in law as though they were the same. *Id.* Generally, legislation challenged on equal protection grounds is accorded a presumption of constitutionality and is reviewed applying a rational basis standard. *Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992). Under the rational basis standard, a statute will not be struck down if the classification scheme is rationally related to a legitimate governmental purpose. *Id.*

Champion has not shown that the PSC's regulation and scrutiny of its rates violates its right to equal protection. The PSC has a rational basis for regulating Champion's rates and regulations because other carriers are subject to competition (unlike Champion) and most ferry services in the state are either publicly owned or under the jurisdiction of another government. Thus, there is no violation of equal protection in this case.

III

Champion next argues that the failure of the Carriers by Water Act to set forth standards for the PSC's regulation of rates charged is unconstitutional as violative of due process.

The Carriers by Water Act satisfies due process because the PSC is required to give notice to the water carrier and other interested persons of the hearing which must be held when the PSC

suspends the operation of a tariff and inquires into rates and regulations. MCL 460.201; MSA 22.91. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker).

Further, due process requires that the delegation of legislative tasks to an administrative agency be accompanied by the existence of standards as reasonably precise as the subject matter requires or permits. *Kopietz v Clarkston Zoning Board of Appeals*, 211 Mich App 666, 670-671; 535 NW2d 910 (1995). In *Attorney General v Public Service Comm*, 161 Mich App 506; 411 NW2d 469 (1987), the Attorney General contended that a statute allowing the PSC to incorporate a gas cost recovery clause in the rates or rate schedules of a utility was unconstitutional because the statute provided no standard to guide the PSC in the exercise of its discretion regarding when a gas cost recovery clause should be approved. This Court disagreed, ruling that the gas cost recovery statute as a whole met the requirement that it provide standards as reasonably precise as the subject matter required or permitted. See *id.*, pp 510-511.

Likewise, reading the Carriers by Water Act as a whole, it meets the requirement that it provides standards as reasonably precise as the subject matter requires or permits. Section one of the act requires that there be a hearing and that notice must be given to the carrier and to other interested persons. Section four of the act also requires that the carrier shall be entitled to reasonable notice and an opportunity to be heard before any tariff shall be imposed. An order imposed by the PSC is entitled to judicial review under § 5, and § 2 limits examination by the PSC to books, accounts, records, and papers. Further, the PSC has a long history of rate regulation of water carriers, motor carriers, and utilities. Accordingly, the Carriers by Water Act provides standards as reasonably precise as the subject matter requires or permits.

Therefore, there is no due process violation in this case.

IV

Next, Champion argues that the PSC impermissibly substituted its judgment regarding a reasonable profit and, therefore, exceeded its authority to fix the rate, fare, charge or tariff in the matter complained of. We disagree because the record does not support Champion's contention in this regard. There is no indication that the PSC impermissibly made a managerial decision. Rather, the PSC was within its authority to set rates based on findings regarding Champion's revenues, expenses, and allowable return on investment.

V

Next, Champion argues that the PSC failed to comply with § 3 of the act in that the PSC failed to promulgate rules. First, we note that the language of § 3 requires the PSC to make all "needful" rules and regulations governing its investigations. Second, an administrative agency may set standards either by formal rulemaking or on case-by-case adjudication. *Northern Michigan Exploration Co v Public*

Service Comm, 153 Mich App 635, 649; 396 NW2d 487 (1986). Because the PSC's rules and practices, whether developed by formal rulemaking or by case-by-case adjudication, in other areas of utilities law adequately establish the standards and practices for reviewing water carrier tariff disputes, Champion has not shown that the PSC failed to make any needful rules.

VI

Last, Champion argues that the language of the Carriers by Water Act is so vague as to be unconstitutional. Champion's claim in this regard is wholly without merit as it has failed to meet the test that the statute is void for vagueness. See *People v Hubbard (After Remand)*, 217 Mich App 459, 484; 552 NW2d 493 (1996).

The orders of the PSC denying Champion's request for an increase in rates are affirmed.

/s/ Barbara B. MacKenzie

/s/ Kathleen Jansen

/s/ Terrence R. Thomas