STATE OF MICHIGAN

COURT OF APPEALS

THE CITY OF HILLSDALE and THE HILLSDALE BOARD OF PUBLIC UTILITIES,

Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS POWER COMPANY,

Defendants-Appellees

and

MICHIGAN MUNICIPAL ELECTRIC ASSOCIATION and MICHIGAN SOUTH CENTRAL POWER AGENCY,

Amici Curiae.

UNPUBLISHED
January 3, 1997

No. 183249

Public Service Commission
No. U-10562

Before: Michael J. Kelly, PJ, and Hoekstra and E.A. Quinnell*, JJ.

PER CURIAM.

Plaintiffs appeal by right the January 26, 1995 order of the Public Service Commission rejecting a hearing officer's proposal for decision, and instead granting the application of

Consumers Power for a certificate of public convenience and necessity to provide electrical service to two customers served by Hillsdale's municipal utility. We affirm.

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

I

Hillsdale has operated a municipal utility for over 100 years. Since 1919 it has served Pittsford Township, where the customers at issue are located. Hillsdale is a small utility with approximately 5,436 customers. Its entire system consists of approximately 180 miles of overhead distribution lines and 10 miles of underground distribution lines. Hillsdale's total revenues in 1993 were $9,228.224.

Consumers is a large investor-owned utility. Its revenues for 1993 were $2,077,275,482. In 1993 Consumers served over 1.5 million customers. The precise number of customers Consumers has in Pittsford Township and the extent of its distribution facilities in Pittsford Township is unknown.

In 1991 Martin Grubbs purchased a house in Pittsford Township and formed Martin Manufacturing, located next door to the house. Both the house and company received electrical service from Hillsdale. Neither Grubbs nor Martin Manufacturing ever complained about the reliability of service from Hillsdale.

In August or September 1993 Grubbs was informed by Hillsdale that he had been mistakenly charged too low a rate. Although Hillsdale did not seek recoupment of the lost revenue, beginning in September or October 1993 his rates were increased. Grubbs complained that given the new rates, he might not be able to afford to run all of his equipment and keep all of his current employees. When Hillsdale refused to provide any relief, Grubbs contacted Consumers about providing electrical service to his home and business. He learned that Consumers' rates would save him approximately $2,000 per year. He contacted Hillsdale and requested a release in order to switch to Consumers Power. Hillsdale refused.

On March 14, 1994 Consumers filed an application with the PSC for a certificate of public convenience and necessity pursuant to 1929 PA 69, MCL 460.501 *et seq.*; MSA 22.141 *et seq.* (Act 69) to provide electrical service to the house and business. Section 2 of Act 69 provides:

> No public utility shall hereafter begin construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service or extension.

Section 5 of Act 69 provides:

> In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or

not public convenience and necessity requires the applying utility to serve the territory. Every certificate of public convenience and necessity issued by the commission under the authority hereby granted shall describe in detail the territory in which said applicant shall operate and it shall not operate in or serve any other territory under the authority of said certificate.

Leave to intervene was granted to Hillsdale and the Attorney General. Following evidentiary hearings held on May 25 and June 27, 1994 the hearing officer issued a proposal for decision on September 9, 1994 in which he recommended that the application be denied. After noting the factors set out in §5 of Act 69, the hearing officer concluded that the first factor did not favor granting Consumers a certificate because there was no evidence that the quality or reliability of service provided by Hillsdale was deficient. The hearing officer found the question of investment by the utilities to be a wash. Although he noted that Hillsdale as the smaller utility could be expected to suffer more by the loss of two customers than Consumers would gain thereby, the hearing officer found that Hillsdale had not made a significant investment to serve those customers. Moreover, although two transformers located near the house and business would become a waste, the hearing officer found that the transformers were 14 years old and would soon have to be replaced anyway. The hearing officer noted that Consumers had a substation located nearby and that hooking up the residence and business to the Consumer system would not entail a large investment. The hearing officer found that there would be little public benefit if the certificate were granted because the customers wished to switch to Consumers only to obtain lower rates. He reasoned that they were the only real beneficiaries of the requested certificate. Moreover, any benefit to Consumers' customers from the additional revenue collected from the two new customers would be inconsequential, whereas the loss spread over Hillsdale's customer base would be greater. The hearing officer concluded that this factor favored denying the certificate. Finally, the hearing officer found that no other considerations, equitable or otherwise, were relevant to his decision.

Consumers filed exceptions to the proposal for decision and Hillsdale, the Attorney General and the PC staff filed replies to the exceptions. In an opinion and order dated January 26, 1995 the PSC rejected the proposal for decision and granted Consumers' application for a certificate of public convenience and necessity to serve the two customers. The PSC agreed with the hearing officer that the investment issue was a wash. The PSC also agreed that there was no evidence one way or the other regarding duplication of service or quality of service. However, the PSC held that the hearing officer failed to give proper weight to customer choice in a situation such as this, and in addition failed to take into account that Pittsford Township not only lies outside of Hillsdale's service boundaries, but is not even contiguous to those boundaries. The PSC held that in light of these considerations Consumers' application should be granted:

> In this situation, where several of the Act 69 criteria do not point in a clear direction, the Commission will look more closely at equitable factors. The customers at issue in this case have expressed an unequivocal desire to take service from Consumers. Under the circumstances indicated by the record, customer choice should be taken into

account. Because one of the customers is an industrial concern that participates in the local economy, the potential rate advantage achieved by that customer may also have benefits for the public at large. Moreover, allowing customers to have a role in deciding which electric company will serve may benefit all customers generally by enhancing the companies' incentive to provide good service at economical rates.

Another consideration is that the municipality in question, Pittsford Township, lies outside of the boundaries of the City of Hillsdale and is not itself contiguous to those boundaries. In general, a noncontiguous municipality is likely to be farther away from the core areas of a municipal utility's service territory. Consequently, there is less reason to apprehend that a customer's change in service from a municipal utility to a jurisdictional utility would result in competition inconsistent with the public convenience and necessity or would have other consequences contrary to the public interest.

To summarize, the record shows that there is little risk of duplicative facilities or investment or other adverse effects due to a change in service, that the customers have shown a strong preference for a change in service, and that the customers are located in a township that is not contiguous to the boundaries of the municipal utility. Under the circumstances of this case, the Commission is persuaded that Consumers' application should be granted.

From this decision, Hillsdale appeals by right.[1]

II

A

All rates, fares, charges, classifications and joint rates, regulations, practices and services prescribed by the PSC are presumed prima facie to be lawful and reasonable. A party aggrieved by an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. The term "unlawful" has been defined as an erroneous interpretation or application of the law, and the term "unreasonable" has been defined as unsupported by the evidence. To the extent that the PSC makes findings of fact, those findings must be supported by competent, material and substantial evidence on the whole record. A reviewing court is required to give deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC. *Marshall v Consumers Power*, 206 Mich App 666, 676-677; 523 NW2d 483 (1994).

B

Hillsdale argues that the fundamental purpose of Act 69 is to restrict competition in order to prevent competing utilities from unnecessarily duplicating resources and facilities needed to provide services to the same area and to avoid the adverse effects of such duplication on rates and other matters of public concern. Although competition may be laudable in the abstract, Hillsdale argues that the

purpose of Act 69 is expressly to limit competition, in the absence of public convenience and necessity, so as to protect utilities from unnecessary competition, thereby reducing the risks inherent in utility investment and thus lowering the cost of capital for utilities. *Panhandle v PSC*, 328 Mich 650, 664; 44 NW2d 324 (1950), aff'd 341 US 329; 71 S Ct 777; 95 L Ed 993 (1950), *Huron Cement Co v PSC*, 351 Mich 255, 267-268; 88 NW2d 492 (1958). Hillsdale argues that the PSC's decision in this case represents a fundamental departure from the historic interpretation of the policies underlying Act 69. Hillsdale contends that the PSC, without any great discussion, held for the first time that customer choice should be taken into account in determining whether to grant a certificate under Act 69, because "allowing customers to have a role in deciding which electric company will serve may benefit all customers generally by enhancing the companies' incentive to provide good service at economical rates." Hillsdale argues that by doing so the PSC ignored its own and the courts' long-standing interpretation of Act 69 as being designed to limit competition except where public convenience and necessity requires it.

We believe that Hillsdale's characterization of Act 69 as being anticompetitive is either incomplete or misleading. The main purpose of Act 69 is to prevent unnecessary duplication and waste. Act 69 prevents unnecessary competition in order "to prevent duplication of facilities and the waste inherent in situations in which a public utility seeks to serve another utility's existing customer." *Marshall, supra*, 206 Mich App at 678. Both the hearing officer and the PSC agreed that granting Consumers' application for a certificate in this case would not cause a duplication of services or lead to waste. Both Consumers and Hillsdale are presently providing electrical service to customers in Pittsford Township. Both have facilities near the residence and business at issue. The cost of hooking up the customers to Consumers is relatively small, as is the waste, inasmuch as the transformers which would be rendered unnecessary by the switch are already due for replacement and apparently have no other possible use.

Although Hillsdale and the amici contend that the PSC abandoned years of precedent and undermined the purposes of Act 69 in this case, we interpret the PSC's decision narrowly.

> *In this situation*, where several of the Act 69 criteria do not point in a clear direction, the Commission will look more closely at equitable factors. The customers at issue in this case have expressed an unequivocal desire to take service from Consumers. *Under the circumstances indicated by the record*, customer choice should be taken into account. (Emphasis added.)

In light of this restrictive language in the PSC's opinion, we do not believe that the PSC intended to announce any new policy. We hold that Hillsdale has failed to show that the PSC's decision is unlawful or unreasonable.

C

Hillsdale argues in the alternative that the PSC improperly applied the criteria specified in §5 of Act 69.

Hillsdale argues that the PSC erred in characterizing the duplication of facilities as *de minimis* for two reasons. First, Hillsdale contends that Act 69 should be interpreted as prohibiting the granting of a certificate whenever duplication would result, even if the duplication is *de minimis*. Second, Hillsdale argues that even if the cost of providing service to the residence and business in this case would be practically nothing to a large company like Consumers, the loss of revenue to Hillsdale would be comparatively great. Hillsdale contends that business customers like Martin Manufacturing are the "bread and butter" of small municipal utilities and constitute the base of municipal electrical business for Hillsdale and many other cities and villages.

We find no merit in this argument. Both Consumers and Hillsdale are presently providing service to some customers in Pittsford Township. Although switching the residence and business in this case to Consumers will require the construction of some power lines, and will thus create some duplication in the sense that Hillsdale already has power lines serving these two customers, such duplication is clearly *de minimis*. The statute delegates to the PSC the right to weigh the various factors and determine whether a certificate of convenience and necessity should issue. *Panhandle, supra,* 328 Mich at 664. We hold that such a delegation carries with it the power to determine that the public interest would not be adversely affected by duplication because it is minimal.

Hillsdale contends that the PSC erred in focusing on the benefit Mr. Grubbs and Martin Manufacturing would obtain by a change in rates, because by doing so the PSC failed to give adequate consideration to whether granting the application would benefit the public at large. Hillsdale argues that a proper analysis would reach the conclusion that granting the application would harm the public for a number of reasons. First, allowing large utilities like Consumers to raid small municipal utilities like Hillsdale will ultimately result in less competition, not more, and thus will harm the public in the long run. Second, even if Consumers' calculations regarding the revenue effect of the switch are accepted, the 1.5 million ratepayers it services would experience a benefit of no more than $.004 per year, whereas Hillsdale's ratepayers will be forced to pay an additional $2.57 per year. Although Hillsdale notes that the PSC speculated that residents in the Hillsdale area would benefit if a local employer like Martin Manufacturing paid lower electrical rates, Hillsdale contends that nothing in the record supports this speculation.

We believe that the PSC had a sufficient factual basis for concluding that lower rates of electricity for a small local manufacturer like Martin Manufacturing would be of benefit to the public interest. Although it is true that Hillsdale's customers will have to pay a somewhat higher rate for electricity as a result of the transfer, the PSC could reasonably conclude that Martin Manufacturing should not be required to pay $2,000 more per year for electricity from Hillsdale in order that each Hillsdale customer could avoid an average increase of $2.57 per year.

Hillsdale contends that the PSC's focus on consumer choice is misplaced or its analysis is incomplete, inasmuch as 1974 PA 157, MCL 124.3; MSA 5.4083 prohibits customers of Consumers located outside of the Hillsdale city limits from leaving Consumers' system and switching to Hillsdale

without the consent of Consumers. Hillsdale argues that this creates a one-way street: Consumers can offer lower rates to Hillsdale's customers in order to induce them to switch to Consumers, and then prevent them from returning to Hillsdale if Consumers later raises its rates or the customers otherwise decide that they would prefer to be serviced by Hillsdale.

We disagree. Even if customers who switch to Consumers will not be able to switch back to Hillsdale without the consent of Consumers, customers cannot switch from Hillsdale to Consumers without the permission of Hillsdale or a ruling of the PSC on an application for certificate of public convenience and necessity. The situation is therefore roughly symmetrical.

Finally, Hillsdale argues that there is nothing in the language of Act 69 to support the PSC's reliance on the fact that Pittsford Township is not contiguous to the City of Hillsdale. Moreover, Hillsdale complains that the PSC failed to articulate any basis or rationale for its conclusion that any negative consequences of competition are somehow less adverse in noncontiguous townships.

We must agree that the PSC's reasoning in this regard is incomplete. However, in light of the other reasons given by the PSC, we conclude that Hillsdale has failed to demonstrate that its decision is unlawful or unreasonable. Moreover, as the legislatively chosen administrative body for interpreting and applying the statute, we are inclined to indulge the PSC's apparent speculation that changes in customer service in noncontiguous areas would be less threatening to the general well-being of municipal utilities than changes in the core service area.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Edward A. Quinnell

[1] In addition to a brief from Consumers Power, this Court granted leave to file briefs amici curiae to the Michigan Municipal Electric Association and the Michigan Sough Central Power agency.