

STATE OF MICHIGAN
COURT OF APPEALS

MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP,

UNPUBLISHED
January 21, 1997

Appellant,

v

No. 178584
Public Service Commission
LC No. U-10445

MICHIGAN PUBLIC SERVICE COMMISSION,
et al,

Appellees.

ATTORNEY GENERAL,

Appellant,

v

No. 178814
Public Service Commission
LC No. U-10445

MICHIGAN PUBLIC SERVICE COMMISSION,
et al,

Appellees.

Before: McDonald, P.J., and White and P. J. Conlin, JJ.*

PER CURIAM.

This case concerns repeatedly litigated questions regarding payments for energy produced by the Midland Cogeneration Venture (MCV). This appeal arises specifically out of the annual power supply cost recovery plan (PSCR) for 1994. The separate appeals of MCV and the Attorney General from the August 18, 1994 decision of the Public Service Commission (MPSC), were consolidated by this Court. We affirm.

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

The factual background for this appeal was recently summarized by this Court in *ABATE v Public Service Commission*, 216 Mich App 8, 12-18; 548 NW2d 649 (1996):

The Midland Cogeneration Venture (MCV) is a limited partnership formed for the purpose of constructing and operating a gas-fired cogeneration plant. On September 10, 1987, MCV filed an application with the MPSC for approval of capacity charges in a contract for the sale of electricity to Consumers Power Company (CP). The MPSC docketed MCV's application as Case No. U-8871, and consolidated it with other applications for QFs [qualifying facilities] and complaints against CP.

* * *

In the appeals before us, CP, MCV, the AG, ABATE and other parties appealed as of right from the MPSC's series of orders. In *Consumers Power Co v Public Service Comm (Consumers Power I)*, [189 Mich App 151; 472 NW2d 77 (1991)], this Court affirmed in part and reversed in part the MPSC's orders. We held that the MPSC properly exercised its authority acting pursuant to MCL 460.6j; MSA 22.13(6j). It appropriately determined the avoided capacity cost which could be passed on to ratepayers, the future capacity needs, the avoided costs using a hypothetical coal-fired facility and a rate structure. We found that clear and satisfactory evidence supported the use of a hypothetical coal-fired plant to determine CP's future avoided capacity costs.

* * *

In March, 1990, MCV began selling power under the unapproved 1987 contract with CP. CP filed a series of annual power supply cost recovery cases. In a temporary order dated December 21, 1989, the MPSC limited CP's power supply cost recovery charges to the backloaded QF rate established in Case No. U-8871. In *Consumers Power Co v Public Service Comm*, [192 Mich App 180; 481 NW2d 1 (1991)], this Court affirmed the temporary order. In a series of other orders, the MPSC limited CP's authorized charges to 3.77 cents/kWh, and allowed CP to charge only for energy actually delivered, not for all available capacity. Various parties appealed as of right.

In *Consumers Power Co v Public Service Comm No 1*, [196 Mich App 436; 493 NW2d 902 (1992)], this Court affirmed those orders. We held that the MPSC was not required to accept new evidence regarding the reasonableness and prudence of the capacity charges in the contract between CP and MCV. Rather the MPSC was entitled to rely on evidence produced in Case No. U-8871, where those issues had been litigated.

THE REVISED SETTLEMENT PROPOSAL

Pursuant to the remand in *Consumers Power I, supra*, CP, ABATE, and the MPSC staff filed a joint stipulation in a number of cases, including Case No. U-8871. The MPSC rejected the stipulation on the basis that it allowed CP to pick and choose among the findings in Case No. U-8871. Following the rejection of the stipulation, the MPSC instructed its staff to attempt to negotiate a settlement. On September 8, 1992, CP, the MPSC staff and several QFs filed a revised settlement proposal. The case was docketed as Case No. U-10127.

* * *

The MPSC granted CP's request to incorporate the record in Case No. U-8871. MCV filed a statement indicating that it did not object to the revised settlement plan.

* * *

In the body of the March 31, 1993, order the MPSC addressed numerous arguments. It rejected the AG's contention that a hypothetical gas-fired proxy should be adopted to determine CP's avoided costs, finding that such a proxy would not necessarily be less expensive. The evidence showed that, over a period of twenty to thirty years, a coal-fired plant is only slightly more costly. The MPSC concluded that, when other assumptions were made, abandonment of the coal-fired proxy adopted in Case No. U-8871 could not be justified.

* * *

The MPSC modified provisions of the revised settlement proposal dealing with recovery of capacity charges. Based on its finding that the proposal allowed CP to recover MCV payments in excess of the avoided costs of a coal-fired proxy plant, the MPSC offered CP two options. Under the first, CP would be allowed to recover 3.62 cents/kWh for available capacity up to eighty percent of 915 MW. This rate represented the avoided cost for a proxy coal plant based on an expected availability of eighty percent, rather than on its expected capacity factor. The option would allow full recovery of the avoided cost of 915 MW of coal-fired capacity.

Under the second option, MCV would be utilized whenever it was available, up to the limits specified in the revised settlement proposal applied to 915 MW of capacity. CP would recover 3.62 cents/kWh for capacity. That rate provided a 15 cents/kWh reduction from the 3.77 cents/kWh approved in Case No. U-8871. Payments would be based on actual energy delivered, rather than on availability. Consumers could choose to run MCV out of economic order.

* * *

On April 6, 1993, CP filed an acceptance of the MPSC's March 31, 1993 order. CP chose option 2 for recovery of MCV capacity payments.

The panel proceeded to find that the MPSC order incorporating option 2 was lawful and reasonable. *Id.* 20. Option 2 was supported by competent evidence. *Id.* 23. The Court found that the decision to use a coal-fired proxy plant to determine avoided costs was supported by the evidence, and had been affirmed in *Consumers Power I, supra*, 189 Mich App at 181-184.

The present case concerns the annual PSCR plan for 1994, under which the MPSC determines the factor to be used by Consumers Power to calculate a reasonable recovery on its wholesale power supply costs. MCL 460.6j; MSA 22.13(6j). As part of this review, Consumers sought clarification of the MPSC orders in Case No. U-10127. MCV sought additional rate recovery on an availability, rather than energy delivered basis, arguing that it should be paid an additional variable energy charge for energy dispatched above the levels provided by the earlier MPSC orders. The AG again argued that the energy payments to QFs should be based on a supply of high sulfur coal to the proxy coal-fired plant, and not on the actual mix of coal used by Consumers.

In an opinion and order issued August 18, 1994, the MPSC stated that the methodology for determining avoided energy payments to OFs adopted in Case No. U-8871 combined a reasonable approximation of the utility's avoided energy costs based on a rolling average of the cost of fuel and O&M expenses at the base load coal-fired generating units with a reasonable approximation of the utility's avoided capacity costs based upon a base load high sulfur coal-fired proxy plant. The MPSC concluded that this method remained appropriate, and it rejected the exceptions raised by the AG and ABATE. The MPSC noted that the parties were unable to agree regarding Consumers' recovery of its capacity and energy payments to the MCV for energy delivered above the 750.3 MW off-peak cap but below the overall 915 MW ceiling. The MPSC held that in Case No. U-10127, it specifically found that the RSP established limits on Consumers' recovery of costs above the caps. Challenges to the legality of that order should have been raised in Case No. U-10127, but they were not. The MPSC rejected the challenges of MCV and Consumers.

Extensive discussion of the issues presented is not required in this opinion. As reflected in *ABATE v Public Service Commission, supra*, p 14, this Court has repeatedly held that the MPSC was entitled to rely on evidence produced in Case No. U-8871, and to not relitigate issues which it had already decided. All the issues presented in this case were either specifically decided or waived in Case Nos. U-8871 and U-10127. MCV acceded to a settlement in U-10127, and waived its appeal of that decision. This Court affirmed those decisions in *ABATE, supra*. No further review is necessary, and this Court will likely be disposed to find that any repeated presentation of these issues in the future would be frivolous.

Affirmed.

/s/ Gary R. McDonald

/s/ Helene N. White

/s/ Patrick J. Conlin