STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and WISCONSIN ELECTRIC POWER COMPANY,

Defendant-Appellees.

UNPUBLISHED
January 20, 1998

No. 191946
Public Service Commission
LC No. 00010994

MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and WISCONSIN ELECTRIC POWER COMPANY,

Defendant-Appellees.

No. 192000
Public Service Commission
LC No. 00010944

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and EDISON SAULT ELECTRIC COMPANY,

No. 192001
Pubic Service Commission
LC No. 00010923

Defendant-Appellees.

MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION,

Plaintiff-Appellant,

v

No. 192515
Public Service Commission
LC No. 00010970

MICHIGAN PUBLIC SERVICE COMMISSION and WISCONSIN ELECTRIC POWER COMPANY,

Defendant-Appellees.

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

In these consolidated cases, appellants Attorney General and Michigan Community Action Agency Association appeal as of right from orders of the Michigan Public Service Commission (PSC) allowing appellees Wisconsin Electric Power Company and Edison Sault Electric Company to suspend their Power Supply Cost Recovery (PSCR) clauses. We affirm the orders of the PSC.

In docket numbers 191946 and 192000, appellants argue that the PSC erred by suspending Wisconsin Electric's PSCR clause without a contested case hearing and that the PSC erred by determining that the suspension of the PSCR clause would not result in a rate increase to customers. In docket number 191946, appellant also argues that the PSC unlawfully allowed Wisconsin Electric to withdraw its 1996 PSCR plan case after it suspended use of the PSCR clause. In docket number 192515, appellant raises a similar issue about the propriety of the PSC allowing Wisconsin Electric to withdraw its PSCR plan. In docket number 192001, appellant argues the PSC does not have authority to suspend a PSCR clause without a contested case hearing, as it did with Edison Sault's PSCR clause; that because it raised a question as to whether Edison Sault's application was going to result in a rate increase, a hearing should have been held; and that the PSC does not have authority to implement a price caps approach to ratemaking[1]. In these consolidated cases, the issues are more succinctly stated as follows: whether the PSC may suspend a PSCR clause without a contested case hearing; whether the PSC erred by determining that the suspension of the PSCR clauses in these cases would not result in rate increases; whether the PSC had authority to allow Wisconsin electric to withdraw its 1996 PSCR plan case; and whether the PSC has authority to implement a price caps approach to ratemaking.

First, the PSC had authority to suspend the PSCR clauses without holding contested case hearings, contrary to appellants claims. MCL 460.6a; MSA 22.13(6a) provides:

> (1) When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected . . . After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. . . . An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing.

Under the statute, the PSC had authority to act without a hearing if suspension of the PSCR clauses would not result in rate increases. We reject appellants' arguments that MCL 460.6j(2); MSA 22.13(6j)(2) requires a contested case hearing for the suspension of a PSCR clause. That provision makes clear the PSC *may* incorporate PSCR clauses, but is not required to do so. If it chooses to do so, it must hold a contested case hearing. The provision speaks only to the discretionary inclusion of a PSCR clause.

In this case, the utilities folded the current PSCR reduction into their base rates after the PSCR clauses were suspended. Because the current reductions were folded into the base rates, there is no question that the change did not result in an increase in the cost of service. Therefore, the PSC had authority to approve the suspension without notice or a hearing. MCL 460.6a; MSA 22.13 (6a).

Appellants also argue, however, that without the PSCR clause, future rate reductions that may have resulted by a further decline in the PSCR factor will be eliminated, resulting in increased costs to customers. For that reason, they argue a contested case hearing was required. The PSC disagreed because the possibility of future increased costs was too speculative to merit a contested case hearing. We agree. Our review of the PSC's orders is limited. In reviewing decisions of the PSC, we must give due deference to its administrative expertise and may not substitute our judgment for that of the PSC. *Attorney General v PSC*, 206 Mich App 290, 294; 520 NW2d 636 (1994). Appellants bear the burden of proving by clear evidence that the orders of the PSC are unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). A potential reduction in a PSCR factor does not constitute an increase so as to warrant a hearing under the statute. In *Attorney General, supra*, the plaintiffs argued that an order regarding Consumer Power Company's rates should be reversed because it increased the cost of service without notice and an opportunity for hearing. The order provided that the company was to spend at least $200 million on O & M expenses, or pay certain refunds. This Court rejected the plaintiff's argument, finding that a *potential* refund does not increase the rate charged to customers. *Id.* at 295 (emphasis added). "The order approving the agreement did not increase the rates." *Id.* Similarly, we find that a potential reduction in a PSCR factor, which may result in a future rate reduction, does not constitute an increase under the statute. There is no evidence, other than by speculation, to support a finding that the PSC's order was unlawful or unreasonable or resulted in increased rates. Because there is no authority limiting the PSC's ability to suspend a PSCR clause and because MCL

460.6(a)(1); MSA 22.13(6a)(1) allows the PSC to approve rate changes without a hearing when no increase in costs of service to customers will result, contested case hearings were not necessary in these cases.

We also note that if power supply costs decline in the future, appellants have the ability to complain to the PSC that the utilities rates are unjust, inaccurate or improper. MCL 460.58; MSA 22.8, MCL 460.557; MSA 22.157. The PSC must then conduct an investigation into the matter.

Next, appellants argue that the PSC erred when it allowed Wisconsin Electric to withdraw its 1996 PSCR plan, which was filed prior to its application to suspend its PSCR clause. The plan was withdrawn only after the PSC allowed Wisconsin Electric to suspend its PSCR clause. Given that it was not going to be using a PSCR clause, there was no need for the PSC to conduct a hearing with regard to the PSCR plan for Wisconsin Electric for the upcoming years. The proceeding was moot given the suspension of the use of a PSCR clause and no purpose would have been served by conducting a hearing with regard to that plan.

Appellants also argue that the PSC did not have authority to allow Edison Sault to implement a price caps approach to ratemaking. We disagree. The PSC has the "power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of 'public utilities'." MCL 460.6; MSA 22.13(6). See also MCL 460.6a(1); MSA 22.13(6a)(1), which makes the PSC responsible for setting electrical utility rates. While, the PSC is statutorily responsible for setting such rates, there is no statute that requires the PSC to use a specific method to calculate rates. Appellants cite to no authority prohibiting the PSC from implementing flexible ratemaking procedures, such as the one at issue. The PSC determined that Edison Sault's proposal was reasonable and in the public interest. The rates under the proposal were equal to existing rates. Appellants have not produced evidence that the rates or ratemaking structure were unreasonable or unlawful. Therefore, we find no error requiring reversal or remand. Moreover, we note that should Edison Sault wish to increase its rates under the new ratemaking procedure, it must, pursuant to the PSC order, file an application seeking an increase. MCL 460.6a; MSA 22.13(6a) requires notice and hearing under such circumstances.

Finally, we note that ratemaking is a legislative function rather than a judicial function, and the concepts of res judicata and collateral estoppel do not preclude the PSC from changing methods for determining proper rates. See *Pennwalt Corp v PSC,* 166 Mich App 1, 9; 240 NW2d 156 (1988).

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] We also note that appellant argues in docket number 192001 that it should not be barred from intervening and challenging the actions of the PSC even though it did not do so in a timely manner. This

issue is moot because, although appellant did not timely object to the initial order of the PSC in this case, the PSC subsequently allowed appellant to intervene and it then decided the issues on the merits.