STATE OF MICHIGAN

COURT OF APPEALS

WABASH VALLEY POWER ASSOCIATION,

Plaintiff-Appellant,

v

FRUIT BELT ELECTRIC COOPERATIVE, and MICHIGAN PUBLIC SERVICE COMMISSION,

Defendants-Appellees.

UNPUBLISHED
July 21, 1998

No. 205498
MPSC
LC No. 11013

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Washtenaw Valley Power Association appeals from a May 7, 1997, decision of the Michigan Public Service Commission and a July 31, 1997, decision on rehearing which denied Wabash Valley's December 28, 1995, application for approval of certain rates and tariffs. The PSC found that the proposed rates should not be approved "at this time" because of the limited record available, the lack of any existing or planned qualifying facility to which the rates would apply, and the consequent lack of any basis for evaluating how the rates would affect the parties, ratepayers, potential developers of qualifying facilities, or the public. Wabash Valley contends that the PSC was required to approve its rates, which Wabash Valley contends were based upon its properly calculated avoided costs. We conclude that the PSC's orders were neither unlawful nor unreasonable.

Wabash Valley is an Indiana-based collection of rural power companies known as a generation and transmission cooperative, or a "G & T." One of Wabash Valley's members is Fruit Belt Electric Cooperative, a rural electrification cooperative ("REC") based in southwestern Michigan. Fruit Belt joined Wabash Valley in 1977. Fruit Belt entered into an "all requirements" contract with Wabash Valley which obligates Fruit Belt to purchase its power from Wabash Valley.

In 1978 Congress enacted the Federal Public Utility Regulatory Policies Act of 1978 ("PUPRA"), PL 95-617, 92 Stat 3117, as part of a package of legislation designed to combat a

nationwide energy crises. See *Consumers Power Co v Public Service Comm*, 189 Mich App 151, 156-160; 472 NW2d 77 (1991), for a discussion of PURPA. Among other things, PURPA encouraged the development of alternative sources of power. PURPA required utilities to offer to purchase power from "qualifying facilities" ("QFs") at just and reasonable rates which may not exceed the utility's "avoided costs." 16 USC 824a-3(b), (d). Particularly relevant to this appeal is PURPA's requirement that states implement the rules of the Federal Energy Regulatory Commission ("FERC") relating to PURPA. 16 USC 824a-3(f)(1) provides:

> (1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

In 1980 the FERC adopted regulations implementing PURPA, codified at 18 CFI 292.101-292.602. *Consumers Power Co*, *supra* at 157. These regulations were issued as FERC's order No. 69 and became effective March 20, 1980.

In recognition of PURPA and the FERC's regulations, on March 17, 1981, the PSC initiated case U-6798 to implement PURPA. The final order in U-6798 was entered on August 27, 1982. Case U-6798 largely consisted of PSC approval of settlement agreements involving utilities, electric cooperatives, the PSC staff and others. One of those settlement agreements involved most, if not all, RECs in Michigan and the only G & T operating in Michigan, Wolverine Power Supply Cooperative. Fruit Belt was a signatory to the settlement agreement. Consistent with PURPA and the FERC regulations, the settlement agreement provided that the sales of a QF which was connected to a REC and subject to an all-requirements contract would, if the G & T agreed, be deemed to be made to the G & T. This provision was based upon a FERC regulation designed to avoid breach of contract problems by providing an alternate means for a utility to meet its PURPA obligation, providing the QF consented to the arrangement. 18 CFR 292.303(d). Rates were established in U-6798, including rates for Fruit Belt to purchase power from a QF even though no QF existed in Fruit Belt's area and even though Fruit Belt did not then purchase power from a QF.

At the time U-6798 was settled, the PSC had not yet exercised jurisdiction over Wabash Valley. Wabash Valley did not participate in U-6798. The PSC eventually exercised jurisdiction over Wabash Valley on June 26, 1983, in U-7963.

In 1987 our Legislature amended MCL 460.6j; MSA 22.13(6j) by, among other things, adding most of what is now MCL 460.6j(13)(b); MSA 22.13(6j)(13)(b). Section 6j(13)(b) deals with capacity charges for power purchased QFs in the context of power supply costs reconciliation proceedings. See *Attorney General v Public Service Comm*, 220 Mich App 561, 564; 560 NW2d 348 (1996), and *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 173 Mich App 647, 657; 434 NW2d 648 (1988). Section 6j(13) authorizes the PSC to determine the "scope and manner of the review of capacity charges for a qualifying facility," and also requires approvals

sought after June 1, 1987, to proceed before the PSC as contested cases. Wabash Valley sought ex parte relief rather than initiating a contested case proceeding.

Wabash Valley sought approval of rates based upon its avoided costs as recently determined in a proceeding before Indiana regulatory authorities. Wabash Valley asserted that U-6798 applied to its application, since Fruit Belt was a party to the settlement agreement in U-6798 and Fruit Belt had an all-requirements contract with Wabash Valley. Wabash Valley requested approval of proposed rates, tariff sheets and a standard contract form covering purchases from qualified facilities located in Fruit Belt's service area. Fruit Belt objected and argued that Wabash Valley had no right to "step into its shoes" despite its all-requirements contract with Wabash Valley. At the time, and presently, there was no QF in existence or planned in Fruit Belt's service area.

The PSC denied Wabash Valley's application. The PSC did not reach the merits of the issues presented by the parties and did not decide whether Wabash Valley's proposed rates were just and reasonable. Rather, after recognizing that no QF existed or was even proposed in Fruit Belt's service area, the PSC simply declined "to express an opinion in the absence of an actual controversy." The PSC found that:

> . . . There is no basis for evaluating how the tariff would affect Wabash Valley, Fruit Belt, their ratepayers, or potential developers. In light of the circumstances, it is unclear how the tariff would affect the public interest.

Wabash Valley has not satisfied its burden of showing by clear and satisfactory evidence that the PSC's order was unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Attorney General v Public Service Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994). This Court's review of PSC orders is narrow. *Attorney General, supra*, 206 Mich App at 294. Pursuant to MCL 462.25; MSA 22.44 all rates, fares, charges, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A final order of the PSC is reviewed to determine whether it is authorized by law and whether it is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, §28; *Attorney General, supra*, 206 Mich App at 294. A reviewing court gives deference to the PSC's administrative expertise and should not substitute its judgment for that of the PSC. *Attorney General, supra*, 206 Mich App at 294.

The PSC was faced with an application for approval of rates to purchase power from a QF which neither existed nor was even shown to be contemplated by anyone. The rate request affected Fruit Belt which opposed the application. The application sought ex parte relief, although MCL 460.6j(13)(b); MSA 22.13(6j)(13)(b) indicates that a contested case proceeding was called for. The rate requested in the application was not the same as the rate recommended by the PSC staff or by the ALJ. The application was based upon an "alternate" scheme which required the consent of the affected QF, 18 CFR 292.303(d), and yet no QF existed to give consent and the position of any potential QF of course could not be ascertained. Given these circumstances, and the role of the PSC in protecting the public interest, the PSC's denial of the application was a prudent exercise of its legislative authority. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 644-645; 209 NW2d 210

(1973) (Williams, J., dissenting on other grounds); *Colony Park Apartments v Public Service Comm*, 155 Mich App 134, 138; 399 NW2d 32 (1985).

PURPA did not require the PSC to determine rates as requested in Wabash Valley's application. PURPA required the PSC to "implement" the FERC rules and regulations governing PURPA for each electric utility over which the PSC has ratemaking authority. 16 USC 24a-3(f)(1). The PSC implemented PURPA and its associated rules and regulations when it issued its final order in U-6798 on August 27, 1982. *Consumers Power Co, supra*, 189 Mich App at 160; *Association of Businesses Advocating Tariff Equity, supra* at 650-651. The FERC regulations on implementing PURPA left the states considerable latitude. Implementation of PURPA could consist of adopting the FERC's rules, following a dispute resolution process, or "any other action reasonably designed" to implement PURPA requirements. 18 CFR 292.401. Wabash Valley is not persuasive in arguing that PURPA and its regulations mandate a rate determination in the largely hypothetical context presented by Wabash Valley. In fact, the FERC regulations do not mandate that a G & T be the entity to purchase power from a QF. 18 CFR 292.303(d).

Wabash Valley was not a party in the U-6798 proceeding. While Fruit Belt was one of the stipulating parties in U-6798, Fruit Belt might have taken a different position if Wabash Valley had been involved in the settlement. Moreover, since U-6798 was decided our Legislature has required contested case proceedings regarding approvals of capacity charges in contracts with QFs. MCL 460.6j(13)(b); MSA 22.138(6j)(13)(b). Given these circumstances, the PSC's decision thirteen years before in U-6798 did not require the PSC to determine a specific rate as requested by Wabash Valley.

Nor was the PSC's decision arbitrary or capricious. See *Bundo v Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976). It is true that the PSC fixed rates in U-6798 in some instances (including rates for Fruit Belt) which did not involve an existing QF, while in the instant case the PSC refused to do so. However, U-6798 was a major PSC proceeding to implement PURPA involving numerous parties and in which the parties stipulated to the result. It was not unreasonable for the PSC at that time to establish what rates it could. In contrast, Wabash Valley filed an ex parte application which did not apply to any actual QF and to which the most affected party objected. The PSC did not face similar situations in 1982 and 1995.

Wabash Valley briefly argues that the result of the PSC's refusal to approve Wabash Valley's rate requests was unreasonable in part because the effect of the PSC's refusal was to jeopardize Wabash Valley's rights under its all-requirements contract with Fruit Belt. This argument lacks merit since there is no indication of any contract breach, now or in the future, and since Wabash Valley is not precluded from again applying to the PSC if circumstances change.

As part of its answer Fruit Belt argues that this Court does not have jurisdiction over the PSC orders appealed by Wabash Valley. This Court has jurisdiction to consider a claim of appeal filed by an aggrieved party from a judgment or order of a tribunal from which an appeal by right to this Court has been established by law. MCR 7.203(A)(2). A final order is the first order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. MCR 7.202(8)(a)(i). MCL 462.26(1); MSA 22.45(1) establishes, by law, appeals by right to this Court from PSC orders "fixing any rate or

rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services." In effect, the PSC's order prohibited Wabash Valley from the "practice" of purchasing from QFs in Michigan at any rate. An appeal from such

an order is reasonably within the broad grant of appellate jurisdiction in MCL 462.26(1); MSA 22.45(1). The PSC's order was also "final." It put a complete end to Wabash Valley's application and to U-11013. Wabash Valley's appeal was timely filed and this Court must consider it.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh