STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS POWER COMPANY,

Defendants-Appellees.

UNPUBLISHED
August 18, 1998

No. 193794
MPSC
LC No. 10961

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

No. 193892
MPSC
LC No. 10997

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

No. 193894
MPSC
LC No. 10995

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

In these consolidated cases the Attorney General appeals orders entered by the Michigan Public Service Commission (PSC) granting ex parte approval of special energy contracts for the supply of retail electric service by Consumers Power Company to its customers General Motors Corporation (GMC), Dow Corning Corporation, Hemlock Semiconductor Corporation, and Bundy Tubing Corporation. We affirm in each case.

In these cases Consumers filed applications with the PSC seeking ex parte approval of special contracts for the supply of retail electric service to its customers. Consumers' applications indicated that its customer base was threatened by competition and that it needed more flexibility to meet that competition. Consumers stated that it was not requesting changes in the cost of service to other customers; therefore, because approval of the contracts would not alter existing rates paid by other customers, the PSC was authorized to approve the contracts without notice or hearing. MCL 460.6a(1); MSA 22.13(6a)(1). Consumers reserved the right to seek appropriate ratemaking treatment which could include requests to recover the effects of the discounts provided by the contracts.

The PSC gave ex parte approval to the contracts on the grounds that they were reasonable, in the public interest, and beneficial to the parties. The PSC cautioned that if Consumers sought to recover the effects of the discounts from other customers, it would bear the burden of proving by clear and convincing evidence that the proposed increases were justified. The PSC concluded that because approval of the contracts did not increase rates for other customers, notice and hearing were not required.

In petitions for rehearing, the Attorney General contended that if an order approving a rate revision might result in higher rates for other customers at present or in the future, such an order could not be issued until after the completion of a contested case hearing. The PSC denied the petitions, finding that ex parte approval of the contracts did not violate §6a(1) because approval did not authorize increases in the rates charged to other customers.

The standard of review for PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). A court must defer to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Antrim Resources v Public Service Comm*, 179 Mich App 603, 619-620; 446 NW2d 515 (1989).

MCL 460.6a(1) provides in pertinent part:

> (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. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. 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. A finding or order shall not be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report. 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.

In each case, the Attorney General argues on appeal that pursuant to §6a(1), the PSC is authorized to alter or amend rates without notice or an opportunity for a hearing only if such action does not result in an increase in the cost of service to other customers. The PSC's authority to grant ex parte approval depends on what will result from that approval, and not merely upon whether the approval grants an increase. If the "effect" or "result" of an alteration in rates via a special contract is to increase costs to other customers at present or in the future, the alteration cannot be approved on an ex parte basis. The literal language of §6a(1) requires that in order to grant ex parte approval to a contract such as those negotiated between Consumers and its customers, the PSC must find that an increase in the rates charged to other customers "will not result" from implementation of the contract.

We disagree. Acceptance of the Attorney General's argument that the PSC cannot issue an order approving a contract on an ex parte basis unless it can find that the order will have no present or future impact on costs to other customers would result in virtually no approvals on an ex parte basis. The PSC has consistently held that §6a(1) does not require notice and an opportunity for a hearing if its order approving a contract on an ex parte basis does not, by its own terms, increase the rates charged to other customers. In *Attorney General v Public Service Comm*, 227 Mich App 148; 575 NW2d 302 (1997), this Court affirmed the PSC's interpretation and application of §6a(1). In that case, the PSC granted ex parte approval to a contract between Consumers and The Upjohn Company pursuant to which Consumers was to supply electricity to Upjohn at rates lower than those previously approved. Consumers did not seek increased rates for its other customers. The Attorney General sought rehearing of the PSC's order, arguing that the PSC's approval of the contract without notice and an opportunity for a contested case hearing violated §6a(1) because the PSC left open the possibility of Consumers obtaining an increase in the rates charged to other customers. The PSC denied the petition, concluding that notice and an opportunity for a hearing were not required because the order approving the contract did not actually authorize an increase in any customer's rates. 227 Mich App at 152.

In affirming the PSC's order, we held as follows:

> We are not persuaded that the PSC's interpretation of subsection 6a(1) is unreasonable or contrary to the statutory language. The PSC's interpretation recognizes that merely approving and implementing the rate amendments in question is

> not sufficient, in and of itself, to cause any rate or cost of service increase to occur. That is, even though the PSC may not have prohibited the utility from seeking a rate increase at some point in the future, and even though the PSC may have expressly laid the groundwork for such a future rate increase request, the fact remains that mere approval and implementation of the contract, without more, will not result in any rate or cost increases. In this regard, the discount contract may be viewed as merely resulting in a reason for Consumers to seek a rate increase in the future—i.e., a reduction in Consumers' rate revenues, as opposed to actually resulting in any future cost or rate increases that may occur—after proper notice and a full contested case hearing, in the event that Consumers seeks to recover its lost Upjohn revenue from its other customers. The PSC's interpretation is plausible and consistent with the literal language of subsection 6a(1) because the statute is silent with respect to whether the rate alteration in question must be sufficient in and of itself to cause, "effect," or "result in" an increase in the cost of services to the utility's customers, or whether notice and a hearing is required whenever any rate alteration merely provides the reason for a subsequent rate increase to be granted in some future PSC proceeding. 227 Mich App at 154.

We decline the Attorney General's invitation to disagree with the holding in *Attorney General, supra*, and to create a conflict pursuant to MCR 7.215(H). MCL 460.6a(1) unambiguously states that notice and an opportunity for a hearing must be provided if the "effect" of an order approving a contract on an ex parte basis would be to increase the cost of services to other customers. The orders approving the contracts at issue in these cases do not raise rates for other customers. Consumers has reserved the right to seek future rate increases; all interested parties would have notice and an opportunity for a hearing in such a proceeding. *Attorney General, supra*, 227 Mich App at 155. The PSC's interpretation and application of §6a(1) in these cases is consistent with that approved in *Attorney General, supra*. We agree with the reasoning and result in that case, and apply it herein.

Additional Issues in Docket No. 193794

The Attorney General argues that the PSC's approval of the contract between Consumers and GMC established discriminatory rates in violation of statute. MCL 462.16; MSA 22.35; MCL 460.557(4); MSA 22.157(4). Consumers' justifications for the rate reductions, including the existence of competition, the availability of alternative energy sources, and pricing stability would apply to any customer. No basis existed for concluding that GMC's circumstances were unique.

This issue is without merit. The PSC is authorized to approve contracts granting special rates. MCL 462.11; MSA 22.30. Charging different rates to different customers does not, in and of itself, constitute discrimination. Rate differences can lawfully be determined based on various factors, including value of service to the customer, the connected load, the time of day when service is used, and the quantity of service used. MCL 460.557(2); MSA 22.157(2). The PSC may consider factors other than those specified in §557(2). *Attorney General v Public Service Comm*, 189 Mich App 138, 148; 472 NW2d 53 (1991). Neither statutory nor case law requires that a contract granting special rates to a customer must be based on factors that apply to that customer and to no other customer. A

rate charged to one customer which differs from that charged to another customer is lawful if based on a reasonable distinction between the customers. *Bradford v Citizens' Telephone Co*, 161 Mich 385, 389-390; 126 NW 444 (1910). A number of factors distinguish GMC's circumstances from those of other Consumers customers, including size and type of load used and the ability to cease being a Consumers customer by obtaining service from another utility or by undertaking self-generation. The rate difference granted to GMC via the special contract was based on a reasonable differentiation between GMC and Consumers' other customers. MCL 460.557(2); *Bradford, supra*.

Finally, the Attorney General argues that the PSC's approval of the special contract between Consumers and GMC was unlawful and unreasonable because the retention of sales at a discounted rate to GMC would have the effect of creating a rate increase for Consumers' remaining customers. Just such an increase is demonstrated by Consumers' request to recover additional capacity costs for 325 megawatts of generating capacity purchased from Consumers' affiliate Midland Cogeneration Venture Limited Partnership.

This issue is without merit. Consumers' application to recover additional capacity costs for 325 megawatts of Midland capacity is at issue in a separate case and has been subject to notice and contested case proceedings. The Attorney General's assertion that a causal relationship exists between the special contract and the Midland capacity case is unsupported. The Attorney General has not established by clear and convincing evidence that the special contract is unlawful or unreasonable based on any connection to the Midland capacity case.

Affirmed.

/s/ Jane E. Markey
/s/ Peter D. O'Connell