STATE OF MICHIGAN

COURT OF APPEALS

DETROIT EDISON COMPANY and MICHIGAN ELECTRIC & GAS ASSOCIATION,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION, ALPENA POWER COMPANY and EDUCATIONAL TELECOMMUNICATIONS NETWORKS COMMITTED CONCERNED ABOUT COSTS,

Appellees.

UNPUBLISHED
November 24, 1998

No. 203421
Public Service Commission
LC Nos. U-010741
U-010816
U-010831

CONSUMERS ENERGY COMPANY, f/k/a CONSUMERS POWER COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION, TCI CABLEVISION OF GREATER MICHIGAN, INC., and EDUCATIONAL TELECOMMUNICATIONS NETWORKS COMMITTED CONCERNED ABOUT COSTS,

Appellees.

No. 203480
Public Service Commission
LC Nos. U-010741
U-010816
U-010831

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

In these consolidated appeals, appellants Detroit Edison Company (Edison), Michigan Electric & Gas Association[1] and Consumers Energy Company (Consumers) appeal as of right from the February 11, 1997, order of the Michigan Public Service Commission (PSC), adopting a statewide formula for determining the rate that Edison, Consumers, and other utilities may charge third parties to attach wires to the utilities' electrical poles. Several other parties have intervened in this matter, but only the Michigan Cable Telecommunications Association (MCTA) and Educational Telecommunications Networks Committed Concerned About Costs (EDUNETS) have filed briefs on appeal. We affirm.

I.

Edison and Consumers filed applications seeking permission to increase the rates charged to attaching parties under MCL 460.6g; MSA 22.13(6g). The PSC ordered a hearing to decide whether a uniform rate should be adopted for all electric utilities and, if so, what method should be adopted for determining rates. Edison and Consumers requested a rate based on the utilities' reproduction costs, reasoning that attaching parties were able to save a substantial amount by not having to construct their own separate network of poles. MCTA and EDUNETS urged a reduction in the pole attachment rate, reasoning that because attaching parties pay for all of their make-ready costs, the utilities incur only minimal incremental expenses as a result of the attachments. Accordingly, EDUNETS advocated a charge based only on the incremental costs. In the alternative, MCTA advocated adoption of the embedded or historical cost method followed by the Federal Communications Commission (FCC). The Administrative Law Judge (ALJ) who conducted the hearing agreed with the PSC staff's recommendation of a rate based on the reproduction costs method. However, the PSC declined to follow the ALJ's recommendation and instead adopted the FCC formula for computing a uniform statewide pole attachment rate. Both appellants now challenge the decision of the PSC. Their appeals were consolidated on this Court's motion.

Our role in this appeal is to determine whether the PSC's rate decision was reasonable and lawful. By statute, appellants bear the burden of proving by clear and satisfactory evidence that the PSC's rate decision was unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Association of Businesses Advocating Tariff Equity v Public Service Comm*, 208 Mich App 248, 263; 527 NW2d 533 (1994). They must meet this burden in the face of a presumption that the PSC's rate decision was lawful and reasonable. MCL 462.25; MSA 22.44; *ABATE, supra*, 208 Mich App at 263. A decision of the PSC is considered unlawful when it involves an erroneous interpretation or application of a law and unreasonable when it is unsupported by the evidence. *Attorney General v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). A party challenging the PSC's factual findings must show that they are not supported by competent, material and substantial evidence on the whole record. *Association of Businesses Advocating Tariff Equity v Public Service Comm*, 219 Mich App 653, 659; 557 NW2d 918 (1996). However, when a party challenges the PSC's ratemaking authority, this Court does not apply the substantial evidence test, but rather accords deference to the PSC's administrative expertise and judgment absent a breach of a constitutional

standard, statutory mandate or other limitation. *Consumers Power Co v Public Service Comm*, 226 Mich App 12, 21; 572 NW2d 222 (1997). Such policy decisions are reviewable only for unlawfulness or clear abuses of discretion involving no choice between reasonably differing points of view.[2] *Id.* at 32.

II.

Docket No. 203421

Edison advances several arguments for the proposition that the PSC's rate decision is unjust and unreasonable. We conclude that Edison has not satisfied its burden on appeal.

A.

Edison first argues that the PSC improperly failed to address the ALJ's finding that a low attachment rate would require Edison's customers to subsidize the activities of the attaching parties. We disagree. As an initial matter, we note that the ALJ's determination that the prior attachment rate resulted in a subsidy was not a "finding" on a disputed factual issue, as suggested by Edison, but rather an interpretation of facts proved at the hearing. The PSC addressed the ALJ's determination regarding the alleged subsidization problem and, based on the same facts, came to a different, and reasonable, conclusion. Thus, contrary to Edison's contention, the PSC complied with its mandate to consider "the utility and its customers" when deciding upon a just and reasonable rate. See MCL 460.6g(2); MSA 22.13(6g)(2). Moreover, the PSC's decision to adopt a lower rate than that recommended by the ALJ was based in part on considerations of policy unrelated to the subsidization issue. As noted above, we will generally defer to the PSC's policy determinations. *Consumers Power*, *supra* at 21.

B.

Edison next argues that the PSC's decision to adopt the FCC formula, an embedded costs formula, over a reproduction costs formula, produced an unjust and unreasonable rate. We disagree. The PSC is not bound to follow any particular method or formula when determining rates. *Detroit Edison Co v Public Service Comm*, 221 Mich App 370, 373; 562 NW2d 224 (1997). Pursuant to the attachments statute, and the requirements of due process, the PSC is only bound to establish rates that are "just and reasonable." See MCL 460.6g(2); MSA 22.13(6g)(2); *Northern Michigan Water Co v Public Service Comm*, 381 Mich 340, 351; 161 NW2d 584 (1968).

Edison initially asserts, in a conclusory fashion, that the rate adopted by the PSC is unjust and unreasonable because it would require Edison's customers to subsidize the activities of the attaching parties. However, instead of explaining why the PSC's embedded costs method fails to provide adequate compensation, Edison merely states, as if it was a matter of fact on the record, that the embedded costs method results in an unfair subsidy. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. E.g. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). By so doing, Edison has failed to meet its burden of showing that the PSC's determination was not supported by the requisite evidence. *ABATE*, *supra*, 219 Mich App at 659. In any event, our review of the record reveals that there was

competent, material, and substantial evidence to support the PSC's conclusion that a rate based on the embedded costs method would enable utilities to recover their historical investment.

Edison also briefly suggests that the rate adopted by the PSC constituted an unconstitutional taking. This argument is unpersuasive for the reasons stated in *In re Retail Wheeling Tariffs*, 227 Mich App 442, 458-460; 575 NW2d 808 (1998).

Edison further contends that the PSC improperly considered the "promotion of competition in communication services" as a factor in setting its rate. However, contrary to Edison's argument, the PSC's decision to adopt the FCC method does not appear to have been motivated by a desire to "manipulate competition" or "favor" the interest of cable television companies, but rather by a desire to create a sensible rate given the current condition of the market. Accordingly, we are not persuaded the PSC exceeded its ratemaking authority in the manner alleged by Edison.

Edison also questions the PSC's "reliance" on § 361 of the Michigan Telecommunications Act, MCL 484.2101 *et seq.*; MSA 22.1469(101) *et seq.* and 47 CFR § 1.1401 *et seq.* Again, contrary to Edison's assertion, the PSC did not base its decision on these sources, but merely noted that its decision to adopt an embedded cost approach created a "desirable degree of consistency" with other states adhering to the FCC standard and the rate applicable to telecommunication pole attachments. Moreover, the fact that the PSC was not bound to adopt the formula mandated by § 361, does not mean that it could not elect to do so in its discretion. Accordingly, Edison's contention is misplaced.

C.

Edison next argues that the PSC erred in refusing to take into account the costs associated with the overhead grounding systems for utility poles. Initially we note that Edison has not shown that the PSC's factual findings regarding the overhead grounding system were not supported by competent, material and substantial evidence. *ABATE*, *supra*, 219 Mich App at 659. More important, however, is the fact that Edison's argument merely calls into question the soundness of the PSC's policy decision with respect to the issue of the overhead grounding systems. In so doing, Edison does not allege a breach of a constitutional standard, statutory mandate, or other limitation. Based on the PSC's findings we cannot say that its decision constituted a clear abuse of discretion. Accordingly, Edison is not entitled to relief on this issue. See *Consumers Power supra* at 21, 32.

D.

Finally, Edison questions the PSC's policy determination with respect to the allocation of costs associated with the "common spaces" on the utility poles. The rate the PSC adopted assesses a charge based only on the amount of useable space that the attaching parties occupy. Edison argues that the PSC should have included other areas of the pole that are necessary for all parties to use the pole, but which are not occupied by attaching parties, such as the portion of the pole buried in the ground for support and the neutral zone, where workers can access the lines. Edison's argument does not question the PSC's factual findings with respect to space allocation. Instead, it merely impugns the soundness of the PSC's policy determination. Although Edison suggests that the PSC should have followed the

FCC's lead and allocated two-thirds of the nonuseable space on a pole to attaching parties, see 47 USC 224(e)(2), the PSC was not bound to follow federal law on this point. Because Edison alleges no other breach of a constitutional or statutory limitation, and based on the PSC's findings we cannot say that its policy decision constituted a clear abuse of discretion, Edison is not entitled to relief on this issue. See *Consumers Power supra* at 21, 32.

III.

Docket No. 203480

A.

Consumers first contends that the PSC's order setting the attachment rate constituted an unconstitutional taking of its private property because it required Consumers "to accept attachments on its pole system by private attaching parties seeking to increase the profits in their own private endeavors at a rate which is inadequate to compensate the utility for its investment and the value provided to attaching parties which then do not need to invest in their own pole network to reach their customers." Consumers also contends that the order violated due process because it compelled the utility to use its property in a manner beyond that which it was willing to undertake. We disagree with these arguments for the reasons stated in *In re Retail Wheeling Tariffs, supra* at 458-460. Because Consumers' property is heavily regulated and used for a public purpose, the PSC's order did not run afoul of Consumers' constitutional rights in the manners alleged. See *id.*

B.

Consumers next argues that the new statewide pole attachment rate adopted by the PSC constituted an arbitrary and unconstitutional change from the previous rate. We disagree. As noted above, a utility rate that is not just and reasonable constitutes a violation of due process. See *Northern Michigan Water, supra* at 351. To meet this constitutional requirement when setting rates, the PSC should consider all reasonable costs of doing business and allow for a reasonable rate of return. *General Telephone Co of Michigan v Public Service Comm*, 341 Mich 620, 631; 67 NW2d 882 (1954). A due process violation may also result from an arbitrary change in ratemaking methods contrary to the reasonable expectations and reliance of investors. *Consumers Power, supra* at 28.

Consumers contends that the new statewide attachment rate adopted by the PSC is unjust and unreasonable because the PSC arbitrarily switched methodologies resulting in a lower rate without a finding of changed circumstances or a showing that the prior rate was excessive. This argument is flawed because the new pole attachment rate is the first statewide pole attachment rate set by the PSC after conducting a full hearing. The rate from 1986 was set pursuant to a settlement agreement. Before then, rates were set in individual cases rather than statewide. Accordingly, there is no factual basis for Consumers' contentions (1) that it had a right to rely on

the previous method employed by the PSC, (2) that the PSC arbitrarily *switched* its method, or (3) that there was a need to show that the prior pole attachment rate was excessive. Thus, Consumers is not entitled to relief on appeal.

Affirmed.

/s/ Michael J. Talbot
/s/ Gary R. McDonald
/s/ Janet T. Neff

[1] Throughout this opinion we will refer to Edison as the appealing party in Docket No. 203421. Michigan Electric & Gas Association only marginally participated in these proceedings and Edison is the primary party to this appeal.

[2] Given this standard of review, one panel of this Court described the PSC's rate setting decisions as being "virtually unreviewable." See *North Michigan Land & Oil Corp v Public Service Comm*, 211 Mich App 424, 439; 536 NW2d 259 (1995).