STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and DETROIT EDISON COMPANY,

Appellees.

UNPUBLISHED
March 23, 2001

No. 218662
Public Service Commission
MPSC No. U-8789

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and DETROIT EDISON COMPANY,

Appellees.

No. 218737
Public Service Commission
MPSC No. U-8789

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Appellants appeal as of right from a decision of the Michigan Public Service Commission (PSC) interpreting a 1988 settlement agreement. We affirm.

The settlement agreement at issue was approved by the PSC on December 27, 1988. The agreement provided, among other things, that Detroit Edison Company (Edison) could recover a portion of its expenditures related to the Fermi 2 power generating facility. The settlement was implemented without incident until 1997, when it became apparent to the PSC that a dispute had arisen regarding section I-E of the settlement agreement, which provided an accounting schedule for Edison's phase-in of revenues from the Fermi 2 plant. Section I-E provides as follows:

FERMI 2 PHASE-IN REVENUES

> In accordance with Statement of Financial Accounting Standards (SFAS) 92, the revenue changes recorded pursuant to the final Fermi 2 phase-in plan are:
>
> | | |
> |---|---|
> | 1988 Actual | $68,379,000 |
> | 1989 | 104,695,000 |
> | 1990 | 70,800,000 |
> | 1991 | 70,800,000 |
> | 1992 | 70,800,000 |
> | 1993 | 70,800,000 |
> | 1994 | 70,800,000 |
> | 1995-1997 | No change |
> | 1998 | ($53,357,000) |
> | 1999 | ($128,049,000) |
> | 2000 | Revert to non-phase-in ratemaking |
>
> The parties agree that the amounts and accounting entries shown on Attachment C will be included in cost of service for ratemaking purposes and that the Company [Edison] shall file a timely general rate case with the MPSC on or before June 1, 1993 . . . to determine the electric rates to be charged retail customers, taking into account the Fermi 2 phase-in revenues required for the year 1994 and beyond.

The Attorney General and the Association of Businesses Advocating Tariff Equity (ABATE) contended that under section I-E automatic rate decreases should occur in 1998 and 1999 that directly corresponded to section I-E's figures for those years.

On December 28, 1998, the PSC issued an opinion and order rejecting appellants' argument. The PSC concluded that such an interpretation of section I-E was inconsistent with the settlement agreement as a whole because, where rate reductions were contemplated, they were specifically provided for in detail. The PSC noted that if the parties actually had intended to require rate reductions in 1998 and 1999, "it would have been very easy to include an unambiguous provision such as: 'Rates shall be reduced by $53 million on January 1, 1998 and by an additional $128 million on January 1, 1999.'" The fact that no such provision was included indicated that no such reduction was intended.

The PSC also noted that although the agreement did not make any direct provision for implementing the reductions in the cost of service for 1998 and 1999, it did set forth a mechanism for reviewing the rate effects of the cost allowances in the general rate cases that

Edison was required to file under the agreement. The PSC observed in its opinion that the settlement agreement required that the rate cases to be filed by Edison "take into account the Fermi 2 phase-in revenues required for the year 1994 and beyond, which would appear to include 1998 and 1999." The PSC pointed to paragraph II-C of the agreement, in which the parties specifically agreed that the phase-in revenues would be included as a cost of service item for ratemaking purposes, and noted that the parties "stopped short of requiring a rate reduction." Finally, the PSC observed that the amounts that the settlement agreement required Edison to record in its books under section I-E did not correspond to the actual rate changes in any of the years listed. The PSC concluded that the only remaining issue was whether the cost of service reductions in the settlement agreement had been fully accounted for in the rates for 1998 and 1999, and, if not, what further actions should be taken to fully implement the agreement. Accordingly, the parties were directed to brief that issue.

The parties submitted briefs as directed, but the Attorney General also sought rehearing of the PSC's finding that the settlement agreement did not provide any mechanism for directly implementing the reductions in paragraph I-E. According to the petition for rehearing, the PSC should have ordered a total rate reduction of $170 million for 1998-1999 because the term "revenue changes" could only be interpreted to mean "rate changes." Edison responded that there was simply no basis for concluding that revenue changes recorded for accounting purposes were the same as rate changes. Edison also pointed out that such an interpretation was inconsistent with the parties' intention in entering into the agreement because no one ever contended that the revenue requirements for the years 1990 through 1994 should have resulted in automatic rate *increases*. The PSC agreed with Edison's reasoning and denied rehearing.

On appeal, the Attorney General and ABATE contend that the PSC erred in rejecting their claim that the figures in section I-E of the settlement agreement constitute automatic rate reductions for 1998 and 1999. This Court's review of an order of the PSC is limited; pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services of the PSC are presumed to be lawful and reasonable. *Attorney General v Public Service Comm*, 231 Mich App 76, 77; 585 NW2d 310 (1998). A party challenging an order bears the burden of demonstrating by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Attorney General*, *supra* at 77-78. "An order is unlawful if it is based on an erroneous interpretation or application of the law, and it is unreasonable if it is not supported by the evidence." *Attorney General*, *supra* at 78, citing *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d 515 (1966). A reviewing court must accord due deference to the PSC's administrative expertise, and may not substitute its judgment for that of the agency. *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666, 667; 523 NW2d 483 (1994). Based on the well established precedent cited above, we reject appellants' assertion that de novo review applies in this case.

We conclude that the PSC did not act unlawfully or unreasonably in interpreting the settlement agreement to provide that the Fermi 2 phase-in revenue changes listed in section I-E of the agreement were to be taken into account as "cost of service" items considered in the context of the total ratemaking equation, rather than dollar for dollar increases or decreases in utility rates. As the PSC found, in each of the ten years preceding 1998, the amount shown in section I-E of the settlement agreement was factored into the ratemaking equation along with

other relevant variables. This is illustrated by the fact that in 1994, although section I-E allowed Edison to phase in $70,800,000 of the cost of Fermi 2, electric rates for 1994 actually decreased by more than that amount.

The inclusion of the phase-in revenues under section I-E as one factor in the ratemaking process also is consistent with section II-C of the agreement, in which the parties expressly agreed to include the Fermi 2 phase-in revenues as "a cost of service item for ratemaking purposes." The cost of service element is only one factor in the ratemaking equation and represents the cost to the utility, not the cost to the consumer, which instead is reflected in the rates set by the PSC. See, e.g., MCL 460.6h(1)(d); MSA 22.13(6h)(1)(d), defining a "general rate case" as involving consideration of the "utility's total *cost of service* and all other lawful elements properly to be considered in determining just and reasonable rates" (emphasis added); MCL 460.557(2); MSA 22.157(2), listing other elements that may be considered in fixing rates; and *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 208 Mich App 248, 258-259; 527 NW2d 533 (1994), in which this Court held that the PSC may consider all relevant factors in setting rates. Although "cost of service" occasionally has been used in reference to the ultimate price paid by consumers for utility service, this meaning cannot be imposed where the agreement specifically states that section I-E revenue changes for each year are to be considered a cost of service *item* for *ratemaking purposes*.

If the amounts shown in section I-E were interpreted to constitute dollar for dollar rate changes, they would be removed from the ratemaking process completely, since the amounts would have to be deducted or added after rates already had been determined. Such an interpretation directly contradicts the agreement's provisions that the revenue changes be included in the ratemaking process. Furthermore, we find that the PSC reasonably concluded that if the parties had intended that the section I-E revenue changes for 1998 and 1999 were to be implemented as dollar for dollar rate reductions, the agreement would have expressly denominated them as "rate reductions." As previously noted, the revenue changes in section I-E are expressly designated in section II-C as cost of service items, not rate changes.

Appellants also contend that because section I-A of the agreement specifically provides for rate increases in the years 1989 through 1992, the figures shown for 1998 and 1999 in section I-E must be corresponding rate decreases. This argument fails to consider the fact that section I-A of the agreement makes no reference whatsoever to section I-E. Furthermore, the specific rate increases in section I-A do not correspond to the amounts shown for the same years in section I-E. Consequently, we find this argument lacking merit.[1]

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[1] Appellants further argue at length that reductions in revenues necessarily must result in rate reductions. We note that in this case, the reductions in revenues shown in section I-E for the years 1998 and 1999 did in fact contribute to substantial rate reductions. In MPSC Case No. U-11588, Edison's rates for 1998 were reduced by approximately $38 million, which reflected the net effect of the $53 million reduction associated with the Fermi 2 phase-in for 1998 and a two-year amortization of storm damage expenses. For 1999, the order issued in MPSC Case No. U-11726 reduced electric rates by $93.8 million and provided for accelerated amortization of the Fermi 2 plant and related assets. Consequently, there were rate reductions in 1998 and 1999, but

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Finally, appellants contend that reversal of the PSC's decision in this case is compelled by *Attorney General v Public Service Comm*, unpublished per curiam decision of the Court of Appeals, issued June 11, 1999 (Docket No. 207993), which incidentally dealt with the same settlement agreement involved in this case. Appellants contend that this Court viewed the $53 million revenue change for 1998 as a guaranteed rate reduction that resulted in a rate increase when offset by storm damage expenses incurred in the previous year. However, it is clear from a reading of the entire opinion that the panel felt that the offset for storm damage expenses should be considered in the context of a full public hearing, along with the other relevant cost of service factors, which included the revenue changes listed in section I-E. Accordingly, that opinion does not provide grounds for disturbing the PSC's decision in this case. Furthermore, the opinion does not compel any particular result in this case because, as an unpublished case, it is not binding precedent. MCR 7.215(C), (H).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

(…continued)

factors outside the settlement agreement resulted in the reductions not being identical to the amounts stated in the agreement. Appellants do not contend that these other factors were improperly considered in the ratemaking process.