

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CONSUMERS ENERGY COMPANY,

Plaintiff-Appellant,

V

MICHIGAN PUBLIC SERVICE COMMISSION  
and ATTORNEY GENERAL,

Defendants-Appellees.

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UNPUBLISHED

February 5, 2002

No. 226492

Public Service Commission

LC No. 00-011225

Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

PER CURIAM.

Consumers Energy Company (Consumers) appeals as of right the Public Service Commission (PSC) order regarding gas costs in Consumers' 1997-1998 Gas Cost Recovery (GCR) plan reconciliation. We affirm.

Consumers filed a GCR plan pursuant to MCL 460.6h(3). The parties entered into a settlement agreement on the plan phase, which was approved by the PSC. The agreement authorized Consumers to implement a GCR factor of \$2.8364 per mcf during the GCR period. All issues concerning Consumers' gas purchases were deferred to the reconciliation proceeding.

The sole issue in this appeal concerns the gas purchasing strategy used by Consumers. The Attorney General maintained that Consumers acted unreasonably in failing to enter into any new long-term fixed price contracts, and in purchasing more gas on the spot market than had been targeted in the GCR plan. The Attorney General maintained that excess costs<sup>1</sup> paid for spot market purchases should be disallowed as not reasonable or prudent. Consumers argued that its purchase of spot market gas did not deviate from its GCR plan, the decision to purchase gas on the spot market was reasonable, and it resulted in a lower overall cost of gas than provided for by the approved GCR factor.

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<sup>1</sup> Consumers argued before the PSC that this case does not involve "excess costs" under the statute because, in fact, Consumers' overall cost of gas saved customers 8.2 cents per mcf in comparison to its GCR factor. However, the PSC rejected that argument and Consumers has not raised this issue in this appeal.

The PSC found that Consumers' decision to increase its reliance on spot market purchases was a deviation from the GCR plan. After making adjustments, the PSC computed a disallowance of \$6,478,000.

Appellant has the burden of showing by clear and convincing evidence that the decision of the PSC is unlawful or unreasonable. MCL 462.26(8). A decision of the PSC is unlawful "when it involves an erroneous interpretation or application of the law." *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 707; 588 NW2d 153 (1998). "A decision is unreasonable when it is unsupported by the evidence." *Id.*

The commission's construction of a statute is a question of law subject to de novo review. See *In re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). Courts must give due deference to the PSC's administrative expertise and may not substitute their judgment for that of the PSC. *Attorney General v Public Service Comm*, 215 Mich App 356, 364; 546 NW2d 266 (1996). Courts should give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer. *Id.*

For excess costs incurred through actions contrary<sup>2</sup> to the commission's gas supply and cost review order, recovery is authorized "only if the utility demonstrates by clear and convincing evidence that the excess expenses were beyond the ability of the utility to control through reasonable and prudent actions." MCL 460.6h(14). As correctly noted by the PSC in its decision in this case, this is "a heightened burden" compared with the showing that must be made to recover excess costs incurred through actions consistent with a GCR plan.

Consumers argues that the PSC could only find its actions unreasonable by looking at the matter in hindsight, in light of developments in the gas market that were unknown at the time Consumers made its gas purchases. We agree. The determination whether actions were reasonable and prudent should be made "in light of existing conditions at the time the decision to purchase the gas was made." *Attorney General v Public Service Comm*, 161 Mich App 506, 517; 411 NW2d 469 (1987). We do not conclude, however, that the PSC violated this standard.

Consumers presented testimony that its purchasing decisions were based on an avoidable cost analysis. Each existing and potential supply was analyzed, and the company determined what costs would not be incurred if the supply was not purchased. Required supplies were then purchased based on the lowest avoidable cost. Spot and contract purchases were timed to occur during downtrends in the market in an attempt to obtain supplies at a price at or below the approved GCR factor. This strategy had been used by Consumers for several years.

Nonetheless, this approach resulted in a deviation from the approved GCR plan. The PSC correctly found that, while Consumers did not know at the time that increasing its spot market purchases would result in paying more for gas, the decision entailed a risk that spot market prices could rise, increasing its gas costs. By increasing its spot purchases, Consumers

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<sup>2</sup> The ALJ in this case concluded that the actions taken by Consumers were not contrary to the GCR plan but that conclusion was rejected by the PSC which found that a "material deviation" had occurred. Consumers does not raise this issue in this appeal.

elected to deviate from the plan and take that risk. Given the plan deviation, the burden was on Consumers to show by clear and convincing evidence that its actions in this regard were reasonable and prudent. MCL 460.6h(14).

The PSC determined that Consumers failed to meet this burden:

In this case, Consumers made no real attempts to explain why it chose to change course during the plan year and replace term contract purchases with spot market purchases. Consumers' arguments that increased spot market purchases afforded it more flexibility and enabled it to avoid making any spot market purchases in March 1998 does not address what circumstances or considerations changed from the time it filed its plan case to the time it actually decided to switch to spot market purchases. It is not even clear on the record that the change in purchasing patterns resulted from a conscious business decision on the part of Consumers' management. . . . Consumers has not demonstrated that its decision to increase spot market and short-term supplies delivered for transportation on the trunk line system was reasonable and prudent . . . . [T]he commission finds that Consumers' decision to switch to spot market purchases, contrary to its GCR plan, was imprudent in the absence of an adequate showing why its business judgment pointed toward a mid-term reshuffling of its supply plans.

Giving the PSC the deference we must under the precedents cited above, we do not find this conclusion to be erroneous.<sup>3</sup>

Further, the amount of the disallowance ordered is supported by the evidence. The PSC calculated the disallowance by comparing the average cost of actual spot market purchases made with the hypothetical contract price that would have paid for the same amount of gas. The GCR plan provided for a certain level of contract and spot market purchases. Under the plan, the amount of gas to be purchased through long term contracts was 77% of the total. With the additional spot market purchases, the portion of gas actually obtained under contract was 75%. Following the original plan would not have resulted in contracting for excess gas, and no set off was warranted.

We affirm.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly

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<sup>3</sup> Further, it seems from the language of the statute that the burden was on Consumers to explain why it would have been unable to avoid the excess costs under consideration here through some reasonable and prudent action like the gas purchasing approach contained in the GCR plan. Under that construction of the statute, which was not employed by the PSC against Consumers in this case, it would be insufficient to show that the approach taken was reasonable and prudent if the approach of the GCR plan would also have been reasonable and prudent.