STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, Appellants, v MICHIGAN PUBLIC SERVICE COMMISSION, WISCONSIN ELECTRIC POWER COMPANY, and INTERNATIONAL PAPER COMPANY, Appellees.	UNPUBLISHED May 11, 2004 No. 244354 MPSC LC No. 00-012725
INTERNATIONAL PAPER COMPANY, Appellant, v MICHIGAN PUBLIC SERVICE COMMISSION and WISCONSIN ELECTRIC POWER COMPANY, Appellees.	 No. 246744 MPSC LC No. 00-012725

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In these consolidated cases appellants Michigan Environmental Council (MEC), Public Interest Research Group in Michigan (PIRGIM), and International Paper Company (IPC) appeal as of right orders entered by appellee Michigan Public Service Commission (PSC) setting tariff rates for appellee Wisconsin Electric Power Company (WEPCO). We affirm in each case.

I. Underlying Facts and Proceedings

WEPCO owns and operates a nuclear generating plant in Wisconsin that supplies electricity to residential and commercial customers in the western portion of Michigan's Upper

Peninsula. IPC is WEPCO's largest retail customer in Michigan. Spent nuclear fuel (SNF) is stored at an on-site facility at WEPCO's plant. WEPCO entered into a standard contract with the Department of Energy (DOE), as required by the Nuclear Waste Policy Act of 1982 (NWPA), 42 USC 10101 *et seq*. Under the contract WEPCO pays a fee to the DOE for a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. Currently, the DOE estimates that the program will begin in 2010. WEPCO classifies the SNF fee as a nuclear fuel expense and includes the cost in its power supply cost recovery (PSCR) program.[1]

In late 2000 WEPCO filed a general rate case application[2] alleging a revenue deficiency and seeking an annual increase of $3.74 million in its tariff rates for its Upper Peninsula service area. WEPCO projected a 2000 test year for ratemaking purposes and included transmission assets in its base rate for which the annual increase was requested, notwithstanding the fact that on January 1, 2001 those assets were to be transferred to the American Transmission Company, LLC (ATC), a company formed to provide wholesale transmission services by consolidating the transmission assets of several electric utilities. Acting on a remand order from the PSC, WEPCO adjusted its 2000 test year by removing transmission assets and related cost components, and continued to seek $3.74 million in rate relief.

At evidentiary hearings the PSC Staff quantified the effect of the removal of the transmission assets from WEPCO's base rate at $1.36 million, and proposed that rather than removing that amount from the base rate, the amount be added to WEPCO's allowance for the cost of power supply and included in WEPCO's annual PSCR plan and reconciliation proceedings. WEPCO accepted the Staff's proposed adjustments on the ground that they had the same net effect as reducing rates by the cost of the transmission assets.

MEC and PIRGIM presented the testimony of a nuclear energy consultant who expressed concerns regarding the DOE's SNF disposal program, and contended that WEPCO had not sufficiently addressed those concerns. The witness asserted that given the possibility that the federal government would never implement a SNF disposal program, the PSC was authorized and obligated to review the reasonableness and prudence of WEPCO's actions in administering the contract with the DOE and to determine whether WEPCO was taking all appropriate steps to protect ratepayers. The witness recommended that the PSC adopt several remedies to ensure that

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[1] MCL 460.6j, added by 1982 PA 304 (Act 304), authorizes the PSC to include a PSCR clause in a utility's rate schedule. A PSCR clause allows a utility to charge customers for the anticipated costs associated with the supply of power. Each year a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a five-year forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j. After the end of the year the PSC conducts a reconciliation proceeding in which it makes adjustments to take into account the true cost of supplying power. MCL 460.6j(12) and (13).

[2] A "general rate case" is defined as "a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service." MCL 460.6a(2)(b). IPC, MEC, and PIRGIM were granted leave to intervene in the proceedings.

WEPCO shared the financial risk of SNF disposal, including: filing more detailed reports regarding its monitoring of the problem, placing revenues collected for the payment of the SNF fee in an escrow account to fund an alternative disposal program if the federal government failed to fulfill its obligations, modifying its nuclear decommissioning fund to provide for the disposal of SNF, and obtaining a performance bond or an insurance policy to ensure proper performance of SNF disposal. The witness did not identify as unreasonable or imprudent any specific action taken by WEPCO.

WEPCO presented a witness who testified that the utility had taken reasonable and prudent steps to manage the storage and disposal of SNF. The witness indicated that WEPCO decided to continue paying the SNF fee to the DOE as required by the Standard Contract because it had been advised that suspending the payments could result in a loss of plant licensure and the future ability to have the DOE dispose of SNF.

IPC attempted to present evidence that the 2000 test year as revised by WEPCO was not a valid basis for establishing rates, and that addressed developments outside the 2000 test year. The PSC disallowed the testimony, concluding that it was irrelevant.

The PSC authorized WEPCO to increase its annual electric base revenues by $3.18 million, and rejected MEC and PIRGIM's request that it impose various conditions on WEPCO's collection of revenues. The PSC concluded that WEPCO's decision to transfer its transmission assets to ATC was reasonable and prudent, and authorized WEPCO to recover ATC transmission charges through its PSCR clause. The PSC acknowledged that the issues surrounding the disposal of SNF were significant and that a solution would not be implemented in accordance with the DOE's timetable, but found that implementation of the remedies proposed by MEC and PIRGIM was not necessary to correct any showing of unreasonable or imprudent action by WEPCO.

II. Analysis

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, 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 has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint,* 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However, a reviewing court may not abandon its responsibility to interpret statutory language and legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). Statutory interpretation is a question of law subject to de novo review. We will defer to the construction placed on a statute by the

agency charged with interpreting it, unless that interpretation is clearly erroneous. *In re Canales Complaint*, 247 Mich App 487, 496; 637 NW2d 236 (2001). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

A. Issues Raised by MEC and PIRGIM in Docket No. 244354

First, MEC and PIRGIM argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond or possibly beyond the scope of its jurisdiction in a general rate case. They note that the PSC is authorized to review proposed charges in both general rate cases and rate reconciliation cases, MCL 460.6a; MCL 460.6j, and assert that therefore, it is logical to conclude that the PSC has the authority to consider and impose lesser remedies to protect ratepayers.

We disagree. The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The statutes that confer power on the PSC must be strictly construed. Authority must be granted by clear and unmistakable language. A doubtful power does not exist. Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the statutory scheme. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1999).

The PSC has the power to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. MCL 460.6. The PSC did not conclude that in the context of a general rate case it lacked jurisdiction to implement the remedies proposed by MEC and PIRGIM. Rather, the PSC determined that implementation of the suggested remedies was not necessary to correct any unreasonable or imprudent action by WEPCO. WEPCO included costs related to SNF disposal and payment of the SNF fee in its base rate which it sought by application to increase. The PSC did not presume that SNF costs were subject to automatic recovery, but rather scrutinized WEPCO's rate increase request in contested case hearings. MEC and PIRGIM did not allege, and the PSC did not find, that WEPCO acted unreasonably or imprudently with respect to issues related to SNF disposal and payment of SNF fees to the DOE. No statute authorizes the PSC to take action such as that suggested by MEC and PIRGIM in either a general rate case or a PSCR proceeding absent a finding of unreasonable or imprudent action by a utility. The PSC correctly concluded that the lack of unreasonable or imprudent conduct by WEPCO made implementation of any remedy proposed by MEC and PIRGIM unnecessary. The PSC's statements reflect a correct interpretation and application of MCL 460.6a in cases in which no unreasonable or imprudent conduct is found. That interpretation and application is entitled to deference. *Canales*, *supra*. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Next, MEC and PIRGIM argue that the PSC's finding that WEPCO acted reasonably and prudently with respect to SNF disposal costs is unexplained and not supported by the requisite evidence. They assert that the PSC ignored evidence that WEPCO failed to grasp the enormity of the potential problems with SNF disposal and abrogated its responsibility to balance the interests of ratepayers with those of the utility.

We disagree. WEPCO's witness testified that the utility acted reasonably and prudently with respect to SNF disposal costs. The witness presented by MEC and PIRGIM did not give

contradictory testimony. The PSC acted in accordance with the authority granted to it, including the authority to consider a variety of factors when setting just and reasonable rates, *Detroit v Public Service Comm*, 308 Mich 706, 718; 14 NW2d 784 (1944), and properly concluded that in the absence of a finding of unreasonable or imprudent conduct on the part of WEPCO, implementation of remedies such as those proposed by MEC and PIRGIM was unnecessary. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Finally, we note that MEC and PIRGIM's argument that their proposed remedies are not preempted by federal law was not raised before or addressed by the PSC, and thus is not properly before us. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The PSC did not rely on the doctrine of federal preemption as a basis for its decision.

B. Issues Raised by IPC in Docket No. 246744

First, IPC argues that the PSC unlawfully allowed WEPCO a rate of return[3] on transmission assets that WEPCO did not own, i.e., those transferred to ATC on January 1, 2001, and over which the PSC had no jurisdiction. IPC notes that if a utility takes a service from a third party, the cost incurred constitutes an operating expense. The utility has no investment in the assets used by the third party to provide the service; thus, the value of those assets cannot be included in the portion of the base rate upon which the utility is entitled to seek a rate of return.

We disagree. The PSC adopted the Staff's recommendation that WEPCO's cost of owning and operating the transmission assets, calculated to be $1.36 million, be recovered not by reducing WEPCO's base tariff rates by that amount but rather by adding that amount to the allowance of the cost of power supply included in the base rates. Thereafter, an amount equal to the revenues attributable to the transmission assets would be credited toward retail customer payment of PSCR costs. The net effect of the arrangement was to allow WEPCO to recover the cost of receiving transmission services from ATC, but not to earn a rate of return on the transmission assets it no longer owned. We give great weight to the PSC's decisions regarding the structure of WEPCO's rates and the method by which WEPCO could recover the costs associated with obtaining transmission services from ATC. *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998); *Attorney General v Public Service Comm*, 220 Mich App 561, 568; 560 NW2d 348 (1996). The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Second, IPC argues that the PSC lacked authority to authorize WEPCO to recover the cost of obtaining transmission services from ATC in its PSCR proceedings. IPC asserts that the purchase of transmission services does not constitute a power transaction or the purchase of fuel, and thus is not a power supply cost recoverable in a PSCR proceeding.

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[3] Rates are set based on the following formula: $R = B(r) + O$. In this formula, "R" represents the revenue the rate will generate, "B" represents the value of the assets upon which the utility seeks the rate of return, "r" represents the rate of return, and "O" represents the utility's operating expenses, which require revenue over and above the return sought on investments.

We disagree. The PSC has broad authority to set just and reasonable rates and may, in the exercise of its discretion, determine what factors are relevant in a particular case. The PSC is not bound by any particular ratemaking methodology, and can make pragmatic adjustments in order to respond to particular circumstances in any given case. *Attorney General v Public Service Comm*, 189 Mich App 138, 147; 472 NW2d 53 (1991).

Power supply costs recoverable in PSCR proceedings include "booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, or fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Nothing in Act 304 in general or in MCL 460.6j in particular prohibits the recognition of transmission costs as PSCR costs. Power must be transmitted in order for it to be distributed to a utility's customers. This holds true whether the power is generated by the utility itself or purchased by the utility from a third-party provider. PSC witnesses testified that historically, transmission costs have been accounted for in PSCR proceedings. The PSC's decision to allow WEPCO to recover transmission costs as PSCR costs was within the PSC's broad ratemaking authority, *Attorney General*, *supra*, 79, was consistent with the language of Act 304 in general and of MCL 460.6j in particular, *Consumers Power Co*, *supra*, 157 n 8, and was supported by the requisite evidence. *Associated Truck Lines*, *supra*. We defer to the PSC's construction of a regulatory scheme it is empowered to administer. *Champion's Auto Ferry*, *supra*. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Third, IPC argues that the PSC erred in concluding that WEPCO's decision to transfer its transmission assets to ATC was reasonable and prudent and that WEPCO should be allowed to recover the resulting fees paid to ATC. IPC observes that no specific evidence supported WEPCO's assertion that the transfer would result in economic benefits to ratepayers, and notes that other evidence suggested that the rates charged by ATC would increase over the years.

We disagree. WEPCO's witness testified that the transfer was reasonable and prudent, and noted that ATC would make system-wide improvements above and beyond those that would have been made had the transfer not taken place. These improvements would result in greater reliability and lower costs. IPC's witness stated that the transfer appeared to be imprudent, but pointed to no specific evidence on which he based this conclusion. The PSC was entitled to rely on the evidence provided by WEPCO's witness, notwithstanding the existence of contradictory evidence. *Great Lakes Steel v Public Service Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983). The PSC's orders are not unlawful or unreasonable. *In re MCI*, *supra*; *Associated Truck Lines*, *supra*; MCL 462.26(8).

Fourth, IPC argues that the PSC's orders unlawfully and unreasonably authorize rates that do not reflect known circumstances for the period in which the rates are to be in effect, and utilize an erroneous Single Business Tax (SBT) rate. IPC contends that by allowing WEPCO's cost of obtaining transmission services from ATC to be accounted for in WEPCO's PSCR proceedings, the PSC allowed the costs that assumed WEPCO's continued ownership of its transmission assets to remain in the base rate for WEPCO's PSCR clause. Furthermore, IPC asserts that the PSC's utilization of a constant SBT rate of 1.9% failed to account for the fact that the SBT is being phased out at the rate of 0.1% per fiscal year.

We disagree. By accounting for WEPCO's cost of obtaining transmission services from ATC in WEPCO's PSCR proceedings, the PSC ensured that WEPCO's rates would accurately reflect the true cost of ATC's services in future years. The PSC's decision to account for WEPCO's transmission costs in this manner was an appropriate exercise of its discretion and ratemaking authority. *Attorney General*, *supra*, 147. Moreover, the PSC's adoption of a constant SBT rate of 1.9% was reasonable under the circumstances. The SBT rate declines in a given fiscal year only if the rainy day fund for the previous year exceeds $250 million. MCL 208.31(5). No evidence showed that the requisite conditions would exist to support a reduction in the SBT rate for fiscal year 2003 and beyond. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Fifth, IPC argues that the PSC unlawfully adopted a rate design that does not reflect the true cost of service for WEPCO's various classes of customers. IPC contends that the PSC's adoption of its Staff's recommended rate design increased the subsidies granted to residential customers, and placed a greater percentage of the total cost of service on industrial customers.

We disagree. WEPCO proposed rate increases of 19.1% for residential customers, 5.2% for general secondary customers, and 6.5% for general primary customers. The PSC adopted its Staff's proposed increases of 13.1% for residential customers, 7.3% for general secondary customers, and 7.5% for general primary customers, concluding that the Staff's rate design took into account the considerations necessary to set just and reasonable rates for WEPCO's various classes of customers, and to avoid imposing a harsh rate increase on residential customers in one stage. The PSC's finding that adoption of the Staff's proposed rate design would accomplish the goal of moving WEPCO's rates for its various classes of customers closer to the actual cost of service was supported by testimony from the Staff's witness. The PSC was entitled to rely on this evidence, notwithstanding the fact that IPC presented evidence that recommended that all rates be based strictly on cost of service. *Great Lakes Steel*, *supra*. The PSC did not abuse its discretion in the exercise of its ratemaking authority, *Detroit Edison Co v Public Service Comm*, 221 Mich App 370, 374; 562 NW2d 224 (1997), and its decision to adopt the rate design recommended by the Staff was supported by the evidence. *Associated Truck Lines*, *supra*. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Finally, IPC argues that the PSC deprived it of due process by denying it access to data regarding WEPCO's actual booked expenses for the year 2001 and by excluding testimony regarding 2001 test data. IPC notes that its witness disputed the assertion that WEPCO's revised 2000 test year accurately reflected the impact of the transfer of the transmission assets to ATC, but was unable to quantify the flaws or present evidence to support his assertions without access to the requested data.

We disagree. The PSC's remand order afforded WEPCO the option of adjusting its 2000 test year to account for the effect of the transfer of the transmission assets or developing a new test year. Significantly, the order did not grant the other parties permission to challenge the choice made by WEPCO, and prohibited the parties from raising new issues on remand. IPC was entitled to, and did, assert on remand that WEPCO's adjusted 2000 test year data was flawed. However, evidence of the effect of the transfer of WEPCO's transmission assets on other years, such as 2001, was irrelevant to the issue of whether WEPCO accurately accounted for the effect of the transfer in the 2000 test year. The PSC's interpretation of the scope of its remand order and the evidence permitted thereunder was reasonable and is entitled to deference.

In re MCI Telecommunications Corp Complaint, 240 Mich App 292, 303; 612 NW2d 826 (2000). The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio