STATE OF MICHIGAN

COURT OF APPEALS

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, Appellant, v MICHIGAN PUBLIC SERVICE COMMISSION and DETROIT EDISON, Appellees.	UNPUBLISHED June 24, 2004 No. 246912 MPSC LC No. 00-013646
ATTORNEY GENERAL, Appellant, v MICHIGAN PUBLIC SERVICE COMMISSION and DETROIT EDISON, Appellees.	No. 247078 MPSC LC No. 00-013646

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

PER CURIAM.

The Attorney General and the Association of Businesses Advocating Tariff Equity ("ABATE") appeal as of right from an order by the Michigan Public Service Commission ("PSC") dismissing their petitions to be granted intervenor status and a rehearing of an ex parte opinion and order. This Court issued an order consolidating these two appeals. We affirm.

I

Consistent with the requirements of MCL 460.10w(1), Detroit Edison sought to divest itself of its transmission assets by transferring them to its affiliate, the International Transmission Company ("ITC"). Both Detroit Edison and ITC were wholly owned subsidiaries of DTE Energy Company ("DTE"). To complete its divestment of transmission facilities, DTE reached an agreement to transfer ITC and the transmission assets to an independent purchaser, Kohlberg, Kravis Roberts & Co. and Trimaran Capital Partners, LLC. Detroit Edison filed the petition at issue in this case to seek approval of its proposed accounting journal entries for the transfer of

the transmission assets. It also requested that the PSC adopt its proposed "ratemaking treatment" of the net proceeds from the sale "that would result in a 50-50 sharing of the net proceeds between Detroit Edison and its customers." Further, it requested ex parte approval, representing that the approvals and findings requested were reasonable and would not result in an increase in the cost of service to Detroit Edison's customers.

Three days after the petition was filed, the PSC approved the proposed accounting entries, noting that they conformed to the Uniform System of Accounts, which the PSC had adopted. See 1979 AC, R 460.9001, as amended by 1986 MR 12, R 460.9001. It also approved the 50/50 split between Detroit Edison's shareholders and its customers. Further, the PSC determined that ex parte relief was appropriate since the approvals granted "will not increase the cost of service to any customer."

ABATE and the Attorney General then filed petitions seeking to intervene and requesting a rehearing of the ex parte opinion and order. The PSC denied the petitions for rehearing and held that the petitions for intervention were moot. The PSC again stated that ex parte relief was appropriate since the relief requested would not increase the cost of service to customers. Further, the PSC stated:

> In its application, Detroit Edison did not request an alteration or amendment in rates or rate schedules. Rather, it proposed that the net proceeds of the sale would be shared 50/50 between the utility and its customers, and that the customers' 50% share would be used to reduce deferred implementation costs that would be billed to customers after the end of the rate freeze provided for pursuant to the provisions of MCL 460.10d(1) and (2). As Detroit Edison points out, the Michigan Court of Appeals has repeatedly held that MCL 460.6a(1) does not require a hearing in such cases involving refunds or reductions in costs.

II

As a preliminary matter, the PSC and Detroit Edison argue that the Attorney General and ABATE are not "parties in interest" or "aggrieved parties" and that this Court therefore lacks jurisdiction. MCR 7.203(A)(2) provides that this Court has jurisdiction of an appeal of right filed by an aggrieved party from an order of a tribunal if an appeal of right has been established by law or court rule. MCR 7.203; *In re Freeman Estate*, 218 Mich App 151, 154; 553 NW2d 664 (1996). MCL 462.26(1) provides that a "party in interest" may appeal a PSC order as of right. *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666, 674; 523 NW2d 483 (1994).

The PSC argues that the Attorney General and ABATE are not aggrieved because the parties they represent will be credited with fifty percent of the net sale proceeds as a result of the ex parte order, and in the absence of the order, they would receive nothing. Detroit Edison argues that the Attorney General and ABATE are not aggrieved parties because they were not parties in the PSC proceedings below. We reject both arguments.

This Court has defined an "aggrieved party" as "'one whose legal right is invaded by an action, or whose pecuniary interest is directly or adversely affected by a judgment or order. It is a party who has an interest in the subject matter of the litigation.'" *In re Freeman Estate, supra*

at 155, quoting 6 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed, 1992), authors' comment regarding Rule 7.203, § 1, pp 138-139. If an appellant was not represented in the proceedings below and the judgment directly affects the interests of that appellant, the appellant is considered an aggrieved party on appeal. *In re Freeman Estate, supra.* Thus, the question is whether the Attorney General and Abate have an interest in the subject matter of the proceedings below. *Id.*

The Attorney General sought intervention pursuant to MCL 14.28, which provides that the Attorney General may intervene when, in its judgment, the interests of the state require intervention and the people of this state "may be a party or interested." MCL 14.28; *Attorney General v Public Service Comm,* 243 Mich App 487, 496; 625 NW2d 16 (2000). In this case, the Attorney General determined that the interests of the state, and correspondingly, taxpayers, as a utility service consumer, and the interests of the people as Detroit Edison customers, required intervention. Because the Attorney General is authorized by statute to intervene on behalf of the people of this state, MCL 14.28 and 14.101, it is implicit that the Attorney General is entitled to enforce the rights of the people when it intervenes. *Id.* at 496-497; *Richland Twp v State Tax Comm,* 210 Mich App 328, 335-336; 533 NW2d 369 (1995). The Attorney General is therefore a party in interest with regard to the subject matter of the ex parte order.

Because the Attorney General is a party in interest, the denial of intervention by the PSC is not a bar to this Court's exercise of jurisdiction. *In re Freeman Estate, supra;* see also *Tucker v Clare Bros Ltd,* 196 Mich App 513, 517-520; 493 NW2d 918 (1992) (failure to formally intervene in lower court proceedings not fatal to right of appeal because appellants were real parties in interest and pursuant to MCL 418.827(1) could have intervened as of right). As Detroit Edison acknowledges in its brief on appeal, this Court has previously decided appeals involving ex parte orders of the PSC. *Attorney General v Public Service Comm,* 227 Mich App 148; 575 NW2d 302 (1997).

Further, the fact that the ex parte order conferred a benefit on Detroit Edison's customers, in the form of a credit of fifty percent of the net sale proceeds, does not negate their status as parties in interest. If these parties were entitled to more, this benefit is illusory. In fact, ABATE and the Attorney General in part contend that Detroit Edison's customers are entitled to one hundred percent of the proceeds and that the calculation of the net sale proceeds may be unreasonably low.

Given that we have jurisdiction over the Attorney General's appeal and can therefore decide the questions presented, we decline to address the jurisdictional issue as it pertains to ABATE.

III

The Attorney General and ABATE argue that notice and a hearing were required under MCL 460.6a(1) because Detroit Edison proposed ratemaking treatment that effectively will result in increased costs to customers. MCL 460.6a(1) provides in relevant part:

> 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. … 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. … *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.* [Emphasis added.]

The action proposed by Detroit Edison does not seek "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." Subsection 6a(1) therefore does not apply. *Attorney General v Public Service Comm*, 220 Mich App 561, 567; 560 NW2d 348 (1996). Detroit Edison's proposed "ratemaking treatment" of the net proceeds from the sale of its transmission assets would "reduce costs" to customers by crediting the proceeds toward deferred implementation costs otherwise recoverable from Detroit Edison's bundled and electric choice customers. Because Detroit Edison did not seek an increase in its rates and charges, or to alter rates or rate schedules that would increase the cost of services to customers, there was no event to trigger the statutory requirement for notice and a hearing.

Nonetheless, the Attorney General and ABATE argue that the ratemaking treatment will potentially *result in* increased costs to customers and therefore notice and hearing are nevertheless required for the proposed ratemaking treatment. We disagree.

Essentially, ABATE and the Attorney General argue that Detroit Edison cannot avoid notice and a hearing by styling the request as something other than a petition to increase rates where the "substantive practical effect" of the 50/50 split of the petition may be to increase rates. Citing *Attorney General, supra*, 220 Mich App 561, they argue that no consideration was given to factors associated with the transfer to determine whether they will cause increased costs in the future. For instance, Detroit Edison will have to pay for transmission services once it no longer has transmission abilities after the sale of these assets and the effect of this change was not weighed against the net profit of the sale to determine whether the sale would cause an increase in costs to customers. Further, they argue that the ex parte order in this case establishes a set formula for calculating the net profit from the sale and precludes future review of the formula, which could result in increased costs to customers, assuming that a different formula may result in a greater profit, and thus a greater credit to customers. We disagree that these circumstances bring the proposed ratemaking treatment within the statutory requirements for notice and a hearing under subsection 6a(1) or that the analysis in *Attorney General, id.*, 220 Mich App 561, governs this case.

We conclude that *Attorney General, supra*, 227 Mich App 148, is more analogous to the circumstances of this case. There, the Attorney General challenged an ex parte approval of a contract whereby Consumers Power Company agreed to provide The Upjohn Company with electric services at discounted rates and sought to reserve the right to seek a rate increase in the future based on the resulting loss of revenue. *Id*. at 149, 151. The Attorney General argued "that whenever a proposed alteration of rates may have the effect of increasing costs to customers in

the future, it cannot be said that the alteration 'will not result' in a cost or rate increase," and that a hearing was therefore required. *Id*. at 153. This Court disagreed, holding:

> 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. [*Id*. at 154.]

Similarly, the Attorney General and ABATE essentially challenge the ex parte order allowing for the 50/50 split on the ground that it will "provide the reason for a subsequent rate increase to be granted in some future PSC proceeding," *id*. Given the holding in *Attorney General, id.*, 227 Mich App 148, that notice and a hearing were not required in this kind of instance, we conclude that this potential effect is insufficient to warrant notice and a hearing. The statute requires notice and hearing when an increase in rates is sought or an alteration of rates or rate schedules effects an increase in the cost of service, not when the proposed ratemaking treatment could conceivably have an attenuated impact on the cost of services at a future date.

Affirmed.

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