STATE OF MICHIGAN

COURT OF APPEALS

In re Application of DTE ELECTRIC COMPANY to Increase Rates.

RESIDENTIAL CUSTOMER GROUP,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

DTE ELECTRIC COMPANY,

Petitioner-Appellee.

UNPUBLISHED
December 21, 2021

No. 353767
Public Service Commission
LC No. 00-020561

Before: STEPHENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

In this general rate case, Residential Customer Group (RCG) appeals as of right an order issued by appellee Michigan Public Service Commission (MPSC) on May 8, 2020, granting petitioner-appellee DTE Electric Company authority to increase its electric rates. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

On July 8, 2019, DTE filed its application to increase rates. In its application, DTE indicated that it was seeking additional annual revenue as early as May 8, 2020, in order to recover various changes in costs, increased expenses, and a reasonable rate of return in the projected test year of May 1, 2020 through April 30, 2021. DTE further explained in its application that it had used the calendar year ending December 31, 2018 as the historical test year and that this 12-month

period had been "normalized and adjusted for known and measurable changes" to arrive at the projected test year. RCG's petition to intervene was granted on July 31, 2019. Following evidentiary hearings on DTE's application to increase rates, the administrative law judge issued a proposal for decision (PFD) on March 5, 2020. After the parties were given the opportunity to file objections to the PFD, the MPSC issued its decision on May 8, 2020.

Relevant to this appeal, the MPSC (1) approved DTE's use of a 12-month "projected test year" of May 1, 2020 through April 30, 2021, in petitioning for a rate increase pursuant to MCL 460.6a(1);[1] (2) rejected RCG's request for the MPSC to ensure that DTE was not seeking to recover expenses or costs incurred to comply with the MPSC's order approving a settlement in MPSC case number U-20084; and (3) declined to either modify or eliminate the "opt-out" charges that DTE charges utility customers who elect not to use advanced metering infrastructure (AMI) meters.[2]

RCG now appeals, challenging these rulings.

II. STANDARD OF REVIEW

> "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 to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, a party must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. An order is unreasonable if it is "arbitrary, capricious, or totally unsupported by admissible and admitted evidence." Thus, a final order of the PSC must be authorized by law and be "supported by competent, material and substantial evidence on the whole record." Const. 1963, art. 6, § 28. [*Enbridge Energy Ltd Partnership v Upper Peninsula Power Co*, 313 Mich App 669, 673-674; 884 NW2d 581 (2015) (some citations omitted).]
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> Review of an administrative agency's fact-finding is akin to an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court. In its fact-finding capacity, the agency has reviewed evidence, such as witness testimony, and it is in the best position to evaluate the credibility and weight of that evidence. Similar to the clear error standard of review for circuit courts, under the constitutional and statutory

[1] MCL 460.6a(1) provides in pertinent part that a "utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges."

[2] "An AMI meter, also known as a smart meter, is capable of collecting near-real-time data on a customer's energy usage and reporting the data to the utility at frequent intervals." *In re Application of Consumers Energy to Increase Electric Rates*, 316 Mich App 231, 235; 891 NW2d 871 (2016) (quotation marks and citation omitted).

> standards of review, a reviewing court must ensure that the finding is supported by record evidence; however, the reviewing court does not conduct a new evidentiary hearing and reach its own factual conclusions, nor does the reviewing court subject the evidence to review de novo. [*In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 101; 754 NW2d 259 (2008).]

"This Court reviews de novo whether the Commission properly selected, interpreted, and applied the relevant statutes." *In re Application of Consumers Energy Co for Approval of a Gas Cost Recovery Plan*, 313 Mich App 175, 187; 881 NW2d 502 (2015). The proper interpretation of a statute is a question of law that this Court reviews de novo. *In re Complaint of Rovas*, 482 Mich at 97. In *In re Complaint of Rovas*, our Supreme Court specifically addressed the proper standard of review applicable to "judicial review of an administrative agency's interpretation of a statute,"[3] holding that

> an agency's interpretation of a statute is entitled to "respectful consideration," but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language. An agency's interpretation, to the extent it is persuasive, can aid in that endeavor. [*Id*. at 93.]

More specifically, the Supreme Court held that the following articulation of the standard of review controls judicial review of an agency's interpretation of a statute:

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*Id*. at 103 (quotation marks and citation omitted; second alteration in original).[4]]

In this case, the parties dispute the precise standard of review applicable in this appeal. However, their dispute actually amounts to a disagreement over the nature of the MPSC actions under review. "[T]here are different standards of review for different agency functions." *Id*. at 100. "[C]ourts should carefully separate the different agency functions under consideration and apply the proper standard of review for each." *Id*. at 108-109. Thus, we will address the appropriate standards of review applicable to each substantive issue raised on appeal within the context of our analysis of each issue below.

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[3] The MPSC was also the administrative agency involved in that case. See *In re Complaint of Rovas*, 482 Mich at 94.

[4] See also *In re Complaint of Rovas*, 482 Mich at 108.

III. ANALYSIS

A. TEST YEAR

We first address RCG's challenge to the MPSC's ruling adopting DTE's projected test year of May 1, 2020 through April 30, 2021 under MCL 460.6a(1).

MCL 460.6a(1) provides in pertinent part that a "utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges."

The MPSC ruled in relevant part as follows:

> The Commission again finds it necessary to highlight the statutory language. MCL 460.6a(1) provides that "[a] utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges." The statute contains no limitation on the future consecutive 12-month period, no requirement to use an historical test year, and no information or limitation regarding the relationship between the date of the application and the test year. The test year may be in the future, and the 12 months must be consecutive; those are the requirements of the statute. . . . The burden is on the utility to prove the accuracy of each and every test year projection. The statutory language is clear, and, unless its clear meaning leads to an absurdity, the Commission is bound by its dictates. [Alteration in original.]

On appeal, RCG argues that the MPSC's order violated the statutory timeframe set forth by the plain language of MCL 460.6a(1). RCG contends that the projected test year may not extend more than 12 consecutive months beyond the date of the utility's filing of its rate application and that the MPSC's construction of the statute was unlawful. In its appellate brief, RCG aptly summarized the fundamental premise of its challenge to the MPSC's test year ruling as follows:

> RCG requests the Court to reject the Commission's adoption of DTE's overly extended projected test year, and to declare that the statutorily required projected test year that may be utilized relates to "a future consecutive 12-month period" commencing with the date the utility filed its rate case, and not some longer timeframe disconnected from the date of the rate case filing. DTE filed this rate case on July 8, 2019. DTE proposed a projected test year extending from May 1, 2020 through April 30, 2021, ending some 22 months after the filing of its rate case and 28 months after the end of the 2018 historical test year, thus violating the statutory mandate.

RCG further contends that its proposed construction of the statute is bolstered by language in MCL 460.6a(4), (5), and (6)[5] because the time limits referenced in those subsections are

[5] MCL 460.6a provides in relevant part:

measured from the date the utility files its rate application and the 12-month period in Subsection (1), being located within the same statutory section, must logically also be measured from the date the rate application was filed. RCG additionally asserts that the length of the time limits in Subsections (5) and (6) are consistent with RCG's reading of Subsection (1), creating "a synergy."

RCG's appellate arguments fundamentally concern the meaning of statutory language in MCL 460.6a(1), thus presenting an issue of statutory interpretation that we review de novo as a question of law. *In re Complaint of Rovas*, 482 Mich at 97. We interpret statutes "according to their plain language," and give " 'respectful consideration' " to the MPSC's interpretation. *Id*. at 93.

This Court recently held that the language in MCL 460.6a(1) authorizing "the use of 'a future consecutive 12-month period' limits the future period only in that it must consist of 12 consecutive, or contiguous, months, and thus does not imply that it must begin no later than the filing date of the attendant rate case." *In re Application of Consumers Energy Co to Increase Rates*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351261); slip op at 4. RCG was also a party in that case and raised essentially the same argument it raises in this case: i.e., "the one-sentence statutory provision at issue, that '[a] utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges,' MCL 460.6a(1), should not be understood as allowing a utility to choose some arbitrarily distant 12-month period for this purpose, but should instead be understood to envision a future period beginning no later than when the utility initially files its rate case." *Id*. (alteration in original). In

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> (4) The commission shall adopt rules and procedures for the filing, investigation, and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to petitions or applications within a period of time allotted by law to issue a final order after the filing of the complete petitions or applications. . . .
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> (5) Except as otherwise provided in this subsection and subsection (1), if the commission fails to reach a final decision with respect to a completed petition or application to increase or decrease utility rates within the 10-month period following the filing of the completed petition or application, the petition or application is considered approved. If a utility makes any significant amendment to its filing, the commission has an additional 10 months after the date of the amendment to reach a final decision on the petition or application. If the utility files for an extension of time, the commission shall extend the 10-month period by the amount of additional time requested by the utility.
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> (6) A utility shall not file a general rate case application for an increase in rates earlier than 12 months after the date of the filing of a complete prior general rate case application. A utility may not file a new general rate case application until the commission has issued a final order on a prior general rate case or until the rates are approved under subsection (5).

reaching our holding rejecting the interpretation proposed by RCG, we noted the "lack of any expressed limitations in MCL 460.6a(1) on how far in the future a projected test year may run." *Id*. at ___; slip op at 5.

Furthermore, as in the instant case, RCG argued in *In re Application of Consumers Energy Co to Increase Rates* that its interpretation of MCL 460.6a(1) was "properly informed by related statutory provisions" in Subsections (5) and (6). *Id*. at ___; slip op at 4. This Court addressed the argument as follows:

> RCG points out that MCL 460.6a(5) sets forth a rule by which rate requests are approved by default where the PSC fails to issue a final order within 10 months after the utility's rate filing. Likewise, MCL 460.6a(6) prohibits the filing of a new rate case "earlier than 12 months after the date of the filing of a complete prior general rate case application." RCG argues that the running of these provisions' timing specifications from the filing date should also apply to MCL 460.6a(1), and further points out that such operation would align the prospective test year of Subsection (1) with the 12-month cycle envisioned by Subsection (6). We are of the opinion that, although such alignment might have empirical appeal, had the Legislature desired that outcome it would have clearly called for it.
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> Moreover, Subsection (5) also starts the 10-month decision period anew in the event that the utility either significantly amends its filing, or requests its own timing extension, and Subsection (6) alternatively states that "[a] utility may not file a new general rate case application until the commission has issued a final order on a prior general rate case or until the rates are approved under subsection (5)." These provisions permit continuing the proceedings beyond the 12 months commencing with the filing date, and indicate that the running of timing limitations from the filing date is not so seriously ensconced as to militate in favor of projecting such a specification into Subsection (1). This is particularly true in light of the lack of any expressed limitations in MCL 460.6a(1) on how far in the future a projected test year may run. [*Id*. at ___; slip op at 4-5 (alteration in original).]

We are bound by this published authority from this Court. *In re Application of Consumers Energy Co for Approval of a Gas Cost Recovery Plan*, 313 Mich App at 195; MCR 7.215(J)(1). Moreover, we expressly agree with the panel in *In re Application of Consumers Energy Co to Increase Rates* that the plain language of MCL 460.6a(1) limits the phrase "future consecutive 12-month period" only in requiring that it "must consist of 12 consecutive, or contiguous, months, and thus does not imply that it must begin no later than the filing date of the attendant rate case." *In re Application of Consumers Energy Co to Increase Rates*, ___ Mich App at ___; slip op at 4. "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible." *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). To the extent RCG advances policy-based arguments for a different rule, such arguments are unavailing because our task in interpreting a statute is to give effect to the intent of the Legislature as expressed by the language of the statute itself. *In re MCI Telecom Complaint*, 460 Mich at 411.

Accordingly, the MPSC did not err in its interpretation of MCL 460.6a(1). *In re Complaint of Rovas*, 482 Mich at 97; *In re Application of Consumers Energy Co to Increase Rates*, ___ Mich App at ___; slip op at 4. All of RCG's additional arguments in support of its challenge to the adoption of the projected test year in this case are premised on RCG's proposed interpretation of the above quoted language in MCL 460.6a(1). Because RCG's proposed interpretation of MCL 460.6a(1) is inconsistent with the statutory language, its additional arguments relying on its erroneous interpretation of the statute do not impact our analysis. We therefore affirm the MPSC's ruling on the projected test year in this case.

B. AMI OPT-OUT CHARGES

Next, RCG challenges the following ruling by the MPSC regarding RCG's request to require DTE to eliminate or reduce the surcharges for customers who opt out of AMI metering:

> DTE Electric noted that the number of customers who have elected to opt-out of AMI metering is substantially lower than expected. The company stated that it "agreed to replace the meters of existing AMI opt-out customers and any customers who had not yet had an AMI meter installed, with digital meters without radios" as part of the settlement agreement in Case No. U-20084. . . . RCG proposed that the Commission require the company to eliminate all surcharges for opt-out customers along with other modifications to the AMI opt-out program. . . . DTE Electric responded that it is not yet required to review the opt-out program. . . .
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> The ALJ recognized the merit in the company's "proposal to make its opt out filing in a separate docket in the third quarter of 2020" and declined to adopt RCG's proposals. . . .
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> RCG takes exception to the ALJ's "failure to adopt RCG's position that DTE's surcharges to opt-out customers should be eliminated or substantially reduced." . . . RCG contends that DTE Electric has failed to present any evidence that its opt-out charges are cost-based, and the Commission should eliminate the charges. RCG also argues that DTE Electric's reliance on only 200-600 meters yet to be installed as justification for its delay in conducting a COSS [cost of service study] to support the opt-out charges is not justified.
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> The Commission declines to modify the AMI opt-out charges in this proceeding. DTE Electric's proposal to file a separate proceeding regarding AMI opt-out charges in the third quarter of 2020 is both reasonable and prudent. . . . RCG has not presented sufficient information to warrant a revision of the previously approved AMI opt-out charges. Therefore, the Commission adopts the findings and recommendations of the ALJ and will review AMI opt-out charges in a separate docket to be filed by the company in the third quarter of 2020.[6]

[6] The ALJ had indicated that DTE had proposed deferring review of the AMI opt-out charges because DTE had not yet completed installing all of its AMI meters.

On appeal, RCG argues that the MPSC "unlawfully and unreasonably failed to adopt RCG's position that DTE's surcharges to [AMI] opt-out customers should be eliminated or substantially reduced." RCG essentially maintains that DTE was required to present evidence in this case of a cost basis to support its opt-out charges rather than simply continuing the opt-out charges as previously approved in MPSC Case No. U-17053 and relying on that previous assessment. As RCG admits, DTE did not seek to impose new or increased opt-out charges but only sought to continue the charges that had been approved in Case No. U-17053. Nonetheless, RCG contends that the opt-out charges should be reviewed in this case, disputes that the opt-out charges are necessary to cover meter readings because there are options for customers to self-read their meters or pay bills under a budget plan, asserts that some customers were wrongfully charged opt-out fees when they actually had AMI meters that were transmitting data, asserts that DTE has not shown that AMI meters result in savings, and asserts that all customers pay on a pro-rata basis for DTE's AMI infrastructure. RCG argues that the MPSC erred by adopting the opt-out charges in this case without requiring evidence of a cost basis for the charges from DTE.

This is not the first time that RCG has presented these arguments in this Court, thus implicating the doctrine of res judicata in addressing RCG's arguments here. "Collateral estoppel and res judicata present questions of law reviewed de novo by this Court." *King v Munro*, 329 Mich App 594, 599; 944 NW2d 198 (2019).

Generally, "[t]he doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature where a method of appeal is provided and where it is clear that it was the legislative intention to make the determination final in the absence of an appeal." *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 7; 420 NW2d 156 (1988). This Court held in *Pennwalt*, 166 Mich App at 9, that "ratemaking is a legislative, rather than a judicial, function" and that res judicata and collateral estoppel therefore "cannot apply in the pure sense" to the MPSC's administrative ratemaking decisions. However, the *Pennwalt* Court further held that an issue that has previously been litigated in the MPSC need not be "completely relitigated" in subsequent proceedings because "[t]o have the same proofs, exhibits, and testimony repeated would be a waste of the commission's resources." *Id*.

Thus, the party seeking to relitigate a previously decided issue bears the burden of "establish[ing] by new evidence or by evidence of a change in circumstances that the costs were unreasonable[, which] adequately balances the competing considerations of administrative economy and allowing plaintiff the chance to challenge the rate increase." *Id*. Absent such evidence, the MPSC need not permit relitigation of the matter and may instead rely on its prior factual determinations. *Id*. at 9-10; accord *In re Consumers Energy Co*, 322 Mich App 480, 493-494, 496; 913 NW2d 406 (2017). However, where a decision of the MPSC has been affirmed on appeal by an appellate court, res judicata may apply more broadly. See *In re MCI Telecom Complaint*, 460 Mich at 430-432.

As we have already mentioned, RCG has raised the arguments related to DTE's opt-out charges that RCG now raises in this appeal multiple times before. We provide two examples by way of illustration. First, in *In re Application of DTE Electric Co to Increase Rates*, unpublished per curiam opinion of the Court of Appeals, issued February, 13, 2018 (Dockets No. 331599, 331868, and 332159), p 4, which was an appeal in Case No. U-17767, we explained that the MPSC had noted in that case regarding RCG's challenge to DTE's AMI opt-out program that "RCG

contended that the program should be altered or eliminated; however, the PSC relied on its previous decisions and appellate opinions to conclude that RCG raised no new arguments and that its challenge to the AMI opt-out program should be rejected once again." This Court also provided the following recitation of relevant background facts regarding the previous case at issue, Case No. U-17053:

> On July 31, 2012, DTE filed an application requesting approval of its AMI opt-out program for residential customers. The PSC docketed the case as Case No. U-17053. Witness Robert Sitkauskas, the Manager of DTE's AMI Technology Group, presented testimony and exhibits detailing initial fees to be charged to opt-out customers to cover work done by meter technicians to install and modify meters for customers who did not wish to participate in the program, and monthly fees to cover special meter reads and other ongoing services. Sitkauskas testified that DTE proposed an initial fee of $87 and monthly fees of $15.
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> On May 15, 2013, the PSC issued an order approving DTE's opt-out program in Case No. U-17053. [*Id*. at 7.]

The May 15, 2013 MSPC order was affirmed by this Court on appeal in a February 19, 2015 opinion. *Id*. at 7 n 4.

On appeal in Case No. U-17767, this Court rejected RCG's argument concerning the appropriateness of the AMI opt-out charges, reasoning as follows:

> In the instant case, the PSC made the following statement regarding its reliance on the evidence presented in Case No. U-17053:
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> > The Commission agrees with the RCG that no new formal cost of service study (COSS) or other cost support was introduced in this rate case to justify the current opt-out program charges. This fact is not disputed. However, the Commission also agrees with DTE Electric and the Staff that ample cost support was presented regarding the approved charges in Case No. U-17053. According to *Pennwalt Corp v Pub Serv Comm*, [166 Mich App 1, 9; 420 NW2d 156 (1988)], the Commission may rely on that evidence and the Commission's previous determinations regarding those surcharges in this case in the absence of new evidence or evidence of a change of circumstances that would necessitate a reconsideration. It is worth noting that Case No. U-17053 was a contested case proceeding that met the requirements of the Michigan Administrative Procedures Act of 1969, MCL 24.201, *et seq*. (APA), and satisfied due process concerns such as notice and an opportunity to be heard. Many utility customers intervened in Case No. U-17053 and the RCG could also have intervened. Further, the fact that the Court of Appeals affirmed the Commission's approval of DTE Electric's optout program and charges further assures the Commission that its decision in Case No. U-17053 is supported by

> competent, material, and substantial evidence on the whole record. Here, in the absence of new evidence or evidence of a change of circumstances, the Commission concludes that the current opt-out charges are appropriate and supported by the record evidence supplied in Case No. U-17053. The Commission also agrees with the PFD and adopts the Staff's proposal recommending a review of the utility's opt-out charges in either its next rate case or six months after the completion of AMI meter installations, whichever occurs first.
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> The issue of the appropriateness of DTE's opt-out fees was fully litigated and decided in the contested case proceeding in Case No. U-17053. The PSC correctly found that the issue need not be "completely relitigated" in this case because appellants [including RCG] established no basis for doing so. *Pennwalt Corp*, 166 Mich App at 9. [*Id*. at 7-8 (alteration in original).]

Nevertheless, in a subsequent general rate case involving DTE (Case No. U-18014) RCG again challenged the AMI opt-out charges, the MPSC again held that it was not required to relitigate the issue, and this Court again affirmed, reasoning as follows:

> In this appeal, Residential[7] again argues that the opt-out charges should be eliminated. Residential first contends that there was no evidence presented in the current proceeding supporting the amount of the fees. The reason for this failure is simple: DTE was not seeking to alter the opt-out fees, which had been set in Case No. U-17053. As the MPSC has explained before, there is no need for the MPSC to take new evidence on an issue that has been decided previously, absent a showing that circumstances have somehow changed. *In re Consumers Energy Co App*, 322 Mich App at 493-494. See also *Pennwalt Corp*, 166 Mich App at 9. Further, Residential is incorrect when it contends that opt-out customers are charged both to opt out of the smart meter program and for the costs of implementing the smart meter program. As the MPSC previously explained, opt-out customers are given credits to ensure that they do not incur duplicative charges for the costs of the smart meter program. *In re Application of DTE Electric Co to Increase Rates*, order of the Public Service Commission, entered December 11, 2015 (Case No. U-17767), p 100.
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> While *In re Consumers Energy Co App*, 322 Mich App at 494-496, dealt with Residential's challenges to Consumers' opt-out fees, we note that this Court similarly found it appropriate for the MPSC to rely on its prior decisions that initially set the opt-out fee where no relevant changes in the circumstances were shown. The instant matter concerns DTE's opt-out fees, but the analysis is essentially the same. Because the reasonableness of the fees were established in a

[7] In that case, the panel referred to RCG as "Residential." *In re Application of DTE Electric Co to Increase Rates*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 338378), p 1.

prior case, there is no need for the MPSC to continually revisit the question absent any relevant changes in the circumstances. See *id*.

* * *

Residential contends that DTE should be required to allow opt-out customers to self-read and report their usage because the rule permits a utility company to allow such a method of reporting energy consumption. While it would certainly be permissible for DTE to permit optout customers to report their energy usage on a monthly basis, as the MPSC aptly recognized, DTE nonetheless retains the statutory authority to read the meters on a regular basis. Residential's proposal essentially amounts to a request that the MPSC control DTE's decision with regard to meter reading in a situation where DTE has been given discretion by the MPSC's own rules. The MPSC cannot control or dictate DTE's management decisions. [*Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 148; 428 NW2d 322 (1988)]. In addition, the present case is not a rulemaking proceeding. While the MPSC may have the ability to create rules and regulations "for the conducting of the business of public utilities," MCL 460.55, that authority is not implicated in this case, see *Union Carbide Corp*, 431 Mich at 152 (distinguishing between the PSC's authority to act in a rate case as opposed to a rulemaking proceeding).

The only change in circumstances that have been demonstrated as implementation of the smart meter program has progressed is that the number of customers choosing to opt out of the program is substantially fewer than what the MPSC anticipated when the opt-out fees were initially determined and set. This change would only lead to an increase in the opt-out rates. But DTE has not requested a rate increase at this point in time, instead asking the MPSC to delay any such decision until the program is fully implemented and the number of opt-out customers is definitively established. The MPSC's adoption of DTE's suggested approach was lawful and reasonable, and thus subject to affirmance. [*In re Application of DTE Electric Co to Increase Rates*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 338378), pp 7-8.]

In this case, RCG's arguments fall well short of carrying its burden to "establish by new evidence or by evidence of a change in circumstances that the [challenged opt-out] costs were unreasonable." *Pennwalt*, 166 Mich App at 9. Virtually all of the arguments raised by RCG in this case were already rejected by MPSC and this Court in the two opinions from which we have quoted extensively above. To the extent RCG has raised any argument that is arguably new, RCG has done nothing more than present alternative methods for implementing and administering the AMI program. Merely presenting alternative methods do "not rise to the level of 'new evidence' or 'changed circumstances' necessary to establish" that the costs were "unreasonable," and the existence of alternatives "does not make [DTE's] chosen method unreasonable." *Pennwalt*, 166 Mich App at 9. The MPSC did not err by declining to require DTE to present its cost-basis evidence, declining to permit the opt-out-charges issue to be completely relitigated in this case, and instead relying on its previous factual determination of reasonableness. *Id*. at 9-10; *In re Consumers Energy Co*, 322 Mich App at 493-494, 496.

C. COSTS FROM U-20084 AND U-18486

Finally, RCG contends that the MPSC "unlawfully and unreasonably failed to adopt a downward rate adjustment to reflect the costs incurred by DTE Electric associated with its violations of [MPSC] rules, and to implement remedies required by the [MPSC's] orders in U-20084 and U-18486."

We begin by reiterating that on appellate review of the MPSC's order, RCG as the allegedly aggrieved party "has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable." *Enbridge Energy*, 313 Mich App at 673. "To establish that a PSC order is unlawful, a party must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. An order is unreasonable if it is arbitrary, capricious, or totally unsupported by admissible and admitted evidence." *Id*. (quotation marks and citations omitted). With respect to the MPSC's findings of facts based on its review of the evidence, the MPSC is "in the best position to evaluate the credibility and weight of that evidence," the MPSC's factual findings are entitled to deference on appellate review, and the reviewing court does not "subject the evidence to review de novo." *In re Complaint of Rovas*, 482 Mich at 101.

The essence of RCG's argument appears to be (1) that DTE incurred substantial costs and fines as a result of violations at issue in Case Nos. U-20084 and U-18486, (2) that DTE had been prohibited from recouping those costs from rate payers through DTE's rates, and (3) that a downward adjustment was necessary in the present rate case to enforce that prohibition. However, RCG does not provide any evidence that any of the costs and fines DTE incurred from those prior cases were wrongfully included as part of DTE's requested rates in the instant rate case. Moreover, DTE submitted evidence that these costs and fines were not part of its rate request in this case. It is thus unclear how DTE could be in violation of the prohibition against recouping the costs and fines stemming from its violations addressed in other cases through its rates at issue in this case.

RCG, in keeping with its established pattern in rate cases, seems to merely want to relitigate this issue. However, our review of the MPSC's resolution of any evidentiary conflicts and its findings of fact are not subject to de novo review on appeal. *Id*. RCG has not presented any evidence to support its claim and has thus failed to meet its "burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable." *Enbridge Energy*, 313 Mich App at 673.

Moreover, DTE did, in fact, introduce evidence below indicating that no costs associated with the settlement agreement in MPSC Case Nos. U-20084 and U-18486 would be recovered in the rates at issue in this case. Theresa Uzenski, manager of regulatory accounting with DTE, testified at some length on this issue, several times explaining that such costs were not included in the rates requested by DTE and thus would not be recovered through such rates. She testified that there was no need to subtract any of these costs from DTE's cost of service for purposes of the projected test year because the costs associated with complying with the settlement in MPSC Case Nos. U-20084 and U-18486 that could not be recovered through rates were excluded from the adjusted historical year and the projected test year was based on the adjusted historical year. Uzenski explained:

> So we did not add back costs to -- for the write-offs that were subtracted. So being that we started with a number that didn't have any cost in it and just basically added inflation, there would be nothing to subtract out of the projected [test year].

The MPSC's ruling on this issue was supported by competent, material and substantial record evidence, *Enbridge Energy*, 313 Mich App at 673-674, and we therefore defer to the MPSC's factual determinations regarding the weight and credibility of the evidence, *In re Complaint of Rovas*, 482 Mich at 101. RCG has failed to meet its burden of demonstrating by clear and satisfactory evidence that the MSPC's ruling was unlawful or unreasonable. *Enbridge Energy*, 313 Mich App at 673. Petitioner-Appellee having prevailed in full are entitled to costs. MCR 7.219(A).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien