

STATE OF MICHIGAN
COURT OF APPEALS

In re Implementation of Section 401e of 2007 PA
164.

COUNTY OF GRAND TRAVERSE, COUNTY
OF ALPENA, COUNTY OF MONTCALM,
COUNTY OF DELTA, COUNTY OF
HILLSDALE, COUNTY OF HOUGHTON,
COUNTY OF DICKINSON, COUNTY OF
CASS, COUNTY OF CHIPPEWA, COUNTY OF
MENOMINEE, COUNTY OF TUSCOLA,
COUNTY OF CHEBOYGAN, COUNTY OF
EMMET, COUNTY OF CHARLEVOIX,
COUNTY OF SAGINAW, COUNTY OF
NEWAYGO, COUNTY OF IONIA, COUNTY
OF GOGEBIC, COUNTY OF OGEMAW,
COUNTY OF MACKINAC, COUNTY OF
HURON, and COUNTY OF ALCONA,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
TELECOMMUNICATIONS ASSOCIATION OF
MICHIGAN, and MICHIGAN BELL
TELEPHONE COMPANY, d/b/a AT&T
MICHIGAN,

Appellees.

UNPUBLISHED
February 14, 2013

No. 301877
MPSC
LC No. 00-015489

In re Implementation of Section 401e of 2007 PA
164.

COUNTY OF VAN BUREN,

Appellant,

MICHIGAN PUBLIC SERVICE COMMISSION
and MICHIGAN BELL TELEPHONE
COMPANY, d/b/a AT&T MICHIGAN,

Appellees.

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Appellant counties appeal as of right from the December 21, 2010, order of the Michigan Public Service Commission (PSC) following our remand in *In re Implementation of § 401e of 2007 PA 164*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket Nos. 285896, 285964, and 286244). That opinion concluded that the PSC had committed legal error in its treatment of the counties' applications for surcharges to operate 9-1-1 systems as provided by MCL 484.1401b(2). We directed the PSC to "consider . . . allowable and disallowable costs" consistent with MCL 484.1401e(2), to "examine each case with some particularity," to "adjust those proposed surcharges that were subject to adjustment to levels necessary and reasonable as discretely determined," and to "decide anew each adjustment with individualized attention to what each affected county's necessary and reasonable 9-1-1 funding levels for 2008 were." Because the PSC did not comply with our remand order we vacate the December 21, 2010 order and again remand.

The PSC had not traditionally played a role in funding 9-1-1 services, but 2007 PA 164 amended the 9-1-1 Service Enabling Act, MCL 484.1101 *et seq.*, to broaden the base from which 9-1-1 services might be supported by including communication service devices beyond conventional landline telephone service, and, for a single fiscal year, to create a role for the PSC in the matter.

At the time relevant, MCL 484.1401b(2) required that 9-1-1 charges "not exceed the amount necessary and reasonable to implement, maintain, and operate the 9-1-1 system in the county."¹ MCL 484.1401e(1) required that each county assessing a surcharge under section 401b, MCL 484.1401b, submit certain information to the PSC no later than February 15, 2008. MCL 484.1401e(2) provided as follows:

If the amount to be generated in 2008 exceeds the amount received in 2007 plus an amount not to exceed 2.7% of the 2007 revenues, the commission, in consultation with the committee, shall review and approve or disapprove the county 9-1-1 surcharge adopted under section 401b. If the commission does not

¹ This provision now appears in subsection (3) of the statute.

act by March 17, 2008, the county 9-1-1 surcharge shall be deemed approved. If the surcharge is rejected, it shall be adjusted to ensure that the revenues generated do not exceed the amounts allowed under this subsection. In reviewing the surcharge under this subsection, the commission shall consider the allowable and disallowable costs as approved by the committee on June 21, 2005.

The “committee” referred to in the statute with which the PSC must consult in reaching its decision is the Emergency Telephone Service Committee (ETSC). This committee is a subset of the state police and is authorized to “develop statewide standards and model system considerations and make other recommendations for emergency telephone services.” MCL 484.1712.

The PSC issued an order on January 2, 2008 order directing the counties to file by February 15, 2008: “the proposed county surcharge that the county intends to begin collecting on July 1, 2008, its estimated revenues for 2007 collected under its existing surcharge, and its estimated county 9-1-1 surcharge revenues for 2008” governing submissions of proof directed the counties to submit only revenue data. The ETSC issued instructions approved by the PSC staff, directing that counties seeking surcharge increases in excess of 2.7 percent submit cost and budgetary data to the ETSC and during a day-long meeting on February 13, 2008 its Certification Subcommittee allowed county representatives to present their requests. At those meetings, county representatives were presented with specific inquires as to equipment needs, 9-1-1 fund balances, costs and funding from other sources. Two members of the PSC staff attended this meeting as well as a February 15, 2008 meeting during which the ETSC subcommittee conducted a preliminary review of the applications. On February 19, 2008, the ETSC held a special meeting to act upon the recommendations of its subcommittee. In a February 27, 2008 letter to the PSC, the ETSC reported on their activities and recommended approval of the excess surcharges requested by 35 counties. The letter noted that:

the original documentation as received by the State 9-1-1 Office for the compilation of the counties’ surcharge requests is very extensive (i.e. thousands of sheets of paper) and is available for duplication upon the commission’s request

The PSC, however, incorrectly concluded that MCL 484.1401e(2) barred any surcharge increases above the 2.7 percent figure and so it simply denied all requested surcharges above 2.7 percent and adjusted all such requested surcharges down to 2.7 percent based on this legal error. Likely as a result of this legal error, the PSC did not request any of ETSC records or filings since whatever materials the counties had filed, it could not alter the 2.7 percent cap that the PSC believe the statute imposed. As a result, the PSC did not conduct a particularized review of the revenue necessary and reasonable to meet the costs of the respective counties’ 9-1-1 systems.

We reversed the PSC’s erroneous legal conclusion that any surcharge greater than 2.7 percent above 2007 levels was barred and directed the PSC to “consider . . . allowable and disallowable costs” consistent with MCL 484.1401e(2), to “examine each case with some particularity,” to “adjust those proposed surcharges that were subject to adjustment to levels necessary and reasonable as discretely determined,” and to “decide anew each adjustment with individualized attention to what each affected county’s necessary and reasonable 9-1-1 funding levels for 2008 were.”

On remand, however, the PSC refused to reopen proofs and refused to consider any of the evidence relevant to costs of implementation, maintenance and operation of the 9-1-1 system that had been submitted to the ETSC. Thus, the PSC made its decision on remand based solely on the revenue materials that the counties had filed with the Commission pursuant to the January 2, 2008 order. Not surprisingly, given its refusal to consider the ETSC record or to take new proofs, the Commission concluded as to each county that the “county had failed to provide the Commission with evidence sufficient to support a finding that the county’s proposed 2008 surcharge reflected the necessary and reasonable costs of implement, maintaining, and operating its 9-1-1 system in 2008.”

Appellants argue that the PSC failed to heed this Court’s command on remand by refusing to consider evidence of the cost of providing 9-1-1 services. The PSC argues that the remand order underlying this case expressly rebuffed calls to reopen proofs and relies on our refusal to remand for additional proofs on a different issue. However, that issue was wholly resolved in the prior opinion and unlike the instant issue, we did not order a remand on that issue at all. As to the instant issue, however, we did order a remand and we did not foreclose additional proofs if required to comply with our directions that the PSC “consider . . . allowable and disallowable costs” consistent with MCL 484.1401e(2), to “examine each case with some particularity,” to “adjust those proposed surcharges that were subject to adjustment to levels necessary and reasonable as discretely determined,” and to “decide anew each adjustment with individualized attention to what each affected county’s necessary and reasonable 9-1-1 funding levels for 2008 were.”

It is clear that the PSC did not comply with these directions. Moreover, its claim that it cannot do so because the necessary data is not available to it is not credible given its refusal to consider the thousands of pages of evidence submitted to the ETSC—at the direction of that body and the PSC—prior to the original PSC ruling.

Appellants additionally argue that the PSC failed to comply with the statute’s mandate that it consult with the ETSC, an entity with expertise in the implementation, operation, and maintenance of 9-1-1 systems. While we reject the suggestion that the PSC must defer to the ETSC’s conclusions that the surcharges were proper, we agree that the PSC appears to have made its own determinations as to what constitutes reasonable and necessary 9-1-1 operations without any record support and without any consideration of the ETSC recommendations. Instead, the PSC appears to have treated the statutory mandate that it consult with the ETSC as a mere formality, completely ignoring its recommendations and its record.

We vacate the December 21, 2010 Opinion and Order of the PSC and remand the matter to that Commission. In this regard:

(1) Any county requesting a contested case hearing, as defined in MCL 24.203(3), shall be afforded one.

(a) In such event, the PSC shall appoint a hearing officer or officers, pursuant to MCL 24.279, to act as presiding officer. Pursuant to MCL 24.281, such presiding officer shall prepare a proposal for decision to which any party may file exceptions. Pursuant to MCL 24.278(2) and except as otherwise provided by law, the parties may make a disposition of such

contested case by stipulation, agreed upon settlement, consent order, waiver, default or other method agreed upon by the parties. If a county's requested surcharge is not approved, the PSC, based upon all the evidence and its findings of fact and conclusions of law, shall by opinion and order modify the requested surcharge in accordance with the statute.

(b) The PSC shall issue its opinions and orders deciding all such contested cases within 180 of the date of this opinion.

(2) In the event that one or more counties do not request a contested case hearing, the PSC shall reopen proofs as to all such counties, consider all relevant evidence as to each individual county's requested surcharge, consider the 2008 report and recommendations of the ETSC, make findings of fact and conclusions of law, and approve, disapprove or modify each individual county's requested surcharge by opinion and order within 180 days of the date of this opinion.

We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry W. Saad
/s/ Douglas B. Shapiro