

STATE OF MICHIGAN
COURT OF APPEALS

In re Implementation of Section 401e of 2007 PA 165.

COUNTY OF GRAND TRAVERSE, 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 CHARLEVIOX, COUNTY OF SAGINAW, COUNTY OF NEWAYGO, COUNTY OF IONIA, COUNTY OF GOGEBIC, COUNTY OF OGEMAW, COUNTY OF MACKINAC, COUNTY OF ALCONA, COUNTY OF ALPENA, COUNTY OF HURON,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and TELECOMMUNICATIONS ASSOCIATION
OF MICHIGAN,

Appellees.

In re Implementation of Section 401e of 2007 PA 165.

COUNTY OF VAN BUREN,

Appellant,

v

UNPUBLISHED
April 20, 2010

No. 285896
Public Service Commission
Case No.00-015489

No. 285964
Public Service Commission
Case No.00-015489

MICHIGAN PUBLIC SERVICE COMMISSION
and TELECOMMUNICATIONS ASSOCIATION
OF MICHIGAN,

Appellees.

In re Implementation of Section 401e of 2007 PA 165.

COUNTY OF SAINT CLAIR,

Appellant,

v

No. 286244
Public Service Commission
Case No.00-015489

MICHIGAN PUBLIC SERVICE COMMISSION
and TELECOMMUNICATIONS ASSOCIATION
OF MICHIGAN,

Appellees.

Before: METER, P.J., MURPHY, C.J., and ZAHRA, JJ.

PER CURIAM.

In these consolidated cases concerning the funding of emergency telephone services under the Emergency 9-1-1 Service Enabling Act, MCL 484.1101 *et seq.*, appellants, twenty-four Michigan counties, appeal as of right from orders of the Public Service Commission (PSC) adjusting downward their respective requested surcharges for those services. We affirm in part, vacate in part, and remand for further proceedings.

I. FACTS

Traditionally, counties funded their 9-1-1 centers through statutory mechanisms not involving the PSC. See MCL 484.1401. However, 2007 PA 164 amended various parts of the 9-1-1 Service Enabling Act to broaden the base from which 9-1-1 services may be supported by extending it beyond traditional landline telephone usage to usage of all communication service devices that may call 9-1-1; the statute also introduced a role for the PSC in the matter.

At the relevant time,¹ MCL 484.1401b provided, in pertinent part:

(1) [A]fter June 30, 2008 a county board of commissioners may assess a county 9-1-1 charge to service users located within that county

(2) The charge assessed under this section and section 401e shall not exceed the amount necessary and reasonable to implement, maintain, and operate the 9-1-1 system in the county.

A “communication service” is

a service capable of accessing, connecting with, or interfacing with a 9-1-1 system . . . by dialing, initializing, or otherwise activating the 9-1-1 system through the numerals 9-1-1 by means of a local telephone device, cellular telephone device, wireless communication device, interconnected voice over the internet device, or any other means. [MCL 484.1102(g).]

MCL 484.1401e provides:

(1) No later than February 15, 2008, each county that decides to assess a surcharge under section 401b shall with the assistance of the state 9-1-1 office submit to the commission all of the following:

(a) The initial county 9-1-1 surcharge for each 9-1-1 service district to be effective July 1, 2008.

(b) The estimated amount of revenue to be generated in each 9-1-1 service district for 2007.

(c) Based on the surcharge established under this subsection, the estimated amount of revenue to be generated for 2008.

(2) 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 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.

¹ Subsection (2) is now designated as subsection (3), but the text has not been changed.

The “committee” for this purpose is a subset of the state police, commonly called the Emergency Telephone Service Committee (ETSC), and is authorized to “develop statewide standards and model system considerations and make other recommendations for emergency telephone services.” MCL 484.1712.

Before 2007 PA 164, counties assessed 9-1-1 charges on only traditional landline service users, the number of which in a given county could readily be determined. However, the number of all communication service users cannot be ascertained with like precision. The ETSC analyzed available information on communication service devices in this state, and arrived at an estimate of .93 such devices per person statewide.

On January 2, 2008, the PSC ordered each county assessing a 9-1-1 surcharge to provide information on the level of the proposed surcharge the county intended to begin collecting on July 1, 2008; its estimated revenues for 2007 collected under the existing surcharge; and its estimated 9-1-1 revenues for 2008. The counties complied, and sent additional information to the ETSC, which recommended approval for several of appellants’ proposed rates. The PSC, however, ultimately rejected the application of any detailed analysis to the requests. Instead, the PSC applied the estimate of .93 communication service devices per person across the board. It then proceeded to approve surcharges as requested in connection with several counties who requested surcharges based on estimated revenues for 2008 not in excess of their estimated 2007 revenues plus 2.7 percent. It also adjusted all surcharges estimated to bring revenues exceeding 2007 levels plus 2.7 percent downward to that level, treating that formula as the statutory ceiling. The PSC explained that

because of the uncertainty related to the number of communication services devices in each county, the most prudent action is for the Commission to adjust the requested surcharges for these counties so that estimated county 2008 surcharge revenue is not greater than the county’s 2007 surcharge revenues plus 2.7%. The surcharge is re-calculated by applying the .93 factor to the county population number identified by the 2000 U.S. Census.

Several counties, including appellants Grand Traverse County and Huron County, petitioned the PSC for rehearing. In response, the PSC credited Grand Traverse County’s assertion that it had initially understated its local landline surcharge revenue for 2007, and approved an adjustment based on the corrected figure. The PSC rejected Huron County’s assertion that the PSC had acted arbitrarily in modifying its surcharge to recover 2007 revenues plus 2.7 percent, on the ground that that county “did not submit sufficient support for approving a surcharge that would likely generate revenues nearly 27% above the 2007 level,” which the PSC characterized as “ten times the statutorily permissible 2.7%.” This left those appellants and several others still aggrieved at having their proposals adjusted downward to where they were expected to generate 2007 revenues plus 2.7 percent.

II. STANDARDS OF REVIEW

“The standard of review for PSC orders is narrow and well defined.” *In re Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). 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, the appellant must

show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). “[A]n order is unreasonable if it is not supported by the evidence.” *In re Consumers Energy Co, supra*, 279 Mich App at 188.

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; *In re Consumers Energy Co, supra*, 279 Mich App at 188. A reviewing court gives due deference to the PSC’s administrative expertise and should not 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, issues of statutory interpretation are reviewed de novo. *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency’s interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id.* at 108.

III. COMMUNICATION SERVICE DEVICES

Several appellants take issue with the PSC’s decision to employ the ETSC’s estimate for the statewide average number of communication service devices per person of .93, arguing that counties that are mostly rural in character, or that have significant prison populations, should have a lower average usage rate.

The affected appellants emphasize Ionia County, asserting that nine percent of its residents are incarcerated in prisons, and insisting that this is an obvious situation where the device usage rate must be below average, thus presumably below .93. We disagree. Any attempt to estimate usage rates might as well include considering the possibility that persons working for correctional institutions, or persons living near them, might elect to keep personal communications devices for themselves in higher numbers than the public at large, as an extra measure of security for themselves. If so, that would mitigate the distortion resulting from a significant prison population in the county. Further, appellants’ arguments and exhibits do not suggest that they examined the demography of Ionia or any other county with sufficient intensity as to have accounted for all possible facets that might balance the presumably reduced usage rates in penal populations. Finally, that nine percent of a county’s population may reasonably be presumed to be entirely without personal communication devices implicates not so great a fraction of the total population as to discredit use of the statewide average usage factor, even though such average presumably presupposes lower rates of incarceration. Given that precise actual figures are not available, we regard nine percent as simply not enough, in light of possible mitigating circumstances, to render use of the statewide average unreasonable.

The affected appellants further argue that counties that are mostly rural in character are more apt than urban-dominated ones to have areas where cell phone service is not available, and argue that the residents of Michigan’s many such counties are thus less likely to have cellular telephones, such that the statewide average is overly high. Appellees retort that this is mere speculation, and offer their own theory that cellular telephone usage may be more intensive in rural areas because of the greater distances between traditional landline telephones. Because appellants’ theory is indeed mere conjecture, subject to being balanced or rebuffed by other conjecture, it does not merit appellate relief.

The affected appellants additionally point out that the .93 figure is an estimated average, and as such cannot be perfect in every application, thus necessarily causing some counties to end up with surcharges that fail to generate the revenues expected. However, to the extent that appellants suggest that the actual statewide average is something different from .93, they provide no concrete evidence in support. To the extent that they complain because the .93 factor is a mere estimate, the obvious retort is that resort to an estimate cannot be avoided, including by those wishing for a different factor. The PSC's decision to apply a statewide estimate put forward by the ETSC instead of rival estimates by various counties was reasonable, given that no county has shown that it has bested mere averages by precisely identifying its rate of actual device usage. In the battle of the estimates, the one covering the whole state as developed by the ETSC carries a presumption of validity or reasonableness superior to proposals by interested counties who offer more supposition than data in support of their positions.

For these reasons, appellants have failed to show that the PSC's decision to apply the average .93 factor in all cases was unlawful or unreasonable.²

IV. RETAINED SURCHARGES

At the relevant time,³ MCL 484.1401b(9) provided, "The service supplier may retain 2% of the approved county 9-1-1 charge to cover the supplier's costs for billings and collections under this section." Appellants argue that this 2 percent must be considered when calculating surcharge levels for purposes of identifying which ones exceed 2007 revenues plus 2.7 percent. These appellants suggest that that 2 percent fee must be worked into that formula, such that they be deemed entitled to at least 2007 revenues plus 4.7 percent.

Appellees suggest that this 2 percent provision takes the place of an earlier such collection mechanism, but fail to identify that asserted mechanism with particularity. Grand Traverse County, et al., argue in their reply brief that the "argument that the 2% might have been previously buried in the technical charge that the industry had previously collected is wholly irrelevant." Appellant St. Clair County in turn advises, "Prior to the 2007 amendment to ETSA, . . . service suppliers were compensated pursuant to a technical charge authorized by ETSA," but that "the amendments to ETSA do not affect a service supplier[']s entitlement to the technical charge."

We need not inquire into whether the 2 percent provision at issue takes the place of an earlier funding mechanism, or is complementary, or even duplicative, of one still in existence,

² At oral argument, there was specific discussion concerning whether, in the event of a remand, the PSC should be invited, or even directed, to take into account such actual data concerning device usage rates as have come to light during the pendency of this appeal. We decline, however, to allow the appellate process to convert a statutory scheme calling for estimates in anticipation of future events into one whereby such estimates are later supplanted by review of past developments. Our affirmance of the PSC's decision to use the .93 factor universally leaves that decision as law of the case, applicable through any further proceedings.

³ This subsection is now designated as subsection (10), but the text has not been changed.

because a straightforward reading of the relevant statutory provisions indicates that any such inquiry is inapt. “The Legislature is presumed to have intended the meaning it plainly expressed.” *Trumble’s Rent-L-Center, Inc v Employment Security Comm*, 197 Mich App 229, 233; 495 NW2d 180 (1992). Further, the Legislature is presumed to have considered the effect of new legislation on all other legislation. See *Walen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). These strictures inveigh against presuming that the Legislature established the presumptively proper funding levels for 2008 as 2007 revenues plus 2.7 percent with no awareness of, or concern for, the provision allowing service providers to retain 2 percent.⁴ According each pertinent statutory provision its plain meaning means calculating, as the PSC did, 2007 revenues plus 2.7 percent without regard for the service providers’ prerogative to retain 2 percent of surcharge revenues.

For these reasons, we reject this claim of error.

V. STATUTORY LIMITATION ON 2008 REVENUES

Appellants argue that the PSC erred in treating the formula of 2007 revenues plus 2.7 percent as a ceiling when adjusting surcharges. We agree.

Again, at the relevant time, MCL 484.1401b(2) authorized assessment of a county 9-1-1 charge not to exceed “the amount necessary and reasonable to implement, maintain, and operate the 9-1-1 system in the county.” Again, MCL 484.1401e(2) states:

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 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 PSC interpreted the latter to mean that “[i]f the proposed surcharge is rejected, the Commission is to adjust it so that the revenues will not exceed the 2.7% over the previous years’ surcharge revenues.” Appellants argue that, rather than fix all adjustments at 2007 revenues plus 2.7 percent, the PSC was obliged to determine what surcharges were necessary and reasonable for each affected county, and base its adjustments accordingly. Appellants’ position has merit.

Section 401e(2) does not speak of 2007 revenues plus 2.7 percent as a limitation on the PSC’s discretion once exercised; instead, it merely presents that formulation as the trigger for the

⁴ Or, conversely, they weigh against presuming that the Legislature provided for service providers’ retention of 2 percent of surcharge revenues without regard for the specification of 2007 revenues plus 2.7 percent as the benchmark beyond which PSC review comes into play.

PSC's involvement. On its face, it establishes a level of cost recovery up to which there is a presumption of necessity and reasonableness. Once a county's proposal exceeds that level, thus inviting PSC overview, the PSC is to adjust surcharges so that they do not exceed "the amounts allowed under this subsection." Appellees point out that that subsection spells out no formula other than 2007 revenues plus 2.7 percent, and suggest that, for that reason, it must be treated as the cap as well as the trigger.

However, that subsection incorporates by reference "section 401b," and thus the latter's authorization under then-subsection (2) of a charge that does not exceed the "amount necessary and reasonable to implement, maintain, and operate the 9-1-1 system in the county." Further, even aside from that incorporation by reference, MCL 484.1401e(2) expressly allows a surcharge generating revenues above 2007 levels plus 2.7 percent, albeit conditioned upon PSC approval.

Section 401e(2) must be examined as a whole, including its incorporation by reference of § 401b. Thus, § 401e(2) must be read to include the provision of § 401b's then-subsection (2) establishing as the upward limit on revenues those "necessary and reasonable" for operation of 9-1-1 systems. The PSC thus erred in holding each county seeking revenues beyond 2007 levels plus 2.7 percent to that precise formulation.

Further, § 401e(2)'s statement that the PSC is to "consider . . . allowable and disallowable costs" suggests that the PSC was expected to examine each case with some particularity. This underscores that the PSC's statutory duty was to adjust those proposed surcharges that were subject to adjustment to levels necessary and reasonable as discretely determined, not arbitrarily to 2007 revenues plus 2.7 percent.

For these reasons, we conclude that the PSC erred in treating 2007 revenues plus 2.7 percent as a cap it was obliged to observe whenever disapproving of a specific proposal that exceeded that level of funding, and in thus deeming itself relieved of the obligation to consider with greater particularity what each affected county's necessary and reasonable costs for its 9-1-1 system might be.

We therefore vacate the PSC's orders in connection with each county for which the PSC adjusted a proposal downward to 2007 levels plus 2.7 percent, and remand this case to the PSC with instructions 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.⁵

⁵ Most appellants additionally argue that, because the PSC failed properly to adjust surcharges to levels reasonably necessary to maintain their respective 9-1-1 systems, each should be deemed approved, citing MCL 484.1401e(2), which deems a plan approved where the PSC "does not act by March 17, 2008." However, that default provision is invoked by total inaction, not imperfect action. The PSC's March 11, 2008, order reflected a good deal of action in connection with each appellant, even if it proceeded incorrectly in important respects. Accordingly, appellants' invocation of the default provision of MCL 484.1401e(2) is inapt. Remand thus remains necessary for the required determinations of necessity and reasonableness.

VI. CONCLUSION

We affirm the decisions below insofar as the PSC uniformly applied the average communication device usage factor of .93 in calculating estimated 9-1-1 surcharge revenues for 2008, and made those calculations with no special regard for the service providers' statutory prerogative to retain 2 percent of those surcharges. We vacate the decisions, however, insofar as the PSC treated the formulation of 2007 revenues plus 2.7 percent as the upward limit on its discretion when adjusting proposed surcharges, and remand this case to the PSC with instructions to consider those adjustments anew while applying particularized analysis and discretion in each instance to determine necessary and reasonable 2008 funding levels.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ William B. Murphy