

STATE OF MICHIGAN
COURT OF APPEALS

In re Application of DETROIT EDISON
COMPANY to Increase Rates.

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

DETROIT EDISON COMPANY,

Petitioner-Appellee.

FOR PUBLICATION

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No. 302110

MPSC

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Advance Sheets Version

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

SAWYER, J.

The Association of Businesses Advocating Tariff Equity (ABATE) appeals of right an order of the Michigan Public Service Commission (PSC) providing that Detroit Edison Company was to refund revenue it had collected through self-implemented rates; the rates were self-implemented while Detroit Edison was awaiting a final order on an application for a rate increase. Rather than requiring a refund to each customer based on that customer's overpayment, the PSC held that the refund was to be made prospectively in the January 2011 billing month to classes of customers based on the classes' pro rata share of the self-implemented increase. We affirm.

I. FACTS AND PROCEEDINGS

On January 26, 2009, Detroit Edison applied for an increase in electrical rates in the amount of \$378,000,000. Under § 6a(1) of 2008 PA 286 (Act 286), MCL 460.6a(1), the PSC was required to act on this application by January 26, 2010. However, § 6a(1) also provided that Detroit Edison was entitled to self-implement an interim rate unless the PSC acted on its

application within 180 days or issued an order preventing or delaying self-implementation for good cause. No such action was taken and no such order issued. Detroit Edison elected to self-implement \$280 million of rate relief.

On January 11, 2010, the commission issued a final order approving a rate increase of only \$217,392,000. Section 6a(1) required a refund because the new rate was less than the self-implemented rate. The refund amount, with interest, was determined to be \$26,872,231.

With respect to the refund, Detroit Edison proposed to allocate the total refund amount among customer classes based upon each customer class's pro rata share of the total revenue collected. ABATE objected to this proposed refund methodology as it pertained to primary customers. It maintained that § 6a(1) required that Detroit Edison calculate a refund for each primary customer based upon each primary customer's actual overpayment and that it refund an amount equal to the actual overpayment to each primary customer. Regarding the refund, § 6a(1) states in pertinent part:

If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected . . . that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. *The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission.* [Emphasis added.]

The PSC held that the refund did not have to be “precisely tailored to each and every Detroit Edison customer who paid a self-implemented rate.” It continued:

Other than requiring that the refund to primary customers be based on their pro rata share of the total revenues collected through the applicable increase, the statute leaves the method of the refund up to the Commission's discretion. MCL 460.6a(1). The Commission has long rejected the notion that historical perfection must be achieved with refunds or surcharges. The Commission has authority to exercise discretion in fashioning a refund procedure, and the most precise procedure may have disadvantages, such as attendant costs or administrative burdens, that outweigh the apparent advantages. See, *Attorney General v Public Service Comm*, 235 Mich App 308; 597 NW2d 264 (1999) [*Mich Gas*]; *Attorney General v Public Service Comm*, 215 Mich App 356; 546 NW2d 266 (1996) [*Mich Consol*]; May 17, 2005 order in Case No. U-13990, pp. 21-22. And, as the Staff correctly notes, the refund must be allocated based on the pro rata share of the revenue from the self-implemented increase, not on the precise dollar amount paid in excess revenue; thus, ABATE's argument in favor of a refund that reflects what each primary customer “actually paid” is inconsistent with the language of the statute. Finally, were the Commission persuaded to order a refund based on the amount each primary customer paid during self-implementation, the administrative costs associated with making those

individual determinations would be addressed in a future rate case, and, under basic principles of cost causation, would likely be borne by the primary class.

The Commission approves the refund procedure proposed by the Staff and agreed to by the company, which bases the refund on rate schedule class, and forecasts sales for the refund month. Further, the Commission approves the use of the [Power Supply Cost Recovery] reconciliation proceeding as a mechanism to complete the refund, in order to make the refunded amount as exact as possible.

ABATE claimed that two unidentified ABATE members who were primary customers subject to the self-implemented rates signed up for service from alternative electric suppliers during the period that these rates were in place rather than continuing to receive bundled service from Detroit Edison. ABATE pointed out that under the refund methodology approved by the PSC, these two primary customers would not receive a refund because they were no longer in the class of customers that would receive the refund. ABATE argued that their exclusion was arbitrary and capricious. The PSC held:

The Commission does not agree with ABATE that primary customers who chose to switch from bundled to choice service during the period of self-implementation are treated unfairly under this refund method. There was nothing hidden from such customers. The possibility that the rate increase adopted in the final order would differ from the unapproved rate increase self-implemented by the company was always present, as was the possibility that the final rate design would differ, however slightly, from the self-implemented rate design. Such customers would have (or should have) been aware of that fact at the point in time when they decided to switch. Indeed, any customer who made that switch early in the self-implementation period likely underpaid during the self-implementation period, since only one [retail open access] rate schedule overpaid during self-implementation.

II. STANDARD OF REVIEW

In *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010), the Court stated:

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. See also *Mich Consol Gas Co v Pub Serv 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 statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). 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 Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

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 Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). 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 Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

It is noted that in *Attorney General v Pub Serv Comm*, 206 Mich App 290, 296; 520 NW2d 636 (1994), the Court explained that MCL 462.26(8) “requires a reviewing court to determine only whether an order is unlawful or unreasonable, not whether it is arbitrary and capricious.”

The standard of review for an agency’s interpretation of a statute was recently set forth in *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935):

“[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.”

This standard requires “respectful consideration” and “cogent reasons” for overruling an agency’s interpretation. Furthermore, when the law is “doubtful or obscure,” the agency’s interpretation is an aid for discerning the Legislature’s intent. However, the agency’s interpretation is not binding on the courts, and it cannot conflict with the Legislature’s intent as expressed in the language of the statute at issue. [Citation omitted; second alteration in original.]

III. ANALYSIS

ABATE first argues that the phrase “shall allocate any refund . . . among primary customers based upon their pro rata share of the total revenue collected through the applicable increase,” MCL 460.6a(1), means that each primary customer must be given back the amount it actually overpaid pursuant to the self-implemented rate. However, the propriety of fashioning a refund by including it in a prospective billing for a class of customers depends on the interpretation given this statute. In *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254, 269; 820 NW2d 170 (2011), quoting *In re Temporary Order to Implement 2008 PA 295*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 290640), pp 4-7, the Court stated:

When interpreting statutory language, this Court’s primary goal is to give effect to the intent of the Legislature. “The first step is to review the language of

the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute.” *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 76; 780 NW2d 753 (2010) This Court accords to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning, or is defined in the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199; 706 NW2d 878 (2005). See also MCL 8.3a; *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189-190; 740 NW2d 678 (2007). Furthermore, statutory language is to be read in context, and “statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole.” *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010)

In *Detroit Edison Co v Pub Serv Comm*, 261 Mich App 1, 8-9; 680 NW2d 512 (2004), vacated in part on other grounds 472 Mich 897 (2005), the Court stated:

If the language of the statute is ambiguous, judicial construction to determine its meaning is appropriate. In re MCI [460 Mich 396, 411; 596 NW2d 164 (1999)]. The Legislature is presumed to be familiar with the rules of statutory construction and is charged with knowledge of existing laws on the same subject. *Inter Coop Council v Dep’t of Treasury*, 257 Mich App 219, 227; 668 NW2d 181 (2003). In addition, the Legislature is presumed to act with knowledge of administrative and appellate court statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991).

We conclude that § 6a(1) is ambiguous and that it is subject to reasonable but differing interpretations. It calls for a “refund” to “customers” and, with respect to “primary customers” requires that the refund be “based upon their pro rata share of the total revenue collected through the applicable increase.” This could be viewed as requiring a “refund” in the traditional sense, i.e., a return of monies previously paid. In this regard, *The American Heritage Dictionary, Second College Edition*, defines refund when used as a verb as “**1.** To return or give back. **2.** To repay (money). . . . To make repayment.” When used as a noun, it is defined as “**1.** A repayment of funds. **2.** An amount repaid.” However, MCL 460.6h(13) also calls for a refund under certain circumstances. Yet, in *Mich Consol*, 215 Mich App 356, and *Mich Gas*, 235 Mich App 308, the Court concluded that § 6h(13) allowed for an adjustment of future rates and did not require a return of actual monies paid. Thus, within the context of PSC statutes, the term “refund” enjoys a broader meaning. There is nothing in the statute that compels the conclusion that use of the term “refund” means the monies returned to a primary customer must be based on the individual primary customer’s actual overpayment.

Nonetheless, § 6a(1) requires that the refund to “primary customers” be based on “their” “pro rata” share of revenues collected. “Primary customers” could be interpreted to mean the individual primary customers, given that the statute refers to “primary customers” and not the class of primary customers. Conversely, the absence of the phrase “individual primary customers” allows for the “primary customers” to be viewed and treated as a group. Further, “their pro rata share” could be interpreted to mean the amount of self-implemented increase in rates that each individual customer actually paid. However, the statute could also be read as

requiring that *all* of the primary customers together be given a refund based on *all* of the primary customers' pro rata share of the total revenue collected.

We conclude that there are cogent reasons supporting the agency interpretation. Although ABATE disagrees, Alan Droz, an auditor manager with the PSC, testified that implementing individual refunds to all primary customers would result in burdensome administrative costs. As the PSC noted, these costs would not be borne by the individual customers who received a refund but would be addressed in a future rate case. ABATE suggests that there is a cogent reason for overruling the PSC because basing the refund on a prospective refund month applicable to only bundled customers will result in no refund to primary customers who switched to choice or retail open access service during the interim period. However, Droz indicated that these primary choice customers would have factored the potential loss of a refund into their decision to switch to choice. This presumption is supported by the fact that "refunds" given by way of a prospective adjustment were approved in *Mich Consol*, 215 Mich App 356, and *Mich Gas*, 235 Mich App 308. Moreover, the Legislature is presumed to have been familiar with this treatment of the term "refund" when it enacted § 6a(1). See *Detroit Edison Co v Pub Serv Comm*, 261 Mich App at 8-9. Thus, we find no cogent reason for overruling the PSC's interpretation of the statute and conclude that the PSC's action was both lawful and reasonable.

Affirmed.

/s/ David H. Sawyer

/s/ Joel P. Hoekstra