

STATE OF MICHIGAN
COURT OF APPEALS

PHIL FORNER,

Petitioner-Appellant,

v

CONSUMERS ENERGY COMPANY,

Respondent-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

UNPUBLISHED
February 25, 2014

No. 307626
Public Service Commission
LC No. 00-016273

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Appellant, Phil Forner, proceeding *improperia persona*, appeals by right the Public Service Commission's (PSC) order dismissing with prejudice his complaint against appellee Consumers Energy Company (Consumers). Appellant alleged that Consumers violated MCL 460.10a in connection with its accounting practices for its appliance service program (ASP) from May 1, 2004, through December 31, 2005, and asked the PSC to order Consumers to compensate its ratepayers with interest, to impose a fine on Consumers, and to order Consumers to compensate him for his time and expense in bringing the complaint. Consumers urged the PSC to dismiss the complaint and impose sanctions on appellant because the issues he raised had already been litigated and resolved in its favor. The PSC agreed with Consumers regarding the substance of appellant's claims but refrained from imposing sanctions, electing instead to warn appellant of the potential consequences if he persisted with repetitive litigation. We agree that the earlier litigation required the PSC to reject all appellant's claims, and so we affirm.

The Customer Choice and Electricity Reliability Act (CCERA), MCL 460.10 *et seq.*, requires the PSC to "establish a code of conduct that shall apply to all electric utilities," and directed that the code "include . . . measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities." MCL 460.10a(4). The PSC established a code of conduct in orders entered on December 4, 2000, and October 29,

2001, in Case No. U-12134. The Legislature subsequently amended the CCERA by enacting 2004 PA 88, effective April 22, 2004. Among the new provisions was the adoption of the PSC's code of conduct "[e]xcept as otherwise provided by this section." MCL 460.10a(5).

Consumers provides both electrical and gas service and has customers who variously take only gas service, only electrical service, or both. Consumers has operated its ASP out of its gas division and has apportioned costs accordingly. Appellant filed a complaint in 2001 which induced the PSC to vindicate his position that Consumers was improperly subsidizing its ASP by advertising it to its customers by placing inserts in the monthly billing envelopes. In an order entered on February 20, 2003, in Case No. U-13089, the PSC directed Consumers to determine the cost of access to its billing machinery and envelopes, how those costs should be accounted for, and how the costs would be charged to its unregulated affiliate. In the related proceedings that followed, appellant objected that Consumers' electricity customers should receive some direct rate relief and that this should include a share of the postage costs relating to the mailings with the improper advertising inserts, even though they caused no incremental increase in overall postage costs, and should also reflect that some utility services used to support the ASP were shared between the gas and electrical divisions, namely billing, payment processing, and the call center.

The PSC has consistently rejected those arguments in cases affirmed in pertinent part by this Court. See *Forner v Mich Pub Serv Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2008 (Docket No. 270941); *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106; 804 NW2d 574 (2010); *In re Application of Consumers Energy Co to Increase Rates*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2012 (Docket No. 295287).

In the published opinion among the three decisions referenced above, this Court reiterated that res judicata bars relitigation of any claim involving the same parties that has earlier been resolved in a final order by a court of competent jurisdiction, and that this preclusion reaches any issue that was, or could have been, resolved in the earlier litigation. *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App at 121. Collateral estoppel similarly bars relitigation of any issue that was actually and necessarily decided in earlier litigation between the same parties. *Id.* at 122. This Court discussed the applicability of these preclusion doctrines in proceedings before the PSC:

[R]atemaking is a legislative, rather than a judicial, function, and thus the doctrines of res judicata or collateral estoppel cannot apply in the pure sense. Even so, issues fully decided in earlier PSC proceedings need not be completely relitigated in later proceedings unless the party wishing to do so established by new evidence or a showing of changed circumstances that the earlier result is unreasonable. [*Id.* (citations and internal quotation marks omitted).]

This Court further noted that its own judicial decisions on appeals of PSC decisions bring those preclusion doctrines fully to bear. *Id.* at 124. This Court concluded that issues inherently bound up with "the overall determination of the amount of billing relief to which the ratepayers were entitled as the remedy for Consumers' improper subsidy of its ASP . . . should have been raised, if at all, in the proceedings that resulted in that determination[.]" *Id.* at 122.

Despite all this litigation consistently rejecting appellant's claims, appellant insists that the earlier decisions resulted from application of the code of conduct and that neither the PSC nor this Court has considered his claims as governed by 2004 PA 88, in particular MCL 460.10a(7)-(8). Appellant thus argues that the enactment of 2004 PA 88 is a changed circumstance that strips the earlier decisions of preclusive effect here. We disagree.

In its 2010 decision, this Court, in the course of rejecting appellant's argument that interest should have factored into any refund covering an illegal subsidy, discussed the amendments of the CCERA effected by 2004 PA 88, and declared that "[n]o new evidence or change of circumstances has suddenly thrown the question of interest into some new light." *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App at 122-123. As well, we take this Court's rejection of appellant's arguments regarding postage in that case to have been informed by the 2004 statutory amendments. *Id.* at 123-124. Likewise, this Court's 2012 decision rebuffing appellant's objections concerning the allocation between the electricity utility and the ASP of costs relating to postage, billing, payment processing, and the call center. *In re Application of Consumers Energy Co to Increase Rates*, unpub op (Docket No. 295287), slip op at 11-12. In the latter, this Court approvingly noted that Consumers had invoked 2004 PA 88 in defending its actions before the PSC, and also that substantial litigation of appellant's issues had occurred since that enactment. *Id.* at 11-12. Indeed, as 2004 PA 88 joined the code of conduct as governing the interactions between a regulated utility and its unregulated ASP, neither the PSC nor this Court has suggested that the amended CCERA now calls for adjudication of appellant's issues any differently from the result as decided under the code of conduct alone.

In light of the PSC and this Court's consistent jurisprudence relating to the issues appellant has repeatedly raised and the lack of any new factual or legal developments that put them in a new light, we affirm the PSC's rejection of appellant's objections.

We affirm.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens