

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and THE DETROIT EDISON COMPANY,

Appellees.

UNPUBLISHED

June 11, 1999

No. 207993

MPSC

MPSC No. 11588

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

The Attorney General appeals as of right the order of the Michigan Public Service Commission (PSC) that approved, ex parte, appellee Detroit Edison's request to amortize extraordinary storm damage costs for 1997 over the following two years. We reverse and remand for further proceedings.

On November 19, 1997, Edison filed an application with the PSC seeking ex parte authorization to implement a rate reduction and for accounting and ratemaking authority to amortize 1997 storm damage expenses. The application referenced the PSC's order in Case No. U-8789 that approved a contested case settlement on December 27, 1988, authorizing a rate reduction beginning in 1998 of \$53,357,000, reflecting a revenue phase-in of the Fermi 2 nuclear plant. The application further indicated that Edison had incurred extraordinary storm damage costs in 1997 of \$29,846,000, and requested authorization to amortize these expenses during 1998 and 1999. For 1998, Edison sought to offset \$14,923,000 (one-half of \$29,846,000) against the \$53,357,000 rate reduction ordered in U-8789, yielding a net rate reduction for 1998 of \$38,434,000 or a credit billing factor of \$0.0008507 per kilowatt-hour for twelve months beginning in January 1998.

Edison sought ex parte approval of its application pursuant to MCL 460.6a(1); MSA 22.13(6a)(1), asserting that the amortization of storm damage costs, in conjunction with the previously ordered rate reduction, would not result in an increase in customer rates. The Attorney General moved to intervene, specifically requesting that the PSC issue a notice of hearing and conduct a contested case proceeding because approval of Edison's request to amortize increased storm damage costs would have the effect of increasing customer rates. The Attorney General further noted that Edison had not

presented any evidence as to the reasonableness or prudence of its claimed extraordinary storm damage costs, and, even assuming that the costs were reasonable and prudent, a two-year amortization period was too short and should be extended to five years.

In an *ex parte* order entered on November 25, 1997—six days after Edison filed its application—the PSC approved implementation of Edison’s proposed net credit factor and its proposed accounting and ratemaking procedures. The PSC ruled, in pertinent part:

After reviewing Detroit Edison’s proposal, the Commission finds that it is reasonable and in the public interest. The Attorney General seeks a hearing on, and adjustments to, Detroit Edison’s proposal. Because the proposal does not increase any customer’s rates, the Commission may approve it without providing notice or an opportunity for a hearing, pursuant to MCL 460.6a(1); MSA 22.13(6a)(1).

This appeal ensued.

The crux of this case involves a determination whether the PSC lawfully issued an *ex parte* order pursuant to § 6a(1) approving Edison’s application. To make this determination, an in-depth analysis of the pertinent language of § 6a(1) is necessary:

When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. . . . A finding or order shall not be authorized or approved *ex parte*, nor until the commission's technical staff has made an investigation and report. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing. . . . [MCL 460.6a(1); MSA 22.13(6a)(1).]

Restated, notice and a hearing are required pursuant to § 6a(1) when a utility seeks a finding or order either (1) to increase its rates and charges, or (2) to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers. Conversely, “[a]n alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing.”

Here, the dispute necessarily concerns whether Edison has sought to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers. Thus, to the extent that appellees argue that notice and a hearing were not required merely because Edison did not seek a straightforward increase in customer rates, their arguments are unsound. The plain language of § 6a(1) indicates that *any* amendment or alteration of rates or rate schedules, which

has the effect of increasing a customer's "cost of services," will trigger the need for notice and a hearing, even if rates are not increased.

While there is no statutory definition of "rate" or "cost of service," the parties' interpretation of these terms, at least for purposes of the present matter, may be traced back to the December 1988 settlement agreement reached in case No. U-8789, which addressed Edison's request for a rate increase to recover its increased costs of owning and operating the Fermi 2 nuclear plant. In pertinent part, the 1988 settlement agreement provided:

E. FERMI 2 PHASE-IN REVENUES

In accordance with Statement of Financial Accounting Standards (SFAS) 92, the revenue changes recorded pursuant to the final Fermi 2 phase-in plan are:

| | |
|-------------|-----------------------------------|
| 1988 Actual | \$68,379,000 |
| 1989 | 104,695,000 |
| 1990 | 70,800,000 |
| 1991 | 70,800,000 |
| 1992 | 70,800,000 |
| 1993 | 70,800,000 |
| 1994 | 70,800,000 |
| 1995-1997 | No Change |
| 1998 | (\$53,357,000) |
| 1999 | (\$128,049,000) |
| 2000 | Revert to non-phase-in ratemaking |

The parties agree that the amounts and accounting entries shown on Attachment C will be included in cost of service for ratemaking purposes and that the Company shall file a timely general rate case with the MSPC on or before June 1, 1993 . . . to determine the electric rates to be charged retail customers, taking into account the Fermi 2 phase-in revenues required for the year 1994 and beyond. [Emphasis added.]

In the present case, Edison's application requested authority to implement a "voluntary rate reduction," explaining as follows:

COST OF SERVICE REDUCTION

3. On June 5, 1997 the Commission issued an order in MPSC Case No. U-8789 requesting interested parties to discuss the intent of Paragraph 1E of a Stipulation and Agreement approved by the Commission on December 27, 1988. Pursuant to the terms of the Settlement, the revenue requirement associated with the Fermi 2 revenue phase-in would be decreased by \$53,357,000 for 1998. Section 1E provides in pertinent part:

“The parties agree that the amounts and accounting entries shown on Attachment C will be included in cost of service for ratemaking purposes. . . .”

4. In its brief in that proceeding on June 26, 1997, and during the course of electric restructuring, the Company explained its proposal to implement the terms of the U-8789 Settlement by reducing its stranded costs, securitizing the balance and providing a rate decrease for all retail tariff customers. The Fermi phase-in reductions were included in the calculation of the net rate decrease.

5. The U-8789 Settlement provides for a reduction in the Company’s cost of service beginning in 1998. Detroit Edison proposes to acknowledge this reduction in cost of service through recognition of storm expense deferrals and amortizations and effectuating a net rate reduction to customers as described below.

Based on the foregoing, the parties’ use of the terms “rate” and “cost of service” entails a certain amount of imprecision or lack of differentiation. This imprecision was adopted by the PSC in its order, which reasoned: “Because the proposal does not increase any customer’s *rates*, the Commission may approve it without providing notice or an opportunity for a hearing. . . .” Nonetheless, reading the parties’ 1988 settlement agreement in U-8789 together with Edison’s application in the present case, we are led to the inescapable conclusion that offsetting \$14 million in extraordinary storm damage costs from 1997 against the previously ordered \$53 million in phased-in cost of service reduction for 1998 has the effect of increasing customers’ “cost of service for ratemaking purposes.” That is, but for the fortuity of the 1988 order establishing the phased-in reduction of \$53 million in the cost of service, the current increase in storm damage expenses clearly constituted an *increase* in the cost of service to Edison’s customers. As such, the notice and hearing requirements of § 6a(1) applied, and the PSC’s issuance of an ex parte order was unlawful.

As correctly noted by the Attorney General, the cases relied on by the PSC and Edison are factually distinguishable because those cases did not involve either an increase in rates and charges, or an alteration, change, or amendment of any rate or rate schedules, the effect of which would be to increase the cost of services to its customers. See, e.g., *Attorney General v Public Service Comm*, 206 Mich App 290, 295; 520 NW2d 636 (1994) (where utility sought approval of stipulated agreement that provided for utility either to spend \$200 million on operating and maintenance expenses and avoid paying a refund or pay a refund if that full amount is not spent, no § 6a(1) hearing was

required because “[a] potential refund does not increase the rate charged to customers.”); *Attorney General v Public Service Comm*, 227 Mich App 148; 575 NW2d 302 (1997) (where utility sought approval of a rate decrease for one large commercial customer, the PSC’s ex parte order was proper under §6a(1) because mere approval and implementation of the contract, without more, would not result in any rate or cost increases).

Here, unlike in the cases cited above, the PSC’s order effectuated an immediate change in rates which had the effect of increasing the cost of service to Edison’s customers. Accordingly, the PSC’s ex parte approval of Edison’s proposed amortization of extraordinary storm damage costs was unlawful to the extent that it was issued ex parte, without notice or hearing as required under §6a(1). The appropriate remedy to cure this statutory violation is to remand this matter to the PSC for further proceedings pursuant to § 6a(1).

Given the foregoing, we decline to address the Attorney General’s remaining arguments.

Reversed and remanded for further proceedings consistent with this opinion. This Court does not retain jurisdiction.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald