

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN ENVIRONMENTAL COUNCIL and
PUBLIC INTEREST RESEARCH GROUP IN
MICHIGAN,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and WISCONSIN PUBLIC SERVICE
CORPORATION,

Appellees.

UNPUBLISHED
December 9, 2003

No. 240403
MPSC
LC No. 00-012613

MICHIGAN ENVIRONMENTAL COUNCIL and
PUBLIC INTEREST RESEARCH GROUP IN
MICHIGAN,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and WISCONSIN ELECTRIC POWER
COMPANY,

Appellees.

No. 240406
MPSC
LC No. 00-012615

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

In these consolidated cases appellants Michigan Environmental Council and Public Interest Research Group in Michigan appeal as of right orders entered by the Michigan Public Service Commission (PSC) approving 2001 power supply cost recovery (PSCR) plans filed by appellees Wisconsin Public Service Corporation (WPSC) and Wisconsin Electric Power Company (WEPC). We affirm in each case.

I. Introduction

MCL 460.6j authorizes the PSC to include a PSCR clause in a utility's rate schedule.¹ A PSCR clause allows a utility to charge customers for the anticipated costs associated with the supply of power, and to recover "the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs" of fuel used to generate electric power "incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Each year a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a five-year forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j(6). After the end of the year the PSC conducts a reconciliation phase in which it makes adjustments to take into account the true cost of supplying power. MCL 460.6j(12) and (13).

The WPSC and the WEPC own and operate nuclear generating plants that supply electricity to Michigan residents. Spent nuclear fuel (SNF) is stored at on-site facilities at the plants. Both the WPSC and the WEPC entered into a Standard Contract with the Department of Energy (DOE), as required by the Nuclear Waste Policy Act of 1982 (NWPA), 42 USC 10101 *et seq.* Under the contracts the utilities pay a fee to the DOE for a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. Currently, the DOE estimates that the program will begin in 2010. The utilities classify the SNF fee as a nuclear fuel expense and includes the cost in their PSCR plans.

II. Underlying Facts and Proceedings

The WPSC and the WEPC filed applications seeking approval of PSCR plans for the year 2001. In each administrative proceeding appellants presented the testimony of a nuclear energy consultant who expressed concerns regarding the DOE's SNF disposal program, and contended that neither the WPSC nor the WEPC had responded in a sufficient manner to address those concerns. The witness noted that ratepayers were being charged extensive costs associated with nuclear waste and disposal, including the cost of the SNF disposal fees paid to the DOE, and asserted that given the possibility that the federal government would never implement a SNF disposal program, the PSC was authorized and obligated to take steps to protect the state's ratepayers and long-term interests. The witness asserted that the PSC was authorized to review the reasonableness and prudence of the utilities' actions in administering their contracts with the DOE, and to determine whether the utilities were taking all appropriate steps to protect ratepayers. The witness recommended that the PSC adopt several remedies to ensure that utilities in general and the WPSC and the WEPC in particular shared in the financial risk of SNF disposal, including: filing more detailed reports regarding their monitoring of the problem; placing PSCR revenues collected for the payment of SNF fees in escrow accounts to fund alternative disposal programs if the federal government failed to fulfill its obligations; modifying nuclear decommissioning funds to provide for the disposal of SNF; and obtaining performance

¹ MCL 460.6j was added by 1982 PA 304 (Act 304).

bonds or insurance policies to ensure proper performance of SNF disposal. The witness did not identify as unreasonable or imprudent any action taken by either the WPSC or the WEPC.

Both the WPSC and the WEPC presented a witness who testified that the utility had taken reasonable and prudent steps to manage the storage and disposal of SNF. Each utility indicated that it continued to make SNF fee payments to the DOE as required by the Standard Contract, and had been advised that suspending those payments could result in a loss of plant licensure and the future ability to have the DOE dispose of SNF. Each utility had determined that storing SNF at an on-site facility was the most cost-effective option.

The PSC affirmed the PSCR plans filed by the WPSC and the WEPC. The PSC acknowledged that the issues surrounding the disposal of SNF were significant and that a solution would not be implemented in accordance with the DOE's contractual timetable, but found that the remedies proposed by appellants were not necessary to correct any showing of unreasonable or imprudent action by the WPSC or the WEPC, and that neither the WPSC nor the WEPC acted in an unreasonable or imprudent manner. Finally, the PSC concluded that appellants' proposals were beyond the scope of a PSCR proceeding. The PSC denied appellants' motions for rehearing.

III. Analysis

The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classifications and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service 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 mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A reviewing court must give due deference to the PSC's administrative expertise, and is not to 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, a reviewing court cannot abandon its responsibility to interpret statutory language and ascertain legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). Statutory interpretation is a question of law subject to de novo review. As a general rule, this Court will defer to the construction placed on a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. *In re Canales Complaint*, 247 Mich App 487, 496; 637 NW2d 236 (2001). 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 Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

First, appellants argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond the scope of its jurisdiction in a PSCR case. They note that a PSCR proceeding is designed to protect ratepayers by prohibiting a utility

from charging ratepayers for costs incurred due to unreasonable or imprudent practices, and contend that because the PSC has the statutory authority to allow or disallow costs in a PSCR proceeding, it logically follows that it has the authority to impose lesser included remedies.

The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The statutes that confer power on the PSC must be strictly construed. Authority must be granted by clear and unmistakable language. A doubtful power does not exist. Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the statutory scheme. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1999).

The PSC correctly interpreted the scope of the authority granted to it under MCL 460.6j(6). The issue before the PSC was not whether it has the power to regulate a public utility or to determine whether a utility's actions with respect to SNF are reasonable and prudent. Pursuant to MCL 460.6, the PSC has the power to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. Rather, the issue the PSC was required to resolve in these cases was whether it is authorized to impose extraordinary remedies in the context of a PSCR hearing. Pursuant to MCL 460.6j(6), the PSC is required to evaluate the reasonableness and prudence of a utility's PSCR plan, and to approve, disapprove, or modify the plan based on its conclusions. In the instant cases the WPSC and the WEPC included costs related to SNF disposal and payment of the SNF fees in their PSCR applications. The PSC did not presume that SNF costs were subject to automatic recovery, but rather scrutinized the costs requested by the utilities in contested case proceedings. Appellants did not allege, and the PSC did not find, that the WPSC and the WEPC acted unreasonably or imprudently with respect to issues related to SNF disposal and payment of SNF disposal fees to the DOE. Appellants have cited no authority that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the utility's PSCR application and adopt a remedy such as those recommended by appellants. The PSC correctly concluded that if it determines that a utility's actions are reasonable and prudent it must allow the costs requested in the plan, and has no authority to adopt extraordinary remedies such as those proposed by appellants. MCL 460.6j(6); *Attorney General v Public Service Comm, supra*.

Contrary to appellants' assertion, the PSC's conclusion that imposition of the remedies requested by appellants is beyond the scope of a PSCR proceeding is not contrary to the legislative intent of an Act 304 proceeding. MCL 460.6j(6) does not authorize the PSC to take action such as that suggested by appellants absent a finding of unreasonable or imprudent action by a utility. The PSC's reasoning for its ruling was succinctly and correctly set out in its statement in each case that the scope of appellants' proposed remedies were beyond the scope of a PSCR proceeding. The PSC's statements reflect a correct interpretation and application of MCL 460.6j(6) in cases in which no unreasonable or imprudent conduct is found, and that interpretation and application is entitled to deference. *Canales, supra*. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Next, appellants argue that the PSC's findings that the WPSC and the WEPC acted reasonably and prudently with respect to SNF disposal costs are unexplained and are not supported by the requisite evidence. Appellants assert that the PSC ignored their evidence that the utilities had failed to grasp the enormity of the potential problems with SNF disposal.

We disagree. The WPSC's witness testified that the WPSC had taken reasonable and prudent steps to manage the storage and disposal of SNF. The decision to continue paying the SNF fee to the DOE was based on a warning from the DOE that the failure to pay the fee could result in the WPSC being deemed ineligible to utilize DOE storage facilities. The decision to store SNF at an on-site facility was based on factors of cost and efficiency. Appellant's witness did not testify that the WPSC acted in an unreasonable or imprudent manner. The WEPC's witness gave testimony that was substantially similar to that given by the WPSC's witness. Appellant's witness did not testify that the WEPC acted in an unreasonable or imprudent manner. In its decisions the PSC considered the remedies proposed by appellants, but concluded that in a PSCR proceeding the critical determination was whether a decision such as that to continue paying the SNF fee and to store SNF at an on-site facility was reasonable and prudent. The PSC did not decline to review ratemaking issues but rather properly applied MCL 460.6j(6) and, contrary to appellants' assertion, did not presume that the utilities' requested SNF disposal costs were automatically recoverable. The PSC's orders are not unlawful or unreasonable. MCL 462.26(8).

Finally, we note that appellants' argument that their proposed remedies are not preempted by federal law, in particular the NWPA, was not raised before or addressed by the PSC, and thus is not properly before us. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The PSC did not consider or rely on the doctrine of federal preemption as a basis for its decision that imposition of the remedies suggested by appellants is beyond the scope of a PSCR proceeding in which no finding of unreasonable or imprudent action is made. The issues raised by plaintiffs are appropriate for consideration, but not in a power supply cost recovery plan case.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio