

STATE OF MICHIGAN
COURT OF APPEALS

In re Application of Consumers Energy Company to
Increase Rates.

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY,

Appellant,

MICHIGAN PUBLIC SERVICE COMMISSION,
HEMLOCK SEMICONDUCTOR
CORPORATION, and ENERGY MICHIGAN,
INC.,

Appellees,

and

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee.

In re Application of Consumers Energy Company to
Increase Rates.

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
HEMLOCK SEMICONDUCTOR
CORPORATION, and ENERGY MICHIGAN,
INC.,

Appellees

UNPUBLISHED
November 20, 2012

No. 301318
Public Service Commission
LC No. 00-016191

No. 301381
Public Service Commission
LC No. 00-016191

and

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee.

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

In these consolidated appeals, the Attorney General and the Association of Businesses Advocating Tariff Equity (ABATE) appeal as of right from a November 4, 2010, order of the Public Service Commission (PSC) authorizing petitioner Consumers Energy Company to adopt a revenue decoupling mechanism, and to include \$26,536,000 in funding for the Low Income and Energy Efficiency Fund (LIEEF) as an operation and maintenance expense. ABATE additionally appeals from the order's approval of Consumers Energy's allocation of certain costs between different retail rate classes, and approval of continued funding for Consumers's advanced metering infrastructure program. We affirm in part, reverse in part, and remand for further proceedings.

I. STANDARDS OF REVIEW

A final order of the PSC must be authorized by law and 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). 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. MCL 462.25; *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).

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.

II. ADVANCED METERING INFRASTRUCTURE PROGRAM

The advanced metering infrastructure (AMI) program has been described as

an information-gathering technology that allows [the utility] to collect real-time energy consumption data from its customers. . . . [T]he so-called "smart meters"

allow the utility to remotely monitor and shut-off [sic] electricity to customers that have these meters installed. . . . The intention appears to be to allow customers to access real time energy consumption data and make alterations in their energy consumption patterns in order to reduce their own costs and to reduce the demands placed upon the system at times of system peak. [*In re Applications of Detroit Edison Co*, 296 Mich App 101, 114; 817 NW2d 630 (2012) (internal quotation marks and citations omitted).]

ABATE argues that there was insufficient evidence of the program's costs and benefits, or that the new technology is necessary for the continued provision of electricity to Consumers's customers, to justify the great expense to ratepayers involved.

Instructive for present purposes is this Court's decision in *In re Applications of Detroit Edison Co*, in which this Court reviewed an AMI program under the substantial evidence test, and concluded that the funding of the program by ratepayers was not justified by the evidence in the record. *Id.* at 114-116. This Court noted that the program was expensive and commercially untested, exposing ratepayers to significant economic risk, while the evidence to justify the expense consisted mostly of mere "aspirational testimony" concerning expectations for the project. *Id.* at 114-115. This Court further opined, "[w]hile we appreciate that a cost-benefit analysis for a pilot program may be more difficult to establish with record evidence, this inherent difficulty does not permit the PSC to authorize millions of dollars in rate increases without an informed assessment supported by competent, material and substantial evidence." *Id.* at 115. This Court remanded *In re Applications of Detroit Edison Co*, to the PSC for a

full hearing on the AMI program, during which it shall consider, among other relevant matters, evidence related to the benefits, usefulness, and potential burdens of the AMI, specific information gleaned from pilot phases of the program regarding costs, operations, and customer response and impact, an assessment of similar programs initiated here or in other states, risks associated with AMI, and projected effects on rates. [*Id.* at 116.]

This Court further took judicial notice that "on January 12, 2012, the PSC issued an order opening a docket to investigate the use of smart meters by electric utilities in Michigan," which promised to investigate the matter with all due thoroughness. *Id.* at 115 n 3, citing Case No. U-17000.

The question in this case, then, is whether the evidence of record better justifies the AMI funding involved than was the case in *In re Application of Detroit Edison*. We conclude that it does. Consumers Energy's Manager of Smart Grid Demand Response Programs testified to how similar programs have worked elsewhere, and opined that "[s]mart meters and a fully enabled smart grid are going to be required for the consumers of Michigan to realize the full potential of coming changes in the electric markets." Consumers' Business Technology Solutions Director of Portfolio Integration Planning and Services testified in turn that the new technology would be required to keep up with anticipated rising demands for electricity. The director of Consumers' smart-grid program also testified extensively about Consumers' collaboration with other entities to develop "interoperability" and security standards, about its monitoring of similar programs in place elsewhere, and about the anticipated timing of the eventual implementation of the new

technology. Additionally, the director testified extensively on the anticipated benefits to its customers. These benefits included: more accurate meter reading, reduction of losses resulting from theft, and the opportunity to aid in energy conservation through a pricing incentive.

In its opinion and order, the PSC relied extensively on the testimony of its own expert, and summarized his testimony as follows:

[The PSC's staff witness] testified that in general, the Commission supports utility investment in Smart Grid and AMI because these technologies have the potential to increase the reliability, security, and efficiency of Michigan's electric distribution system while allowing customers to reduce consumption. [The witness] noted, however, that Consumers' initial request included a significant level of expenditures related to full deployment of AMI/Smart Grid, rather than the pilot, and the Commission has not yet approved full deployment of these systems.

[The witness] testified that in [an earlier case], the Commission approved \$68 million in capital expenditures for Smart Grid and AMI pilots but that case did not include a lifecycle benefit cost analysis of Consumers' AMI/Smart Grid proposal. According to [the witness], the Staff reviewed Consumers' preliminary lifecycle analysis presented in this case and found that the viability of full deployment of AMI is not unequivocally demonstrated at this time. Nevertheless, [the witness] opines that continuation of the pilot is reasonable, provided that the costs of the pilot are controlled.

[The PSC's staff witness] testified that on the basis of its review of the specific expenditures requested by Consumers, the Staff concludes that it is prudent for additional cost cutting measures to be implemented by Consumers to reduce the overall cost of the project. . . . [A]reas of particular concern are: 1) the level of expenditures for intangible information technology (IT) labor and expenses; 2) the level of expenditures related to architecture, assessment, and testing of metering/communication infrastructure being vetted by Consumers; and 3) the prudence of doubling the company's air conditioning load-control pilot using non-Smart Grid technology. [The witness] recommended a 20% downward adjustment to intangible IT expenditures and an adjustment to the load control pilot. [The witness] testified that the Staff is not recommending cost adjustment to the metering/communication testing category at this time, but is recommending that the Commission explore utility and vendor practices via the Commission's Smart Grid Collaborative, or an alternative forum, with a report to be filed with the Commission.

[The staff witness] contended that in evaluating cost recovery of this Smart Grid project, the Commission should consider that the magnitude of the project on a life-cycle basis is substantial, estimated by Consumers at \$2.57 billion in nominal dollars, or \$0.960 billion present dollars. In addition, although Consumers estimates that the overall project will achieve a benefit cost ratio greater than one over 25 years, the costs are heavily weighted toward the

beginning of the project while the benefits are not expected to accrue until the later years. In addition, over half of the expected benefits derive from difficult-to-measure demand response programs offered to customers. [The witness] further noted that Consumers did not receive a federal grant for Smart Grid/AMI like other utilities that are currently deploying these systems, and the current economic situation in the state makes investment in Smart Grid/AMI difficult for customers. [The witness] opined that these considerations increase the importance of keeping program costs low.

[The staff witness] testified that Consumers plans to spend almost \$200 million on its Smart Grid/AMI pilot, or almost 20% of the cost of full deployment. [The witness] noted that the cost of the meters is only about 1% of the total cost of the pilot and that the bulk of the expenditures are for Metering, Communications, and Testing (\$65 million thru 2011) and Intangible Software, Computers, and related Software (\$117 million thru 2011). [The witness] calculated that Consumers proposes to spend 80% of the total IT costs in the pilot phase. [The witness] testified that front-loading so many full deployment costs onto the pilot puts ratepayers at great financial risk if the results of the pilot demonstrate that Consumers should not go forward with full deployment.

The PSC, citing its staff witness's testimony, concluded that "while it is reasonable for Consumers to continue Smart Grid and AMI pilot activities, at this time, the Commission cannot approve full deployment of the technology." The PSC further noted that "the benefit and cost information necessary for evaluating the reasonableness and prudence of full AMI and Smart Grid deployment is not yet available from the company's pilot." The PSC called for Consumers Energy to prepare and submit a report "detailing the milestones that were achieved and not achieved, decisions regarding functionality, and any other relevant information or decisions made through the piloting process," which would "facilitate the Commission's decision making process with respect to the appropriateness of requiring customers to bear the costs of moving out of the piloting phase into full deployment." The PSC further expressed concerns and advised caution:

Consumers should not consider the Commission's generally favorable view of AMI and Smart Grid as a blank check that will allow the company to incur staggering costs that will ultimately be borne by ratepayers. As the Staff points out, Consumers has forgone opportunities for collaboration with other utilities in customizing AMI software; collaborations that could have resulted in significantly reduced IT costs. The Commission is also concerned that Consumers' ratepayers may ultimately be paying for costs that primarily benefit vendors. . . . [T]he use of utility testing and assessment as a vehicle for vendors to develop their products is not a problem that is unique to Consumers; nevertheless, Consumers appears to have been much more accommodating to vendors than many other utilities.

The PSC credited its staff's recommendation of "a downward adjustment of \$40,807,466 for AMI and Smart Grid," noting that the greater part of that related to Consumers' decision to delay deployment of the new technology. The PSC authorized an operations and maintenance

expense of \$3,297,000 for the continuation of the AMI program, while noting that the capital costs related to the program were included in the rate base as Construction Work in Progress, with an offset for Allowance for Funds Used during Construction, and so were not included in the rates approved in the order. The PSC further directed Consumers to “reevaluate its plan to move to full AMI deployment in mid-2012.”

We conclude that the PSC’s continuation of funding for the AMI program has a sufficient evidentiary basis. Consumers’ witnesses covered many particulars concerning benefits and timing, and what the PSC relied on from its own staff witness was decidedly guarded. Perhaps most significantly, we note that the amount of AMI funding that the PSC approved was decidedly conservative—far below the amount requested. This case is distinguishable from *In re Applications of Detroit Edison Co*, 296 Mich App at 114-116, in that the evidence underlying the PSC’s funding decision in this case went well beyond the merely “aspirational testimony,” and the amount of approved funding far below, what was of concern in that case. Accordingly, our conclusion that no remand is required in this case comports with the dictates of *In re Applications of Detroit Edison Co*.¹

III. OTHER ISSUES

The Attorney General’s and ABATE’s objections to the PSC’s approval of a rate decoupling mechanism (RDM) for Consumers Energy have been vindicated by recent case law. In *In re Applications of Detroit Edison*, 296 Mich App at 110, this Court concluded that a plain reading of MCL 460.1089(6) (directing the PSC to authorize certain providers of natural gas “to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider’s most recent rate case”) and MCL 460.1097(4) (directing the PSC to “report on the potential rate impacts on all classes of customers if the electric providers whose rates are regulated by the commission decouple rates”), leaves the PSC without authority “to approve or direct the use of an RDM for electric providers.” As the partial concurrence stated, “[t]hese sections set forth the scope of the Commission’s authority specifically as to rate decoupling and clearly limit that authority, regardless of what its scope was prior to their passage.” *Id.* at 119 (SHAPIRO, P.J., dissenting in part and concurring in part). Accordingly, we reverse and remand this case to the PSC for further proceedings related to the RDM.

Recent case law has likewise vindicated the Attorney General’s and ABATE’s objections concerning continued funding of the LIEEF: “[T]he deletion of all references to the LIEEF from the Customer Choice and Electricity Reliability Act . . . indicates a legislative intention to

¹ We note that the issue of AMI funding arose also in the recent case of *In re Application of Consumers Energy Co Increase Rates*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2012 (Docket No. 2012). In that case, this Court concluded that the evidence of record, and funding levels involved, placed it on “all fours” with *In re Detroit Edison Co Applications*, and so followed the latter’s precedent and remanded for further development of that issue. *Id.* at 10-11.

withdraw any obligation, or prerogative, on the part of PSC-regulated utilities to raise money for that fund.” *In re Application of Mich Consol Gas Co to Increase Rates*, 293 Mich App 360, 368; 810 NW2d 123 (2011), amended 293 Mich App 801 (2011) (citation omitted). See also MCL 460.10d; 2008 PA 286. Accordingly, we reverse the decision below insofar as the PSC authorized its regulated utility to charge its ratepayers for continued funding of the LIEEF.

However, recent case law has favored the PSC and its regulated utilities in connection with ABATE’s objections concerning the PSC’s decision to revert to an earlier method for computing peak demand. See MCL 460.11(1); *In re Applications of Detroit Edison*, 296 Mich App at 117. This Court decreed that “the statute in question should be read with the understanding that the Legislature intended the specificity where it was specific, and the silence where it was silent,” and thus that the Legislature intended to prescribe the specific numerical formula for balancing those components that it set forth, while leaving the PSC and its constituent utilities the discretion to decide between returning to calculating peak demand on the basis of the peak hour from each month of the year or continuing to do so on the basis of peak demands in the four months typically occasioning the greatest energy usage. *Id.* at 117-118. Because this Court affirmed the PSC’s use of the 12-month method in *In re Applications of Detroit Edison*, we do so here.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens