

STATE OF MICHIGAN
COURT OF APPEALS

In re Application of Mich Gas Utilities Corp Per
Order U-14292

MICHIGAN GAS UTILITIES CORPORATION,

Petitioner-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and ATTORNEY GENERAL,

Appellees.

UNPUBLISHED

January 24, 2013

No. 301103

Public Service Commission

LC No. 00-015963

Before: SAWYER, P.J., and MARKEY and M.J. KELLY, JJ.

PER CURIAM.

Petitioner Michigan Gas Utilities Corporation (MGUC) appeals as of right from an order of the Michigan Public Service Commission (PSC) disallowing the recovery of certain claimed depreciation expenses. We reverse.

I. Underlying Facts and Proceedings

On April 1, 2006, MGUC, then known as WPS Michigan Utilities, purchased the assets of Aquila, Inc. These assets included mobile radios and mainframe computer equipment. Thereafter, WPS Michigan Utilities changed its name to MGUC and became a subsidiary of Integrys Energy Group, Inc.

In March 2006 MGUC filed an application in Case No. U-14830 for approval of changes to recordkeeping, accounting practices, and depreciation rates for certain accounts in connection with its operation of Aquila's natural gas assets. In an order entered on September 12, 2006, the PSC approved MGUC's proposed changes.

In 2006 and 2007 MGUC made the decision to provide laptop computers to its operations personnel to increase accuracy and efficiency. MGUC retired the mobile radios and mainframe computer equipment it acquired from Aquila, notwithstanding the fact that these assets had remaining useful life.

In June 2007 the PSC issued an order in Case No. U-14292 directing certain utilities, including MGUC, to file new depreciation cases in 2008 and 2009. On May 16, 2008, MGUC filed an application in Case No. U-15550 requesting approval of revised depreciation rates and practices. The parties reached a settlement agreement under which the parties determined that MGUC's existing depreciation rates and practices would not change at that time, and that MGUC would file a new depreciation case.

On July 30, 2009, MGUC filed an application in the instant case seeking accounting approval of proposed depreciation rates and practices. The Proposal for Decision identified three disputed areas: (1) remaining life estimates to be used in determining rates of depreciation; (2) net salvage costs, i.e., the treatment of costs associated with the retirement of assets; and (3) the request by MGUC to adopt amortization for certain plant accounts. MGUC sought to amortize and collect over a five-year period a depreciation reserve of \$2.5 million.¹ The ALJ recommended that the PSC deny MGUC's request to amortize the accounts at this time and allow MGUC to seek the undepreciated amounts related to the retired communications equipment in its next rate case. Only the ALJ's recommendation on the amortization issue prompted the filing of exceptions.

The PSC issued an order disallowing recovery of the reserve deficiency associated with the early retirement of the communications assets. The PSC noted that auditing data showed that more than 90% of the mobile radio equipment was in service by the end of 2001, and that MGUC's depreciation order in effect at that time required MGUC to give the PSC advance notice of the retirement. The PSC noted that such advance notice language was "boilerplate in depreciation rate cases[.]" The PSC concluded:

The magnitude of the depreciation reserve sought in this proceeding takes this out of the category of a routine replacement or retirement, and into the category of one for which the company should have given the Commission advance notice. The Commission finds that the request to increase the reserve deficiency to account for the early retirement of these communications assets should be denied. With that exception, the Commission finds that the remainder of the PDF is well-reasoned and thorough, and adopts the findings and recommendations therein, along with the rates set out in Attachment 1 to this order.

The PSC ordered MGUC to implement revised depreciation rates set out in an attachment to the order, and directed MGUC to file a new depreciation case and study.

II. Standard of Review

¹ When property is retired the full cost of the property, less the net salvage value, is charged to the depreciation reserve. At the time MGUC purchased Aquila's assets the reserve deficiency was estimated to be approximately \$180,000. The increase of the reserve to \$2.5 million occurred due to MGUC's retirement of communications assets that still had a remaining useful life.

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. *Michigan 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 mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it arbitrary, capricious, or not supported by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

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; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise, and we will not substitute our judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and we will not overrule that construction absent cogent reasons. If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute by the PSC is not binding on us. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103-109; 754 NW2d 259 (2008). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. Analysis

On appeal, MGUC first argues that the PSC's order is unlawful and unreasonable because the PSC's denial of MGUC's request to recover the depreciation reserve deficiency on the ground that MGUC failed to notify the Commission in advance of its decision to retire early the communications and mainframe equipment was not supported by any statute or rule. We agree.

The PSC noted that in excess of 90% of the mobile radio equipment retired was in use by the end of 2001, and observed that MGUC's depreciation order in effect at that time in Case No. U-12395 required MGUC to give the Commission advance notice of retirement of assets during the period in which the depreciation rates were in effect. However, that order ceased to be effective prior to retirement of the assets in 2006 and 2007. The PSC approved revised depreciation rates for MGUC in an order issued on March 12, 2003, in Case No. U-13393. That order, and the settlement agreement it approved, did not contain a provision requiring MGUC of the early retirement of assets.

The PSC has only those powers conferred on it by statute. These statutes must be strictly construed, and the PSC may exercise power only if it is conferred by clear and unmistakable statutory language. *In re Application of Consumers Energy Co*, 279 Mich App 180, 190; 756 NW2d 253 (2008).

In In re Application of Consumers Energy Co for Authority to Implement a Gas Cost Recovery Plan and Factors, 278 Mich App 547; 753 NW2d 287 (2008), this Court stated:

The PSC has broad authority to set just and reasonable rates and may, in the exercise of its discretion, determine what factors are relevant in a particular case. The PSC is not bound by any particular ratemaking method and can make pragmatic adjustments in order to respond to the particular circumstances of any given case. [*Id.* at 563 (internal citations omitted).]

The PSC primarily relied on the advance notice provision in the settlement agreement approved by the order in Case No. U-12395 to deny MGUC's request to recover the reserve deficiency. However, that clause applied specifically to the period in which the depreciation rates established by the agreement were in effect. The depreciation rates established by the settlement agreement approved in the September 7, 2001, order in Case No. U-12395 were no longer in effect when MGUC retired the assets at issue.

The PSC correctly observed that MGUC did not seek to recover the reserve deficiency in Case No. U-14830, which dealt with certain accounting and depreciation changes associated with the acquisition of Aquila, or in Case Nos. U-15549 and U-15990, MGUC's latest general rate cases. However, MGUC filed Case No. U-14830 on March 20, 2006, apparently before all the assets at issue had been retired. Moreover, MGUC filed Case Nos. U-15549 and U-15990 after the PSC issued an order in Case No. U-14292 instructing it and other utilities to file a depreciation rate case.

The PSC has wide discretion in matters of ratemaking. *In re Application of Consumers Energy Co*, 278 Mich App at 563. The PSC reasoned that the magnitude of the recovery sought made this case one in which MGUC should have given the Commission advance notice that the assets were to be retired. However, the PSC's conclusion that MGUC was required to give advance notice of the retirement of the assets at issue when MGUC was under no order to do so constituted an abuse of discretion in the exercise of its judgment, and thus was unlawful. *In re MCI Telecom Complaint*, 460 Mich at 427.²

² MGUC's assertion that the PSC could not enforce an advance notice requirement because it was not properly promulgated as a rule is without merit. A "rule" is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency[.]" MCL 24.207(a). The PSC must promulgate rules "for the conduct of its business and the proper discharge of its functions hereunder, and all persons dealing with the commission or interested in any matter or proceedings before it shall be bound by such rules and regulations." MCL 460.55. The PSC's assertion that MGUC should have given the Commission advance notice of retirement of the assets was not the adoption of a policy of "general applicability[.]" MCL 24.207(a). The PSC's decision applied only to MGUC, and did not adopt a requirement for future cases. Cf. *In re Public Serv Comm Guidelines*, 254 Mich App at 266-268 (adoption of guidelines for transactions between regulated utilities and

Finally, MGUC argues that the PSC's decision was arbitrary and capricious, and thus unreasonable, because the PSC based its decision to deny MGUC's request to recover the reserve deficiency on language that did not appear in the orders applicable to MGUC. We agree.

A decision is unreasonable if it is arbitrary or capricious. *Associated Truck Lines, Inc*, 377 Mich at 279. A decision is arbitrary if it was without adequate determining principle, was arrived at through an exercise of will or caprice, was without consideration or adjustment with reference to principles, circumstances, or significance, or was decisive but unreasoned. A decision is capricious if it was subject to sudden change, or was freakish or whimsical. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 63-64; 678 NW2d 444 (2003).

The PSC concluded that MGUC should have adhered to an advance notice provision that was not contained in the orders to which MGUC was subject. MGUC had no notice that the PSC would conclude that the provision was applicable in this case. Moreover, the PSC did not conclude that it would have denied the request had it been given advance notice of the retirement of the assets at issue. Under the circumstances, the PSC's decision to deny the MGUC's request to recover the reserve deficiency was arbitrary.

We reverse.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Michael J. Kelly

nonregulated affiliates did not comport with rulemaking procedures). The PSC's assertion that an advance notice provision is "boilerplate" language in depreciation cases is puzzling in light of the demonstrated absence of such language in various decisions, but the PSC's citation of the advance notice provision did not violate rulemaking procedures.

Similarly, MGUC's argument that the PSC improperly attempted to amend its prior orders to require MGUC to provide advance notice of the retirement of certain assets is without merit. The principle that a court speaks through its orders, *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987), applies as well to the PSC. The PSC cannot correct a prior order unless doing so would not injure a party to which the order applied. See *G & A Truck Line, Inc v Public Serv Comm*, 377 Mich 300, 307; 60 NW2d 285 (1953). The PSC did not specifically seek to amend the orders applicable to MGUC, i.e., those in Case Nos. U-13393 and U-14830.