

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
DAVIS, P.J., AND MURPHY AND SERVITTO, JJ.

ATTORNEY GENERAL MICHAEL A. COX,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and
CONSUMERS ENERGY COMPANY

Appellees.

Supreme Court No. 1 36431

Court of Appeals No. 261747

Michigan Public Service Commission
Case No. U-13917

Attorney General's Reply Brief in Response to Consumers Energy Company

Michael A. Cox
Attorney General of Michigan

Robert Ianni (P24084)
Division Chief

Donald E. Erickson (P13212)
Assistant Attorney General

Tobacco & Special Litigation Division
525 W. Ottawa Street
7th Floor Williams Building
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1123

January 9, 2009



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INTRODUCTION

In Case Nos. SC 134667 and SC 136431, the Court granted leave to appeal regarding the transmission cost issue raised by the Attorney General and consolidated the cases for argument and decision. The Attorney General filed separate briefs addressing each case. Consumers Energy Company (CECo or the Company) filed an Appellee's Brief in SC 136431. The Michigan Public Service Commission (MPSC or the Commission) filed a single brief for both cases. This reply brief responds to the Appellee's Brief filed by CECo.

THE MPSC HAS LIMITED POWERS.

While CECo's brief argues that the MPSC has broad implied ratemaking authority to include recovery of transmission costs in PSCR factors, it carefully ignores Michigan Supreme Court opinions repeatedly ruling the MPSC is an administrative agency having limited powers that must be found in affirmative, clear, and unmistakable statutory language. CECo's brief does not cite or distinguish any of the Supreme Court's major decisions from 1914 through 1999.¹

Pages 28-30 in CECo's brief cite and rely upon ten opinions issued by the Michigan Court of Appeals as support for the Company's argument that the Commission has broad ratemaking authority. The cited Court of Appeals opinions conflict with the Supreme Court's unswerving rulings that the MPSC is an administrative agency that has limited powers.

In 1936, even though the Michigan Public Utilities Commission (PUC) found rates charged were too high and even though the PUC had statutory power to reduce rates prospectively, the Supreme Court held that the PUC lacked the power to grant damages resulting from excessive rate charges.² That opinion followed rulings in earlier opinions.

¹ Most of those cases were previously cited in footnote 15 of the Attorney General's brief on appeal.

² *Sparta Foundry Co v Michigan Public Utilities Comm'n*, 275 Mich 562, 564; 267 NW 736 (1936).

In an appeal decided in 1958, Huron Portland Cement Company filed a complaint and requested the MPSC to force Consumers Power Company to provide service to Huron Portland Cement even though it was located in the service territory of another utility. The MPSC ruled it lacked the power to grant the complaint because Consumers Power did not apply for a certificate of public convenience and necessity. The Supreme Court affirmed and ruled that the statute that allows utilities to request permission to serve customers in another utility's service territory could not be extended to empower the MPSC to grant the complaint filed by Huron Portland Cement Company.³

In 1988, the Supreme Court again confirmed that the MPSC possesses no common law and possesses only that authority bestowed upon it by statute.⁴ Thus, a determination of the Commission's powers requires an examination of the various statutory enactments pertaining to its authority. In addition, the Court ruled that the power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.⁵ In *Union Carbide*, the Supreme Court reversed a Court of Appeals' that the Commission had implicit ratemaking power to order Consumers Power to terminate an unreasonably high price fuel oil contract even though the Court affirmed that the Commission had ratemaking power to disallow recovery of costs resulting from the contract.

In 1999, the Supreme Court ruled that the, the Electric Transmission Act, the Railroad Commission Act, and 1929 PA 69 did not empower the MPSC to force electric utilities to provide a "retail wheeling" program. The MPSC had ruled that it had the power to require electric utilities to transport over their electric lines electricity generated by a third party, but the

³ *Huron Portland Cement Co v PSC*, 351 Mich 255, 262; 88 NW2d 492 (1958).

⁴ *Union Carbide Corp v MPSC*, 431 Mich 135, 146; 428 NW2d 322 (1988).

⁵ *Id.* at 151

Court ruled that the MPSC lacked clear and unmistakable statutory authority to order a utility to transmit electricity through its system when the electricity is generated by a third party provider.⁶

Turning back to Court of Appeals precedent, in reaching its conclusion that the MPSC had implied ratemaking power to order Consumers Power to terminate its fuel contract with Union Carbide Corporation, the Court of Appeals opinion⁷ had cited and relied upon two of the early Court of Appeals opinions, which are cited in CECO's brief.⁸ The Supreme Court reversed and concluded that the power to set rates does not necessarily imply other powers.⁹ In other words, the Court of Appeals' opinion in *Union Carbide*, pre-1988 opinions issued by the Court of Appeals, and subsequent Court of Appeals opinions cited in CECO's brief conflict with the Supreme Court's opinions.

THE DISPUTED TRANSMISSION COSTS ARE NOT COSTS OF PURCHASED AND NET INTERCHANGED (PNI) POWER TRANSACTIONS

CECo argues (1) that recovery of transmission costs paid to third parties through the power supply cost recovery (PSCR) process was an accepted historical practice, (2) that there is no difference between internal and external transmission costs, and (3) that the MPSC followed a longstanding practice when it allowed recovery of all transmission costs via PSCR factors (Brief, pp 5 & 20-23). CECO's arguments are at best misleading.

CECo requested the Commission to authorize CECO to switch recovery of the Company's transmission costs from its base rates to recovery via its PSCR factors and requested authority to include all transmission costs in all future calculations of PSCR expenses, factors, and reconciliations (Attorney General's Appendix, pp 13a-14a). Thus, CECO's application in this

⁶ *Consumers Power Co v PSC*, 460 Mich 148, 157, n 8; 596 NW2d 126 (1999).

⁷ *Union Carbide Corp v PSC*, 153 Mich App 217, 230-231; 395 NW 2d 292 (1986).

⁸ Those cases are *Attorney General v PSC*, 122 Mich App 777, 787; 333 NW2d 131 (1983), and *Attorney General v PSC #1*, 133 Mich App 719, 725-726; 349 NW2d 539 (1984)

⁹ *Union Carbide Corp v PSC*, 431 Mich at 148-149.

case recognized the difference between internal and external transmission costs. CECo's brief now attempts to avoid the difference and characterize all transmission costs as booked costs of PNI power transactions."

The plain language in MCL 460.6j(1)(a) allows the MPSC to use a PSCR factor and reconciliation only to recover booked costs of fuel burned and booked costs of PNI power transactions. Booked costs of PNI power transactions are described in Account 555, and Account 555 says that the cost at point of receipt by the utility of electricity purchased for resale shall be booked in that account.¹⁰ This reference to "cost at point of receipt" is why CECo's external transmission costs were and are recoverable as PNI costs.

Internal transmission costs are not PNI costs—CECo's argument to the contrary notwithstanding. Those costs have nothing to do with purchased and net interchanged power transactions. As distinguished from Account 555, Account 565 states that the account "shall include amounts payable to others for the transmission of the utility's electricity over transmission facilities owned by others." In other words, internal transmission costs are distinguishable and distinguished from external transmission costs based upon the difference in the nature of the source of the electricity being transmitted.

Before selling its transmission system, CECo booked its internal transmission costs in Account Nos. 350.1 through 350.9, which address costs related to transmission service when a utility owns the transmission system. As the Attorney General's witness testified, most transmission expenses are now booked in Account 465 (sic 565), not in Account 555 (Attorney

¹⁰ The MPSC's promulgated accounting rules are identified in the Uniform System of Accounts for Major and Nonmajor Electric Utilities (USOA), 1986 AACCS, R460.9001. The text of the USOA can be found at the following website:
http://www.state.mi.us/orr/emi/admincode.asp?AdminCode=Single&Admin_Num=46009001&Dpt=CI&RngHigh=

General's Appendix, p 124a). In other words, transmission costs booked in Account 565 are not associated with purchased power, so they are not PNI costs as CECo's brief claims.

Did 2000 PA 141 result in CECo's sale of its transmission system? The answer is, "Yes." Did CECo's sale of its transmission system increase the amounts CECo books in Account No. 565? The answer is, "Yes," most internal transmission costs were shifted from Accounts 350.1-350.9 to Account 565. But the shift does not turn those costs into PNI costs identified in MCL 460.6j(1)(a) and booked in Account 555.

The Legislature created an option allowing CECo to sell its transmission system by adding MCL 460.10w to 1939 PA 3 via 2000 PA 141. That act amended MCL 460.6l, which was originally enacted in 1982 PA 304 along with MCL 460.6j, but the Legislature did not amend the definition of PSCR expenses found in MCL 460.6j(1)(a). So when a utility generates electricity and pays a third party to transmit the electricity over transmission facilities owned by the third party, the resulting transmission costs are not authorized as PSCR expenses by affirmative, clear, and unmistakable statutory language.

Would it be a sound policy to include internal transmission costs in PSCR expenses along with external transmission costs? That is irrelevant to the current legal question. CECo's witness testified that including transmission costs in PSCR factors would be a good policy (Attorney General's Appendix, pp 61a-68a), but the Legislature, not the courts or the MPSC, must amend language in a statute if policy considerations justify a change.¹¹ The Legislature is free to make any policy choice.¹²

Questions of statutory interpretation are reviewed de novo. Const 1963, art 6, § 28 provides for judicial review to determine whether a decision is authorized by law, and if a

¹¹ *Consumers Power Co v PSC*, 460 Mich at 156.

¹² *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999).

hearing is required, whether a decision is supported by record evidence, but Const 1963, art 6, §28 does not stand for the proposition that agencies can assume the courts' constitutional role as the final arbiter of the meaning of a statute.¹³ Concepts such as "abuse of discretion," "clear error," or "reasonableness" do not apply to the interpretation of a statute because applying those concepts would threaten separation of powers principles by allowing an agency to usurp the judiciary's constitutional authority to construe the law and to infringe on the Legislature's lawmaking authority.¹⁴

THE MPSC'S DECISION TO SWITCH RECOVERY OF TRANSMISSION COSTS TO PSCR FACTORS IS NOT A DECISION THAT MUST BE FOLLOWED.

CECo argues that the MPSC's decision in this case to switch recovery of internal transmission costs to recovery via the Company's PSCR factor constitutes a consistent MPSC construction of MCL 460.6j over a long period of time, which is entitled to respectful consideration (Brief, p 22). This case has been pending since 2004 and the first published decision by the Court of Appeals regarding this issue was July 3, 2008, in the companion appeal in SC 134667, so this case does not involve a longstanding interpretation by the MPSC. Ultimately, the plain language in MCL 460.6j(1)(a) must control.¹⁵

CECO'S ANALOGY BETWEEN MCL 460.6H(1)(B) AND MCL 460.6J(1)(A) DOES NOT APPLY

CECo attempts to draw an analogy between "booked costs of gas sold" described in MCL 460.6h(1)(b) and the booked costs described in MCL 460.6j(1)(a). The term "booked costs of gas sold" in MCL 460.6h(1) and the terms "booked costs, . . . , of fuel burned" and "booked costs of purchased and net interchanged power transactions" in MCL 460.6j(1)(a) are similar, but the

¹³ *In re Complaint of Rovas*, 482 Mich 90, 100; 754 NW2d 259 (2008).

¹⁴ *Id.* at 102..

¹⁵ *Consumers Power Co v PSC*, 460 Mich at 157, n 8.

disputed internal transmission costs in this case are neither booked costs of fuel burned nor booked costs of PNI power transactions. Furthermore, the case cited by CECO¹⁶ was decided before the Supreme Court's decision in *Union Carbide*.

Booked costs of gas sold are distinguishable from CECO's internal electric transmission costs because internal electric transmission costs are not related to CECO's purchase of a commodity (in this case electricity and in the case cited by CECO natural gas). External transmission costs are analogous and are covered by MCL 460.6j(1)(a) as booked costs of PNI power transactions. The Commission lacks affirmative, clear, and unmistakable statutory authority to include in PSCR factors costs that are neither booked costs of fuel burned nor booked costs of PNI power transactions.

¹⁶ In the case cited and quoted on page 27 in CECO's brief, the Court of Appeals ruled that the phrase "booked costs of gas sold" subsumed any additional payment made pursuant to a "take-or-pay" arrangement between Consumers Power and its pipeline suppliers. *Attorney General v PSC #1*, 136 Mich App 696, 699; 431 NW2d 47 (1988). That opinion was issued approximately two months before the Supreme Court in *Union Carbide* rejected the concept of broad, implied powers previously recognized by the Court of Appeals.

**THE RELIEF REQUESTED BY THE ATTORNEY GENERAL DOES NOT CONFLICT
WITH THE FEDERAL FILED RATE DOCTRINE.**

Pages 39-40 in CECo's brief seem to suggest that the relief requested by the Attorney General conflicts with and is pre-empted by the federal filed rate doctrine. The Attorney General is not arguing CECo unreasonably or imprudently incurred projected or reported transmission costs that must be disallowed. Instead, the Attorney General requests two rulings: (1) the Court should rule the MPSC's addition of non-PNI related transmission costs to PSCR factors and PSCR expense recovery is not statutorily authorized and should remand with instructions to the MPSC to conduct hearings to determine how properly to reallocate recovery of the improperly shifted costs and (2) the Court should order the MPSC to exclude non-PNI related transmission costs from future PSCR expenses.

Respectfully submitted,

Michael A. Cox
Attorney General of Michigan

Robert Ianni (P24084)
Division Chief

Donald E. Erickson

Donald E. Erickson (P13212)
Assistant Attorney General

Tobacco & Special Litigation Division
525 W. Ottawa Street
7th Floor Williams Building
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1123

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