STATE OF MICHIGAN

COURT OF APPEALS

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR GAS COST RECOVERY.

CONSUMERS ENERGY COMPANY,

Petitioner-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and RESIDENTIAL CUSTOMER GROUP,

Appellees.

FOR PUBLICATION
December 29, 2022
9:00 a.m.

No. 356330
Public Service Commission
LC No. 00-020209

Before: HOOD, P.J., and JANSEN and K. F. KELLY, JJ.

K. F. KELLY, J.

Petitioner, Consumers Energy Company ("Consumers Energy" or "the Company"), appeals as of right a September 24, 2020 order of the Michigan Public Service Commission ("the PSC") approving with modifications Consumers Energy's application for gas supply cost recovery reconciliation for the 12-month period ending March 31, 2019. On appeal, Consumers Energy presents arguments challenging the PSC's refusal to allow Consumers Energy to recover from its customers certain costs to replace gas that was stranded because of a fire that occurred at a Consumers Energy facility. Consumers Energy's arguments are unavailing. We affirm.

I. BACKGROUND

On June 28, 2019, Consumers Energy filed in the PSC an application for gas cost recovery reconciliation for the 12-month period ending on March 31, 2019. The gas cost recovery reconciliation process is governed by MCL 460.6h, added by 1982 PA 304 ("Act 304"). Consumers Energy stated that, for the period at issue, it had a total underrecovery of $17,520,929, which included an underrecovery of $17,473,154 and accrued interest of $47,775. Consumers Energy requested that a hearing be held on the application.

The PSC Staff ("the Staff") participated in the proceedings. In addition, intervenor status was granted to, *inter alia*, the Michigan Department of Attorney General ("the Attorney General") and a nonprofit organization called Residential Customer Group ("RCG"), whose members included residential gas customers of Consumers Energy.

On May 5, 2020, an evidentiary hearing was held before an administrative law judge ("ALJ"). The testimony of all witnesses had been prepared in writing and was bound into the record, and cross-examination was waived.

Consumers Energy presented the testimony of James P. Pnacek, Jr., who is a senior engineer for Consumers Energy. He testified that Consumers Energy stores natural gas in a storage field near the Ray Natural Gas Compressor Station (sometimes referred to as "the Ray facility") in Macomb County. A fire erupted at the Ray facility at about 10:30 a.m. on January 30, 2019. Pnacek explained that "[t]he fire, which did not cause injuries, reduced the amount of natural gas Consumers Energy could deliver to all customers from underground storage located in the Ray field near the compressor station." As a result, Consumers Energy purchased additional gas to meet customer demand in January 2019, February 2019, and March 2019. Although the Ray facility was returned to service late in the evening on January 30, 2019, the fire had reduced the ability to deliver gas from the facility for the remainder of the 2018-2019 winter, which was colder than normal. Pnacek opined that Consumers Energy's decisions and actions "resulted in a safe and reliable supply for all customers and were appropriate and reasonable for the actual weather conditions experienced."

Pnacek provided further testimony in rebuttal to the testimony of Nora B. Quilico, a Staff witness whose testimony will be summarized later. Quilico had recommended a disallowance of costs related to the Ray fire, which Quilico attributed to a design flaw at the Ray facility, but Pnacek opined that there were weather-related concerns that Quilico had failed to mention. Pnacek noted that, at the time of the Ray fire,

> Michigan was experiencing extreme cold conditions arising from a polar vortex. In fact, on January 28, 2019, Governor Gretchen Whitmer declared a state of emergency in response to the extreme cold temperatures. This was also acknowledged by the Commission in its February 7, 2019 Order in Case No. U-20463 wherein the Commission cites to "unprecedented demand in natural gas due to extremely cold weather conditions on January 30 and 31, 2019." See February 7, 2019 Order, MPSC Case No. U-20463, page 1.

Also, the extremely cold weather from January 29, 2019 through February 1, 2019, was mentioned in the Staff's January 31, 2020 investigative report in PSC Case No. U-20463. Pnacek testified that "[t]he cold weather significantly increased actual and projected customer demand. The purchases [of additional gas] were operationally necessary to reduce the supply deficiency due to the Ray Fire incident, to stabilize the system, to reestablish system pressures, and to meet customer demand."

Next, Consumers Energy presented the testimony of Michael H. Ross, the director of gas supply for Consumers Energy. He testified that Consumers Energy's "actions have resulted in securing reliable supplies at just and reasonable costs for its customers and should be approved in

this proceeding." In rebuttal to Quilico's testimony that costs related to the Ray fire should be disallowed, Ross opined that Consumers Energy's gas supply purchases "were reasonable and prudent given the facts and circumstances in existence at the time." Ross disputed the propriety of tying the proposed disallowance to the perceived cause of the Ray fire. He noted that there had been no formal determination that Consumers Energy was liable or legally responsible for the Ray fire. He opined that a determination of the root cause of the fire was beyond the scope of this reconciliation proceeding. He viewed the events leading up to the Ray fire as irrelevant to the facts and circumstances that existed when Consumers Energy decided to purchase the additional gas supply.

The Staff presented the testimony of Quilico, a public-utilities engineer for the PSC who had recently been "promoted to manage the Act 304 and Sales Forecasting Section within the Energy Operations Division." Quilico described the Ray fire as follows:

> During the near design cold conditions experienced from January 30th-31st, 2019[,] a blowdown stack at one of the compressors at the Ray storage facility caught fire and ultimately made a major source of supply unavailable during the extreme weather event and beyond. The Ray facility was returned to service late in evening on January 30th, but derated, or at a much-reduced deliverability for the remainder of the winter.

Quilico noted that, in February 2019, in docket number U-20463, the PSC directed Consumers Energy to file a report addressing, *inter alia*, the origin of the fire, how Consumers Energy responded to the fire, whether Consumers Energy had failed to properly maintain its equipment or to comply with PSC rules, and the cost of the incident. In that proceeding, the Staff filed a May 8, 2019 response to Consumers Energy's report. In that response, the Staff noted that Consumers Energy's report indicated that, on the date of the fire, "Plant 3" at the Ray facility detected an "abnormal operating condition in the Det-Tronics control system." According to the Staff response, it did not appear that Consumers Energy had "included an investigation into the abnormal operating condition in the Det-Tronics control system report," and the Staff planned to further analyze that matter. The Staff response further stated:

> At this point in Staff's investigation, it appears that the blowdown silencer for Ray Plant 3 that was designed and placed into service in 2013 was located where gas could be discharged at a location where it could create a hazard due to its proximity to the thermal oxidizer. The decreased discharge velocity of the silencer design, in conjunction with the close proximity to a competent ignition source, allowed a gas plume to ignite.

Quilico noted that, in a July 2, 2019 order in docket number U-20463, the PSC stated:

> In its initial report, Consumers determined that the origin of the fire was a failure in the Det-Tronics control system, which initiated the emergency safety fire-gate process and caused the release of natural gas into the atmosphere through Plant 3 blowdown silencers, which was then ignited by the Plant 2 thermal oxidizer exhaust system. Through subsequent investigation, the company states that it identified a grounding fault as the underlying cause of the initial firegate event. Consumers

> asserts that it has relocated the well pump pressure switch and pressure transmitter to eliminate future grounding fault issues. In addition, the company avers that it has contracted with an engineering firm to evaluate the origin of the fire and improve facility design.

Quilico then quoted from the Staff's January 31, 2020 final report on the Ray fire:

> This fire initiated from the ignition of gas that was venting from a localized shutdown of Plant 3. The gas from Plant 3 vented out of the blowdown silencers and then ignited when the wind blew the gas towards Plant 2's thermal oxidizer. Upon recognizing the fire, Consumers initiated an emergency shutdown (ESD) of the entire station, increasing the amount of gas venting from the blowdown silencers for Plants 2 and 3, which ultimately added additional fuel to the existing fire. Staff determines that the root cause of the Consumers' Ray Compressor Station Fire that occurred on January 30, 2019, was interference from the domestic water well pump at the station, which caused a voltage spike in the grounding system of the communications system of the Plant 3 controls. This caused the system to lose communication and go into "fault mode," resulting in a Plant 3 ESD.

Quilico testified that, in light of this information, the Staff had reached the following conclusion regarding who should be responsible for gas costs resulting from the Ray fire:

> Seeing as the "abnormal operating conditions" which the Company vaguely addressed and investigated are what triggered the Company's emergency shutdown procedures, and that those procedures included the station blow-down silencing which ultimately led to the Ray compressor station fire, the Company should take responsibility for the added costs that this incident created for GCR [Gas Cost Recovery] customers. Whether it was "abnormal operating conditions," the emergency procedures themselves, the actual physical design of the compressor station, or all these conditions in combination, the ratepayers should not be held responsible from a cost perspective for what would appear to be a flawed system design.

As for the amount of the incremental costs resulting from the Ray fire, i.e., the incremental costs of purchasing additional gas to replace gas that was inaccessible due to the fire, Quilico testified that the Staff agreed with Consumers Energy that there was an incremental cost of $7,158,412 for January 2019 related to the Ray fire. The Staff believed that Consumers Energy should not be allowed to recover those costs from its customers.

> Staff believes a disallowance of $7,158,412 is warranted. GCR customers should not be expected to shoulder the burden of an incident for which they had no part in making. Based on the evidence presented in Case No. U-20463, it appears improper design of the compressor station was the cause of the Ray incident. The Company should be responsible for bearing the cost burden of this event.

The Staff did not recommend a disallowance for February 2019 because, in light of the average prices of gas that month, the purchases of additional gas that month did not harm customers. For

March 2019, which was colder than normal, the Staff recommended a disallowance of $788,863 in additional costs related to the Ray fire. Thus, the Staff recommended a total disallowance in the amount of $7,947,275, which included gas costs for both January 2019 and March 2019 that were related to the Ray fire.

RCG presented the testimony of Geoffrey C. Crandall, who testified that he had more than 40 years of experience in utility regulatory issues. He opined that the additional costs arising from the Ray fire should be the responsibility of Consumers Energy rather than its customers. He explained that Consumers Energy

> must be held to a high standard of reasonableness and prudence in the operation of its facilities, distribution lines, compressors, storage fields, and other infrastructure, and it is not for the ratepayers to provide a backstop or a form of insurance, cost or risk avoidance of the costs incurred due to [Consumers Energy's] operation or maintenance of its facilities, or which may arise from the utility's negligence.

Therefore, he opined that costs associated with the Ray fire should be disallowed.

The Attorney General presented the testimony of Sebastian Coppola, who testified that he is an independent energy business consultant. Coppola noted that, in conjunction with the Staff's filing of its January 31, 2020 report regarding the Ray fire in docket number U-20463, the Staff issued two letters notifying Consumers Energy of the Staff's findings, recommendations, and compliance action. The Staff's compliance action letter stated that Consumers Energy had committed a probable violation of 49 CFR 192.167(a)(2), which required a compressor station to have an emergency shutdown system that "discharge[s] gas from the blowdown piping at a location where the gas will not create a hazard." The Staff's compliance action letter further stated:

> The fire at Ray Compressor Station occurred above the Plant 2 dehydration area near the thermal oxidizer. The source of gas was identified to be the Plant 3 blowdown silencers located approximately 135 feet southwest of the Plant 2 thermal oxidizer. Plant 3 had undergone an emergency shutdown prior to the fire. The temperature transducer in the thermal oxidizer exhaust stack indicated that the temperature was 1506 [degrees Fahrenheit], well above the auto-ignition temperature of natural gas. The blowdown silencers for Plant 3 were designed and placed into service in 2013. The slowed discharge velocity of the natural gas from Plant 3 due to the silencer design, in conjunction with the close proximity to a competent ignition source in Plant 2's thermal oxidizer, allowed a gas plume to ignite. Failure for each compressor station to have an emergency shutdown system that discharges gas from the blowdown piping at a location where the gas will not create a hazard is a violation of 49 CFR 192.167(a)(2).
>
> After investigation of the probable noncompliance, it is Staff's recommendation that Consumers be subject to a civil penalty of $10,000.

The Attorney General provided a complete copy of the Staff's compliance action letter as an exhibit.

Coppola testified that, on the basis of the Staff's investigation and compliance action letter, it seemed that Consumers Energy "was in violation of a critical safety standard which significantly contributed to the fire and the temporary shutdown of gas withdrawals" at the Ray facility. This led to Consumers Energy's "emergency steps to purchase additional gas supply in a very tight market at extremely high prices" that were "up to five times the prices paid earlier in the month." Coppola opined that "customers should not pay for the incremental cost of buying emergency gas supply, particularly in light of [Consumers Energy's] probable violation of a safety standard." Coppola thus recommended a disallowance of $7,158,412 of incremental gas costs resulting from the Ray fire.

Following the evidentiary hearing, the parties provided extensive briefing. The Staff, the Attorney General, and RCG argued that Consumers Energy should not be allowed to recover from its customers the replacement gas costs related to the Ray fire, whereas Consumers Energy argued that it should be allowed to recover those costs from its customers.

On July 29, 2020, the ALJ issued a proposal for decision ("PFD") recommending that the PSC adopt the Staff's proposed adjustments related to the Ray fire. The ALJ stated that the costs of the Ray fire should be assigned to Consumers Energy rather than to its customers. Consumers Energy's "customers essentially bought the gas stored in the Ray field and then had to purchase gas a second time when the stored gas was unavailable due to the fire." Also, "the Governor had to declare an emergency and every customer had to reduce their individual usage to allow the Company to meet the need during the relevant time period." The ALJ next addressed an argument of Consumers Energy that additional gas purchases during an emergency should be deemed reasonable and prudent under a PSC-approved tariff called the Curtailment of Gas Service During an Emergency tariff ("the curtailment tariff") (relevant provisions of which will be quoted later). The ALJ viewed the tariff as contemplating matters that were outside Consumers Energy's control, such as acts of God, riots, or insurrections. The ALJ stated that "[t]he fire in this case appears to have been the result of a flawed design by the Company." Imposing costs on customers did not seem appropriate when Consumers Energy's actions or inactions caused the situation. Although the additional gas purchases after the fire were necessary, "the simple fact of the matter is that if there had been no fire, the Company would not have been required to purchase the additional gas and the Company bears responsibility for the fire."

Consumers Energy filed exceptions to the PFD, and the parties engaged in further briefing with respect to those exceptions. The parties adhered to their earlier-expressed respective positions.

On September 24, 2020, the PSC issued its order approving with modifications Consumers Energy's application for gas supply cost recovery reconciliation for the 12-month period ending March 31, 2019. As relevant to this appeal, the PSC addressed the issues pertaining to the Ray fire. The PSC stated that Consumers Energy was incorrect to assume that compliance with the tariff automatically rendered all gas purchases reasonable and prudent. The PSC quoted MCL 460.6h(12), including language providing that, at the gas cost reconciliation, the PSC "shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review." The PSC stated that, although the gas supply was safeguarded through customer curtailment as well as replacement gas purchases, this did "not dictate how the resulting

costs must be assigned or the reasonableness and prudence of [Consumers Energy's] actions to supply fuel." The PSC stated that the tariff addressed actions taken before enforcement of a curtailment plan and that Consumers Energy purchased additional supply after a curtailment plan had gone into effect. Also, the PSC noted that the tariff "sets a goal for the utility to seek to purchase additional supply at reasonable and prudent prices." The PSC stated, "[T]he tariff does not constitute a guarantee that all replacement supply, no matter what the price, will be found to have been reasonable and prudent by the [PSC] in a later GCR reconciliation review."

Next, the PSC said that Consumers Energy itself had concluded that improper design of the compressor station of the Ray facility was the cause of the fire. The PSC quoted the following language from Consumers Energy's May 30, 2019 report in docket number U-20463:

> Consumers Energy's ongoing investigation into the origin of the fire has revealed that a grounding fault was the underlying cause of the initial firegate event. When the station's well pump started up, its variable frequency drive caused a voltage spike in the grounding system of the Det-[T]ronics panel located in the headquarters building. These high voltages caused enhanced discrete input/output (EDIO) and analog input module (AIM) modules to lose communication with the Det-[T]ronics pilot air system, a fault which triggered the initial firegate.

The PSC then provided the following analysis:

> Based on [Consumers Energy's] conclusion and applying the reasonableness and prudence standard of MCL 460.6h(12), the [PSC] finds that ratepayers should not shoulder the burden of the additional supply costs associated with the loss of access to the Ray storage field that resulted from the fire. This decision is not based on a finding of negligence or the existence of a *force majeure* event. The [PSC] notes that the determination of whether a *force majeure* event has occurred under Section C3.3A of the curtailment tariff is left to the judgment of the company. The [PSC] makes this determination under MCL 460.6h(12), which requires the [PSC] to consider the reasonableness and prudence of expenses for which the utility expects to charge the customer that could not have been considered in the GCR plan case. Based on [Consumers Energy's] findings at the conclusion of its investigation of the fire's origins, the [PSC] finds that the gas replacement costs resulting from the inability to access the Ray storage field were not reasonable and prudent. Costs arising from the grounding fault which was the origin of the fire should be borne by the utility and not by ratepayers. As the [PSC] has previously acknowledged, the weather complicated the situation, but colder than normal weather is to be expected and flexibility is built into the GCR plan for that purpose, among others.

The PSC thus disallowed recovery by Consumers Energy of the incremental gas costs attributable to the Ray fire. For January 2019, the incremental gas costs arising from the fire came to $7,158,412. For March 2019, the incremental gas costs resulting from the fire amounted to $788,863. However, purchases made in February 2019 led to savings, relative to the cost of storage inventory, in the amount of $1.18 million. The PSC found "that all of the replacement purchases arising from the lack of deliverability from the Ray storage field in January through March 2019 should be included in the calculation of the disallowance." The PSC found "that the total

disallowance should be $6,766,978," and the PSC approved "a total underrecovery of $10,889,058, which includes interest in the amount of $80,835."

On October 23, 2020, Consumers Energy filed a petition for rehearing, which the PSC denied on January 21, 2021. The PSC stated that Consumers Energy had provided no basis for granting rehearing. The PSC noted that it was "empowered to consider the record evidence in this proceeding and related proceedings, and did so in finding that, under MCL 460.6h(12), ratepayers should not be held responsible for the incremental costs associated with the inability to access the gas in storage." This appeal ensued.

II. STANDARD OF REVIEW

"A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record." *In re Application of Consumers Energy Co to Increase Rates*, 338 Mich App 239, 242; 979 NW2d 702 (2021), citing Const 1963, art 6, § 28. An aggrieved party must "show by clear and satisfactory evidence that the order of the [PSC] complained of 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. A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. [*In re Application of Consumers Energy Co to Increase Rates*, 338 Mich App at 242 (citation omitted).]

"Issues of statutory interpretation are reviewed de novo." *Id*. at 243, citing *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008). "A reviewing court should give respectful consideration to an administrative agency's interpretation of statutes it is obliged to execute, but not deference." *In re Application of Consumers Energy Co to Increase Rates*, 338 Mich App at 243, citing *In re Complaint of Rovas*, 482 Mich at 108. Questions of constitutional law are likewise reviewed de novo. *In re Application of Consumers Energy Co to Increase Rates*, 322 Mich App 480, 491; 913 NW2d 406 (2017).

An order of the PSC "is unreasonable if it is not supported by the evidence." *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Coop*, 329 Mich App 163, 175; 942 NW2d 38 (2019) (quotation marks and citation omitted). The PSC's findings of fact are entitled to deference. *In re Complaint of Rovas*, 482 Mich at 101.

III. ANALYSIS

MCL 460.6h addresses gas cost recovery proceedings. In the context of gas cost recovery, "[t]he 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." *In re Application of Consumers Energy Co for Authority to Implement a Gas Cost Recovery Plan & Factors*, 278 Mich App 547, 563; 753 NW2d 287 (2008). Regarding a gas cost reconciliation proceeding, MCL 460.6h(12) provides, in relevant part:

> At the gas cost reconciliation the commission shall reconcile the revenues recorded pursuant to the gas cost recovery factor and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold by the gas utility. *The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review*. [Emphasis added.]

The applicability of the "reasonableness and prudence" standard in gas cost recovery reconciliation proceedings is also supported by the language of MCL 460.6h(13)[1] and (14).[2]

Applying the statutory "reasonableness and prudence" standard, the PSC determined that Consumers Energy's customers "should not shoulder the burden of the additional supply costs associated with the loss of access to the Ray storage field that resulted from the fire." In reaching this conclusion, the PSC relied on Consumers Energy's admission that the fire resulted from a grounding fault involving the Det-Tronics system at the Ray facility. In other words, a flaw in Consumers Energy's own equipment led to the fire. Therefore, on the basis of Consumers Energy's findings at the conclusion of its investigation of the fire, the PSC found "that the gas replacement costs resulting from the inability to access the Ray storage field were not reasonable

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[1] MCL 460.6h(13) states, in relevant part:

> In its order in a gas cost reconciliation, the commission shall require a gas utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for gas sold, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the gas supply and cost review. . . .

[2] MCL 460.6h(14) provides, in relevant part:

> In its order in a gas cost reconciliation, the commission shall authorize a gas utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for gas sold, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the gas supply and cost review. For excess costs incurred through actions contrary to the commission's gas supply and cost review order, the commission shall authorize a utility to recover costs incurred for gas sold in the 12-month period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through actions consistent with commission's gas supply and cost review order, the commission shall authorize a utility to recover costs incurred for gas sold in the 12-month period in excess of the amount recovered over the period only if the utility demonstrates that the excess expenses were reasonable and prudent. . . .

and prudent. Costs arising from the grounding fault which was the origin of the fire should be borne by the utility and not by ratepayers." The PSC acknowledged that "the weather complicated the situation, but colder than normal weather is to be expected and flexibility is built into the GCR plan for that purpose, among others."

Consumers Energy argues that its curtailment tariff required the PSC in this proceeding to regard as reasonable and prudent the costs to replace the gas that was inaccessible as a result of the Ray fire. Consumers Energy's argument is unconvincing.

Section C3.3(A) of the curtailment tariff provides:

> A. Company's Right to Curtail
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> The Company recognizes its primary public service obligation is to maintain gas service to its Customers. *If, in the event of an emergency arising out of extreme cold weather or other causes referred to as Force Majeure situations the Company determines that its ability to deliver gas may become inadequate to support continuous service to its Customers on its system, the Company shall have the right to partially or completely curtail service to each of its Customers* in accordance with the order of curtailment set forth below, irrespective of the contracts in force. This plan applies to all gas sales, transportation and storage service provided by the Company except for gas moving on the Company's gathering systems. The Company will implement this curtailment plan throughout its system to the extent reasonable and possible, consistent with its practical operation, considering such factors as system capacity and the extent to which curtailment of Customers in a specific portion of the Company's system may remedy the emergency. [Emphasis added.]

Section C3.3B addresses steps to be taken before curtailment and provides, in relevant part:

> B. Steps Prior to Curtailment
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> When there is adequate time during an emergency situation, and if applicable, the following steps will be implemented by the Company *prior to the enforcement of the curtailment plan* established by this rule.
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> * * *
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> (2) Implement contingency contracts for emergency gas supply purchases established in advance. Seek to purchase additional gas supplies at prices which shall be regarded as reasonable and prudent . . . . [Emphasis added.]

A tariff is generally applied in accordance with the plain meaning of its terms. See *In re Complaint of Bierman Against CenturyTel of Mich, Inc*, 245 Mich App 351, 360; 627 NW2d 632 (2001) (discussing the PSC's application of the plain language of a tariff); *Beaudin v Mich Bell Tel Co*, 157 Mich App 185, 188-189; 403 NW2d 76 (1986) (applying the plain language of a tariff). Also, "[p]rinciples of statutory interpretation apply to the construction of administrative

rules." *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003).

Initially, although this was not the focus of the PSC's decision, it is notable that Consumers Energy fails to adequately address the full language of § C3.3B(2) of the tariff, i.e., the provision describing the precurtailment step on which Consumers Energy relies for its argument. Consumers Energy focuses on the second sentence of that provision, which states, "Seek to purchase additional gas supplies at prices which shall be regarded as reasonable and prudent[,]" while all but ignoring the first sentence, which says, "Implement contingency contracts for emergency gas supply purchases established in advance." Section C3.3B(2) of the tariff identifies one of many steps that Consumers Energy is to take before enforcement of a curtailment plan when there is adequate time during an emergency situation. It is thus reasonable to understand the language of § C3.3B(2) as referring to a single step. Yet Consumers Energy fails to offer any analysis regarding whether or how the two sentences of that provision are to be read together. The second sentence, about seeking to purchase additional gas supplies at prices that are to be regarded as reasonable and prudent, should arguably be read as related to the first sentence, regarding the implementation of "contingency contracts for emergency gas supply purchases established in advance." In other words, the meaning of the second sentence may be limited by the language of the first sentence.[3] But Consumers Energy offers no meaningful analysis of the first sentence or how it relates to the meaning of the second sentence. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position. Failure to adequately brief an issue constitutes abandonment." *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019) (citation omitted). Consumers Energy's argument in reliance on the tariff could thus be deemed abandoned.

Moreover, to the extent that the meaning of the second sentence of this provision is limited by the first sentence, Consumers Energy's appellate presentation is deficient for an additional reason. If the meaning of the second sentence is limited by the first sentence, then Consumers Energy's entire argument in reliance on the tariff would hinge on whether the additional gas purchases were made in the implementation of the type of contingency contracts identified in the first sentence. But Consumers Energy has not presented any argument or identified any evidence that it purchased the additional gas as part of the implementation of "contingency contracts for emergency gas supply purchases established in advance."[4] Consumers Energy's failure to

[3] Such a contextual understanding of the language of this provision could be grounded in the doctrine of *noscitur a sociis*, which means, "it is known from its associates." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002) (quotation marks, brackets, and citations omitted). "This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Id*. (quotation marks and citation omitted).

[4] RCG notes that Consumers Energy has presented no evidence that it implemented any such contingency contracts. Rather, RCG says, it appears the emergency gas purchases were made on an ad hoc or spot market basis. Like Consumers Energy, RCG has identified no evidence on this point. None of our analysis should be read as suggesting that any purchases of additional gas supplies on an ad hoc or spot market basis were inappropriate during an emergency situation. The

adequately brief the tariff issue again constitutes abandonment. *Seifeddine*, 327 Mich App at 520; see also *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009) ("This Court will not search the record for factual support for a party's claim.").

But even setting all that aside, Consumers Energy has not established that the PSC failed to apply the plain language of the curtailment tariff. The PSC correctly determined that the plain language of the tariff did not require the PSC to conclude that the replacement gas costs arising from the Ray fire were reasonable and prudent. The PSC also correctly determined that the tariff did not require the PSC to allow Consumers Energy to recover such costs from its customers.

The PSC explained, "The fact that supply was safeguarded through customer curtailment (as the tariff allows), and through replacement gas purchases, does not dictate how the resulting costs must be assigned or the reasonableness and prudence of [Consumers Energy's] actions to supply fuel." The PSC noted that "the tariff does not constitute a guarantee that all replacement supply, no matter what the price, will be found to have been reasonable and prudent by the [PSC] in a later GCR reconciliation review." The PSC stated that "[t]he language of the tariff addresses actions taken prior to enforcement of the curtailment plan, and sets a goal for the utility to seek to purchase additional supply at reasonable and prudent prices."

The PSC's analysis is consistent with the language of the tariff. The tariff addresses actions to be taken by Consumers Energy before enforcement of the curtailment plan, including seeking to purchase additional gas at reasonable and prudent prices. The PSC correctly alluded to the fact that a curtailment plan for some types of customers had already gone into effect by the time of the additional gas purchases.[5] Moreover, the focus of the tariff language is on Consumers Energy's actions, not on the PSC's decision in a gas cost reconciliation proceeding. The tariff language does not dictate how the costs of additional gas supply are to be assigned. Nor does the tariff language address the reasonableness and prudence of Consumers Energy's actions to supply fuel.

Consumers Energy's position is effectively that, under the tariff, the cost of any gas purchased during an emergency, no matter what the price, must automatically be deemed reasonable and prudent and must automatically be assigned to customers. But such an expansive interpretation of the tariff not only lacks support in the language of the tariff; it would also severely

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point is merely that Consumers Energy has failed to establish that the gas purchases at issue qualify as a precurtailment step under the relevant tariff language or were shielded from the PSC's statutory authority to review whether the costs incurred were reasonable and prudent.

[5] Consumers Energy argues that it properly pursued precurtailment steps under the tariff because Consumers Energy had curtailed gas service for industrial or commercial customers but not for residential customers. But no support for such a distinction is to be found in the plain language of the tariff. As noted, § C3.3B of the tariff addresses "Steps Prior to Curtailment" and provides, in relevant part, that "the following steps will be implemented by the Company *prior to* the enforcement of the curtailment plan established by this rule." (Emphasis added.) Consumers Energy fails to establish that the additional gas purchased after the implementation of the curtailment plan constituted a precurtailment step under the tariff or that it is shielded from the PSC's statutorily authorized "reasonableness and prudence" review.

constrict or nullify in this context the PSC's statutory authority to "consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review." MCL 460.6h(12); see also MCL 460.6h(13) and (14) (providing further support for the PSC's authority to conduct a "reasonableness and prudence" review). The PSC properly declined to interpret or apply the tariff language in an unreasonably expansive manner that would conflict with the governing statutory language. See generally, *In re Procedure & Format for Filing Tariffs Under Mich Telecom Act*, 210 Mich App 533, 546, 553; 534 NW2d 194 (1995) (rejecting the PSC's reasoning that was inconsistent with statutory language). Consumers Energy's position is thus untenable because it would essentially eliminate in this context the PSC's statutory authority.

Consumers Energy makes further arguments seeking to limit the PSC's review and to exclude consideration of the cause of the fire. Consumers Energy relies on provisions of MCL 460.6h. Consumers Energy cites MCL 460.6h(1)(b), which states, " 'Gas cost recovery clause' means an adjustment clause in the rates or rate schedule of a gas utility which permits the monthly adjustment of rates for gas in order to allow the utility to recover the booked costs of gas sold by the utility if incurred under reasonable and prudent policies and practices." This provision merely provides a definition of "gas cost recovery clause" to provide for a monthly adjustment of rates on the basis of the booked cost of gas incurred through reasonable and prudent policies and practices. It does not circumscribe the PSC's authority to conduct a "reasonableness and prudence" review in a gas cost reconciliation proceeding. Consumers Energy also suggests that MCL 460.6h(13) and (14) limit the PSC's review to a utility's actions in incurring the costs. But those provisions, as explained earlier, provide support for the PSC's review in gas cost reconciliation proceedings.

Consumers Energy cannot overcome the central point: MCL 460.6h(12) broadly authorizes the PSC to "consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review." Consumers Energy is seeking to impose on its customers gas replacement costs resulting from a fire. The PSC's consideration of the circumstances surrounding the fire that led to the incurrence of the costs fell within its broad statutory authority.

Consumers Energy presents an argument in reliance on language in MCL 460.6h(6), which states, in relevant part:

> In evaluating the decisions underlying the gas cost recovery plan, the commission shall consider the volume, cost, and reliability of the major alternative gas supplies available to the utility; the cost of alternative fuels available to some or all of the utility's customers; the availability of gas in storage; the ability of the utility to reduce or to eliminate any sales to out-of-state customers; whether the utility has taken all appropriate legal and regulatory actions to minimize the cost of purchased gas; and other relevant factors.

Consumers Energy argues that, other than the catchall phrase "other relevant factors," the considerations listed in this provision pertain to a utility's decisions regarding the purchase of gas, including the volume purchased and the price paid. Consumers Energy's implication is apparently that the circumstances pertaining to the fire should be excluded from the PSC's consideration.

Consumers Energy further contends that the catchall phrase "other relevant factors" should be limited to considerations related to a utility's policies and practices or actions.

Consumers Energy's argument in reliance on MCL 460.6h(6) is unconvincing. That provision pertains to a gas cost recovery *plan* case, which is known as a gas supply and cost review. The present action is a different type of proceeding: a gas cost *reconciliation* proceeding. It is true that the two types of proceedings are not entirely unrelated. In general, reconciliation may involve adjustment, refinement, or enforcement of what was decided in the attendant plan case. *In re Mich Consol Gas Co Application*, 304 Mich App 155, 167; 850 NW2d 569 (2014). But the list of factors pertinent to a plan case and Consumers Energy's proposed limitation on the meaning of the phrase "other relevant factors" in MCL 460.6h(6) are not dispositive of the scope of the PSC's review in a reconciliation proceeding. Under MCL 460.6h(6), the PSC's role in a plan case is to "evaluate the reasonableness and prudence of the decisions underlying the gas cost recovery plan filed by the gas utility . . . ." MCL 460.6h(6). As noted, MCL 460.6h(12), which pertains to reconciliation proceedings, provides for broad review of "any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review." The PSC's consideration of the circumstances surrounding the fire that led to the incurrence of the additional costs, including Consumers Energy's admission that a grounding fault involving its own equipment led to the fire, fell within the PSC's broad review authority at the reconciliation stage under MCL 460.6h(12).

Next, Consumers Energy vaguely asserts that it has been denied due process. "Due process in a civil case requires notice and an opportunity to be heard." *In re Application of Consumers Energy Co for Authority to Implement a Gas Cost Recovery Plan & Factors*, 278 Mich App at 568. In support of its due process argument, Consumers Energy relies on *West Ohio Gas Co v Pub Utilities Comm of Ohio*, 294 US 63; 55 S Ct 316; 79 L Ed 761 (1935). In that case, a public utility commission reduced a utility company's recovery by 2% on the basis of some vague notion of fault or negligence. *Id*. at 68. The United States Supreme Court stated:

> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial. In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault. There is not even the shadow of a warning to the company that fault was imputed and that it must give evidence of care. Without anything to suggest that there was such an issue in the case, the commission struck off 2 percent: it might with as much reason have struck off 4 or 6. This was wholly arbitrary. [*Id*. (citation omitted).]

The Supreme Court concluded that the utility company had been denied a fair hearing in violation of due process requirements. *Id*. at 70-71. The Court also stated that "[g]ood faith is to be presumed on the part of" a utility company's managers and that, "[i]n the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay." *Id*. at 72. In reliance on *West Ohio*, Consumers Energy argues that "it is not permissible for a regulator to hold a utility accountable to anticipate and refute every conceivable claim of negligence or other kind of fault absent some credible claim against the utility's management policies or decisions."

Consumers Energy's reliance on *West Ohio* is misplaced. The PSC expressly stated that its decision was "*not* based on a finding of negligence . . . ." (Emphasis added.) Rather, the PSC's decision was based on its application of the "reasonableness and prudence" standard of MCL 460.6h(12). Therefore, the present case differs from *West Ohio* because the PSC did not base its decision on a vague notion of negligence or fault with respect to which Consumers Energy lacked proper notice or an adequate hearing. It has been clear throughout the proceedings that the circumstances surrounding the fire that led to the gas replacement costs were at issue. Consumers Energy was afforded notice and ample opportunity to address the issue at the evidentiary hearing and through briefing. Also, the PSC did not fail to presume good faith on the part of Consumers Energy's managers. For these reasons, Consumers Energy's due process argument is unavailing.

Finally, Consumers Energy argues that the PSC's order was not supported by competent, material, and substantial evidence. Consumers Energy acknowledges that its own investigation in docket number U-20463 found that a grounding fault in the Det-Tronics system was the underlying cause of the fire, but Consumers Energy says that there is no evidence of improper design of its equipment. Consumers Energy notes that its settlement agreement with the Staff in docket number U-20463 provided that the settlement shall not be construed as a finding or admission of liability or a violation of any law or regulation. Consumers Energy disputes the expertise of witnesses who testified regarding a potential design problem related to certain equipment at the Ray facility.

Consumers Energy's arguments are unconvincing. Consumers Energy's argument regarding the settlement agreement in docket number U-20463 is inapt. The PSC did not base its decision in this case on the settlement agreement. Rather, the PSC relied primarily on Consumers Energy's own finding that a grounding fault in its own equipment led to the fire. The fire led to the gas replacement costs that Consumers Energy seeks to impose on its customers. The reports and findings in docket number U-20463 were referenced repeatedly in the testimony in this case.[6] Consumers Energy itself participated in the proceeding in docket number U-20463 and had ample opportunity in that proceeding to present facts, arguments, and reports regarding the Ray fire. Consumers Energy says that there is no testimony from a qualified expert establishing a design

[6] Consumers Energy suggests that it was improper for the PSC to consider findings or evidence from docket number U-20463 because the PSC failed to take official notice of facts from that proceeding. But in the PSC, after RCG asked that the PSC take official notice of the investigation, Staff report, and final order from docket number U-20463, Consumers Energy opposed that request, stating, in relevant part: "Undoubtedly, the [PSC] is aware of its own orders related to the Ray facility fire. The [PSC] is aware of prior filings made by Consumers Energy. Also, the [PSC] is aware of the information contained in the Staff's Reports. *As this information is all within the* [*PSC's*] *general purview, official notice is not necessary*." (Emphasis added.) That is, Consumers Energy is taking a position on appeal that differs from what it asserted below. A party may not assert a position in the lower tribunal and then seek appellate relief on the basis of a contrary position. *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 737; 832 NW2d 401 (2013). In any event, as discussed, the findings in docket number U-20463 were referenced repeatedly during the testimony in this case. Consumers Energy did not object or move to strike that testimony. The PSC did not err in considering findings from docket number U-20463.

flaw in Consumers Energy's equipment. Again, however, Consumers Energy itself found that a grounding fault in its own equipment led to the fire. This alone supports the PSC's reasoning.

Consumers Energy notes that violations of administrative rules or regulations do not constitute negligence per se but may provide evidence of negligence. See *Zeni v Anderson*, 397 Mich 117, 142; 243 NW2d 270 (1976) (stating that violations of administrative regulations constitute only evidence of negligence, not negligence per se). Again, however, the PSC's decision was not based on a finding of negligence, let alone negligence per se. This is not a common-law tort action in which the other parties are seeking to hold Consumers Energy liable for negligence. This is an administrative gas cost reconciliation proceeding in which Consumers Energy seeks to impose gas replacement costs on its customers. The PSC correctly applied the statutory "reasonableness and prudence" standard rather than common-law negligence principles.

Accordingly, we conclude that Consumers Energy's appellate arguments lack merit. The PSC's order disallowing the recovery of costs to replace gas that was inaccessible because of the Ray fire was not unlawful or unreasonable.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Noah P. Hood