

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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

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CONSUMERS ENERGY COMPANY,  
  
Petitioner-Appellant,

FOR PUBLICATION  
December 29, 2022

v

MICHIGAN PUBLIC SERVICE COMMISSION  
and RESIDENTIAL CUSTOMER GROUP,

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

Appellees.

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

JANSEN, J. (*dissenting*)

For the reasons that follow, I respectfully dissent. I would reverse the Michigan Public Service Commission (PSC) decision approving with modifications Consumers Energy’s application for gas supply cost recovery reconciliation for the 12-month period ending March 31, 2019, and remand for further proceedings. The PSC ultimately concluded that Consumers Energy’s customers should not “shoulder the burden” of the additional supply costs because Consumers Energy admitted in a separate case that the Ray facility fire was the result of a grounding fault involving the Det-Tronics system, and therefore the gas replacement costs were not “reasonable and prudent,” despite the cold weather. I would conclude that the PSC abused its discretion, and the order disallowing the recovery of costs to replace gas that was inaccessible because of the Ray fire was unreasonable and unlawful.

The gas cost recovery reconciliation process is governed by MCL 460.6h, added by 1982 PA 304 (“Act 304”). “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” of gas cost recovery. *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) (*In re Consumers Energy*). 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.

Consumers Energy argues that under its curtailment tariff, the purchase of the extra gas was reasonable and prudent. Section C3.3(A) of the curtailment tariff provides:

A. Company's Right to Curtail

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 provides the steps to be taken before curtailment and states, in relevant part:

B. Steps Prior to Curtailment

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.

\* \* \*

(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 . . . .

“Principles 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). Tariffs are to be applied according to their plain language. See *In re Complaint of Bierman Against CenturyTel of Mich, Inc*, 245 Mich App 351, 360; 627 NW2d 632 (2001); *Beaudin v Mich Bell Tel Co*, 157 Mich App 185, 188-189; 403 NW2d 76 (1986).

The PSC failed to apply the plain language of MCL 460.6h(12) and the curtailment tariff. The tariff specifically provides in Section C3.3(A) that in the event of extreme cold weather, if the Company determines that its gas supply may become inadequate to provide continuous service, the Company may curtail service. Section C3.3B provides that *prior* to the enforcement of curtailment, “[w]hen there is adequate time during an emergency situation,” the Company may buy additional gas “at prices which shall be regarded as reasonable and prudent.” During the polar vortex, the governor declared a state of emergency because of extreme cold temperatures. Consumers Energy had curtailed service for industrial and commercial customers in an attempt to preserve resources for residential customers. It had not yet curtailed service for residential consumers. However, given the fire at the Ray facility, it can hardly be said that there was “adequate time during an emergency situation” available. The combination of the cold weather and the Ray fire necessitated the purchase of additional gas so the Company would not have to curtail service for its most vulnerable customers.

There is no caselaw interpreting this statute for purchasing additional gas supplies under similar emergency conditions. However, in *In re Consumers Energy*, 278 Mich App at 550, Consumers Energy applied to reopen a gas cost recovery plan case after a settlement was reached between Consumers Energy, the Staff, the attorney general, and the Residential Ratepayers Consortium, regarding the rates to be charged customers because hurricanes had struck the Gulf of Mexico, dramatically increasing natural gas prices. The case was reopened, and a new settlement agreement was entered, increasing the rate price, which was approved by the PSC. *Id.* at 551. The Michigan Community Action Agency Association (MCAAA) appealed the orders entered by the PSC reopening the case and approving the gas cost recovery plan. *Id.* at 549. This Court affirmed the orders, reasoning that the PSC followed proper procedure in reopening the case and properly determined that the revised gas cost recovery plan was reasonable and prudent. *Id.* at 552-568. Although the case at hand concerns gas cost reconciliation proceedings rather than a gas cost recovery plan, and therefore is governed by separate provisions of MCL 460.6h, *In re Consumers Energy* provides a persuasive example of reasonable and prudent actions taken by Consumers Energy in response to circumstances affected by extreme weather.

Additionally, there have not been any complaints about the actual rate of cost at which the additional gas was purchased, or that Consumers Energy, by way of example, is trying to recover an amount from customers in excess of what was spent. See *Mich Gas Utilities v Public Serv Comm*, 200 Mich App 576, 584; 505 NW2d 27 (1993) (“a gas utility [may] recover from customers any net amount by which the rates collected during the reconciliation period were less than the actual amount reasonably and prudently incurred by the utility for its gas supply and not otherwise lawfully precluded by the PSC.”). Although I disagree with the Company’s argument that under the tariff, the cost of *any* gas purchased during an emergency, no matter the price, must automatically be deemed reasonable and prudent and assigned to customers, given the emergency circumstances, Consumers Energy’s actions were reasonable and prudent under MCL 460.6h(12) and appropriate under the tariff. The PSC abused its discretion in concluding to the contrary.

I would also find that the PSC’s consideration of the cause of the fire was an abuse of discretion. Although MCL 460.6h(12) 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,” there was no formal determination that Consumers Energy was responsible for the fire. The PSC relied on

evidence from the separate case related to the fire; however, that case resulted in a settlement. Consumers Energy's 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 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 there is no evidence of improper design of its equipment. There was no evidence that Consumers Energy designed the plant, or that they were aware of any defect. The plant had been properly functioning since its inception in 2013, so any defect would have been latent until the extreme cold temperatures of the polar vortex occurred. Thus, the PSC's reliance on the cause of the fire as an alleged design defect to preclude recovery of costs was an abuse of discretion and not supported by competent, material, and substantial evidence.

Under these circumstances, I would conclude that Consumers Energy's purchase of additional gas was reasonable and prudent, and the Company is entitled to recover those costs. Therefore, I would reverse the PSC order disallowing recovery by Consumers Energy of the incremental gas costs attributable to the Ray, and remand this matter for further proceedings.

/s/ Kathleen Jansen