STATE OF MICHIGAN

COURT OF APPEALS

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES.

RESIDENTIAL CUSTOMER GROUP,

Intervenor-Appellant,

v

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

UNPUBLISHED
July 20, 2023

No. 360034
Public Service Commission
LC No. 00-020963

Before: M. J. KELLY, P.J., and SHAPIRO and REDFORD, JJ.

PER CURIAM.

Appellant, the Residential Customer Group (RCG), appeals as of right the December 22, 2021 order of the Michigan Public Service Commission (PSC) approving new electric rates for Consumers Energy Company insofar as the PSC declined to offset or otherwise adjust the new rates by the $28 million in excess profits Consumers Energy donated to its unregulated private entity, the Consumers Energy Foundation, and by an additional $18 million in excess profits it

invested in six internal programs, the latter of which the PSC approved in an earlier, ex parte order.[1] We affirm.

I. STANDARDS OF REVIEW

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. See also *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). A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

II. CASE NO. U-20932

The PSC's Case No. U-20932 concerned Consumers Energy's plans for an over-recovery of $56 million that resulted primarily from weather conditions and unexpectedly high reliance on residential service. The PSC acknowledged Consumers Energy's plan to donate half of that over-recovery to its unregulated foundation, without suggesting that its approval was required, and approved the investment of the other half in programs that this Court recognized as "benefit[ing] Consumers' customers and their communities."[2] *In re Application of Consumers Energy for One-Time Revenue Refund*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 357466), p 1.

Case No. U-20932 was not a contested rate case, but rather an uncontested accounting case. RCG claimed an appeal from the resulting orders, but this Court dismissed it on the ground that RCG was not an aggrieved party and thus lacked appellate standing. *Id.* at 1-2. Much of RCG's advocacy in this case challenges the propriety of the actions taken and approved in Case No. U-20932. But such collateral challenges to orders over which this Court concluded appellant lacked standing to appeal are not properly before this Court now. "It is well established in Michigan that, assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding[.]" *Workers' Compensation Agency Dir v MacDonald's Indus*

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[1] See *In the Matter of the Application of Consumers Energy Co for Approval of a One-Time Voluntary Refund*, order of the Public Service Commission, entered May 13, 2021 (Case No. U-20932), appeal dismissed sub nom *In re Application of Consumers Energy for One-Time Revenue Refund*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 357466).

[2] In this case, RCG's witness opined that $18 million of the latter investment was attributable specifically to Consumers Energy's electric division, which is why RCG frames its objection in reference to that figure.

Prod, Inc, 305 Mich App 460, 474; 853 NW2d 467 (2014). Accordingly, RCG must join this Court in presuming the lawfulness and reasonableness of the PSC's orders in that earlier case.[3] See MCL 462.25; *Mich Consol Gas Co*, 389 Mich at 635-636.

III. OVER-RECOVERY

RCG argues that the new rates, as approved in the instant case, are unlawful and unreasonable because those new rates were calculated without deeming the past over-recovery as funds available to meet the cost of service in the future. We disagree.

It is important to distinguish correcting for an under- or over-recovery resulting from old rates to avoid repeating similar miscalculations from doing so by adjusting the new rates with the effective goal of canceling that under- or over-recovery. This Court has explained:

> Past expenses and costs are factors to be considered in determining what the new rate should be so it is fair and reasonable. Past expenses and costs are not recoverable under a future rate. If a rate structure is wrong and causes a utility to lose $1,000,000, the utility cannot recover that in its new rate. The commission must certainly raise the rate so the loss will not continue. If the rate structure is wrong so the utility gains $1,000,000 more profit than is reasonable and just, the commission cannot order a refund. It can certainly lower the rate so there will be no excess profit in the succeeding years. [*Detroit Edison Co v Pub Serv Comm*, 82 Mich App 59, 68; 266 NW2d 665 (1978),[4] aff'd 416 Mich 510; 331 NW2d 159 (1982).]

Our Supreme Court further explained:

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[3] Accordingly, we decline to consider RCG's challenges concerning whether Consumers Energy's investment of over-recovery funds in several internal programs was properly characterized as a "refund," or whether its donation to its private foundation effectively constituted a violation of its ratepayers' constitutional protections against being forced to support that foundation's viewpoints. See US Const, Am I; Const 1963, art 1, § 5.

Further, because Case No. U-20932 was an uncontested accounting case, and not a contested rate case, we reject RCG's assertion that the timing of that case, in relation to the instant or preceding rate cases, resulted in any overlapping or "pancaking" of rate cases as prohibited by MCL 460.6a(1), (5), and (6).

[4] We acknowledge that RCG's objection is not that the PSC did not insist on necessarily-reduced rates in response to the subject over-recovery, but rather that, after that over-recovery, the PSC approved a rate increase with no adjustments reflecting that excess. However, we read *Detroit Edison*'s statements regarding how the PSC might respond to an over-recovery as a command to identify what caused the over-recovery and guard against repeating the miscalculation, not necessarily to lower calculated future rates by the amount of the past over-recovery. That would constitute retroactive ratemaking, which, as discussed in *Detroit Edison*, is impermissible.

> "[A]ny rate . . . prescribed by the commission and put into effect by the carriers may be confidently collected and retained by them as their very own, without misgiving that at some future time a further hearing of the commission may be had and more evidence taken and a different conclusion reached and those rates condemned as unreasonable and reparation certificates allowed for the difference between the rates which the commission did authorize and the rates which it should have authorized." [*Mich Bell Tel Co v Mich Pub Serv Comm*, 315 Mich 533, 550; 24 NW2d 200 (1946), quoting with approval *State v Pub Serv Comm of Kan*, 135 Kan 491, ___; 11 P2d 999, 1006-1007 (1932).]

The United States Supreme Court has similarly held that "the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations." *Bd of Pub Utility Comm'rs v New York Tel Co*, 271 US 23, 32; 46 S Ct 363; 70 L Ed 808 (1926). The caselaw thus well establishes that, after lawful rates have been paid and received, neither the ratepayers nor the utilities should be concerned that what hindsight has revealed about the reasonableness of those rates will render ratepayers vulnerable to having to pay more, or utilities vulnerable to having to receive less, after all.

Accordingly, as this Court noted in its opinion dismissing RCG's appeal of Case No. U-20932, "ratepayers are not aggrieved when a utility decides to expend excess revenues in ways other than offering immediate and direct rate relief to its customers." *In re Application of Consumers Energy*, unpub op at 3. In this case, retention, investment, or disbursement of the over-recovery with which RCG takes issue was a matter for Consumers Energy, its parent company, or its shareholders to decide. Consumers Energy thus had the broad discretion to use those funds in ways that might, or might not, directly reduce future costs of operation for its ratepayers. RCG's argument that Consumers Energy's decision to dispose of those funds in ways other than what RCG might have preferred rendered the PSC's order approving new rates in this case unlawful or unreasonable, is thus inapt. In short, Consumers Energy was not required to use the excess profits in the manner desired by RCG.

At oral argument, the participating parties attributed the subject over-recovery mainly to unexpected weather conditions. In addition, the PSC noted in its order that the excess funds were largely the result of "shifting . . . usage associated with the effects of the ongoing COVID-19 pandemic."[5] Consumers Energy and the PSC were thus entitled to look at the over-recovery as a one-time circumstance.[6] RCG has not suggested that such pandemic-related pressures have carried over in full force to the period in which the new rates apply, nor has it attempted to identify any

[5] *In the Matter of the Application of Consumers Energy Co for Authority to Increase Rates*, order of the Public Service Commission, entered December 22, 2021 (Case No. U-20963), p 243.

[6] Administrative agencies often have to make decisions on the basis of estimates or expectations which, in hindsight, will be off the mark, but final administrative decisions are not mere tentative orders subject to revision when information coming to light with the passage of time confirms or belies the accuracy of the estimates upon which the agencies relied.

systemic and persisting flaw in the old rate calculations that the PSC should have insisted be corrected to prevent a repeat of those excessive returns with the new rates. We also note that the PSC cautioned that if overcollection continued to occur, it "is likely to lead to the need for additional voluntary refunds in the future," and urged the parties to review forecasted sales "with a higher level of scrutiny in future rate cases if this trend persists."[7]

For these reasons, we conclude that RCG has failed to show that the PSC's order approving the new rates in this case was unlawful or unreasonable.

Affirmed.

/s/ Michael J. Kelly
/s/ Douglas B. Shapiro
/s/ James Robert Redford

[7] *In the Matter of the Application of Consumers Energy Co* (Case No. U-20963), p 243.