Court of Appeals, State of Michigan

ORDER

In re Application of Consumers Energy to Increase Electric Rates

Docket No. 317434; 317456

LC No. 00-017087

Peter D. O'Connell
Presiding Judge

Karen M. Fort Hood

Michael F. Gadola
Judges

The Court orders that the motion for reconsideration is DENIED.

O'Connell, P.J., would GRANT the motion for reconsideration and issue his attached opinion to clarify the previous opinion, *In re Application of Consumers Energy to Increase Electric Rates*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2015 (Docket Nos. 317434; 317456).

Gadola, J., writes separately to make clear to the parties that the scope of the remand from this Court remains as set forth in *In re Application of Consumers Energy to Increase Electric Rates*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2015 (Docket Nos. 317434; 317456).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL 22 2015
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL, Appellant, v MICHIGAN PUBLIC SERVICE COMMISSION, Appellee, and CONSUMERS ENERGY COMPANY, Petitioner-Appellee.	UNPUBLISHED No. 317434 Public Service Commission LC No. 00-017087
MICHELLE RISON, ANN DEROUIN, MITCHELL DEROUIN, BILLIE J. PREKLESIMER, JOYCE HORNESS, MARCUS HORNESS, MIKE KEMPF, SANDY KEMPF, DAN MARTIN MILLS, CHERYL MCKINNEY, GLORIA GARDNER, KERRY KRENTZ, HEATHER WITKOWSKI, CHRISTINE HUNT, SCOTT BRASPENNINX, and PAM DAZEY, Appellants, v MICHIGAN PUBLIC SERVICE COMMISSION, Appellee, and CONSUMERS ENERGY COMPANY, Petitioner-Appellee.	No. 317456 Public Service Commission LC No. 00-017087

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

O'CONNELL, P.J.

These cases involve two issues of first impression in Michigan. First, the scope of the Michigan Public Service Commission's (PSC) authority when analyzing rate increases for the utilities, and second, the standing of the individual appellants to pursue this appeal. For the reasons stated in this opinion, I believe the Michigan Supreme Court should grant leave and clarify these important jurisprudential issues before we remand this case to the PSC.

These cases come to this Court with an unconventional procedural history. The individual appellants did not participate in the proceedings below, but because MCL 462.26(1) allows a "party in interest" to appeal as of right from an order of the PSC "fixing any rate or rates, . . . regulations, practice or services," a prior panel of this Court determined that the individual appellants had standing to appeal. On appeal, the individual appellants raise issues that the proceedings below only partially addressed. Further, they claim that the Attorney General's interest in the case below was significantly different than their interests on appeal. Because we were unable to fully resolve in their entirety the individual appellants' and Attorney General's issues on appeal, we remanded this case to the PSC for further proceedings.

In our prior opinion, I voted to remand this case to the PSC. *In re Application of Consumers Energy to Increase Electric Rates*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2015 (Docket Nos. 317434 & 317456). In part, that vote was because of the strange procedural history of this case and because the individual appellants did not have an opportunity to present their case to the PSC. The PSC then filed a motion for reconsideration

This opinion is an attachment to the order denying reconsideration in Docket Nos. 317434 and 317456.

of our prior opinion. I write to clarify why I voted to remand this case to the PSC for further proceedings.

In its motion for reconsideration, the PSC requests that the State of Michigan forego any further hearings in these cases.[1] It contends that no further hearings are necessary concerning the advanced metering infrastructure (AMI) smart meter program. The PSC implies that our prior remand instructions, in essence, exceed the scope of its responsibility. Specifically, the PSC contends that it has conducted sufficient hearings as it relates to "cost of service principles" on all issues and it need not conduct further hearings.

In part, the PSC is correct: it has conducted hearings on cost of service principles. But it appears, based on the lower court record, that the prior hearings were limited only to monetary issues. In my opinion, a cost benefit analysis has more than one dimension.[2] Because the PSC

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[1] As a result of our prior remand opinion, I fully expected the PSC on remand to grant the individual appellants a full and fair due process hearing so that they would have their day in court and would be able to air their concerns about the AMI program. In our form of government, the least a governmental body should do is listen to its citizens and provide a forum to allow them to air their grievances. Unfortunately, in its motion for reconsideration, the PSC claims it has already done so: "What this Court is requiring the Public Service Commission to do on remand has already been done." The PSC claims, "The Commission has already 'thoroughly' addressed the issues this Court remanded." First, if the above statements were correct, I would not have voted to remand this case for further proceedings. Second, the individual appellants in Docket No. 317456 have not had the opportunity to present any evidence to the PSC. I for one am curious to see what proofs will be presented. I concede a hearing was held below, but supplementing this record with additional facts and conclusions of law that actually support the PSC's ultimate decision and giving the individual appellants their day in court is a fundamental requirement of our form of government.

[2] As the United States Supreme Court has recently stated, " 'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost. . . . including, for instance, harms that regulation might do to human health or the environment." *Michigan v*

has not weighed the burdens, benefits, costs, and advantages of the entire AMI program, I am convinced that its decision is not supported by competent, material, and substantial evidence. See *In re Applications of Detroit Edison Co*, 296 Mich App 101, 115; 817 NW2d 630 (2012).

Notwithstanding the PSC's arguments, the individual appellants, and in part the Attorney General, argue on appeal that the utility and the PSC's cost-benefit analysis is flawed. The individual appellants argue that the opt-out program violates federal and state laws governing disability and ask the PSC to consider additional health, safety, privacy, and disability-related cost issues, including that smart meters may place individuals with electro-sensitivity issues, pacemakers, and heart-related issues in danger. On reconsideration, the PSC is adamant that its only responsibility is to approve tariffs based on the cost-of-service principles. The PSC argues that it has adequately completed its responsibility in this regard and need not conduct any further proceedings.

For the reasons stated in this opinion, I conclude that a cost-benefit analysis should include health, safety, and privacy issues. Since the individual appellants have standing to appeal the PSC's order and have not had the opportunity to present these issues to the PSC, I would deny the PSC's request to forego further hearings on these important matters.

I. FACTS REGARDING JURISDICTION

EPA, ___ US ___; ___ S Ct ___; ___ L Ed 2d ____ (2015); slip op at 29. "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Id.* While the holding in that case is not specifically applicable to this case, the general principle regarding nonmonetary costs applies.

In a June 28, 2013 order, the PSC approved the application of petitioner-appellee Consumers Energy Company (Consumers) "for authority to continue the advanced metering infrastructure (AMI) program and implement a non-transmitting meter provision." This program involves the use of transmitting meters, informally called "smart meters," which employ a cellular-based communications system to record and transmit the amount of electricity used by a customer. In Docket No. 317456, multiple pro-per appellants appealed from the June 28, 2013 order of the PSC in Case No. U-17087. In Docket No. 317460, Matthew Crehan filed a claim of appeal from the same June 28, 2013 PSC order. On August 19, 2013, this Court entered an order consolidating these two appeals with the Attorney General's appeal from the June 28, 2013 order in Docket No. 317434.

On appeal, the pro-per appellants and Crehan (collectively, the individual appellants) are concerned that smart meters create potential health and privacy issues. Appellants also contend that the charges to participate in an "opt-out" program, a program to avoid having smart meters installed on their homes, are excessive.

In a motion to dismiss, Consumers argued that the individual appellants are not aggrieved parties with standing to appeal under MCR 7.203(A)(2) because they did not intervene in the PSC proceedings in this matter. In essence, since they did not participate below, Consumers argued they cannot participate in this appeal. In addition, Consumers argued that the individual appellants are not aggrieved parties because they have failed to allege or demonstrate a concrete or particularized injury arising from the June 28, 2013 order. Consumers argued that the present Case, No. U-17087, was limited in scope "to the economics of fixing [Consumers's] electric

rates and the reasonableness of charges contained within [Consumers] AMI opt-out tariff as they relate to cost-of service principles."

Consumers also asserted that the purpose of the present case was not to decide whether Consumers could install smart meters on any particular residence in its service territory. Consumers further argued that the Attorney General fully represented the interests of the individual appellants as "purported Consumers Energy customers" in the proceedings below, and that the Attorney General continues to represent the appellants the Attorney General's appeal in Docket No. 317434. In support of this position, Consumers noted that the Attorney General filed a notice of intervention in the proceeding for and on behalf of the people of the State of Michigan and that the Attorney General stated in that notice of intervention that the interests of Consumers' ratepayers is a public one "being common among virtually all ratepayers" in Consumers' service area. From this, Consumers argues that any appeal by the individual appellants based on the lawfulness of the PSC's rate decisions would be "unjustifiably redundant and outside the scope of what the law provides for the right to appeal an order" and that the right to appeal such an order would significantly impede the regulatory process.

On October 4, 2013, the PSC filed a concurrence in support of Consumers' motion to dismiss. The PSC additionally argued in order to have standing to appeal the PSC's order, a party must have an interest in the subject matter of the litigation and must show that the order directly affects the party's rights or property. While acknowledging that it is clear that the individual appellants have an interest in the AMI program, the PSC asserted they did not establish a direct relationship between them and Consumers' investment in AMI program.

Crehan did not file an answer to the motion to dismiss, but the pro-per appellants in Docket No. 317456 filed an answer and supporting brief. The pro-per appellants argued that they are aggrieved parties within the meaning of MCR 7.203(A)(2) because the June 28, 2013 order requires them to pay "unjust fees" to escape from a "known harm" of health and privacy issues with the AMI program. They claimed that research published in peer-reviewed journals shows that the type of radiation emitted by smart meters can "wreak havoc" with the human nervous system and "interfere with calcium transport on cell membranes," and this new source of radiation adds to what may already be excessive levels from cell towers and other sources. Appellants further indicate that some appellants are "electro-sensitive," evidently indicating that they are or may be particularly at risk from negative health effects from the smart meters, and that the PSC failed to provide them reasonable accommodation under the Americans with Disabilities Act, 42 USC 12111 *et seq*, or the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. In addition, the pro-per appellants claimed that they would "present a prima facie case, based on publicly available articles in professional journals, that the intent of the smart meters is to establish a regime of detailed monitoring and ultimately control of how homeowners can use electrical energy" and seek to establish "the much publicized fact that the industry plans to use the new smart meters to communicate with a new generation of 'smart appliances' now being developed by Whirlpool and others."

The pro-per appellants maintained that the Attorney General did not represent their interests below because he focused entirely on rate and cost issues, not the health and privacy concerns that appellants allege can only be addressed by preserving the right of customers to keep an analog meter as the defined opt-out meter. Further, the pro-per appellants disagree with

Consumers' statement that the proceeding below was limited to fixing rates. Finally, the pro-per appellants claimed that they were not given fair notice or opportunity to participate in the proceeding below. In specific response to the PSC's answer, the pro-per appellants indicated that it is not necessary for them to have a direct financial stake in Consumers' investment in AMI in order to be aggrieved by the unjust fees they must pay to avoid their health and privacy concerns.

II. PRIOR RULING ON JURISDICTION

In a prior order, this Court denied the motion to dismiss the appeals in Docket Nos. 317456 and 317460. *In re Application of Consumers Energy to Increase Electric Rates*, unpublished order of the Court of Appeals, issued December 6, 2013 (Docket Nos. 317460 and 317456). This Court's rational was that MCL 462.26(1) allows "any common carrier or other party in interest" to appeal as of right to this Court from orders of the PSC "fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services." The Court entirely rejected Consumers' standing argument because we reasoned that requiring a person or entity to become a party to the case in order to appeal the order would render the words "in interest" in the phrase "party in interest" nugatory or mere surplusage. See, e.g., *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). The Court concluded that, by using the broader phrase "party in interest" instead of merely "party," the Legislature has allowed persons other than those who were parties to the proceedings below to appeal the relevant types of orders to this Court.

Consumers cited *American States Ins Co v Albin*, 118 Mich App 201, 210; 324 NW2d 574 (1982), lv den 417 Mich 955 (1983), in support of its position that a party must have intervened in the PSC proceedings to be an aggrieved party with standing to appeal. But this Court noted that *American States Ins Co* is distinguishable because it involved an appeal from circuit court proceedings. This Court reasoned that, regardless of what is required to constitute an aggrieved party with standing to appeal from a circuit court case, the Legislature has specifically provided in MCL 462.26 that a "party in interest" may appeal from the relevant type of order.

Further, this Court concluded that the appellants and Crehan had a concrete and particularized interest in this appeal. The order allowed Consumers to charge customers to retain their analog meters—an "up front" fee of $69.39 before the smart meter was installed or $123.91 after installation—as well as an additional $9.72 monthly charge. At minimum, it appeared to this Court that those charges directly affected appellants and Crehan.

Finally, this Court concluded that Consumers and the PSC had established no basis to dismiss the individual appellants' appeals on the basis that they are required to accept the Attorney General's representation of their interests. It is a well-established practice for natural persons to act in pro per in this Court. This Court, therefore, concluded that appellants had jurisdiction to pursue their appeals.

III. CURRENT APPEAL

After hearing oral arguments on April 10, 2015, this panel issued the following opinion:

In these consolidated cases, the Attorney General and Michelle Rison, et al., appeal a June 28, 2013 order issued by the Michigan Public Service Commission (PSC) approving an application by Consumers Energy Company (Consumers Energy) for a rate increase to continue funding, among other things, its advanced metering infrastructure (AMI) program, and approving tariffs for customers who elect to opt-out of the AMI program. For the reasons below, we affirm the stipulation and order for the rate increases in Docket No. 317464, but because of the numerous issues raised on appeal in Docket No. 317456 concerning tariffs for customers who elect to opt-out of the AMI program, we remand those issues to the PSC and direct the PSC to conduct a contested case hearing on the opt-out tariff. We direct the PSC to issue a detailed opinion with sufficient facts and conclusions of law that allows this Court to review the entire scope of the unusual opt-out tariff.

I. BACKGROUND

Several years ago, Consumers Energy began implementing an AMI[1] program in Michigan. On November 4, 2010, the PSC issued an order in Case No. U-16191 that approved Consumers Energy's pilot AMI program, but required Consumers Energy to meet certain conditions, such as providing information on the benefits and costs of the program, before approving full deployment of the AMI program. In *In re Application of Consumers Energy Co to Increase Rates*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket Nos. 301318 and 301381), this Court affirmed the PSC's decision regarding Consumers Energy's pilot AMI program. On June 7, 2012, the PSC issued an order in Case No. U-16794 authorizing Consumers Energy to proceed with Phase 2 of its AMI deployment program. In that case, the PSC adopted $44.8 million in expenditures for the AMI program in Consumers Energy's rate base.

On September 19, 2012, Consumers Energy filed an application requesting rate relief in the case underlying this appeal, Case No. U-17087, to cover, among other things, its ongoing investments associated with the AMI program. In addition, Consumers Energy sought approval of opt-out tariffs for customers who did not wish to participate in the AMI program. On October 19, 2012, an administrative law judge (ALJ) granted intervenor status to the Attorney General.

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[1] An AMI meter, also known as a smart meter, is capable of collecting near-real-time data on a customer's energy usage and reporting the data to the utility at frequent intervals. *In re Applications of Detroit Edison Co*, 296 Mich App 101, 114; 817 NW2d 630 (2012).

On May 7, 2013, the parties filed a settlement agreement in which they agreed to an annual rate increase of $89 million. However, in the agreement, the Attorney General reserved two issues for future resolution, including (1) a request to the PSC "to direct Consumers Energy to suspend the [AMI] program," and (2) an objection "to the amount of the 'opt-out' fee." The PSC entered an order on May 15, 2013, approving the settlement agreement. Thereafter, the Attorney General challenged the PSC's continued support of Phase 2 of Consumers Energy's AMI program and challenged Consumers Energy's application for approval of its opt-out tariffs.

In response, Consumers Energy argued that it prepared an updated business case analysis for its AMI program in March 2012, and that the analysis indicated a 20-year positive net present value (NPV) of $42 million for the AMI program. Consumers Energy noted that the Attorney General also sought suspension of its AMI program in Case Nos. U-16191 and U-16794 on the ground that the cost/benefit analysis used in each case was flawed, but that the PSC rejected the Attorney General's request in each case. The Attorney General argued that the PSC should suspend Consumers Energy's AMI program until a cost/benefit analysis showed that the program would bring value to customers. The Attorney General asserted that its analysis showed that the AMI program had a negative NPV, and that Consumers Energy's testimony regarding savings from the AMI program was speculative.

On June 28, 2013, the PSC issued an order approving Consumers Energy's continuation of the AMI program and approving Consumers Energy's opt-out tariffs. The Attorney General (Docket No. 317434) and Michelle Rison, et al. (Docket No. 317456)[2] now appeal from the PSC's June 28, 2013, order.

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[2] Appellants in Docket No. 317456 were not parties to the proceedings below. These appellants claim entitlement to an appeal as of right under MCL 462.26(1), which states the following:

> Except as otherwise provided . . . any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals. . . .

Appellants claim they are parties in interest under the statute because they are customers of Consumers Energy who will be required to pay tariffs under the opt-out program. The phrase "party in interest" in MCL 462.26(1)

II. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classifications and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *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 satisfactory 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 is 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 must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. A reviewing court gives due deference to the PSC's administrative expertise and is not to 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). "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. DOCKET NO. 317434

In Docket No. 317434, the Attorney General argues that the PSC erred in approving the continuation of Phase 2 of Consumers Energy's $750 million AMI program because the record lacked competent, material, and substantial evidence demonstrating that the costs of the AMI program outweighed its benefits. The PSC first argues that the Attorney General lacks standing to challenge the June 28, 2013, order in this case. A party must be aggrieved by a lower court's decision in order to have standing to bring an appeal from that decision. MCR 7.203(A); *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co*, 475 Mich at 291 (quotation marks and citation omitted).

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is undefined in the statute, and it is unclear whether this phrase permits any *person* with an interest in the proceedings to file an appeal as of right, or whether it requires that such a person first be a *party* to the proceedings to claim such an appeal. On remand, the PSC shall determine if these parties have standing to proceed below.

MCL 462.26(1) provides that "any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals." The Attorney General gave notice of intervention and was granted intervenor status in this case below. The Attorney General had the statutory right to intervene to represent the interests of the people of the state, MCL 14.28, and he stated that he intervened because the case would affect rates paid by Consumers Energy's customers. The June 28, 2013, PSC order approved, among other things, opt-out tariffs for Consumers Energy's customers. Thus, the Attorney General was a party in interest with standing to appeal the order under MCL 462.26(1).

Although the Attorney General has standing to bring this appeal, we conclude that the stipulation to the $89 million increase forecloses any objection that the Attorney General has to the rate increase.

As part of Case No. U-17087 underlying this appeal, the Attorney General was permitted to contest Consumers Energy's requested rate increase associated with the 2013 through 2014 portion of Phase 2 of its AMI program. See MCL 462.26(1). However, we determine that the Attorney General, on appeal, may not contest the rate increase because the parties stipulated in the May 7, 2013, settlement agreement to an $89 million revenue increase that covered, in part, Consumers Energy's ongoing investments in its AMI program. The agreement stated the following:

> The Attorney General has requested the Commission to direct Consumers Energy to suspend the Advanced Metering Infrastructure ("AMI") program, and in the event the program continues, has objected to the amount of the "opt-out" fee. These issues are not resolved as part of this settlement. The parties request the Commission to address these issues based upon the initial and reply briefs filed pursuant to the schedule established by the Administrative Law Judge in this case. *The parties agree that the $89.0 million annual revenue increase and associated rates specified in this Settlement Agreement shall not be affected by the Commission's ruling on this issue. . . .* [Emphasis added.]

Because the Attorney General stipulated to the $89 million rate increase that covered, in part, the 2013 through 2014 portion of Phase 2 of Consumers Energy's AMI program, the Attorney General has not presented any issues warranting relief.

IV. DOCKET NO. 317456

A. AUTHORITY TO APPROVE AMI OPT-OUT PROGRAM

Appellant customers contend that the PSC lacked the statutory authority to impose an opt-out program on customers who do not wish to participate in the AMI program, and that the PSC should have considered an opt-in program instead. Because this issue was not raised below, we review the unpreserved claim for outcome-determinative plain error. *In re Application of Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

The PSC possesses only those powers conferred upon it by the Legislature, and thus has no authority to make management decisions on behalf of utilities. *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 148-150; 428 NW2d 322 (1988) (holding that the PSC lacked authority to forbid the operation of a facility). However, under MCL 460.6(1), the PSC has broad authority to regulate reasonable rates for all public utilities. Within its ratemaking authority, "[t]he PSC has discretion to determine what charges and expenses to allow as costs of operation." *Ford Motor Co v Pub Serv Comm*, 221 Mich App 370, 375; 562 NW2d 224 (1997).

In this case, the PSC's June 28, 2013, order approved tariff rates for customers who elected either to retain a standard meter or to replace a transmitting AMI meter with a standard meter. The approved rates were based on the PSC's determination of the actual costs associated with maintaining equipment and services for customers with non-transmitting meters. A decision to impose charges and expenses based on a utility's costs of operation is well within the ratemaking authority of the PSC. *Ford Motor Co*, 221 Mich App at 375. Accordingly, the PSC did not exceed its statutory authority.

B. IMPOSITION OF FEES ON OPT-OUT CUSTOMERS

Appellant customers argue that the PSC's approval of the tariffs requiring customers who opt-out of the AMI program to pay a one-time charge of either $69.39 or $123.91 and a monthly charge of $9.72 was unjust, unreasonable, and unsupported by evidence in the record. At oral argument before this Court, the parties raised numerous arguments regarding whether the tariff amounts approved by the PSC represented the actual costs associated with continued use of analog meters, and whether any of these costs were already accounted for in the utility's rates. Unfortunately, it appears that these issues were given only cursory analysis in the PSC lower court record. We conclude that the record on this issue is inadequate to support an informed decision by the Court at this time. Accordingly, we remand this issue to the PSC to conduct a con-

tested case hearing on this significant issue.[3] The parties are entitled to present their positions, and the PSC shall issue a written opinion on its findings of fact and conclusions of law.

Docket No. 317434 is affirmed. Docket No. 317456 is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[3] On remand, the PSC should clarify the purpose and nature of the opt-out tariff by addressing whether the tariff represents a reimbursement for costs of service, or whether the tariff constitutes something more akin to a tax, sanction, or penalty imposed upon customers who choose to opt out of the AMI program.

IV. THE PSC'S MOTION FOR RECONSIDERATION

In its motion for reconsideration, the PSC contends that no further hearings are necessary concerning the smart meter program. I disagree. In my opinion, there are two reasons why this case must be remanded.

First, the Attorney General's two main concerns have not been adequately addressed in this lower court record.[3] The PSC and Consumers Energy advance the notion that smart meters

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[3] In the initial settlement agreement, the Attorney General reserved two issues for future resolution, including (1) a request to the PSC "to direct Consumers Energy to suspend the [AMI smart meter] program," and (2) an objection "to the amount of the 'opt-out' fee." While the Attorney General expediently agreed to resolve these issues from the existing record, in my opinion this lower court record is inadequate to form any meaningful understanding of these complex issues. In its motion for reconsideration, the PSC emphasizes that it is only necessary to call "one witness" to satisfy its burden on review. I do not disagree with this statement. Of course, if the PSC only allows one witness to testify, they only hear one side of the issue. The recent opinion in *The Detroit Edison Co v Stenman* implies that the only evidence presented regarding issues of privacy, safety, and health in that case was a staff report, not even the testimony of a witness. *The Detroit Edison Co v Stenman*, ___ Mich App ___; ___ NW2d ___ (2015); slip op at 2. Reliance on a staff report, without allowing appellants the opportunity to present evidence, is hardly a thorough testing or consideration of the appellants' concerns. The

will save the public money on their utility bills. Unfortunately, this argument is inherently illogical: how can smart meters save money when Consumers seeks to add millions of dollars to the base rate to fund the AMI program? It appears, as the Attorney General argues and as in other states, that the smart meter program actually increases rates.[4] Remand is necessary for the PSC to articulate the total cost of the AMI program.

I am concerned that under the opt-out program, those who opt-out must pay either a penalty, tax, or a fee for the privilege of retaining their non-smart meters. This Court, in its prior opinion, approved the PSC's order allowing costs to fund the AMI smart meter program to be added to the utility's base rate. At first glance, it appears the opt-outers are required to pay twice for the privilege of retaining their non-smart meter. The first payment is in the form of a penalty, tax, or fee to avoid having a smart meter installed on their home,[5] and the second payment is of continued costs associated with the AMI smart meter program that eventually will be added to the base rate.[6]

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point remains that the PSC did not clearly identify the purpose and nature of the opt-out tariff as it is intertwined with the base rate increase. It appears some customers are being charged twice for the same service.

[4] The Attorney General's office represents both the PSC and the consumer, a potential conflict of interest. Any reference to the Attorney General is to the consumers' argument, not the PSC's argument.

[5] In essence, this is a do-nothing tariff.

[6] One rationale for the opt-out tariff is the cost of retaining meter readers to read the non-smart meters. However, no explanation is put forth why that cost is not included in the approved tariff that will be added to the base rate or why that cost is allocated to the few who have decided to retain their current meter. Business decisions are generally the providence of the utility, unless the utility's decision, in essence, is a penalty to force compliance with an unwanted meter. Of concern is the PSC's approval of the opt-out tariff as it affects those customers who do not accept the change imposed by the utility. Why penalize those few individuals who do nothing,

Why both charges? On remand, the PSC should answer that question. In the case of the opt-outers, they receive no benefit from the AMI smart meter program and must actually pay to be excluded from it, but then the opt-outer must also share in the costs of the program because of the increase to the base rate. From this lower court record, I cannot discern the reason to approve a tariff that is associated with the base rate of the AMI program and, at the same time, penalize those individuals that choose not to be associated with the AMI program. As we stated in our prior opinion:

> Appellant customers argue that the PSC's approval of the tariffs requiring customers who opt-out of the AMI program to pay a one-time charge of either $69.39 or $123.91 and a monthly charge of $9.72 was unjust, unreasonable, and unsupported by evidence in the record.

From this lower court record I am unable to discern the genesis, the reasons, or the rational for such an unprecedented double tariff. Contrary to the PSC's argument in its motion for reconsideration, the PSC did not address whether a double-tariff exists in this case. The quote the PSC provides in its motion does not support its assertion. Also, the Attorney General argued that more than a cursory cost benefit analysis should be provided to justify this program. At this time, the lower court record supports the Attorney General's concerns. On remand, I would require the PSC to articulate a factual basis and a detailed analysis of its reasons for selecting this methodology and to further articulate and supplement their prior opinion why these costs are not already included in the base rate associated with the AMI program.

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especially those citizens who have pacemakers and implant devices being exposed to smart meters that are not UL certified safe for these devices. Electro-sensitivity may prevent some citizens from installing smart meters or visiting homes that have working smart meters.

I am also greatly concerned that the opt-out costs are actually a penalty imposed to force the opt-outers to comply with the AMI program. On remand, the PSC is charged with the task of determining if this new cost is a penalty, a tax, or a legitimate fee. See *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998) (criteria to be considered when distinguishing between a fee and a tax). Also see *Nat'l Federation of Indep Business v Sebelius*, ___ US ___, ___; 132 S Ct 2566, 2595-2596; 183 L Ed 2d 450 (2012) (distinguishing between a tax and a penalty). The PSC's implied finding that it is a fee/tariff rather than a penalty or a tax is not supported by even a scintilla of evidence in this lower court record. Just because the PSC says it is so on appeal does not make it so.[7]

Second, the appellants in Docket No. 317456 have not had the opportunity to present any evidence to the PSC. If we were to grant the PSC's motion for reconsideration, these appellants would be denied procedural due process.[8] An extensive hearing where all are invited to air their

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[7] Merely stating something does not make it true. The "it is because we say it is" philosophy has no place in judicial jurisprudence. See *Webster v Reproductive Health Servs*, 492 US 490, 552; 109 S Ct 3040; 106 L Ed 2d 410 (1989) (BLACKMUN, J., concurring in part and dissenting in part); *Council of Organizations & Others for Ed About Parochiaid v Governor*, 216 Mich App 126, 136; 548 NW2d 909 (1996) (O'CONNELL, J., dissenting). If there are not valid health, safety, and privacy issues associated with the AMI program, why have an opt-out program?

[8] The Michigan and United States Constitutions provide that no person shall be deprived of property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. The essential purpose of due process is to ensure fundamental fairness. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005); *Lassiter v Dep't of Social Servs of Durham Co*, 452 US 18, 24; 101 S Ct 2153; 68 L Ed 2d 640 (1981). Due process requires that a party receive notice of the proceedings against it and a meaningful opportunity to be heard. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). In this case, if the PSC is allowed to implement the smart meter program and charge customers to opt out of the program without considering the public's concerns, it has denied the public a meaningful opportunity to be heard.

concerns about the smart meter program may persuade the public that the "fox is not watching the henhouse,"[9] and more importantly, that sufficient safeguards are in place to implement the smart meter program.

Some citizens are alarmed over the potential health, safety, privacy, and cost issues associated with the smart meter program. To Consumers Energy and the PSC's credit, it appears that they both are minimally aware of the public concern over the smart meter program; otherwise, they would not have instituted the opt-out program and the opt-out tariff.[10]

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[9] As Judge GRIFFIN noted in *Attorney General v Mich Pub Serv Comm*, 243 Mich App 487, 508; 625 NW2d 16 (2000), while quoting *State ex rel Allain v Mississippi Pub Serv Comm*, 418 So 2d 799, 783 (Miss, 1982), "[i]t is also readily apparent that in performing their duties, the agencies will from time to time make decisions, enter orders, take action or adopt rules and regulations which are, in spite of good intentions, either illegal or contrary to the best interests of the general public." Sometimes in cases involving governmental agencies, a conflict of interest between the public and an agency may arise.

We should all be aware of the frailties inherent in the PSC's genetics. It is expected to protect the public's interests while working closely with the utilities that it is supposed to protect those interests from. This situation is often referred to as putting the fox in charge of the henhouse. A fox-and-henhouse situation arises when a person in charge of making a decision may have a conflict of interest. *In re Grand Jury Subpoenas*, 454 F 3d 511 (CA 6, 2006). See *Freeman v Town of Hudson*, 549 F Supp 2d 138 (D Mass, 2012) ("If I was a farmer, I would not put the fox in charge of the henhouse because all the hens would disappear.").

[10] This presents another unanswered question. In a prior order the PSC directed investor-owned utilities to "make available an opt-out option, based on cost-of-service principles, for their customers." While Consumers argues in favor of the opt-out program in this case, it is possible that the utilities are not concerned with the "non-existent" privacy and health issues connected to the AMI program. If that is correct, it is only the PSC that is responsible for the opt-out program. But why, then, has the PSC mandated an opt-out program if the individual appellants' concerns have no merit? If this reasoning has any merit, then logically it follows that the only reason for the opt-out program is to raise money for the utilities. It is important to mention that, while the utilities have complied with the PSC opt-out program, the individual appellants are outraged over the cost of this unique and unusual program. I for one encourage the PSC and the utilities to resolve this question on remand.

Consumers Energy and the PSC deserve credit for attempting to alleviate citizens' health, safety, and privacy issues by instituting the opt-out program. This awareness and concern bodes well for the citizens of Michigan.

As well as the potential health issues, at oral arguments, appellants argued that smart meters may in fact be the instrument of monitoring, listening, and viewing activities in individual's homes. They also argued that smart meters are networked and, without proper security measures, anyone, including the government and hackers, could monitor a customer's activities. I would find it disconcerting, if true, that a smart meter in conjunction with a smart television might allow others to listen and record private conversations in one's living room.

Though it may turn out that the appellants' concerns are unfounded, they should at least have the opportunity to present their case to the PSC before they are charged (and possibly double-charged) for opting out of the AMI program.[11] And in my opinion, even Consumers Energy should implement best practices, especially since Consumers Energy is installing smart devices on all private homes it services, in some cases against the wishes of the owner of the home. On remand, I would direct the PSC to allow appellants to address their concerns over the

[11] I note that 50 years ago, only a few brilliant minds were concerned about the health hazards of smoking, and we have only recently become aware of the health hazards of second-hand smoke. I suspect there is no need to mention the health hazards of lead-based paint or radium-painted glow-in-the-dark watches produced from 1917 to 1926. At the time, all of these products were not considered health hazards. I for one am not personally concerned about the AMI smart meter program, but as an elected state official, I can understand the concerns of Michigan's citizens. In my opinion, these citizens deserve the opportunity to present their evidence and view to the tribunal.

privacy, health, safety, and cost benefits issues associated with the AMI program at the hearing.[12] And, if these concerns are valid, I would require the PSC to impose safeguards as a condition to any further funding of the AMI program.

On reconsideration, the PSC dogmatically requests that we reject the appellants' Fourth Amendment constitutional issues associated with the smart meter program. I note that constitutional issues are not within the providence and jurisdiction of the PSC. The PSC does not have authority to determine constitutionality. *In re Fed Preemption of Provisions of the Motor Carrier Act*, 223 Mich App 288, 299; 566 NW2d 299 (1997). However, weighing the costs and benefits of the AMI smart meter program before allowing the utilities to pass the burdens of the program on to the customer is within the PSC's purview.

While it may be argued that the health, safety, and privacy issues associated with the AMI program are not the PSC's concern, I ask the rhetorical question, "if not the PSC, then who"? The PSC does have the power to incentivize decisions through its ratemaking authority, though it cannot directly order a utility to make a specific decision. *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 158; 596 NW2d 126 (1999). Consumers Energy seeks a rate increase to install a grid of smart meters that can communicate with IP addresses to anyone who has the technology to receive and send the signals. By requiring the costs of this controversial program to fall on the shoulders of the public instead of on the utilities, the PSC is implicitly

[12] I would loathe to discover 20 years from now that these concerns are valid. Historically, it is less burdensome to address these issues as they arise than to attempt to reform 20 years of ill-conceived policy decisions.

deciding that the public's concerns regarding the costs of the AMI program have no merit. In conjunction with its rate-making authority, the PSC can, and in my opinion should, flush out the nonmonetary costs and benefits of this innovative technology and implement best practice before allowing utilities to place these controversial devices on each home in Michigan at the public's expense.

While the appellants have standing to appeal the PSC's order, the present record is simply not adequate for us to answer the appellants' questions on appeal. Because of the significant statewide issues raised by appellants in this case, I would remand this case for further proceedings consistent with this concurrence and our prior opinion, and I would retain jurisdiction. I would caution the PSC that these issues are of great concern, not just locally, but also nationally and internationally.

/s/ Peter D. O'Connell

This opinion is an attachment to the order denying reconsideration in Docket Nos. 317434 and 317456.