

STATE OF MICHIGAN
COURT OF APPEALS

PENINSULAR GAS COMPANY,

Plaintiff-Appellant,

UNPUBLISHED
October 29, 1996

v

No. 185681
LC No. U-10630

MICHIGAN PUBLIC SERVICE COMMISSION
and TOWNSHIP OF CALUMET,

Defendants-Appellees.

Before: Markman, P.J., and McDonald and M.J. Matuzak,*JJ.

PER CURIAM.

Peninsular Gas Company appeals the April 13, 1995 order of the Michigan Public Service Commission (PSC), which granted an interim rate surcharge to cover a portion of the costs associated with an environmental assessment and remediation investigation. We affirm.

Peninsular Gas Company is a privately owned gas utility which operates in the Upper Peninsula. From approximately 1907 to 1947, the company's predecessors operated a manufactured gas plant in the Village of Laurium. The manufacturing process produced gas from coal, and generated coal waste by-products which were disposed of on site. The facility ceased operation in 1947, and was converted to a propane plant, which the company uses for backup supply. The plant was last used in 1978.

The Department of Natural Resources identified the plant as a site of environmental contamination, and directed the company to engage in response activities under the Michigan Environmental Remediation Act, MCL 324.20101 *et seq*; MSA 13A.20101. The DNR determined that Peninsular is responsible for conducting assessment and remediation activities due to its ownership of the property.

Peninsular subsequently filed an application with the PSC requesting authority to implement a surcharge to cover the clean up costs. Peninsular sought to generate annual revenues of \$475,000 for a

*Circuit Court Judge, sitting on the Court of Appeals by assignment.

ten year period to cover the estimated remediation costs. The requested surcharge represented a 13.89% annual increase in total rates.

An evidentiary hearing was held in which Peninsular presented evidence as to the history of the manufactured gas plant, the investigation expenses related to the cleanup and the potential costs of remediation. The costs of remediation over the life of the project were estimated to range from between \$2,000,000 and \$5,000,000. Commission staff members testified that the remediation action was necessary although they proposed modifications to the surcharges proposed by Peninsular. The hearing officer issued a proposal for decision in which he concluded that the environmental assessment and remediation costs were current operating expenses and were recoverable from ratepayers.

In a decision entered April 13, 1995, the PSC found that its prior accounting orders did not guarantee that all costs associated with assessment and remediation of environmental contamination arising from manufactured gas plant facilities necessarily constituted reasonable operating costs and, therefore, would be recoverable from ratepayers. The PSC noted that the burden was on the utility to show that the costs are properly recoverable from ratepayers and declined to establish a specific limit for costs that may be recoverable. The PSC concluded that costs associated with the assessment and remediation of the environmental contamination are unique and extraordinary and may be categorized as something other than exclusively utility operating costs or exclusively non-utility operating costs.

The PSC found that remediation costs could not be adequately estimated on the record before it. The remediation investigation plan had yet to be completed and approved by the DNR. The range of estimates for remediation costs was too broad and uncertain to allow a reasonable estimate of probable total costs. Further, there was some question about the reasonableness of the cleanup costs as well as the extent to which the cleanup related to the operation of utility service as opposed to ownership of the land. As an interim resolution, the PSC allowed Peninsular to recover 50% of the costs associated with the assessment and remediation investigation before the completion of the general rate case. The PSC noted that the final percentage of recoverable costs recoverable from ratepayers may differ as a result of findings in the general rate case.

The PSC also noted that it had a history of being reluctant to authorize single-issue rate proceedings. It had been 12 years since the PSC last reviewed Peninsular's rates in a general rate case and the company had the highest authorized rate of return and the highest equity percentage of any gas utility in Michigan. The PSC directed Peninsular to file a general rate case no later than April 15, 1996.

Peninsular appealed to this Court, asserting that the PSC order was unlawful or unreasonable in refusing to permit the company to recover unavoidable and prudently incurred operating expenses. The PSC responded that it properly granted partial relief pending a full rate review.

This Court's review of PSC orders is narrow in scope. All rates, fares, regulations, practices and services prescribed by the PSC are deemed prima facie to be lawful and reasonable, and the party attacking an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8), MCL 462.25; MSA 22.44,

Antrim Resources v PSC, 179 Mich App 603, 619-620; 446 NW2d 515 (1989). A decision of the PSC is unlawful when it involves an erroneous interpretation or application of law, and it is unreasonable when it is unsupported by the evidence. *Attorney General v PSC*, 165 Mich App 230, 235; 418 NW2d 660 (1987). A reviewing court must give due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the commission. *Attorney General v PSC*, 189 Mich App 138, 142; 472 NW2d 53 (1991).

The Legislature has delegated to the PSC authority to set just and reasonable rates. MCL 460.6; MSA 22.13(6). Determination of just and reasonable rates requires a determination of the reasonable costs of doing business. In making that determination, the PSC has reasonable discretion to determine what charges and expenses to allow as costs of operation. *Detroit Edison Co v PSC*, 127 Mich App 499, 524; 342 NW2d 273 (1983). A decision to grant interim rate relief is also reasonably discretionary with the commission. *Id* at 512.

Peninsular has failed to establish that the PSC abused its discretion in awarding it only partial relief pending the filing of a general rate case. This decision was based in substantial part on the lack of information available to the commission. The PSC observed that the investigation was not complete and that the DNR had yet to approve a remediation plan. Because there was a wide range in the estimates of the cost of the project, the commission had a reasonable basis for deferring a decision pending the filing of a general rate case. Although the PSC allowed Peninsular to recover 50% of the remediation costs from ratepayers under the interim order, it noted that the final percentage may well differ following completion of the rate case. Given the interim nature of the award, there is no showing that the PSC abused its discretion. Any errors in the allocation may be corrected in the general rate case. *Detroit Edison, supra* at 512. Allegations that the PSC improperly denied recovery of reasonable operating costs are premature where this issue may yet be addressed in the pending general rate case. We do not understand that the PSC is ultimately in disagreement with plaintiff that plaintiff is entitled to the full measure of its reasonable costs of operation, only that what constitutes such measure has yet to be determined with reasonable precision.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ Michael J. Matuzak