

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

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CHARTER TOWNSHIP OF CALUMET,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,  
and PENINSULAR GAS COMPANY,

Appellees.

UNPUBLISHED  
June 18, 1999

No. 205802  
PSC  
LC No. 011127

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ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,  
and PENINSULAR GAS COMPANY,

Appellees.

No. 205844  
PSC  
LC No. 011127

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Before: Cavanagh, P.J., MacKenzie and McDonald, JJ.

PER CURIAM.

These consolidated appeals concern the Public Service Commission's July 31, 1997, decision in U-11127. This case involves who should pay for several million dollars in environmental cleanup costs which the state government (and potentially the federal government) requires Peninsular Gas Company to pay pursuant to the Michigan Environmental Response Act, 1982 PA 301; MCL 342.20101 *et seq.*; MSA 13A.20101 *et seq.* MCL 324.20126; 13A.20126 imposes liability on property owners, both past and present. The PSC determined the environmental cleanup costs were part of Peninsular's operating costs and could be passed onto customers in Peninsular's rates. Pursuant

to a choice the PSC gave Peninsular, Peninsular elected to have a surcharge established at a specific dollar amount for recovery of seventy-five percent of reasonable and prudent environmental costs.

Peninsular distributes gas to customers in the Keweenaw Peninsula in upper Michigan. Peninsular and its predecessors have been in business in the area since the 1800s. Peninsular's property includes property known as the Florida Gas Site which was formerly the location of a manufactured gas plant. The property has not been used for that purpose for forty years. Peninsular began its current business of distributing gas in 1966.

In 1992 the Michigan Department of Environmental Quality identified Peninsular's plant site and areas nearby as being contaminated and as requiring remediation. The contamination was found to be from the manufactured gas operation which had been conducted decades before. Contaminants were found to have polluted the property still owned by Peninsular and were found to have leached into underground water and contaminated a nearby wetland which is not owned by Peninsular. Assessment and remediation costs were initially estimated in the range of \$2 million to \$5 million. Those estimates have increased since. These costs probably exceeded the value of Peninsular and Peninsular was unable to pay the costs or obtain a loan to cover the costs.

Peninsular filed an application with the PSC to implement a surcharge to recover costs associated with the environmental cleanup. The Township of Calumet intervened. After hearings an ALJ recommended Peninsular's request be approved. The PSC considered the request in U-10630. The PSC found that the environmental costs were unique and extraordinary and were not typical operating expenses. The PSC at least initially determined that there should be some sharing of the financial burden between Peninsular and its customers. In what it characterized as an "interim resolution" the PSC allowed Peninsular to recover fifty percent of the environmental costs while directing Peninsular to file a general rate case in which the PSC would consider Peninsular's rates in general as well as the request for the environmental surcharge. The PSC noted the possibility that its order in the general rate case might allow Peninsular to recover either more or less than fifty percent of the environmental costs.

Peninsular filed the instant application seeking a rate increase to cover its environmental costs. The case was designated U-11127. The Attorney General was permitted to intervene. In its decision the PSC recognized that the environmental cleanup costs were unusual and that the costs would probably force Peninsular into bankruptcy if it did not obtain rate relief. The PSC found it in the public interest to grant the relief. The PSC offered Peninsular the choice of either (1) deferring the environmental costs and amortizing them over ten years or (2) surcharging customers for seventy-five percent of the costs. Peninsular opted for the second choice.

Separate appeals have been filed by the Township of Calumet and the Attorney General. The positions of the two appellants overlap somewhat. Calumet argues that there was a lack of evidence supporting the PSC's decision to make Peninsular's customers bear seventy-five percent of the environmental cleanup costs and that it was unlawful for the PSC to charge customers for costs related to property which has never been used to provide them with utility service. The Attorney General argues that the environmental cleanup costs are not current operating expenses upon which rates can be

based since the costs are associated with operations which occurred years ago to manufacture gas, a service quite different than the service customers are currently paying for. The Attorney General further argues that the PSC acted unlawfully or unreasonably when it increased the customers' share of the costs from fifty percent to seventy-five percent.

The PSC's rate order is presumed prima facie to be lawful and reasonable. MCL 462.25(1); MSA 22.45(1). On appeal, appellants have the burden to show by clear and satisfactory evidence that the PSC's order was unlawful or unreasonable. MCL 462.26(8); MSA 22.458(8); *Michigan Intra-state Motor Tariff Bureau, Inc v PSC*, 200 Mich App 381, 387; 504 NW2d 677 (1993). Appellants have not satisfied their burden.

In determining Peninsular's just and reasonable rates, the PSC had to determine Peninsular's reasonable costs of doing business. *Detroit Edison v PSC*, 221 Mich App 370, 374; 562 NW2d 224 (1997), *Detroit Edison v PSC*, 127 Mich App 499, 524; 342 NW2d 273 (1983). The PSC had the discretion to determine what charges and expenses to allow as costs of operation. *Detroit v Michigan Public Service Comm*, 308 Mich 706, 716-717; 14 NW2d 784 (1944); *Detroit Edison v PSC*, *supra* at 524.

Appellants are not persuasive in arguing that any portion of the environmental clean-up costs should not be considered operating expenses of Peninsular. The costs must be paid by Peninsular. The costs are based upon Peninsular's ownership of property which the PSC found was currently needed in the ordinary course of Peninsular's service to its customers. The evidence did not indicate to the PSC that standards were violated when the waste dumping occurred which resulted in the contamination which now must be cleaned up. The evidence strongly indicated that Peninsular would face bankruptcy if rate relief were not provided.

The PSC's ratemaking process involved a balancing of the interests of Peninsular and its customers. *Building Owners & Managers Assoc of Metropolitan Detroit v Public Service Comm*, 424 Mich 494, 510; 383 NW2d 72 (1986); *Detroit v Michigan Public Service Comm*, *supra* at 716; *ABATE v PSC*, 208 Mich App 248, 267; 527 NW2d 533 (1984). The financial solvency of Peninsular was a legitimate factor for the PSC to consider. *Michigan Bell Telephone Co v PSC*, 332 Mich 7, 38; 50 NW2d 826 (1952); *Attorney General v PSC*, 189 Mich App 38; 472 NW2d 53 (1991). There is a value in continuity of service to ratepayers and there is a risk to ratepayers in the uncertainty accompanying the bankruptcy of their utility. The PSC performed the necessary balancing.

Appellants have not shown that the PSC abused its discretion in exercising its legislative ratemaking authority. *Detroit Edison v PSC*, *supra* at 524. This Court accords deference to the judgment of the PSC in exercising its legislative function. *Consumers Power Co v Public Service Comm*, 226 Mich App 12, 21; 572 NW2d 222 (1997). The fact that the contamination arose from a different utility service provided to different customers in past years or that some of the environmental expense is associated with contamination which leached into property not owned by Peninsular and which never provided utility service, does not change the fact that Peninsular is incurring a significant expense in the course of its business in the present. The costs involved are necessary costs for

Peninsular to operate, and the costs are actually related to Peninsular's current property because that property is the source of the contamination.

We note that other courts have reached a similar result. See *Chesapeake Utilities v Delaware Public Service Comm*, 705 A2d 1059 (Del, 1997); *In the Matter of the Request of Interstate Power*, 559 NW2d 130 (Minn, 1997), and *Citizens Utility Board v Illinois Commerce Comm*, 651 NE2d 1089, 1093, 1095-1096 (Ill, 1995). An exception is *Indiana Gas Co v Office of Utility Consumer Counselor*, 675 NE2d 739 (Ind, 1997). However, in *Indiana Gas Co* the contamination related to sites purchased by the utility after the polluting activity had ceased. The *Indiana* Court expressly recognized that its result might be different if the utility had owned the sites when they were used as manufactured gas facilities.

Appellants argue in part that aspects of the PSC's decision were not supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28. These arguments are misplaced in this case because the PSC's determinations being appealed are part of the end result of the PSC's legislative ratemaking function. This Court does not review legislative action for "competent, material and substantial evidence on the whole record," but instead defers to the PSC, absent a breach of a constitutional standard or statutory mandate or limitation. *Consumers Power v PSC*, 226 Mich App at 21; *Colony Park Apts v PSC*, 155 Mich App 134, 138; 399 NW2d 32 (1985); *Great Lakes Steel v PSC*, 130 Mich App 470, 480; 344 NW2d 321 (1983), *Detroit Edison v PSC*, *supra* at 524. Appellants have not demonstrated that requiring ratepayers to pay seventy-five percent of the environmental cleanup costs is an abuse of discretion or results in an unlawful or unreasonable rate. The initial fifty percent surcharge was an interim measure and was ordered by the PSC before the PSC had a full view of Peninsular's rates and the facts and circumstances of the case.

Nor is there merit in the Attorney General's argument that the PSC's order constitutes illegal retroactive ratemaking. See *Detroit Edison v PSC*, 221 Mich App 370, 376; 562 NW2d 224 (1997). There is no retroactive ratemaking in this case because the rate established by the PSC is prospective. Environmental cleanup costs were not previously factored into rates. The environmental expense is currently being incurred. The fact that the expense is caused by past conduct does not make this a case of retroactive ratemaking. See *ABATE v PSC*, 208 Mich App 248, 261; 527 NW2d 533 (1994).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Barbara B. MacKenzie  
/s/ Gary R. McDonald