

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
PENINSULAR GAS COMPANY for reconciliation)
of environmental assessment and remediation costs)
with amounts recovered from customers to fund)
such costs.)
_____)

Case No. U-11127-R

At the March 29, 2001 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On August 26, 1999, Peninsular Gas Company (Peninsular) filed an application requesting reconciliation of environmental assessment and remediation costs with amounts recovered pursuant to surcharges authorized by the Commission's July 31, 1997 order in Case No. U-11127, Peninsular's most recent general rate case. According to Peninsular's calculation, its surcharge revenues exceeded its allowable costs by \$37,323.04.

Pursuant to due notice, a prehearing conference was held on December 15, 1999 before Administrative Law Judge George Schankler (ALJ). In addition to Peninsular, the Commission Staff (Staff), Attorney General Jennifer M. Granholm (Attorney General), and the Charter Township of Calumet (Calumet) appeared and participated in this case.

On June 22, 2000, an evidentiary hearing was conducted, with witnesses presented by Peninsular and the Staff. The record consists of 197 pages of transcript and nine exhibits that were received into evidence.

On August 3, 2000, Peninsular, Calumet, and the Attorney General filed briefs. On August 17, 2000, Peninsular, Calumet, the Attorney General, and the Staff filed reply briefs. Thereafter, on October 23, 2000, the ALJ issued his Proposal for Decision (PFD) in which he recommended that the Commission approve Peninsular's reconciliation with the modifications proposed by the Staff, which increased the overrecovery to \$39,387. The ALJ recommended that the Commission reject the disallowances proposed by the Attorney General and Calumet.

On November 6, 2000, Calumet and the Attorney General filed exceptions. On November 13, 2000, Peninsular filed replies to exceptions.

Legal Expenses

Peninsular submitted invoices for legal services related to environmental assessment and remediation activities totaling \$67,387.47 for the period of August 1997 through December 1999. Each invoice contained a running list of legal services rendered, but did not state the time required for each service or an hourly rate. See Exhibit A-4.

Calumet and the Attorney General took the position that Peninsular should not be permitted to recover the claimed amount for legal services. Calumet argued that the Commission should disallow the entire amount because Peninsular had failed to substantiate the reasonableness and prudence of the costs and to provide sufficient detail for a meaningful review of the accuracy and appropriateness of the company's accounting. The Attorney General argued that the Commission should, at minimum, disallow 50% of the legal fees (\$33,693.74) due to Peninsular's failure to

provide sufficient support for a finding that the costs gave rise to benefits for ratepayers and sufficient detail to permit a review of the reasonableness of the costs.

The ALJ analyzed these challenges to Peninsular's legal fees by noting that Peninsular's President William March and Staff witnesses, Cornell Pettiford and Dr. Nicholas Nwabueze, Ph.D., testified that the fees were reasonable and could legitimately be recovered through the surcharge. He noted that no party seriously contended that legal services were not needed to deal with the emerging issues concerning the environmental assessment and remediation. The ALJ stated that a detailed hourly breakdown for the activities of Peninsular's attorneys was not a prerequisite to recovery. The ALJ thus rejected arguments by the Attorney General and Calumet that some or all of Peninsular's claimed legal expenses should be disallowed.

The Attorney General and Calumet except to the ALJ's determination on this issue. The Attorney General argues that the Commission should adopt her proposal to limit recovery of legal fees to 50% of the amount claimed because Peninsular failed to meet its burden of proof. She argues that Peninsular did not even attempt to demonstrate what benefits its customers received from those services. In her view, Peninsular should not be permitted to fully recover legal expenses that it could not adequately explain. Although the Attorney General does not dispute Peninsular's general need for legal services related to the environmental assessment and remediation efforts, she argues that a general need does not speak to the reasonableness of particular actions (or their concomitant costs) in response to that need.

Calumet argues that Peninsular has failed to meet its burden to demonstrate the reasonableness and prudence of its legal expenses and the accuracy and appropriateness of its accounting for these expenses. Calumet asserts that the record contains insufficient detail on this issue to test either the reasonableness of or the company's accounting for these costs. Calumet argues that the Commis-

sion would not permit Peninsular to recover gas costs from customers if the Company presented only the total bill, without knowing the number of units used and the price of each of those units and should not take a different approach to legal fees. Although Calumet believes all of these costs should be excluded, it states that the Commission might reasonably accept the Attorney General's proposed disallowance.

The Commission finds that the exceptions of the Attorney General and Calumet should be rejected. Although the record could be clearer with respect to the amount of time required to perform necessary legal services, the Commission finds that, in this case, the admitted evidence is sufficient to support the recovery requested. As noted by the ALJ, there is no genuine dispute that Peninsular required legal services in its efforts to minimize the cost of the environmental assessment and remediation. Mr. March testified that there were many conversations among Peninsular's legal counsel, its consultant, and its president. Some of those conversations were lengthy. In addition, the invoices list contacts with state and federal regulatory agencies,¹ letters drafted, and materials reviewed. These lists leave little doubt that legal counsel spent a significant amount of time performing these services.

Moreover, Peninsular and its president and sole shareholder, Mr. March, had every incentive to minimize the need for and cost of legal services, because the Commission's July 31, 1997 order in Case No. U-11127 requires Peninsular to absorb 25% of these costs. Mr. March testified that, in his opinion, the legal services were well worth the charged amount. He believed that the company saved ratepayers significant amounts by resisting the demands of the Michigan Department of Environmental Quality (MDEQ) for an expensive fix. The Staff's witnesses testified that these

¹These agencies included the federal Environmental Protection Agency, the MDEQ, and the Commission.

costs were within the ambit of costs permitted recovery under the environmental surcharge.

Neither believed that the total was unreasonable. While it is true that a more complete accounting might have facilitated closer questioning, the Commission is persuaded that, given the nature and complexity of the issues required to be addressed, the legal fees claimed and supported by invoices on this record were reasonably and prudently incurred.

Further, the Commission is not persuaded that there is any problem with Peninsular's accounting for these costs. It appears that the invoices were prepared in a manner that separates out services provided for environmental assessment and remediation efforts and those provided for other issues. In this proceeding, Peninsular claims only those amounts related to the former.

Uncollectible Expense

Peninsular took the position that it should be permitted to recover uncollectible amounts related to the environmental assessment and remediation surcharge. In its view, to disallow recovery of the uncollectible amounts would effectively increase its burden by requiring it to absorb more than 25% of the related costs. Peninsular further argued that there was no provision in Case No. U-11127 for uncollectible expense related to the environmental surcharge.

The Attorney General objected to Peninsular's request to recover \$1,676.13 in uncollectible expense related to the surcharge. In her view, uncollectible revenues are already recovered in Peninsular's base rates. Because the company did not demonstrate that uncollectible amounts related to the surcharge were in excess of uncollectible amounts assumed in Peninsular's base rates, the Attorney General argued that the Commission should exclude this amount from Peninsular's recovery.

The ALJ rejected the Attorney General's proposal to exclude the uncollectible amounts from recovery. In his view, the general rate portion of the July 31, 1997 order in Case No. U-11127 did not incorporate any consideration of the surcharge when determining Peninsular's net operating income.

The Attorney General excepts and argues that the claimed uncollectible amounts are not an incremental cost of the environmental assessment and remediation. Moreover, she argues that the ALJ's reasoning misses the point that the Attorney General raised. She states that the amounts in Exhibit A-3 represent actual booked revenues and actual booked expenses, but do not include an actual amount for uncollected surcharge revenues above the total level of uncollectible expense in base rates during the surcharge period. She argues that Peninsular has the burden of going forward and the burden of persuasion, but has not attempted to demonstrate that the \$1,676.13 reported as the ratepayers' share of uncollectible expense represents any amounts not actually collected from the surcharge. Rather, Peninsular merely applied to surcharge revenues the factor used to determine uncollectible expense in Case No. U-11127 to obtain an uncollectible amount for recovery in this case. The Attorney General argues that no record evidence demonstrates that Peninsular actually failed to collect the full amount of the accrued surcharge revenues. Thus, the Attorney General argues, Peninsular has failed to demonstrate that these costs are an incremental cost of the environmental assessment and remediation efforts.

Peninsular responds that the disallowance proposed by the Attorney General should be rejected. Mr. March testified that he employed the same method in this reconciliation as the Commission approved in its June 2, 1998 order in Case No. U-10630-R. Peninsular insists that recovery of uncollectible amounts associated with the environmental surcharge is necessary to

prevent the company from bearing more than 25% of the environmental assessment and remediation costs.

The Commission finds that Peninsular should be permitted to recover the uncollectible amounts related to the environmental surcharge. The ALJ correctly found that the general rates set in the Commission's July 31, 1997 order in Case No. U-11127 did not include costs associated with the environmental surcharge. In that order, the Commission set Peninsular's rates and then permitted the company to choose whether it would employ a surcharge to collect 75% of the costs associated with the environmental assessment and remediation or defer and amortize those costs as the Commission had authorized other utilities to do. The Commission expressly separated its consideration of environmental assessment and remediation costs from the general rate case:

The Commission addresses the appropriate treatment and recovery of expenses associated with environmental assessment and remediation in a separate section of this order. The Commission's resolution of that issue allows these costs to be treated separately and there is no need to include them here. Therefore, costs associated with manufactured gas plant cleanup should be removed from expenses for the test year.

Id., p.15. Having expressly excluded consideration of those costs from Peninsular's base rates, it would not be appropriate for the Commission to now conclude that the uncollectible expense associated with the environmental surcharge was included in base rates.

Reasonableness and Prudence of Environmental Assessment and Remediation Efforts

Calumet took the position that because the MDEQ had assumed control over the environmental cleanup activities, a determination as to how the costs incurred by Peninsular for assessing the contamination had or would contribute to the remediation of the site was not possible. It asserted that there was no evidence on this record that demonstrates how the collected data that Peninsular

had turned over to the MDEQ had or would be used. Therefore, Calumet stated, it would take no position on whether the on-site engineering costs incurred by Peninsular were reasonably and prudently incurred.

The ALJ acknowledged Calumet's general position, and "simply note[d] that Calumet 'takes no position on whether all the on-site engineering costs incurred by Peninsular were reasonably and prudently incurred.'" PFD, p. 6.

Calumet excepts to this statement and argues that the ALJ failed to understand the meaning of Calumet's statement of no position. In Calumet's view, the record does not support finding that Peninsular incurred these costs reasonably and prudently. It now argues that the Commission should find that Peninsular has failed to meet its burden to demonstrate that these costs were reasonably and prudently incurred. Therefore, Calumet argues, the Commission "should not allow full cost recovery from Peninsular's customers in the absence of evidence on this issue." Calumet's exceptions, p. 5. Calumet does not propose an alternate amount that it could agree that Peninsular should recover.

Peninsular responds that Calumet is now attempting to set an impossible standard for cost recovery. It argues that whether a cost is reasonably and prudently incurred must be measured from the time that the decision was made or the action taken. Attorney General v Public Service Commission, 161 Mich App 506; 411 NW2d 469 (1997). Moreover, Peninsular argues, the reasonableness and prudence of these costs should not depend upon whether or how the data collected by Peninsular's consultant will be used by the MDEQ. At the time the data was collected, Peninsular states, the consultant and Peninsular contemplated that the consultant would be in charge of the project. Peninsular argues that the data collected and actions taken were reasonable in light of that expectation.

The Commission rejects Calumet's exception as unfounded. Peninsular presented evidence that it had expended funds for assessment and remediation of the site. Its consultant testified to the reasonableness of the activities undertaken in an attempt to satisfy the requirements imposed by the MDEQ. He further testified that the data gathered had been given to the MDEQ for its use in the clean-up. Peninsular presented sufficient evidence of reasonableness and prudence of these costs, considering the circumstances surrounding them. The Staff presented witnesses who testified to the appropriateness of cost recovery. On the other hand, there is no evidence on this record to support a conclusion that the costs were either unreasonably incurred or were not incurred for the purpose of assessment or remediation of the environmental contamination. No party even attempted to demonstrate that an activity undertaken on this project was unreasonable or imprudent in whole or in part. The Commission finds that Peninsular presented sufficient evidence that its claimed costs were reasonable and prudently incurred.

Allocation of Refund

Peninsular proposed to allocate the overrecovery to GCR customers using its standard roll-in refund procedures for gas sales customers and issuing a check to its one transportation customer. Use of the standard refund methodology, Mr. March testified, would ease Peninsular's administrative burden and would be equitable because the overrecovery results from a volumetric surcharge.

The Attorney General argued in her initial brief that the standard refund procedures would not be equitable to summer seasonal customers, who paid higher amounts on smaller volumes of gas. She argued that Mr. March admitted that the share of revenues that a customer paid would be heavily dependent upon when the customer purchased gas. The Attorney General proposed that the refund be allocated to customers based on seasonal usage during the collection period.

The ALJ rejected the Attorney General's proposal, agreeing with Peninsular that applying a usage factor to seasonal customers' bills would create an administrative nightmare not justified given the small amount of the refund.

The Attorney General excepts and argues that the surcharge was variable depending upon the season at Peninsular's request. In her view, the company should not now argue that it is too difficult to return the money to customers in the same proportions as they were required to contribute. She further argues that her proposal need not be an undue administrative burden. She proposes that Peninsular merely add the revenues collected in months June through November and divide that total by the total revenues reported in Exhibit A-2 to provide a seasonal proportionality. She states that Peninsular could then apply that ratio to the total overrecovery and refund the resulting amount per thousand cubic feet (Mcf) to customers based upon their consumption during those months. She goes on to argue that a similar process could be used for revenues collected in December through May. She insists that with computer capability and available billing records, this method should not pose a significant problem.

Peninsular argues that the Commission should affirm the use of the standard roll-in refund methodology. It argues that the surcharge varied significantly throughout the year, from a low of \$0.05 per Mcf in months January through March plus December to a high of \$1.75 per Mcf in June, with the other months varying in between these extremes. Peninsular states that it would indeed be an administrative burden, not justified by the amount at issue, to calculate each customer's contribution and make proportionate refunds.

Further, Peninsular argues that the Attorney General's failure to present this proposal on the record deprived the company of an opportunity to introduce evidence concerning the difficulty of effecting such a refund. Moreover, Peninsular argues, the Attorney General has not sufficiently

explained her proposal or how it would not be the administrative nightmare that Mr. March claimed. Peninsular points out that the Attorney General contemplates that customer records must be reviewed and suggests that with the use of computers, the task would not be difficult. Such a suggestion, Peninsular argues, is without evidentiary basis. The company argues that the Attorney General has no knowledge of how the company's billing records are generated or stored or whether the company's computer is set up to retrieve data necessary for the detail that would be required for her newly proposed refund method.

The Commission finds that the Attorney General's exception should be rejected. As the proponent of a refund method differing from Peninsular's standard refund procedure, the Attorney General bears the burden of demonstrating the superiority of her proposed alternative. In the present case, the Attorney General failed to meet that burden in several respects. First, the Attorney General failed to propose a specific alternative refund method on the record. Second, she failed to establish with any precision the likely effect of employing that method on the different ratepayer classes. Third, the record does not establish that Peninsular has the capability to calculate a refund that takes into account historical seasonal usage without incurring undue cost. For these reasons, the Commission finds that the Attorney General's position should not be adopted.

Burden of Proof

The Attorney General argues that the ALJ's approach to the issues in this case impermissibly shifted the burden of proof when he rested his rejection of the Attorney General's positions in part on these issues being raised in initial briefs. In her view, the burden is on Peninsular to demonstrate the reasonableness, prudence, and proper accounting of all expenditures related to the

environmental assessment and remediation, pursuant to the Commission's July 31, 1997 order in Case No. U-11127.

The Commission finds that, in fashioning its decision in this case, it has not altered the established burden of proof. In the Commission's view, Peninsular has provided sufficient evidence of the reasonableness and prudence of its claimed costs to withstand a facial challenge. Any party desiring to challenge these costs could have used available procedures to seek additional detail and present any facts or circumstances to demonstrate imprudence or unreasonableness.

The Commission FINDS that

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 et seq.; MSA 22.21 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The revenues associated with Peninsular's environmental surcharge exceeded the recoverable costs by \$39,387.

c. Peninsular should refund the overrecovery plus interest at the rate of 10.73% as provided in the Commission's July 31, 1997 order in Case No. U-11127 using its standard refund procedures for sales customers. It should issue a refund check to its transportation customer.

THEREFORE IT IS ORDERED that:

A. The revenues associated with the environmental surcharge exceeded Peninsular Gas Company's recoverable costs by \$39,387.

B. Peninsular Gas Company shall refund the overrecovery plus interest at the rate of 10.73% as provided in the Commission's July 31, 1997 order in Case No. U-11127 using its standard refund procedures for sales customers. It shall issue a check to accomplish the refund to its transportation customer.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of March 29, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

B. Peninsular Gas Company shall refund the overrecovery plus interest at the rate of 10.73% as provided in the Commission's July 31, 1997 order in Case No. U-11127 using its standard refund procedures for sales customers. It shall issue a check to accomplish the refund to its transportation customer.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 29, 2001.

Its Executive Secretary

In the matter of the application of)
PENINSULAR GAS COMPANY for reconciliation)
of environmental assessment and remediation costs)
with amounts recovered from customers to fund)
such costs.)
_____)

Case No. U-11127-R

Suggested Minute:

“Adopt and issue order dated March 29, 2001 reconciling Peninsular Gas Company’s environmental assessment and remediation costs with amounts recovered pursuant to the surcharge approved in Case No. U-11127, as set forth in the order.”