ORDER NO. 88923

IN THE MATTER OF THE APPLICATION OF COLUMBIA GAS OF MARYLAND, INC. FOR AUTHORITY TO INCREASE RATES AND CHARGES	* * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9480

Issue Date: November 21, 2018

On April 13, 2018, Columbia Gas of Maryland, Inc., ("Columbia" or "Company") filed an Application to increase its base rates by $5,997,212.[1] The Maryland Public Service Commission ("Commission") delegated this proceeding to the Public Utility Law ("PULJ") Division on April 17, 2018. The Office of People's Counsel ("OPC"), the Staff of the Public Service Commission ("Staff") and Columbia (collectively the "Parties") conducted discovery and filed testimony by a variety of witnesses on the issues raised in the Application. On behalf of the Parties in this proceeding, on July 30, 2018, Staff filed a Joint Motion for Approval of Agreement of Unanimous Stipulation and Settlement ("Settlement Agreement") agreeing that an increase of $3.7 million in Columbia's annual revenue requirement was appropriate and would be effective with Columbia's November 2018 billing cycle.[2] The Settlement Agreement resolved all but one of the issues in the case. The sole issue remaining for litigation was Columbia's request to recover $318,313

[1] On June 1, 2018, Columbia filed supplemental testimony and exhibits to update its test year which also updated the Company's proposed revenue increase to $6.02 million.

[2] *In the Matter of the Application of Columbia Gas of Maryland, Inc. for Authority to Increase Rates and Charges*, Case No. 9480, Proposed Order of the Public Utility Law Judge ("Proposed Order of PULJ"), October 2, 2018 at 6.

for environmental remediation of its Hagerstown Service Center Annex (also referred to as the "Cassidy Property") that a Columbia predecessor operated as a Manufactured Gas Plant ("MGP") process, which was the site of a coal tar pond."[3]

On October 2, 2018, the Chief PULJ issued a Proposed Order in which he approved the Settlement Agreement and decided that with regard to the contested issue Columbia was entitled to recover its environmental remediation costs associated with the Cassidy Property.[4] On October 16, 2018, OPC filed a Notice and Memorandum on Appeal to the Commission pursuant to Section 3-113(d)(2) of the Public Utilities Articles and COMAR Section 20.07.02.13. Staff and the Company responded to OPC on October 31, 2018. The Commission has reviewed Proposed Order of the PULJ pertaining to the contested issue – recovery of the Cassidy Property environmental remediation – and the supplemental information filed on appeal by OPC, Columbia and Staff. For the reasons explained below, the Proposed Order of the PULJ is affirmed.

A. Proposed Order of the PULJ Findings & Analysis

To provide the necessary background information related to the environmental remediation issue in this matter, the Proposed Order of the PULJ laid out a brief history of the MGP site which includes both Columbia's Hagerstown Service Center and the Annex. The Proposed Order noted that the MGP site at its height was approximately seven acres and was owned by American Gas and Heat Company which later changed its name to Hagerstown Light & Heat ("HL&H") and ultimately to Hagerstown Gas

[3] Reply Memorandum on Appeal of Columbia Gas of Maryland, Inc. ("Columbia Reply") filed October 31, 2018 at 1.
[4] Proposed Order of PULJ at 52-53.

Company ("HGC").[5] As part of the seven-acre MGP site, there were approximately 2.5 acres that contained a tar pond used to store MGP residuals. The Proposed Order noted that Columbia witness Ferry testified that "it is this pond that has been found to be impacted by tars…"[6] In January 1952, HGC sold the referenced 2.5 acre parcel to Bester-Long, Inc., a road construction company. In 1968, Columbia acquired HGC and became the owner of the current Service Center parcel.[7] Through a series of transactions, Cassidy Trucking purchased from R. F. Kline, Inc. a 3.85 parcel including the 2.5 acre parcel that contained the tar pond. Cassidy Trucking subsequently purchased additional one acre parcels each from CSX Transportation, Inc. and Community Rescue Service, Inc. for a total of approximately 5.82 acres to comprise the Cassidy Trucking property.

In 2013, Columbia purchased the entire 5.82 acres from Cassidy Trucking. The Proposed Order indicates that Columbia witness Ferry testified that the Cassidy property was purchased "to reduce the cost of remediating the environmental impacts caused by the tar pond, to avoid litigation, and to minimize the transaction costs associated with its assessment and remediation of the property."[8] The Proposed Order also noted that prior to the current proceeding Columbia sought recovery of the remediation costs associated with the Cassidy Property in Case No. 9316. However, in that case the Chief Public Law Judge found that the Cassidy Property was not used and useful and therefore denied the recovery costs.[9] The findings in Case No. 9316 were upheld by the Commission, the

[5] Proposed Order of the PULJ at 18.
[6] *Id*.
[7] *Id* at 19.
[8] *Id* at 20.
[9] *Id*.

Circuit Court of Washington County, Maryland and the Maryland Court of Special Appeals.[10]

In 2017, the Maryland General Assembly adopted PUA § 4-211[11] which sets out how recovery for a gas company's environmental remediation costs is allowed. As a result of the enactment of PUA § 4-211, Columbia in this instant proceeding renewed its attempt recover remediation costs for the Cassidy Property.

PUA § 4-211(a) states:

> (a) Consideration of remediation costs in setting rates. --
>
> > (1) Except as provided in paragraph (3) of this subsection, when determining necessary and proper expenses while setting a just and reasonable rate for a gas company, the Commission may include all costs reasonably incurred by the gas company for performing environmental remediation of real property in response to a State or federal law, regulation, or order if:
> >
> > > (i) the remediation relates to the contamination of the real property; and
> > >
> > > (ii) the real property is or was used to provide manufactured or natural gas service directly or indirectly to the gas company's customers or the gas company's predecessors.
> >
> > (2) Environmental remediation costs incurred by a gas company may be included in the gas company's necessary and proper expenses regardless of whether:
> >
> > > (i) the real property is currently used and useful in providing gas service; or
> > >
> > > (ii) the gas company owns the real property when the rate is set.

[10] *Id.*, *Columbia Gas of Maryland, Inc. v. Public Svc. Comm'n. of Maryland,* 224 Md. App. 575 (2015).
[11] Prior to the adoption of PUA § 4-211, Columbia Gas supported House Bill ("HB") 571 in 2016, which would have required the Commission to approve the recovery of certain environmental remediation costs. HB 571 was amended to make it permissive rather than mandatory. Nonetheless, HB 571 failed to pass in 2016. In 2017, the bill resurfaced as HB 414 and cross-filed as Senate Bill ("SB") 355. SB 355 was passed in the General Assembly, signed by the Governor, and became effective October 1,2017 and is now codified as PUA § 4-211.

> (3) Environmental remediation costs incurred by a gas company may not be included in the gas company's necessary and proper expenses if a court of competent jurisdiction determines that the proximate cause of the environmental contamination is a result of the gas company's failure to comply with a State or federal law, regulation, or order in effect when the contamination occurred.

The Chief PULJ found that Columbia's request to recover remediation costs fit well within the statute and its criteria.[12] First, when determining the meaning of a statute, "[t]he cardinal rule of statutory construction is to ascertain and carry out the intentions of the Legislature." However, if the language of the statute is clear, courts "need not look beyond the statutory language to determine the Legislature's intent."[13] In this case, the Chief PULJ found that the language of the statute is clear and there was no need to delve into its legislative history.

The Chief PULJ determined that Columbia's request for environmental remediation cost satisfied the three prongs of statutes. First, remediation costs must be incurred in response to a State or federal law, regulation or order.[14] The Chief PULJ noted that the Cassidy property had been involved with numerous site inspections and assessments by the Maryland Department of Environment ("MDE") and MDE's CHS Enforcement Division which had informed Columbia that both the Service Center and the Cassidy Property were required to be addressed. While OPC argued that there were no Commission orders from a government agency addressing the Cassidy property directly, Columbia cited both 42 U.S.C. Chapter 103 – CERCLA, and the Environmental Article ("EA") Annotated Code of Maryland, § 7-222 as the applicable laws governing the

[12] *Id* at 45.
[13] *Id* at 45. *Marriott Employees Fed. Credit Union v. Motor Vehicle Admin*., 346 Md.437, 444, 697 A.2d 455, 458 (1997), citing *State v. Pagano*, 341 Md. 129, 133, 669 A.2d 1339, 1340 (1996).
[14] *Id* at 45.

remediation. The Chief PULJ found that the initial requirement of PUA § 4-211(a)(1) has been satisfied.

The second prong found in PUA § 4-211(a)(1)(i-ii) requires that the remediation costs must be related to the contamination of the real property, and "the real property is or was used to provide manufactured or natural gas service directly or indirectly to the gas company's customers or the gas company's predecessors".[15] The Proposed Order indicated that "[a]ll parties agree that the Cassidy Property is contaminated and at least a portion of the Cassidy Property, the tar pond, was used in the provision of manufactured gas service to customers by Columbia's predecessor."[16] Although OPC raised arguments to limit the recovery to portions of Cassidy Property and cited other potentially responsible entities for the contamination, the Chief PULJ did not find that the statute supported the restrictive view argued by OPC. Therefore, the Chief PULJ found that the requirements of § 4-211(a)(1)(i-ii) were satisfied.

Finally, the PULJ noted that PUA § 4-211(a)(3) provides the Commission discretion to disallow recovery of remediation costs if it was determined by a court that the proximate cause of the contamination was the gas utility's failure to comply with a respective State or federal law, regulation, or order in effect when the contamination occurred. The Proposed Order stated that "[n]either Staff nor OPC asserted this subsection was applicable."[17] The Chief PULJ found no evidence that Cassidy Property's contamination resulted from Columbia's failure to comply with a State or

[15] *Id* at 47.
[16] *Id* at 47.
[17] *Id* at 49.

federal law, regulation or order when the contamination occurred. Therefore, the final prong of PUA § 4-211(a)(3) was met.

Next, the PULJ determined an appropriate rate recovery schedule for the environmental remediation costs. The Chief PULJ agreed "with the Company that only $318,313 is at issue in this proceeding and future remediation costs will be decided when Columbia seeks recovery. The decision in this case does not require the Commission to approve environmental remediation costs that have not yet been incurred."[18] OPC argued that there needed to be a determination that the remediation costs sought by Columbia were necessary and proper expenses. The Chief PULJ disagreed with OPC and indicated that determination of necessary and proper expenses is part of the PUA § 4-101(3) analysis which includes consideration of "necessary and proper expenses" when determining a just and reasonable rate.[19] The PULJ noted that the Commission had previously determined that the environmental remediation costs were necessary and proper expenses in *Re Chesapeake Utilities Corporation* ("CUC"), 80 Md. P.S.C. 187, 190 (1989). In that case, the Commission allowed recovery of remediation costs associated with the cleanup of the pits used to store coal tar residue from a manufactured gas plant operated by CUC's predecessor."[20] The Chief PULJ found that the facts surrounding the CUC case are similar to the Cassidy Property, "with the exception that the Cassidy Property was previously found to be *not* used and useful." The PULJ found

[18] *Id* at 49.
[19] *Id* at 50.
[20] *Id* at 51.

that PUA § 4-211 effectively alters the landscape making previously unrecoverable costs recoverable.[21]

B. OPC's Appeal

OPC argues that a proper analysis of PUA § 4-211 requires consideration of the legislative history. OPC notes that Columbia was dissatisfied with the Commission's and the Maryland Court of Special Appeals finding in Case No. 9316 so they "went to the Maryland General Assembly in search of an override."[22] Initially, the Company "sought a mandatory law but ended up with a permissive one."[23] OPC asserts that "the Commission retains discretion as to whether to approve such a [environmental remediation] claim."[24] OPC argues that "the "necessary and proper" standard and the legislative history confirm, the Commission must still consider the benefit to customers of including such costs in rates and the costs' connection to current customers, and must then determine whether it is appropriate for customers or for utility shareholders to pay such costs."[25] OPC argues that "Columbia failed to support the imposition of Cassidy Property remediation costs on ratepayers."[26] OPC also argues that by applying PUA § 4-211 only 43% of the Cassidy property would be eligible for recovery because the Statute provides that for recovery there must be a showing that "the real property is or was used to provide manufactured or natural gas service directly or indirectly to the gas company's customers or the gas company's predecessors."[27] OPC contends that of the total 5.82

[21] *Id* at 52.
[22] Notice of Appeal by the Office of People's Counsel of the Proposed Order of the Public Utility Law Judge ("OPC Appeal") filed October 16, 2018.
[23] OPC Appeal at 3.
[24] OPC Appeal at 4.
[25] OPC Appeal at 4.
[26] *Id*.
[27] *Id*.

acres only 2.5 acres of the property (approximately 43%) "was used to provide manufactured [] gas service." So if the Commission determines that Cassidy Property costs are recoverable, "only the costs of remediating 2.5 aces that Columbia's predecessor owned are eligible for recovery under the Statute."[28] OPC argues that Columbia failed to offer evidence that show what portion of the costs sought in this case or future remediation costs are attributable to the 43% of the Cassidy Property that the Statute covers.[29] Lastly, OPC argues that Columbia offered no evidence to show how the recovery of the Cassidy Property remediation costs in rates will benefit customers nor established a connection between the costs and the current customers.[30]

C. Staff Reply

Staff supports Columbia's claim to include the amortized Cassidy Property remediation costs in rate base under PUA § 4-211.[31] Staff argues that "[e]ven if the Commission should take OPC's course and seek 'context' for this statute in outside sources, OPC's interpretation must be rejected."[32] Staff also argues that OPC proposes that this statute maintains the status quo leaving in place the decision of Case No 9316 and requiring a showing of "used and useful" as a prerequisite for recovery despite the enactment of PUA § 4-211. Staff rejected OPC's argument because "[a] statute can not be interpreted to be meaningless."[33] Staff concludes that "[a]lthough the Cassidy property is not used and useful in providing utility service to current customers as determined by the Commission, that consideration no longer precludes recovery of

[28] *Id* at 5.
[29] *Id* at 5.
[30] *Id* at 11.
[31] Reply Memorandum by the Staff of the Public Service Commission ("Staff Reply") filed on October 31, 2018.
[32] Staff Reply at 8-9.
[33] Staff Reply at 9.

environmental remediation costs under newly-enacted PUA § 4-211 as were awarded here by the [Chief] PULJ."[34]

D. Columbia Reply

Columbia argues that the Chief PULJ's decision to permit the Company's claim for environmental remediation costs related to the Cassidy Property under PUA § 4-211 is well supported by the application of the record in this case. [35] Columbia argues that OPC failed to demonstrate any grounds for reversing or modifying the Chief PULJ's decision. Additionally, Columbia notes that OPC's argument seeks to have the Commission reach a conclusion on this case that ignores rules of statutory construction and which would be inconsistent with PUA § 4-211.[36]

E. Commission Decision

The Chief PULJ correctly noted that the Maryland Courts have long held the "if the language of the statute is clear, courts need not look beyond the statutory language to determine the Legislature's intent."[37] Here the language of PUA § 4-211 is clear and unambiguous and therefore there is no need to delve into the legislative history. It is clear that the Legislature intended to remove the requirement of "used and useful" which earlier prevented Columbia from recovery in Case No. 9316 to now allow recovery of those remediation costs. To attack the statute as ambiguous and rely on extraneous sources to understand the statutes meaning is futile. The Commission agrees that OPC's analysis would render the newly-enacted PUA § 4-211 meaningless and a statute cannot

[34] Staff Reply at 9.
[35] Reply Memorandum On Appeal of Columbia Gas of Maryland, Inc. (Columbia Reply) filed on October 31, 2018.
[36] Columbia Reply at 15.
[37] Proposed Order of the PULJ at 45.

be interpreted to have no meaning. Based on the foregoing, the Commission affirms the Proposed Order of the PULJ.

IT IS THEREFORE, this 21st day of November, in the year Two Thousand Eighteen by the Public Service Commission of Maryland,

ORDERED: (1) That Proposed Order of the Public Utility Law Judge in Case No. 9480 is AFFIRMED; and,

(2) That Columbia Gas of Maryland file with the Commission revised tariff pages in compliance with this Order, and that the revised tariff pages will have the effective date of November 26, 2018.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman
Commissioners