

**ORDER NO. 88165**

IN THE MATTER OF THE CONTINUING  
INVESTIGATION OF THE PURCHASED  
GAS ADJUSTMENT CHARGES OF  
SANDPIPER ENERGY, INC.

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

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CASE NO. 9514(d)

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Issue Date: April 28, 2017

**ORDER REVERSING PORTION OF  
PROPOSED ORDER OF PUBLIC UTILITY JUDGE  
DENYING RECOVERY OF ACTUAL GAS COSTS OF \$136,213.17**

On December 22, 2016, the Maryland Public Service Commission’s (“Commission”) Public Utility Law Judge (“PULJ”) Division issued a Proposed Order approving the Gas Sales Service Rate of Sandpiper Energy, Inc. (“Sandpiper”), for the period under review, as well as a revised Actual Cost Adjustment (“ACA”) factor of \$0.17364 per propane Ccf sold or \$0.07235 per natural gas Ccf effective for the 12 months beginning January 2017. The Proposed Order denies recovery of a requested adjustment for under-recovery during the prior period of 2015 in the amount of \$136,213.17.

In this Order, the Commission reverses the portion of the Proposed Order that denies recovery of the requested adjustment for the under-recovery that occurred during 2015 in the amount of \$136,213.17. As discussed herein, the Commission finds that, based on the facts of this particular case, Sandpiper should be allowed to recover its actual gas costs for this prior period.

**I. Background and Procedural History**

This appeal stems from an accounting error by Sandpiper in the calculation of its ACA over the period from January 2015 through April 2016. The error at issue was an

inadvertent mistake in the coding of a formula in an accounting spreadsheet used by Sandpiper to calculate its ACA.<sup>1</sup> This error caused Sandpiper to “double-count” revenues attributable to prior ACA amounts when initially calculating a subsequent ACA rate.<sup>2</sup> As a result, the ACA rate paid by customers during the period of January 2015 through December 2015 under-recovered gas costs by \$136,213.17.<sup>3</sup> In addition, the ACA rate for 2016 was set at a rate that would have caused Sandpiper to under-recover \$1,474,361.64 if the erroneous accounting had continued through 2016.<sup>4</sup> However, the mistake was discovered by Sandpiper in February 2016, and an adjustment to Sandpiper’s Gas Sales Rate (“GSR”) was made in May 2016 to correct the error.<sup>5</sup> The rate impact of the requested adjustment is an additional \$12.00 per year assessed to Sandpiper’s customers.<sup>6</sup>

The issue of the subject accounting error was considered at the annual hearing in Sandpiper’s purchased gas adjustment (“PGA”) proceeding under Public Utilities Article (“PUA”) § 4-402 on December 15, 2016. After consideration of testimony and argument, the PULJ, in the Proposed Order, denied recovery of the amount under-collected in 2015 because it represented a prior period adjustment. Sandpiper filed a timely Notice of Appeal on January 20, 2017, and a Memorandum on Appeal on January 30, 2017. Maryland Office of People’s Counsel (“OPC”) and the Technical Staff of the Commission (“Staff”) filed Reply Memoranda on February 21, 2017.<sup>7</sup>

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<sup>1</sup> Memorandum on Appeal of Sandpiper Energy, Inc. (“Sandpiper Memo”), p. 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Reply Memorandum on Appeal of the Staff of the Public Service Commission of Maryland (“Staff Memo”), p. 2.

<sup>6</sup> Reply Memorandum on Appeal of the Office of People’s Counsel (“OPC Memo”), p 2-3.

<sup>7</sup> OPC filed a Corrected Reply Memorandum on February 22, 2017.

## **II. Positions of the Parties on Appeal**

### **A. Sandpiper's Appeal of the Proposed Order**

On appeal, Sandpiper argues that the Proposed Order is contrary to law and controlling precedent in that it misinterpreted PUA § 4-402 and completely ignored a 2003 order in the Baltimore Gas and Electric (“BGE”) PGA proceeding, *Re Baltimore Gas and Electric Company*, 94 Md PSC 262 (Case No. 8500(y), Order No. 78622 dated August 14, 2003, hereinafter the “BGE Order”) that explicitly rejected identical arguments raised by Staff and OPC in this case.<sup>8</sup> Sandpiper contends that in the BGE Order, the Commission held that prior period adjustments are appropriate under PUA § 4-402 and allowed in PGA cases.<sup>9</sup> Sandpiper further argues that the Proposed Order demonstrates arbitrary and capricious decision-making because the PULJ failed to distinguish (or even mention) several other PULJ proposed orders allowing other gas companies to recover much larger prior period adjustments.<sup>10</sup>

### **B. OPC's Reply to Sandpiper's Appeal**

In its Reply to Sandpiper's Appeal, OPC states its position that the Proposed Order should be affirmed because it correctly reads the Commission's duty under PUA § 4-402, to disallow “unjustified” fuel charges.<sup>11</sup> OPC maintains that while the BGE Order decided that a prior-period adjustment is not necessarily an automatic bar to recovery for fuel costs, the Commission is free to revisit that 14-year old finding.<sup>12</sup> OPC contends that the BGE Order

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<sup>8</sup> Sandpiper Memo, p.6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> OPC Memo, p. 2.

<sup>12</sup> *Id.*

stands for the proposition that the Commission should and can use its discretion to inquire into the nature of the prior period fuel rate adjustments, as the PULJ did in this case.<sup>13</sup>

### **C. Staff's Reply to Sandpiper's Appeal**

In its Reply to Sandpiper's Appeal, Staff argues that the Proposed Order was correctly decided, based on the most recent Commission precedents, the Code of Maryland Regulations ("COMAR") provisions governing undercharges, and sound reasoning.<sup>14</sup> Staff maintains that prior period adjustments for utility undercharges should be permitted only in rare circumstances.<sup>15</sup> Staff recommends that the Commission deny Sandpiper's appeal and affirm the disallowance of \$136,213.17.<sup>16</sup>

### **III. Discussion**

In this proceeding, pursuant to PUA § 4-402(d), the Commission is required to conduct an annual evidentiary hearing on Sandpiper's purchased gas adjustment charges at which time Sandpiper must verify and justify its purchased gas adjustment charges for each month of the yearly period pursuant to PUA §4-402(b). PUA § 4-402(c) provides the bases for a mandatory disallowance of such charges. Pursuant to PUA § 4-402(c), the Commission shall order a company to charge off and amortize any charge the Commission finds is unjustified because:

- (1) the company failed to show that the charges were based solely on increased costs of fuel, purchased power, or purchased gas;
- (2) the company failed to follow competitive practices in procuring and purchasing fuel, power, or gas; or
- (3) the company failed to show that its practices in procuring and purchasing fuel were reasonable.

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<sup>13</sup> *Id.*

<sup>14</sup> Staff Memo, p. 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Although the annual period of investigation implies that cost recovery is for the period under investigation, prior period adjustments are not explicitly addressed in PUA § 4-402. As the Commission in the BGE Order noted, “[r]equests for prior period adjustments, while not to be encouraged, will remain a fact of regulatory life as long as mechanisms such as purchased gas clauses exist. The regulatory issue is how to deal with these requests.” *Re Baltimore Gas and Electric Company*, 94 Md.P.S.C. 262, 267 (2003).

Each of the parties discusses precedent in its memorandum. The doctrine of *stare decisis* dictates that courts look to past cases with similar issues (precedent) when making their decisions. *See, e.g., State v. Waine*, 444 Md. 692, 699-700 (2015). As applied to the Commission in *Maryland Office of People’s Counsel v. Maryland Pub. Serv. Comm’n*, an agency action may be arbitrary or capricious “if it is irrationally inconsistent with previous agency decisions.” *Maryland Office of People’s Counsel v. Maryland Public Service Comm.*, 226 Md.App. 176, 207-08 (2015), *citing Harvey v. Marshall*, 389 Md. 243, 302-03 (2005). Thus, in accordance with the general principles of *stare decisis*, the Commission decides cases the same way when their legally material facts are the same.<sup>17</sup> *Stare decisis* is not absolute and decisions that are wrong may be overturned. *Unger v. State*, 427 Md. 383, 417 (2012). This means that the Commission may overrule a prior decision if the Commission subsequently determines the prior decision was not correct. Even the Supreme Court has not felt constrained to follow precedent when governing decisions are unworkable or badly reasoned. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991) *quoting Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 765 (1944). There certainly is no

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<sup>17</sup> When a Commission decision is based on the specific facts of a case, and not a rule of law, it is difficult for the decision to be rendered arbitrary or capricious. *See, e.g., Maryland Office of People’s Counsel v. Maryland Pub. Serv. Comm’n*, 226 Md.App. 176, 208 (2015).

binding precedent as Sandpiper argues, because “[s]tare decisis is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’” *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451 (1940).

The Commission in the BGE Order found the \$9.4 million at issue in that case was proceeds from capacity release transactions utilizing Federal Energy Regulatory Commission (“FERC”) regulated transportation and storage assets, which qualify for dollar-for-dollar recovery pursuant to the filed rate doctrine.<sup>18</sup> Therein, the Commission specifically noted that the disallowance in the *Baltimore Thermal* case,<sup>19</sup> on which it was asked to base its decision, did not run counter to the filed rate doctrine and the company’s right to dollar-for-dollar recovery.

The Commission in the BGE Order held that the filed rate doctrine required dollar-for-dollar recovery of the costs at issue in that case unless there was a reasonable basis to conclude the costs were somehow imprudently incurred. However, in a case decided subsequent to the BGE case, FERC held that there is no violation of the filed rate doctrine or the rule against retroactive ratemaking where tariff language provides notice of potential adjustment for prior periods. *TransColorado Gas Transmission Co.*, 112 FERC ¶ 61135 (2005). In that case, FERC discussed potential grounds for not permitting recovery very similar to those listed in PUA §4-402(c). *See id.* If such grounds precluding recovery are not present, FERC addresses under- and over-collections of fuel gas costs on a flexible, case-by-case basis. *Id.*

We believe that FERC’s approach provides sound guidance. We too will start with

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<sup>18</sup> The filed rate doctrine requires “that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.” *Nantahala*, 476 U.S. 953, 962, 106 S.Ct. 2349, 2354 (1986).

<sup>19</sup> *Re Baltimore Thermal Energy Corp.*, 80 Md.P.S.C. 305 (1989).

Sandpiper's tariff. Sandpiper's Gas Sales Service Rate ("GSR") charges consist of fixed costs (demand costs), variable costs (commodity costs), interruptible margin sharing credits, supplier refunds, the current actual cost adjustment ("ACA"), and the appropriate taxes.<sup>20</sup> The ACA is an adjustment calculated annually based on actual data for the 12 months which ends on September 30 of each year.<sup>21</sup> The adjustment is done to reconcile GSR collections received from Sandpiper customers with the actual gas costs incurred by Sandpiper over that same time period.<sup>22</sup> *Id.* at 5. Sandpiper's tariff provides:

#### ACTUAL COST ADJUSTMENT

An Actual Cost Adjustment (ACA), to recover actual gas cost under or over collections, shall be computed by taking the actual cost of purchased gas as recorded on the books of the Company during the recovery period of the twelve months ended September, and subtracting there from an amount equal to the Gas Sales Rate multiplied by the actual sales for which the rate is applicable during the recovery period recorded on the books of the Company during the recovery period and further subtracting or adding any material ACA over or under collections for the previous year. Therefore, the total ACA amount to be recovered will contain the over or under collection of gas costs for the current determination period as well as a final reconciliation of the ACA amount from the previous period. The derived amount shall be divided by the forecasted quantities of gas for the appropriate time period. The resulting unit rate per 100 cubic feet shall be reflected for a twelve (12) month period. The determination period to be used in the computation of the ACA shall be the twelve (12) months ended September 30 of each year.<sup>23</sup>

We find that the annualized adjustment language in Sandpiper's tariff does not establish an absolute bar to prior period adjustment because the ACA provision states that the ACA is to be computed by taking the actual cost of purchased gas during the recovery period of the twelve months ended September, and subtracting there from an amount equal to the GSR multiplied by the actual sales for which the rate is applicable during the recovery period

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<sup>20</sup> Direct Testimony of Matthew M. Everngam, p. 4.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.*

<sup>23</sup> Sandpiper Tariff, P.S.C. Md. No. 1, Sheet 35.

*and further subtracting or adding any material ACA over or under collections for the previous year* [emphasis added]. The next sentence states, “[t]herefore, the total ACA amount to be recovered will contain the over or under collection of gas costs for the current determination period *as well as a final reconciliation of the ACA amount from the previous period.*” [emphasis added].<sup>24</sup> The language “over or under collections for the previous year” would allow adjustments for the one-year period prior to the one-year period under investigation. Thus, taken as a whole, the tariff language provides notice that an adjustment for a prior one-year period might be allowed.

In the present case, the pertinent facts are not in dispute. The record in this case contains no evidence that the requested adjustment was unjustified due to any of the reasons listed in PUA § 4-402(c). Consideration of adjustments not found to be unjustified by PUA §§ 4-402(c)(1), (2) or (3), are of course governed by the Commission’s broad powers to regulate utility rates under PUA §§ 2-112, 2-113, and 4-101. *See Maryland Office of People’s Counsel v. Maryland Pub. Serv. Comm’n*, 226 Md.App. 176, 206 (2015). As the Court of Special Appeals has explained, the “only statutory imperative is to construct and approve just and reasonable rates ... which, among other things, fully consider and are consistent with the public good.” *Id. citing Bldg. Owners & Managers Ass’n of Metro. Baltimore, Inc. v. Pub. Serv. Comm’n of Maryland*, 93 Md.App. 741, 762 (1992) (citation and quotations omitted). Unless prior period adjustments are found to be unjustified under PUA § 4-402(c), the reasonableness of prior period adjustments will be determined by the Commission in each particular case based on the facts and circumstances of that case.

In the BGE Order, after concluding that BGE was entitled to recover the entire \$9.4 million from its gas customers based on the filed rate doctrine, the Commission found that

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<sup>24</sup> *Id.*



PUA §§ 4-202 and 4-203 operated as a separate reason for BGE to fully recover that sum. The Commission held that BGE was required to charge the rates contained in its Gas Service Tariff for the regulated market-based rate (“MBR”) retail gas sales service. The Commission held that the fact that BGE made a mistake in calculating the rate pursuant to the method prescribed in the tariff did not excuse BGE from its obligation. The Commission held that the double-refunding which led to the under-recovery in that case was inconsistent with the company’s tariff and therefore unlawful under PUA §§ 4-402 and 4-403. Such reasoning seems to run contrary to the notion that, as we noted above, prior period adjustments are a regulatory reality.<sup>25</sup>

Although as Staff notes, prior period adjustments are disfavored, they may be allowed, if (1) the utility company’s tariff taken as a whole provides notice that a prior period adjustment may be allowed, (2) no facts are present to find the requested adjustment unjustified under PUA § 4-402(c), and (3) based on the facts and circumstances of the case the Commission finds the requested adjustment reasonable. Each request for an adjustment is based on the particular facts and circumstances involved. Facts such as the type of error, the cause of the error, the timing of the discovery of the error, and the result of the error in terms of rate impact are likely to be different in each case.

The nature of the accounting error at issue in this case is outlined in Section I above.

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<sup>25</sup> COMAR 20.55.04.05E contemplates gas undercharge adjustments for errors due to incorrect application of rate schedules, incorrect calculation of charges, or other similar reasons (not just customer metering errors as Sandpiper contends). Since we did not find prior period adjustments *per se* unlawful under PUA §§4-202 and 4-203, the portion of the BGE Order which found that those statutes precluded application of COMAR 20.55.04.05E, to the extent it might have been controlling at all, is rendered inapposite. However, application of at least a portion of COMAR 20.55.04.05 to cases governed by PUA §4-402 is inappropriate because the requirement to annually justify purchased gas adjustment charges pursuant to PUA §4-402(b) is contrary to the ability to retroactively bill for undercharges occurring less than 12 months before the discovery of an error without Commission authorization under COMAR 20.55.04.05E(2)(a). Even if COMAR 20.55.04.05E was applicable, it would not operate to disallow the requested adjustment (or a significant portion thereof) in this case. Although as the parties argue, the gas was used between October 1, 2013 and September 30, 2014, the undercharging occurred in 2015 and was discovered early in 2016.

The error was an inadvertent accounting error. Sandpiper discovered the error relatively quickly and took action to rectify the error promptly. The rate impact of the error, while not minimal, is not excessive, and should not present undue hardship upon Sandpiper's customers. Therefore, based on the facts and circumstances present in this case, we will allow Sandpiper to recover its actual gas costs for the prior period in question in the amount of \$136,213.17.

#### **IV. Conclusion**

For the reasons set forth herein, the portion of the Proposed Order denying recovery of actual gas costs of \$136,213.17 is hereby reversed.

**IT IS THEREFORE**, this 28th day of April, in the year Two Thousand and Seventeen, by the Public Service Commission of Maryland,

**ORDERED:** (1) That, as more fully detailed herein, the Proposed Order of the PULJ is reversed in part and Sandpiper is allowed to recover its actual gas costs for the prior period in question in the amount of \$136,213.17;

(2) That the balance of the Proposed Order is affirmed; and

(3) That this matter will be continued and a further hearing shall be held prior to January 1, 2018.

*/s/ Kevin W. Hughes* \_\_\_\_\_

*/s/ Harold D. Williams* \_\_\_\_\_

*/s/ Michael T. Richard* \_\_\_\_\_

*/s/ Anthony J. O'Donnell* \_\_\_\_\_  
Commissioners