ORIGINAL

Decision No. 21120

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

Golden State Milk Products Company, a corporation, Complainant, vs. The Southern Sierras Power Company, a corporation, Defendant.	Case No. 2532.

George Harris and Frederick Hyde, for the complainant,

Henry Coil, for the defendant.

BY THE COMMISSION:

O P I N I O N

In this proceeding, complainant seeks reparation for alleged overcharges made by the defendant utility. Public hearing was held before Examiner Handford in San Francisco on October 15, 1928.

The facts, over which there is scarcely any dispute, are as follows:

For several years prior to 1924 a considerable portion of the Imperial Valley, including the Town of El Centro, was served by the Holton Power Company. The Southern Sierras Power Company operated only in the southeastern part of the valley near Yuma and Andrade. In 1920 the rates of the Holton Power Company were fixed by this Commission and in accordance with our order its Schedule P-2 was published.

In December, 1923, the Commission permitted The Southern

Sierras Power Company to purchase the properties of the Holton Power Company. Our decision stated that the "consolidation will not result in any change of management or rates." The duty of The Southern Sierras Power Company was, therefore, to then republish the Holton Power Company schedule. Thinking that its own schedule "applicable to that territory in the vicinity of Andrade Substation in Imperial County and for resale into Mexico" was identical with the Holton Power Company schedule, The Southern Sierras Power Company filed and published the same as applicable "over the entire Imperial Valley." This was Schedule P-22, effective January 1, 1924. There was in fact a material difference in the two schedules. Condition "C" of The Southern Sierras Power Company Schedule P-22, had it been properly construed and applied, would have resulted in a material reduction in charges to about 13 consumers in and about El Centro.

Special Condition "C" of the Holton Schedule P-2 read as follows:

> "The demand charge may be based on the horse power of measured maximum demand occurring during that month and the eleven months immediately preceding, providing the installation consists of at least two motors and has a total connected load of 50 h.p. in which case the h.p. upon which the demand charge will be based will be not less than 50% of the total active connected load, and in no case less than $600. per year."

Condition "C" of Schedule P-22 read:

> "The demand charge may be based on the horse power of measured maximum demand instead of horse power of connected load, in which case the horse power upon which the demand charge will be based will be not less than 50% of the highest maximum demand occurring during the preceding eleven months, and in no case shall the demand charge be less than $600. per year."

Since The Southern Sierras Power Company apparently did not realize that its Schedule P-22 differed from the Holton Power Company's Schedule P-2, it made no changes in billing consumers taken over from the Holton Company after January 1, 1924.

The error did not come to its attention until August of the same year. After some correspondence with this Commission, it was permitted to file a new schedule, P-31, effective by special permission retroactively as of January 1, 1924. This schedule, with Condition "C" as originally published in the Holton Power Company Schedule P-2, was made "applicable to the entire Imperial Valley, except that certain portion in the vicinity of and served from Andrade Substation." It has not since been cancelled.

The complainant and its predecessors at El Centro have been consumers of power from the Holton Power Company and its successor, The Southern Sierras Power Company. The demand clause as expressed in Schedules P-2 and P-31 has at all times controlled the assessment of the monthly charges for power used. Had the demand clause in Schedule P-22 been applied the complainant's bills for power would have been materially reduced. Complainant contends that Schedule P-22 has been at all times since January 1, 1924, and is now the lawful published rate, and demands a repayment of all excess charges made since that date.

Defendant takes the position that its Schedule P-22 was filed inadvertently and in violation of the Opinion and Order of this Commission; that it never became legally effective, and that Schedule P-31, filed some eight months later to correct the error in the earlier schedule, then became and now remains the legal and proper rate chargeable for service rendered complainant. It also invokes the Statute of Limitations. Informal complaint was filed October 24, 1927. It claims, therefore, that whatever effect may be given to the schedules filed and published, the complainant can not recover for overcharges made more than two years preceding such complaint. In answer to the plea of the

Statute of Limitations the complainant urges that such provision of the Public Utilities Act is a limitation to recover reparation under Section 71 of the Act alone, which is not the section under which recovery is here sought. Quoting from its brief:

> "A complete answer to that point is found in the fact that we are here dealing with illegal rates as distinguished from rates which are unreasonable or discriminatory, although sanctioned by effective schedules. Section 71 is concerned only with the latter."

Complainant apparently conceives its demand to be one for the recovery of an overcharge, on the theory that the higher rate provided in Schedule P-31, because illegally filed and published, is ineffective for any purpose, and that the lower rate provided in Schedule P-22, legally filed and published, is the effective rate which should at all times have been applied. It is not claimed that the rate charged is unreasonable or discriminatory, nor has complainant offered specific proof of the damages sustained. Whether the demand is for an overcharge or for an unreasonable, preferential or discriminatory charge, the right to recover must rest in Section 71, for the relief provided by that section is the only relief afforded in this forum to a patron who has suffered by the unlawful act of a utility. Therefore, if the complainant's case is not to fail, it must fall within that section, and recovery be limited by the provision therein that the complaint must be brought within two years from the time the cause of action accrues.

There is no doubt that defendant's Schedule P-31, since it changed the existing rates upward, should not have been received for filing with this Commission without a finding that such increase was justified. The fact that the necessity for the revision resulted from an error in the cancelled schedule did not

relieve the utility from the duty of making its tariff changes in the manner provided by the Act. The tariff in question, however, was in fact received for filing, published and placed in effect. What then was the duty of the defendant utility under said schedule? We are confident that its duty was to adhere strictly to every provision therein until such tariff was regularly changed or suspended.

Section 17 (b) of the Public Utilities Act requires a utility to charge the rates "specified in its schedule on file and in effect at the time." This provision is almost identical with that in Section 6 (7) of the Interstate Commerce Act requiring interstate carriers to make the charges "specified in the tariff filed and in effect at the time." It has been the uniform rule of the Interstate Commerce Commission, approved by the courts, that the filed and published rates of interstate carriers, though filed and published in violation of law, become, nevertheless, the effective rates binding on shipper and carrier alike: Penn. Ry. v. Int. Coal Co. 230 U.S. 184; Davis v. Portland Seed Co. 264 U.S. 403; Magnolia Co. v. Beaumont, etc., Ry. 20 Fed. (2nd) 384; Beaumont, etc. Ry v. Magnolia Co. 26 Fed. (2nd) 72.

We see no reason why we should adopt a contrary rule. One of the main advantages to be obtained from public regulation is the prevention of secret rates, rebates, preferences and discrimination. A means is provided by the Act for the preparation, filing and publishing of rate schedules, from which there shall be no deviation. If such tariffs are unjust to either the utility or to its patrons, a procedure is provided for the correction of the defects. To hold that the effective rate is not the one filed and published, but is some other theoretically legal rate, would lay every tariff open to attack by both the utility and its

patrons. We can not conceive of any hardship resulting from an adherence to such rule. Should the rate charged be in excess of the just and reasonable rate, a consumer may clearly, under the provisions of Section 71, demand reparation. If the rate charged is in fact reasonable, though technically illegal because not filed and published in conformity with the statute, a consumer is not in equity entitled to reparation. For any violations of the Act by a utility, the Commission may, of course, in a proper case, invoke the penalty provided, but we find no provisions in the Act which empower the Commission to award damages or reparation for every injury resulting therefrom.

We conclude that complainant is not entitled to recover any payments assessed under defendant's Schedule P-31 subsequent to the date such schedule was made effective. Since complainant can not recover payments made more than two years prior to the date of complaint, or prior to October 24, 1925, which was subsequent to the filing of Schedule P-31, we need not consider the rights of the parties as to transactions prior thereto.

The parties introduced in evidence a written application or contract covering power service to be rendered by defendant to complainant. Since it does not appear that the parties intended to contract on any other basis of rates than those provided in the effective tariffs of the utility, and had no right to do so, we have given no consideration to such agreement.

O R D E R

The above entitled complaint having been filed, a public hearing thereon having been held, the matter having been submitted and being ready for decision, and good cause appearing,

IT IS HEREBY ORDERED that said complaint be and the

same is hereby dismissed.

IT IS HEREBY FURTHER ORDERED that all moneys impounded or deposited with this Commission by complainant be released to and paid over to defendant, The Southern Sierras Power Company.

The effective date of this Order shall be twenty (20) days from and after the date hereof.

Dated at San Francisco, California, this 16th day of May, 1929.

Thos. S. Louttit

C. L. Lanney

Leon O. Whitsell

Commissioners.

I can see no escape from the conclusion expressed in the opinion and order, and I therefore concur.

It should be pointed out, however, that a patron of a utility who pays rates specified in a tariff unlawfully filed because not supported by a showing before the Commission and a finding that the increased rates so filed are justified (Sec. 63(a) Public Utilities Act) is not entirely remediless. In California Adjustment Co. v. A.T. & S.F. R. Co., 179 Cal. 140, the State Supreme Court had before it a situation closely analogous to that here presented, and it reached the conclusion that an independent right of action existed under Sec. 73(a) of the Act. While the Supreme Court of the United States has reached a somewhat different conclusion in construing the Interstate Commerce Act, the meaning of the Public Utilities Act is primarily a local question in which the decision of the State Court is controlling.

Hence, while the complainant is not entitled to relief in this forum, it would seem to have a remedy in the courts to the extent any of the overcharges complained of have not been barred by the statute of limitation.

W. J. Carr
Commissioner.