

ORIGINAL

Decision No. 21869

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Golden State Portland Cement Company, a corporation,	Complainant,
vs.	
Southern Sierras Power Company, a corporation,	Defendant.

Case No. 2383.

O'Melveny, Milliken & Tuller, and
Louis W. Myers, and William W. Clary and
C. L. McFarland, for Complainant.

Henry W. Coll, Newman Jones and Hugh
Gordon, for Defendant.

J. J. Deuel and L. S. Wing, for California
Farm Bureau Federation, Intervenor.

WEITSELL, COMMISSIONER:

O P I N I O N

Complaint in this proceeding was filed June 21, 1927. The Commission was asked, first: to declare a certain contract between the parties to be void or abrogated; second, to grant reparation because of discrimination in rates; third, to fix fair and reasonable rates for power service. Three other proceedings have been instituted, each to an extent presenting the same issues as raised herein; Application 11743 of Southern Sierras Power Company for readjustment of rates; Cases 2440 and 2541, investigations on the Commission's own motion into the rates, contracts and practices of the defendant. These later proceedings were consolidated for hearing and have since been

submitted. Hearings in the instant case were concluded on June 14, 1928, but it was agreed that decision might be deferred until the other rate proceedings were also submitted and that all evidence received in those proceedings might be used in this case. However, since the several matters were not joined, separate decisions are necessary.

The complainant began purchasing power from the defendant on January 5, 1914, under a contract to continue in effect for twenty years. In October, 1915, the defendant entered into a contract with the Southwestern Portland Cement Company, which contract was similar in all respects to that with complainant except that the Southwestern Company was accorded the right after five years to discontinue the purchase of power from defendant should it make provision for the generation of power on its own premises. The complainant's plant is at Oro Grande and that of the Southwestern Company at Victorville about five miles distant, both in San Bernardino County. The complainant admits that throughout the period between 1915 and the present these two cement plants have been similarly situated as to the amount of power purchased and as to their rights respectively to have equal rates and privileges from the Power Company.

The contracts made by the utility in 1914 and 1915 with these two cement companies were at rates less than those in its published tariffs applicable to like classes of service. Since such contracts were executed there have been three rate proceedings before this Commission involving the defendant utility, in each of which the Commission ordered changes, both increases and decreases, in the particular schedules applicable to these two cement companies. The last was on June 14, 1922, Decision No. 10587, (21 C.R.C. 798), when the Commission fixed a schedule designated

as Schedule P-24. Upon each of such rate changes as ordered by the Commission the two cement companies were billed and paid for power at the revised schedule.

It appears that both cement companies are in a position to manufacture their own power by using waste heat from the cement kilns. Both companies considered making such changes. The defendant then sought to force the complainant by injunction to continue to buy power for the remainder of the twenty year term of the 1914 contract. With the Southwestern Company the defendant on March 22, 1927, entered into a new contract for a term of ten years providing for a rate less than that specified in Schedule P-24. Immediately afterward the complainant was offered a similar contract, but complainant refused the offer and has since impounded with the Commission the difference between the amount of the bills rendered by defendant computed on the P-24 Schedule and that which complainant considers to be a proper charge.

The complainant obviously desires to be relieved from its twenty year contract so that it may be free either to generate its own power or to negotiate separately with the defendant for a contract more favorable than that executed by the Southwestern Company. Accordingly, it prays that this Commission declare such contract of 1914 either to be void, for the reason that it is without consideration and is contrary to public policy, or that it has since been abrogated by the acts of the Commission and of the defendant. There is no doubt that this Commission has the authority to alter or abrogate contracts made by a public utility with its consumers both as to rates and duration (Sutter-Butte Canal Company vs. Railroad Commission) decided by the Supreme Court of the United States April 8, 1929, 73 Law Ed. 373.

As stated above, the evidence in concurrent proceedings dealing with the rates, regulations and contracts of the defendant (Application No. 11743 and Case No. 2541) has been

stipulated in evidence in this proceeding. The Commission has rendered its Decision and Order No. 21748 in those proceedings fixing just and reasonable rates and conditions of service to consumers situated similarly to the plaintiff. Schedule P-11 therein is made available to cement plants similarly located, upon condition that such consumers enter into a contract to purchase their entire power requirements from the company for the full term of ten years, and it was, in said decision, found to be unreasonable for the company to require from any such consumers a contract to continue service for a term in excess of ten years. The rates provided in such schedule are lower than those which complainant has paid under its existing twenty year contract entered into in 1914. Service under the new schedule will now be available to plaintiff under the conditions therein provided, namely, upon the execution of a contract to purchase power at such rates for a period of ten years. Since it has been found to be unreasonable for the company to require any cement plant consumer hereafter qualifying under Schedule P-11 to enter into a contract to continue service for a longer term than ten years, and the complainant has already, under its contract of 1914 been a consumer of the company in excess of a ten year term and at higher rates than those fixed in Schedule P-11, we conclude that complainant has now satisfied all reasonable requirements as to its obligation to continue service, and we hold, therefore, that any attempt on the part of the defendant to force the complainant to continue to purchase power during the entire term thereof would be unjust and unreasonable discrimination. The order herein will accordingly provide for the complete abrogation of such contract.

The other relief prayed for by complainant is reparation because of defendant's alleged discrimination in charging the Southwestern Company a lower rate since March 22, 1927, than it has charged the complainant. Under any view which we might

take as to the validity of complainant's contract of 1914, its claim for reparation must fail. As stated above, it admits that the two competing cement companies have at all times been similarly situated and entitled to equal rates and heretofore, at least, this Commission has so considered them. Defendant has offered to complainant exactly the same rates that it accorded to complainant's competitor, upon the condition that complainant enter into a similar contract, but the complainant has refused to accept such a contract. Its claim of discrimination is premised upon the assumption that had it been legally free to negotiate a new private contract with the utility it might have been able, because of its ability to generate its own power at low cost, to have obtained from the defendant utility a rate more favorable than that accepted by its competitor.

This does not establish discrimination. Discrimination results from an unequal charge for a like and contemporaneous service by a utility under substantially similar conditions and circumstances. In so far as circumstances have been within the control of the defendant utility it has accorded to each cement company exactly the same rates and service. The economic necessities, advantages or disadvantages of the consumer may not be considered.

I recommend the following form of order:

O R D E R

A public hearing having been held on the complaint as above entitled, the matter being submitted and now ready for decision, and basing its order on the findings and conclusions in the opinion above,

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that the contract hereinabove mentioned, executed on the 5th day of January, 1914, between Southern Sierras Power Company and Golden State Portland Cement Company, providing for the sale and purchase of electricity for power and lighting purposes for a term of twenty years, be and the same is hereby abrogated both as to duration and as to rates.

IT IS HEREBY FURTHER ORDERED that in all other respects the said complaint be and is hereby dismissed, and that the Secretary of the Railroad Commission of the State of California be instructed to deliver and pay to Southern Sierras Power Company all moneys impounded with the said Railroad Commission by the Golden State Portland Cement Company.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

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

December
~~November~~ Dated at San Francisco, California, this 6th day of 1929.

Thos B. Latta
C. Seavey
Edward
Leon Whitehall
M. J. Cunn
Commissioners.