ORIGINAL

Decision No. 5314

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

PALO ALTO GAS COMPANY,
Complainant,

vs

PACIFIC GAS AND ELECTRIC COMPANY,
Defendant.

Case No. 1144

Louis Oneal and Wm. F. James for Palo Alto Gas Company.

C. P. Cutten for Pacific Gas and Electric Company.

THELEN and DEVLIN, Commissioners:

OPINION ON MOTION TO DISMISS.

This is a motion to dismiss the complaint by reason of alleged absence of jurisdiction to award reparation.

The complaint herein was filed on September 8, 1917. It alleges, in effect, that Palo Alto Gas Company, hereinafter at times referred to as the Palo Alto Company, and Pacific Gas and Electric Company, hereinafter at times referred to as the Pacific Company, are both public utilities engaged in the business of selling gas; that the Palo Alto Company is a consumer and patron of the Pacific Company and now purchases and for more than two years last past has purchased gas from the Pacific Company for sale by the Palo Alto Company to the inhabitants of the City of Palo Alto and its vicinity; that the Pacific Company threatens to compel the Palo Alto Company to pay 60¢ per thousand cubic feet for all gas sold by the Pacific Company to the Palo Alto Company and sold by the latter company to its customers for more than two years last past; and that said rate of 60¢ per one thousand cubic feet of said

gas was and is excessive, unreasonable and unfair. The Palo Alto Company asks the Railroad Commission to fix a just and reasonable rate to be paid by the Palo Alto Company to the Pacific Company and to order the Pacific Company to make reparation to the Palo Alto Company for the excessive charges of the past and for further relief.

The answer alleges that the Palo Alto Company ceased to be a customer of the Pacific Company on September 22, 1917, on which day the possession and operation of the Palo Alto Company's gas system were transferred to the City of Palo Alto; denies that said rate of 60¢ per one thousand cubic feet of gas was or is excessive, unreasonable or unfair; alleges that all gas sold by the Pacific Company to the Palo Alto Company was sold under a contract dated March 18, 1905, a copy whereof is attached to the answer as Exhibit "A"; alleges that all gas bought by the Palo Alto Company prior to March 31, 1913 was paid for at the price specified in said contract but that from April 1, 1913 to date the Palo Alto Company has paid to the Pacific Company only 54 ¢ per one thousand cubic feet of gas instead of 60¢ per one thousand cubic feet of gas claimed by the Pacific Company to be due under said contract; and alleges that the Palo Alto Company now owes to the Pacific Company the sum of $10,609 on account of gas so sold by the Pacific Company to the Palo Alto Company. The answer sets forth a number of jurisdictional defenses all of which, however, the Pacific Company expressly withdrew at the hearing herein except the defense that the Railroad Commission has no jurisdiction to award reparation on the facts of this case.

The Palo Alto Company being no longer a customer of the Pacific Company, the issue in this proceeding is reduced to the question of reparation.

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Public hearings were held in San Francisco on January 3 and 4, 1918. After evidence bearing on the issue of reparation had been presented, the Pacific Company made its motion to dismiss, urging that the Railroad Commission has no jurisdiction, on the facts of this proceeding, to award any reparation. The parties asked for and were granted permission to file briefs on this motion. The briefs have been filed and a decision may now be made on said motion.

The Pacific Company bases its motion on the following propositions -

1. That the Railroad Commission's power to award reparation is limited to cases in which the alleged unreasonable or excessive rate was theretofore actually paid in full by the consumer.

2. That the Railroad Commission has no power, in any event, to award reparation unless the Commission has first affirmatively established a rate and the public utility later charges a rate higher than the rate thus established.

3. That the Railroad Commission has no power to grant reparation in a case in which the rate was originally established by a contract unless the rate had theretofore been changed by agreement of the parties or act of the Commission.

4. That the issue of reparation can not be raised unless at least 25 consumers join in the complaint.

5. That, in any event, the Railroad Commission can award reparation only as to rates paid or charges made within two years prior to the filing of the complaint.

We shall consider these points in order.

1. Actual Prior Payment of Alleged Excessive Rate.

The complaint herein was filed in reliance on Section 71 of the Public Utilities Act, reading as follows:

> "(a) When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; provided, no discrimination will result from such reparation.
>
> (b) If the public utility does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction to recover the same. All complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a public utility to obey an order or decision of the commission."

Defendant urges that under the language of this section reparation can be awarded only in cases in which the excessive or discriminatory charge concerning which complaint is made has first actually been paid by the consumer. Defendant draws attention, in this connection, to the fact that in the present case, while the defendant has continously claimed 60¢ per thousand cubic feet of gas, the Palo Alto Company, subsequent to April 1, 1913, has paid only 54¢.

Defendant relies in this connection on Paine Lumber Company, Ltd. v. Chicago and North Western Railway Company, 16 Wisconsin Railroad Commission Reports, 633, in which case it was held that the Railroad Commission of Wisconsin has no jurisdiction to award reparation unless the charge claimed to be excessive has first been paid by the consumer. The case is not persuasive here for the reason that the Wisconsin Statute provided that the Commission might award reparation only in cases where the charge complained of had actually been "exacted". Section 71 of the Public Utilities Act applies where an excessive or discriminatory amount has been "charged". Section 71 does not require that the excessive or discriminatory amount shall actually have been exacted or paid.

To require a customer who has been charged an excessive or discriminatory rate to first pay the charge before he can apply to the Railroad Commission for relief would seem to be an unnecessary and useless burden which the statute will not be assumed to intend unless clearly required by its language, which is not the case here.

The reference in Section 71 to the payment of interest by the utility refers to cases in which the excessive or discriminatory charge was paid.

2. Necessity for Prior Establishment of Rate by Railroad Commission.

The defendant next urges that the Railroad Commission has no jurisdiction to award reparation unless the Commission has first established a rate and the public utility thereafter charges an amount higher than the rate thus established.

This contention finds no support in the language of Section 71.

It has been the uniform practice of the Railroad Commission to award reparation in appropriate cases entirely irrespective of whether the charge complained of had theretofore been established by the Commission. The most recent cases in which this Commission awarded reparation in cases in which the charge complained of had merely been filed with the Commission and had not been established by the Commission are:

Phoenix Milling Company vs Southern Pacific Company, Case No. 1061, decided on Sept. 8, 1917.

Pacific Portland Cement Company vs. Tidewater Southern Railway Company, Case No. 1129, decided on October 29, 1917.

City Street Improvement Company, vs. Southern Pacific Company and Peninsular Railway Company, Case No. 1122, decided on December 6, 1917.

As is well known, the Interstate Commerce Commission follows the same practice under a reparation statute very similar to Section 71 of the Public Utilities Act.

Defendant bases its contention in this respect not on any language in Section 71 but on a number of decisions by other state railroad or public utility commissions holding that they have no power to award reparation under statutes which limit their jurisdiction to the establishment of rates for the future.

Charlesworth vs Omro Electric Light Company, 16 W.R.C.R. 23, P.U.R. 1915 B.1;
Rhodes-Burford Home Furnishing Company vs. Union Electric Light and Power Company, 2 Mo. P.S.C.R. 656, P.U.R. 1916, B.645.

These decisions do not apply here for the reason that Section 71 very clearly shows that it is intended to apply to excessive or discriminatory charges irrespective of whether the rate was established by the Railroad Commission or merely filed by the utility. Under the provisions of Sections 22 and 23, Article XII, California State Constitution, the power of the

Legislature to enact Section 71 can not reasonably be questioned. The Pacific Telephone and Telegraph Company vs. Railroad Commission of California, 166 Cal. 640.

The instances to which the defendant would limit the authority of the Railroad Commission to award reparation are cases of "illegal" rates as to which recovery would lie in court without any proceeding before the Railroad Commission. We do not so read Section 71.

3. Rate Established by Contract.

Defendant next urges that the Railroad Commission has no authority to award reparation herein for the reason that the rate was originally established by contract.

Defendant does not question the jurisdiction of the Commission to alter or modify a contract rate established by a public utility but does challenge the power of the Commission to award reparation in such a case as long as the rate remains unchanged by act of the parties or the Commission.

We do not find anything in Section 71 thus limiting the jurisdiction of the Commission. An excessive or discriminatory rate may as well be established by contract as by filing by the public utility without contract. We do not agree in this respect with the decision of the Public Utilities Commission of Idaho in Taylor vs. Northwest Light and Water Company, P.U.R. 1916 A 372.

Attention should also be directed to the fact that the contract in this instance expired on June 1, 1915, and that the contract was not renewed or extended. The contract was entered into on March 18, 1905, between United Gas and Electric Company and Palo Alto Gas Company and was limited to a term of 10 years "from and after the date when the gas company shall commence delivery of gas to the consumer," which date was June 1,

1905. The Pacific Company is the successor of United Gas and Electric Company under this contract. At the time the contract expired, a controversy existed between the parties as to the rate to be paid and other matters and the contract was not renewed or extended. With reference to the rate, the Palo Alto Company paid 54¢ per thousand cubic feet continuously after the expiration of the contract, although the contract provided for one-half of the rate charged by the Palo Alto Company to its consumers, which rate was $1.20 per thousand cubic feet. With reference to the quality of the gas, the contract provided that the gas should contain 600 B.T.U. but the gas actually delivered for some time prior to the expiration of the contract, as testified to by complainant, contained approximately between 500 and 525 B.T.U. With reference to the pressure, the contract provided for a pressure between 30 and 80 pounds, whereas the actual pressure was frequently less.

4. Claim for Reparation by Less than 25 Consumers.

Relying on Section 60 of the Public Utilities Act, defendant urges that the Railroad Commission has no jurisdiction to entertain a claim for reparation unless made by 25 consumers.

Section 60 provides in part that "no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation, unless the same be signed by the mayor or the president or chairman of its board of trustees or a majority of the council, commission or other legislative body of the city and county, or city or town, if any, within which the alleged violation occurred, or not less than 25 consumers or purchasers or prospective consumers or purchasers of such gas, electricity, water or tele-

phone service."

Section 71 specifically refers to the "complainant" in reparation cases and seems clearly to contemplate that a complaint for reparation may be filed by a single complainant. We believe that the specific provisions of Section 71, referring to reparation, must be construed to prevail over the general provisions of Section 60 and that an individual consumer who has been compelled to pay an excessive or discriminatory rate is not to be denied relief merely because he can not induce 24 other consumers to join him in a reparation complaint or induce the Railroad Commission to institute an investigation on its own motion.

5. Statute of Limitations.

Defendant, finally, urges that if the Railroad Commission has jurisdiction to award reparation, this power can be exercised only with reference to charges as to which the cause of action arose within two years prior to the filing of the complaint. The complaint herein was filed on September 8, 1917.

Section 71-b of the Public Utilities Act reads in part as follows:

> "All complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission."

The Palo Alto Company asks reparation back to April 1, 1913. The company seeks to avoid the two-year limitation by a reliance on the general rule of equity that where a party is induced to refrain from instituting suit or pursuing a remedy until his right is lost, the party through whose act or inducement the remedy has been barred will be estopped from setting up or urging as a defense the bar of the statute of limitations and by testimony tending to show that the Palo Alto Company was induced

by acts of the Pacific Company to refrain from earlier filing a complaint with this Commission.

We deem it unnecessary to consider the testimony in this regard, for while this principle is applicable to estop a defendant from urging the bar of the statute where the statute goes simply to the remedy, we do not understand that it applies to revest jurisdiction in a tribunal when by lapse of time the right itself has terminated.

The question whether the two-year period mentioned in Section 71-b goes merely to the remedy or whether it is a condition of the right itself was carefully considered by this Commission in James Mills Sacramento Valley Orchard and Citrus Fruit Company vs. Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company, Vol. 9, Opinions and Orders of Railroad Commission of California, p. 80. In this case, which involved a claim for reparation on shipments of fruit trees, neither defendant railroad pleaded the bar of the statute and one of the railroads expressed a willingness to waive the defense if it could legally do so. This Commission held that the two year provision in Section 71 goes to the right and not the remedy and that the defense can not be waived. The decision was based largely on the decision of the Supreme Court of the United States in A. J. Phillips Co. vs. Grand Trunk Railway Co., 236 U.S. 662, construing a similar provision in the Interstate Commerce Act. At page 83, this Commission said:

> "It is true that this legal bar was not pleaded as a defense by either of the defendants and that the Santa Fe has impliedly expressed its willingness to waive this defense, if it can legally do so. We are of the opinion, however, that the provision of the Public Utilities Act above quoted is further distinguishable from the ordinary statute of limitations to the extent that it need not be affirmatively pleaded and can not be waived in a case of this kind by a carrier. The reasoning of the Supreme Court of the United States in the case of A. J. Phillips Co. vs. Grand Trunk Railway Co., 236 U.S. 662, is no less binding on us than it is convincing. The court was, it is true, construing the federal statute, which might be considered as being somewhat stronger than ours, as that statute provides that 'all complaints for the recovery of damages

shall be filed with the commission within two years from the time the cause of action accrues, and not after.' The court decides the question partly on the strength of this phrase, but its reasoning is such as to apply just as strongly to the present case, and we feel that we can not explain our position better than by quoting the following language of Justice Lamar (p. 667):

> 'Under such a statute the lapse of time not only bars the remedy but destroys the liability (Finn vs. United States, 123 U.S. 227 232) whether complaint is filed with the commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. *** To permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preference by means of consent judgments or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as a matter of law, that the plaintiff had no cause of action.' "

To the same effect see Eason v Beaumont Land and Water Company, Vol. 10, Opinions and Orders of the Railroad Commission of California, page 686.

We conclude that in so far as the jurisdiction of the Railroad Commission under the provisions of Section 71 of the Public Utilities Act is concerned, the Pacific Company could not voluntarily waive the two-year provision and hence could not be deemed estopped by conduct on its part from pleading this defense.

We conclude that the Railroad Commission has juris-

diction to consider the issue of reparation in this proceeding but only as to causes of action which may have accrued on and subsequent to September 8, 1915. The motion to dismiss must accordingly be denied.

We submit the following form of order:

<u>O R D E R</u>

Pacific Gas and Electric Company, defendant in the above entitled proceeding, having moved that the complaint herein be dismissed for want of jurisdiction, and careful consideration having been given to said motion,

IT IS HEREBY ORDERED that said motion be and the same is hereby denied.

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.

Dated at San Francisco, California, this 29th day of Aprilary, 1918.

Max Thelen

H. D. Loveland

[illegible]

Frank R. Devlin

Commissioners.