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Decision No. 42676

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

RIVERSIDE CEMENT COMPANY, a corporation, Complainant, vs. CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Defendant.	Case No. 4971
SOUTHWESTERN PORTLAND CEMENT COMPANY, a corporation, Complainant, vs. CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Defendant.	Case No. 4972
RIVERSIDE CEMENT COMPANY, a corporation, Complainant, vs. CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Defendant.	Case No. 4981

Overton, Lyman, Plumb, Prince & Vermille, by Wayne H. Knight and Donald H. Ford, for Southwestern Portland Cement Company; O'Melveny & Myers, by Lauren M. Wright, for Riverside Cement Company; Henry W. Coil, for California Electric Power Company; J. J. Deuel, for California Farm Bureau Federation.

O P I N I O N

Riverside Cement Company[1] and Southwestern Portland Cement Company[1] in these complaints seek an order of this Commission directing California Electric Power Company[2] to repay to the complainants alleged overcharges for electric service rendered under the provisions of

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1/ Hereinafter referred to as Riverside and Southwestern, respectively.

2/ Hereinafter referred to as California Electric.

special contracts and a tariff schedule which one complainant asserts is incorrectly applied.

The complaints were consolidated for the purpose of receiving evidence and testimony in a hearing before Examiner O'Brien on February 9, 1949.

The evidence shows that Riverside obtained electric service for its cement plant near Oro Grande from California Electric under the terms of a special contract authorized by this Commission by Decision No. 36547, dated August 10, 1943, in Application No. 25722. The term of the contract was from October 14, 1942 to October 13, 1947. Because of the pendency of California Electric's application for a general increase in electric rates (Application No. 28791), the aforesaid contract was extended by consent of the parties and authorization of this Commission to and including March 31, 1948. Among other things, the contract contained provisions whereby the charges could be increased with increases in the market price of fuel oil[3/], and that

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3/ Paragraph 10(e) of contract reads as follows: "Whenever during any period or periods the market price of fuel oil of 14° to 14.9° gravity F.O.B. cars Los Angeles as shown by the quotations of the Standard Oil Company of California, shall exceed $1.30 per barrel, the energy charge in above schedule shall be automatically increased one-fourth mill (0.025¢) per K.W.H. for each full ten cent (10¢) increase above said $1.30 per barrel in such market price of oil and after any such increase shall be correspondingly decreased by a decrease in the price of fuel oil, but no decrease in the market price of oil shall have the effect of reducing the said energy charge below the rates named in above schedule."

prior notice of such changes would be given to the customer[4] who would have the right to terminate thereafter the agreement within one year. The contract also provided that if lower or more advantageous rates were placed in effect for comparable service[5], such rates would be made effective for Riverside. It further appears that pursuant to the fuel oil escalator clause, electric charges were increased .05¢ per kwh, effective July 1, 1947, to reflect the increase in the price of oil to $1.50 per barrel on March 19, 1947, and an additional .05¢ per kwh, effective October 23, 1947, by reason of the increase in the price

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4/ Paragraph 12 of the contract reads as follows: "The Company shall give written notice to the Consumer of any increase in rates resulting from the application of paragraph (e) hereinbefore stated, the effective date thereof, the amount of such increase and the price of fuel oil upon which the same is based and the Consumer shall have the right at any time within ninety days after receipt of such notice to elect either to continue to take energy hereunder at such increased rate or to rescind this Agreement within one year from the date of such election. Provided, however, the Consumer shall not be permitted to rescind this agreement for the purpose of purchasing power from any other source than the Company, it being understood that the installation by the Consumer of its own generating facilities shall not be deemed the purchase of power from any other source. If the Consumer shall elect to rescind it shall serve written notice to that effect on the Company within said period of ninety days, which notice shall specify the effective date of such rescission. The said increase in rates shall not commence until the expiration of said ninety day period and if the Consumer shall have elected to rescind this contract such increased rates shall continue in effect from the expiration of said ninety day period until the effective date of the rescission of this agreement, (subject, however, to further increases or decreases by reason of further change in the price of fuel oil as provided in paragraph (e) hereinbefore.) The Company shall have the right at its option to waive the increase provided for in paragraph (e) hereinbefore, or any part of such increase, either permanently or for a designated period, and if the Company shall promptly serve notice of such waiver upon the Consumer the provisions of this paragraph 12 shall be of no effect during the period of such waiver."

5/ Paragraph 14 of the contract provides: "That in the event the Company shall at any time, either voluntarily or by order of any legal authority place in effect any lower or more advantageous rates than those at any time in effect hereunder to any other cement manufacturing plant or consumer having a load similar to that of Consumer and in the same territory, the Company shall likewise make the same rate effective for the Consumer hereunder."

of fuel oil to $1.70 per barrel on July 1, 1947, and that a third increase of .1¢ per kwh due to the increase of the price of fuel oil to $2.15 per barrel would have become effective April 12, 1948 had not the contract terminated on March 31, 1948. Subsequently, Riverside received service under Schedule No. PW until July 31, 1948, and thereafter under Schedule No. P-2.

The evidence further shows that by reason of the increase in the price of fuel oil above $1.41 per barrel and the application of the provisions of the fuel oil escalator clause, the charges to Riverside during the period July 1, 1947 to March 31, 1948 were higher than had such charges been computed upon the rates contained in Schedule No. PW or upon the rates contained in special contracts with Sierra Talc Company, Natural Soda Products Company, West End Chemical Company, or the United States Navy at its test station at Inyokern. Reparations amounting to $21,739.91, plus accrued interest at the rate of 7% per annum, are requested.

Southwestern's complaint, Case No. 4972, is similar. Service to the Southwestern cement plant near Victorville was rendered under the terms of a special contract authorized by this Commission's Decision No. 37107, dated June 6, 1944 in Application No. 26150. The contract period extended from May 1, 1944 to April 30, 1949. The Southwestern contract contained provisions similar to those described above in the Riverside contract. Increases in charges were made, as in the case of Riverside, pursuant to the provisions of the fuel oil escalator clause and in harmony with the changes in the market price of fuel oil recited above. Since March 31, 1948 service to Southwestern has been billed in accordance with California Electric's rate Schedule No. PW up to July 31, 1948, and thereafter in accordance with rate Schedule No. P-2. Here again the operation of the escalator clause, in accordance with the changes in the market price of fuel oil, resulted in charges

to Southwestern during the period from July 1, 1947 to March 31, 1948, which were higher than had such charges been computed upon the rates contained in Schedule No. PW or upon the other special contract rates enumerated above. Southwestern seeks reparations in the amount of $16,535.72 with interest at the rate of 7% per annum from the date of the payment of the charges.

Case No. 4981 is presented only by Riverside. Since July 31, 1948, Riverside has received electric service under California Electric's Schedule No. P-2. Schedule No. P-2 became effective for service rendered by California Electric subsequent to July 31, 1948 and was ordered filed by this Commission's Decision No. 41798 in California Electric's application for a general increase in rates (Application No. 28791). Schedule No. P-2 contains a provision[6] providing a discount in the amount of the bill for high voltage delivery. California Electric supplies Riverside with service through a step-down substation containing transformer banks which reduce the 33 kv line voltage to 2,300 volts and 460 volts. Riverside's electric equipment is connected to the low voltage buses of the substation. The substation is owned by California Electric. Electricity consumed by Riverside is measured on the high voltage side of the substation. Riverside in its complaint contends that by virtue of the service being metered at 33,000 volts, the high voltage discount provision of Schedule No. P-2 is applicable and that Riverside is entitled to a 5% discount in the charges for electric service. Riverside contends that this discount amounted to $6,413.01 for the months of August, September and October, 1948, and asks that reparations in the amount of this sum

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6/ The provision reads as follows: "When delivery hereunder is made at the same voltage as that of the distribution line from which service is supplied, a discount of 5% will be applied to bills for service delivered at voltages from 25 kv to 50 kv."

and such further similar sums be ordered by the Commission, together with interest at 7% per annum from the date of payment of the alleged excessive charges.

With respect to the first two cases, Southwestern and Riverside contend that the increase in rates, resulting from the application of the provisions of the fuel oil escalator clause, created a situation under which paragraph No. 14 of the contract relating to lower or more advantageous rates to other similarly situated customers should have been made operative. The company, on the other hand, maintains that the increase of charges under the special contract, by reason of the operation of the escalator clause and the resulting higher rate applicable to complainants than applicable to other customers under existing tariffs or special contracts, does not constitute the "placing in effect" of more favorable rates to other similar customers.

We cannot agree with the complainants' position respecting the meaning of paragraph No. 14 of the contract. It appears to the Commission that the intent of that provision was to make available to Riverside and Southwestern any rate schedule or special contract which California Electric might thereafter make available to a customer having comparable load characteristics to those of the complainants. Certainly, any applicable rate schedules or special contracts then in existence could not have been more advantageous. As to any existing special contracts or tariff schedules, which after the initial date of the contracts might become more favorable or might have a more favorable rate level than would result from the change in effective contract rates pursuant to the fuel oil escalator clause, complainants' remedy was to exercise the provisions of paragraph No. 12 and to terminate the contract in accordance therewith.

It is appropriate, however, to consider whether filed tariffs or special contracts, entered into with other customers subsequent to

the initial date of these contracts, did in fact present lower or more advantageous rates than those contained in the contract. Since any such determination depends upon the future operations of the customer, the final decision with respect to whether or not any other rates are lower or more advantageous is the ultimate responsibility of the customer. Neither the utility nor this Commission can anticipate future customer usage which is entirely within the discretion of the customer as to its future volume. One measure of the relative advantages between different rate tariffs or special contracts, however, would be to apply the provisions of those contracts to the effective period of the contracts under review. Since the charges to Riverside and Southwestern, under the contract, did not become higher than Schedule No. PW or the other special contract rates above referred to until the price of fuel oil had exceeded $1.41 per barrel, it is apparent that these latter rates if applied to service to complainants since the initial date of their contracts would result in substantially greater charges, and presumably, upon that test, were less advantageous than those contained in the contract. Even if such a comparison had resulted in a lower charge to complainants, such rates should not have been made effective to the complainants unless, in fact, the rate schedules or contracts had been established subsequent to the initial date of the complainants' contract.

Riverside's contract became effective October 14, 1943 and Southwestern's contract became effective May 1, 1944. Schedule No. PW, Revised C.R.C. Sheet No. 348-E became effective December 15, 1945 and remained in effect until superseded by Schedule No. P-2 pursuant to Decision No. 41798 on August 1, 1948. Schedule PW can be traced back through a number of revisions to Original C.R.C. Sheet No. 88-E, Schedule No. PW-1, effective October 1, 1941, and Original C.R.C. Sheet No. 90-E, Schedule No. PW-2, effective October 1, 1941. Throughout

these modifications the rate level remained unchanged except for an inconsequential revision of the minimum charge. As a consequence it must be concluded that the PW Schedule in effect on July 1, 1947, was the same filed schedule of rates which was in effect on the date which the contracts, here under consideration, initially became effective and, consequently, did not constitute a more advantageous rate which had been placed in effect, as contemplated by the provisions of paragraph 14.

Complainants likewise refer to special contracts with a number of other customers. Two of the customers are Sierra Talc Company and Natural Soda Products Company. These customers for many years were served on Schedule No. P-2 which had limited applicability. In Decision No. 39301 this Commission authorized California Electric to withdraw and cancel Schedule No. P-2 and to continue in effect, by special contract, the rates of Schedule No. P-2 to these two customers because of the circumstances involved. The special contracts became effective March 11, 1946 as to Sierra Talc Company and April 19, 1946 as to Natural Soda Products Company. Under those circumstances the consummation of such contracts did not constitute the establishment of a new schedule of rates not theretofore existing, and the Commission's intent to restrict this schedule to the two customers is unmistakably clear from the following language of the opinion:

> "To make this rate available beyond the boundaries of its present limited territory or to new customers in the area indiscriminately might result in an unreasonable burden on the utility's other classes of customers if adequate earnings are to be maintained."

Complainants refer to the contract under which the West End Chemical Company received service. This contract dated November 15, 1944 covered a number of special circumstances peculiar to the particular customer involved which necessitated special treatment. The rates provided for in the contract, however, were the same rates as set forth

in the utility's filed Schedule No. PW. Such contract, therefore, cannot be considered to constitute the establishment of rates not theretofore in effect. With respect to the contract for electric service to the Naval Ordinance Test Station of the United States Navy at Inyokern, that contract contained rates which were identical with those in Option B of rate Schedule No. PW. Since the Navy received service at 33,000 volts, a discount of 5% was incorporated in the contract. The inclusion of this high voltage discount, coupled with the provisions of Schedule No. PW, in the Commission's opinion constituted placing in effect a lower and more advantageous rate than Schedule No. PW. Furthermore, as the complainants' brief shows, the provisions of the PW Schedule with the high voltage discount resulted in a lower rate than the Cement Company contracts when the price of fuel oil exceeded $1.44 per barrel. If the Cement Companies had facilities available to take delivery at this voltage, and could have qualified for the high voltage discount, it is not apparent that the rates of the special contract with the Navy Department would have produced a lower bill throughout the period of the contracts than was actually billed to the Cement Companies.

The Riverside contract expired on October 13, 1947. Prior to the expiration date negotiations between Riverside and California Electric had taken place looking toward the execution of a new contract. On October 15, 1947, California Electric filed its Application No. 28791 for a general increase in its electric rates and incorporated therein a request for authority to increase the rates in the special contract with Southwestern Portland Cement Company, and submitted a form of contract which it was willing to enter into with Riverside Cement Company.

During the course of the hearings on the rate application, Riverside and California Electric entered into agreements to extend

the contract with Riverside from time to time until March 31, 1948. It appears that neither Riverside nor California Electric made computations to determine that the filed tariff Schedule No. PW, in effect on October 14, 1947, was at a level lower than effective rates in the special contract. Riverside, of course, was under no obligation to execute a contract for electric service and could have taken service under the filed tariff schedules had it so desired. It appears, however, that California Electric was taking steps to have the level of the filed tariff increased, along with its other rates, in its general rate increase application. Under the circumstances, there is no conclusive evidence that the rate provisions of the special contract were prospectively higher or less advantageous than the filed tariff Schedule No. PW. We cannot conclude, therefore, that the provisions of the contracts with Southwestern or Riverside have been improperly applied by California Electric.

Complainants urge further that the provisions of Rule and Regulation No. 19 required California Electric, upon the expiration of Riverside's contract on October 13, 1947, to assume responsibility for bringing to Riverside's attention the options which Riverside might have under rate schedules available to it, so that Riverside might select the schedules most advantageous to its position. In view of the history of rate negotiations and special contracts between California Electric and these two customers, we are not impressed with this contention. Rule and Regulation No. 19 is applicable to California Electric's filed tariff schedules and to service rendered by it as an electric public utility. However, where special contracts are entered into, departing from the tariff schedules, and where such contracts have been authorized by the Commission, the provisions thereof, being deviations from the filed tariffs, take precedence over the tariff schedules. Since service to Riverside had been rendered for a period

of five years under a special contract, and since negotiations for a new contract, including a proposed form of contract submitted in Application No. 28791, were then before California Electric and Riverside, there is no basis for the contention that Riverside may have suffered because of failure to carry out the provisions of a filed rule and regulation not applicable to such special contracts. On the basis of the foregoing facts, the Commission finds that complaints No. 4971 and No. 4972 are without merit and should be dismissed.

In Case No. 4981, Riverside contends that it is entitled to a 5% discount under the provisions of rate Schedule No. P-2, which became effective August 1, 1948. The provision is quoted above. The special condition contemplates that where delivery of electric energy is taken by the customer at the same voltage as that of the distribution line from which the service is supplied, and where such delivery is above 25 kv, a discount of 5% will be applicable. In Decision No. 36547 in which this Commission authorized the contract with Riverside, the following language is used:

> "A relatively important difference, however, is the inclusion of a provision in the proposed agreement, under which the energy delivered to the Customer shall be measured on the primary or high voltage side of the transformer rather than on the secondary side as in the case of the deliveries to the Southwestern Company. This provision is to compensate for the additional cost of furnishing service at two voltages, i.e., for 460 volts and 2300 volts, rather than at a single voltage."

California Electric states that it intends to meter deliveries to Riverside at 460 volts and at 2,300 volts and will bill such deliveries as two separate accounts after the effective date of the decision in this proceeding unless ordered to do otherwise by the Commission. We cannot agree with Riverside that the metering of the electricity supplied to Riverside on the high voltage side of the substation owned and operated by California Electric constitutes a delivery at the same voltage as the distribution line from which the

service is supplied within the meaning of the provisions of Schedule No. P-2. The selection of the delivery voltage, however, should be left to the customer's option. In this case Riverside may elect to take service at 33,000 volts and take advantage of the discount provisions of Schedule No. P-2, but to do so will have to provide the necessary facilities to convert the voltage of delivery to the voltage at which it wishes to apply the service to its various electrical appliances. It may elect to receive service at one or more secondary voltages and to have the service metered at each of such voltages, whereupon California Electric will be expected to bill such deliveries in accordance with its schedule provisions. California Electric shall ascertain, after the effective date of this order, Riverside's election with respect to the alternatives enumerated above, and shall thereafter provide the facilities necessary to apply its applicable rate tariffs in accordance with such election. Based upon the foregoing facts, the Commission finds that Riverside's complaint Case No. 4981 is without merit and should be dismissed.

O R D E R

The Commission having considered the complaints of Southwestern Portland Cement Company and Riverside Cement Company against California Electric Power Company, hearings having been held, evidence introduced, briefs having been filed, and the Commission being fully advised in the premises and the matter being ready for decision,

IT IS HEREBY ORDERED as follows that:

1. Case No. 4971, Riverside Cement Company vs. California Electric Power Company, be and it is hereby dismissed.

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2. Case No. 4972, Southwestern Portland Cement Company vs. California Electric Power Company, be and it is hereby dismissed.

3. Case No. 4981, Riverside Cement Company vs. California Electric Power Company, be and it is hereby dismissed.

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

Dated at San Francisco, California, this 5th day of April, 1949.

R. E. [signature]
Justus F. Craemer
Ira H. Rowell
Harold P. Huls

Commissioners.