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ORIGINAL

Decision No. 45626

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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, Prince & Vermille, by 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

On April 5, 1949, this Commission, by Decision No. 42676, dismissed the above-entitled complaints of Riverside Cement Company and Southwestern Portland Cement Company against California Electric Power Company. On May 2, 1950, the Supreme Court of the State of California, in Riverside Cement Co. v. Public Utilities Commission,

35 Cal. (2d) 328, ordered that "the portions of the commission's order dismissing the two complaints should be annulled and the cases remanded for computation of the amount of reparations due to the petitioners respectively." On July 25, 1950, the Commission issued an order reopening the above-entitled cases for further hearing, and such further hearing was held before Examiner O'Brien in Los Angeles on January 18, 1951.

Subsequent to the order reopening the proceeding, the Commission suggested that the parties might reach agreement as to computation of the amount of reparations due, and that the matter might be disposed of upon the filing of a stipulation. On December 11, 1950, counsel for Riverside Cement Company advised the Commission that in his opinion the parties could not reach an agreement, and suggested that the matter be set for hearing. Counsel for Southwestern Portland Cement Company, under date of December 20, concurred in the suggestion that the matter be set for further hearing.

At the hearing on January 18, complainants filed copies of computations prepared by defendant at the request of complainants, showing the difference between the amounts billed under the special contracts with the complainants and the amount which would have been billed had the charges been predicated on the provisions of defendant's Rate Schedule PW(B), Revised C.R.C. Sheet Nos. 348-E and 349-E. Computations were also submitted showing the additional difference if charges had been predicated upon the rates contained in the special contract with Natural Soda Products Company. As to Southwestern Portland Cement Company, the computations covered the period from July 1, 1947, until July 31, 1948. As to Riverside Cement Company, the computations covered the period from July 1, 1947, until April 1, 1948. Counsel for defendant verified

the arithmetic accuracy of the computations, but contended that the amount due was limited to the difference between the amount actually billed under the special contract rates and the amount of the bill computed under the rates of Schedule PW(B). In the opinion of defendant, the correct amount of reparations as to Southwestern is computed by Exhibit 18 in the amount of $13,857.68, and as to Riverside the sum is $13,184.36, shown in Exhibit 21. Under the theory advanced by complainants, that the special contract rate applicable to Natural Soda Products Company should be used as the measure of damages, Southwestern would be entitled to $114.73 less for the period from July 1, 1947, to April 1, 1948, and $499.77 more for the period from April 1, 1948, to July 31, 1948, or a total of $14,242.72. Similarly, Riverside claims an additional sum of $8,173.03 for the period July 1, 1947, to April 1, 1948, or a total of $21,357.39.

In its Decision No. 42676, this Commission held that paragraph 14 of the contract between the parties, which provided that lower or more advantageous rates made effective for other similar customers in the same territory after the date of the contract would likewise be made effective to complainants herein, was not operative under the conditions here existing because the tariffs or contracts in which such assertedly more favorable rates were contained had been in effect at the time the contracts with complainants were consummated. The Commission dismissed the cases, therefore, on the basis that complainants, in attempting to obtain lower rates, had not availed themselves of the remedy contained in the contract, namely, to terminate it in accordance with the provisions of paragraph 12. The opinion went on to point out the difficulty confronting the Commission of determining the fact of whether or not the filed tariff or some other special contract

rate was in fact more advantageous for the future when considering the potential uncertainties, including the prediction of behavior of fuel oil market prices and the control which future operations by complainants could have on the level of rates. The opinion suggested that one test of rate advantage would be the application of the alternative rates to a contract period, but the Commission did not determine that some rate other than the special contract rates was, in fact, lower or more advantageous.

The Commission, in its opinion, also gave consideration to complainants' contention that the rates contained in special contracts between defendant and Natural Soda Products Company and Sierra Talc Company should be used as a measure of the amount of damage suffered by complainants. The opinion pointed out that the rates under which these latter two customers were served were contained in filed tariff schedules whose applicability was limited to a restricted territory in defendant's service area. The opinion also directed attention to the Commission's Decision No. 39301, in which defendant was authorized to withdraw and cancel specific earlier schedules, and to enter into special contracts with Sierra Talc Company and Natural Soda Products Company, further limiting the availability of those rates to the two customers named in the special contracts. The Commission's conclusion as a result of consideration of those facts was that such contracts did not, in effect, constitute the establishment of a new rate. It did not determine whether in fact the rates contained in special contracts with Sierra Talc Company and Natural Soda Products Company were lower or more advantageous as of the time the escalator clause of complainants' special contracts caused their electric rates to exceed the Natural Soda Products Company's rates, or the additional fact as to whether complainants were as of that date in fact

customers of the same kind and in the same territory as Sierra Talc Company and Natural Soda Products Company.

The Supreme Court has concluded that the rate chargeable under complainants' special contracts depended upon "the effect to be accorded the language of paragraph 14." The Court pointed out as follows:

> "A similar Rule 19 applicable to the utility was in effect when the consumer selected a rate under tariff schedules in existence at the time service was requested, and placing upon the utility the duty to advise those of its customers affected in the event of adoption of new or optional schedules or rates. This rule and the foregoing decisions of the Commission indicate a required utility policy of affording to the consumer the opportunity to select the lowest rate suited to its needs at the commencement of service and the consumer's right to be kept apprised of new lower rates when such should become effective. * * * Since the purpose of the contracts was to obtain a rate lower than the filed tariffs and on a par with other special rates, it is unreasonable to assume that the petitioners agreed to pay any rate higher than such existing rates." (35 Cal. (2d) at 311.)
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> "The Utility's attempt to rest upon the future tense of the verb in paragraph 14 cannot avail it under the facts. Obviously the language would apply in the event tariffs were reduced below the contract rate. But that is not the exclusive application. A similar situation in effect obtained here when the company gave notice increasing the contract charge above the existing tariff. That act was the equivalent of placing in effect a rate or schedule lower or more advantageous than the contract rate. As the commission found, the price of fuel oil could go to $1.41 without increasing the contract rate above the filed tariff. When, however, the utility raised the contract rate above the filed tariff, to all the intents and purposes of paragraph 14 it was placing in effect a rate lower or more advantageous than the increased contract rate.
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> "It may not be questioned that if the language of paragraph 14 applied it took precedence over the provisions of the escalator clause and afforded a lower rate to the petitioners from July 1, 1947, overcharges resulted, and the petitioners were entitled to recover reparations. That result is determinative here and it becomes unnecessary to discuss other matters, none of which may be deemed to override the controlling intent and policy. Nor is it proper on this review to consider

> which of the lower rates applies, whether that under the filed tariffs or the contract rate of other consumers in the same territory. Those are factual issues bearing on the amount of the reparations and are for the commission to resolve." (35 Cal. (2d) at 332.)

Neither Natural Soda Products Company nor Sierra Talc Company during the period prior to August 1, 1948, were similar consumers in the same territory as complainants. The filed tariffs under which those two customers were served were applicable in the limited territory in Owens Valley, in which defendant was compelled to meet the price competition of the Department of Water and Power of the City of Los Angeles. The applicability of those schedules was further limited by the authorization of special contracts for those two customers and the withdrawal of the tariffs. Not until the Commission prescribed higher system-wide industrial power schedules effective August 1, 1948, was the territorial distinction removed. Concurrently with that rate change, the stipulated similarity and territorial identity became a fact.

Since the rates in the special contracts with West End Chemical Company and the U. S. Navy at Inyokern were heretofore shown to be the same as those prescribed by the filed tariffs, except for the high voltage discount applicable to the Navy for which complainants could not qualify, it follows that the measure of the amount of reparations is fixed by the filed tariff rate, Schedule PW(B), as shown by Exhibit Nos. 18 and 21. Defendant will be ordered to make reparation accordingly.

O R D E R

Pursuant to the decision of the Supreme Court of the State of California that Cases 4971 and 4972 be "remanded for computation of the reparations due..."

C-4971 FF
C-4972
C-4981

IT IS HEREBY ORDERED that California Electric Power Company:

(1) Shall pay reparations to Riverside Cement Company for overcharges for electric service supplied during the period July 1, 1947, to April 1, 1948, in the amount of $13,184.36 with interest at the legal rate of interest.

(2) Shall pay reparations to Southwestern Portland Cement Company for overcharges for electric service rendered during the period July 1, 1947, to July 31, 1948, in the amount of $13,857.68 with interest at the legal rate of interest.

IT IS HEREBY FURTHER ORDERED that item 3 of the Commission's order in Decision No. 42676, in Case No. 4981, be and it is hereby reaffirmed.

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

Dated at San Francisco, California, this 1st day of May, 1951.

Commissioners.