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ORIGINAL

Decision No. 63428

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AMERICAN CEMENT CORPORATION, a corporation, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, a corporation, Defendant.	Case No. 7036 (Filed December 9, 1960)

O'Melveny & Myers by Lauren M. Wright and Donn B. Miller, for American Cement Corporation, complainant.
F. T. Searls, John C. Morrissey and Malcolm A. MacKillop, for Pacific Gas and Electric Company, defendant.
Dion R. Holm, Thomas M. O'Connor and Robert Laughead, for City and County of San Francisco; Donald J. Carman and Richard Edsall, by Richard Edsall, for California Electric Power Company; and William W. Eyers, for California Manufacturers Association; interested parties.

O P I N I O N

By this proceeding, complainant seeks: (1) to be relieved of its obligations to defendant under a contract for the cost of installation of a gas main extension from Hinkley Station to Oro Grande, San Bernardino County, and (2) to obtain the refund, with interest, of amounts previously paid pursuant to said contract. Defendant filed an answer on January 12, 1961, requesting that the complaint be dismissed, and filed a motion to dismiss on July 5, 1961. Public hearing was held in San Francisco before Examiner William W. Dunlop on July 5, 1961, at which time the complaint and defendant's motion to dismiss were taken under submission, subject

to the filing of briefs. Briefs having been filed, the matter now is ready for decision.

This case is similar in many respects to Pacific Cement and Aggregates, Inc. v. Pacific Gas & Electric Company (Case No. 6678), in which Decision No. 61716 was issued March 21, 1961; that decision may be referred to for discussion of the central problem involved.

At the time the main extension here in question was authorized and installed, defendant's Rule 15[1/] provided that the estimated cost of gas main extensions to furnish interruptible service should be paid, without refund, by the applicant for such service. Said rule also provided:

> "F. In unusual circumstances when the application of the provisions of this rule appears impracticable or unjust to either party, or in the case of an extension which has cost-to-revenue ratio in excess of 15 to 1, the Company or the applicant may refer the matter to the Public Utilities Commission of the State of California for special ruling, or for the approval of any special conditions which may be mutually agreed upon."

In accordance with the rule, the Commission in 1956 approved a special contract between complainant and defendant for the installation of the Hinkley-Oro Grande extension.[2/] Installation was completed and service begun in April 1957, and since that time complainant has been paying to defendant, pursuant to the contract, a "surcharge" of 1.4 cents per Mcf of gas delivered by defendant through the extension. The contract provides that such surcharge payments shall continue until they equal the installation cost of the extension, plus interest, or until complainant sooner completes

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1/ Effective June 11, 1951 and filed pursuant to Decision No. 45751, in Application No. 31466. See especially Section E2(b) of said Rule.

2/ Decision No. 53610 in Application No. 38171, 55 Cal PUC 157.

the payment of said cost, provided that payment in full shall be made within five years in any event.

On May 21, 1957 this Commission commenced an investigation (Case No. 5945) of the gas and electric extension rules of every major gas and electric utility under the Commission's jurisdiction. After hearing, the Commission on September 15, 1959 issued its Decision No. 59011 ordering new extension rules for all utilities involved in the proceeding, including a new Rule 15 for defendant. After rehearing and the issuance of Decision No. 59801 on March 22, 1960 (essentially affirming Decision No. 59011 on this point), a new Rule 15 for defendant became effective for all new applications for service received by the utility on and after April 20, 1960. Under the new rule, gas main extensions for interruptible service are to be paid for by defendant if the cost of the extension does not exceed the estimated annual revenue as determined by defendant. The installation cost of the Hinkley-Oro Grande extension was much less than the annual revenue defendant has derived therefrom. In short, if the new rule had been in effect in 1956 and 1957, defendant rather than complainant would have paid for the extension.

The effect of this change in Rule 15 has been discussed in Pacific Cement and Aggregates, Inc. v. P. G. & E. (Decision No. 61716 in Case 6678, issued March 21, 1961). We there held: (1) that the 1951 decision establishing former Rule 15 had, in effect, found the resulting charges to be reasonable, and (2) that therefore the findings in 1959 and 1960 that such charges were no longer reasonable could be applied only prospectively.[3/] A petition for writ of review of Decision No. 61716 has been denied by the California

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3/ See Pub. Util. Code § 734; Arizona Grocery Co. v. A.T. & S.F. Ry., 284 U.S. 370, 389, 52 S.Ct. 183, 76 L.Ed. 348, 355.

Supreme Court.

Complainant points to the fact that in the Pacific Cement case the installation cost had been fully paid to defendant before Rule 15 was changed, whereas here the surcharge has continued beyond the time when the Commission found such installation charges to be no longer reasonable. That distinction, however, is not material to the question here presented. Although denominated a surcharge, the payment specified in the contract is not a charge for gas in the ordinary sense; rather, it provides a method for discharging an installation obligation which became binding in 1957 in accordance with the extension rule then in effect. Even if complainant were to take no more gas and thus eliminate the surcharge, it would still be liable under its contract for full payment of the installation charge at the end of the agreed five-year period. It was the installation charge itself--not complainant's method of paying it--which was considered in the 1959 and 1960 decisions. In continuing to collect this surcharge, defendant does not discriminate against complainant, for complainant is not in the same class as interruptible customers who do not have prior installation obligations to satisfy.

Findings

The Commission has considered the evidence and the arguments of the parties. We find as follows:

1. The charge under attack by complainant is contained in a contract for gas main extension for interruptible natural gas service entered into between complainant and defendant on June 13, 1956.

2. The requirement in Section 10 of said contract that complainant pay the installation cost of $335,607 as a condition of obtaining service is in accordance with defendant's Rule 15 in effect at the time the contract was executed in 1956 and at the time service actually was established in 1957.

3. Fairly interpreted, the 1951 order of the Commission (Decision No. 45751), under which defendant's Rule 15 became effective on June 11, 1951 and which was controlling at the time service was established for complainant pursuant to said 1956 contract, formally declared the rates and charges therein fixed to be reasonable.

4. The alternate methods of payment of the $335,607 of installation cost set forth in Section 10 of the 1956 contract were: (1) a monthly charge of 1.4 cents per Mcf of gas delivered, until the sum of $335,607 plus interest at six per cent per annum on the unpaid balance has been paid, and in any event within five years after the date interruptible gas is first supplied, or (2) at any time within said five years, a sum equal to the entire unpaid balance of the installation cost, plus accrued interest at the rate of six per cent per annum. These alternate methods of payment were mutually agreed upon in 1956 by complainant and defendant pursuant to Section F of Rule 15 then in effect. The special payment arrangements contained in Section 10 of the 1956 contract were subsequently expressly authorized by this Commission by Decision No. 53610 in Application No. 38171.

5. Complainant has elected to pay the installation cost of $335,607 over a period of time rather than by a lump sum payment.

6. The extension to serve complainant was completed, and actual initial gas deliveries were made, prior to September 15, 1959, the issue date of Decision No. 59011, and prior to April 20, 1960, the effective date of defendant's new Rule 15.

7. The evidence does not sustain a finding of unlawful discrimination against complainant by defendant.

8. Defendant's motion to dismiss should be granted and the relief sought by complainant should be denied.

O R D E R

Public hearing having been held on the above-entitled complaint, the matter having been duly submitted, and the Commission being fully advised,

IT IS ORDERED that the relief sought by complainant is hereby denied and that this complaint is hereby dismissed.

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

Dated at San Francisco, California, this 20th day of MARCH 1962.

Everett A. Piper
President

D. W. Mitchell

George G. Grover

Frederick B. Holoboff

Commissioners

Commissioner C. Lyn Fox, being necessarily absent, did not participate in the disposition of this proceeding.