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ORIGINAL

Decision No. ~~61022~~

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APEX SMELTING COMPANY, a corporation, Complainant, vs. SOUTHERN CALIFORNIA GAS COMPANY, a corporation, Defendant.	Case No. 7123 Filed May 18, 1961

Ira M. Price II, of Latham & Watkins, for complainant.
John Ormasa, for defendant.
Louis W. Mendonsa, Arch E. Main and Melvin E. Mezek, for the Commission staff.

O P I N I O N

Nature of Proceeding

Complaint, as above-entitled, was filed by Apex Smelting Company (Apex) against Southern California Gas Company (Southern) requesting an order which will:

1. Determine that Apex is within the class of consumers to which Southern's Schedule G-53 rate is applicable;

2. Order Southern to furnish gas to Apex under the same terms and conditions that Southern furnishes gas to those consumers to which said Schedule G-53 rate already applies;

3. Eliminate the discriminatory treatment of Apex by Southern in the future and require Southern to sell natural gas and services to Apex at the rates set out in said Schedule G-53;

4. Give such reparation to Apex for past discriminatory treatment as the law and the regulations of the Commission allow; and

5. Include in such order such other and further provisions and relief as may be just and proper in the premises.

Southern's answer, filed on June 5, 1961, generally denies all the material allegations of the complaint and requests that the complaint be dismissed. Thereafter public hearing was held in Los Angeles, before Examiner William W. Dunlop, on October 24 and 31, 1961, January 16, February 5, 6, 7 and March 20, 1962. The matter was submitted upon receipt of briefs[1] and now is ready for decision.

Issues and Guiding Principle

The principal issues advanced by complainant here to be decided are:

1. Is Apex operating a "smelter" within the meaning of that term as it is used in defendant's Schedule G-53 and its predecessor schedules?

2. In the event that the Commission determines that Apex does not operate a "smelter", has defendant discriminated against Apex in charging it for gas service under Schedule G-50 instead of under Schedule G-53?

In viewing these issues, the rule has been stated many times that where there is an ambiguity in a tariff, any doubt in its interpretation is to be resolved against the utility responsible for the ambiguity.[2]

Operations of Apex

It appears from the record that Apex Smelting Company of California (Apex) is a California corporation with its plant and

1 Concurrent opening briefs were filed on May 16, 1962, and concurrent closing briefs were filed by May 31, 1962.

2 Civil Code 1654; Transmix Corp. v. So. Pac. Co., 187 CA 2d 257, 267 (1960); So.Pac. v. Lathrop, 15 F.2d 436; American Ry.Express Co. v. Price Bros.; 54 F.2d 67; United States v. Gulf Ref. Co., 268 U.S. 543, 45 S.Ct. 597, 69 L.Ed.1082.

offices at 2211 East Carson Street, Long Beach, California. The plant and office site occupies about 20 acres of land. Apex utilizes two open-well reverberatory furnaces, one having a capacity of 100,000 pounds and the other, 70,000 pounds; one smaller aluminum furnace; one zinc furnace; one sweat furnace, one borings dryer, one crusher, one milling installation; and miscellaneous equipment and machinery. Approximately 100 people are employed, including such technical and engineering personnel as an assay engineer, electrical engineer and spectroscopist. One or more of its furnaces operate 24 hours a day, year-round, normally using natural gas with oil as standby fuel.

Apex has been purchasing natural gas from Southern since May 1953 under Schedule G-50. The annual consumption of gas by Apex at its Long Beach plant for the years 1953 through 1961, together with the charges computed under Southern's Schedule G-50 compared with the charges computed under Southern's Schedule G-53 are as follows:

Period	Consumption Thousands of Cubic Feet	Charges Schedule G-50	Charges Schedule G-53	Difference in Charges
May-Dec. 1953	72,664	$22,453	$21,727	$,726
Year 1954 ...	113,735	35,462	34,277	1,185
Year 1955 ...	130,884	43,339	40,638	2,701
Year 1956 ...	143,399	48,434	45,071	3,363
Year 1957 ...	207,376	69,925	64,910	5,015
Year 1958 ...	156,911	62,525	58,002	4,523
Year 1959 ...	225,503	91,548	84,968	6,580
Year 1960 ...	157,976	69,158	64,498	4,660
Year 1961 ...	165,903	76,938	71,787	5,151

Raw materials received at the Apex plant consist of scrap aluminum in various forms, drosses, slags, metal turnings, light metal chips and other materials. All of the materials receive a preliminary treatment prior to being placed in the reverberatory furnaces. For example, the aluminum scrap metal is crushed and

shredded and then screened to remove fine metal, dust, and non-metallics. The processed scrap is further cleaned by magnetic means to remove iron and then is screened to produce a uniform material for charging to the reverberatory furnaces.

Heavy scrap is charged into a sweating furnace where the aluminum is separated from iron and steel. The liquid metal from this operation is cast into large cakes and recharged into a reverberatory furnace.

Aluminum borings are first processed through a borings dryer where they are passed through a rotary drum, and water, oils and emulsifying products are driven off by heat. The dry product, with the moistures removed, then passes over a magnetic separator to take out the tramp iron.

Drosses and slags are broken up on a grizzly, fed onto a conveyor belt, where contaminated materials are removed. The drosses and slags are then crushed in a mill in the presence of strong currents of air which remove dust and fine particles, and the remaining product is screened and then sent to the reverberatory furnaces.

The products from all of these preliminary operations are charged into a reverberatory furnace, normally through an open well. Fluxes are added to the charge and the resulting mixture is puddled to induce a separation of metallic and non-metallic materials. The fluxes react with the oxides and non-metallics to produce a slag, freeing the metal associated with the charge so that it can enter the bath of the furnace. The temperature of the molten bath is between 1400 and 1500 degrees Fahrenheit. As the oxides, non-metallics and other impurities are separated from the aluminum, the impurities form a slag or dross and are removed from the molten bath by skimming and slagging operations. The process of fluxing,

puddling, skimming and slagging is repeated with each batch of the charge so that the operation may continue for hours.

During the process, magnesium is removed from the bath. Other metals such as zinc, copper, iron and silicon, which are present in the charge, dissolve in the bath and become part of the alloy produced. During the process, gases are induced into the molten bath which combine and remove the dissolved gases, principally hydrogen, and which also accelerate the chemical process of removing the undesirable magnesium.

Generally, various alloying materials such as manganese, copper and iron are added to the molten bath to meet the desired alloy specifications of the customers of Apex. Samples are taken from the bath from time to time and analyzed in the quantometer and assay laboratories, and the charge adjusted accordingly.

When the process has been completed for a particular charge, the liquid metal is tapped from the furnaces and cast into ingots on a continuous casting machine. The ingots are then stacked until cooled and are then sold by Apex to its customers.

Summary of Apex's Position

Complainant urged that it is operating a smelter within the meaning of the applicability clause of Schedule G-53 and its predecessor schedules for the following reasons:

1. Apex utilizes smelting furnaces and smelting auxiliary equipment and conducts smelting processes and techniques to produce aluminum and zinc ingots by the smelting of industrial waste products consisting of dross, slags, turnings and scrap.

2. Apex is recognized by the United States Government and by authoritative sources in the metals industry as a smelter of secondary scrap and waste materials; i. e., Apex is a secondary smelter.

3. The term smelter is not defined in the tariff schedule and has never been defined by any other document filed by Southern with the Commission.

4. Southern erroneously contends that "smelter" can mean only the recovery of metal from an ore and is limited to a primary smelter. Southern, however, has applied the smelter rate to several secondary smelters in the past and has never applied the smelter rate to any primary smelter.

5. Two months before the term "smelter" was first added to the applicability clause of Schedule A-14 (a predecessor to Schedule G-53), Southern applied the rate to a secondary smelter and the purpose of adding "smelter" to the list of equipment eligible for the A-14 rate was to encompass secondary smelters within the rate schedule.

6. Southern's attempted distinction between primary smelters and secondary smelters for rate tariff purposes leads to absurd, illogical and unreasonable results.

Regarding its claim of discriminatory treatment, Apex urged that:

1. There is no logical or natural reasonable distinction which can or should be drawn for gas rate purposes between primary smelters and secondary smelters.

2. In terms of gas consumption and other relevant factors, the circumstances concerning Apex and G-53 customer (like boilers and oil heaters) are substantially similar, and Apex should receive gas at the same G-53 rate as these other customers.

Finally, Apex took the position that the term "smelter" in Schedule G-53 includes secondary smelters; that Apex operates a secondary smelter; that secondary smelters have in the past received

gas service under Schedule G-53 and its predecessor rate schedules; that the smelter rate was first introduced into Southern's tariff in order to apply to secondary smelters; that Apex is entitled, as a "smelter" to be served under Southern's Schedule G-53; that to differentiate for rate purposes between a "primary smelter" and a "secondary smelter" like that operated by Apex, merely on the basis of the kind of charge which is smelted (when the processes, operations, furnaces, and gas service are the same or practically the same), is arbitrary, erroneous and discriminatory; and that Apex is entitled to reparations from Southern.

Summary of Southern's Position

The position taken by Southern may be summarized briefly as follows:

1. The term "smelters" contained in the applicability portion of Schedule G-53, for rate application purposes, means smelting from an ore and was designed for and was applicable to the primary smelting industry.

2. The "smelter" applicability provision was included in Southern's tariff in 1934 as part of a general program keyed in with the Chamber of Commerce program with the expectation that there would be ore imported into Los Angeles Harbor and smelted there or in close proximity.

3. Apex does not smelt aluminum or any other metal from the ore, but rather, is engaged in a business involving the secondary recovery of metals at its plant in Long Beach. For this reason, Apex is not entitled to gas service under Schedule G-53.

4. The application of rate Schedule G-50 to secondary recovery of metal operations, such as those at Apex, is not discriminatory nor unfair but is proper because the gas usage is relatively small compared to that of a large boiler plant, the sizes and types of

furnaces used are generally designed primarily for gas fuel, gas is the preferred fuel, practically all equipment uses a light oil standby and the light oil standby costs tend to exceed gas costs.

5. The Commission's continued recognition of fuel oil as an important factor in the rate design of Schedules G-50 and G-53 is necessary, proper and imperative.

6. Gas has a value of service for the secondary recovery of metal class of business which permits the charging of a G-50 rate, whereas the types of operation served on G-53 might well be lost to fuel oil if the higher priced G-50 rate were the applicable rate.

7. The type of gas furnace used does not determine whether smelting occurs, and should not determine whether the smelter rate is applicable.

8. The only secondary recovery of metal business which has at any time, since the adoption of the "smelter" applicability clause in Southern's rate schedules in 1934, received the benefit of the smelter applicability clause was Pacific Smelting Company. This was a rate misapplication which was started on December 23, 1933, two months prior to the introduction of the smelter applicability, and corrected by Southern some nine years later in January 1943 by canceling the contract with the customer.

9. The evidence does not support a finding of unreasonableness and discrimination in the establishment of separate rate Schedules G-50 and G-53, but supports the need of these schedules and the applicability of Schedule G-50 to the secondary recovery of metal business.

10. The statute of limitation period applicable to a complaint for reparations based upon unreasonable, excessive, or discriminatory rates confines recovery to the 2-year period immediately preceding the filing of the formal complaint.

11. A complainant fails to prove damages when it submits no evidence whatsoever comparing the value of the schedule under which it receives service with the schedule under which it claims it should have received service.

12. The complaint should be dismissed and judgment should be entered in favor of Southern.

Findings

On this record we find as follows:

1. Apex commenced operations at its plant at 2211 East Carson Street, Long Beach, in May 1953 and has received interruptible gas service at that location from Southern since May 1953 under Schedule G-50, Interruptible Natural Gas Service.

2. At the time gas service was originally established for the Long Beach plant of Apex, Southern refused to provide gas Service under its Schedule G-53, Limited Interruptible Natural Gas service, to that location and Southern still continues to refuse to provide gas service to that location under its Schedule G-53.

3. Effective February 27, 1934, by Advice Letter 138, Southern revised the applicability clause of its then effective Schedule A-14 to include "smelters". Schedule A-14 was superseded, effective April 1, 1937, by Schedule A-19, which was applicable to gas service to stationary high-pressure steam boilers, smelters, oil stills and oil heaters. Effective June 30, 1939, Schedule A-19 was superseded by Schedule S-3A, which continued to be applicable to smelters, among others. Schedules S-3A and S-4A were merged into present Schedule G-53 effective February 1, 1950.

4. Schedule G-53 is applicable, subject to interruptions in supply, for natural gas service to commercial or industrial customers, exclusive of cement plants and steam electric generating stations, for gas used only in stationary steam boilers, smelters

and petroleum oil stills and heaters, where such customers are located near existing mains having a delivery capacity and supply in excess of the then existing requirements of firm customers.

5. Southern's Schedules G-50 and G-53 contain identical standby fuel requirements in the event of interruption and do not specify any particular standby fuel as a condition of service.

6. While Southern claimed that the term "smelters" contained in the applicability portion of Schedule G-53 and predecessor schedules means smelting from an ore and was designed for and was applicable to the primary smelting business, since February 27, 1934, when Southern revised its Schedule A-14 to include "smelters", up to the present time, Southern's tariff schedules have never contained a definition of the term "smelters" as used in its tariff schedules.

7. Southern has never furnished gas service to a primary smelter under Schedule G-53 but did for a period of at least nine years provide the smelter rate to at least one secondary smelter.

8. In May 1953 when Apex commenced operations at 2211 East Carson Street in Long Beach, Apex desired gas service from Southern under Schedule G-53 and still desires service under said Schedule G-53.

9. The operations of Apex at 2211 East Carson Street, in the City of Long Beach, were and are those that qualify for service under Southern's Schedule G-53 as "smelters".

10. The rates and charges collected by Southern from Apex were, and are, at variance from those applicable under its tariffs (Schedule G-53) in violation of Section 532 of the Public Utilities Code.

11. Where a finding of violation of tariff provisions is involved, as in this instance, it is not necessary that complainant present any proof of other damage, since Southern is bound by law to observe its published and filed tariffs. (Chromcroft v. Davies, 57 Cal. P.U.C. 519, 522.)

12. The charges collected by Southern from Apex under Schedule G-50 for the service here in issue and rendered during the 3-year period provided in Section 736 of the Public Utilities Code should be adjusted to the charges applicable under Schedule G-53, with Southern making refund to Apex including interest at seven percent.

13. The exact amount of reparation due Apex is not of record. Should it not be possible for Apex and Southern to reach an agreement as to the amounts of the overcharges, as reparations, the matter may be referred to the Commission for further action and the entry of a supplemental order.

In view of our finding on the interpretation of Southern's Schedule G-53, we do not reach a determination on the issue of alleged discrimination.

O R D E R

Based upon the evidence and the findings thereon contained in the foregoing opinion,

IT IS ORDERED that within thirty days after the effective date of this order Southern California Gas Company shall refund to Apex Smelting Company all charges collected for gas service under Schedule G-50 in excess of charges that would have been due under Schedule G-53 during the 3-year period provided in Section 736 of the Public Utilities Code together with interest at seven percent.

IT IS FURTHER ORDERED that Southern California Gas Company shall furnish gas service to Apex Smelting Company in accordance with its regularly filed and effective tariff schedules consistently with the findings herein.

IT IS FURTHER ORDERED that upon the refund of overcharges, as reparation herein directed, Southern California Gas Company shall notify the Commission in writing of the amount thereof, within ten days after such refund.

The Secretary is directed to cause a certified copy of this decision to be served upon Southern California Gas Company.

The effective date of this decision shall be twenty days after the date of such service.

Dated at San Francisco, California, this 31st day of JULY, 1962.

George G. Grover
President

Commissioners