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ORIGINAL

Decision No. 74467

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC-SOUTHERN FOUNDRIES, INC. 600 21st Street Bakersfield, California, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY 1918 "H" Street Bakersfield, California, Defendant.	Case No. 8645 (Filed June 16, 1967)

John C. M. Lambert, for Pacific Gas and Electric Company, defendant.
Harold H. Larsen, for Pacific Southern Foundries, Inc., complainant.

O P I N I O N

This is a complaint by Pacific Southern Foundries, Inc. (hereinafter referred to as Foundry) against Pacific Gas and Electric Company (hereinafter referred to as PG&E). The complaint alleges that PG&E has overcharged Foundry for the electric power used to operate Foundry's electric arc furnace from March, 1955 to November 1, 1965.

A duly noticed public hearing was held in this matter before Examiner Jarvis in San Francisco on November 29, 1967 and January 4, 1968, and it was submitted on January 30, 1968.

PG&E filed an amended answer which denied the material allegations of the complaint. It also raised the statute of limitations. In public utility law the running of a statute of limitations for reparations extinguishes the right thereto. (Application of Southern Pacific Co., 57 Cal. P.U.C. 328, 331.) The

complaint was filed on June 16, 1967. At the hearing the Presiding Examiner ruled that under the pleadings it was possible to adduce evidence which might disclose the erroneous application of an existing tariff schedule, which would be governed by a three-year statute (Public Utilities Code §§ 736, 532) or that PG&E failed to comply with its Rule 12, which would be governed by a two-year statute (Public Utilities Code § 735). The Presiding Examiner correctly ruled that Foundry should be permitted to produce evidence relating to the alleged damages for a period of three years preceding the filing of the complaint. In the light of the findings and conclusions hereinafter entered it is not necessary to determine which statute of limitations is applicable to the facts here presented.

The record indicates that Foundry is located at 2200 "S" Street in Bakersfield. Prior to 1946, PG&E supplied service to an electric furnace at that address for Haberfelde Steel Company. At that time service to the electric furnace was supplied under PG&E's Schedule H-1. In 1946, the foundry, including the electric furnace, was sold to Phillips Foundry Company. Service to the electric furnace was continued under Schedule H-1. On April 7, 1955, Phillips Foundry Company changed its name to Pacific-Southern Foundries, Inc. In 1955, Pacific Valves, Inc. purchased all of the outstanding stock of Foundry, and since that time Foundry has been a wholly owned subsidiary of Pacific Valves, Inc. From 1946 to 1955, W. J. Gates, one of the investors in Phillips Foundry Company, was a vice president of the corporation and general manager of the foundry operation; although during the year of 1954 he was ill and did not engage in business activity. Gates continued as general manager of Foundry from 1955 to 1964, but he did not have any ownership interest in the corporation during this period.

At the time in 1955 when Pacific Valves, Inc. acquired all of Foundry's capital stock, it was receiving service to the electric furnace under Schedule H-1. In Decision No. 47832 (Pacific Gas and Electric Co., 52 Cal. P.U.C. 111) entered on October 15, 1952, the Commission stated at page 147:

> "Applicant proposes one system-wide cooking and heating rate to replace Schedules H-1, H-2, H-21, and H-50 and WH-53. Applicant proposes limiting the new schedule to those establishments presently served under the superseded schedules. This rate is generally on the low-side compared to other rate forms. It has only two commodity blocks which give inadequate reflection of the demand component in view of the wide varieties of load to which the schedule is applicable. Applicant's proposal appears reasonable and in the future this type of load will be served under the general service schedules alone or in combination with other service for the same customer."

Appendix A to Decision No. 47832 authorized PG&E to revise Schedule H-1, and the revision provided that: "This schedule is applicable only to those establishments which were being served under Schedules H-1, H-2, H-21, H-50, and WH-53 on the effective date of this schedule."

Foundry contends that the electric furnace should never have been placed on Schedule H-1, because that schedule applies to heating and cooking, and is not applicable to an electric furnace. Webster's International Dictionary, 2nd Edition, indicates that "heating" is the present participle and verbal noun of "heat". It defines "heat" in part as ". . . . 5. A single complete operation of heating, as at a forge or in a furnace. . . ." It defines "furnace" in part as ". . . . 1. An enclosed place in which heat is produced by fuel combustion, the electric arc, etc., as for reducing ores or melting metals. . . ." Insofar as Schedule H-1 refers to "heating", by definition it would apply to the electric furnace. There is nothing on the face of Schedule H-1 which would preclude its

application to an electric furnace. Furthermore, the record discloses that PG&E has consistently interpreted Schedule H-1 as being applicable to electric furnaces, and that even though the schedule had been closed since 1952 and some customers have elected other schedules since then, in 1967 PG&E was still furnishing service to a number of electric furnaces under that schedule. The Commission is of the opinion that Schedule H-1 was an appropriate one for the electric furnace here under consideration.

Foundry next contends that, assuming Schedule H-1 is an appropriate one for an electric furnace, the schedule should not have been applied to it in 1955 and thereafter because (1) no yearly contracts for such service were executed and (2) when Pacific Valves, Inc. acquired all of its common stock, Foundry became a different "establishment" and no longer entitled to service under that schedule. There is no merit in either contention.

Schedule H-1 in 1955 provided in part as follows:

> "Optional Annual Minimum Charge: Upon application by the customer, the Company will put the minimum charge on an annual basis of $45.00 per annum for the first 7 kw. or less of connected load, plus $3.75 per annum for each additional kilowatt; provided the customer signs a contract for service for a period of not less than one (1) year. The Company reserves the right to bill the annual minimum charge proportionately throughout the year."

Except for changes in the amounts of the charges, the optional annual minimum charges provision in Schedule H-1 has remained the same from 1955 to date. The provision is not mandatory. It may be brought into play at the option of a customer. It does not provide for annual contracts but for "a contract for service for a period of not less than one (1) year." There is no provision in PG&E's tariff requiring yearly contracts for service under Schedule H-1 nor is there any evidence that as a matter of practice PG&E executed yearly contracts with any customer receiving service under Schedule H-1.

The change of beneficial ownership in the stock of a corporation whose physical plant remains the same does not make the corporation or the plant a "new establishment" under Schedule H-1. Decision No. 47832, by authorizing PG&E to limit service under Schedule H-1 to establishments being served on November 10, 1952,[1/] provided for the eventual elimination of that schedule. Webster's International Dictionary, 2nd Edition, defines "establishment" in part as meaning: ". . . . The place where one is permanently fixed for residence or business . . . or place of business, with its fixtures and organized staff. . . ." The term "place of business" refers to a physical location and not to the ownership interest of a business. To construe the word "establishment" in Schedule H-1 to be otherwise would thwart the intent of the eventual discontinuance of the schedule because the service could then be moved from place to place. Immediately prior to the time Schedule H-1 went into effect in 1952, PG&E issued a memorandum to its personnel interpreting the manner in which the schedule should be applied. The memorandum in part provided that:

> "New Schedule H-1, authorized by subject decision, is closed to new establishments but is applicable throughout the entire territory to accounts formerly served under heating Schedules H-1, H-2, H-21, H-50 and WH-53, all of which it supersedes, for service rendered on and after November 10, 1952.
>
> "New H-1 is identical in form to superseded Schedules H-1 and H-2 and though it differs from other schedules in the superseded group, no special difficulties in applying it seem probable whenever it is advantageous to the customer to continue service thereunder.

1/ The date upon which the tariff filing pursuant to Decision No. 47832 became effective.

> "The new schedule is applicable only to those establishments which were being served under the above-listed schedules on the effective date of the new schedule. We are serving approximately 8000 such establishments at the present time and, if the transfer is made to new H-1 at this time, it will continue to be available to such establishments even though changes of party or changes of load occur; however, it will not again be made available to a customer who transfers to another applicable rate schedule or moves his equipment to a new establishment."

We believe this to be a correct and reasonable interpretation of the application of Schedule H-1. It is conceded that the foundry operation and electric furnace remained in the same physical location prior to and after Foundry's stock was sold to Pacific Valves, Inc. in 1955. Therefore, at the time of the transfer of the stock Foundry was not a "new establishment" under Schedule H-1 and was entitled to continued service, at its option, under that schedule.

Foundry next contends that PG&E violated its Rule 12 by failing to inform Foundry that Schedule A-13 was available for the electric furnace, and that the application of that schedule would result in lesser charges than those under Schedule H-1. Foundry does not contend that it did not know of the existence of Schedule A-13 in 1955 because the record clearly establishes that as early as 1953 it was receiving service for lights and various motors under Schedule A-13. Foundry contends that when Pacific Valves, Inc. acquired all of its stock in 1955, PG&E had knowledge thereof; that it became a new customer at that time; that while PG&E may have informed Foundry of the existence and applicability of Schedule A-13 to the electric furnace it misinformed Foundry that Schedule H-1 would be less expensive and that when Foundry was properly apprised of the correct facts in 1965 it elected to receive service under Schedule A-13. Foundry bases its alleged damages on a PG&E rate analysis furnished it for the period from August 17, 1964 to July 21, 1965, which

indicated that if the electric furnace had been under Schedule A-13 there would have been a saving of $11,528, which would have been 12 percent less than the amount paid under Schedule H-1. It argues that it was overbilled by 12 percent for service to the electric furnace from March, 1955 until it switched to service for the furnace under Schedule A-13 on November 1, 1965. PG&E contends that it properly advised Foundry, as required by its Rule 12, of the optional applicability of Schedule H-1 and A-13 to the electric furnace; that the information upon which a choice of schedule could be made was within the knowledge of Foundry; that the information provided it by Foundry, upon which analyses were made, indicated that H-1 was a better rate and that if the electric furnace had been under Schedule A-13 instead of H-1 from November of 1952 until November of 1965, Foundry would have had to pay $20,901 to $66,850 more for service to the furnace.

Foundry did not become a new customer of PG&E when all of its stock was acquired by Pacific Valves, Inc. The existence of a corporation begins upon the filing of its Articles of Incorporation with the Secretary of State and continues perpetually, unless otherwise provided by law. (Corporation Code § 308.) A corporation is an entity with an existence different and separate from that of its shareholders. (Maxwell Cafe v. Dept. Alcoholic Beverage Control, 142 Cal. App. 2d 73, 78.) In Joe Balestrieri v. Commissioner of Internal Rev., 177 Fed. 2d 867, the Court stated at page 872:

> "A corporation is a legal entity separate and distinct from its stockholders and the continuity of its existence is not interrupted by changes in stock ownership. If, on the day after the contract with reference to the chrome milling venture was made, Balestrieri and Otto had sold and transferred all of their stock to others not connected with the partnership, the corporation's rights, duties and liabilities under the contract would not have been affected in the least."

Similarly, in the matter here under consideration, the contract for service to the electric furnace entered into between Foundry and PG&E was not affected when Pacific Valves, Inc. acquired all of Foundry's stock.

The final point requiring consideration is whether PG&E violated Rule 12 with respect to Foundry. The pertinent parts of that rule provide that:

> "Where there are two or more rate schedules applicable to any class of service, the Company or its authorized employees will call applicant's attention, at the time application is made, to the several schedules, and the applicant must designate which rate or schedule he desires.
>
> "In the event of the adoption by the Company of new or optional schedules or rates, the Company will take such measures as may be practicable to advise those of its customers who may be affected that such new or optional rates are effective."

In order to determine whether a violation of Rule 12 occurred, it is necessary to consider the rate schedules here involved. Schedule H-1 is based solely on energy consumption. The applicable rate blocks are applied to the total number of kilowatt hours per month actually used. Schedule A-13 is based on energy consumption and created demand, and the rate thereunder is broken down into two components: a demand charge and an energy charge. As a load factor increases, the average rate decreases under Schedule A-13 and remains relatively constant under Schedule H-1.

The record is clear that, at least as early as 1953, Foundry was aware of Schedules H-1 and A-13 because it was receiving service under both of them. Foundry does not deny this but contends that misrepresentations were made concerning the desirability of continuing service to the electric furnace under Schedule H-1. During the period from 1955 to 1963 Gates was informed by PG&E and understood that

Schedule H-1 was a closed schedule and that if the service to the electric furnace was changed to Schedule A-13 it could not be changed back to Schedule H-1. Similar statements were made by PG&E to others connected with Foundry. These statements were correct. In order to determine whether Schedule A-13 was more beneficial to Foundry than Schedule H-1 it was necessary to predict the nature of Foundry's operations in the future. The information upon which such a prediction could be based was solely within the knowledge of Foundry. Any estimates made by PG&E necessarily were based on information supplied by Foundry. Foundry contends that PG&E should know of its alleged increased power demands by virtue of its meters at a nearby substation. This contention has no merit. The record indicates that there was no meter at the nearby substation until the middle of 1964 and that the meter installed in 1964 was not a demand-type one, and, therefore, did not accurately reflect demand for projections under Schedule A-13. Furthermore, even if a demand meter had been installed and even if it be assumed that PG&E noticed an increase in demand for a particular period, the determination of whether to permanently give up the Schedule H-1 rates for those under Schedule A-13, was one to be made by Foundry based on future plans. An increase demand or use of energy during one period of time does not necessarily mean that the particular level of use will be maintained or increased in the future.

In 1953, Thomas Spivy was the PG&E representative who handled Foundry's account. In November of 1953 he presented a rate analysis of the electric furnace account to Foundry. Spivy testified that in making the analysis he considered the potential application of the Schedule A-13 rates, but that in his opinion the Schedule H-1 rates were the better ones for Foundry in 1953. He so advised Gates. There is nothing in the record to show that at the time the analysis was made it was other than in accordance with PG&E's normal practice

and that Spivy did not use ordinary care in making it. In fact, the record shows, in retrospect, that Spivy was correct. William Gallavan, a supervisor of rates in PG&E's rate department, testified that he had prepared a rate analysis for the electric furnace account from November, 1952 to November, 1965. The analysis compared the actual revenues collected by PG&E under Schedule H-1 and the amounts which would have been billed under Schedule A-13 with assumed demands of 2,200 and 2,700 kilowatts, which assumptions have evidentiary basis in the record. The analysis indicates that in the two years immediately following the Spivy analysis, 1954 and 1955, if the electric furnace had been on Schedule A-13, Foundry would have had to pay the following additional amounts:

	Additional Charges at 2,200 KW	Additional Charges at 2,700 KW
1954	$ 9,720	$12,218
1955	10,694	13,680

The record indicates that John McFadzean, who was the PG&E power engineer dealing with Foundry during the period 1955 to 1963, had various conversations with Gates concerning the possibility of changing the service to the electric furnace from Schedule H-1 to Schedule A-13. McFadzean testified that in 1957, he had a conversation with Gates concerning combining the existing Schedule H-1 and Schedule A-13 accounts on one meter under a Schedule A-13 account; that Gates was aware that the Schedule H-1 was closed; that Gates spoke of the possible reduction or cancellation of contracts; that, in these circumstances, he recommended that Foundry retain Schedule H-1 for the electric furnace and that Gates indicated to him that Foundry would take no action to change to Schedule A-13 until business conditions became more stable. Gates, who testified in behalf of Foundry at the hearing, stated that he did not remember whether or not

he was ever told by PG&E about the applicability of Schedule A-13 to the electric furnace and that he had no recollection of the 1957 conversations previously referred to. Physical evidence in the record, including a contract for service under Schedule A-13 executed in October, 1957 and rate analyses, all signed by Gates, supports the positive testimony of the witnesses called by PG&E. Again, there is no evidence that at the times McFadzean made his analyses and gave his recommendation in 1957 he was acting other than in accordance with PG&E's normal practice and that he did not use ordinary care. Subsequent events again show that not only was the recommendation made in good faith but that it was correct. In 1957 it would have been more advantageous for Foundry to have had the electric furnace on Schedule A-13. However, for the next two years, 1958 and 1959, Schedule H-1 was more advantageous. The Gallavan analysis shows the following:

	Additional Charges at 2,200 KW	Additional Charges at 2,700 KW
1957	($5,185)	($1,481)
1958	6,232	9,548
1959	3,123	6,959

The import of Foundry's position seems to be that somehow PG&E should have divined the exact point in time when Schedule A-13 became more advantageous than Schedule H-1 for Foundry, and to have immediately recommended such change. This is not required by PG&E's Rule 12 and, as indicated, PG&E was in no position to determine the future demand for the electric furnace account because this information was solely within the knowledge of Foundry. Furthermore, the record indicates that from 1952 to 1965 the only two consecutive years when it would have been more advantageous for Foundry to have had service to the electric furnace on Schedule A-13 were 1964 and 1965;

that Foundry was made aware of this by a rate analysis furnished it by PG&E for the period from August 17, 1964 to July 21, 1965 and that after this analysis, Foundry took steps to have service to the electric furnace under Schedule A-13.

PG&E's duty under its Rule 12 was to "call attention" and "advise" Foundry of the existence of alternate rate schedules applicable to the electric furnace. Clearly, this was done. After such notification it was Foundry's decision, not PG&E's, to determine which schedule to use. Although PG&E is not required by its tariff to furnish rate analyses, it had a duty, in presenting such analyses and other information to Foundry, not to make any misrepresentations and to use good faith and ordinary care in making the analyses. PG&E did not breach this duty.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. Foundry is located at 2200 "S" Street in Bakersfield. Prior to 1946, PG&E supplied service to Haberfelde Steel Company for an electric furnace at said address. The service was supplied under PG&E's Schedule H-1.

2. In 1946 the foundry located at 2200 "S" Street in Bakersfield, including the aforesaid electric furnace, was sold by Haberfelde Steel Company to Phillips Foundry Company. Service to the electric furnace was continued under Schedule H-1. On April 7, 1955, Foundry changed its name, by amending its Articles of Incorporation, from Phillips Foundry Company to Pacific-Southern Foundries, Inc. In 1955, Pacific Valves, Inc. purchased all of the outstanding stock of Foundry.

3. W. J. Gates was one of the investors in Foundry. From 1946 to 1955 he was a vice president of the corporation and general manager of the foundry operation. After the sale and transfer of Foundry stock in 1955, Gates no longer had a stock interest in Foundry; he was no longer an officer of the corporation but he continued as general manager until 1964.

4. PG&E's Schedule H-1 applies to heating and cooking services. The word "heating" is the present participle and verbal noun of the word "heat". The word "heat" is defined in part as meaning a single complete operation of heating as at a forge or in a furnace. The word "furnace" is defined in part as an enclosed place in which heat is produced by fuel combustion, the electric arc, etc., as for reducing ores or melting metals. By definition, Schedule H-1 applies to Foundry's electric furnace.

5. There is nothing on the face of Schedule H-1 which would preclude its being applied to Foundry's electric furnace.

6. PG&E has consistently applied its Schedule H-1 to electric furnaces similar to the one operated by Foundry, and at the time of the hearing in this proceeding it was furnishing service to a number of such furnaces on that schedule.

7. There is no provision in PG&E's tariff requiring yearly contracts for service under Schedule H-1, nor is there any evidence that, as a matter of practice, PG&E executed yearly contracts with any customer receiving service under that schedule.

8. PG&E's Schedule H-1 is based solely on energy consumption. The applicable rate blocks are applied to the total number of kilowatt hours per month actually used. Schedule A-13 is based on energy consumption and created demand, and the rate thereunder is broken down into two components: a demand charge and an energy charge. As a load

factor increases, the average rate decreases under Schedule A-13 and remains fairly constant under Schedule H-1.

9. In Decision No. 47832, entered on October 15, 1952, the Commission authorized PG&E to file a tariff limiting service under Schedule H-1 to establishments being served on the effective date of the tariff. The tariff limiting service under Schedule H-1 became effective on November 10, 1952, and Schedule H-1 may only be applied to establishments which were receiving service on that date.

10. In 1953, Foundry was receiving service to the electric furnace under Schedule H-1 and other service under Schedule A-13.

11. During the period from 1955 to 1963 representatives of PG&E informed W. J. Gates on various occasions that Schedule H-1 was a closed schedule and that if the electric furnace were shifted from Schedule H-1 to Schedule A-13 it could not again be served under Schedule H-1. These were correct statements.

12. In order to determine whether Schedule A-13 would be more beneficial to Foundry than Schedule H-1 for service to the electric furnace it was necessary to predict the nature of Foundry's future operations. The information upon which such a prediction could be based was solely within the knowledge of Foundry.

13. All rate analyses made by PG&E in connection with the electric furnace were based upon information supplied by Foundry to PG&E about Foundry's prospective operations.

14. There was no meter located at the PG&E substation located near Foundry until the middle of 1964, and the meter which was installed in 1964 was not a demand-type meter, and, therefore, could not accurately measure demand for projected analyses under Schedule A-13.

15. On November 12, 1953, Thomas Spivy, the PG&E representative who handled Foundry's account, made an analysis of the electric furnace account in which he considered the potential application of Schedule A-13 to the electric furnace. He concluded that the Schedule H-1 rates were more beneficial to Foundry. He advised Gates of his conclusion and Gates signed the analysis on November 24, 1953, which indicated Foundry wanted service to the electric furnace continued on Schedule H-1. There is nothing in the record to indicate that Spivey did not use ordinary care in making the analysis or that it was not prepared in accordance with PG&E's normal practice. If the electric furnace had been changed to Schedule A-13, Foundry would have had to pay the following additional amounts:

	Additional Charges at 2,200 KW	Additional Charges at 2,700 KW
1954	$ 9,720	$12,218
1955	10,694	13,680

16. In 1957, John McFadzean, who was the PG&E power engineer dealing with Foundry, made a rate analysis of the electric furnace account. There is no evidence that he did not use ordinary care in making the analysis or that he did not follow PG&E's ordinary practices. At the time McFadzean made his analysis Gates indicated to him that he was concerned about the possible reduction or cancellation of contracts by Foundry's customers. As a result of his analysis and the representations made by Gates, McFadzean recommended to Gates that the electric furnace be kept on Schedule H-1. If the electric furnace had been on Schedule A-13, Foundry would have had to pay the following additional amounts for the years indicated:

	Additional Charges at 2,200 KW	Additional Charges at 2,700 KW
1957	($5,185)	($1,481)
1958	6,232	9,548
1959	3,123	6,959

17. During 1957, Gates, who was aware that Schedule H-1 was closed, decided to keep the electric furnace on that schedule rather than change to Schedule A-13, because of his concern over the possible reduction or cancellation of contracts by customers of Foundry.

18. The only two consecutive years from 1952 to 1965 when it would have been more advantageous for Foundry to have had service to the electric furnace on Schedule A-13 rather than Schedule H-1 were 1964 and 1965. Foundry was made aware of this by a rate analysis prepared by PG&E for the period from August 17, 1964 to July 21, 1965, and, after this analysis, Foundry took steps to have service to the furnace under Schedule A-13.

19. During the period from 1963 to 1965, PG&E correctly informed Foundry of the applicability of its rates under Schedules H-1 and A-13 to the electric furnace. All the rate analyses prepared by PG&E in connection with the electric furnace were prepared with ordinary care and made in good faith.

Conclusions of Law

1. At the time Foundry acquired the foundry, including the electric furnace, at 2200 "S" Street, Bakersfield, from Haberfelde Steel Company, the continued service to said electric furnace did not constitute service to a new establishment under PG&E's Schedule H-1 and continued service to the electric furnace under that schedule was proper.

2. Since 1946, Foundry has remained the same legal entity and the transfer of all of its stock in 1955 did not change the entity.

Neither the change in corporate name nor the change in ownership of its stock made Foundry a new customer of PG&E under any of its tariffs.

3. PG&E's Schedule H-1 was an appropriate schedule for service to Foundry's electric furnace.

4. PG&E was not authorized or required to enter into yearly contracts with Foundry for service to the electric furnace under Schedule H-1.

5. PG&E did not violate its Rule 12 in connection with its service to Foundry's electric furnace.

6. PG&E did not breach any duty which it may have had to Foundry in connection with service to the electric furnace during the period from 1953 to 1965.

7. Foundry is entitled to no relief in this proceeding.

O R D E R

IT IS ORDERED that complainant is entitled to no relief in this proceeding, and the complaint is denied.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 30th day of JULY, 1968.

William Symons, Jr., President

William M. Bennett

Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.