smc

Decision No. a. 86085

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into electric utility Fuel Cost Adjustment tariff provisions and procedures; and the changes, if any, that should be made to said tariff provisions and procedures.	)	Case No. 9886 (Filed March 18, 1976)

ORDER DENYING REHEARING AND MODIFYING DECISION NO. 85731

Petitions for rehearing of Decision No. 85731 have been filed by Southern California Edison Company (Edison) and Toward Utility Rate Normalization. The Commission has considered these petitions and is of the opinion that good cause for rehearing has not been shown to exist. However, two matters do require discussion.

Finding No. 12 in Decision No. 85731 provides in part that:

> "... The energy cost adjustment factor should be applied on a cents-per-kwhr basis only to sales above lifeline quantities."

By this sentence we meant to carry forward our discussion in Decision No. 85731, mimeo 15, where we stated:

> "Any collection debits would be developed as part of the energy cost adjustment factor and applied on a cents-per-kwhr basis only to sales above lifeline quantities."

Finding No. 12 should be modified to conform to that discussion.

In Decision No. 85731, Ordering Paragraph 2, we ordered our staff to make certain recommendations to us. No provisions were made for Edison to have notice of or an opportunity to respond to those recommendations. Edison objects. We will modify Decision No. 85731 to provide Edison an opportunity to

reply to the staff recommendations. No other points require discussion.

THEREFORE IT IS ORDERED that:

1. Finding No. 12 of Decision No. 85731 is hereby modified as follows:

> "12. The overcollection credit should be applied on a uniform cents-per-kwhr basis to all appropriate sales and the credit should be specified separately. Any collection debits should be developed as part of the energy cost adjustment factor and applied on a cents-per-kwhr basis only to sales above lifeline quantities."

2. Decision No. 85731 is hereby modified by the addition of Ordering Paragraph 2a as follows:

> "2a. The staff shall provide copies of the recommendations ordered above regarding Southern California Edison Company to Southern California Edison Company. Southern California Edison Company shall have ten (10) days to respond to the staff recommendations."

3. Rehearing of Decision No. 85731, as modified above, is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 7th day of JULY, 1976.

President

I dissent
William Symons, Jr
Commissioner

I will file a written dissent
Vernon L. Sturgeon
Commissioner

Commissioners

COMMISSIONER VERNON L. STURGEON, DISSENTING

By Case No. 9886, opened March 18, 1975, we undertook an investigation into the electric utility fuel cost adjustment (fca) tariff provisions. The fca provisions were first authorized in March 1972 as an expeditious vehicle for the recovery of increases in fossil fuel expense. On April 27, 1976, the Commission issued Decision No. 85731 in which it was determined by the majority that, under the fca provisions utilizing average-year forecasts, the utilities were able to amass sizable overcollections; that is is, fuel adjustment revenues in excess of actual fuel adjustment costs. We decided to change the fuel clause from one based on average-year forecasts to one based on recorded data. Over the dissents of Commissioner Symons and myself, the majority further determined that the overcollections were to be amortized over a period of three years. Southern California Edison Company (Edison) filed a petition for rehearing, reconsideration and stay on May 6, 1976. I would grant that request.

It is Edison's argument that, in issuing Decision No. 85731, the Commission has illegally engaged in retroactive ratemaking. This claim is meritorious. The Commission has, through the requirement for the amortization of overcollections set up a procedure for the establishment of future rates based, in part, on past earnings. As specifically recognized (Decision No. 85731 at 3), those past earnings were lawfully collected under rates found by us to be just and reasonable. The error originally committed in Decision 85731 is continued by the majority today.

In Pacific Tel. & Tel. Co. v. Public Util. Com. (1965) 62 C.2d 634 the Supreme Court held that this Commission lacked power to require refunds of "general rates already approved by it." (62 C.2d at 650.) In City of Los Angeles v. Public Util. Com. (1972) 7 C.3d 331 the same Court stated that:

> "To permit the commission to redetermine whether the preexisting rates were unreasonable as of the date of its order and to establish new rates for the purpose of refunds would mean that the commission is establishing rates retroactively rather than prospectively (7 C.3d at 357, emphasis added.)

The Commission, itself, has determined that:

> "... costs applicable to past periods are not properly includible in current operating expenses for rate fixing
> ...
> Past deficts (sic) may not be made up by excessive changes in the future nor may past profits be reduced by disallowance to future operating expense." (App. of Pac. Tel. & Tel. Co. (1949) 48 CPUC 323 at 836.)

This holding follows the teachings of the United States Supreme Court. Thus, in Board of Public Utility Comrs. v. New York Teleph. Co. (1926) 271 U.S. 23, 70 L.ed. 808 the Supreme Court stated that:

> "Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. Galveston Electric Co. v. Galveston, 258 U.S. 388, 395, 66 L.ed. 678, 692, 42 Sup. Ct. Rep. 351; Georgia R. & Power Co. v. Railroad Commission, 262 U.S. 625, 632, 67 L.ed. 1144, 1148, 43 Sup. Ct. Rep. 680. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. Newton v. Consolidated Gas Co. 258 U.S. 165, 175, 66 L.ed. 538, 547, 42 Sup. Ct. Rep. 264, Galveston Electric v. Galveston, supra 396 (66 L.ed. 683, 42 Sup. Ct. Rep. 351); Monroe Gaslight & Fuel Co. v. Michigan Pub. Utilities Commission (D.C.) 292 Fed. 139, 147; Minneapolis v. Rand (C.C.A. 8th) 285 Fed. 818, 823; Georgia R. & Power Co. v. Railroad Commission (D.C.) 278 Fed. 242, 247, affirmed in 262 U.S. 625, 67 L.ed. 1144, 43 Sup. Ct. Rep. 680; Chicago R. Co. v. Illinois Commerce Commission (D.C.) P.U.R. 1922 C, 282, 277 Fed. 970, 980; Garden City v. Garden City Teleph. Light & Mfg. Co. 150 C.C.A. 25, P.U.R. 1917 B. 779, 236 Fed. 693, 696." (70 L.ed at 812-813).

The above-stated legal proposition is unquestionably the law of the land. The remaining issue then is whether the Commission's action in Decision No. 85731 comes within this rule. As shown hereinafter that question must be answered in the affirmative.

In Decision No. 85731 the Commission recognized that retroactive ratemaking is precluded by law. Thus, after quoting from Pacific Tel. & Tel. Co. v. Public Util. Com., supra, 62 C.2d 634 the Commission concluded that:

> "This language clearly bars the reducing or refunding of revenues under rates which were lawfully and finally effective." (Mimeo at 10.)

However, the Commission then indicated:

> "We intend to do neither. However, we see no prescription in the cases discussing retroactive ratemaking (and contrariwise we see authority) for reducing rates prospectively even though that reduction may be appropriate in part because of past performance. When we find overcollections we have the option of reducing rates or reducing the rate of return. (cf. City of Los Angeles v. Public Utilities 15 Cal. 3d 680, filed on December 12, 1975)." (Mimeo at 10-11.)

To the contrary, we cannot, based on the prior cited authority, reduce future rates because of past overcollections. The action in Decision No. 85731 constitutes retroactive ratemaking.

An attempt is made by the majority to distinguish the prohibition against retroactive ratemaking in a general rate proceeding from the instant "special" proceeding. Thus, it was indicated in Decision No. 85731 that:

> "... we hold the distinction between general rate revenues and fca revenues is so clear that there is a correspondingly clear distinction between fca increases and general rate increases." (Mimeo at 12.)

That there is a distinction or difference between general rate increases and fca increases may be taken as true. However,

such a determination by itself, does not afford any justification for permitting retroactive ratemaking when fca increases are involved. Stated otherwise, any distinction that may exist between general and special rates is irrelevant to the resolution of the question of whether the Commission can engage in retroactive ratemaking. The answer in either case is no.

It does not follow from the above that we are powerless to prevent Edison from reaping a windfall. One way open is simply to maintain the average year forecast fca until a complete weather cycle has occurred. In this way, the above-average wet years will be offset by below-average wet years in time. In any event, rehearing with respect to the present procedures should have been granted.

Vernon L. Sturgeon
Commissioner

San Francisco, California
July 7, 1976