SW/VG

ORIGINAL

Decision No. 86183

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SKI-LIFT APARTMENTS CORP.,

Complainant,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Defendant.

Case No. 9922
(Filed June 2, 1975;
amended July 9, 1975 and
September 17, 1975)

Leon E. Kent, Attorney at Law,
for complainant.
John W. Evans, Attorney at Law,
for defendant.

OPINION ON REHEARING

Complainant owns two apartment buildings known as Post and Krone located adjacent to the Mammoth Mountain Inn at Mammoth Lakes, California. It seeks a declaration that it is not liable for and should not be required to pay any of the amounts due for electric energy supplied by the defendant to the buildings during December 14, 1974 to April 30, 1975, and an order that the complainant's application for service be accepted by the defendant in accordance with the defendant's tariffs applicable to new customers. Pending the determination of this case, by Decision No. 84533 dated June 10, 1975, the Commission ordered the defendant to provide complainant with electric energy under the tariffs applicable to new customers as of May 1, 1975, and the defendant has complied with the order.

A hearing was held in Los Angeles on September 22 and 23, 1975 before Examiner James D. Tante and the matter was submitted on the latter date. In Decision No. 85177 dated November 25, 1975, the Commission denied the relief requested by the complainant and terminated its order made in Decision No. 84533. The complainant's motion for rehearing was granted and limited to oral argument by Decision No. 85428 dated February 3, 1976, and in that decision the suspension of Decision No. 85177 imposed by the timely filing of the petition for rehearing was ordered continued until further order of the Commission.

A rehearing limited to oral argument was held in Los Angeles on May 4, 1976 before Examiner James D. Tante and the matter was submitted on that date.

Dorothy Jean Martinez, stockholder and treasurer of complainant; Ralph Edward Driskel, stockholder of complainant; and Leon E. Kent, attorney and assistant secretary of complainant, testified for the complainant. John D. Katch, San Bernardino district manager and previously Bishop district manager of defendant; and Donald L. Milligan, special service representative of defendant, testified for the defendant at the original hearing; nineteen exhibits were received in evidence.

A previous owner of the apartments in question, Mammoth Mountain Inn Corp., went into bankruptcy in July 1969. Certain persons who had loaned money to the bankrupt and whose loans were secured by trust deeds on individual apartments claimed the right to foreclose and formed an association called Ski-Lift Apartments (SLA) in order to protect their financial interest in the apartments. In May 1971 a representative and agent of SLA, Lincoln Lancet, signed an application for service of electric energy, made a security deposit of $1,500, and electric energy was provided the apartments by the defendant. The bills were sent by

defendant addressed to "Ski-Lift Apts., Mammoth, 7365 Melrose, Los Angeles, California," and the bill showed that the service address was "Ski-Lift Apts., Mammoth Lks., CA 93546."

In November 1971, approximately six months after making application for service of electric energy, a group of persons consisting of more than two-thirds of those who had previously formed SLA, and several other persons, formed the corporation which is the complainant herein. Complainant acquired title to the two apartment buildings in November 1972. From May to November 1971 the apartment buildings were operated by and the bills for electric energy were addressed to and paid for by SLA. From November 1971 to November 1972 the apartment buildings were operated by and the bills, issued in the name of SLA, were sent to and were paid by the complainant. From November 1972 to September 30, 1973 the buildings were operated for the complainant by Resort Operators, Inc. (Resort) and the bills were regularly issued in the name of SLA and not in the name of the complainant, but were sent to and paid by the complainant.

On March 7, 1972 a request for a change of rate schedule form (Exhibit 6) which showed the customer as SLA Mammoth and requested a change from Schedule A6B to Schedule A-7 was signed by Ski-Lift Apartments Corp. by Richard C. Dudek, secretary-treasurer, in a space on the form marked and provided for the customer's signature.

On October 1, 1973 the apartment buildings were leased by complainant to Resort with the provision that Resort was to pay for the utilities. The complainant continued to pay the bills for electric energy up to and including the January 1974 bill. Defendant had no knowledge of this lease agreement prior to May 1, 1975. On January 15, 1974 a change of address was presented to the defendant and it thereafter mailed the bills to the same

addressee, and with the same indication of the service address as indicated above, to P. O. Box 317, Mammoth Lakes, CA 93548, and the bills were paid by Resort. In August 1974 an additional $1,500 deposit was requested of the addressee to whom the bills were being sent and the deposit was paid by Resort on August 29, 1974.

The addressee and the indication of the service address where electric energy was provided continued to remain the same but the mailing address for the account was changed effective March 17, 1975 to "176 West Adams, Chicago, Ill. 60603" and changed again effective May 14, 1975 to "c/o Dr. McEachen, 17650 Palora Street, Encino, CA 91316."

The sum of $458 of the January 1975 bill for electric energy provided during the period of approximately December 15, 1974 to January 14, 1975 was not paid; the $4,745 February 1975 bill for electric energy provided from January 14 to February 13, 1975 was not paid; the $5,122 March 1975 bill for electric energy provided from February 13 to March 17, 1975 was not paid; the $5,230 April 1975 bill for electric energy provided from March 17 to April 15, 1975 was not paid; $1,298 of the May 1975 bill for electric energy provided from April 15 to May 14, 1975 was not paid; for a total sum of $16,853 due for electric energy provided from December 1974 to May 14, 1975, less $3,000 on deposit with the company, for an amount now due the defendant of $13,853.

There is no dispute that during the period from May 13, 1971 to November 1971 when complainant was incorporated, that SLA made application for, was liable for, and paid for electric energy provided by the defendant. Prior to the rehearing complainant contended that it was not a customer as defined in Rule No. 1 of defendant's tariffs on file with the Commission in that the application of SLA was still on file and SLA was the customer; that if

complainant did become the customer thereafter, the defendant is estopped, by reason of its conduct, to refuse to provide electric energy to complainant after May 1, 1975 in accordance with its tariffs applicable to providing service to new customers; and that if complainant was a customer of defendant during the period January 1 to May 1, 1975, the defendant caused damage to the complainant by its acts and conduct during that period in failing and refusing to notify complainant of the failure of Resort to make the payments as required, in an amount in excess of $16,853, the amount of unpaid bills for service during the period involved, and that complainant is entitled to have this sum offset against any sums due the defendant, so that nothing is owed or due the defendant and complainant, therefore, is entitled to have electric energy furnished it by the defendant in accordance with its tariffs applicable to new customers. Complainant also requested a declaration that it is not liable for the amount of $13,853 now due the defendant.

At the first hearing the complainant admitted that from November 1971 to January 1974 the bills were sent to and paid by complainant and did not deny that this brought it within the description of customer as set forth in Rule No. 1 of the defendant's tariff schedules.

In its amendment to petition for rehearing complainant stated on page 4: "Complainant corporation became the customer by receiving service and receiving bills and paying for same regularly, supplanting the previous association and Resort Operators became the substituted customer in exactly the same fashion...." and "...the corporation became the customer and replaced the unincorporated group because it received service, received and paid bills regularly...it is conceded it was the customer...."

At the rehearing the complainant admitted that it became a customer of the defendant in November 1972 and continued as such until January 1974, but then changed its position and contended that it was not a customer during this period or any other time involved herein because the bills were not issued in its name as required by defendant's Rule No. 1 but were issued in the name of SLA.

The complainant's contention that it was not a customer of the defendant in that the application of SLA was still on file is without merit. If the complainant came within the provisions of Rule No. 1 it would have become a customer of the defendant notwithstanding the fact that SLA's application may still have been on file with the defendant.

The Commission does not have jurisdiction to award damages as an offset, or otherwise, in a matter of this nature; therefore, the contention of complainant that it is entitled to have any sum due defendant offset by damages, if any, caused complainant by defendant's conduct, is not properly before the Commission. (Williams v Pacific Tel. & Tel. Co. (1965) 64 CPUC 736.)

Complainant contends that the conduct of the defendant during the period January 1 to May 1, 1975 in not communicating with or advising complainant of the fact that amounts due for electric energy were unpaid was improper, and was such that it would work an injustice and injury upon complainant and that estoppel should apply and if the complainant was a customer during the time the bills were not paid the defendant should not be permitted to require complainant to pay the unpaid amounts due or to make additional deposits in order to reestablish credit. The quantum and character of proof necessary to justify such relief must measure up to that which would be required had the complainant paid the full tariff charges and then sought reparations upon the ground of unreasonableness, and the defendant had opposed the relief sought. Care must be taken to see that a discriminatory situation is not brought about, for attached to the Commission's power to grant reparation is the salutary limitation that no discrimination will result from such reparation. (Kotex Co. v E. S. Stanley, dba Star Truck & Warehouse Co. (1933) 38 CRR 513.)

After waiting a reasonable time for the February 24, 1975 bill to be paid and it remaining unpaid, and before March 24, 1975 when the next bill was to be mailed, the defendant communicated with Resort and made arrangements with Resort that the latter would mail a check in the amount of $4,500 each week to the defendant until the bill became current. After receiving and banking one of such checks defendant was notified that the check was not honored by the bank by reason of insufficient funds. The time elapsed between the receipt of the check by the defendant and the notice by the bank was in excess of one week.

Defendant communicated with Resort and received assurances and a reasonable explanation from Resort with respect to the problem.

Thereafter a second such check failed to clear because of insufficient funds and defendant requested Resort to send it a cashier's check in the amount of $16,000. Resort purchased such a check in Chicago and defendant verified this with the bank where the check was purchased. Defendant did not receive the check and after one week and several telephone calls determined to disconnect the meter through which electric energy was provided for the Ski-Lift Apartments. As a courtesy defendant contacted Dr. McEachen, president of the complainant, to inform him that the service to the Ski-Lift Apartments was to be disconnected. During this period defendant was of the opinion that Resort was merely managing the apartments for or was the agent of complainant.

Defendant had no reason to believe that anyone other than SLA or the complainant was liable for electric energy provided the Ski-Lift Apartments, had no knowledge of the lease between the complainant and Resort, and had no knowledge that Resort had agreed with the complainant to pay the utility bills incurred after October 1, 1973. It had no obligation to advise the complainant of the fact that certain bills were unpaid. The defendant conducted itself in a manner consistent with good business practice after it learned that there were sums due and unpaid for electric energy it had provided. The contention of complainant that if it was a customer the conduct of the defendant during that period was such that the defendant should be estopped from asserting its rights against the complainant is without merit. It is a well-established principle of public utility law that a utility "cannot directly or indirectly change its tariff

provisions by contract, conduct, estoppel or waiver...." (Mendence v Pacific Tel. & Tel. Co. (1971) 72 CPUC 563, 565; Johnson v Pacific Tel. & Tel. Co. (1969) 69 CPUC 290, 295, 296; Transmix Corp. v So. Pac. Co. (1960) 187 CA 2d 257, 264, 265, 266; and Pittsburgh C.C. & St. L.R. Co. v Fink (1919) 250 US 577.)

The tariff schedules applicable to electric service of defendant as approved by and on file with the Commission provide in part:

> Rule No. 1: "Customer: The person in whose name service is rendered as evidenced by the signature on the application, contract, or agreement for that service, or in the absence of a signed instrument, by the receipt and payment of bills regularly issued in his name regardless of the identity of the actual user of the service."
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> Rule No. 11 B. Nonpayment of bills: "1. When a bill for electric service has become past due..., service may be discontinued if the bill is not paid. . . . A customer's service, however, will not be discontinued until the amount of any deposit made to establish credit for that service has been fully absorbed."
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> Rule No. 11 H: "When a customer desires to terminate his responsibility for service, he shall give the utility not less than two days' notice of his intention and state the date on which he wishes the termination to become effective. A customer may be held responsible for all service furnished at the premises until two days after receipt of such notice by the utility or until the date of termination specified in the notice, whichever date is later."
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> Rule No. 6 C: "2. A customer who fails to pay bills before they become past due..., may be required to pay said bills and reestablish his credit by depositing the amount prescribed in Rule No. 7. This rule will apply regardless of whether or not service has been discontinued for such nonpayment."

When incorporated in November 1971 the complainant did not have a signed agreement with the defendant but received and paid bills sent to it by the defendant in the name of Ski-Lift Apartments, and on March 7, 1972 signed a request for change of rate schedule and submitted the same to the defendant. If complainant thereby became a customer of defendant as defined in defendant's Rule No. 1 it contends that after January 15, 1974, at which time there was a change of address but not of the addressee presented to the defendant and thereafter the bills were paid by Resort, that Resort became a customer and complainant terminated its status as a customer. The bills were not issued in the name of Resort so Resort did not become a customer as defined in defendant's Rule No. 1.

Dorothy Jean Martinez and Ralph Edward Driskel testified that on June 2, 1975 they were in the defendant's office in Bishop discussing the matter with Paul Ibello, an employee of the defendant. They stated that they had inquired about the Ski-Lift file and that Mr. Ibello had a folder containing papers to which he referred during the discussion, and from a distance of a few feet they saw a paper in the file resembling Exhibit 1, an application and contract for service, signed by one Roger Weston, an employee of Resort. They were unable to say, however, whether it applied to the Ski-Lift Apartments, or the Mammoth Inn, which was owned and operated by Resort.

John D. Katch testified that a file is not usually maintained by the defendant for each customer, but when a problem arises where payments are overdue for service to complainant's apartments and to Resort's Mammoth Inn, and a monthly check from Resort had been received on prior occasions for service to both places, the defendant would probably open a single file for both

customers. He stated that Resort had not signed an application for service for complainant's apartments and that the application seen by witnesses Martinez and Driskel could only be the one which had been signed by Resort for service to its Mammoth Inn.

Complainant argued that Resort had made written application to defendant for service to complainant's apartments, thus relieving it from liability after January 15, 1974. The evidence does not show that Resort made such an application for service.

The complainant's contention that if it had become a customer its status as such was terminated upon Resort becoming a customer before December of 1974 is without merit in that Resort never became a customer of the defendant as defined by Rule No. 1.

The question remaining for this Commission is not whether the complainant is or is not indebted to the defendant for electric energy provided by the latter but whether the complainant was a customer as defined in Rule No. 1 of the defendant during December 15, 1974 to May 14, 1975 when $13,853 became due and was not paid for electric energy provided the apartment buildings known as Post and Krone, owned by complainant and leased to Resort. If the complainant was such a customer, the defendant may discontinue electric service to the buildings until and unless the unpaid amounts are paid and credit is reestablished pursuant to its rules. If the complainant was not such a customer it is entitled to have service in accordance with the defendant's rules applicable to new customers.

The defendant admits that the bills were issued in the name of SLA and not complainant but contends that beginning in November 1971 the complainant became a customer by the receipt of and payment of bills regularly issued in its name regardless of the identity of the actual user of the service. The uncontroverted

evidence is that although complainant did receive and pay the bills regularly issued from November 1972 to January 1974, the bills were never issued in complainant's name but were issued in the name of SLA, so the complainant never became a customer by reason of merely receiving and paying the bills.

The defendant further contends that when the complainant signed Exhibit 6 in the space marked and provided for the customer's signature requesting a change of rate schedule in which SLA Mammoth was designated as the customer, the complainant was the person in whose name service is rendered as evidenced by the signature on the application, contract, or agreement for that service, and therefore became a customer as defined by its Rule No. 1.

We agree with defendant. We are not disposed to interpret defendant's Rule No. 1 so narrowly that we abandon all common sense. Clearly complainant considered itself a customer. If complainant, when it became a corporation had notified defendant by letter of its change in business form, that letter, it might be argued, would not strictly be an application, contract, or agreement for service, but we have no doubt complainant would be liable for services rendered. Finally, our decision to hold complainant liable is supported by traditional corporation law. In cases where individuals incorporate and all assets are transferred to the corporation and the corporation continues to carry on the same business, the separate entities may be disregarded and the new corporation held liable for the obligations of the former partnership (D N & E Walter Co. v Zuckerman (1931) 214 C 418; 6 Witkin, Summary of California Law, Corporations, Sections 8, 12, and 13, pp. 4320-4326).

Findings

1. In May 1971 SLA signed defendant's application for service of electric energy for two apartment buildings known as Post and Krone now owned by the complainant, and such service was thereafter provided by the defendant. SLA thereby became a customer of the defendant.

2. In November 1971, approximately six months after making application for service of electric energy, a group of persons consisting of more than two-thirds of those who had previously formed SLA, and several other persons, formed the corporation which is the complainant herein. Complainant acquired title to the two apartment buildings in November 1972. From May to November 1971 the apartment buildings were operated by and the bills for electric energy were addressed to and paid for by SLA. From November 1971 to November 1972 the apartment buildings were operated by and the bills, issued in the name of SLA, were sent to and were paid by the complainant. From November 1972 to September 30, 1973 the buildings were operated for the complainant by Resort Operators, Inc. (Resort) and the bills were regularly issued in the name of SLA and not in the name of the complainant, but were sent to and paid by the complainant.

3. On March 7, 1972 the complainant signed a request for a change of rate schedule form showing SLA Mammoth as the defendant's customer.

4. On October 1, 1973 the apartment buildings were leased by the complainant to Resort with the provision that Resort was to pay the utility bills. On January 15, 1974 a change of address was presented to the defendant and it thereafter mailed the bills to the

same addressee, SLA Mammoth, to the new address and the bills were thereafter paid by Resort except that as of May 14, 1975 there was $13,853 that was unpaid and due the defendant for electric service it had provided while Resort was the lessee. Resort did not thereby become the customer of the defendant as defined in Rule No. 1 because service was not rendered in its name, it did not sign an application, contract, or agreement for service, and the bills were not issued in its name.

5. The fact that SLA had an application on file with the defendant at the time the complainant received and paid the bills for and used electric energy did not prevent the complainant from becoming a customer of the defendant.

6. The defendant cannot directly or indirectly change its tariff provisions by contract, conduct, estoppel, or waiver, and the conduct of the defendant was not such that it should be, and it is not, estopped to assert a right it may have, if any, to refuse to provide further electric energy to the complainant until such time as the complainant pays the amount due and unpaid and posts a reasonable deposit for the reestablishment of credit.

7. During the period November 1972 to May 1, 1975 complainant was a customer of the defendant, and as of May 1, 1975 there was due defendant for electric energy provided the apartment buildings owned by the complainant and known as Post and Krone, the sum of $16,853, less $3,000 deposit, or $13,853.

8. The Commission does not have jurisdiction to offset the amount, if any, which might be due the complainant by reason of any damage which may have been caused it by the defendant by defendant's failure to advise complainant before May 1, 1975 of the fact that there were certain sums due and unpaid for electric energy provided by defendant to complainant's Ski-Lift Apartment buildings.

9. The conduct of the defendant was not such that it should be estopped to assert its right to refuse to provide further electric energy to the complainant until such time as the complainant paid the amount due and unpaid and posted a reasonable deposit for the reestablishment of credit.

10. The tariffs applicable to electrical service of defendant, as approved by and on file with the Commission, provide that the defendant may terminate service to the complainant and not reinstate service until such time as the unpaid bills are paid and the complainant deposits a reasonable sum for the reestablishment of credit.

11. The complainant's request that the Commission declare that it is not liable for and should not be required to pay any of the amounts due for electric energy supplied by the defendant during the period December 14, 1974 to April 30, 1975 and that the complainant's application for service be accepted by the defendant in accordance with the defendant's tariffs applicable to new customers should be denied.

12. The order granting interim relief in Decision No. 84533 should be terminated.

The Commission concludes that the relief sought by the complainant should be denied and the order set forth in Decision No. 84533, dated June 10, 1975, should be terminated.

O R D E R

IT IS ORDERED that:

1. The relief requested by complainant is denied.
2. The order heretofore made in Decision No. 84533 dated June 10, 1975 is terminated.

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

Dated at San Francisco, California, this 3rd day of AUGUST, 1976.

President

Commissioners

Commissioner Robert Batinovich, being necessarily absent, did not participate in the disposition of this proceeding.