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ORIGINAL

Decision No. 87277

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CARNATION COMPANY, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.	Case No. 9854 (Filed January 6, 1975; amended January 29, 1975)

George E. Sperling, Jr., Attorney at Law, for Carnation Company, complainant.
Malcolm H. Furbush, Bernard J. Della Santa, and Joseph Englert, Jr., Attorneys at Law, for Pacific Gas and Electric Company, defendant.
William J. Jennings, Attorney at Law, for the Commission staff.

OPINION

Complainant operates a can manufacturing plant at Riverbank, California. The plant uses natural gas provided by Pacific Gas and Electric Company (PG&E) in the manufacturing process. Complainant recently constructed a new unit requiring an additional 2,700 cu.ft./hr. of natural gas on an interruptible basis. As a condition of service, defendant PG&E demanded an initial payment, not expressly authorized by tariff, of $58,126 plus $581.26 per month for the first 60 months of service, in addition to the tariff charges for the amounts of natural gas consumed. Complainant signed a contract approved by Commission resolution agreeing to PG&E's demands, but with the express reservation of its right to prosecute this complaint.

PG&E asserts that its mains had insufficient capacity to provide the additional 2,700 cu.ft./hr. on peak demand days. The single payment was claimed to defray PG&E's costs of constructing extra main capacity; the smaller periodic payments are the asserted costs of ownership of the additional utility plant. The complaint contends that PG&E was not entitled to demand these charges and should have initiated service without either charge. Complainant seeks reparations of the $58,126 and the monthly charges paid to date, and costs of $4,500.

PG&E's answer asserts that the complaint is a challenge to the reasonableness of applicant's tariff rules and affirmatively alleges that PG&E's conduct was fully justified by its Tariff Rule 15 governing gas main extensions. In addition, PG&E asserts that due to current and impending gas shortages, the quantity of gas it will sell to complainant must be taken from supplies that otherwise would have been sold to other interruptible customers. It concludes that it will thus receive no additional net revenue to compensate it for the construction which is needed to supply Carnation. It claims that these circumstances justify the application of paragraph E.7 of Rule 15.[1/]

The matter was heard in San Francisco before Examiner Gilman on July 27-29, 1975 and submitted on September 30, 1975 subject to the filing of briefs.

1/ Rule No. 15 - Gas Main Extensions (applicable to extensions of gas distribution mains).

"E.7 Exceptional Cases

"In unusual circumstances, when the application of this rule appears impractical or unjust to either party, the utility or the applicant shall refer the matter to the Public Utilities Commission for special ruling or for the approval of special conditions which may be mutually agreed upon, prior to commencing construction."

The staff participated in this proceeding for the purpose of protecting the integrity of a group of Commission resolutions which had been approved with the concurrence of the Utilities Division. Those resolutions generally follow the pattern described by the complaint: interruptible service offered on payment of construction and cost of ownership charges. The staff presentation also was intended as a means whereby the staff's expertise could be made available on the record.

Position of the Parties

Complainant has asserted alternate theories, either that the charges were discriminatory or that there had been a *de facto* rate increase. It claimed that because of the dismissal of a prior related PG&E application (A.54071), discussed below, approval of PG&E's contentions would constitute retroactive ratemaking. It further claimed that the construction was not necessary. It asserted that actual costs of ownership are no more than 0.61 percent and that the construction costs properly assignable to Carnation are no more than $35,000. It argued that diminishing supplies of natural gas bear no logical connection to the question of whether Carnation should pay for an improvement in PG&E's plant. It also claimed that PG&E's conduct in demanding the supply contract has been inequitable because there was no disclosure of certain material facts, and because of inconsistent representations. Carnation claimed that PG&E furnished other competitive can manufacturing plants with gas under more favorable arrangements.

PG&E claimed that the complaint raised only two issues: (1) whether there was unreasonable discrimination and (2) whether the cost of ownership charge was excessive.

PG&E concedes that "[u]nder Section D.2 of Rule No. 15, as it presently exists, an interruptible customer is allowed one year's estimated annual total revenue (not net new revenue) to be set off against the cost of the main extension and reinforcement of facilities required to serve him and there is no provision for a cost of ownership charge." It argues that application of existing tariff provisions would promote new interruptible service and that making an applicant pay the nontariff charges discourages new applications for service. It claims to have treated all such customers similarly. Those customers not assessed cost of ownership charges were only those who required modifications costing less than $1,000. It argues these customers constitute a subclass and that the cost of administering monthly charges for this subclass would be disproportionate to the expected revenue. It claims that the distinction between distribution and transmission plant was an accounting matter only and irrelevant to matters involving system capacity and load. It contends that the composite cost of ownership of the type of plant involved is .91 percent of the capital cost per month; since the charge is required only for the first five years of service, and even though the costs are indefinite, it argues that 1 percent is a reasonable charge.

The contracts PG&E offers all new interruptible customers are different from those authorized in its tariff. It claimed that use of special contracts is justified in these circumstances by paragraph E.7 of its Tariff Rule 15 quoted above.

Staff pointed out the distinction between overall gas supply problems which provide a systemwide upper limit on the amount of gas available and deliverability problems which can restrict the availability of gas to interruptible customers served by a portion of PG&E's pipeline system, even when total firm and interruptible loads do not exceed supply. It points out that the construction is needed in this case to remedy a deliverability problem.

Staff recommends, on equitable basis, that some refund be made available to complainant in the event that firm-load growth or further supply restrictions made the improved deliverability useless for complainant. It contends that Carnation is not entitled to reparations. Staff claims that the other similar contracts are final and not subject to review on any grounds. It cites Section 1709 of the Public Utilities Code which prohibits collateral attacks on Commission decisions. It claims that paragraph E.7 should be applied because of "unusual" circumstances. Rather than adopting PG&E's theory that supply problems are unusual, it asserts that the peculiar deliverability conditions encountered here are unusual. It contends that giving complainant relief not available to other customers similarly situated would be inequitable and discriminatory. It argues, therefore, that Carnation should be denied relief.

Complainant's first witness, an engineer employed by it, described the history of negotiations between Carnation and PG&E. He testified that Carnation's coating plant at Riverbank had been receiving firm gas in the amount of 85 million cu.ft. annually. The additional interruptible gas was made necessary by the completion of a major addition to Carnation's can coating plant. The fuel is used in tinplate lithographing and coating ovens and in an oven fume incinerator. He testified to a series of contacts with PG&E concerning the additional supply of gas for the new coating plant, indicating that PG&E had refused to serve unless the payments in question were made without the possibility of a refund.

Complainant's next witness was a registered engineer with long experience in utility regulation. He testified that the contract terms are discriminatory and contrary to usually accepted utility rate practices. The witness submitted cost studies and a review of all new interruptible contracts submitted by PG&E for Commission approval.

A commercial analyst employed by PG&E testified concerning the declining supply of natural gas. He asserted that since May 1973 PG&E has uniformly invoked the E.7 ("Exceptional Cases") clause of PG&E's Tariff Rule 15 against each new interruptible customer and has obtained separate Commission approval in each instance.

A PG&E engineer testified that the additional demand at the Riverbank plant would cause a pressure drop if the system were not augmented. The witness stated that PG&E would absorb the extra cost for the additional capacity not needed by complainant. Another PG&E employee testified on the cost of ownership.

Related Proceeding (A.54071)

In 1973, PG&E's tariff required advances from new interruptible gas customers only for upgrading distribution mains; where transmission improvements were required, PG&E alone bore the cost. The payment for new distribution capacity was a true advance; i.e., the charge could be forgiven in whole or in part if the new service provided sufficient revenue to PG&E; there were no cost of ownership charges.

PG&E filed A.54071 in May of 1973 seeking major changes in these rules. The capital charge was to be applied to transmission, as well as distribution, extensions,or enlargements. The revenue credit was to be eliminated and a monthly cost of ownership charge (1 percent per month for 60 months) imposed. The proposed tariff language would have made Rule 15, including paragraph E.7, applicable to both transmission and distribution improvements.

PG&E claimed that the new and increased charges were justified by, *inter alia*, "...steadily diminishing gas supplies. This increase in curtailments to existing interruptible customers would be accelerated by the addition of new customers or an increase in demand by existing customers would have been encouraged by promotional revenue allowances... [B]ecause of insufficient gas supplies, any gas delivered to new interruptible customers will necessarily be taken away from existing interruptible customers, resulting in virtually no additional revenues..."

The application was protested and therefore set for hearing. After completion of PG&E's case in chief, protestant California Manufacturers Association moved for dismissal on the grounds that the proceeding was a rate increase and that no showing had been made as required by Section 494 of the Public Utilities Code. The examiner set the matter over to allow PG&E time to prepare additional studies to make a showing.2/

PG&E never introduced the required evidence; rather the application was dismissed at applicant's request (Decision No. 83041, June 25, 1974). The application was never renewed and the tariff items in question remain the same as in 1973.

Meanwhile (in October 1973), PG&E proffered the first of the present series of new interruptible service contracts for Commission approval under General Order No. 96-A. In this first instance, the contract terms differed from the tariff only in eliminating the revenue credit (Advice Letter 645-G). In April 1974, PG&E filed two similar advice letters (657-G and 658-G); both the contracts required the payment of a monthly cost of ownership charge in addition to eliminating the revenue credit. Each was approved by the Commission.

Since that date every system improvement required to serve a new interruptible customer has been paid for by that customer, with

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2/ Under Commission practice (Rule 63) an examiner can deny but cannot grant such a motion. If presented with a meritorious motion, he indicates a favorable ruling by taking the matter off calendar, forcing the applicant (or complainant) to choose between supplying the missing information or submitting to an adverse decision on the merits. In this case PG&E's counsel expressly conceded that the examiner's ruling was correct.

a cost of ownership charge and with no refund; these charges have been assessed without regard to whether the improvement was in transmission or in distribution systems. In each case, individual contracts were used; each contract was approved by Commission resolution.

Exhibit 10 is a summary of contracts for new interruptible customers filed between October 10, 1973 and May 15, 1975. There are thirty such contracts. The record indicates that the list includes all new interruptible customers whose peak-day needs exceed the capacity of any portion of PG&E's system.

The first such contract omitted the cost of ownership. This charge would have been very small since the construction cost was only $773. The same treatment was afforded two other customers whose construction cost advances were less than $1,000.

Most of the contracts, unlike Carnation's, allow credit based on revenue received from the new connection. However, all the contracts filed after March 11, 1975 were similar to Carnation's.

Discussion

We find that there is no special or exceptional circumstance involved in this proceeding. It is not unusual or exceptional that a new interruptible gas customer should find that a utility is unable to supply its needs without depleting the supply which would otherwise be delivered to other customers at the same or higher rates. It is not unusual or exceptional that the gas requirements of an interruptible customer will exceed the capacity of a utility's system on days when peak loads are experienced. Without finding an exceptional or unusual circumstance there can be no lawful authorization of a deviation from an applicable tariff rate. A deviation authorizing higher than tariff charges based on a usual or unexceptional circumstance is unlawful either as discrimination or as an irregular rate increase. The former characterization would apply if only some of the customers affected by unexceptional circumstance are charged the higher rate. On the other hand, if each affected customer is charged the higher rate, then the series of individual increases is in all probability a de facto rate increase. It should be noted that deviation contracts are approved without the evaluation of revenue and expense projections normally given even the most minor rate increase.

The review given advice letters requesting a tariff deviation is far less exacting than that given even the most minor general rate increase. For example, one of the most elementary and basic requirements for a rate increase showing is an estimate of the additional gross revenue which the increase is expected to produce (Rule 23(c), Rules of Procedure; Title 20, Chapter I, Article 6, California Admin. Code). No such showing is required where a utility presents deviation contracts.

Section 532 of the Public Utilities Code generally provides that no utility may charge a rate different than those provided in its tariff. The last sentence, however, states: "The Commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility." We interpret this section to require that an exception cannot be found just and reasonable unless it is in fact an exception. If there were no requirement for an exceptional circumstance, a utility could require a deviation contract from every member of a class of ratepayers, in order to effectuate an unjustified rate increase, violating § 454 Pub. Util. Code. If the Commission were to establish an "exception" from a generally applicable tariff rule for a customer who was not somehow dissimilarly situated from others who pay the tariff rate, it would be promoting rather than preventing discrimination. Section 489 of the Public Utilities Code requires filing and publication of all effective rates. More specifically, utilities are required to include all contracts in their tariffs; the section also recognizes the Commission's power to permit tariff deviations.

Paragraph IX of General Order No. 96-A provides that generally used contracts must be included in a utility's tariffs. Under paragraph X Commission approval is required for each execution of a contract for service at other than tariff rates. While proof of an exceptional circumstance is not specifically required such arrangements are described as "exceptions".

Paragraph E.7 is likewise consistent with a requirement that tariff exceptions be authorized only in exceptional circumstances.

In summary, a requirement that tariff rates be used unless there are unusual circumstances is essential if this Commission is to be able to prevent discrimination and guarantee that rate increases are justified. Since there are no unusual circumstances in this instance we must hold that PG&E cannot lawfully impose nontariff charges, and order reparations.

Promotional Rates

PG&E has characterized the existing tariff rule as promotional, implying that the program which it unilaterally substituted for that promotional rule is consistent with our policy favoring conservation of a unique and scarce resource.

PG&E has not, however, demonstrated that these rates have deterred any potential new interruptible customer from demanding service or induced it to select an alternative energy source. Quite the contrary, it appears that PG&E's decision to enlarge the capacity of its system has placed it in a position to deliver more natural gas to interruptible users. If PG&E had elected not to enlarge its system, significant quantities of gas would probably have been retained for eventual delivery to high priority users such as residential customers. PG&E has not explained why we should hold that the elimination of bottlenecks which served to ration the consumption of industrial users should be held to be sound public policy.

It would appear that PG&E had no obligation under its tariff to construct additional main capacity in response to Carnation's demand for service. If it had simply connected Carnation to its existing system, other interruptibles on this portion of PG&E system would undoubtedly have faced more frequent interruptions. However, Special Condition No. 2 of PG&E's gas tariff (applicable to all interruptible natural gas service) provides that PG&E is not liable for any interruption in service to interruptible customers resulting from "..inadequate transmission or delivery capacity or facilities, or storage requirements." This course of action would not have any effect on supplies.

Alternatively, PG&E might arguably have refused to accept any new interruptible customer whose loads exceeded the existing capacity of its system under the tariff rule (15.D.2) which provides "Extensions of distribution mains and/or enlargements of existing distribution main capacities to furnish interruptible service will be installed, owned and maintained by the utility provided: (1) In the utility's opinion, adequate supplies of gas are, and will continue, to be available from firm service..." It appears therefore that construction of additional plant capacity was not required; rather PG&E had other options which would clearly have had no adverse impact on gas supply. PG&E nevertheless unilaterally elected a course of action which must contribute to earlier exhaustion of California's gas supply.

The Transmission/Distribution Distinction

PG&E claims that it is entitled to treat interruptible customers alike regardless of whether their needs require upgrading of transmission or distribution systems. That position is untenable; PG&E's tariff allows certain limited charges for upgrading distribution capacity, but none for transmission modifications. The distinction is material here; if the modification in question was in transmission plant, complainant is entitled to a complete refund; if, otherwise, it is entitled only to partial relief. PG&E contends that the distinction is an accounting rather than an engineering concern. Accepting this, the following appears to be a widely accepted accounting definition:

> "Distribution System" means the mains which are provided primarily for distributing gas within a distribution area, together with land, structures, valves, regulators, services and measuring devices, including the mains for transportation of gas from production plants or points of receipt located within such distribution area to other points therein. The distribution system owned by companies having no transmission facilities connected to such distribution system begins at the inlet side of the distribution system equipment which meters or regulates the entry of gas into the distribution system and ends with and includes property on the customer's premises. For companies which own both transmission and distribution facilities on a continuous line, the distribution system begins at the outlet side of the equipment which meters or regulates the entry of gas into the distribution system and ends with and includes property on the customer's premises. The distribution system does not include storage land, structures, or equipment.

"Distribution Area" means a metropolitan area or other urban area comprising one or more adjacent or nearby cities, villages, or unincorporated areas, including developed areas contiguous to main highways.

These provisions are from the Federal Power Commission's Uniform System of Accounts for Natural Gas Companies (cf. Title 18, Chapter I, Subchapter F, Code of Federal Regulations), which we follow. PG&E has not demonstrated that any of the system modifications considered are within a distribution area.

Is Relief for Carnation Discriminatory?

Staff has contended that it would be discriminatory to give relief to Carnation if there is no relief to other interruptible customers who paid nontariff charges for connection. However, for the purposes of this proceeding, it is enough to recognize that Carnation alone expressly protested PG&E's demands and that the Commission resolution approving the agreement between PG&E and Carnation specifically recognized Carnation's right to further prosecute this action. Those factors distinguish complainant from the other customers.

Because Carnation never consented to PG&E's demands, except under protest, we have not found it necessary to consider the contention that each of the deviations considered collectively constitutes a rate increase, effectuated without the required notice showing and finding (Section 454). Nor do we find it necessary to consider complainant's contention that this series of advice letters was a device to evade a concededly proper examiner's ruling and to obtain the relief sought in A.54071 while depriving the protesting parties therein of their right to be heard.

Findings

1. It is not unusual or exceptional that a new interruptible gas customer should find that a utility is unable to supply its needs without depleting the supply which would otherwise be delivered to other customers at the same or higher rates.

2. It is not unusual or exceptional that the gas requirements of an interruptible customer will exceed the capacity of a utility's system on days when peak loads are experienced.

3. Carnation agreed to pay construction and cost of service charges under protest. The Commission resolution authorizing the payment expressly recognized Carnation's right to maintain this complaint. No other customer paid such charges under protest.

4. The contract executed by Carnation is not set forth in PG&E's tariff.

5. Defendant did not charge new interruptible customers a cost of ownership charge if the total of such charges would have been less than $1,000.

6. Prior to March 11, 1975, all new interruptible customers were allowed a revenue credit to offset the nontariff charges for system enlargements. Subsequent to that date no such customer, including Carnation was allowed a revenue credit.

7. There is no evidence to demonstrate that PG&E's program of assessing nontariff charges to connect new interruptible customers has encouraged the use of alternate fuels or inhibited interruptible load growth.

8. The construction paid for by Carnation enables PG&E to deliver more gas to interruptibles. It is part of PG&E's transmission system.

9. PG&E has not indicated whether and for how long there will be adequate supplies of natural gas to meet Carnation's needs.

Conclusions

1. Charging a customer more than the tariff rate violates Sections 532 and 489 of the Public Utilities Code unless the Commission finds that there is an unusual or exceptional circumstance.

2. If a utility imposes a contract to provide service to a portion of the public it must set forth the terms of the contract in its tariff. To use an unpublished contract the utility should demonstrate to the Commission that the exceptional treatment is justified by an unusual circumstance. Use of an unpublished contract where there are no unusual or exceptional circumstances violates General Order No. 96-A and Section 489 of the Public Utilities Code.

3. When PG&E and/or one of its customers applies to the Commission for relief under Rule 15.E.7 it must be demonstrated that the generally applicable tariff rules should not be applied because of an unusual circumstance.

4. Under PG&E's Rule 15, a new interruptible customer whose load exceeds the capacity of existing distribution plant is not required to pay a cost of ownership charge, and must pay only a portion of the construction cost. If the necessary change is in transmission plant, the connection must be made without charge.

5. If individuals constituting a portion of the public are compelled to pay a uniform charge higher than provided by tariff, Section 454 of the Public Utilities Code is violated unless there has been a showing that the increase is justified. One of the elements of such showing is a statement of the gross revenue impact of the increase.

6. It was not unduly discriminatory for PG&E to forego collection of monthly cost of ownership charges for projects costing less than $1,000.

7. It is not unduly discriminatory to charge one connection charge to individuals who commence service before a certain date and a higher charge for later connections, if the increased charge is justified.

8. PG&E under its tariff is not liable if it adds another interruptible customer to a system with insufficient capacity to meet peak day firm plus interruptible loads.

9. PG&E under its tariff is not required to accept new interruptible customers if it does not believe there will continue to be adequate supplies for such customers.

10. It is not discriminatory to award complainant reparations without determining whether or not other customers who did not reserve the right to contest charges can or cannot also receive reparations.

11. PG&E should be required to pay reparations in the amount of any charges collected from Carnation not provided in PG&E's tariff.

O R D E R

IT IS ORDERED that Pacific Gas and Electric Company shall pay to complainant reparations in the sum of $58,126 plus any cost of ownership charges received plus interest at 7 percent per annum from the date of collection.

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

Dated at San Francisco, California, this 3rd day of MAY, 1977.

Robert Batinovich
President

Vernon L. Sturgeon

Richard D. Gravelle

Commissioners

I absent,
William Symons Jr
Commissioner