

Decision No. 90777 SEP 12 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

STANISLAUS FOOD PRODUCTS CO.,)

Complainant,)

vs.)

PACIFIC GAS AND ELECTRIC CO.,)

Defendant.)

Case No. 10359
(Filed June 23, 1977)

Graham & James by Boris H. Lakusta and David H. Renton, Attorneys at Law, for complainant.
Malcolm H. Furbush and Bernard J. Delia Santa, Attorneys at Law, for defendant.

O P I N I O N

This is a complaint for reparation. Oral argument was held before Administrative Law Judge Gilman on November 21, 1977 in San Francisco. The parties agreed that the matter should be submitted pursuant to the following stipulation:

"Stanislaus Food Products Company (Stanislaus) and Pacific Gas & Electric Company (PG&E) hereby agree, subject to oral argument, to submit the above-entitled cause for decision on the following stipulated facts and issues of law.

"A. Stipulations of Fact:

- "1. In early 1974, Stanislaus requested PG&E to provide it with additional natural gas service on an interruptible basis. PG&E stated that it would have to construct additional facilities, including gas lines and valves, in order to provide Stanislaus with such interruptible service. PG&E stated that as a condition of providing such service, PG&E would require Stanislaus to agree by contract to pay for the construction and the cost of owning and maintaining the facilities for 60 months.

- "2. Stanislaus, in discussions with PG&E officials, orally objected to PG&E's demand that Stanislaus pay for the construction and maintenance of such additional facilities. PG&E nevertheless persisted in its demand and Stanislaus, being in need of the gas to operate its plant and having no source of gas other than PG&E, signed a contract prepared by PG&E and containing the terms demanded by PG&E.
- "3. The contract aforesaid (copy of which is attached to the Complaint as Exhibit C) was executed on June 24, 1974. Under such contract PG&E agreed to provide Stanislaus with natural gas service on an interruptible basis, and Stanislaus agreed to pay PG&E \$41,181.00; which represented the estimated cost of constructing the aforementioned additional facilities, and a monthly charge of \$411.81 for a period of sixty (60) months, which PG&E had represented would be the cost of owning and maintaining such additional facilities.
- "4. Stanislaus did pay PG&E the non-refundable advance of \$41,181.00 and has paid thirty-one (31) monthly charges of \$411.81 during the period from April 1975 until October 1977.
- "5. While Stanislaus did not protest such payments in writing and did not reserve in the contract between Stanislaus and PG&E the right to seek reparation from the Public Utilities Commission, Stanislaus orally objected to PG&E's terms while the contract was being negotiated and insisted that PG&E had no right to require Stanislaus to pay either the non-refundable advance or the monthly maintenance charges. PG&E refused to accept that position.

- "6. The PG&E tariff provision on which PG&E relied in demanding the payments aforesaid for constructing and maintaining facilities was its Rule 15 E.7. That rule allows PG&E to enter into special contracts to require customers to pay for facilities where there are 'unusual circumstances'.
- "7. The circumstance relied on by PG&E to justify application of Rule 15 E.7 was expressly held by this Commission to be outside the category of 'unusual circumstances' as that term is used in Rule 15 E.7. In Carnation Co. v. PG&E, Case No. 9854, Decision No. 87277, mimeo, page 8, May 3, 1977, the Commission said:
'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. . . . Without finding an exceptional or unusual circumstance there can be no lawful authorization of a deviation from an applicable tariff rate.'
- "8. In addition to Stanislaus and Carnation, twenty-eight other PG&E customers were required to sign contracts similar to the one in issue in this proceeding. The amounts that each of these customers was overcharged by PG&E can be readily determined from a review of PG&E's business records.
- "9. If the Commission determines that Stanislaus is entitled to reparation, PG&E shall repay to Stanislaus the non-refundable advance payment of \$41,181.00 plus thirty-one (31) monthly payments of \$411.81. In addition, Stanislaus shall be entitled to interest on each of the aforementioned payments at the rate of 7 percent per annum from the date that each such payment was made until the date of the Commission's order awarding Stanislaus reparation.

"B. Stipulation of Legal Issues:

The sole question is whether the fact that Stanislaus did not make its protest in writing and that the Commission was silent in its Resolution approving the contract had the effect of destroying the right of Stanislaus to reparation."

We take official notice that the contract in question was approved by the Commission in Resolution G-1659 dated August 20, 1974, a copy of which is attached hereto as Appendix A.

Discussion

As is apparent from the stipulation of the parties, this case involves issues substantially similar to those raised in Carnation, supra. After reviewing our decision in Carnation and the stipulation of the parties in this proceeding we have concluded that the complaint should be denied. We have reached this conclusion on two independent grounds discussed below.

In January of 1975 Carnation Company (Carnation) filed a complaint with the Commission protesting the terms of a contract under which PG&E would provide gas service to a new unit at Carnation's can manufacturing plant in Riverbank, California. PG&E agreed to construct the necessary additional facilities, and to supply Carnation on an interruptible basis, provided Carnation agreed to pay for the construction and the cost of owning and maintaining the facilities for 60 months. The parties eventually signed a contract to this effect in which Carnation reserved the right to litigate the propriety of the contract terms before the Commission by way of the previously filed complaint. The terms which PG&E required are not specifically provided for by the company's tariff. PG&E, however, proceeded to negotiate these special conditions under the provisions of paragraph E.7 of Tariff Rule 15 which authorizes PG&E to enter into special contracts requiring customers to pay for facilities where there are unusual or exceptional circumstances. In the advice letter filed with the contract for Commission approval, PG&E explained the circumstances it felt justified a special agreement under Rule 15.

"[I]n view of the shortage of the future supplies of natural gas available for interruptible customers no realistic estimate of sales or revenues to this customer during the life of this contract can be made. Because the increase in sales of interruptible gas to this customer must be taken from supplies that would have been sold to other interruptible customers, there will be no significant additional revenues to the Company from this class of service."

The contract as signed with Carnation's reservation of rights was approved by the Commission in Resolution G-1760 enabling Carnation to obtain the additional gas service it needed while the terms under which it was provided were being litigated.

The contract was subsequently invalidated in Decision No. 87277 (issued May 3, 1977) upon the basis that no unusual or exceptional circumstances were involved which would warrant deviation from otherwise applicable tariff provisions.

Upon review of the issues presented in the present complaint, and in Carnation, considered in light of circumstances existing at the time, we find deviation from general tariff provisions to have been justified. The Commission is provided explicit authority to approve such deviations by Public Utilities Code Sections 489 and 532. This authority is also recognized in PG&E's Tariff Rule 15, and in paragraph X of Commission General Order No. 96. It is of little moment which of these authorities PG&E thought it was proceeding under. Regardless of the legal authority utilities must provide service in accord with their filed tariff except in the event that unusual circumstances render application of general tariff provisions unreasonable or impractical. Upon our initial review of Carnation we found no such unusual or exceptional circumstance. Upon reconsideration we have concluded that where projected revenues from a new service are inadequate to cover the costs of constructing the facilities necessary

to provide such service, exceptional circumstances are presented. In these circumstances it is entirely appropriate that the costs involved be shared in some proportion by utility and customer. In this manner reasonable limits can be placed upon the burden such service would place on other customers of the utility system. To the extent that this conclusion is inconsistent with our previous holding in Carnation, Carnation is overruled.

Even if we were persuaded that no unusual circumstance was involved here and no deviation justified, Public Utilities Code Section 1709 would require dismissal of Stanislaus' complaint. Section 1709 prohibits collateral attack upon final orders and decisions of the Commission.

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Stanislaus signed a contract in many respects similar to that signed by Carnation. It was approved by Commission Resolution G-1659 similar in many respects to Resolution G-1760 approving Carnation's contract. Both the contracts and the resolutions approving them differed, however, in important respects. Carnation did not agree to the conditions for service requested by PG&E, but consented only to an interim agreement which would allow gas service to begin while the points of disagreement were presented to the Commission. The limited nature of the agreement was reflected in Resolution G-1760 which did not finally resolve the reasonableness of PG&E's demands upon Carnation. In contrast, Stanislaus did agree by contract to the terms required by PG&E and allowed PG&E to submit them for Commission consideration without reservation or formal protest. As a consequence, Resolution G-1659 was not conditioned in the same manner as Resolution G-1760. In Resolution G-1659 the Commission found "good cause" for deviation from PG&E's tariff and further found the resulting increase in charges "justified." This constituted a formal and effective finding of reasonableness.

Resolutions are Commission decisions with the same force and effect as any other Commission decision. Having failed to reserve rights in the contract, and having failed to protest the advice letter by which PG&E sought approval of the contract, Stanislaus should have sought further review by way of petition for rehearing. By failing to file for rehearing, Stanislaus allowed the Commission's decision approving the contract to become final. Relitigation of its terms by way of this separate complaint is now barred by Section 1709.

Although we have denied relief in this case, we are concerned that parties with legitimate claims may in the future be denied relief as a result of simple unfamiliarity with Commission procedure. In order to minimize this potential, each contract for which PG&E seeks approval under the Commission's General Order No. 96-A should contain the following language:

"PG&E shall provide customer with a copy of the Advice Letter filed for Commission approval of this agreement. The Advice Letter shall be provided customer concurrently with its filing with the Commission.

"Customer may take exception to or seek modification of this agreement by filing a protest with the Commission not less than 20 days after the date of service set forth in the Advice Letter. Protests should be filed in accordance with the Commission's General Order 96-A.

"Customer protest need not impede the provision of utility service to customer. Customer may request that the Commission require service be provided pending resolution of the dispute. In such circumstances the Commission may require customer to deposit any sum of money in dispute with the Commission pending final resolution."

Findings of Fact

1. Stanislaus and PG&E agreed by contract that PG&E would construct additional facilities to supply Stanislaus additional natural gas service on an interruptible basis, and that Stanislaus would pay for the construction and the cost of owning and maintaining the facilities for 60 months.

2. The agreement between Stanislaus and PG&E was executed on June 24, 1974. Stanislaus paid PG&E the estimated cost of construction and thirty-one monthly charges from April 1975 until October 1977 representing the cost of owning and maintaining the facilities.

3. Stanislaus reserved no right in the agreement to seek reparation or litigate the terms of the contract before the Commission.

4. PG&E negotiated the special agreement under its Rule 15 E.7.

5. The circumstance relied on by PG&E to justify deviation from general tariff provisions in this instance was held by the Commission in Carnation, supra, to be usual and unexceptional.

~~6. The projected revenues from the additional service at issue in this proceeding are inadequate to cover the costs of constructing the facilities necessary to provide the service.~~

6 X Stanislaus filed no protest to the advice letter by which PG&E sought approval of their contract.

7 X The agreement was approved by the Commission in Resolution G-1659 dated August 20, 1974.

8 X Stanislaus filed no petition for rehearing of Resolution G-1659.

9 10. The contract Carnation signed with PG&E constituted only an interim agreement which allowed gas service to begin while the terms of the contract were litigated by way of a separately filed complaint.

~~10 II.~~ In order to minimize loss of legitimate claims on procedural grounds each contract for which PG&E seeks approval under the Commission's General Order No. 96-A should contain the language indicated in the body of this opinion. K

Conclusions of Law

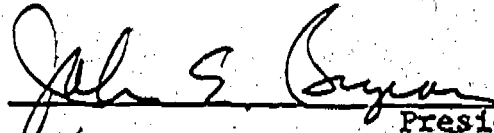
1. The Commission is provided explicit authority to approve tariff deviations by Public Utilities Code Sections 489 and 532.
2. Utilities must provide service in accord with their filed tariff except in the event that unusual circumstances render application of general tariff provisions unreasonable or impractical.
3. It is of little moment which legal authority PG&E thought it was proceeding under in negotiating the agreement at issue with Stanislaus.
4. Where projected revenues from a new service are inadequate to cover the costs of constructing the facilities necessary to provide such service, exceptional circumstances are presented which warrant deviation from general tariff provisions.
5. The circumstances presented and considered in Resolution G-1659 were exceptional and justified deviation from otherwise applicable tariff provisions.
6. Resolutions are Commission decisions with the same force and effect as any other Commission decision.
7. Resolution G-1659 is a final Commission decision.
8. Public Utilities Code Section 1709 prohibits collateral attack upon final orders and decisions of the Commission.
9. Relitigation of the terms of the contract between Stanislaus and PG&E previously approved in Resolution G-1659 is barred by Public Utilities Code Section 1709.
10. To the extent our decision in Carnation, supra, is inconsistent with this decision, Carnation is overruled.

O R D E R

IT IS HEREBY ORDERED that the complaint of Stanislaus Food Products Co. is denied. It is further ordered that each contract for which Pacific Gas and Electric Company seeks approval under the provisions of General Order No. 96-A shall contain the language indicated in the body of this order.

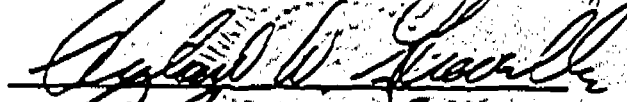
The effective date of this order shall be thirty days after the date hereof.

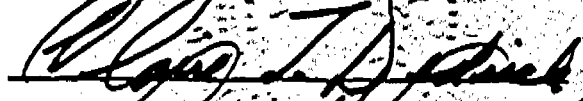
Dated SEP 12 1979, at San Francisco, California.

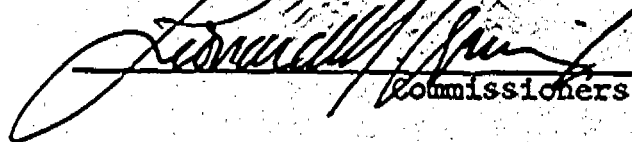


President









Commissioners

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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_____ Director
_____ Numerical File
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_____ Accounting Officer

RESOLUTION NO. G-1659

RESOLUTION

UTILITIES DIVISION
BRANCH/Section Gas
DATE: August 20, 1974

SUBJECT: Order Authorizing Rate Increase Under Special Contract on
Less than Statutory Notice

WHEREAS: PACIFIC GAS AND ELECTRIC COMPANY by Advice Letter No. 667-G, filed August 9, 1974 having requested short notice authorization under Section X.A. of General Order No. 96-A and Sections 454, 491 and 532 of the Public Utilities Code to carry out the terms of a contract with Stanislaus Food Products Company covering a gas main reinforcement and supply of interruptible gas service to customer's facilities in Modesto under conditions that deviate from filed tariffs, and

WHEREAS: The agreement for said gas main reinforcement deviates from filed tariffs in that the cost of construction will be borne by the customer without allowing one year's estimated revenue to be deducted from the advance as provided under Rule No. 15, and

WHEREAS: The agreement further deviates from filed tariffs by requiring the customer to pay a monthly cost-of-ownership charge equal to one percent of any non-refunded advance for a period of sixty months, and

WHEREAS: The reason for such deviation is because sale of interruptible gas to this customer will result in no additional revenue to the utility under this class of service, and

WHEREAS: Approval on less than statutory notice is requested in order that construction of facilities may proceed promptly to provide an early service date, and

WHEREAS: We find this increase is justified; therefore, good cause appearing,

IT IS ORDERED that authority be granted under Sections 454, 491 and 532 of the Public Utilities Code to carry out the terms and conditions of the above agreement, effective August 20, 1974.

IT IS FURTHER ORDERED that the contract be marked to show that it was authorized under Resolution of the Public Utilities Commission of the State of California No. G-1659.

I hereby certify that the foregoing Resolution was duly introduced, passed and adopted at a regular conference of the Public Utilities Commission of the State of California, held on the 20th day of August, 1974, the following Commissioners voting favorably thereon:

VERNON L. STURGEON, President
WILLIAM STIGONS, JR., J. P. KUKASIN, JR.,
THOMAS MORAN, D. W. HOLMES, Commissioners

William R. Johnson

Secretary