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ORIGINAL

Decision No. 92070 JUL 29 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the Pacific Southcoast Freight Bureau for Authority to Increase California Freight Charges to Cover Fuel Cost Shortfall Between October 1, 1978 and September 30, 1979, X311S.

Application No. 59670
(Filed May 16, 1980;
amended June 17, 1980)

And Related Matters.

- Case No. 5330
- Case No. 5433
- Case No. 5436
- Case No. 5437
- Case No. 5438
- Case No. 5604
- Case No. 7857
- Case No. 8808
- Case No. 9819
- Case No. 9820

O P I N I O N

By this application Pacific Southcoast Freight Bureau (applicant), on behalf of California common carriers^{1/} participating in its tariffs, requests authority to make effective increases for a period of one year to recapture shortfall losses on fuel costs for the period October 1, 1978 to September 30 1979.^{2/} The amount to be recovered is approximately \$79.9 million.

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- 1/ The rail common carriers are listed in Exhibit A attached to the application and Appendix A attached to this order.
 - 2/ The increase sought is published in the Temporary Fuel Shortfall Recovery Surcharge Tariff X311S (Ex Parte 311 (Sub 1-F1)) attached to the application as Exhibit K.

Applicant cites an Interstate Commerce Commission (ICC) Report and Order dated August 14, 1975 (350 I.C.C. 563, 8573) which states that carriers should be permitted to recover the full cost of fuel increases. The ICC in its Ex Parte 311 S proceeding therefore granted this shortfall recovery. However, in the proceeding two Commissioners dissented. Commissioner George M. Stafford who dissented said:

"I would deny the petition. I believe that the recovery of fuel expense increases incurred during the last quarter of 1978 should be incorporated into general increase proposals."

Commissioner Charles L. Clapp who also dissented said:

"I would deny the petition. Ex Parte No. 311 is an emergency Procedure designed to aid carriers in recovering fuel increases during a period of rapidly rising prices. It is not meant as a short panacea for losses which occurred more than a year ago."

This opinion will address the retroactive ratemaking this application poses and explain the procedures available to applicant's members to recover increased fuel expense through their rates. We cannot procedurally afford the same relief the ICC can.

Retroactive Ratemaking

The rule against retroactive ratemaking prevents the Commission from authorizing revenues designed to recover expenditures by applicant's members incurred prior to the effective date of a decision authorizing a prospective rate change. Nonetheless, applicant requests us to set rates at a level that will allow its members to recover past expenditures. The Commission and the California Supreme Court have long and consistently held that this is impermissible.

In Wm L. Govan (1926) CRC 254, 256, the Commission stated that applicant water utility's rates did not reasonably compensate it for the costs of rendering the service required. However, the Commission also stated that "the rates established in the order following this opinion can not properly be made retroactive or effective at a date prior to the order herein..." Subsequently the Commission said: "The making of rates is a prospective process; that is, new rates are

applicable to the future." (SoCal Water Co. (1962) 59 CPUC 797, 799.) In other decisions the Commission has repeated and abided by this prohibition. (California Cities Water Company (1967) 67 CPUC 197, 203; P.T.&T. Co. (1968) 68 CPUC 203, 204.)

The present situation is similar to that in Wm. L. Govan, supra. The issue is not the reasonableness of the expenditures. Instead, as we held in Wm. L. Govan and the other cases cited above, the issue is if the ratemaking is retroactive or prospective. In Wm. L. Govan we prohibited the utility from collecting in the future for past reasonable expenses because of the rule against retroactive ratemaking.

We thoroughly discussed the rule against retroactive rate-making in Pacific Telephone and Telegraph Co. (1949) 48 CPUC 823. In that case the utility sought permission to include past accruals to the pension fund in current operating expenses. The following excerpts are taken from the Commission's discussion in that case:

"Our conclusion in Decision No. 41416 was based primarily on the fact that the accruals in question applied to past periods and upon the established principle that costs applicable to past periods are not properly includible in current operating expense for rate fixing. . . ."

* * *

". . . There are definite rules of law governing rate fixing and the Commission is bound thereby. Broad and plenary as its authority may be to fix rates, it is not free to disregard cardinal principles of rate fixing. There is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively, unless some specific statutory or constitutional authority permits. Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowance to future operating expense."

* * *

". . . This Commission is not free to dispose of the rights of the rate-payer, secured to him by law, under the guise of supporting a necessary social undertaking. . . ."

* * *

" . . . The company is now asking for permission to charge to present and future rate-payers what should have been charged to rate-payers in past years. If retroactive charges to operating expense lawfully may be made against the rate-payer in support of a pension system, there is no reason why retroactive charges to operating expense may not be made for any other purpose that may be deemed desirable." (P.T.&T. Co. (1949) 48 CPUC 823, 836-37.)

P.T.&T. Co. is factually similar to the situation of applicant's members since in both cases entities sought authorization to recover past expenditures through future rates. In P.T.&T. Co. we refused the authority because the expenditures were made before the rate decision became effective. Were we to do otherwise here it would be allowing applicant's members to recover a deficit through future "excessive" rates.

The California Supreme Court has long and consistently held that retroactive ratemaking is prohibited. In Southern Pacific Co. v Railroad Com. (1927) 194 C 734, the Court held that the Commission has the authority to award reparation but lacks the authority to retroactively set rates. The Court wrote:

"There is a distinction between the power to fix rates and the power to award reparation. The former is a legislative function, the latter is judicial in its nature. . . . The fixing of a rate in the first instance is prospective in its application and legislative in its character. Likewise the reducing of that rate would be prospective in its application and legislative in its character." (Southern Pacific Co. (1927) 194 C 734, 739.)

Southern Pacific Co. clearly prevents the Commission from authorizing prospective rates to collect the already incurred fuel expense. Here we are involved in the legislative act of setting a rate "in the first instance." That is, we are considering establishing new rates; we are not adjudicating a dispute about past rates. The Court held that the act of setting rates is prospective in its application and legislative in its character. Therefore Southern Pacific Co. holds that Commission lacks the authority to perform the legislative function of setting rates retroactively.

In Pacific Tel. & Tel. Co. v Public Util. Com. (1965) 62 C 2d 634, the Commission ordered a reduction in rates for an earlier period. The Court held that this was impermissible retroactive rate-making because the Legislature gave the Commission authority to set rates only for the future. The Court wrote:

"Section 728 of the Public Utilities Code provides so far as here material that 'Whenever the Commission, after a hearing, finds that the rates... demanded, observed, charged, or collected by any public utility for or in connection with any service...are...unreasonable, ...the commission shall determine and fix, by order, the just, reasonable, or sufficient rates...to be there- after observed and in force.'

"As Pacific states, this language is plain and unambiguous. The Legislature has instructed the commission that after a hearing it is to make its order fixing rates to be in force thereafter." (Emphasis added by Court) (Pacific Tel. & Tel Co. v Public Util. Com. (1965) 62 C 2d 634, 650.)

The Court construes Public Utilities Code Section 728 to give the Commission power to set rates prospectively only.

We have established for energy utilities balancing accounts to recover past incurred energy cost expenses. This was because energy-related expenses constitute almost half of their total operating expense, and severe fluctuations in expense, either up or down, would cause a potentially devastating impact on those utilities or an unfair hardship on ratepayers. We do not have such balancing accounts for applicant or its individual members. Their fuel expense as compared to energy utilities is not of the same magnitude. They are not energy purveyors.

Discussion

We believe applicant, who has long been involved before this Commission, should have known of the retroactive ratemaking problems an application like this poses, given California law. Applicant could have filed an application in 1978 if it determined that future rate

rates did not adequately cover fuel cost increases. We could have considered such an application, and we and applicant would not now face this dilemma. We are governed by different statutes and law; what the ICC may do, we cannot. Applicant should recognize that and pursue rate relief for intrastate operations consistent with applicable statutes and case law. We must deny the requested rate relief.

A public hearing is not necessary because this opinion turns on the legal principles discussed.

Findings of Fact

1. Applicant proposed to raise rates for a one-year period to recover about \$79.9 million to compensate for fuel costs incurred from October 1, 1978 to September 30, 1979.

2. Applicant could have filed an application or applications with this Commission in 1978 and thereafter to prospectively adjust rates to recover increased fuel expense.

Conclusions of Law

1. The application proposed retroactive ratemaking, which this Commission may not authorize.

2. The proposed rates are, since they will recover prospectively only fuel expense incurred in the past, unjust and unreasonable. The application should be denied.

O R D E R

IT IS ORDERED that Application 59670 is denied.

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

Dated JUL 29 1980, at San Francisco, California.

Commissioner JOHN E. BRYSON

Present but not participating.

Thomas L. Sturgeon
 President

Richard D. Howell

Edward W. Smith

Clare J. DePaul
 Commissioners

APPENDIX A

Alameda Belt Line	(a California Corporation)
Almanor Railroad Company	(a California Corporation)
Amador Central Railroad Company	(a California Corporation)
Arcata & Mad River Railroad Company (The)	(a California Corporation)
Atchison, Topeka and Santa Fe Railway Company (The)	(a Kansas Corporation)
Burlington Northern	(a Delaware Corporation)
California Western Railroad	(a California Corporation)
Camino, Placerville and Lake Tahoe Railroad Company	(a California Corporation)
Central California Traction Company	(a California Corporation)
Fikse Brothers Incorporated	(a California Corporation)
Harbor Belt Line Railroad	(unincorporated)
Holton Inter-Urban Railway Company	(a California Corporation)
Los Angeles Junction Railway Company	(a California Corporation)
McCloud River Railroad Company	(a California Corporation)
Miles & Sons Trucking Service	(a California Corporation)
Modesto & Empire Traction Company	(a California Corporation)
Northwestern Pacific Railroad Company	(a California Corporation)
Oakland Terminal Railway (The)	(a California Corporation)
Pacific Motor Trucking Company	(a California Corporation)
Petaluma and Santa Rosa Railroad Company	(a California Corporation)
Quincy Railroad Company	(a California Corporation)
Sacramento Northern Railway	(a California Corporation)
Santa Fe Trail Transportation Company (The)	(a Kansas Corporation)
Santa Maria Valley Railroad Company	(a California Corporation)
Sierra Railroad Company	(a California Corporation)
Southern Pacific Transportation Company	(a Delaware Corporation)
Stockton Terminal & Eastern Railroad	(a California Corporation)
Sunset Railway	(a California Corporation)
Tidewater Southern Railway Company	(a California Corporation)
Trona Railway Company	(a California Corporation)
Union Pacific Railroad	(a Utah Corporation)
Ventura County Railway Company	(a California Corporation)
Visalia Electric Railroad Company	(a California Corporation)
Western Pacific Railroad System (The)	(a Delaware Corporation)
Yreka Western Railroad Company	(a California Corporation)

(END OF APPENDIX A)