EX-8

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Decision No. 92317 OCT 8 1980

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| 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, 5433, 5436, 5437, 5438, 5604, 7857, 8808, 9819, 9820 |

ORDER MODIFYING AND, AS MODIFIED, DENYING REHEARING OF DECISION NO. 92070

An application for rehearing of Decision No. 92070 has been filed by the Pacific Southcoast Freight Bureau, applicant in this proceeding. Decision No. 92070 denied applicant's request for authority to impose a one-year surcharge to recapture a shortfall due to regulatory lag in the operation of fuel cost adjustment procedures formally adopted by the Interstate Commerce Commission (ICC) at 354 ICC 563 (1975). The ground for denial of the application was that to grant the request would constitute retroactive ratemaking.

We have carefully considered each and every allegation of error in the application for rehearing. We are of the opinion that none of the allegations presents sufficient grounds for granting rehearing. However, to reflect the further study which we have given this matter, we shall modify our discussion appearing under

the heading of "Retroactive Ratemaking," as well as our Findings of Fact. Therefore,

IT IS HEREBY ORDERED that Decision No. 92070 is modified as specified herein:

1. The second full paragraph on page 5 of Decision No. 92070, beginning with the words "We have...," is stricken, and in its place the following paragraphs are substituted:

> "The rule against retroactive ratemaking is very broad in its application, as it is one of the most 'cardinal principles' in the ratemaking process. Pacific Telephone and Telegraph, supra, 48 CPUC at 836. Without this rule, the Commission, as well as the people of this state whom it is charged to protect, would be virtually powerless against utility efforts to recover unauthorized expenses. A lowering of the bar against retroactive ratemaking would represent abandonment of the fundamental concept in public utility law that profit is not guaranteed. See Southern Cal. Edison Co. v. Public Utilities Com. (1978) 20 Cal. 3d 813, 821, n. 8 and authorities cited therein; see also Priest, Principles of Public Utility Regulation (1969), Vol. 1, at 22-23.
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> "In recent years, a limited exception to the rule against retroactive ratemaking has developed. This is the exception presented in Commission Decision No. 85731, Southern Cal. Edison Co. (1976) 79 CPUC 758, and in the California Supreme Court's review of that decision, Southern Cal. Edison Co. v. Public Utilities Com., supra, 20 Cal. 3d 813. Applicant argues forcefully that these cases control the outcome here. However, as explained below, the exception recognized there is not applicable to this case.
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> "In D. 85731, the Commission adopted a new fuel clause for Edison and other utilities. The new clause, operating on a recorded basis with a balancing account, replaced a clause operating on an average-year basis. The decision also required the utilities to refund windfall revenues occasioned by use of the old average-year fuel clause. In particular, the utilities contended that adjusting prospective rates to refund the windfall constituted retroactive ratemaking. The Commission, analyzing the "specific, extraordinary purpose" of fuel cost adjustment clauses, rejected the claim that revenue shortfalls

due to regulatory lag could be compensated through fca procedures (79 CPUC at 764) and, in view of the fact that an fca clause was already a part of the utilities' tariffs, held: "The setting of future rates to reflect past over-or undercollections is not retroactive ratemaking." (Id., at 774.) In the ensuing challenge by Edison, the California high court approved the quoted language. (20 Cal. 3d at 830, fn. 21.)

"What applicant overlooks in relying on the quoted Conclusion of Law from Decision No. 85731 is that the fca had already been made part of the utilities' tariffs. In context, the Commission's Conclusion of Law would read: 'Where a fuel cost adjustment procedure has already been made part of a utility's tariff, the setting of future rates to reflect past over- or under collections is not retroactive ratemaking.'

"In this case, there is no fca clause in operation for applicant and its members. The average-year fca which had been made part of the utilities' tariffs before Decision No. 85731 implicitly had a 'self-contained balancing process' (20 Cal. 3d at 825) by which, over the long run, revenues and costs would have evened out. Our ECAC proceedings are explicitly based on the operation of balancing accounts. But a careful study of the procedures authorized by ICC in its Ex Parte No. 311 proceedings (see 354 ICC 563) reveals that those procedures have no self-contained balancing process. Those procedures simply allow for prospective rate increases 1/ based on a formula which tracks the increased fuel costs expected to be encountered in the future. (See Id., at 575-579.) The absence of any balancing process bars this Commission from deeming the ICC's procedures the equivalent of our own fca procedures. In the absence of an fca clause, setting future rates on the basis of past over- or undercollections is retroactive ratemaking.

"Applicant argues that the present application is indistinguishable from the applications approved in Commission Decisions Nos. 90795, 90965, 91447 and 92071.

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1/ If this application were approved, applicant would have a process by which it could always raise rates to meet all increases in fuel costs, but under which the Commission or other regulatory bodies could never order refunds of windfall profits realized when fuel costs did not rise as much as anticipated. This is a result our ECAC proceedings (but not the ICC's procedures) are designed to prevent.

In those decisions, the Commission simply allowed applicant's members to impose the same prospective surcharges approved by the ICC as a means of coping with increased fuel costs expected to be faced in the future. Neither the ICC nor the Commission allowed those surcharges to make up past losses. The prior applications are analytically distinct from that presently under review.

"That the ICC allowed applicant's members to impose a one-year surcharge to make up losses due to regulatory lag at the ICC in its X-311 proceedings does not mean that this Commission may, or should, abandon its long-standing rule against retroactive ratemaking. Since there is no balancing account or fca clause already in operation here, the application must be denied. Regulatory lag is a problem in all ratemaking and so-called losses due to it are not compensable. We shall not open the floodgates now.

"Applicant also has not demonstrated that the ICC's action has preempted the Commission from adhering to its rule against retroactive ratemaking.

"Applicant may, if it wishes, apply to the Commission for the establishment of balancing accounts for its members. Whether their energy-related expense in comparison with their total operating expense and their rate of return will justify the institution of such balancing accounts is a matter on which applicant will bear the burden of proof and as to which we express no opinion at this time."

2. Finding of Fact No. 1 is modified to read as follows:

"In its original application, 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. In its application for rehearing, applicant informs this Commission that '[a]ctually, the portion of the shortfall revenue attributable to California intrastate traffic which would result from the granting of this application is about $2,000,000 for the Class I railroads.' The amount of money at stake played no part in the Commission's decision to deny the application, as the decision turns entirely upon legal principles."

IT IS FURTHER ORDERED that rehearing of Decision No. 92070 as modified herein is denied.

The effective date of this decision is the date hereof.

Dated OCT 8 1980, at San Francisco, California.

President

Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.