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ORIGINAL

Decision No. 93189 JUN 16 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

STANISLAUS FOOD PRODUCTS COMPANY,

Complainant,

v.

PACIFIC GAS & ELECTRIC COMPANY,

Defendant.

Case No. 10359
(Filed June 23, 1977)

Graham & James, by David H. Renton, Attorney at Law, for Stanislaus Food Products Company, complainant.
Bernard J. Della Santa, Attorney at Law, for Pacific Gas and Electric Company, defendant.

OPINION AFTER REHEARING

Stanislaus Food Products Company (Stanislaus) seeks reparation from Pacific Gas and Electric Company (PG&E) for payments made by Stanislaus for the construction and maintenance of facilities required to provide Stanislaus with additional interruptible gas service. Stanislaus was among thirty PG&E customers who, beginning in 1973, had been required by PG&E to enter into contracts agreeing to pay for the costs of constructing, owning, and maintaining additional facilities to accommodate their requests for increased interruptible gas service. Because these contracts deviated from PG&E's tariff, PG&E had filed advice letters seeking Commission approval for each of the contracts. In these letters, PG&E asserted that because projected revenues from the new services were inadequate to cover the costs of constructing the necessary additional facilities, "unusual circumstances" justified the deviations.[1/] By Resolution G-1659, the Commission adopted this justification in its *ex parte* approval of PG&E's contract with Stanislaus. Stanislaus' complaint followed.

The complaint alleges that no unusual circumstances existed to justify the special conditions of service. During oral argument on November 21, 1977, Stanislaus and PG&E filed a stipulation of facts and legal issues. It was received as Exhibit 1 and a copy is attached as Appendix A. On September 12, 1979, the Commission issued D.90777 denying Stanislaus relief. A petition for rehearing of D.90777 was filed by Stanislaus on October 11, 1979, and PG&E responded on October 26, 1979. By D.91178, dated December 18, 1979 the Commission granted limited rehearing of D.90777 in these terms:

> "We are also of the opinion that while the phrase 'unusual circumstances', as used in Paragraph E. 7 of PG&E's Tariff Rule No. 15, was properly defined in D.90777, the parties did not have sufficient notice of this interpretation of the tariff to make a proper showing during hearing in this matter."

Accordingly, the Commission ordered rehearing of D.90777 "limited to the receipt of evidence and briefs on the issue of the existence

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1/ "Rule 15 - Gas Main Extensions"

* * *

"E. Special Conditions"

* * *

"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."

of 'unusual circumstances' justifying the contract conditions requiring Stanislaus to pay for the construction and maintenance of facilities necessary to provide additional interruptible gas service to Stanislaus".

Before hearings were held, Stanislaus filed on May 1, 1980, a petition to amend its complaint. PG&E opposed the petition by its response filed May 28, 1980. At the hearing on June 3, 1980, before Administrative Law Judge Robert T. Baer, the petition to amend the complaint was denied. The matter was submitted June 3, 1980, subject to the filing of briefs. Stanislaus filed its opening brief on July 1, 1980, PG&E replied July 22, 1980, and Stanislaus closed August 4, 1980. The proceeding is now ready for decision.

Facts

On June 24, 1974, Stanislaus and PG&E entered into an agreement that PG&E would provide interruptible gas service to Stanislaus and Stanislaus would pay PG&E the estimated cost of constructing the necessary facilities ($41,181) plus the cost of owning and maintaining the facilities for 60 months ($411.81 per month).

The payments required by PG&E exceed the amounts PG&E may charge under Tariff Rule No. 15, Gas Main Extensions. PG&E relied upon Tariff Rule No. 15(E)(7), the so-called "unusual circumstances" exception, to support the excess payments required by the contract. PG&E submitted the contract by advice letter and the Commission approved it in Resolution G-1659. When the Commission rejected PG&E's "unusual circumstances" rationale on May 3, 1977, in Carnation Co. v PG&E, 81 CPUC 581, Stanislaus filed its own complaint. The record consisted only of the stipulation of PG&E and Stanislaus. PG&E conceded that the rule of the Carnation case applied and that the only issue for the Commission to decide was whether Stanislaus' failure to reserve the right to challenge the contract required a different result. In D.90777, the Commission overruled Carnation, sustained PG&E's "unusual circumstances" rationale, and denied Stanislaus relief. In D.91178 the Commission granted limited rehearing.

Issue

The sole issue on rehearing is whether there is sufficient evidence to support a conclusion that unusual circumstances existed at the time of the contract.

PG&E's Evidence

At rehearing PG&E's witness testified to the facts supporting the application of the "unusual circumstances" rationale by PG&E in 1973, 1974, and 1975. He said that:

> "In view of the shortage of future supplies of natural gas available for interruptible customers, no realistic estimate of sales or revenues to this customer 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 revenues to the company from this class of service." (Exhibit 2, p. 2.)

The witness also stated that in 1974 PG&E was projecting curtailment of all interruptible gas service because of insufficient supplies of gas to meet all of its customer requirements. Under curtailment PG&E would be taking gas supply from an existing customer in order to supply the new load.

The projected curtailments were based, according to the witness, upon certain changed supply and economic factors. Prominent among those factors he mentioned were:

1. The Arab oil embargo of 1973.
2. The curtailment of deliveries to PG&E by the El Paso Natural Gas Company (El Paso) commencing in November 1977.

3. Curtailment of deliveries to PG&E predicted by Canada's National Energy Board (NEB).

4. The steady decline of California gas production.

The supply problem was so extreme, the witness said, that PG&E filed with the Commission a temporary supplementary agreement, which the Commission authorized February 20, 1974 by Resolution No. G-1616. The agreement eliminated the exclusive fuel provision in Gas Rule 12 from all service and extension agreements, allowing customers to switch from gas to alternate fuels at any time. The possibility that some customers might switch to alternate fuels made it difficult to project revenues, particularly where new main extensions applications under Rule 15(D) are involved.

When asked what effect declining gas supplies would have on construction of gas mains and reinforcements, the witness replied:

> "Well, if you can sell all the gas that you are able to obtain from the suppliers to existing customers, it does not make any sense to install additional facilities to provide service to new customers." (Tr. 57.)

The witness also testified that it was not fair to existing customers to provide interruptible gas service under Section D of Rule 15 because additional facilities without additional revenue would burden existing ratepayers with the cost of their construction.

Stanislaus' Evidence

In support of its contention that no unusual circumstances existed to justify the contract under Rule 15(E)(7), Stanislaus introduced: Exhibit 3, a PG&E letter to Stanislaus, dated February 25, 1974, explaining the conditions under which it would serve Stanislaus; Exhibit 4, a PG&E letter to Stanislaus, dated March 22, 1974, transmitting a copy of the contract PG&E would require Stanislaus to sign; Exhibit 5, a list of 33 customers who entered into contracts similar to Stanislaus'; and Exhibit 6, a staff letter to counsel for Stanislaus, indicating that a review of its records revealed only one other case where a utility company other than PG&E had filed for approval of a special contract under Rule 15(E)(7).

Stanislaus has offered proof through cross-examination of PG&E's witness and through Exhibit 5 that shows that it was PG&E's policy to treat all applicants for interruptible service after 1973 in exactly the same way and to require them to submit to contracts deviating from Rule 15. Given these facts, Stanislaus argues that PG&E cannot now say that each of those cases involved unusual circumstances when they were all treated exactly the same way.

Discussion

"Unusual circumstances", as that phrase is used in Rule 15(E)(7) is not defined at all, let alone in terms of circumstances unusual to a particular customer. But the meaning of the phrase is illuminated by the dependent clause which follows it. Rule 15(E)(7) begins:

> "In unusual circumstances, when the application of this rule appears impractical or unjust to either party,..." (Emphasis added.)

The unusual circumstances are, therefore, those which result in impracticability or injustice to either party. The economic conditions and the state of PG&E's gas supplies, noted above, which assured that additions to the interruptible class would cause PG&E to incur operating expenses without corresponding additions to revenues, in our opinion made the application of Rule 15 both unjust and impractical for PG&E. Accordingly, PG&E has not applied Rule 15(E)(7) erroneously to Stanislaus.

Stanislaus next argues that the order granting limited rehearing (D.91178) is unlawful because it permits PG&E to present evidence on an issue that was excluded from this case by stipulation of the parties. Citing Consumers Lobby Against Monopolies v PUC (1979) 25 C 3d 891, 908, Stanislaus contends that when the Commission hears reparation cases, it sits as a quasi-judicial tribunal, exercises judicial powers, and is subject to the same rules as a court. One such rule is Code of Civil Procedure Section 283, which states:

> "An attorney and counselor shall have authority:
>
> "To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise; ..."

California Appellate courts have sustained this statutory rule and have held that:

> "A stipulation may lawfully include or limit issues or defenses to be tried, whether or not such issues or defenses are pleaded." (Bemer v Bemer (1957) 152 CA 2d 766, 777.)

The courts have extended the rule to make a stipulation binding upon a court unless it is contrary to law, court rule, or public policy. (Glade v Superior Court (1978) 76 CA 3d 738, 744.)

Glade cited Estate of Burson (1975) 51 CA 3d 300 in support of its statement of the general rule regarding the binding effect of stipulations. Since Burson involved facts closely analogous to the instant case, we quote at length from the decision:

> "Where a clause of a will is ambiguous in a fashion that permits extrinsic evidence in aid of its interpretation, a stipulation of its meaning is one of 'ultimate fact'. [Citation] In essence the stipulation is a substitute for the extrinsic evidence that could otherwise be offered. Here the pertinent clause in decedent's will was ambiguous on its face as to the meaning of 'home place' and latently ambiguous when its wording

> is compared with the property owned by decedent when they executed the will. Thus the stipulation is one of fact and is binding on the court unless it is contrary to public policy.
>
> "The stipulation furthers the public policies of settling disputes and expediting trials and is by no stretch of the imagination contrary to the policy of California. On the record here, it simply reflected what the parties agreed the pertinent language meant. The stipulation avoided the necessity of expenditure of the time and money of the parties and the public by removing from the litigation an item not in dispute." (51 CA 3d at 306.)

To determine the meaning of the phrase "unusual circumstances", as it appears in Rule 15(E)(7) will require a review of the facts to which the tariff provision is to be applied. Realizing this the Commission has granted rehearing "limited to the receipt of evidence and briefs on the issue of the existence of 'unusual circumstances' justifying the contract condition requiring Stanislaus to pay for the construction and maintenance of facilities necessary to provide additional interruptible gas service to Stanislaus." (D.91178, p. 1.) Since, as in Burson, the ambiguity of the document permits extrinsic evidence to aid in its interpretation, it is clear that the meaning of "unusual circumstances" is one of fact. Attorneys in court matters could lawfully enter into a stipulation as to the meaning of "unusual circumstances" and could make it binding upon a court as long as it was not against public policy. It has not been suggested that the stipulation between PG&E and Stanislaus is against any public policy of the state. As in Burson the stipulation furthers the public policies of settling disputes and expediting trials.

The Commission in its demurrer to the petition of Stanislaus for writ of review 2/ argued:

> "The Commission having the authority to interpret a utility tariff, was not bound, nor in turn should the parties be, by a stipulation based on law (Carnation) overruled by the Commission in Decision No. 90777. (See Oakland Raiders v Berkeley, 65 Cal. App. 3d 623, 629 (1977))." (Demurrer, p. 11.)

In the Raiders case the city of Berkeley passed an ordinance imposing a 10 percent gross receipts tax upon professional sports events taking place in the city. The Raiders, which had leased the Memorial Stadium of the University of California for certain football games to be played in 1972, 1973, and 1974, sued to enjoin the tax. The principal issue was whether the ordinance was an improper regulation of property controlled by the Regents of the University or a valid tax law. On appeal by the city of a trial court order enjoining the enforcement of the tax, the Raiders argued that the city's counsel had stipulated that the ordinance was a regulatory measure, to which the court responded:

> "If there was such a stipulation, it was ineffective. The interpretation of the Constitution, statutes, and ordinances is a subject within the authority of the courts, not the parties. (See 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 67 et seq., p. 3309 et seq.) The matters normally subject to stipulation relate to pleadings, issues, evidence, liability, procedure, and damages, but not to interpretation of the law. (See 1 Witkin, Cal. Procedure (2d ed. 1970) Attorneys, § 131 et seq., p. 142 et seq.)" (65 CA 3d at 629.)

2/ Stanislaus Food Products Company v CPUC, PG&E, real party in interest, S.F. No. 24112, filed January 16, 1980, and denied as premature.

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The situation in Raiders is distinguishable from that in the instant case. In Raiders the court could determine on the face of the ordinance whether it was a tax or regulatory measure. In this case the Commission has conceded that extrinsic evidence is necessary before "unusual circumstances" can be found to exist. To be consistent we should not now conclude that the meaning of "unusual circumstances" is a question of law for the Commission to decide.

The stipulation between Stanislaus and PG&E was therefore of a type, which, had it been properly made in a court proceeding, would have bound the court to decide the sole issue remaining in the case and no other. This conclusion does not, however, determine the issue here for reasons we will now explain.

First, the stipulation between Stanislaus and PG&E was made at a time when both parties considered Carnation an accurate statement of the law. However, as noted above, Carnation was overruled in D. 90777. The fundamental premise on which the stipulation was based is now nonexistent. The stipulation is correspondingly undermined. It would make no sense for the Commission to decide this case on the basis of a stipulation completely vitiated by a change in the law. Would PG&E, or, for that matter, Stanislaus have entered into such a stipulation as this if either had known that Carnation would be overruled? Obviously not. To decide this case on the basis of such a stipulation would make a mockery of our duty to adhere to sound public policy.

Second, the California Supreme Court has held that a "tariff is in the nature of a contract between the shipper and the carrier" (Transmix Corporation v Southern Pac. Co. (1960) 187 CA 2d 257, 263) tariffs are not wholly analogous to contracts. Unlike contracts, tariffs determine the rights of many consumers vis-a-vis the public utility. Tariffs are filed with the Commission with its approval or pursuant to its order. The Commission has extensive powers to suspend, rescind, modify, or enact tariffs. Public utilities may deviate from their filed tariffs only with the permission of the Commission (§ 532). Once filed with and approved by the Commission tariffs are accorded the force of statutes.

(Penn. R. Co. v International Coal Min. Co. (1912) 230 US 184, 197; Dyke Water Co. v Public Util. Com. (1961) 56 C 2d 105, 123, cert. den. 368 US 939; Dollar-A-Day Rent-A-Car Sys. v Pac. T&T Co. (1972) 26 CA 3d 454, 457; Pacific Motor Tar. Bur. Tar. No. 1 (1936) 39 CRC 551, 558; Fortier Transportation Co. (1955) 55 CPUC 27, 29-31.)

Thus, our response to the complaint of Stanislaus may have more wide-ranging effects than the usual judicial proceeding would involve because of the effect upon other customers of PG&E. The interests of the public, as distince from PG&E's and Stanislaus' narrower interests, are thus involved in this case as they would not be in judicial proceedings. This public interest, which it is the Commission's duty to protect, is the distinguishing factor which allows us to conclude that in our quasi-judicial proceedings we have the authority to set aside a stipulation.3/ Stanislaus has not cited any case or statutory law to the contrary, nor do we know of any.

Stanislaus also argues that is has been deprived of due process of law because it had no notice of the pendency of PG&E's advice letter filing for approval of the Stanislaus contract under Rule 15(E)(7). Stanislaus observes that General Order 96-A did not in 1974 require, as it now does, PG&E to serve a copy of the advice letter upon the customer affected nor did it allow protests to be filed. Although Stanislaus knew from the contract language and from a letter (Exhibit 3) dated more than 5 months before PG&E filed its advice letter that PG&E would seek Commission approval of the contract, that knowledge did not amount to notice of the pendency of the action sufficient to overcome a due process challenge. However, that

3/ See also § 701.

concession does not mean that the Commission is bound to decide for Stanislaus on the merits. It merely requires the Commission to invoke procedures to cure the procedural defect. That it has done by granting and holding rehearing, by receiving evidence and argument, and by deciding the various issues raised by the parties based on a refreshed record. Due process does not require more.

Findings of Fact

1. In 1974 PG&E was projecting curtailment of all interruptible gas customers because of insufficient supplies of gas.

2. The projections of insufficient supplies were based upon the Arab oil embargo of 1973, the curtailment of deliveries to PG&E by El Paso commencing in November 1972, the curtailment of deliveries to PG&E predicted by Canada's NEB, and the steady decline of California gas production.

3. The effect of declining gas supplies and curtailment of interruptible gas customers is that new interruptible gas customers share in the amount of gas available to that class, but revenues from that class do not increase.

4. The construction of new gas facilities for interruptible customers under these conditions places a financial burden on existing ratepayers unless a deviation from Rule 15 is authorized.

5. It is unfair to existing customers to require them to pay the operating and maintenance expenses of new interruptible facilities when possible curtailment of the interruptible class may make it impossible for the class to return sufficient revenue to cover its own costs.

6. The factors listed in Findings 1 through 5, which assured that additions to the interruptible class or reinforcement of the facilities serving existing interruptible customers would cause PG&E to incur operating and maintenance expenses without corresponding additions to revenues, made the usual application of Rule 15 both unjust and impractical for PG&E.

7. The factors listed in Findings 1 through 5 justify deviations from Rule 15 under the "unusual circumstances" clause (Rule 15(E)(7)).

8. The increases in charges, resulting from the Stanislaus' contract, do not involve any factor for return on invested capital, but are merely designed to defray PG&E's construction and operating and maintenance expense.

9. The increased charges, provided by the Stanislaus contract, and authorized by Resolution No. G-1659, were just and reasonable.

Conclusions of Law

1. The Commission is not bound by the stipulation between Stanislaus and PG&E.

2. This complaint proceeding has provided Stanislaus with notice and opportunity to be heard sufficient to overcome any lack of due process which may have existed in connection with the proceedings giving rise to Resolution No. G-1659.

3. The interpretation of the "unusual circumstances" clause of Rule 15, for which Stanislaus has contended, should be rejected in favor of the interpretation adopted in the above discussion.

4. The denial of Stanislaus' petition to amend its complaint was proper and in accordance with Rule 8 of the Rules of Practice and Procedure.

5. The complaint should be denied.

ORDER AFTER REHEARING

IT IS ORDERED that D.90777 is affirmed and the complaint of Stanislaus Food Products Company is denied.

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

Dated JUN 16 1981, at San Francisco, California.

John E. Bryson
President

Richard D. Gravelle

Leonard M. Grimes, Jr.

Victor Calvo

Priscilla C. Grew
Commissioners

App. Case 10359
Exhibit No. 1
Witness Stipulation
Date 11/21/77
Com. or Ex.

APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

STANISLAUS FOOD PRODUCTS COMPANY, Complainant, v. PACIFIC GAS & ELECTRIC COMPANY, Defendant	Case No. 10359 STIPULATION OF FACTS AND LEGAL ISSUES

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.

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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

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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 were 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 circumstances 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

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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% 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.

It is so stipulated.

Graham & James by
Boris H. Lakusta
Attorneys for Stanislaus
Food Products Company

It is so stipulated.

Bernard J. Della Santa
Attorney for Pacific Gas &
Electric Company