

Decision 01-03-051 March 27, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Barratt American, Inc.,

Complainant,

vs.

Southern California Edison Company,

Defendant.

Case 00-07-054
(Filed July 28, 2000)

O P I N I O N

1. Summary

If a utility for 30 years interprets its tariff to give a substantial credit to customers for conversion from overhead to underground facilities, may the utility without the approval of this Commission reinterpret its tariff to take that credit away? On the facts and circumstances of this case, we determine that the answer is no.

2. Background

The facts are not in dispute. A home builder, Barratt American, Inc., states that it was required to convert existing overhead electric facilities to underground facilities in a new development in Rancho Cucamonga, California. In performing the work, Southern California Edison Company (SCE) included a pole removal cost of \$33,700 in its charge to Barratt American. Pole removal costs in similar projects in the past have been borne by SCE.

The undergrounding work is governed by SCE's Tariff Rule 20, entitled "Replacement of Overhead With Underground Electric Facilities."

SCE acknowledges that for 30 years, from approximately 1967 to 1997, it did not include pole removal costs as part of its Rule 20 charges. However, SCE states that in 1997 it "reviewed its practices with respect to Rule 20 and concluded that pole removal costs are part of the conversion project" and therefore should be paid by the applicant.

3. Procedural History

This complaint was filed on July 28, 2000. SCE timely filed an answer on September 21, 2000.

On October 11, 2000, the assigned Administrative Law Judge (ALJ) issued a ruling directing SCE to respond to a number of questions. Specifically, SCE was asked (1) whether it had sought or obtained Commission approval for its change in practice in assessing pole removal costs; (2) if not, under what authority did it make the change in practice, and (3) had there been any other changes since 1997 in the assessments to an applicant for underground conversion.

SCE responded on November 9, 2000. It stated that it had not sought Commission approval for its change in practice. It explained that it frequently reviews its tariffs and makes changes in procedures. It further explained:

"SCE's practice is to implement procedures in accordance with its tariffs. So long as SCE's procedures are not inconsistent or in conflict with its tariffs, SCE does not typically seek approval of the specific procedures it is implementing. Likewise, if SCE determines that a procedure should be changed, it does not seek approval if the procedure, as changed, is still consistent with SCE's tariff." (SCE Response, at 2.)

SCE stated that, since 1997, it made one other change in Rule 20 assessments to applicants for conversion. That change (requiring applicants to pay the costs of transformers and meters) was ordered by the Commission in Decision (D.) 97-12-098 in Rulemaking (R.) 92-03-050 and was implemented by SCE through an advice letter filing.

In a telephone conference call conducted on November 29, 2000, the parties agreed that the issues raised in Barratt American's complaint are legal in nature and did not require an evidentiary hearing. Accordingly, Barratt American filed an opening brief on December 19, 2000; SCE responded on January 12, 2001; and Barratt American replied on January 19, 2001.

The matter was deemed submitted to the Commission on January 19, 2001.

4. Relevant Provisions of Rule 20

SCE's Tariff Rule 20 governs the conversion of overhead electric facilities to underground facilities. The tariff follows an underground conversion policy established by this Commission in 1967 in D.73078, 67 CPUC 490. That policy, little changed in subsequent years, encourages conversion statewide by having utilities, through rates, share some of the costs of conversion.

Rule 20.A applies to cities and counties and requires SCE to pay the costs of conversion, within specified limits, for projects deemed to be in the public interest. Rule 20.B applies to required conversion along public streets and roads by applicants other than cities and counties, with applicants bearing much of the cost. Rule 20.C applies to conversions by applicants not covered by 20.A or 20.B, with applicants paying all of the cost less net salvage value and depreciation of the replaced overhead facilities.

Rule 20.B applies to the conversion at issue here. In relevant part, it states:

“In circumstances other than those covered by A above, SCE will replace its existing overhead electric facilities with underground electric facilities along public streets and roads or other locations mutually agreed upon when requested by an applicant or applicants when all of the following conditions are met:

“2. The applicant has:

“c. Paid a nonrefundable sum equal to the excess, if any, of the estimated costs, including transformers, meters, and services, of completing the underground system and building a new equivalent overhead system.

“3. The area to be undergrounded includes both sides of a street for at least one block or 600 feet, whichever is the lesser, and all existing overhead communication and electric distribution facilities within the area will be removed.”

5. Positions of the Parties

Barratt American’s position can be stated simply. Under protest, it paid SCE the pole removal charges at Rancho Cucamonga. The charge was inconsistent with previous SCE Rule 20 projects. Since SCE for 30 years had not assessed such a charge under Rule 20, it should not have changed its practice without first seeking Commission approval through an advice letter filing or other procedure.

SCE responds that under the express terms of Rule 20.B.2.c, the applicant must pay all the costs of completing the underground system, except that the applicant is entitled to a credit, to be funded by ratepayers, for the amount that it would cost to build a new equivalent overhead system. SCE contends that under

Rule 20.B.3, completion of the underground system specifically includes removal of existing overhead facilities.

SCE argues that it is appropriate for costs of removing existing overhead facilities to be borne by the applicant and property owners who will receive the benefit of service from the underground facilities. It also is consistent with SCE's former Schedule U, a tariff that was in place between 1957 and 1967, when it was replaced by Rule 20.

SCE argues that Barratt American has failed to allege any violation of law, order or rule of the Commission, as required by Pub. Util. Code § 1702. It argues that no rule or law requires prior Commission approval of a change in practice if the change is consistent with the applicable tariff. SCE states that the Commission is reviewing Rule 20 in an ongoing rulemaking proceeding, R.00-01-005, and that this matter more appropriately should be considered in that forum.

6. Discussion

In November 1967, through D.73078, the Commission ordered certain electric and telephone utilities, including SCE, to adopt a uniform Rule 20 to implement practices with respect to undergrounding facilities. Rule 20 was based on the conversion rules of Pacific Gas and Electric Company (PG&E) and San Diego Gas & Electric Company (SDG&E).

SCE states that when it adopted Rule 20 in place of its Schedule U, it also implemented the policy of PG&E and SDG&E of not charging an applicant for the cost of removing existing overhead facilities. SCE has submitted declarations showing that both PG&E and SDG&E changed their policies and also began charging for pole removal costs in 1995.

The purpose of the Commission's order in D.73078 was to encourage the location and relocation of electric and telephone facilities underground. The Commission stated:

“[T]he time had long passed when we could continue to ignore the need for more emphasis on aesthetic values in those new areas where natural beauty has remained relatively unspoiled or in established areas which have been victimized by man's handiwork.” (67 CPUC2d at 490.)

This policy of encouraging underground utility facilities continues today, although the Commission has made changes to require those seeking conversion to bear more of the cost. In *Re Line Extension Rules*, D.97-12-098, the Commission approved a change in Rule 20.B.2.c to require applicants to pay the costs of transformers, meters, and services instead of excluding those costs. The Commission stated the following reason for ordering this and other changes:

“The Commission modifies the existing line and service extension rules and practices for gas and electric utilities in several ways that will reduce the amounts by which ratepayers already connected to the utility systems subsidize the costs caused by new ratepayers requiring new line and service extensions.”

Based on the Commission order in D.97-12-098, SCE filed and obtained Commission approval of Advice 1309-E to change Rule 20.B.2.c to shift transformer, meter, and service costs to applicants.

SCE has not filed an advice letter to reflect its change in practice in charging applicants for pole removal costs. It asserts that no such filing is required by the law or by Commission rules so long as the change in practice conforms to the tariff.

We disagree.

Pub. Util. Code § 454 states in pertinent part:

“[N]o public utility shall change any rate *or so alter any classification, contract, practice, or rule as to result in any new rate* except upon a showing before the commission and a finding by the commission that the new rate is justified.” (Emphasis added.)

More specifically, General Order (G.O.) 96-A provides that:

“The tariff schedules of a utility may not be changed whereby any rate or charge is increased, *or any condition or classification changed so as to result in an increase*, or any change made which will result in a lesser service or more restrictive conditions at the same rate or charge, until a showing has been made before the Commission and a finding by the Commission that such increase is justified.” (G.O. 96-A, § VI; emphasis added.)

SCE insists that its change in policy is consistent with the language of Rule 20. Certainly, when the tariff language is considered as a whole--including the Rule 20.B.3 provision specifically addressing removal of overhead facilities--that interpretation appears valid. When determining whether there is ambiguity in a tariff, we are required to consider tariff language as a whole. (*Re Southern California Utility Power Pool* (1995) 60 CPUC2d 462, 471.) On the other hand, Rule 20.B.2.c does not address pole removal costs and, given the Commission’s intent in D.73078 to encourage conversion to underground facilities, it was not unreasonable for SCE for 30 years to assume that it should bear the removal costs. It is settled law that an ambiguity in a tariff must be construed against the utility and in favor of the customer. (*Order Denying Rehearing* (1992) 45 CPUC2d 645.)

The issue here, however, is not whether SCE’s pole removal practice conforms to its tariffs. The issue is whether the change in that practice required prior Commission approval. We conclude that it did. To conclude otherwise

would allow a utility, in practical effect, to increase its charges without Commission authorization. This would contravene Pub. Util. Code § 454, G.O. 96-A, and the rule of construction just cited that a tariff must be construed in favor of the customer.

SCE argues that seeking approval of a change in practice without a change in tariff language would be tantamount to seeking an advisory opinion. The Commission generally does not issue advisory opinions. (*Re San Diego Gas and Electric Company* (1991) 42 CPUC2d 9.) Moreover, SCE states that if it filed an advice letter every time it changed a practice, the Commission would be inundated with filings.

We believe those contentions overstate the effect of our decision today. Our order is confined to the facts of this case. It finds that Barratt American has stated a valid complaint under G.O. 96-A. SCE should have sought Commission approval before changing a practice that had been in place for 30 years and that eliminated a substantial credit to applicants for underground conversion. Rather than seek an advisory opinion, SCE could have sought a change in tariff language to make its new practice clear and put conversion customers on notice that they no longer would get credit for costs of pole removal.

Accordingly, we find for complainant and require that SCE refund to Barratt American the \$33,700 that SCE had assessed for pole removal.

The scope of this proceeding is set forth in the complaint and answer; by agreement of the parties, a hearing is not needed. Our order today confirms that ALJ Walker is the presiding officer.

7. Comments on Draft Decision

The draft decision of ALJ Walker in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Only SCE has filed comments.

SCE has called our attention to two minor errors in the statement of facts. We have corrected the text accordingly.

More substantively, SCE argues that the complaint does not raise the issue of whether SCE was required to seek Commission approval of the change in interpretation of Rule 20, and it is therefore improper for the Commission to deal with that issue in this case. On the contrary, the complaint cites evidence alleging that there is no “documentation showing that the Commission has approved a change in the responsibilities of the applicant as outlined in Tariff Rule 20-B.2.c.” (Complaint, p. 2.) In any event, this Commission liberally construes complaints that present a plausible cause of action. (*Coachella Valley Communications v. AMI Telecommunications Company, et al.*, D.00-09-007, 2000 Cal. PUC LEXIS 688.) SCE’s argument to the contrary has no merit.

SCE also argues that the Commission already has ruled that a utility need not include a credit for pole removal costs under Rule 20. In support of that, however, it cites only dicta in an ALJ Ruling addressing scheduling matters in another proceeding.¹ The ALJ Ruling cited by SCE does not address the question

¹ *Administrative Law Judge’s Ruling Setting Comment and Response Schedule*, dated August 4, 2000, in R.00-01-005. (“Rule B provides limited ratepayer funding for the cost of cables, transformers, and other electrical equipment, but the balance of the costs must be paid by the applicant.”)

of whether a utility is required to seek Commission approval before imposing a new charge on relocation customers, and for that reason the ALJ Ruling is inapposite here.

SCE next contends that the requirements of Pub. Util. Code § 454 apply only to "new rates," and that no new rates are at issue here. That is a highly restrictive -- and incorrect -- reading of Section 454 and the implementing requirements of G.O. 96-A. As noted in the draft decision, those rules provide that a utility may not change a practice that results in an increase in a tariff schedule without a finding by the Commission that such increase is justified. SCE is incorrect in its contention that Section 454 does not apply to the facts of this case.

SCE also argues that it is unfair to penalize it for a mere "lack of notice," particularly when Barratt American was aware that the policy on pole removal credits had changed. SCE misinterprets the draft decision. Changing a 30-year practice to impose a substantial new charge on a customer requires more than mere notice. It requires a showing by the utility before the Commission that the increase is justified, and a finding by the Commission that the increase is proper. That showing, and that finding, are lacking here.

We note, in passing, that when SCE decided in 1997 to change its practice on pole removal charges, it was a party to R.92-03-050, in which SCE successfully sought Commission approval for other changes in Rule 20 that imposed new charges on relocation customers. The record is silent as to why SCE did not in that proceeding include its proposal to change the pole removal policy as well.

Finally, SCE warns of the possible precedential effect of the decision on cases that might be brought since the utility's change in policy in 1997. SCE states that if the decision is to stand, the Commission should limit it to only those

cases where a complainant notified SCE of its complaint and paid a pole removal charge under protest, as Barratt American did. The short answer to that concern is that SCE is free in any subsequent case to seek to distinguish the findings of this proceeding. Again, however, the issue in this case is not who gave “notice” to whom. The issue is whether a utility may reinterpret a long-standing practice to eliminate a substantial customer credit without first seeking the approval of this Commission. On that issue, we decide against SCE. Accordingly, we adopt the draft decision without substantive change.

Findings of Fact

1. Barratt American was required to convert existing overhead electric facilities to underground facilities in Rancho Cucamonga, California.
2. In performing the work, SCE charged Barratt American \$33,700 for its costs of pole removal.
3. Between 1967 and 1997, SCE did not charge pole removal costs in similar conversion projects.
4. In 1997, SCE reviewed its tariff and concluded that pole removal costs are part of the conversion project and should be charged to the applicant.
5. SCE did not seek Commission approval of its change in practice regarding pole removal costs.
6. The undergrounding work at issue is governed by SCE’s Tariff Rule 20.

Conclusions of Law

1. G.O. 96-A requires prior Commission approval of any change in a condition or classification resulting in an increase in a tariff schedule.
2. Complainant has established a *prima facie* violation by SCE of G.O. 96-A.
3. SCE should be directed to refund to Barratt American the \$33,700 charge assessed for pole removal costs.

4. The scope of this proceeding is set forth in the complaint and answer; ALJ Walker is designated as the presiding officer.

5. This order should be made effective immediately so that complainant recovers the improperly assessed charges as soon as possible.

O R D E R

IT IS ORDERED that:

1. The Commission finds for Barratt American, Inc. in its complaint against Southern California Edison Company (SCE) in Case (C.) 00-07-054.

2. SCE is directed to refund \$33,700 to Barratt American, Inc., within 30 days of the date of this order.

3. C.00-07-054 is closed.

This order is effective today.

Dated March 27, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners