

GCM

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

10,678

FILE B-194905

DATE: JUL 6 1979

DLG02067

[Claim for]

MATTER OF South Carolina Electric and Gas Company [Late Payment Charges.]

DIGEST: Contract provision providing Air Force will not be liable for payment of penalty or interest charges to utility company does not relieve the Air Force of obligation to pay late payment charges when those charges are approved by State commission as part of utility's tariff to recoup losses attributable to late payments and Air Force has agreed to pay approved tariff.

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The Accounting and Finance Office of the Charleston Air Force Base, South Carolina, (his reference: ACF (Mr. Johnk, 583-3387)), has requested our opinion on the propriety of paying arrears and late payment charges on two contracts for utilities services provided to the United States Air Force, Charleston Air Force Base, by the South Carolina Electric and Gas Company (SCE&G).

SCE&G has assessed these charges on the Air Force accounts since February 1971 but the Air Force has refused to pay them. The SCE&G maintains that the late payment charges are part of the General Terms and Conditions of Service which has been approved by the Public Service Commission of South Carolina (Commission) and are a part of the company's tariff.

The HQ MAC/Office of the Staff Advocate (HQ MAC/SJA) and SCE&G base their respective contentions on different provisions of the contracts. HQ MAC/SJA relies primarily on paragraph 4(c) which states in pertinent part that "[a]ll bills for service shall be paid without penalty or interest..." SCE&G relies primarily on paragraph 2 which states in pertinent part that the Government will pay for service at the authorized tariff rate and that "[s]ervice furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law or by any federal, state or local regulatory commission having jurisdiction." By an order dated July 1, 1970, the Commission authorized SCE&G to adopt a plan as part of its rates whereby a one and a half percent "Late Payment Charge" would be assessed on any past due amounts.

The issue in this case involves the characterization of the late payment charges. Provision 4(c) expressly forbids the payments of late charges if they are considered to be penalties or interest.

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Several jurisdictions have held that late payment charges are not "interest." In State ex rel. Utilities Commission v. North Carolina Consumer Council, 18 N.C. App. 717, 198 S.E. 2nd 98, 100, cert. denied 284 N.C. 124 (1973), the court stated that "[t]o say that the [late payment] charge is unrelated to rates is to fail to consider the reality." It then quoted Coffelt v. Ark. Power and Light Co., 248 Ark. 313, 451 S.W. 2nd 881, 883 (1970), reh. denied 27 April 1970, with approval:

"The late charges, far from being an exaction of excessive interest for the loan or forbearance of money, is in fact a device by which consumers are automatically classified to avoid discrimination. Its effect is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills."

See also Ferguson v. Electric Power Bd. of Chattanooga, Tenn., 378 Supp. 787, 790 (1974).

This Office in several decisions has also stated that such payments are not interest if they are part of the utility's rate schedule by which the Government through its contract with the utility has agreed to be bound. In those cases, we have authorized payment. See B-173725, September 16, 1971; B-184962, November 14, 1975; and B-188616, May 12, 1977. Of particular relevance is B-186494, supra, in which we concluded that late payment charges were part of the utility rates payable under a contract provision similar to the one in paragraph 2 rather than a penalty or interest charge excluded under a provision similar to the one in paragraph 4(c). We noted that the utility commission which allowed the utility to charge a late payment fee had concluded that the rates were not penal or arbitrary, and would allow the utility to recover costs expended in connection with payment delays.

The rationale of that decision is applicable here. As part of the rate schedule, the South Carolina Public Service Commission authorized the charge under dispute in this case for a similar reason: "A maximum of one and one half percent (1 1/2%) may be added to any unpaid balance not paid within 25-days of the billing date to cover the cost of collection and in carrying accounts in arrears." (26 Code of Laws of South Carolina, R103-439.3; Late Payment Charges, (1976) (emphasis added). [26]

We conclude that the 1 1/2 percent late payment charge is neither a penalty nor interest and payment of the charge is not precluded by paragraph 4(c) of the contract. Rather this charge is

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part of the utility's General Terms and Conditions which were approved by the Commission. Therefore, under paragraph 2 of the contract, requiring it to pay the utility's authorized rates, the Air Force should pay these charges.

The SCE&G has offered to write off current charges if the Charleston base would acknowledge its responsibility for any late payment charges incurred in the future. We recommend that the Air Force accept this offer.

Comptroller General
of the United States