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SURCHARGES - PUBLIC UTILITY BILLS DECISION HOLDING THAT THE SURCHARGES IMPOSED BY THE PUBLIC UTILITIES IN PENNSYLVANIA IN ACCORDANCE WITH THE PENNSYLVANIA PUBLIC UTILITY COMMISSION'S ORDER MAY BE PAID BY U.S. GOVERNMENT AGENCY. WHERE THE COMMISSION HAS DETERMINED THAT NEW AND INCREASED TAXES CONSTITUTE A LEGITIMATE COST WHICH THE UTILITIES ARE ENTITLED TO RECOVER THROUGH INCREASED RATES AND SUSPENDS NORMAL PROCEDURES TO ALLOW PUBLIC UTILITY COMPANIES TO IMPOSE A TEMPORARY SURCHARGE, IT APPEARS THAT THE INTERESTS OF THE GOVERNMENT WILL BE ADEQUATELY PROTECTED IN THAT THE GOVERNMENT IS TO BE TREATED IN THE SAME MANNER AS ALL OTHER PUBLIC UTILITY CUSTOMERS, AND THE COMMISSION HAS RESERVED THE RIGHT TO REVIEW EACH COMPANY'S FINANCIAL SITUATION TO DETERMINE IF ANY ADJUSTMENTS ARE APPROPRIATE. GAO THEREFORE, DOES NOT OBJECT TO THE PAYMENT OF THE SURCHARGE.

TO MR. NORMAN MOGUL:

REFERENCE IS MADE TO YOUR LETTER (YOUR REFERENCE DPSC-ZA), DATED JANUARY 6, 1971, WITH ENCLOSURES, IN WHICH YOU REQUEST AN ADVANCE DECISION AS TO THE PROPRIETY OF THE PAYMENT OF SURCHARGES ON PUBLIC UTILITY BILLS IN THE STATE OF PENNSYLVANIA. OUR OPINION IS REQUESTED BASED ON LEGAL MEMORANDA DATED JULY 10 AND JULY 13, 1970, BY THE ASSISTANT COUNSEL FOR LITIGATION, FRAUD AND SERVICES, OFFICE OF COUNSEL, DEFENSE PERSONNEL SUPPORT CENTER, PHILADELPHIA, PENNSYLVANIA, IN WHICH THE VIEW IS EXPRESSED THAT THE SURCHARGES WERE NOT ESTABLISHED IN ACCORDANCE WITH APPLICABLE PENNSYLVANIA LAW AND ARE, THEREFORE, INVALID. THE ASSISTANT COUNSEL ALSO CONTENDS THAT THE SURCHARGES OF ONE OF THE UTILITIES, THE PHILADELPHIA ELECTRIC COMPANY, ARE INAPPLICABLE SINCE THEY WERE NOT CHANGED IN ACCORDANCE WITH THE PROVISIONS OF THE UTILITY'S CONTRACT WITH THE GOVERNMENT. HE CONCLUDES THAT THE GOVERNMENT SHOULD NOT PAY THE SURCHARGE.

IN LATE 1969 AND EARLY 1970, THE PENNSYLVANIA STATE LEGISLATURE RETROACTIVELY INCREASED THREE TYPES OF TAXES ON UTILITY COMPANIES - THE CAPITAL STOCK TAX, THE CORPORATE NET INCOME TAX AND THE GROSS RECEIPTS TAX - AND IMPOSED A NEW TAX ON REAL PROPERTY OWNED BY PUBLIC UTILITIES. THE PUBLIC UTILITIES ARE ENTITLED BY STATE LAW AND REGULATION TO RECOVER IN THEIR RATES THEIR LEGITIMATE COSTS PLUS A FAIR RETURN ON THEIR CAPITAL.

IN AN ORDER DATED MARCH 10, 1970, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION (COMMISSION) FOUND THAT THE NEW AND INCREASED TAXES CONSTITUTE A LEGITIMATE COST WHICH THE UTILITIES ARE ENTITLED TO RECOVER THROUGH INCREASED RATES. IT ALSO INDICATED THAT EACH OF THE 620 SEPARATE UTILITY COMPANIES MIGHT BE ENTITLED TO RATE INCREASES, THAT THE COMMISSION WAS BEING DELUGED BY THE UTILITIES WITH REQUESTS FOR RATE INCREASES, AND THAT " *** TO ATTEMPT TO GIVE NECESSARY AND PROMPT RELIEF ON AN INDIVIDUAL BASIS WOULD BE AN IMPOSSIBILITY." RATHER THAN

HANDLE THE MATTER ON AN INDIVIDUAL BASIS, THE COMMISSION SUSPENDED THE NORMAL PROCEDURES AND TOOK WHAT IT CALLED "A MORE SENSIBLE AND PRACTICABLE APPROACH" BY ALLOWING ALL AFFECTED UTILITY COMPANIES TO IMPOSE A TEMPORARY SURCHARGE TO RECOVER THE COST OF THE TAXES. THE COMMISSION WOULD LATER REVIEW EACH UTILITY'S FINANCIAL SITUATION TO DETERMINE IF ANY ADJUSTMENT IN ITS RATES OR SURCHARGES, OR ANY REFUND OR OTHER REMEDIES TO ITS CUSTOMERS, WOULD BE APPROPRIATE.

THE MAIN ARGUMENT OF THE ASSISTANT COUNSEL IN ASSERTING THAT THE SURCHARGES ARE INVALID IS THAT THE COMMISSION, BY ADOPTING SUCH A PROCEDURE, VIOLATED APPLICABLE STATE LAW. HE NOTES, FOR EXAMPLE, THAT THE COMMISSION FAILED TO HOLD PUBLIC HEARINGS ON THE PROPOSED RATE INCREASES. HE ALSO DISPUTES THE TEMPORARY NATURE OF THE INCREASE, STATING THAT "AS A PRACTICAL MATTER THE COMMISSION *** HAS ESTABLISHED A RATE INCREASE WHICH IS AS PERMANENT AS THE TAXES *** ."

THE QUESTION RAISED BY THE ASSISTANT COUNSEL GOES TO THE LEGALITY OF AN ORDER PROMULGATED BY A LAWFULLY CONSTITUTED STATE REGULATORY AGENCY, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, WHICH ORDER AFFECTS, OR COULD AFFECT, VIRTUALLY EVERY PUBLIC UTILITY CUSTOMER IN THE STATE. IT APPEARS THAT UNDER THE ORDER THE GOVERNMENT WILL BE TREATED IN THE SAME MANNER AS ALL OTHER PUBLIC UTILITY CUSTOMERS - INCLUDING THE STATE AND ITS POLITICAL SUBDIVISIONS. MOREOVER, THE COMMISSION HAS RESERVED THE RIGHT TO REVIEW THE RECORDS OF EACH UTILITY COMPANY AND TO MAKE SUCH ADJUSTMENTS, INCLUDING REFUNDS TO CUSTOMERS, AS IT DEEMS APPROPRIATE AND AT THIS TIME WE HAVE NO REASON TO BELIEVE THAT THE GOVERNMENT'S INTERESTS WILL NOT BE ADEQUATELY PROTECTED. FURTHER, THE PROPER FORUM GENERALLY FOR A CHALLENGE TO THE ORDER OF A STATE REGULATORY AGENCY IS IN THE COURTS. SEE 66 PURDON'S PENNA. STATUTES ANNOTATED (P.S.) 1442. WE NOTE FROM THE ENCLOSURES WITH YOUR LETTER THAT THE MATTER WAS BROUGHT BEFORE THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA, IN THE CASE OF KLINE, ET AL. V BLOOM, ET AL., EQUITY DOCKET 3023 NO. 92 COMMONWEALTH DOCKET, 1970, AND WE ASSUME FROM THE RECORD BEFORE US THAT THE COURT RULED IN FAVOR OF THE COMMISSION. IN LIGHT OF THE FOREGOING, WE WOULD NOT QUESTION THE INSTANT ORDER OF THE COMMISSION NOR SURCHARGES IMPOSED PURSUANT THERETO.

IN ADDITION THE ASSISTANT COUNSEL TAKES THE POSITION THAT SINCE THE COMMISSION'S ORDER PROVIDES THAT ANY AMENDED TARIFF FILED BY A UTILITY "SHALL CARRY AN EFFECTIVE DATE WHICH SHALL BE 10 DAYS AFTER ITS FILING" AND SINCE THE BELL TELEPHONE COMPANY OF PENNSYLVANIA'S TARIFF APPARENTLY BECAME EFFECTIVE 12 DAYS AFTER FILING, THE UTILITY FAILED TO COMPLY WITH THE EXPRESS TERMS OF THE ORDER AND THE SURCHARGE IMPOSED BY IT IS, THEREFORE INVALID.

ALLEGATIONS OF NONCOMPLIANCE WITH THE COMMISSION'S ORDERS ARE PROPERLY FOR CONSIDERATION PRIMARILY BY EITHER THE COMMISSION OR THE COURTS. SEE FOR EXAMPLE 66 P.S. 1391, 1431 AND 1442. FURTHER, THIS OFFICE IS NOT IN A POSITION TO DETERMINE THE EFFECT OF ANY NONCOMPLIANCE WITH THE COMMISSION'S ORDER BY THE BELL TELEPHONE COMPANY. MOREOVER, THE COMMISSION RETAINS A REVIEW AUTHORITY OVER THE IMPOSITION OF THE SURCHARGE AND WE HAVE NO REASON TO BELIEVE THAT THE GOVERNMENT'S INTERESTS WILL NOT BE ADEQUATELY PROTECTED. IN FACT, WE FAIL TO SEE HOW MAKING THE EFFECTIVE DATE OF A RATE INCREASE 12 DAYS AFTER THE FILING OF THE TARIFF INSTEAD OF 10 DAYS AFTER SUCH FILING MAY BE SAID TO ADVERSELY EFFECT THE INTEREST OF THE GOVERNMENT. THEREFORE, AND ABSENT A SHOWING THAT THE GOVERNMENT IS NOT BEING TREATED IN THE SAME MANNER AS ALL OTHER PUBLIC UTILITY CUSTOMERS, THIS OFFICE WILL NOT OBJECT TO THE PAYMENT OF THE SURCHARGE IMPOSED BY THE BELL TELEPHONE COMPANY.

WE WILL NOW CONSIDER THE QUESTION AS TO WHETHER THE RATES OF THE PHILADELPHIA

ELECTRIC COMPANY WERE CHANGED IN ACCORDANCE WITH THE CONTRACT (NO. CA-OOT-1626(TP) BETWEEN THE UTILITY AND THE GENERAL SERVICES ADMINISTRATION. IN HIS MEMORANDUM OF JULY 13, 1970, THE ASSISTANT COUNSEL QUOTES FROM THE APPLICABLE PORTIONS OF THE CONTRACT AND THE COMMISSION'S ORDER. AS QUOTED IN THE MEMORANDUM, THE CONTRACT PROVIDES, IN PERTINENT PART:

"ARTICLE 6. PUBLIC REGULATION. (A) SERVICE FURNISHED UNDER THIS AGREEMENT SHALL BE SUBJECT TO RATES PRESCRIBED BY ANY FEDERAL, STATE OR LOCAL REGULATORY COMMISSION HAVING JURISDICTION OVER THE SUPPLY OF SERVICE TO THE CONTRACTOR'S CUSTOMERS GENERALLY." THE COMMISSION'S ORDER OF MARCH 10, 1970, STATES, IN PERTINENT PART:

"THIS ORDER IS INTENTIONALLY COUCHED IN PERMISSIVE RATHER THAN MANDATORY LANGUAGE, TO PRECLUDE THE POSSIBILITY THAT ANY SURCHARGE IMPOSED HEREUNDER IS A COMMISSION-MADE RATE." SINCE THE COMMISSION'S ORDER STATES THE SURCHARGES ARE NOT TO BE CONSIDERED COMMISSION-MADE, THE ASSISTANT COUNSEL IS OF THE VIEW THAT THE SURCHARGES CANNOT BE CONSIDERED TO BE RATES PRESCRIBED BY THE COMMISSION. THEREFORE, HE CONTENDS THAT THE CONTRACT HAS NOT BEEN COMPLIED WITH AND THAT THE SURCHARGE IS NOT LAWFULLY PAYABLE.

IN OUR VIEW THE FACT THAT THE SURCHARGE IS NOT TO BE CONSIDERED A COMMISSION-MADE RATE DOES NOT PRECLUDE IT FROM BEING CONSIDERED A RATE PRESCRIBED BY THE COMMISSION AS REQUIRED BY THE CONTRACT. THE ORDER OF MARCH 10, 1970, SETS OUT IN DETAIL THE MANNER IN WHICH THE SURCHARGE IS TO BE COMPUTED AND UNDER WHAT CIRCUMSTANCES IT IS TO BE RECOMPUTED. WHILE THE COMMISSION DOES NOT SPECIFY THE EXACT AMOUNTS TO BE CHARGED BY EACH INDIVIDUAL UTILITY, BY PROMULGATING SPECIFIC INSTRUCTIONS FOR THE CALCULATION OF THE SURCHARGE RATE AND BY PROVIDING FOR COMMISSION REVIEW OF SUCH CALCULATION, IT IS OUR VIEW THAT THE COMMISSION DOES, FOR THE PURPOSE OF THIS CONTRACT, PRESCRIBE THE RATE. THAT IS TO SAY WHILE A UTILITY IS NOT REQUIRED TO INCREASE ITS RATES, ONCE IT FILES A NEW TARIFF OR SUPPLEMENT TO THE EXISTING TARIFF IN ACCORDANCE WITH OR PURSUANT TO THE COMMISSION'S ORDER, THE RATES CONTAINED IN THE NEW TARIFF OR SUPPLEMENT BECOME IN EFFECT THE PRESCRIBED RATES UNLESS SUCH RATES ARE SUBSEQUENTLY CHANGED BY THE COMMISSION. MOREOVER, THE CONTRACT IN EFFECT MERELY REQUIRES THAT THE GOVERNMENT BE CHARGED AT THE SAME RATES AS THE OTHER CUSTOMERS OF THE PHILADELPHIA ELECTRIC COMPANY AND, OF COURSE, ALL OF THE UTILITY'S CUSTOMERS WILL BE PAYING THE SURCHARGE. THEREFORE, WE BELIEVE THAT THE AFOREMENTIONED CONTRACT PROVISION IS BEING COMPLIED WITH AND THAT THE AMOUNT BILLED FOR THE SURCHARGE, IF OTHERWISE PROPER, MAY BE PAID. ALSO, AS INDICATED ABOVE, THE SAFEGUARDS OF COMMISSION REVIEW OF THE IMPLEMENTATION OF THE SURCHARGE AND OF APPEAL OF THE COMMISSION'S FINAL DETERMINATION OF RATES REMAIN AVAILABLE TO THE GOVERNMENT.

IN LIGHT OF THE FOREGOING, IT IS OUR VIEW THAT THE SURCHARGES IMPOSED BY THE PUBLIC UTILITIES IN PENNSYLVANIA IN ACCORDANCE WITH THE COMMISSION'S ORDER MAY BE PAID. ACCORDINGLY, PAYMENTS ON THE ..END :