- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In Re Complaint of COVEY APARTMENTS, INC., Complainant vs. QUESTAR CORPORATION, Respondent	))))))	DOCKET NO. 01-057-09 REPORT AND ORDER

ISSUED: January 9, 2002

SYNOPSIS

Complainant having failed to show any violation of Respondent's published tariffs or of the applicable statutes and Commission rules, we dismiss.

Appearances:

Gary Dodge	For	COVEY APARTMENTS, INC.
Jonathan M. Duke	"	QUESTAR CORPORATION

By the Commission:

PROCEDURAL HISTORY

Pursuant to notice duly served, the above-captioned matter came on regularly for hearing the fourth day of October, 2001, before A. Robert Thurman, Administrative Law Judge, at the Commission Offices, Heber Wells Office Building, Salt Lake City, Utah. Evidence was offered and received, and the Administrative Law Judge, having been fully advised in the premises, now enters the following Report, containing proposed Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. Complainant is a customer of Respondent, a gas corporation certificated by this Commission.

2. Complainant is the owner of an apartment block known as the Covey Apartments (the apartments). On July 26, 1990, Complainant established an account with Respondent for the apartments, Complainant having acquired the apartments from a previous owner at about the same time.[(1)] At the time service was initiated, the apartments were billed according to Respondent's F1 tariff, an industrial rate affording the ratepayer a discount based on a minimum load factor.[(2)]

3. On or about July13, 1992, owing to a failure to maintain the minimum load factor, the apartments were switched from the F1 rates to the general residential (GS1) rates.[(3)] The existing meter, a model used for industrial installations, remained in place. This meter differs from the more usual residential meter in that it has one more dial, representing at each increment 100,000,000 cubic feet (cf), at the extreme left side of the meter face. A normal residential meter from the same era had only six dials with the dial representing the highest digit representing only 10,000,000 cf per increment.[(4)] 4. As nearly as events can be reconstructed, at the time of the rate change, a meter reader familiar with the GS1 normal meters, and unfamiliar with the industrial type meter at the apartments, read only five dials and

misinterpreted the leftmost dial as representing only 10,000,000 cf per increment, an error of 90%. Since subsequent readers used the previous read as a starting point, the error became self-perpetuating.(5) As a result, from the date of the billing change, usage was recorded and billed at 90% under actual usage.

5. On January 30, 2001, as a matter of routine, the meter at the apartments was pulled and replaced, and the reading error was discovered. Both the old and new meters were tested and found to be functioning within permissible limits set by the Commission.(6)

6. More or less coincidentally with the rate change, Complainant had improvements made to the apartments' heating system, and Complainant's employees attributed the sudden drop in heating expense to that work.(7) Owing to the steep increase in heating expense following discovery of the error, the apartments' value for loan purposes was decreased by $700,000.(8) Complainant also claims it was damaged by being deprived of the opportunity to raise its rents to cover the full cost of heating. However, there is nothing in the record to indicate that Complainant did in fact adjust its rents in favor of its tenants to afford them the benefit of the lower gas rates.

DISCUSSION

Section 54-3-7, UCA 1953, as amended, provides in pertinent part that no public utility ". . . shall charge, demand, collect or receive a greater or less or different compensation for any . . . commodity . . . than the rates . . . specified in its schedules . . . in effect at the time . . . ." Section 54-3-8, UCA 1953, as amended, provides in pertinent part that no public utility shall " . . . as to rates . . . make or grant any preference . . . to any person . . . ." These provisions have long been construed *not merely to authorize* backbilling for undercollections, as Respondent has done in the instant case, *but indeed to mandate* such backbilling.

Complainant would have us put an implied gloss on the above provisions to negate them in case of a utility's negligence accompanied by damage to the customer. In support of its position, Complainant directs our attention to case law from other jurisdictions. We have examined the authorities furnished us by Complainant and find ourselves unable to agree with them.

The leading case cited by Complainant is West Penn Power Co. v. Piatt, 592 A.2d 1306 (Pa Super 1991). The case is quite close on its facts to the instant case. The Pennsylvania Superior Court held that the utility's customer could assert the defense of detrimental reliance and set off its damages against the amount underbilled. The Court did take notice of Pennsylvania statutes similar to Utah's and, in effect, put a judicial gloss on them as Complainant urges us to do in regard to Utah's.

With due respect to the Pennsylvania Court, we believe the case represents a classic instance of a hard case making bad law. By focusing solely on the harshness of the result, the Court failed to give due weight to the most basic canon of statutory construction, i.e., absent ambiguity or vagueness, a statute is to be given its plain meaning. We believe the Utah statutes are unmistakable in their intent.

Perhaps more seriously, the Pennsylvania Court failed to apprehend the salutary purpose behind the statutes. Absent a hard and fast enforcement of the prohibition of preferences, it becomes too easy for utilities and customers to collude to discriminate against other customers. Indeed, one can foresee scenarios in which the collusion occurs between corrupt utility employees and customers to the detriment of both the utility and other customers. If such scenarios appear far-fetched, we can only answer that if human history teaches anything, it is that human cupidity and human ingenuity are both infinite. We therefore reject the rationale of the Pennsylvania Court.

We have examined the other authorities cited by Complainant, which Complainant characterizes as representing a trend, and conclude that the characterization is overstated. The other authorities either follow the West Penn case or are readily distinguishable from the instant case on their facts.

Even if we were otherwise disposed favorably to Complainant's position, we believe we are bound by the pronouncements of the Utah Supreme Court which cut decisively the other way. In the case of American Salt Co. v. W. S. Hatch Co., 748 P.2d 1060 (Utah 1987), the Court authorized a carrier to recover its full tariff charges even though

they exceeded the market value of the commodity shipped. We deem the harshness of this result commensurate with the harshness to this complainant of application of the Utah statutes.

In regard to that harshness, we believe the Commission has adequately ameliorated the hardship on customers underbilled for extended periods by adopting its rule limiting a utility's recovery to a period of 24 months. Complainant will have the benefit of approximately seven years of gas service rendered at one-tenth the tariffed price. Complainant argues that the price break redounded only to the benefit of its tenants, yet Complainant's officer testified that Complainant did not reduce rents in light of the reduction of gas expense and in fact raised them.[(9)] We are of the opinion that Complainant has in fact benefited from the long period of underbilling.

Finally, in regard to monetary disputes between utilities and customers, the Commission's sole jurisdiction derives from § 54-7-20, UCA 1953, as amended. That statute speaks solely in terms of reparations for deviations from tariff. That is not the claim made here. It follows that the Commission is without jurisdiction to grant Complainant the relief it seeks.

CONCLUSIONS OF LAW

The Commission has party jurisdiction; subject-matter jurisdiction is lacking. Complainant has failed to prove facts which would entitle it to relief under Section 54-7-20, UCA 1953, as amended. That statute entitles a customer to reparations only upon a showing of charges beyond Respondent's published tariff, or a discriminatory application of the tariff. The facts alleged by Complainant do not indicate such overcharge or discrimination.

Respondent is, under the law, not only allowed but required to charge in accordance with its tariff in order to prevent invidious discrimination among customers. Accordingly, the charges imposed on Complainant are lawful, and Respondent is entitled to collect the same. The complaint must be dismissed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

The complaint of COVEY APARTMENTS, INC. against QUESTAR CORPORATION be, and the same hereby is, dismissed.

If COVEY APARTMENTS, INC. wishes to proceed further, COVEY APARTMENTS, INC. may file a written petition for review within 20 days of the date of this Order. Failure so to do will preclude the right to appeal to the Utah Supreme Court.

Dated at Salt Lake City, Utah, this 9th day of January, 2002.

COMMENT OF THE COMMISSION

We concur with the outcome of the Administrative Law Judge's order. We do not have the equitable powers required to grant the relief Complainant seeks. Only a state court can decide if those equitable remedies should be available in Utah, not this Commission.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#27248

1. Testimony of Brent Bakker, Reporter's Transcript of Proceedings (hereafter Tr.) at 9.
2. Id. at 11.
3. Id. at 12.
4. Id. at 12-13; Exhibit 1, p. 4.
5. Testimony of Brent Bakker, id. at 26.
6. Id. at 14-16;
7. Testimony of Tad Callister, Tr. at 59.
8. Id. at 53.
9. Testimony of Tad Callister, Tr. at 67-68.