



FILE: B-186494

DATE: 6/17/77

JUL 22 1976

MATTER OF: Late charges for utility services

097887
497887

DIGEST: 1. Rule now applied by the General Accounting Office (GAO) is that Government agencies may pay interest on late payments pursuant to either statute or contract provision. 51 Comp. Gen. 251 (1971), overruling 22 id. 772 (1943). Thus, if contract between Coast Guard and utility company is construed as obligating Coast Guard to pay late charges, there is no objection to payment based on absence of statutory provision therefor.

2. Contract between Coast Guard and utility company provides for payment of rates approved by State utility commission but also states that bills shall be paid "without penalty or interest." GAO believes that late payment charges approved by State commission as part of utility rates are properly payable under contract, and are not excluded as penalty or interest, since such charges merely recoup direct costs incurred by utility incident to late payments. However, since matter is sub judice, contract construction will ultimately be adjudicated by court.

The certifying officer for the Fifth Coast Guard District, Department of Transportation, has requested our opinion as to whether late payment charges for electrical service billed to the Coast Guard Air Base in Elizabeth City, North Carolina, by the Virginia Electric and Power Company (VEPCO), can be paid as legal and valid obligations of the United States. The matter is being litigated in the United States District Court for the Eastern District of North Carolina, United States v. Virginia Electric and Power Company, et al., No. 76-006-CIV-2, and the instant request for our opinion was submitted pursuant to an order by the District Court (filed April 26, 1976).

VEPCO and the United States Coast Guard entered into a contract on July 1, 1965. VEPCO agreed to deliver electrical service to the Air Base in return for a price to be determined in accordance with a rate schedule attached to and incorporated in the contract.

db MS 9-13-76

Paragraph 1 of the General Provisions of the contract states that "All bills for service shall be paid without penalty or interest." Paragraph 3(b) of the General Provisions states that:

"Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction. If during the term of this contract the public regulatory commission having jurisdiction received for file in an authorized manner rates that are different from those stipulated herein for like conditions of service the Contractor agrees to continue the prescribed service and the Government agrees to pay for such service at the different rates from and after the effective date of such rates."

The Coast Guard refused to pay the late charge amounts included in VEPCO's billings on the basis that they constituted "penalty or interest" precluded by paragraph 1 of the General Provisions, supra.

On March 1, 1976, the North Carolina Utilities Commission (CUC), after considering a complaint filed by VEPCO to require the Coast Guard to pay the late charges, issued an ex parte order directing VEPCO to discontinue electrical service to the Air Base unless the late payment charges were paid. On April 13, 1976, the Government sought a preliminary injunction from the District Court to enjoin VEPCO and the NCUC from discontinuing electrical service. In its memorandum of law in support of a preliminary injunction, the Government argued, inter alia, that the Coast Guard, certifying officer could not pay the late charges in view of decisions of our Office which were said to prohibit the payment of interest, absent statutory authority therefor. The Government's memorandum placed particular reliance on our decision at 22 Comp. Gen. 772 (1943), and quoted the syllabus of the decision as follows:

"In the absence of a statute authorizing the allowance of interest for delay by the Government in making payment for coal and other supplies, or of a statute authorizing purchasing officers to obligate the Government to pay such interest, the inclusion of the marketing rules and regulations issued pursuant to the Bituminous Act of 1937 in a contract for the purchase of coal which rules and regulations contain a provision requiring code member coal dealers to charge purchasers interest where payment is delayed beyond the due date fixed therein, may not be viewed as lawfully obligating the Government to pay interest for delay in making payment."

Since the NCUC subsequently postponed its order for discontinuance of electrical service at the Air Base, the District Court denied the Government's motion for a preliminary injunction. However, invoking the "doctrine of primary jurisdiction," the Court ordered the Government to seek an opinion from our Office, pursuant to 31 U.S.C. § 82d (1970), "on whether the Coast Guard's certifying officer could lawfully obligate the Government to pay the charges at issue." The Court noted that even though our "opinion might be advisory, it would nevertheless be a valuable contribution to this Court's efforts to adjudicate the merits of this case." Further proceedings in the action were stayed pending receipt of our opinion.

As indicated in 22 Comp. Gen. 772, supra, it was our position at one time that the Government could not pay interest for payment delays in the absence of express statutory authority. However, we have since modified our position in recognition of the opinion of the Supreme Court in United States v. Thayer-West Point Hotel Company, 329 U.S. 585, 590, (1947), which indicated that the Government could contract for the payment of interest, even in the absence of express statutory authority therefor. Thus the rule now applied by our Office is that the Government may pay interest pursuant to a statute or a contract provision, in the absence of a statutory prohibition against such payments. See 51 Comp. Gen. 251, 252 (1971), which overruled 22 Comp. Gen. 772.

In view of the foregoing, although there is no express statutory authority therefor, we would not object to payment of the late charges here involved if the contract is interpreted as providing for such charges. It appears that the proper construction of the contract will ultimately be adjudicated in the pending civil action. However, consistent with the Court's request, we offer the following views on this issue which may be of assistance to the Court.

The basic point to be resolved is, of course, whether the late payment charges imposed as part of the rates approved by the NCUC constitute a "penalty or interest" within the meaning of paragraph 1 of the contract's general provisions. It may be that paragraph 1 was intended by the Coast Guard to preclude any late payment charges, irrespective of their nature, but the language does not expressly so state. Moreover, VEPCO and the NCUC make a persuasive case that the instant late charges do not constitute penalties or interest in a general sense as a matter of North Carolina law. See, e.g., VEPCO's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction in the pending action, pp. 10-13.

The Memorandum notes that, in adopting the late payment rates, the NCUC specifically concluded that the rates were not penal or arbitrary,

but would merely recoup VEPCO's costs which were directly attributable to payment delays. Also, the alternative to late payment rates would be to recoup these costs through higher standard rates, thereby in effect penalizing customers who make timely payments. The same rationale was embraced by the North Carolina courts in concluding that the late payment rates did not constitute "interest" for purposes of the State usury statute. See State ex rel. Utilities Commission v. North Carolina Consumers Council, 15 N.C. App. 717, 198 S.E.2d 98, cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973).

A somewhat analogous approach was employed by our Office in 39 Comp. Gen. 285 (1959). There we held that a Federal agency could pay additional charges imposed by a local government where utility bills were not paid in advance. We viewed the additional charges as "an integral part of the rate structure and applicable to all users alike," and went on to observe:

"While utility bills generally do not become due until after the service has been furnished, we recognize that many public utilities assess additional charges if payment is not made thereafter within a stipulated period. Such payment conditions are similar to the granting of discounts for prompt payment and provision therefor is contained in many Government contracts. In the present case there would appear no question but that the United States would be liable for the full amount if the Village of Amherst raised its rates proportionally and made them payable at the end of the quarter with the provision that users making payment in advance would be given a corresponding discount for such advance payments. Accordingly, where payment is not made in advance, we see no valid basis whereby the United States might avoid such additional charges." Id. at 586

On the basis of these considerations, it appears to us that the disputed charges are an element of the utility rates payable under paragraph 3(b) of the general provisions, supra, rather than a penalty or interest excluded under paragraph 1. As noted previously, however, we consider the final resolution to be dependent on the Court's construction of the terms of the contract. If the Court agrees with our interpretation, the Coast Guard certifying officer may make the payments in question.

R.F.KELLER

Comptroller General
of the United States

| Deputy