28923

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

FILE: B-214479 **DATE:** July 26, 1984

MATTER OF: Social Security Administration--Late Payment Charges for Utility Services

DIGEST:

A regulated public utility's approved tariff constitutes a contract between the parties for service. The Prompt Payment Act and GAO decisions provide that contract payment terms must be given effect as written, even though the Government's liability for late charges is difficult to avoid due to the very short period designated by the tariff for timely payments.

By letter dated February 3, 1984 (reference SMF-235), the Director of the Social Security Administration's (SSA) Division of Finance requested our opinion on several problems related to invoices from the General Telephone Company of the Southwest (hereafter GTE).

Southwest, with its parent company, General Telephone and Electronics, is the sole supplier of telephone services in some localities, and it serves SSA field offices in Texas and in other states. To illustrate its problem, SSA cites the Texas General Exchange Tariff, approved by the Texas Public Utility Commission, under the terms of which GTE has assessed late charges on its bills to SSA for fiscal years 1983 and 1984, totalling $7,937.39 as of the date of the request. SSA has been disputing these charges, claiming that the more liberal terms of the Prompt Payment Act, 31 U.S.C. §§ 3901-09 (1982), should control late payments rather than the terms of the tariff. For the reasons explained below, the Texas late charges are properly payable by SSA, and are not contrary to the Prompt Payment Act.

The tariff provides that GTE's commercial accounts are due 15 days after invoices are postmarked (or prepared if no postmark exists). A one time only late charge of 5 percent is assessed on delinquent commercial accounts on the 16th day. The problem is that there is a statutory requirement that long distance charges be certified as official Government business by the agency making the calls. 31 U.S.C. § 1348 (1982). In view of the processing time required in sending invoices to Baltimore for final certification and payment, according to SSA, it is extremely difficult for it to make timely payment

029561

and avoid the late charges. Under the Prompt Payment Act, the Government would have 30 days after receipt of the invoice to pay the bills without penalty. The question is whether the tariff provisions or the Prompt Payment Act provisions take precedence in assessing late payment charges.

In 1971, this Office first articulated its current rule that the Government may pay interest on overdue payments or payments delayed by disputes and litigation. 51 Comp. Gen. 251 (1971). Overruling 22 Comp. Gen. 772 (1943), we held that the Government may bind itself by contract to make payments on designated schedules and to pay interest at a specified rate on delinquent accounts. When supported by a contract or statute, we found appropriations were available to pay the extra costs associated with interest.

We have applied this principle to several cases involving public utilities. For example, in Western Massachusetts Electric Company, B-184962, November 14, 1975, the utility had insisted on supplying electricity to the Army Corps of Engineers under its published rate schedule. It refused to enter into a separate contract with the Army which would have waived the late payment charge under its published rate schedule. In the circumstances, we determined that the published schedule was a contract for service and that an invoice for the late charge could be paid. See also, B-173725, September 16, 1971.

These cases, of course, predate the Prompt Payment Act, and to the extent that our precedent and the later statute are incompatible, the statute would be controlling. We find, however, that the two are complementary rather than contradictory.

The legislative history of the Prompt Payment Act shows that it was a response to the demands of suppliers and vendors for interest payments on delinquent Government accounts. See, Hearings on H.R. 4709 Before the Subcommittee on Legislation and National Security of the House Committee on Government Operations 97th Cong., 1st Sess., passim (1981). Prior to passage of the Act, interest charges for late payments could not be assessed against the Government except where otherwise provided by contract or statute. Since the Government dictates the terms of many contracts, most suppliers to the Government were unable to collect interest on overdue payments.

The Prompt Payment Act provided a statutory right to recovery in cases where Government contracts lacked payment terms and interest clauses. The Act was not intended to supplement existing contracts that contained timely payment and interest provisions. In fact, the Act specifically provides that where a contract spells out a specific payment date, it is the contract date which controls. 31 U.S.C. § 3903(1)(A) (1982).

In the absence of any other agreement, the terms of the Texas General Exchange Tariff must be regarded as being incorporated into the contract for telephone services between SSA's Texas field offices and GTE Southwest. Both the Prompt Payment Act and our cases require that SSA comply with the contract terms for remittance. Thus the more favorable provisions of the Prompt Payment Act (e.g. for a 15-day grace period before interest penalties are due) do not apply where the contract terms provide otherwise.

Furthermore, the regulations issued under the Act themselves exempt all or nearly all public utility contracts from coverage. We asked the OMB officials who helped draft the implementing regulations published at 41 C.F.R. Part 1-29 (1983) (temporary) why they included a broad exception for utilities. They told us that, in their view, the drafters of the Prompt Payment Act did not expressly take into account regulated public utility services supplied under published rate schedules, and that the exemption was intended to give effect to our cases on this subject. (Those cases are the same ones discussed above.) We agree with that analysis.

We note, from correspondence submitted with the request, that GTE argues that it is entitled to both its late charge and to interest under the Prompt Payment Act. The Act provides no authority to compensate a vendor twice for delinquent payments, and thus, we would find such a claim to be improper.

We also note from the submission that some of the late charges questioned date back to fiscal year 1983. Payments for late charges dating from fiscal year 1983 should, of course, be made from 1983 funds.

Finally, the request mentioned several other states in which GTE supplies telephone services to SSA field offices. If the tariffs and public utility codes in those states are substantially similar to those in Texas, and they are otherwise correct these other late charges may also be paid.

Milton J. Socolar

for Comptroller General
of the United States