

ORIGINALDecision No. 63105

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Estate of Graeme MacDonald, doing
business as MacDonald PRODUCTS
COMPANY, et al.,

Complainants,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

Case No. 7025
(Filed November 23, 1960)

Boris H. Lakusta, Graham, James & Rolph, for Estate
of Graeme MacDonald, doing business as MacDonald
Products Company, et al., complainants.
Pacific Gas and Electric Company by F. T. Searls,
Malcolm A. MacKillop and John S. Cooper, for
defendant.

O P I N I O NNature of Proceeding

Complaint as above-entitled was filed by the Estate of Graeme MacDonald, doing business as MacDonald Products Company, and two individuals, Edmund B. MacDonald and Alastair MacDonald Boone. For convenience they are referred to herein in the singular, or as MacDonald.

MacDonald is engaged in the business, among others, of owning, developing, operating and maintaining properties which are leased to various commercial enterprises. The Broadway Shopping Center in Walnut Creek and the Hayward Building at 22449-22475 Foothill Boulevard, Hayward, are such properties owned by MacDonald which are within the service area of Pacific Gas and Electric Company (Pacific).

Complainant requests: (1) an order requiring defendant, Pacific, to furnish master meter electric service to MacDonald at the Broadway Shopping Center in Walnut Creek by means of master meters at 10 designated buildings, without conditioning such service upon acceptance by complainant of master meter gas service at that location but conditioned only upon complainant's compliance with Pacific's existing Rule 18; (2) an order requiring defendant, Pacific, to furnish master meter electric service to complainant at the Hayward Building in Hayward conditioned only upon complainant's compliance with Pacific's existing Rule 18.

Defendant's answer was filed on December 13, 1960, asking that the complaint be dismissed. Thereafter, the complaint was consolidated for hearing with Pacific's Application No. 42434^{1/} on January 9, 1961. The record in the complaint matter includes exhibits and testimony introduced during all or portions of 14 days of public hearings held during the period November 1, 1960, to July 17, 1961, before Examiner William W. Dunlop in San Francisco. Upon receipt of briefs on August 16, 1961, the complaint matter was submitted and now is ready for decision.

Complaint and Answer

The complainant asserts that Pacific has steadfastly refused to provide master meter electric service for the Broadway Shopping Center at Walnut Creek except upon condition that complainant accept master metering for gas as well; that such refusal by Pacific is arbitrary, discriminatory and unlawful, in that: (1) it violates defendant's existing tariffs, specifically Rules 16 and 18 thereof, and (2) it constitutes an unlawful and arbitrary discrimination

^{1/} In Application No. 42434 Pacific Gas and Electric Company asks authority to amend its presently filed electric and gas Rule 18 relating to the supply to separate premises and to resale.

against complainant by imposing an arbitrary condition not imposed upon other of Pacific's customers who upon request and upon agreeing to the terms of Rule 18 have been furnished master meter electric service without condition; and that complainant has at all times been willing, and has made such willingness known to Pacific, to comply with the provisions of defendant's Rule 18 which requires, alternatively, that the master meter customer resell only "at rates identical with the rates of the Company (Pacific) that would apply in the event that energy were supplied to the sub-customer directly by the Company (Pacific)".

Complainant further asserts that Pacific has steadfastly refused to provide master meter electric service for the Hayward Building at Hayward; that such refusal by Pacific is arbitrary, discriminatory and unlawful, in that: (1) it violates defendant's existing tariffs, specifically Rules 16 and 18 thereof, and (2) it constitutes unlawful and arbitrary discrimination against complainant inasmuch as Pacific has provided such service for other of Pacific's customers who have requested such service and who have agreed to the terms of Rule 18; and that complainant has at all times been willing, and has made such willingness known to Pacific, to comply with the provisions of Rule 18.

Defendant, in its answer, generally denies the allegations of the complaint and asserts that under the provisions of its Rule 18 Pacific is not required to permit a customer to resell electric energy by submetering for commercial uses "unless specially agreed upon" by defendant. Defendant further asserts that to allow complainant to resell electric energy by submetering for commercial uses would result in a substantial middleman profit to complainant

without benefit to defendant or to its ratepayers generally and would not be in the public interest. Pacific requests a dismissal of the complaint.

Summary of Evidence

The pertinent facts underlying the complaint as presented by a witness for complainant were not challenged by Pacific at the time of hearing. These basic facts briefly are summarized herein.

Broadway Shopping Center

Broadway Shopping Center in Walnut Creek consists of 23 buildings as graphically shown in Exhibit 21. A major portion was constructed and completed in 1950-1951, at which time private streets were laid out.^{2/} Request was made at the time of initial construction for master meter electric service for the entire shopping center. Pacific refused the request. Subsequent talks between Graeme MacDonald and Pacific's president resulted in a decision by MacDonald not to press the request for a single master meter at that time. Then defendant and complainant, in 1951, entered into an agreement pursuant to defendant's extension rules for the installation of underground electric facilities to serve the shopping center. Thus, complainant installed underground electric facilities in the center from a cluster of poles with risers just inside complainant's property line. Five vaults along with necessary conduit and meters on panels on each building at the rear entrance also were installed. All such facilities are now the property of defendant. Defendant has provided both electric service and gas service directly to the various business establishments in the center ever since, pursuant to applications for such services on file with defendant.

^{2/} The streets subsequently were dedicated to public use on December 31, 1951.

In December 1957 and early in 1958, complainant renewed its request for master meter electric service at the Broadway Shopping Center, but modified the request by asking that only 10 of the 23 buildings be master metered. By letters dated February 4, 1958, March 6, 1958, and April 28, 1959,^{3/} defendant agreed to complainant's request provided complainant would also take over the master metering of gas, and the customers served directly by defendant notified defendant that they wished to discontinue service from Pacific. In its letter of April 28, 1959, Pacific advised complainant "master metering of one commodity makes it mandatory to master meter the other commodity".

Appendix B of the complaint is a letter dated May 13, 1959, from the Public Utilities Commission to the complainant reading as follows:

"Reference is made to your recent letter under the subject 'Resale of Electricity' in which you ask if a reseller of electric energy is also required to take on the obligation of reselling natural gas.

"The Commission's staff reports that there is no requirement to this effect in the filed tariffs of public utilities such as the Pacific Gas and Electric Company, nor does the staff believe that there has been before the Commission in a formal proceeding a question to decide concerning the reasonableness or validity of such a requirement."

By letter dated May 27, 1959,^{4/} complainant advised defendant as follows:

"We appreciate and accept your offer to sell for \$10,131.63, tax included, the electric meters, current transformers and allied equipment at Broadway Shopping Center, as shown in the print attached to your letter of April 28, 1959. We will also secure from each customer acceptance of this change in metering plan.

"We have informally requested the Public Utilities Commission for information regarding our obligation to

^{3/} Appendix A to the complaint.

^{4/} Appendix C to the complaint.

re-sell gas, a copy of their reply is enclosed. In light of established precedent and lack of requirement in your filed tariffs with the Public Utilities Commission or existing rules and regulations, we respectfully request that you reconsider your demand that we also master meter natural gas. We do not believe that your request is valid, or reasonable, and appears to be discriminatory.

"We are most desirous, however, to cooperate with you and grant some relief to your gas distribution costs. We are willing to have transferred to our name and assume responsibility for each individual gas service as presently furnished to those tenants to whom we will submeter electric energy."

Pacific replied by letter of July 28, 1959 (Appendix D to the complaint) wherein it stated, in part: "On review of this matter, we have concluded that our previous affirmative response was not warranted. However, having made this offer to you based on the conditions set forth in our letter of April 28th, which included the requirement that both gas and electricity be resold and recognizing that you may reasonably be relying on it, we are willing to adhere to it."

Complainant subsequently by letter of its attorneys of February 1, 1960, again made request upon Pacific for master meter electric service without the gas master meter condition (Appendix E to the complaint). Pacific replied by letter of March 3, 1960, refusing to depart from its previous stand (Appendix F to the complaint).

The testimony reveals that each of the 10 buildings in question has multiple tenants, the total number of tenants being 51; that if master meter electric service were established, complainant would be able to do the reading of sub-meters and collecting without hiring additional people; and that complainant has at all times been willing, and has made such willingness known

to Pacific, to comply with the conditions in Rule 18 for master meter electric service.

Hayward Building

The Hayward Building, located at 22449-22475 Foothill Boulevard in Hayward, is a single building containing nine stores. It is separate from other buildings owned by complainant on the so-called Hayward Strip.

Hayward Building was constructed in 1957. At the time of construction complainant did not request master meter electric service. Pacific now provides direct electric service to each of the nine stores in the building. Electric service to the Hayward Building comes underground from a point outside the premises, then to a vault at the property line.

On July 13, 1959, after Pacific had commenced supplying direct service to each store in the building, complainant requested master meter electric service for the entire building. Pacific refused to provide the requested master meter service by letter to complainant dated August 11, 1959, which states, in part, as follows:

"After considering and reviewing your plan, including factors such as the initial conditions under which the installation was made, the effect on the tenants, the effect on other customers and the eventual over-all results, we have concluded that we should not consent to the proposed resale of electric energy."

Complainant subsequently by letter of its attorneys of February 1, 1960, again made request upon Pacific for master meter electric service. Pacific replied by letter of March 3, 1960, refusing to depart from its previous stand.

Pacific's Rules 16 and 18

The pertinent portions of Pacific's Rules relied upon by complainant are as follows:

Rule 16

Service Connections and Facilities on Customer's Premises

(A) Meter Installations and Miscellaneous Service Equipment on Customer's Premises:

1. Meter Installations:

(c) Master Meters:

A master meter will be furnished and installed by the Company upon application by the owner or lessee of any building where the floors (or portions thereof) or rooms or groups of rooms are rented separately and where electric energy is to be metered and resold by said owner or lessee to the individual tenants as provided in Rule 18. In such cases, the said owner or lessee shall furnish, install, maintain and test the submeters.

Rule 18

Supply to Separate Premises and Resale of Electric Energy

Where the Company has adequate service facilities to supply separate premises, such separate premises, even though owned by the same customer, will not be supplied with electric energy through the same meter, except as specifically provided for in certain domestic service schedules applicable in unincorporated territory.

Unless specially agreed upon, the customer shall not resell any of the electric energy received by him from the Company to any other person or for any other purpose, or on other premises than specified in his application for service.

Owners or lessees of apartment houses or other buildings may resell electric energy to tenants of such houses or buildings, provided either,

1. Such energy is resold at rates identical with the rates of the Company that would apply in the event that energy were supplied to the sub-customer directly by the Company, or
2. The charge to the sub-customer for such energy is absorbed in the rental charge for the premises occupied by him.

In the event that such energy is resold otherwise than as provided for above, the Company shall have the right at its option, either to discontinue service to the customer, or, to furnish electric energy directly to the sub-customer.

Pacific's Change in Applying Rules 16 and 18

The evidence indicates that Pacific for many years prior to 1958 provided master meter electric service to owners or lessees of apartment houses or other buildings upon request whenever the conditions of Rule 18 were met. It appears that some time in 1958 or 1959 Pacific changed its practice consistently granting applications for master meter electric service to owners or lessees of apartment houses but consistently refusing applications for master meter electric service to owners or lessees of other buildings.

The Issue

The issue, according to complainant, is whether under its tariffs, particularly Rules 16 and 18, Pacific had the obligation to furnish master meter electric service upon request if the applicant for such master meter electric service agreed to comply with the conditions respecting charges to sub-meter tenants as set forth in Rule 18 of Pacific.

Complainant takes the position that under Rule 16 Pacific has obligated itself to furnish master meter electric service "where the electric energy is to be metered and resold by said owner or lessee to the individual tenants as provided in Rule 18", and that said rules do not give Pacific discretion when to grant and when to deny master meter electric service.

Defendant, on the other hand, takes the position that its Rule 16 deals only with meter installations; that its Rule 18 deals with supply to separate premises and resale of electric energy; and that on the basis of Rule 18 it has the right to refuse master meter service because said rule provides that resale will not be allowed "unless specially agreed upon".

A witness for defendant and a witness for the Commission staff each testified that defendant's tariffs give Pacific the right to refuse master meter service.

Findings

Upon a careful consideration of the evidence we find as follows:

1. The provision of master meter electric service, under Pacific's applicable tariffs, is at the option of Pacific and subject to agreement by Pacific. We do not construe Rules 16 and 18 of Pacific as does complainant.

2. Pacific did agree to the provision of master meter electric service at the Broadway Shopping Center in Walnut Creek pursuant to its letter of April 28, 1959, subject, however, to the condition, among others, that master meter gas service also be taken.

3. Pacific's electric service and gas service are two separate services, the provision of one being independent of the other. Pacific's tariff schedules for the two services are separate. Said tariffs do not provide for the taking of master meter gas service as a condition to obtaining master meter electric service.

4. Pacific's requiring complainant to take master meter gas service at the Broadway Shopping Center in Walnut Creek as a condition for obtaining master meter electric service is arbitrary and unreasonable.

5. Pacific presently is providing electric service to individual tenants in the Broadway Shopping Center in Walnut Creek pursuant to application for such service by such tenants. It is reasonable that, as a condition to Pacific's providing master meter electric service to a building of complainant in said shopping center, complainant

obtain and file with Pacific an acceptance in writing of this change in service and metering plan from each customer of Pacific in said building and that each such customer notify Pacific in writing of their intention to discontinue electric service from Pacific.

6. The provision of master meter electric service to the ten designated buildings in the Broadway Shopping Center in Walnut Creek generally in accordance with Pacific's offer of April 28, 1959 (Appendix A of this complaint), modified to exclude the requirement that master meter gas service also be taken and further modified to reflect any appreciable changes in depreciated cost of facilities, is reasonable.

7. Pacific should be required to provide master meter electric service to the Broadway Shopping Center in Walnut Creek pursuant to the conditions outlined in 5 and 6 above.

8. At the time of the construction of the Hayward Building, complainant did not request master meter electric service. Pacific never agreed to provide master meter electric service to the Hayward Building. Pacific exercised its option to refuse to provide such service at that location in accordance with its applicable tariffs and has been since the construction of and now is furnishing electric service to the occupants of said building.

O R D E R

Complaint as above entitled having been filed, answer having been filed, hearing having been held, and based upon the evidence and foregoing findings thereon,

IT IS ORDERED that:

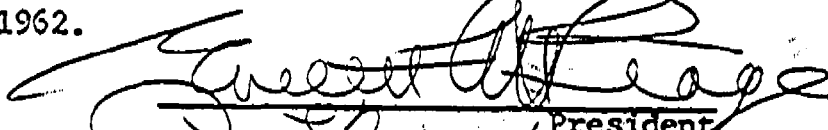
1. Pacific Gas and Electric Company shall furnish, if complainant so desires, master meter electric service to complainant

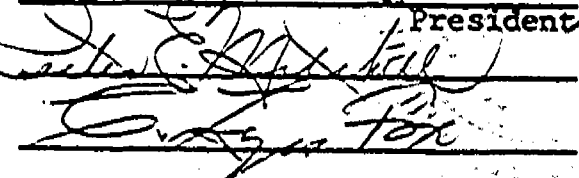
at the Broadway Shopping Center in Walnut Creek by means of master meters for the ten designated buildings shown in Exhibit 21, generally in accordance with Pacific's offer of April 28, 1959 (Appendix A of the complaint), modified to exclude the requirement that master meter gas service also be taken at that location and further modified to reflect any appreciable changes in depreciated cost of facilities. The provision of such service for the ten designated buildings of the Broadway Shopping Center in Walnut Creek is conditioned upon complainant first having obtained and filed with Pacific an acceptance in writing of this change in service and metering plan from all customers of Pacific in said ten buildings and written notification from all such customers of their intention to discontinue electric service from Pacific. Pacific shall not be obligated to provide master meter electric service to said ten buildings unless it has received from complainant within six months of the effective date of this order such an acceptance in writing from each customer of Pacific in said ten buildings and written notification from such customers of their intention to discontinue electric service from Pacific.

2. Complainant's request with respect to the Hayward Building is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 9th day of JANUARY, 1962.



President


Commissioner

Commissioners

I dissent from the order denying master metering for the Hayward Building. I agree with the order granting master metering for the Broadway Shopping Center, but disagree with the reasoning of the majority opinion.

The reliance upon the second paragraph of Rule 18 is misplaced.

That paragraph provides:

"Unless specially agreed upon, the customer shall not resell any of the electric energy received by him from the Company to any other person or for any other purpose, or on other premises than specified in his application for service."

This language is not ambiguous. The phrase "unless specially agreed upon" is applicable only to items other than those specified in the application for service.

P. G. & E. cannot properly rely on the technicality that the written applications for service did not expressly refer to master metering; complainants omitted the master meter request from their formal applications simply because P. G. & E. had already refused to provide it. It is clear that in the beginning complainants did ask for master metering.

The view I take of the tariff provisions makes it unnecessary for me to consider whether enforcing the "consent" of P. G. & E. without the condition which P. G. & E. imposed amounts to the rewriting of a contract. Neither do I reach the question of what the tariff should provide with respect to master metering; a decision on that question may be appropriate in Application No. 42434, still pending.


Commissioner