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ORIGINAL

Decision No. 79811

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MARIE P. BRESSLER, et al., Complainant, vs. BAYSHORE PROPERTIES, INC., a California corporation, Defendant.	Case No. 9186 (Filed January 28, 1971)
MARIE P. BRESSLER, et al., Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, Oakland, California, Defendant.	Case No. 9187 (Filed February 1, 1971)
Investigation on the Commission's own motion into the status, operations, service, equipment, facilities, rates, and records of BAYSHORE PROPERTIES, INC., and into the rules of PACIFIC GAS AND ELECTRIC COMPANY.	Case No. 9206 (Filed March 30, 1971)
BAYSHORE PROPERTIES, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.	Case No. 9217 (Filed April 28, 1971)

Stanley T. Grydyk, Attorney at Law, for White's Ice Cream; Patricia Hubbell, in propria persona and for Joseph Rogers; and Marie P. Bressler, Karen E. Stilwell, and Joseph M. LoGrande, in propriae personae; complainants.
Jacobs, Sills & Coblentz, by William F. McCabe, Attorney at Law, for Bayshore Properties; and John C. Morrissey, John S. Cooper and Robert Ohlbach, Attorneys at Law, for Pacific Gas and Electric Company; defendants.
John S. Fick, Attorney at Law, for the Commission staff.

O P I N I O N

The first of the above-referenced proceedings is a complaint of six commercial tenants of Sun Valley, a regional shopping center controlled by Bayshore.

The complaint alleges that Bayshore by selling electricity to its tenants has become a public utility whose system was constructed without certification and whose rates and operations are not covered by filed tariffs. Secondly, complainants allege that Bayshore is reselling electricity purchased from Pacific Gas and Electric Company (PG&E) in violation of the conditions of PG&E's Rule 18. Complainants seek determination of and an order for repayment of alleged overcharges.

Bayshore contends it is not a public utility and asserts that its charges for electrical energy are absorbed in the rental for the premises in conformity with paragraph C(2) of Rule 18. It further asserts that the Commission lacks jurisdiction to determine a complaint against a nonutility.

The second complaint by seven Sun Valley tenants alleges that PG&E is selling electricity to Bayshore and that the subsequent resale of that energy is in violation of Rule 18. Complainants seek an order that PG&E enforce its Rule 18 and supply complainants directly. PG&E claims a lack of knowledge and belief as to whether Bayshore is violating Rule 18 and asserts that it would be impractical to render direct service.

Case No. 9206 is a Commission investigation instituted for the purposes of determining whether Bayshore is an electrical corporation and whether PG&E's Rule 18 is being violated. The Commission's Order Instituting Investigation also ordered PG&E to present certain evidence and consolidated all three cases.

Prehearing conference was held before Examiner Gilman on March 8, 1971 in Pleasant Hill. After opportunity for exceptions to the Examiner's initial Prehearing Memorandum, an Amended Memorandum was issued on April 22, 1971.

The Memorandum provides for submission to the Commission of certain fundamental questions of law, before hearing, as if made on motion to dismiss.

The announced purpose of partial submission was to determine whether all of the issues presented in the complaints required evidentiary hearing and, in the event that any of them did not, to expedite the taking of evidence.

The questions of law submitted are:

1. Whether a landlord who distributes but does not generate electricity for his own and his tenants' use can be an "electrical corporation" within Section 218 of the Public Utilities Code.

2. Whether a landlord's furnishing of electricity to its tenants under the below-quoted lease provision[1/] violates PG&E's Rule 18.

Since the Examiner's Amended Memorandum was issued, certain other procedural questions have been raised by the parties. It is appropriate to deal with them in this opinion.

1/ "17. Lessor shall supply all electricity required for the conduct of Lessee's business in the demised premises. At the expiration of each leasehold year Lessor shall, through Lessor's electrical engineer, determine the product of the amount of electricity used by Lessee in the demised premises for such leasehold year and the amount therefor which Lessor had to pay for such electricity to the public utility company which furnished the same (said product is hereinafter referred to as the 'adjusted operating expenses'). Should said adjusted operating expenses for any leasehold year be more than the sum of $ (which sum is hereinafter referred to as the 'base operating expenses'), Lessee shall, within ten (10) days after receipt by Lessee from Lessor of a bill therefor, pay to Lessor a percentage of the sum of $ equal to the percentage of such increase in adjusted operating expenses over said base operating expenses. Should said adjusted operating expenses for any leasehold year be less than said base operating expenses, Lessor shall forthwith refund to Lessee a percentage of said sum of $ equal to the percentage of such decrease in adjusted operating expenses below said base operating expenses. In no event shall Lessor be liable for any interruption or failure in the supply of such electricity caused by accident, breakage, repairs, or any other cause beyond the control of Lessor.

"All other utilities, including, without limiting the generality of the foregoing, water and gas, used upon or furnished to the demised premises, and any sewer charge, shall be paid for by Lessee."

Status

Given our interpretation of Rule 18 (below), Bayshore is left with only a few permissible courses of action including:

(a) To renegotiate its leases with all of the tenants served with electricity so that they are in conformity with Rule 18.C(2).

(b) Arrange with PG&E for direct service to all of Bayshore's tenants.

(c) Seek a certificate of public convenience and necessity as an electric utility.

We recognize as a practical matter that the last alternative is likely to be avoided by Bayshore. Bayshore's ability to obtain a certificate of public convenience and necessity would be complicated not only by all of the responsibilites and requirements of utility service but also by their location within the service area of PG&E.

Furthermore, we cannot ignore the possibility that the remaining issues in this proceeding would be determined by settlement rather than litigation.

In light of the above considerations we think it inappropriate to resolve the issues concerning Section 218[2/] at the present time.

Tariff Interpretation

Several views of Rule 18.C(2) are urged upon us. Staff, White's and the remaining complainants support the view that Rule 18.C(2) requires a rental charge which does not vary with electrical consumption. PG&E's position appears to be that any charges, whether

2/ "'Electrical corporation' includes every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this State, except where electricity is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others."

or not they vary with electrical consumption, are permissible so long as they are not "specifically identifiable as electric charges". Bayshore contends that Rule 18.C(2) does not preclude a lease which provides for a rental which may vary directly with electrical consumption.

Rule 18.C(2) cannot be interpreted in isolation; rather it must be considered in connection with the whole of Rule 18. The policy considerations which underlie Rule 18 are discussed in PG&E Revision of Rule 18 (Decision No. 63562, Application No. 42434, 59 P.U.C. 547) which authorized a version of Rule 18 not materially different from that now in effect.

The rule in effect prior to that decision permitted commercial resales with the consent of the company. Domestic resales were permitted either on condition that the ultimate consumers were charged rates identical to PG&E's or that the charge was "absorbed" in the rent.

The rule was modified for the express purpose of preventing PG&E from making future contracts for resale in commercial establishments except with Commission approval or under the absorption clause. Certain long-standing commercial resales were, however, to be permitted to continue.

Under the provision of paragraph D all resales (except absorption) were to be submetered and the utility was expressly given the power, and impliedly the duty, to ensure that the means of determining consumption and billing practices were as accurate as the utility's own.

The provisions dealing with submetered customers are appropriate for tenant charges which vary with consumption. Paragraph D in particular is designed to ensure that the determination of the amount of energy consumed is accurate and beyond dispute.

The absorption provisions, on the other hand, lack any requirements ensuring accuracy of consumption figures. This comparison alone should be sufficient to indicate that Rule 18.C(2) did not contemplate payments which vary with tenant consumption of electricity.

A comparison of all the submetering provisions with those applicable to absorption arrangements further strengthens this conclusion. The submetering provisions authorize submetering only for domestic landlords; commercial landlords cannot institute such a program without Commission approval. Submetering landlords have no freedom to establish or negotiate their own rate structure.[3/] Submetering landlords must assume the expense of providing and ensuring the accuracy of meters.

However, if we adopted Bayshore's interpretation of Rule 18.C(2) the absorption landlord would be able to obtain greater benefits than the submetering landlord without any of the burdens or disadvantages. If such were the interpretation, no rational landlord would be likely to voluntarily elect a submetering program.

Further, the interpretation of Rule 18.C(2) must be consistent with the basic policy set forth in Decision No. 63562, i.e., to encourage the vertical integration of the electrical supply in PG&E's market area by discouraging commercial resales. If Bayshore's interpretation were adopted, Rule 18.C(2) resales would be sufficiently attractive to commercial landlords that the opposite of the intended result would be likely.

3/ The tariff rule differs from that stated in Appendix A to Decision No. 63562 in paragraph (4). The tariff authorizes resale,

> "4. Where the Utility has been authorized or directed by the Public Utilities Commission of the State of California to provide service to a customer for submetering on the same basis as in 3. above;..." [Emphasis added.]

thus incorporating the requirement that the landlord adopt PG&E's rate levels and structure.

Finally, an absorption rule which permitted consumption to be determined by estimate rather than by meter would obviously lead to many disputes about the reliability of the estimates. We cannot attribute to previous Commissioners an intent to foster such disputes.

Therefore, we can only describe the electric supply provisions of the lease which requires some form of estimation of actual usage as providing for commercial submetering without a meter. As such, the arrangement violates the tariff in at least three respects: first, the estimation of consumption is inherently less reliable than metering; second, there was no advance approval by the Commission; and thirdly, the resulting charges would be different from those due if PG&E had rendered direct service.

Failure to comply with Rule 18 leaves Bayshore and PG&E with the alternatives described in Section E.

> "In the event such energy is furnished or resold otherwise than as provided for above, the Utility may either discontinue service to the customer or furnish electric energy directly to the subcustomer."

The parties should, however, have the opportunity to exercise the alternatives hereinbefore discussed and, therefore, the order herein will provide an interval for reconciling the problems prior to termination of service if they are not reconciled.

However, there is nothing under the tariff that can be done to retroactively cure the lack of a method of establishing consumption with reliability equivalent to metering; nor could we, under the tariff, retroactively authorize rates differing from PG&E's. Whatever consumer protection is provided by those tariff provisions became vested rights of the complainants at the time they became mediately served customers of PG&E and cannot now be retroactively abrogated.

As indicated below, the disputes over past transactions will have to be resolved by civil court, if they cannot be settled.

Jurisdiction

While Rule 18 was adopted under our authority, we nevertheless have no jurisdiction to determine the financial damages arising under that rule which exists between Bayshore and its tenants. It is our opinion that such issues are exclusively within the jurisdiction of the civil courts.

Certain of the tenant-complainants have sought discovery of Bayshore's dealings with other non-complaining tenants. We see no connection between the expected product of such discovery and any possible issue within the scope of our jurisdiction over PG&E. Whatever discovery of such matters is necessary should be governed by the court which assumes jurisdiction to determine the mutual rights and liabilities of Bayshore and its tenants.

Conclusions

1. This Commission has no jurisdiction to determine the financial damages of tenants and landlords arising under Rule 18 (electric) of PG&E's tariffs.

2. PG&E may not provide electricity to a customer who is a commercial landlord and who resells the electricity to its tenants under any arrangement whereby the rent varies with an increase in electrical consumption, except subject to the provisions of Rule 18, paragraph C.4 or 5 and under paragraph D.

3. PG&E should be authorized to provide electricity to Bayshore Properties, Inc., at its Sun Valley shopping center until the electrical supply arrangements for all Sun Valley tenants can be brought into conformity with Rule 18, direct service by PG&E can be arranged, or Bayshore has been granted a certificate of public convenience and necessity. The parties should be allowed until June 1, 1972 to make the necessary arrangements.

4. The issues in Case No. 9186 should not be determined at this time.

5. The material sought in complainants' requests for discovery is not material, and would not lead to the production of evidence material to any cause of action stated against PG&E.

6. We have jurisdiction to determine whether PG&E has violated Rule 18 of its electrical tariff.

O R D E R

IT IS HEREBY ORDERED that:

1. Complainants' various requests for discovery of dealings between Bayshore and non-complaining tenants are hereby denied and any subpoenas issued by this Commission in aid thereof are hereby quashed.

2. Pacific Gas and Electric Company (PG&E) is authorized to continue service to Bayshore Properties under present conditions only until June 1, 1972. Bayshore should report to the Commission as soon as one of the alternatives herein set forth has been achieved and the status of the various alternatives if one has not been achieved within sixty days after the effective date of this order. If Bayshore has not submitted verified proof of achieving one of the alternatives by June 1, 1972, PG&E shall report to the Commission within five days thereafter of action taken to conform to Rule 18.

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

Dated at San Francisco, California, this 14th day of MARCH, 1972.

Chairman

Commissioners