

Decision No. 84482

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

VAN NESS RESTAURANT, INC., doing
business as THE HOUSE OF PRIME RIB,
Complainant,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,
a Corporation,
Respondent.

Case No. 9537
(Filed April 10, 1973)

Charles O. Morgan, Jr., by S. Derek Spencer,
Attorney at Law, for Van Ness Restaurant,
complainant.

Howard V. Golub, Louis Schofield, and Kathy
Todrank Graham, Attorneys at Law, for
Pacific Gas and Electric Company, defendant.

O P I N I O N

This is a complaint by Van Ness Restaurant, Inc., doing business as The House of Prime Rib (Prime Rib), against Pacific Gas and Electric Company (PG&E). Prime Rib seeks an order either restraining PG&E from collecting underbilled charges for electric service or granting reparations for that amount.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis in San Francisco on October 10 and November 19, 1973. The matter was submitted subject to the filing of transcript and subsequent briefs, the last of which was received on January 11, 1974.

The general facts surrounding the controversy are not in dispute. The Commission makes the following findings.

Findings of Fact

1. At all times herein mentioned Prime Rib received service from PG&E at its premises located at 1906 Van Ness Avenue, San Francisco, California, through one gas and two electric meters.

2. From September 24, 1969 to February 26, 1972, PG&E underbilled Prime Rib for electricity furnished through one of the meters. The underbilling occurred when a rate change was applied to Prime Rib's account. A multiplier of one (1) rather than the correct multiplier of forty (40) was applied to the readings of the one meter here involved. As a result, Prime Rib was billed a lesser amount than PG&E's applicable tariff rate for the electricity furnished during this period. The total amount underbilled was \$6,670.18. Attached hereto as Appendix A, and by this reference made a part hereof, is a tabulation of the amounts actually billed to Prime Rib and the corrected amounts which should have been billed in accordance with PG&E's tariffs.

3. PG&E discovered the aforesaid underbilling during an audit of accounts on or about April 1, 1972.

4. On April 4, 1972, PG&E sent Prime Rib a letter requesting payment of the underbilled amounts.

5. Prime Rib refused to pay PG&E the sum of \$6,670.18 or any part thereof. On November 8, 1972, PG&E filed an action in the San Francisco Superior Court seeking to collect that amount.

Prime Rib seeks an order restraining PG&E from collecting the underbilling or portions thereof, or in the alternative, reparations in an equivalent amount which would cancel the debt in whole or in part. Prime Rib advances two arguments in support of its position. (1) PG&E should be estopped from collecting the underbilling because Prime Rib believed it had been billed accurately

and properly paid its utility bills and it made financial commitments it would not otherwise make in reliance thereon. (2) PG&E's erroneous billings violated Section 451 of the Public Utilities Code^{1/} which gave rise to a cause of action under Section 2106. The amount of damages recoverable under the alleged cause of action is the difference between the underbilled amount and the tariff charges.

The material issues presented in this proceeding are:

1. Is the doctrine of estoppel applicable to prevent the collection of underbilled lawful tariff charges? If so, should it be applied in this case?

2. Does underbilling lawful tariff charges constitute a violation of Section 451 for which the Commission can grant relief? If so, should such relief be granted herein?

The Commission concludes that the doctrine of estoppel is not applicable to the collection of underbilled lawful tariff charges for the reasons which follow. We first note that we are not here dealing with the situation where the tariff rate itself or the application thereof is alleged to be unreasonable.^{2/} (Section 734.) It is a well established principle of public utility law that a utility "cannot directly or indirectly change its tariff provisions by contract, conduct, estoppel or waiver...." (Mendence v PT&T Co. (1971) 72 CPUC 563, 565; Johnson v PT&T Co. (1969) 69 CPUC 290, 295-96; Transmix Corp. v Southern Pacific Co. (1960) 187 CA 2d 257, 264-66; Pittsburgh, C.C. & St. L.R. Co. v Fink (1919) 250 US 577.)

1/ All code references herein are to the Public Utilities Code unless otherwise noted.

2/ Prime Rib does not contend that the tariff rate is unreasonable and there is no evidence about this in the record.

The principle and its rationale has recently been restated by the California Supreme Court:

"Section 532 forbids any utility from refunding 'directly or indirectly, in any manner or by any device' the scheduled charges for its services. In addition, a public utility 'cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff....' (Transmix Corp. v. Southern Pac. Co., 187 Cal.App.2d 257, 264 [9 Cal.Rptr. 714]; accord South Tahoe Gas Co. v. Hofmann Land Improvement Co., 25 Cal.App.3d 750, 760 [102 Cal.Rptr. 286].) Scheduled rates must be inflexibly enforced in order to maintain equality for all customers and to prevent collusion which otherwise might be easily and effectively disguised. (R.E. Tharp, Inc. v. Miller Hay Co., 261 Cal.App.2d 81 [67 Cal.Rptr. 854]; People ex rel. Public Util. Com. v. Ryerson, 241 Cal.App.2d 115, 120-121 [50 Cal.Rptr. 246].) Therefore, as a general rule, utility customers cannot recover damages which are tantamount to a preferential rate reduction even though the utility may have intentionally misquoted the applicable rate. (See Transmix Corp. v. Southern Pac. Co., *supra*, p. 265; Annot. 88 A.L.R.2d 1375, 1387; 13 Am.Jur.2d, Carriers, § 108, p. 650; United States v. Associated Air Transport, Inc. 275 F.2d 827, 833.)

"These principles are most commonly applied in cases which involve mistaken rate quotations whereby the customer is quoted a lower rate than set forth in the published tariff. Upon discovery of the error, the utility may initiate an action against the customer to recover the full legal charges for the service, as filed and published in rate schedules. (See, e.g., Gardner v. Basich Bros. Construction Co., 44 Cal.2d 191 [281 P.2d 521]; R.E. Tharp, Inc. v. Miller Hay Co., *supra*, 261 Cal.App.2d 81.) In granting recovery to the utility, the courts usually rely on the fact that the rates have been filed and published and have thereby become part of the contract between the utility

and the customer. (Gardner v. Basich Bros. Construction Co., supra, p. 193; Transmix Corp. v. Southern Pac. Co., supra, 187 Cal.App.2d 257, 265.) Under these circumstances the customer is charged with knowledge of the contents of the published rate schedules and, therefore, may not justifiably rely on misrepresentations regarding rates for utility service. (See Transmix Corp. v. Southern Pac. Co., supra, p. 265; 13 Am.Jur.2d, supra, § 108, p. 649; Annot. 88 A.L.R.2d, supra, 1375.)" (Empire West v Southern California Gas Co. (12 C 3d 805, 809-10.)

Prime Rib asserts that the Commission could grant the requested relief under the authority of San Gabriel Water Co. (1948) 48 CRC 87. In the San Gabriel case the Commission stated the principles heretofore discussed. (48 CRC at pp. 88-89.) It appears that while some of the underbillings in the San Gabriel case were for a period of more than six months, "most of the disputed bills were for a lesser period of time, and the record does not clearly indicate the exact dates when the higher monthly charges actually became due...." (48 CRC at p. 89.) The Commission limited the collection of undercharges to a period of six months. The San Gabriel case may be harmonized with the authorities heretofore cited on the basis that six months was an estimate of the time during which higher rates were in effect, and that the collection of undercharges was properly limited to that period of time. To the extent the San Gabriel case is inconsistent with the authorities previously cited and the views herein expressed, it is overruled. Since we have concluded that the doctrine of estoppel is not applicable to prevent the collection of underbilled lawful tariff charges, it is unnecessary to make findings on the evidence presented by the parties as to whether a factual basis for applying the doctrine exists.

Prime Rib next contends that the underbilling constituted a violation of Section 451, which gives rise to a cause of action under Section 2106. It is urged that the quantum of damages in the alleged Section 2106 action is the same as the underbilled amount for which PG&E is suing Prime Rib in the Superior Court and that the Commission should restrain PG&E from prosecuting the Superior Court action or award reparations in that amount. Prime Rib's argument is ingenious but devoid of merit.

Section 451 provides that:

"All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

"Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

"All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

Since Section 532 requires PG&E to collect its filed tariff rates, we hold that it is the reasonableness of the filed tariff rates or the application thereof to which Section 451 refers. As indicated, the reasonableness of PG&E's applicable tariff and its application to Prime Rib is not here in question.^{3/} As a matter of law, a billing required by Section 532 to correct an error cannot be unreasonable under Section 451.

^{3/} See Footnote 2, ante.

Section 2106 provides that:

"Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

"No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt."

However, Section 2106 must be construed in the light of Section 1759 and other sections of the Public Utilities Code. (Waters v Pacific Telephone Company (1974) 12 C 3d 1, 11.) Since PG&E was required by Section 532 to collect its tariff charges, its attempt to rectify the underbillings, when discovered, was not an unlawful act under Section 2106.

No other points require discussion. The Commission makes the following conclusions.

Conclusions of Law

1. The doctrine of estoppel is not applicable to the collection of underbilled lawful tariff charges.
2. PG&E's attempt to collect underbilled lawful tariff charges is not a violation of Section 451.
3. PG&E's attempt to collect underbilled lawful tariff charges is not a violation of Section 2106.
4. Prime Rib is entitled to no relief in this proceeding.

O R D E R

IT IS ORDERED that the relief requested is denied.

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

Dated at San Francisco, California, this 28th day of MAY, 1975.

William J. Lyons, Jr. President
Leonard V. ...
Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Robert Batinovich, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A
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<u>As Billed</u>				<u>Corrected Billing</u>	
<u>Dates</u>	<u>Reads</u>	<u>KWH</u>	<u>Amounts</u>	<u>KWH</u>	<u>Amounts</u>
09/24/69	1298		\$		\$
10/24/69	1559	261	9.90	10,440	234.32
11/25/69	1829	270	10.18	10,800	241.52
12/26/69	2059	230	8.95	9,200	209.52
01/27/70	2326	267	10.08	10,680	239.12
02/26/70	2566	240	9.26	9,600	217.52
03/27/70	2782	216	8.52	8,640	198.32
04/27/70	3011	229	8.92	9,160	208.72
05/27/70	3292	281	10.51	11,240	250.32
06/25/70	3535	243	9.35	9,720	219.92
07/24/70	3809	274	10.30	10,960	244.72
08/25/70	4091	282	10.54	11,280	251.12
09/24/70	4393	302	11.16	12,080	267.12
10/26/70	4660	267	10.08	10,680	239.12
11/25/70	4913	253	9.66	10,120	227.92
12/28/70	5176	263	9.96	10,520	235.92
01/27/71	5464	288	10.73	11,520	255.92
02/26/71	5711	247	9.61	9,880	223.47
03/29/71	5943	232	9.25	9,280	219.10
04/27/71	6168	225	9.00	9,000	213.50
05/26/71	6401	233	9.28	9,320	219.90
06/25/71	6649	248	9.83	9,920	231.90
07/27/71	M			10,780	249.74
08/25/71	7188	539	21.27	10,780	251.08
09/24/71	7474	286	11.25	11,440	264.40
10/27/71	7743	269	10.63	10,760	250.68
11/26/71	M			9,840	232.11
12/26/71	8235	492	19.63	9,840	233.16
01/26/72	8464	229	9.21	9,160	219.37
02/26/72	8704	240	9.61	9,600	228.29
Totals	7,406		\$286.67	296,240	\$6,777.82
Less Amount Billed				7,406	286.67
Corrected Additional Charge				288,834	\$6,491.15
Corrected Additional Tax					179.03
					\$6,670.18

APPENDIX A
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<u>Dates</u>	<u>CITY TAX</u> <u>As Billed</u>	<u>As Corrected</u>
10/26/70	\$	\$
11/25/70	.48	11.40
12/28/70	.48	11.80
01/27/71	.54	12.80
02/26/71	.48	11.17
03/29/71	.46	10.96
04/27/71	.45	10.68
05/26/71	.46	11.00
06/25/71	.49	11.60
07/27/71	M	12.48
08/25/71	1.06	12.55
09/24/71	.56	12.32
10/27/71	.53	12.53
11/26/71	M	11.61
12/26/71	.98	11.66
01/26/72	.46	10.97
02/26/72	.48	11.41
Totals	\$7.91	\$186.94
Less Amount Billed		7.91
Corrected Additional Charge		\$179.03