

Decision 84 06 024

JUN 6, 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WILLIAM PHILLIPS,

Complainant,

vs.

PACIFIC GAS & ELECTRIC COMPANY,

Defendant.

Case 83-06-05
(Filed June 10, 1983)

Fletcher & Fogderude, by Eric K. Fogderude,
Attorney at Law, for complainant.
Andrew Niven, Harry W. Long, Jr., and
Peter W. Hanschen, Attorneys at Law,
for defendant.

O P I N I O N

Introduction

This matter arose as a result of Pacific Gas and Electric Company's (PG&E) discovery of evidence of electric meter tampering at the home of complainant, William Phillips. On July 19, 1982 a PG&E meter reader observed that the outer seal of the electric meter serving complainant's residence was missing. The meter reader replaced the seal and reported the incident to PG&E's revenue protection representative, Dale C. Larsen.

Larsen made a followup investigation on September 17, 1982. Based on his investigation he confirmed that there had been meter tampering by periodically turning the meter upside down to run backwards and erase electric usage from the meter.

On that date Larsen removed the original meter at complainant's residence. He installed a new meter with a special lock ring to prevent further tampering. Based on an analysis of complainant's billing record, PG&E sent a supplemental bill of \$1,184.34 to complainant for unrecorded consumption during the period between August 15, 1980 and the meter change date of September 17, 1982. Since the original meter was resealed on July 19, 1982, PG&E reduced the adjustment to \$952.96 for the period between August 15, 1980 and July 19, 1982.

Complainant contends that neither he nor any member of his family had tampered with the meter. He requests that his money order for the disputed amount be placed in an interest-bearing account.^{1/} Complainant seeks an adjustment of the supplemental billing to zero plus \$1,000 for attorney's fees and costs.

After notice, a hearing was held in Fresno on November 10, 1983. The matter was submitted on that date subject to concurrent opening and closing briefs on the issue of whether notations on the back of checks paid by complainant and deposited by PG&E precluded collection of the disputed amount. After the meter replacement, PG&E billed complainant for the sum of the disputed amount and for current billing amounts. Complainant paid the then current billings. His notations generally stated that the disputed bill has been paid in full. PG&E filed an opening brief on this issue. Complainant did not file any briefs on this issue.

^{1/} Complainant's deposit with the Commission was refunded because it was not made out to the Commission.

Complainant testified that:

1. He purchased his home in October 1976. He, his wife, and three children, ages 13, 11, and 10, now occupy the residence.
2. Between November 1979 and August 1980 he also shared his home with his unemployed brother-in-law and his wife and their three children. When his brother-in-law's family moved out they took a 17-cubic-foot frost-free refrigerator unit with them. That unit was one of two previously operated by complainant.
3. His father and mother visited him about the time of his daughter's May 18, 1980 birthday. His parents occupied their recreational vehicle which was parked in his driveway. This vehicle obtained electrical energy from an outlet in his garage.
4. On May 18, 1980 the power to his home went out. A PG&E serviceman came out, cut the meter seal, and removed and checked the meter. The serviceman informed complainant his main circuit breakers were the cause of his problem. Since the circuit breakers could not be replaced without removing the meter, the serviceman did not reseal the meter.
5. He called Mr. Patterson, an electrician he knew, to make the necessary repairs. On May 19, 1980 Patterson installed new main circuit breakers and installed the outer meter ring which fits around the glass meter housing. He did not reseal the meter.
6. He installed a "Doughboy" swimming pool in his yard in September 1980. Subsequently, he was able to reduce his airconditioning use.

7. Since the replacement of his meter, his average daily electrical use in kilowatt-hours per day (kWhd) dropped below his use during the disputed period between August 15, 1980 and July 19, 1982.

Complainant's wife, Kathaleen Phillips, testified that no one other than PG&E representatives tampered with the electric meter seal at her home; no one turned over the meter; on September 17, 1982 a PG&E representative advised her that her power would be turned off for approximately five minutes to enable him to work on an electrical problem on the block; her husband's testimony was correct.

Erik K. Fogderude, complainant's counsel, testified that he believed complainant is honest based on his business relationship with him; he lived in the same tract as complainant; housing construction throughout the tract was similar; floor areas of the houses ranged from 1,250 to 1,500 or 1,600 square feet; complainant's electrical usage was higher than his.

Fogderude argues that letters from complainant's father and from Sue Wilson, a former neighbor, about the 1980 outage at complainant's home and electrical use by Wilson, not received in evidence, should be considered by the Commission; PG&E's processing of complainant's checks (Exhibit 5) with notations on the back of the checks stating that the disputed bill was paid in full constituted a settlement of the disputed amount accepted by PG&E; and scratches and wear on the prongs of the meter originally installed at complainant's home do not show that complainant tampered with that meter.

PG&E's Testimony

Testimony on behalf of PG&E was elicited through direct examination and cross-examination of Dale C. Larsen which is summarized below.

Larsen has been employed by PG&E for over 15 years. During the last two years he has been employed as a revenue protection representative responsible for investigating reports of possible meter tampering or energy theft. His duties routinely require inspection of metering equipment in the field for signs of tampering, analysis of customer billing records, and interview of customers when his investigations indicate the possibility that unmetered energy was taken from PG&E. He investigated 1,636 individual cases of potential meter tampering in his present position. Based on his investigations 77% of these cases did not involve meter tampering or energy theft.

On July 19, 1982 a PG&E meter reader on his regular rounds noted that the outer seal on the electric meter at complainant's home was missing. The meter reader immediately resealed the meter and advised Larsen of the broken seal for determination of possible meter tampering. Larsen delayed his field investigation to obtain the next regular monthly recorded meter reading after the resealing of the meter. The August 18, 1982 reading of 1,215 kWh was considerably higher than the July 19, 1982 reading of 863 kWh.

On September 17, 1982, Larsen made a field investigation at complainant's residence. He broke the new seal, removed the outer retaining ring used to connect the electric meter to complainant's electric panel. He found: the inside of the ring was relatively clean, free from the accumulated loose dust and

dirt which should have been present; there were an excessive number of shiny scratch marks on the ring (see photos on Attachment A, pages 1 and 3 of Exhibit 2) at its slotted connecting joint. The lack of accumulated dirt on the ring indicated that the ring had been removed or disturbed recently. The scratch marks indicated that the retaining ring had been opened and closed a number of times. Such scratches were caused by abrasive movement of the ring's tongue in and out of the ring slot. The meter ring had to be removed to take the meter out of its socket. In addition, the glass case housing the meter was relatively free of the accumulated dust normally expected at that location. There was no indication that rain or a stream of water washed the dirt off the meter glass. The top of the electric panel housing the meter had an accumulation of dirt on it. He also found that the factory-installed inner seal of the meter which seals the outer glass from the moving parts of the meter was missing. After Larsen removed the meter from the electrical panel he found that the tips of the four meter prongs showed extensive wear, i.e. the exterior metal cladding on the prongs was largely scrapped off (see sheet 4 of Attachment A of Exhibit 2), and irregularities in the jaws of the sockets holding the prongs. Due to repeated insertion and removal of the meter there were distinctive scratch marks on the prongs. Two opposing prongs had parallel scratch marks from one jaw socket indicating that the meter had been repeatedly removed and reinserted upside down. Based on his past experience, Larsen estimated the meter had been removed and replaced at least 50 times. His experience includes a test in which he installed and removed a new meter, and reinstalled it upside down over 300 cycles; viewing other

instances of tampering; discussing the extent of tampering with other customers who admitted they had tampered with their electric meters; and comparing the extent of meter wear for those customers with the number of tampering cycles. Larsen believes that complainant's meter had been reversed during the six-month period prior to Larsen's removal of the meter because the scratches in the meter ring were still shiny. In the periods between Larsen's removal of the meter at complainant's residence, the date photographs of the meter were taken, and the hearing date, he kept the meter in a protective environment to prevent normal field corrosion.

Larsen testified that: he reviewed electrical consumption records for complainant from October 26, 1976 (complainant's move-in date) through September 17, 1982 and a four-year computer analysis of complainant's recorded consumption from July 18, 1978 to September 17, 1982; the computer analysis is a tool to indicate significant variances in electrical use between from one period to another; such variances, in combination with other information, can indicate unmetered energy use. The computer analysis includes three graphs (Attachment B to Exhibit 2) showing average daily use, in kWhd by month; percentage deviations of daily use from the four-year average use per month, and percentage deviations of the average daily use from the two-year period from August 16, 1978 to August 15, 1980. The second graph shows an almost consistent drop in daily use after August 15, 1980. Based on the computer study he believes complainant's meter had been tampered with beginning on or about August 15, 1980. He also notes that minimum monthly consumptions for nearly four years prior to

August 15, 1980 were 569 kWh, 570 kWh, and 621 kWh for May 1978, February 1978, and December 1976; but minimum readings during the meter tampering period dropped to 424 kWh, 444 kWh, and 484 kWh for February 1982, November 1980, and June 1981 (see Exhibit 6).

Larsen used complainant's average daily consumption by billing months between October 16, 1978 and October 15, 1979 as a cap for adjusting complainant's monthly use between August 15, 1980 and July 19, 1982. He recalculated complainant's bills using the rates in effect for each billing period based on the adjusted consumption. The cumulative additional charge for 23 of the 24 months in dispute is \$952.96 (see Attachment C to Exhibit 2).

Larsen also testified that he sought information from complainant which might explain complainant's abnormal usage pattern since the pattern could be due to extreme and consistent conservation efforts, and significant changes in occupancy or in electrical use in complainant's home; but Fogderude advised complainant to refuse to supply information to PG&E.

Larsen testified that the delay in detecting the broken meter seal is due in part to the location of the meter near a palm tree. Furthermore, the meter was normally read over complainant's neighbor's fence at a location 10 to 15 feet from the meter.

PG&E Argument

In its brief, PG&E admits it endorsed and cashed complainant's checks containing payments for current electric service billings containing handwritten notations on the backs of the checks, indicating that the disputed bill is paid in full. But PG&E argues that:

"There cannot be an accord and satisfaction or release from liability of a required tariff charge by a public utility where a

debtor tenders a check for less than the full amount, the check is marked as payment in full for any amount owed, and the utility endorses and cashes the check.

"A public utility is required by law to charge reasonable rates, which are subject to the jurisdiction of the Commission. (Cal. Const., Art. XII, Sec. 23; Pub. Util. Code sections 451, 453, 454, 491, 495, 532). In particular, Public Utilities Code Section 532 requires each public utility to charge its customers according to the rates on file with the Commission and prohibits the utility from extending any privilege to one customer not extended to all similarly situated customers. Public Utilities Code Section 453(a) also prohibits the utility from granting anyone an advantage as to charges or service. Applying these Public Utilities Code Sections to a circumstance of meter tampering recently in the case of Jerry L. Perez v. Pacific Gas & Electric, Decision 83-11-018 (November 2, 1983), this Commission held, 'Thus, if the utility discovers that it has--inadvertently or otherwise--extended the "privilege" of free electricity to a customer, that utility is obligated to collect the value of that free electricity, as set forth in the utility's tariffs, from the customer.'

"Having determined the value of the free electricity to a customer (such as Complainant Phillips) whose meter has been tampered with, the public utility cannot by contract, conduct, estoppel, or waiver directly or indirectly increase or decrease the published tariff rate until the published tariff itself is changed; the rate when published becomes established by law and can be varied only by law and not by act of the parties. ... (Citations omitted.)"

PG&E further argues that in James B. Packard v. Pacific Telephone and Telegraph Co. (1972) 73 CPUC 307, 308, the Commission stated:

"It would appear that Complainant is under the misapprehension that utility rates are a private contract matter between the utility and the customer. This is not so. Just and reasonable rates are set by this Commission (Public Utilities Code, Section 451) and the utility is required to charge those rates, and no others, unless with the special permission of the Commission. Public Utilities Code, Section 453."

"In an early case the California Supreme Court recognized this distinction between private contracts and utility rates:

'The statute expressly forbade the plaintiff to charge or receive compensation for electrical energy at any rate other than the specified in the contract duly filed. It therefore could not lawfully accept the amounts tendered by the defendant. In view of this situation counsel for the plaintiff very pertinently inquired, "How can the law imply that plaintiff has done that which the statute expressly forbids?" We think the answer must be that a contract of accord thus arising cannot properly be brought into being with one of the essentials of a contract lacking, to wit, a lawful subject matter.' Sierra and San Francisco Power Co. v. Universal Electric & Gas Company, 197 Cal. 376, 387 (1925)."

"The Commission has explicitly found this well-settled rule controlling where a customer has sent a partial payment to a utility with the notation 'payment in full,' and the utility has cashed the check. The case in point is Bert C. Johnson v. P. T. & T. Co. (1969) 69 CPUC 290. . . ."

* * *

"The ruling in the Johnson case was cited favorably and applied to different circumstances in San Mateo Junior College District v. P. T. & T. Co. (1974) CPUC 197, 203-04.

"The facts in the instant case on this issue are not materially distinguishable from those in Johnson v. P. T. T., supra."

Discussion

Larsen has developed expertise in detecting electric meter tampering, including tampering by turning meters upside down to run backwards and erase electric usage from the meter. Larsen's testimony establishes that complainant's electric meter had been tampered with within a six-month period before his field investigation. His investigation was set up after a meter reader reported a broken meter seal on the meter serving complainant. Larsen observed: shiny scratch marks in the inner portion of the outer meter ring at the location the ring is joined together; a lack of accumulated dust and dirt inside the outer meter ring and on top of the glass meter housing and the presence of accumulated dust and dirt on top of the meter panel; the factory-installed inner meter ring was missing; extensive wear on the tips of the meter prongs; there were distinctive scratch marks from a socket jaw on two opposing meter prongs.

We conclude that the tampering involved repeated cycles of removal of the meter, reinstallation of the meter in both upside down and normal positions. Since the meter serving complainant clearly was tampered with we must determine both whether PG&E may assert a claim for disputed amounts and whether PG&E's adjustment is reasonable.

We agree with PG&E's argument, summarized above, that it can claim disputed billing amounts even though it endorsed and deposited complainant's checks containing notations that the bills had been paid in full. Complainant did not choose to brief the issue it had raised.

At the time this complaint was filed, PG&E's tariffs did not address PG&E's right to collect for residential meter underregistrations in excess of three months even though the underregistration occurred over a longer period. PG&E's then effective Rule 17(B)2 was aimed at defective equipment, not at errors caused by fraudulent acts of customers or other persons having access to the meters. The meter serving complainant is installed on the side of his house.

The Perez complaint is another case involving unauthorized use of utility service. In D.83-11-018 in that proceeding, we concluded that allowing a customer to have any electricity which he or she may have received by fraudulent means beyond the three-month backbilling limitation of this rule is clearly granting an advantage or privilege in violation of Public Utilities (PU) Code Sections 453(a) and 552. In this

case, PG&E backbilled for unmetered energy between August 15, 1980 and September 17, 1982 on November 16, 1982. Its corrected billing for the 24-month period between August 15, 1980 and July 19, 1982 (the date the meter was resealed) was mailed on March 18, 1983.

Complainant argues that certain comparisons of his use by months show increases during the purported tampering period compared to the "pretampering period"; PG&E's adjustments do not reflect increased consumption due to the presence of a second family in complainant's home for seven months;^{2/} PG&E's estimates do not reflect reductions in complainant's consumption due to his conservation efforts which reflect his actions with respect to PG&E's conservation advertising and to his efforts to reduce his electric bill; complainant's consumption of electricity has gone down since Larsen installed a new meter at complainant's residence. However, we find that Larsen's testimony on meter tampering, together with his testimony on the results of his computer analysis, establishes that complainant's meter had been tampered with in the billing period beginning August 15, 1980 and a pattern of reduced consumption existed until the meter was resealed on July 19, 1982. After PG&E installed a new meter, complainant made substantial reductions in his use to levels below those of the pretampering period to 526 kWh, 531 kWh, and 532 kWh for May 1983, February 1983, and October 1982. The level did not drop to the readings

^{2/} At the hearing, another PG&E employee testified that PG&E's existing revenue protection computer program could not handle an adjustment excluding consumption during the time two families lived in complainant's home.

of 424 kWh, 444 kWh, and 484 kWh during the tampering period. The rebilling period between August 15, 1980 and July 19, 1982, used by PG&E, is reasonable.

The remaining issue is the reasonableness of PG&E's substitution of average daily consumption by billing months between October 16, 1978 and October 15, 1979 as a cap for adjusting complainant's bills during the 24-month adjustment period. We recognize that estimates of amounts of unmeasured electricity resulting from meter tampering are necessarily imprecise because there is no way to know precisely when the meter was inverted or for how long. However, we find that the \$952.96 adjustment calculated by PG&E is reasonable and that complainant is not entitled to any modification of that adjustment. Furthermore, at the time Larsen adopted the surrogate average monthly consumptions for backbilling purposes, he was unaware that two families shared complainant's residence between November 1979 and July 1980 since neither the surrogate base period or 24 months adjustment period includes the period between November 1979 and July 1980, the additional incremental use of that second family is not included in PG&E's adjustment. We have no basis for determining the net effect on complainant's electrical use due to his use of a swimming pool and to a possible reduction of his airconditioning use, but this argument cannot explain large declines in usage throughout the adjustment period.

Findings of Fact

1. On July 19, 1982 a PG&E meter reader observed that the outer seal of the electric meter serving complainant's residence was missing. The meter reader replaced the seal and reported his observation to Larsen, a PG&E revenue protection representative.

2. Larsen found several indications of recent electric meter tampering at complainant's home and evidence that the meter had been periodically removed and alternately reinserted in upside-down and normal positions. Inserting the meter in an upside-down position caused it to run backwards, thus deducting from, rather than adding to, the measurement of electricity being used.

3. A computer analysis establishes that complainant's meter had been tampered with in the billing period beginning August 15, 1980 and that a pattern of reduced consumption existed until the meter was resealed on July 19, 1982.

4. PG&E sent a supplemental bill of \$1,184.34 to complainant for unrecorded consumption during the period between August 15, 1980 and September 17, 1982, the date Larsen changed the meter. Since the original meter was resealed on July 19, 1982 Larsen reduced the adjustment to \$952.96 for the period between August 15, 1980 and July 19, 1982.

5. Complainant contends that neither he nor any member of his family tampered with the meter. He requests that PG&E's supplemental billing should be reduced to zero and that he receive an additional amount of \$1,000 for attorney's fees and costs.

5a. D.83-04-017 concerning awards of attorney fees requires a showing that a party's factual or legal contention(s) or recommendations were adopted as a condition to an award of attorney fees.

6. PG&E backbilled complainant for a 24-month period to recover estimated unmetered consumption resulting from complainant's unauthorized use of electric consumption. PG&E substituted average daily consumption by billing months between October 16, 1978 and October 15, 1979 as a cap for adjusting complainant's bills during the 24-month adjustment period.

7. PG&E presented its supplemental bill reflecting substituted consumption for 23 of the 24 months between August 15, 1980 and July 19, 1982.

8. At the time the complaint was filed PG&E's Rule 17 did not address PG&E's right to collect for residential meter underregistrations due to unauthorized use of electricity. PU Code Sections 453(a) and 532 prohibit granting an advantage or privilege to a customer without Commission authorization.

9. After receipt of PG&E's supplemental billing for unauthorized use of electricity complainant sent checks containing the notations that his bills had been paid in full. PG&E endorsed and deposited several of complainant's checks with such notations.

Conclusions of Law

1. Unmetered electricity was consumed at complainant's residence between August 15, 1980 and July 19, 1982.

2. PG&E has an obligation under PU Code Sections 453(a) and 532 to collect undercollections from complainant for diversion of electricity caused by inverting the electric meter at his residence during that period.

3. PG&E's method of estimating the amount of its undercollections from complainant is reasonable.

4. Strict application of the three-month limitation in PG&E's then existing Rule 17 would violate PU Code Sections 453(a) and 532 in that these sections prohibit the utility from granting any customer an advantage or privilege. Allowing a customer to have any electricity which he or she may receive by fraudulent means beyond the three-month billing limitation of the then existing rule would be clearly granting an advantage or privilege.

5. PG&E can claim the disputed billing amounts even though it had endorsed and deposited complainant's checks containing notations that the bills had been paid in full. Any restriction preventing PG&E from collecting those amounts would be in violation of PU Code Sections 453(a) and 532.

6. Since complainant did not prevail, it is unnecessary to consider whether attorney fees should be awarded.

7. The relief requested by complainant should be denied.

O R D E R

IT IS ORDERED that the complaint is denied.

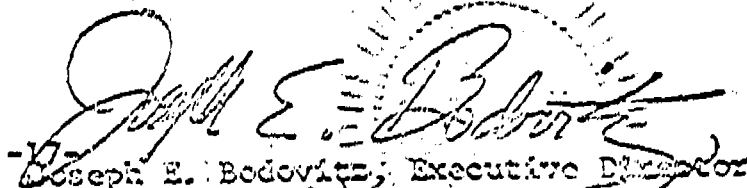
This order becomes effective 30 days from today.

Dated June 6, 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Priscilla C. Grew,
being necessarily absent, did
not participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


-10- Joseph E. Bodovitz, Executive Director

dirt which should have been present; there were an excessive number of shiny scratch marks on the ring (see photos on Attachment A, pages 1 and 3 of Exhibit 2) at its slotted connecting joint. The lack of accumulated dirt on the ring indicated that the ring had been removed or disturbed recently. The scratch marks indicated that the retaining ring had been opened and closed a number of times. Such scratches were caused by abrasive movement of the ring's tongue in and out of the ring slot. The meter ring had to be removed to take the meter out of its socket. In addition, the glass case housing the meter was relatively free of the accumulated dust normally expected at that location. There was no indication that rain or a stream of water washed the dirt off the meter glass. The top of the electric panel housing the meter had an accumulation of dirt on it. He also found that the factory-installed inner seal of the meter which seals the outer glass from the moving parts of the meter was missing. After Larsen removed the meter from the electrical panel he found that the tips of the four meter prongs showed extensive wear, i.e. the exterior metal cladding on the prongs was largely scrapped off (see sheet 4 of Attachment A of Exhibit 2), and irregularities in the jaws of the sockets holding the prongs. Due to repeated insertation and removal of the meter there were ⁴⁸⁰ distinctive scratch marks on the prongs. Two opposing prongs had parallel scratch marks from one jaw socket indicating that the meter had been repeatedly removed and reinserted upside down. Based on his past experience, Larsen estimated the meter had been removed and replaced at least 50 times. His experience includes a test in which he installed and removed a new meter, and reinstalled it upside down over 300 cycles; viewing other

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5. PG&E can claim the disputed billing amounts even though it had endorsed and deposited complainant's checks containing notations that the bills had been paid in full. Any restriction preventing PG&E from collecting those amounts would be in violation of PU Code Sections 453(a) and 532.

6. The relief requested by complainant should be denied. Since complainant did not prevail, it is unnecessary to consider whether attorney fees should be awarded.

O R D E R

IT IS ORDERED that the complaint is denied.

This order becomes effective 30 days from today.

Dated JUN 6 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Priscilla C. Crew.
being necessarily absent, did
not participate