ALJ/EA/jc

Decision 84 07 103 JUL 18 1984 ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cleancraft, Incorporated, a California corporation, Complainant, vs. San Diego Gas & Electric Company, Defendant.	Case 82-02-02 (Filed February 5, 1982)

McLean & McLean, by Donald F. McLean, Jr., Attorney at Law, for complainant.
Maya Sanchez, Attorney at Law, for defendant.
Carol B. Henningson, Attorney at Law, for Southern California Edison Company; David J. Gilmore, Attorney at Law, for Southern California Gas Company; and A. Kirk McKenzie, Attorney at Law, for Pacific Gas and Electric Company; interested parties.

ORDER AFTER REHEARING

On June 29, 1983 this Commission issued Decision (D.) 83-06-092. The decision arose out of a complaint filed by Cleancraft, Incorporated (Cleancraft) against San Diego Gas & Electric Company (SDG&E) and had to do with procedures followed by the company for backbilling for commercial meter error. The tariff provision in question was SDG&E's Rule 18.B.3., which regulates undercollection where no customer fraud is involved. The rule makes a distinction between underregistrations of three months or less and those of more than three months.

Based on the evidence presented, we concluded that the utility should not be permitted to backbill for underregistrations exceeding three months without first initiating a proceeding before this Commission to determine the nature of any such underregistration. We ordered that SDG&E file an advice letter with us proposing a revision of Rule 18.B.3. reflecting this requirement.[1/]

Additionally, we noted in the decision that other regulated gas and electric utilities have rules similar to SDG&E's Rule 18.B.3. So, we also ordered the Executive Director to serve a copy of the decision on each such utility. And, finally, we ordered that each of these utilities also file advice letters like the one we were requiring of SDG&E.

Within a short time, we received a joint petition for rehearing from Southern California Gas Company (SoCal Gas) and Pacific Gas and Electric Company (PG&E), as well as petitions for modification from Southern California Edison Company (Edison) and SDG&E.

The joint application of SoCal Gas and PG&E addressed the legal propriety of our issuing an order directed to utilities who were not parties to the underlying adjudicatory proceeding and alleged that factual differences made it inappropriate to apply D.83-06-092 to them in any case. Edison's petition said essentially the same thing.

1/ SDG&E complied by advice letter filed December 14, 1983. Its amended tariff became effective on January 13, 1984.

SDG&E's petition for modification differed from the others. It asked for two things:

1. An extension of the effective date of Ordering Paragraph 4 of D.83-06-092, and
2. A rehearing of that portion of the decision ordering revision of Rule 18.B.3.

By D.83-10-091 dated October 19, 1983, we ordered a rehearing limited to the issue of whether the tariff revision ordered in D.83-06-092, with respect to SDG&E, should be extended to other regulated gas and electric utilities.

The hearing was held in the Commission's Courtroom in Los Angeles on February 21, 1984 before Administrative Law Judge (ALJ) Colgan. The matter was submitted that day subject to receipt of concurrent posthearing briefs due on March 13, 1984.

It was our intent in ordering the hearing not to confine our inquiry to the legal issues but rather, as the ALJ stated at the outset of the hearing, we also wanted all the participants to be heard regarding the substance of the ordered revisions.

Propriety of Original Order

In their petitions the parties cite various federal court decisions for the proposition that we overstepped our jurisdiction by promulgating a rule of widespread or general application in an adjudicatory rather than a rulemaking proceeding. The federal cases are not persuasive authority here since they deal with acts of various federal administrative agencies (the NLRB, FTC, and INS) which failed to act in accordance with the federal Administrative Procedures Act (APA). We are not bound by the APA. Rather, we are bound by our State Constitution and statutory law and we need not look beyond them for direction in this matter.

Article XII, Section 2 of the Constitution says: "Subject to statute and due process, the commission may establish its own procedures. . . ." (Emphasis added.) Public Utilities (PU) Code Section 1708 states in relevant part: "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. . . ." (Emphasis added.) It cannot be denied that utility tariff provisions are orders or decisions made by this Commission. Further, in California Trucking Association v Public Utilities Commission (CTA v PUC) (1977) 19 C 3d 240, 137 Cal Rptr 190, the California Supreme Court held that opportunity to be heard, "as provided in the case of complaints", is spelled out in PU Code Sections 1701-1706. The Court states: "Section 1705 requires a hearing at which parties are entitled to be heard and to introduce evidence..."

We agree with the claim of petitioners that Ordering Paragraph 4 in D.83-06-092 did not comply with CTA v PUC or PU Code Section 1708 insofar as it required utilities which had not received notice or an opportunity to be heard to file tariff changes. However, D.83-10-091, in which we ordered rehearing and found that the utilities which had filed petitions were "parties" for purposes of PU Code Section 1731, remedied the notice deficiency, at least as to them, and the rehearing held on February 21, 1984 remedied the hearing deficiency.

Substantive Showing by the Parties

Each of the four participating parties at the rehearing presented the prepared testimony of one witness regarding the substance of the ordered tariff revision. No staff was present at the hearing. The only cross-examination was by the ALJ. The resulting record provided the following information.

SDG&E

SDG&E submitted the prepared testimony of William E. Osborne, Jr., a senior commercial industrial representative in the Customer Energy Management Department (Exhibits R-1 and R-2).

Osborne stated that he helps develop policies and procedures for billing commercial accounts. It is his position that the changes we required of SDG&E in D.83-06-092 are unnecessarily burdensome. In support of this position he testified that SDG&E issued 32 backbills in 1983 for nonfraudulent commercial meter errors of more than three months' duration, none of which were disputed by the customer, though seven were for amounts between $1,000 and $5,300. The longest backbilling period was for 24 months. The average was 10.2 months.

Osborne testified that review by the Commission should, in his opinion, be limited to disputed bills. Further, he recommended retaining unchanged the language of Rule 18.B.3. since SDG&E normally had no problems with it.

When asked why the rule made an apparent distinction between unbilled commercial electrical usage for up to three months and to such use in excess of three months, he stated that "this was done way before my time" (RT 517) and that he was not aware of any reason for the distinction. (We note that the interpretation of this distinction was a major issue in the original Cleancraft proceeding.)

SoCal Gas

SoCal Gas called Robert B. Puckett, tariff analyst (Exhibit R-3). It is his position that the requirement the Commission made in D.83-06-092 is an unnecessary burden on both the Commission and SoCal Gas. He testified that there were 44

rebillings for undercollection of more than 90 days' duration on commercial accounts in 1983, all of which were resolved to the satisfaction of the customer and the utility. One was for over $131,000. Ten were for over $10,000. Each was paid in a lump sum, though payment arrangements will be made if a customer requests them. Of the original amount billed, only six were negotiated so that a different amount (smaller) was finally paid. He also testified that these adjustments usually occur on billings for estimated usage. Puckett explained that most underbilling is a result of meter error. There are several causes for meter error. Once the cause is determined, the error can be precisely calculated except where the cause is a gradual or complete failure of the meter. In these cases consumption must be estimated. He was unfamiliar with the exact meter-checking schedule, but testified that for a few very large users it is weekly or biweekly, while for others it may be every six months, 12 months, two years, or five years. He noted that one reason customers do not dispute the rebillings is that many large customers closely monitor their own gas usage, so they know when they are being underbilled. Sometimes, he said, they have contacted SoCal Gas to ask that their meters be checked for underregistration. He also explained that some large underbillings, such as the one for $131,000, occur because an unavailable meter part needs to be replaced. He noted that because large customers, such as this one, do their own monitoring, they are "generally aware that there has been some problem and are grateful for the use of their money for the period of time that they didn't have to pay their bill until such time as the company contacts them." (RT 541.)

Further, he claimed that meters tend to underregister more than overregister because they are adjusted slightly under actual use and because wear and tear tend to slow them down (RT 538).

PG&E

PG&E presented the testimony of John T. Crews, director of the Consumer Affairs Section of the Customer Operations Department. It is Crews' position that Ordering Paragraph 4 of D.83-06-092 should not apply to PG&E.

Crews testified that PG&E's Rule 17.B.3. is the rule that Ordering Paragraph 4 would affect in both electrical and gas operations. He stated that when a commercial metering error is discovered, "typically a PGandE representative attempts to contact the customer personally to make an appointment to discuss the retroactive charge before the bill is delivered to the customer." (Exhibit R-4, page 3.) He said the phrase "subject to review by the Public Utilities Commission" is interpreted by PG&E as a reference to PG&E's Rule 10.B.2. which describes informal Commission review of disputed bills (i.e., review by our Consumer Affairs Branch). When he was asked whether the phrase "subject to review by the Public Utilities Commission" could not say "subject to Rule 10.B.2.", Crews agreed that that is what he would do if he were drafting the rule now (RT 550).

He also noted that while Rule 10.B.2. requires the commercial customer to make a deposit of the disputed amount with the Commission, "PGandE has agreed to waive this requirement in most cases." (Exhibit R-4, page 4.)

Crews testified that PG&E had 468,697 electric meters and 180,311 gas meters in service in October 1983. Though PG&E does not compile data in the format the other utilities do, Crews found that for the first quarter of 1983 there were a total of 33 commercial backbills issued for underbillings in excess of three months' duration. Of these, 18 were for electric and 15 were for gas. The median backbill was for $954; the highest was $177,882. The longest backbill was for 29 months. Crews' testimony also showed that of the 33 backbillings for the first quarter of 1983, five were canceled, 19 were paid immediately--either in full or as adjusted, and nine were paid in monthly payments ranging from three months to 24 months in duration (Exhibit R-5). Further, Crews stated that there is no company-imposed limit on how long these payments may be extended. In cases of hardship, he said, the repayment period may be even longer than the underbilled period (RT 544).

Crews also stated that a check of all the formal complaints filed against PG&E in the last two years showed that none of them involved nondomestic customer backbillings for meter underregistrations of over three months' duration. And, he pointed out that in 1983 PG&E filed a total of only 29 formal applications with the Commission. Thus, he concluded that assuming the figures for the first quarter of 1983 are representative, the change required by Ordering Paragraph 4 would cause PG&E to jump from 12 applications to around 144 applications and of these about 132 would be essentially uncontroverted underbilling verifications which would not achieve "any material benefit for either PGandE or its ratepayers."

When Crews was queried about the language in Rule 17.B.3., regarding the three-month distinction, he testified the distinction he makes is simply that if there is sufficient proof to indicate that a meter error has existed in excess of three months, but no precise date when the error began can be ascertained, then PG&E is limited to backbilling for three months only.

Edison

Linda L. Carpenter, regulatory specialist in its Revenue Requirements Department, testified on behalf of Edison. It is her position that it is inappropriate for the Commission to apply Ordering Paragraph 4 of D.83-06-092 to Edison.

In support of that position Carpenter testified that application of Ordering Paragraph 4 would require Edison to revise its tariff Rule 17 entitled, "Meter Tests and Adjustments of Bills for Meter Error", which is different from SDG&E's Rule 18.B.3. in that reference to backbilling for underregistrations being subject to Commission approval was deleted in 1956 when the Edison rule was "modernized". She also testified that Edison's policy is to hold off on the issuance of disconnection of service notices while a disputed bill is being reviewed by Edison or by the Commission in the informal or formal complaint processes.

Carpenter estimated that approximately 40 to 50 backbillings for periods in excess of three months are presented to commercial customers annually. There were 19 such bills issued in the six-month period from July 1, 1983 to December 31, 1983. Of these, seven were for over $1,000--the highest being for $11,557. That one was for 6.75 years and was paid in full in one payment. All others were for less than one year. Of them, two, each for about a year and each over $4,000, are being paid on extended payment schedules (12 months and 36 months). Carpenter stated that no bill of the type in issue

here has been the subject of an informal complaint to the Commission in at least two years nor the subject of a formal complaint in at least five years.

Carpenter claimed that application of Ordering Paragraph 4 to Edison would require the following extra work for Edison personnel: preparation of an application to the Commission in each of the 40 to 50 cases annually, interface with Commission staff, possible responses to data requests, and possible participation in hearings. These activities would require involvement of Edison's Customer Service Department, Revenue Requirements Department, and Law Department. She noted that it would likely impose a similar burden on Commission staff. She concluded that in light of Edison's successful resolution of these billings, such increased administrative burden is unwarranted.

Discussion

In our initial Cleancraft decision (D.83-10-091) we said at page 4:

> "The Commission agrees with Cleancraft that a customer facing the threat of termination in circumstances such as these should not be required to file a complaint in order to obtain a hearing forum. Rather, the rule should be clarified to indicate that the utility must initiate a proceeding before this Commission to determine the existence or extent of any underregistration of over three months in length. The customer has the right to a Commission decision prior to the issuance of a back bill in such an instance."

After hearing the parties to the rehearing proceeding, we conclude that our focus was inappropriate when we identified the problem as being the <u>means</u> of resolution available to the customer. The evidence upon rehearing has made it abundantly clear that the great majority of the proceedings which Ordering Paragraph 4 directs the utilities to initiate would simply reiterate facts everyone already agreed to. It is far better that no one waste time with such matters.

The real problem for Cleancraft was not the procedure, but the threat of service termination and the question of whether the only way it could avoid the threat of such termination was to deposit the very large amount of money in dispute while the matter was being decided.

The tariffs of each of the participant parties contain a provision which states that in lieu of paying the disputed bill, the customer may deposit that amount with the Commission while the Commission reviews the basis for the billing and that service will not be terminated for nonpayment of the disputed bill pending Commission review <u>if</u> the deposit has been made. (SDG&E's Rule 10, SoCal Gas' Rule 11, PG&E's Rule 10, and Edison's Rule 10.) PG&E's rule has a unique provision which applies only to residential customers. It says: "A residential customer who is unable to pay the full amount in dispute will not be required to deposit the disputed amount during Commission review." PG&E's witness testified that despite its tariff, PG&E has generally agreed to waive the deposit requirement as to commercial customers' disputed bills. Such waiver, of course, is just a matter of not enforcing a tariff. So, while it might be the equitable thing to do, especially when dealing with a small commercial customer with a very large backbill, it is really an insufficient solution.

The factual situation in Cleancraft, together with the language of these provisions, lead us to the conclusion that, in the case of SDG&E at least, the deposit requirement needs to be reexamined for flexibility. Some possibilities are: restricting the deposit amount to only a portion of the backbill when it is for an extended period--say, in excess of three months, or notifying the customer (at the time it is determined that the customer and the utility have failed to agree on the amount) that the customer must deposit the full amount with the Commission or in lieu thereof (1) be granted a waiver by the utility, or (2) request the Commission to set a reasonable deposit based on the written assertions of the customer and the utility. Perhaps there are other possibilities.

We think this approach is particularly appropriate when applied to SDG&E because its backbilling seems less flexible than that of the three other participant utilities. For example, SDG&E claims to have an unwritten policy which forbids it from offering payment terms in excess of six months no matter what burden this might place on the customer. By contrast, each of the other utilities described a policy of reasonable application to the individual situation when dealing with payment arrangements. Further, we calculate from the somewhat incomplete data furnished by each of these utilities that the average time span of SDG&E's backbills of over three months is far greater than that for the others. They are approximately as follows:

SDG&E	10.2
SoCal Gas	6.7
PG&E	6.4
Edison 2/	5.0

2/ This calculation was made after removing one atypical, very extraordinary billing from the list.

We do not know the reason for this. Perhaps it has to do with frequency of meter checks. There is not a sufficient record on this issue to determine that.

We realize that in formulating the issue as we just have, we have moved away from the rule we notified the parties we intended to address. That meter error rule (SDG&E's Rule 18, SoCal Gas' Rule 16, PG&E's Rule 17, and Edison's Rule 17) is unquestionably a problem and we think the problem has arisen in part because each of these utilities has amended its rule in a piecemeal fashion on one occasion or another to comply with an order of this Commission. Unfortunately, they failed to look at the entire context of the rule in doing so. Consequently, all but Edison have language retained for no apparent reason which perpetuates questions about proper interpretation.

This hearing has convinced us that the problem arising out of Cleancraft was unusual. Therefore, we are not inclined to go forward with implementation of Ordering Paragraph 4 of D.83-06-092, nor are we ready to make any other broadly based order just yet. We would prefer to give the utilities an opportunity to take a careful look at their own tariffs and perhaps "modernize" them as Edison did once in 1956. For that reason, among others, we have issued Order Instituting Investigation (OII) 84-05-046. That OII will also address the adoption of rules relating to customer deposits pending resolution of such billing disputes.

In the meantime, however, we believe the evidence does not warrant the extension of our Cleancraft decision to any utility beyond SDG&E.

And, as to SDG&E, we agree with its contention that the revision ordered by D.83-06-092 does not really remedy the problem Cleancraft faced. Therefore, we will direct SDG&E to withdraw the amendment it has added to Rule 18.B.3. effective January 13, 1984 and we will await the outcome of OII 84-05-046.

Findings of Fact

1. The Commission, in D.83-06-092, attempted to extend Ordering Paragraph 4 to parties other than the participants to the proceeding.

2. Three nonparticipants objected to application of Ordering Paragraph 4 to them or other nonparticipants on jurisdictional grounds and on grounds of substantive differences.

3. All of the parties participating in this rehearing, including SDG&E, resolved all disputes involving backbills to commercial customers for a period of over three months during 1983 without Commission intervention.

4. The primary problem posed in Cleancraft was not the means of resolving a billing dispute, but the question of whether continuation of service pending resolution of a disputed bill could only be assured by depositing a very large amount of money with this Commission.

5. Requiring the utilities to apply to the Commission before issuing a backbill for a period of more than three months does not ameliorate the problem which was posed in Cleancraft.

6. SDG&E has a more rigid policy for dealing with disputes involving backbilling for underregistration to commercial customers than do the other rehearing participants.

Conclusions of Law

1. While extension of Ordering Paragraph 4 of D.83-06-092 to utilities which were not parties to the proceeding violated statutory and constitutional requirements, those requirements were met by the notice provided in the Commission's order granting rehearing, D.83-10-091, at least as to those parties which filed petitions with the Commission and participated in the rehearing.

2. The language of the meter error tariff of each of the participating parties (SDG&E's Rule 18, SoCal Gas' Rule 16, PG&E's Rule 17, and Edison's Rule 17) tends toward ambiguity and confusion of interpretation. However, the Commission should refrain from imposing any amendment to them at this time, since OII 84-05-046 will address these problems.

3. Ordering Paragraph 4 of D.83-06-092 should be rescinded.

IT IS ORDERED that:

1. Paragraph 3, beginning with "The Commission agrees...", of page 4 of D.83-06-092 is deleted and replaced by the following:

> The Commission agrees with Cleancraft that a customer should have the opportunity to have a forum to contest its claim of inappropriate overbilling without being subjected to threat of shutoff for failure to deposit the entire amount in dispute where, as here, the amount was allegedly accrued over a very long period of time and was very large. We believe this problem will be remedied as a result of our pending proceeding in OII-84-05-046.

2. Paragraph 4 at page 4 of D.83-06-092 is amended by deleting "As the rule stands..." and replacing it with "As Rule 18 stands..."

3. Finding of Fact 12 at page 20 of D.83-06-092 is deleted.

4. Conclusion of Law 7 at page 21 of D.83-06-092 is deleted.

5. Ordering Paragraphs 3 and 4 at pages 21 and 22 of D.83-06-092 are deleted.

6. SDG&E's petition for modification is granted to the extent that SDG&E shall, within 30 days, file an advice letter with this Commission proposing to delete the amendments added to its Rule 18.B.3. effective January 13, 1984.

7. SDG&E's request for an extension of the effective date of D.83-06-092 is denied because it is moot.

8. The petitions of Pacific Gas and Electric Company, Southern California Gas Company, and Southern California Edison Company are granted in that Ordering Paragraph 4 of D.83-06-092, as issued on June 29, 1983, shall not apply to them or any other gas or electric utility not a party to the original proceeding.

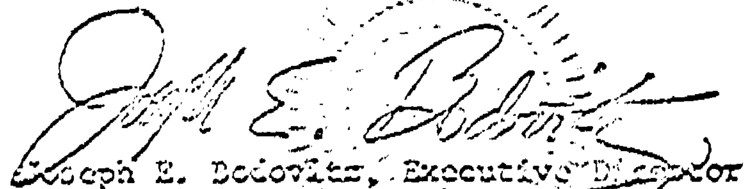
9. The petitions of SDG&E, Pacific Gas and Electric Company, Southern California Gas Company, and Southern California Edison Company are granted and denied as set forth above.

This order is effective today.

Dated JUL 18 1984, at San Francisco, California.

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

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



Joseph E. Bodovitz, Executive Director

Conclusions of Law

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2. The language of the meter error tariff of each of the participating parties (SDG&E's Rule 18, SoCal Gas' Rule 16, PG&E's Rule 17, and Edison's Rule 17) tends toward ambiguity and confusion of interpretation. However, the Commission should refrain from imposing any amendment to them at this time, since OII 84-05-046 will address these problems.

3. Ordering Paragraph 4 of D.83-06-092 should be rescinded.

4. SDG&E's unwritten policy regarding deposits pending resolution of billing disputes of commercial customers is so rigid as to place an unreasonable burden on some customers.

IT IS ORDERED that:

1. Paragraph 3, beginning with "The Commission agrees...", of page 4 of D.83-06-092 is deleted and replaced by the following:

> The Commission agrees with Cleancraft that a customer should have the opportunity to have a forum to contest its claim of inappropriate overbilling without being subjected to threat of shutoff for failure to deposit the entire amount in dispute where, as here, the amount was allegedly accrued over a very long period of time and was very large. We believe this problem will be remedied as a result of our pending proceeding in OII-84-05-046.