

Decision 84 10 03S

OCT 3 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Irving H. Kaye as trustee for Audry F. Kaye,

vs.

Complainants,

Pacific Gas & Electric Company,

Defendant.

Case 83-04-02
(Filed April 5, 1983)

Irving H. Kaye, for himself and
Audrey F. Kaye, complainants.
Gail A. Greeley, Attorney at Law,
for Pacific Gas and Electric Company,
defendant.

O P I N I O N

Complainant Irving H. Kaye's first cause of action concerns Pacific Gas and Electric Company's (PG&E) failure to discontinue service to a duplex which he owned in Redwood City. He alleges that the first order to discontinue was given in March of 1980, and that it was repeated in May and August. When a dispute arose over Kaye's responsibility for charges to the two units, he tendered a check to PG&E endorsed as payment in full for all of the Kaye's outstanding bills. PG&E has continued to bill for the full amount even though it cashed the check.

His second cause of action deals with the automatic gas-fired furnace installed in his residence in San Mateo. PG&E employees visited his home in response to his complaints that this appliance and the gas water heater were malfunctioning. One of these employees inspected both appliances. According to the complaint, the employee stated that he had resized the orifices in the furnace.

Since that time both water heater and furnace have allegedly been even less efficient than before, consuming more gas and producing less heat. In addition, the furnace's main burner often fails to ignite, forcing Kaye to manipulate both thermostat and igniter to ensure that the main burner ignites.

His third cause of action claims that PG&E is diluting his gas with an inert substance. He claims that this explains the poor heating performance of his gas appliances. He also claims that this practice unjustly enriches PG&E.

An amendment to the complaint revealed that Kaye had filed an action in the United States District Court for the Northern District of California against PG&E (Number C 83 2322 RPA). The complaint also named this Commission as a defendant. That proceeding was dismissed for lack of subject matter jurisdiction.

In its answer, PG&E admits that its personnel visited complainant's residence and discovered that the water heater was not operating properly. There was a second visit at which time the service personnel planned to enlarge orifices on complainant's water heater. PG&E alleges that the serviceperson told complainant that the orifice resizing could not be completed until a burner nut was loosened. PG&E alleges that complainant has never informed PG&E that the nut has been loosened and that therefore resizing has not been attempted. ✓

PG&E's answer to the amendment denied that it or any of its employees tampered with plaintiff's furnace. It also denies that it participated in any fraud upon plaintiff or any other PG&E customer or that it dilutes that gas supplied to plaintiff. It admits that the heating value of gas supplied to its customers may vary but denies that such differences result in theft by fraud since customers are billed for the heating value of the gas supplied, rather than volume.

A prehearing conference was held on May 16, 1983 and hearings on November 21 and 22, 1983 before Administrative Law Judge Gilman. The matter was submitted subject to briefs. The last brief was filed March 19, 1984.

Complainant's Testimony

Kaye testified that he had a duplex constructed for sale. Electrical and gas service was initiated in complainant's name while the duplex was being completed. In March of 1980, both units were vacant and the property in the hands of a realtor. He made his first telephone call to terminate utility services to both units sometime in March. He made a second call. A third call was made in May or June and a fourth in July or August. He claims that PG&E nevertheless continued to bill him for both services until February 1981. The only consumption of energy would occur during occasional visits by a broker to show the property.

He claimed that he reached a compromise agreement with a PG&E employee, under which he would pay \$200 of a total debt of \$375.56. This total included part of the bills from the duplex plus bills from his residence. He gave the employee a check for \$200 which bore on the reverse side a payment-in-full statement. PG&E cashed the check, but subsequently billed him for the \$175.66 and has continued to do so. Because of this dispute, he began to withhold payment on all bills for service to his residence. At the time of the hearing, the total arrearages exceeded \$1,400.¹

In 1981, Kaye noticed that the water heater at his residence no longer produced very hot water. About the same time, he also noticed that his gas-fired floor furnace no longer produced very hot air. He complained to PG&E which removed his gas meter for testing. At the same time a PG&E serviceperson inspected his water

¹ Complainant has not deposited any sums with this Commission under the disputed bill provisions of PG&E's tariff.

heater and told Kaye that the orifice was undersized. He subsequently noticed that his furnace began to malfunction; he had to manipulate the thermostat by hand before the furnace would light. After the PG&E visit, he had a private repairman inspect the water heater. The repairman adjusted the pilot and burner. After this adjustment, it operated much better than previously. He does not think that PG&E resized the water heater orifice; despite its improved performance, he claims that the water heater still will not produce very hot water, even with the thermostat at high. He claims that the water heater still takes too long to heat water.

He testified that the furnace was purchased 15 years ago and performed well until sometime in 1978-1979. In 1981 he installed a "pilotless" igniter in the furnace. He testified that the PG&E serviceperson went under his house and subsequently stated that he had fixed the orifice on the furnace.

At hearing, Kaye presented a statement by an independent repairman, stating that he had found the furnace's igniter electrode was rotated away from the pilot nozzle.²

Complainant is convinced that the PG&E serviceperson moved the electrode while working on the furnace. He argued that, as a result, a great deal of gas must have escaped, since otherwise the house would have blown up. As a consequence, he has concluded that he has been billed for a large quantity of gas which was wasted.

² A "pilotless" igniter has a pilot; the pilot nozzle is intended to direct a small amount of gas over a sparking mechanism, the electrode. When the thermostat calls for heat, gas is released through the nozzle and the spark ignites it. The main burner is then ignited by the pilot flame. When the burn cycle is completed, both pilot and main burner are turned off by the thermostat.

He testified that his furnace, even after the main burner comes on, no longer heats the house as quickly as it did before 1981. He also testified that both his water heater and his furnace produced more heat on some days than on others.

He introduced the results of an experiment conducted on a neighbor's gas range. On one date a given quantity of water took longer than on another to reach the boiling point. This experiment was intended to show that the heating value of PG&E gas varies.

He also attempted to introduce results of other experiments purporting to measure the heating value of gas. These exhibits were rejected since they were based on his theory that a gas appliance should always heat water twice as fast as an electrical appliance.

He claims to have discovered the reason for poor appliance performance when he watched his gas meter being tested by PG&E. In this test, the utility used compressed air to operate the meter mechanism. This incident led him to believe that PG&E was using compressed air as a "propellant" to pressurize its gas mains. He claims that the poor performance of his appliances is caused by excessive dilution of PG&E's gas. He seeks reparations for himself and other customers for the amount of compressed air they purchased at gas prices.

PG&E's first witness was employed by it as a gas engineer. He testified that while PG&E's gas meters measure volume, PG&E's customers pay only for the heat value (Btu) of the gas received. The heat value adjustment is based on calorimeter readings. These readings are averaged to develop a factor which is multiplied by the volume consumed to develop a gas bill. The gas for Kaye's residence is measured at the Milpitas mixer. The equipment there provides continuous calorimeter readings. This facility is designed to mix Canadian, interstate and intrastate gas to stabilize day-to-day Btu readings. PG&E's gas mix is never less than 1,000 Btu and never above 1,080 Btu./cubic foot.

California gas has a heating value slightly below 1,000 Btu; the value of imported gas approximating 1,080 Btu. In recent years the heating value of imported gas has gradually declined. We take notice that reported heating values of mixed gas in 1981 exceeded 1,040 Btu, declining to approximately 1,020 in 1983. In 1984, the value returned to approximately 1,040 Btu.

All gas appliances are designed to accommodate a range of heating values above 950 Btu. In the witness' opinion, the heating value would have to fall below 900 Btu to produce a noticeable variation in the operation of either a furnace or a water heater. He noted that many PG&E customers are industrial users for whom Btu content is extremely critical. If the heating value of PG&E's gas were to vary widely from day to day, these customers would quickly complain to PG&E. He testified that he did not know of any monitoring of PG&E's gas heat values, except possibly by industrial customers.

He explained that fluctuation in the temperature of hot water from a water heater would not be caused by heating value variations unless the gas were so poor that the heater would operate continuously.

PG&E does not use a propellant. Natural gas is mechanically compressed to pressurize its mains.

PG&E's standard practice, if a repairman finds that a gas appliance is operating at substantially below rated capacity, is to resize the orifices to provide additional gas. Orifice size would affect the length of time a water heater takes to heat water to match any given thermostat. Orifice size would affect the temperature of hot air coming from a floor furnace.

Kaye questioned this witness concerning observed variations in the time it took to boil water on gas ranges. The witness explained that variations between gas ranges are primarily affected by the size of the flame. Flame size could be affected by pressure,

length of the customer's gas service pipe, and burner condition and design. On electric appliances, one primary variable would be voltage.

In this witness' opinion, there would be no safety hazard if the electrode on Kaye's heater were turned away from the pilot nozzle. He recognized that in most instances, this would cause a delay in firing the pilot. Even if there were no ignition, the nozzle provides only about one cubic foot per hour which would be vented through the flue. Kayes' igniter³ includes a time out device which will cut off the pilot if ignition is not achieved in 90 seconds. It also has an interlock device so the main burner will not go on until the pilot is ignited.

On "pilotless" igniters the electrode is normally prevented from rotating by a set screw. In order to turn the electrode away from the pilot nozzle the set screw would have to be loosened. Once loosened, the witness believed that an electrode might be rotated by "normal vibration". He testified that it is unlikely that the set screw had loosened by itself.

PG&E also called its director of consumer affairs. He testified that Kaye paid for all utility service to the duplex except for charges of \$36.56 for one unit and \$60.83 for the other. PG&E did not bill Kaye for service to the duplex after October 24, 1980. PG&E's records show that there was no gas usage after May 20, for one unit, and a minimum consumption in the other. This minimum consumption was consistent with a pilot light being left on. In October of 1980 consumption of electricity and gas in this unit increased substantially; the consumption was enough to indicate that the unit was lived in for part of the month.

³ Kaye displayed an igniter identical to one installed in his house for the witness' inspection.

According to PG&E's records, Kaye owed a total of \$304.15 on both services for residence and duplex when the \$200 check was received. The witness noted that PG&E received a payment of \$104.50 in December 1980 after the "payment in full" check was cashed. He explained that the unpaid portion of the Redwood City bills was transferred to Kaye's residence bill but not until January 1981.

PG&E's records show that there were two visits by service personnel to Kaye's residence. On the first, the furnace was inspected and its main burner adjusted. The gas water heater was also inspected and its main burner adjusted. The gas water heater was also inspected and found to be undergassed. On the second visit, the repairman reported that he could not resize the burner on the water heater because he could not loosen the burner nut. On this visit he found that the furnace was also undergassed.

In rebuttal complainant testified that he has insulated his water heater; even so, he claims that his gas consumption has not been reduced.

Discussion

Motion to Strike

Complainant moved to strike defendant's answers on the grounds that they were filed more than thirty days after PG&E received copies of the complaint and of the amended complaint from the Commission's Docket Office. Rule 13 requires that answers must be filed "[w]ithin thirty days after service of the complaint." We have found that there was a violation of Rule 13. PG&E received a copy of the amended complaint from the Docket Office on June 22 and the answer was not filed until July 25. The original answer was, however, timely filed. The complaint was delivered to PG&E on April 8; the answer was filed on Monday, May 9, the last day for filing. (Under Code of Civil Procedure §§ 12 and 13, the first day is not counted. The last day is not counted if it is a holiday.)

This motion is in effect, a demand that we should treat the allegations of the complaint as having been admitted; presumably this effect is intended to include the allegation that PG&E dilutes its gas. If the motion were granted, complainant would be awarded substantially more in reparations than his evidence justifies.

The Rule does not provide that a complainant has an unqualified right to place a defendant in default when the Rule is violated. Consequently the issue is whether it would be just to impose such a sanction in the circumstances of this case.

We have concluded that there is no reason to give complainant a windfall. It is apparent that this was a technical violation and did not injure complainant. There is no claim and no evidence that the violation was other than unintentional.

Billings for the Duplex

Complainant contends that PG&E was obligated to terminate service and stop billing him when it received a telephoned request for such action. PG&E has not disputed this interpretation of its tariff.

PG&E's tariff, would seem to give it a complete legal defense against this claim. Rules 8 and 11.A.1 of its gas and electric tariffs make no provision for termination of service by telephone; under both tariffs, a customer is obligated to pay for all service rendered until after he mails a written notice or makes an oral request at the utility's district office. Even though there was apparently no such notice until October 24, 1983, PG&E's counsel has not raised this defense. It appears that this can be treated as a knowing waiver of all of the utility's legal rights under those rules.⁴ Since there is no other legal basis for disposing of the reparations claims, we will deal with them on an equitable basis.

⁴ In many circumstances a utility may not lawfully waive its tariffs. However, in this instance, there would be no apparent discrimination, and the waiver should be permitted to become effective.

Neither party produced evidence which would enable us to specify the exact date of this call. We have therefore assumed that the call was received too late to affect the May 21 billing but early enough to affect all service covered in the June 20 billing. This assumption does not unduly favor either party.

If PG&E had responded reasonably to the telephoned request for termination of service, complainant would have been told how to give proper notice under PG&E's tariff Rule 11.A.1, and PG&E would have received little if any revenue between June and October. It would therefore be inequitable to allow it to collect its full tariff charges for service occurring after that call. On the other hand, there are some equities on the utility's side; it would be inequitable to deprive it of all revenue for energy consumed by persons who entered the premises with complainant's consent. We have therefore concluded that the parties should share the liability for charges incurred in the months of June through October.

There is no basis, and no need, for a precise formula to allocate these charges between the parties. The fixed charges for both services to both units totalled \$29.50 and the total billing for the period in question was \$64.52. It appears just and reasonable to require complainant to pay all but the fixed charges of \$29.50. Table I is a breakdown of the charges.

TABLE I
Charges for Duplex

<u>Date (1980)</u>	<u>Unit 1</u>		<u>Unit 2</u>	
	<u>Gas</u>	<u>Electric</u>	<u>Gas</u>	<u>Electric</u>
6/20	\$1.20*	\$ 3.58	\$ 2.94	\$ 1.75*
7/22	1.20*	3.42	3.23	1.79
8/21	1.20*	2.88	3.23	1.75*
9/23	1.20*	1.75*	2.94	1.75*
10(closing)	<u>1.20*</u>	<u>1.94</u>	<u>10.46</u>	<u>15.11</u>
	6.00	13.57	22.80	22.15
			Total	\$64.52

* Fixed charges only; no consumption.

Btu Variation

Kaye contends that we should disregard PG&E's calorimeter readings and its engineer's testimony on the grounds that there is no monitoring of calorimeter operations.

This is incorrect; the Commission is responsible for this aspect of gas utility regulation and makes inspections of calorimeter installations. We also note that gas purchase and sales figures are regularly audited by the Commission staff for ratemaking purposes.

We have found no evidence that PG&E dilutes its gas. If we were to assume that Kaye's observations of fluctuating water and air temperatures are accurate, the difficulty would have to lie somewhere on his side of the meter.

Accord and Satisfaction

PG&E argues that cashing the \$200 check did not bar it from collecting the remainder of the disputed bill. This is a correct statement of the law. (Sierra and San Francisco Co. v Universal Electric & Gas Co. (1925) 197 C 376; Johnson v P.T. & T. Co (1969) 69 CPUC 290.) Both opinions hold that a "paid in full" endorsement on a check to pay part of the utility bill is ineffective. Both decisions are based on the principle that a utility cannot make a binding contract for service at a rate which differs from that stated in its tariff.

Igniter Malfunction

The evidence supports a finding that the electrode in Kaye's furnace ignition system was rotated away from the pilot, thus interfering with ignition of the furnace's main burner. It is clear that two events must have occurred to create this condition - the set

screw must have been loosened and someone must have touched the electrode to move it.

We have found that additionally the amount of gas used by this malfunction was relatively small. Our staff has estimated that a properly functioning electronic ignition system will save about \$4.00 per month as compared to the cost of a malfunctioning pilot, which runs continuously. Even when malfunctioning, Kaye's igniter did not run continuously; it would therefore consume far less gas than a conventional pilot. Furthermore, this special type of igniter has a time-out device which limits the pilot flow during an unsuccessful ignition to approximately 1/40 of a cubic foot. When Kaye "jiggled" the thermostat, he was able to make the igniter function because several times the normal pilot flow had accumulated and ignited. In such situations, only a part of the total pilot flow would be wasted, since all of the gas which accumulated would burn and help to heat the house.

Thus, Kaye's igniter, even when malfunctioning, used far less gas than a conventional pilot. During the coldest months, it consumed perhaps one or two dollars' worth of gas more than if properly functioning. It also seems that the amount of gas used could have been further reduced by turning off the furnace in warm months and by having the trouble diagnosed sooner.

Kaye's theory is that the set screw was loosened and the electrode rotated at the same time and thus both inferably were caused by the same person. However, the loose screw by itself would not cause any noticeable symptoms. It is therefore at least equally probable that the screw had remained loose but unnoticed since the igniter was installed and the electrode moved in some way, either then or later.

The claim that a PG&E employee intentionally sabotaged the furnace is speculative and no evidence was presented in support of the claim. On the other hand, the engineering witness' vibration theory also appears to be speculative and must likewise be rejected. Since the complainant bears the burden of proof and since he presented no evidence to establish that a PG&E employee either loosened the set screw or rotated the electrode, no reparations can be awarded.

Kaye was concerned that the igniter malfunction might have caused an explosion. As noted in Finding 13 his furnace ignition system is designed to be fail-safe.

Findings of Fact

1. PG&E's answer to the amended complaint was filed more than 30 days after service of the amended complaint.
2. It has not been claimed or shown that the late filing was other than unintentional.

3. It has not been claimed or shown that the late filing injured complainant.

4. Permitting PG&E to waive its defenses under tariff Rules 8 and 11A1 would not discriminate against any other customer.

5. Complainant in late May made a call requesting termination of electrical and gas service to his vacant duplex. The precise date of this call cannot be established. There is insufficient evidence to establish whether there was an earlier call. It is not unfair to either party to deem that the call was made too late to affect the May billing but in time to affect all of the June billing.

6. Someone consumed a small amount of electricity in both units between June 20 and October 24, 1980. A pilot light was left on in one unit. ✓

7. This consumption would not have occurred if the service had been discontinued.

8. One unit was occupied in October 1980. The occupant used both gas and electricity. PG&E did not bill complainant for any service to the duplex after October 24, 1980.

9. Complainant has not claimed that the persons who used energy or left the pilot on did so without his authority.

10. The method PG&E uses to determine the heat value of its gas is reliable.

11. There were small daily variations in heating value of gas delivered during the period between 1981 and the date of hearing. There has also been a gradual decline in the heating value delivered from the Milpitas mixer during part of this period. Both decline and variation amount to less than 3%; this would not produce a perceptible effect on the operation of gas appliances.

12. PG&E does not dilute its gas.

13. The electrode on Kaye's furnace was rotated so that the stream of gas from the pilot nozzle did not reliably ignite the main burner. We cannot determine who caused the set screw to be loose so that the electrode could be rotated.

14. The value of gas wasted by a rotated electrode would average \$2.00 per month or less.

15. No evidence was produced to show that a utility serviceperson rotated that electrode.

16. Kaye's furnace and his igniter are designed to fail-safe when the pilot fails to ignite.

Conclusions of Law

1. The motion to strike should be denied.

2. PG&E has waived its rights under Rules 8 and 11.A.1; the reparations claim should be resolved on equitable grounds.

3. PG&E should not receive payment in full for consumption which would not have occurred if it had complied correctly with a request to terminate service.

4. Complainant should be held responsible for a portion of both fixed and variable costs of electricity and gas consumed after he requested that service be terminated.

5. Complainant should be awarded \$29.50 in reparations.

6. A utility may lawfully bill for the full charges provided by its tariff, after it has cashed a consumer's check for part payment, even though the check is endorsed as payment in full.

7. Where complainant failed to establish that defendant caused an injury to a complainant, he cannot recover reparations.

8. PG&E is not liable for any reparations for fluctuations in delivered heating value of its gas.

O R D E R

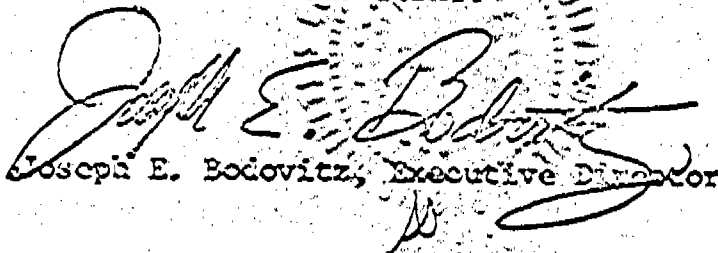
IT IS ORDERED that Pacific Gas and Electric Company shall afford a bill credit to Irving H. Kaye in the amount of \$29.50. All other claims are denied.

This order becomes effective 30 days from today.

Dated October 3, 1984, at San Francisco, California.

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

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11. There were small daily variations in heating value of gas delivered during the period between 1981 and the date of hearing. There has also been a gradual decline in the heating value delivered from the Milpitas mixer during part of this period. Both decline and variation amount to less than 3%; this would not produce a perceptible effect on the operation of gas appliances.

12. PG&E does not dilute its gas.

13. The electrode on Kaye's furnace was rotated so that the stream of gas from the pilot nozzle did not reliably ignite the main burner. We cannot determine who caused the set screw to be loose so that the electrode could be rotated.

O R D E R

IT IS ORDERED that Pacific Gas and Electric Company shall afford a bill credit to Irving H. Kaye in the amount of \$29.50 all other claims are denied.

This order becomes effective 30 days from today.

Dated OCT 3 1984, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. CREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners