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Decision 88 07 062 JUL 22 1988 JUL 25 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Judy McPhail, Complainant, vs. Sierra Pacific Power Company, Defendant.	Case 86-07-046 (Filed July 24, 1986)

Stephen Rapkin, Attorney at Law, for Judith McPhail, complainant.
David Y. Norris, Attorney at Law (Nevada), for Sierra Pacific Power Company, defendant.

O P I N I O N

The Complaint

Complainant Judy McPhail stated that she moved to a rental residence in the Tahoe area around November 27, 1985. Allegedly both her landlord and defendant Sierra Pacific Power Company (Sierra) had told her to expect electric bills of "a little over $200" a month. (The house is a large four-bedroom residence with electric baseboard heating.)

Her first electric bill, received in early January 1986, was for zero kilowatt-hour (kWh) consumption. She was charged $3.00, the appropriate minimum customer charge under defendant's tariff. The second bill, $34.21 for 499 kWh, was received in early February.

Some time later, she received a call from a company representative who told her that her bill for the first two months should have been $1,171.59. Shortly thereafter, she received a bill for $1,814.36 which included the third billing period.

She then moved out, abandoning her lease rather than face more high utility bills.

The complaint seeks a reduction of an unspecified amount in the bills for the second and succeeding month's service. (The complaint did not disclose that the utility had voluntarily reduced the bill by $734.[1] Defendant took this step unconditionally without requiring complainant to waive the rest of her claim.)

Her complaint requested that hearing be deferred for personal reasons.

The Answer

As soon as the complaint was filed (July 24, 1986), our Docket Office served defendant with a copy by mail together with the usual Instructions to Answer. However, instead of filing a pleading, the utility's attorney set forth its defense in an unverified letter to the Docket Clerk (received on August 18). No copy of the letter was sent to complainant.

When the letter was received, the Docket Office informed the attorney that a letter did not constitute an answer. Defendant did not file a formal answer until September 25, concededly long after the 30-day period required by our Rule 13. It was accepted for filing even though it was not accompanied by the usual motion to accept a late-filed pleading.

The answer contended in general language that the complaint failed to state a cause of action. The answer alleged that complainant knew that she could not rely on past bills, and

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1 Prior to the filing of the complaint, the dispute had been brought to the attention of the Commission's Consumer Affairs office; the office recommended that the bill be written down by $734. The amount of the recommended write-down was based on two elements. The first was an estimate of the amount she could have conserved if she had known from the beginning that the house was an energy waster. The second assumed a levelized annual billing, thus maximizing the impact of lifeline allowance.

that she knowingly assumed the risk that her bills would be substantially higher. It also argued that the first two bills should have placed complainant on notice and that she should have inquired about her bill. As a result, defendant contends, complainant's hands are unclean and she should not be granted relief.

Hearing was held in South Lake Tahoe on March 3, 1987. At hearing, complainant was represented for the first time by an attorney. She testified, as did two company executives.

Complainant's attorney did not file a brief; however, he did file a motion to dismiss the complaint. Because of his failure to lodge the motion with the Docket Office and to file the requisite number of copies, filing was not accomplished until July 6, 1987. Defendant's attorney filed a brief and a response to the motion. The brief raised a new defense, i.e., that its Tariff Rule 18 authorized it to back-bill.[2] It also claimed Sierra did not intentionally mislead complainant to obtain her business.

The Evidence

Complainant testified that when she called defendant's office to ask about past utility bills, the employee who answered told her that they were in the range of $200.

Her prospective landlord had told her that past bills did not exceed $200. He also stated that a solar installation had cut heating bills in half.

Defendant's evidence indicated that its employees are expected to respond to inquiries like complainant's with an average

2 Since we have decided the case on other grounds, it is not necessary to rule on the argument. We should simply note that it appears to be incomplete; it gives no recognition to the utility's duty to read the meter regularly (Tariff Rule 9A1) and the restrictions on the use of estimated bills (§ 770(d) of the Public Utilities (PU) Code and Rule 9A1).

usage figure. In this case, the pre-1986 average usage was low. A utility exhibit indicated that there had been only one bill of more than $400; all other recorded bills were for less than $200 per month. The testimony also indicated that the employee should have cautioned complainant that her bills might be radically different from those of past tenant.

Complainant is convinced that the employee omitted the word "average" from the statement concerning past bills. She understood the statement to refer to the maximum past bill. She also does not remember being warned that her bills might differ from those of prior tenants.

Complainant testified that she moved into the leased house in late November. Her bill for the first month's service (ending in late December) purports to be based on an actual meter reading which showed that no consumption occurred. She provided a copy of the company's own internal record; this document also purports to show that meter had been read at the end of the first billing period and that it registered zero consumption. Defendant did not attempt to explain how one of its meter readers could report zero consumption for a residence which had been occupied continuously for over 30 days.

The next reading, at the end of January, indicated that complainant had consumed 10,499 kWh since the last correct reading. The bill for that amount of electricity would have been $1,171.59. According to defendant's evidence, its office staff noted that this consumption was far larger than any prior month's bill. Its staff therefore assumed that there had been a meter reading error in the amount of 10,000 kWh. Without any apparent attempt to verify this assumption, it wrote the bill down to $34.21, the proper charge for 499 kWh. The bill presented to complainant did not disclose that it was based on other than an actual meter reading.

Defendant did not at this time checkread the meter to verify the 499 kWh estimate. Heavy winter weather conditions had

caused outages and all of the company's employees were occupied on service problems. Aside from checking its own past records, it did not take any other steps to determine whether such a low estimated consumption was reasonable. It did not explain why its staff failed to consider the obvious possibility that the meter had been underread or even underestimated in a prior month.

The next regular reading, at the end of the third billing period, was 4,725 kWh higher than the actual January reading. This reading finally convinced defendant's staff that the January reading was not in error. Defendant therefore backbilled complainant for the 10,000 kWh written off on the January bill plus the 4,725 kWh consumed in the third (February) billing period. The bill for this amount of electricity came to $1,753. A utility official called complainant just before the backbill arrived in the mail; this was her first notice that her utility bills were much higher than anticipated.

The utility conducted check readings on March 13 and 21, which confirmed that consumption was very high. A meter test was conducted in April, which showed that the meter was running slightly slow. Utility employees also examined the solar installation. Sierra testified that it was not well-designed and would not have a major impact on heating bills.

Complainant then abandoned her lease rather than face more high utility bills. It is not clear when she actually moved; the last day of utility service was April 15. Her total bill for electric service from the date she moved in until April 15 was $2,334.18. She did not deposit the disputed sum; the utility has been willing to accept small payments on account both before and after she moved out.

Complainant's testimony concedes that there is no proof that she did not consume all of the energy registered by the meter. Although she is a long-time resident of the Lake Tahoe area, she, nevertheless, finds it hard to believe that electrical space

heating could consume that much energy, especially in light of her efforts to conserve.

Discussion

Complainant's theory or theories of recovery are not clearly stated. However, we infer that she seeks recovery for two separate injuries. The first source of injury would be her mistaken belief that electric space heating would be affordable. Apparently she contends that this injury should be redressed by a reduction in each of her bills. This would be in addition to the $734 already received.

Under the second theory, the utility's faulty bills would render it liable for her delay in moving to a more energy-efficient rental. This theory would logically require a determination of when she would have have moved if the first two bills had correctly stated her consumption. It would also require us to compare her actual bills after that date with an estimate of the energy bills she might have encountered had she lived in a more energy efficient rental. She apparently claims the difference between the two (less the $734) should be subtracted from the outstanding bill.

There is authority which indicates that her first cause of action may be grounds for reparations. Scan-A-Pad v General Tel. (1975) 79 CPUC 124 awarded reparations against a utility because it misinformed a customer who relied on it for advice about the most economical form of utility service where the customer had a choice of tariffs under which to take service. There was a similar holding in H. L. Welker, Inc. (1969) 69 CPUC 579. Her second cause of action appears to be governed by Parts Locater v PT&T (1982) 9 CPUC 2d 262. That decision held that prompt accurate billing is part of the service a utility must provide; if such service is substandard, the Commission may order it to refund a portion of its tariff charges.

Although it appears to us that there may be elements of consequential damages mixed in with complainant's claims, neither party argued the matter. Accordingly, we will address each issue as if it were a pure reparations claim, and dispose of them on that basis.

Is the Utility Responsible for Complainant's Decision to Lease?

If the utility employee used the word "average" when stating that past bills did not exceed $200, then the statement was true. If the word was omitted, the statement would have been untrue; there was at least one bill for over $400. In the absence of more definite evidence from complainant, we will presume that the normal course of business was followed and that the employee truthfully stated that the average bill did not greatly exceed $200.

It appears that complainant combined this information provided by the utility with representations from the landlord to form a mistaken conclusion that her energy bills would be not exceed $200 even in the winter. We note that this was an unrealistic assumption. It is, by now, a matter of general knowledge that electric space heating is very expensive in cold climate areas. In addition, complainant has been a resident of this area for nine years and should be aware of energy rates for this area.

We find that the utility is not liable for her mistake. Rather it appears to have been the result of her own mistaken assumptions and/or the representations of the landlord. We conclude that defendant is not liable for complainant's mistaken belief that electric space heating together with all other electric usage would not cost more than $200.

Is Defendant Liable for Complainant's Delay in Moving?

We now turn to a consideration of complainant's second contention, that there should be a bill reduction for those months after the date she would have moved, had the first two bills been accurate. Almost certainly, a correct billing for the first month would have induced her to move 60 days earlier than her actual move; a correct billing for the second month's consumption would have caused her to move 30 days earlier. Unfortunately, she has not provided any estimate of how much less she would have paid for energy in another new residence.

It is part of a complainant's burden to prove the amount of reparations which are due. (Ad Visor v General Tel. (1976) 79 CPUC 313.) Since the complainant has already received $734 to offset whatever sums might be due, it would be especially difficult on this record to conclude that defendant owes her more.[3]

Because of this failure of proof, we have no basis for ordering defendant to reduce the bill by any amount larger than the $734. Since complainant did not prove an essential element of her case there is no need to consider defendant's defenses.

Should We Grant Complainant's Post-Hearing Motion?

This motion asks for relief comparable to a default judgment in a court proceeding. We are asked to adopt the allegations of the complaint as findings, and to disregard both the answer and the evidence. If the motion were granted, complainant

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3 The available information tends to indicate that the $734 more than compensates complainant for any savings she might have realized by moving two months earlier. The amount of energy she consumed in the last 60 days of service should have cost roughly $784. Unless she could have limited her total energy bill in an another rental to less than $50 for a 60-day period, it is difficult to see how she could justify any additional recovery under this theory.

would receive all the relief justified by the findings thus adopted. (Cf. §§ 580, 585, Code of Civil Procedure (CCP).) Since our Rules do not specifically provide any remedy for default, complainant's attorney argues that we should follow the CCP provisions as a model.

Even if we were to follow the CCP provisions, we could not grant complainant default relief. Her complaint does not specify the amount of reparations sought. Even if construed liberally, it does not include either alleged facts or a proposed formula by which the amount could be calculated. Giving a default judgment for any sum not specified or calculable from the complaint would deprive defendant of due process; it was not notified of the severity of the risk it ran by failing to answer. (Greenup v Rodman (1986) 44 C. 3d 489.)

Therefore, whether or not Commission default procedures should follow those of the courts, complainant's motion must be denied.

We do not condone defendant's delay in filing an acceptable answer. A utility which grosses over $40 million annually from its California operations should be as familiar with our procedures for formal consumer complaints as it is with the procedures for rate increases.

Findings of Fact

1. There is no evidence that complainant did not consume all energy she was billed for.

2. When the house in question is occupied full-time during the winter, space heating requires large quantities of electricity.

3. The solar installation is shaded and not properly aligned. It would not cause a major reduction in winter heating requirements.

4. Defendant gave a truthful answer to complainant's question concerning past electric bills for the residence in

question. Its employee stated that, on the average, past bills did not exceed $200.

5. Any injury resulting from complainant's decision to lease the house was not caused by utility misrepresentations.

6. If complainant had been warned of high consumption by a proper first period or second period bill, she would have conserved by moving to a more energy efficient residence well before April 15.

7. Complainant has not provided evidence to support an estimate of how much less she would have paid for energy if she had moved to a more energy efficient residence.

8. Defendant has partially satisfied the complaint by reducing the bill by $734.

9. Complainant has not deposited funds with the Commission.

Conclusions of Law

1. Defendant is not liable for mistakes which were not caused by utility misconduct or untruthful representations.

2. The bill for the first month's electricity should not be adjusted.

3. Without proof that she could have saved more than $734, if properly billed, complainant cannot be awarded further reparations.

4. Even if adopted as findings, the allegations of the complaint would not support the award of any sum of reparations.

5. Complainant's bill should not be reduced except for payments on account and the $734 reduction already made.

O R D E R

IT IS ORDERED that:

1. Complainant's motion for relief in the nature of a default judgment is denied.

2. Complainant's bill should not be reduced by any amount in excess of $734 plus amounts already paid on account.

3. The complaint is denied.

4. Defendant is directed to establish a formal payment arrangement with complainant for payment of the outstanding bill.

This order becomes effective 30 days from today.

Dated JUL 22 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

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

Victor Weisser, Executive Director

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