

DEC 21 1988

Decision 88-12-080 December 19, 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Wilbert Thorne and Daria Mack,

Complainant,

vs.

Pacific Gas and Electric  
Company,

Defendant.

Sheila Standley,

Complainant,

vs.

Pacific Gas and Electric  
Company,

Defendant.

ORIGINAL

Case 85-08-071  
(Filed August 30, 1985)

Case 87-04-004  
(Filed April 6, 1987)

Katherine E. Meiss, Attorney at Law, for  
Daria Mack, Wilbert Thorne, and Sheila  
Standley, complainants.

Howard V. Golub, Mark R. Huffman, and  
Alice L. Reid, Attorneys at Law, for  
Pacific Gas and Electric Company,  
defendant.

OPINION

Summary of Decision

This decision denies in part and grants in part the complaints of Wilbur Thorne, Daria Mack, and Sheila Standley.

- b. Prohibiting defendant from billing a user for diverted services when defendant becomes aware of the diversion, and
  - c. Requiring a utility to adjust the innocent user's bill to reflect actual usage, deleting charges for diverted services; and
5. Declare a policy and promulgate procedures to specifically address instances of utility diversion, including a recognition that a utility, due to its unique position as a monopoly supplier of services so essential and basic to the welfare of the region's residents, has a responsibility to take affirmative action to alleviate the inequities, injustices, and hardships caused by utility diversion.

Evidentiary hearing in the matter was scheduled for January 8, 1986. At the request of complainants the hearing was rescheduled for January 29, 1986.

By a letter dated January 17, 1986, the counsel for complainants requested that the hearing be taken off calendar and postponed indefinitely.

On April 6, 1987, Legal Aid Society of Alameda County filed another complaint (C.87-04-004) on behalf of Sheila Standley requesting relief similar to the relief requested in C.85-08-071.

C.85-08-071 was consolidated with C.87-04-004.

Evidentiary hearing in the consolidated matter was held on July 22 and 23, 1987.

The matter was submitted on October 5, 1987 upon receipt of concurrent reply briefs.

#### Background

Wilbert Thorne, Daria Mack, and Sheila Standley (complainants) allege that they were victims of what is known as utility "diversion" or theft of service. Diversion of the type complained of here occurs when a utility user's meter registers not only that user's service but also the service provided to others;

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Summary of Decision

This decision denies in part and grants in part the  
complaints of Wilbur Thorne, Daria Mack, and Sheila Standley.

History of Proceeding

On August 30, 1985, Legal Aid Society of Alameda County filed a complaint, Case (C.) 85-08-071, on behalf of Wilbert Thorne and Daria Mack requesting that the Commission:

1. Enjoin defendant, PG&E from:
  - a. Denying complainants and others similarly situated, gas and electric service for their failure to pay for past service diverted without their consent to a third party or parties, and
  - b. Requiring complainants and others similarly situated to provide extra security deposits, advance payments or any other requirements for future gas or electric service which places a heavier burden on them than is placed on customers with good credit standing; and
2. Order PG&E to:
  - a. Adjust complainants' bills and bills of others similarly situated to reflect service actually used by them, and
  - b. Credit, pursuant to Public Utilities (PU) Code § 734, complainants and others for amounts paid by them towards bills for diverted services; and
3. Declare that complainants and others similarly situated are not liable for services diverted by their landlords without the tenants' knowledge or consent; and
4. Promulgate a rule to be applied in cases of utility diversion. Such a rule should include at a minimum provisions:
  - a. Prohibiting defendant from terminating a user's service on account of failure to pay for diverted services, and

- b. Prohibiting defendant from billing a user for diverted services when defendant becomes aware of the diversion, and
  - c. Requiring a utility to adjust the innocent user's bill to reflect actual usage, deleting charges for diverted services; and
5. Declare a policy and promulgate procedures to specifically address instances of utility diversion, including a recognition that a utility, due to its unique position as a monopoly supplier of services so essential and basic to the welfare of the region's residents, has a responsibility to take affirmative action to alleviate the inequities, injustices, and hardships caused by utility diversion.

Evidentiary hearing in the matter was scheduled for January 8, 1986. At the request of complainants the hearing was rescheduled for January 29, 1986.

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Background

Wilbert Thorne, Daria Mack, and Sheila Standley (complainants) allege that they were victims of what is known as utility "diversion" or theft of service. Diversion of the type complained of here occurs when a utility user's meter registers not only that user's service but also the service provided to others;

the user in whose name the meter is registered is usually unaware that more than his or her utility service is being registered on his or her meter. The user does not realize that he or she is paying for gas or electricity used by others.

Complainants request an order enjoining defendant, PG&E from denying them gas and electric service for their failure to pay for past diverted services; and requiring them to provide extra security deposits, advance payments or any other requirement for future gas or electric service which places a heavier burden on them than is placed on customers with good credit standing. Complainants also request a refund for any payments made to PG&E for energy not used by them.

Statement of Facts for Complainant Thorne

Complainant Wilbert Thorne formerly resided at 3027 Filbert Street, Apartment 3, Oakland, in a building owned by C. Darrel Moore. The building contained three other residential units. Thorne received gas service from PG&E at this address for a period of approximately two years and four months. Thorne established utility service with PG&E for his own use in his separate apartment.

From September 1981 to January 1984, he received monthly charges for gas service which ranged from \$10.75 per month to \$130.00 per month.

The water heater which provided service to all four units in the building, was tapped into Thorne's gas line. Thorne alleges that he was not aware of this when he moved into the unit, or when he contracted with PG&E for gas service to his unit. He paid for gas service to all four units from 1981 until November 1983.

Thorne occupied his unit before other tenants in the building. As other tenants moved in, Thorne's gas bill escalated.

After repeated complaints to PG&E by Thorne that he was being billed for gas service to others, PG&E investigated his claim and found that the hot water system for the entire building was

tapped into his meter. However, PG&E found that Thorne's gas meter was recording the energy flow correctly.

Having ascertained the diversion, PG&E responded by adjusting Thorne's account to a lower billing rate pursuant to its baseline tariffs. Under the baseline tariff, user rates for customers using additional appliances are reduced.

Thorne alleges that PG&E did not notify him that the new bill reflected gas service to the other three units in the building as well as his own. He also alleges that the landlord was never notified of the diversion. PG&E denies both of these allegations.

In November 1983, PG&E discontinued both gas and electric service to Thorne because of his failure to pay his bill in the amount of \$429.34. A portion of the unpaid bill represented charges for gas service which had been diverted to other apartments. In January 1984, PG&E activated the service at the landlord's request.

No payment on Thorne's outstanding balance was made by the landlord. Thorne's gas service was effectively restored through the landlord's account, but he continued to be without electric service until he moved out some eight months later.

Thorne moved from 3027 Filbert Street in July 1984. He now resides at another apartment in Oakland, where his gas and electricity are supplied by his landlord. He is barred from establishing PG&E service in his own name until he pays the unpaid bills.

Thorne alleges that he is unable to pay the disputed bill. He has asked PG&E to recalculate his bill to include only charges for service to which he consented. PG&E contends that billing disputes of this type should be resolved between the customer and the diverter.

Thorne filed an informal complaint with the Commission in June, 1984, seeking adjustment of the bill. The Commission in its reply stated that this was a landlord-tenant problem and that



adequate remedies existed for Thorne resolve the problem with the landlord.

Statement of Facts for Complainant Mack

Complainant Daria Mack moved into an apartment located at 5949 MacCall Street, Oakland, California, in September 1976.

Mack alleges that at no time was she informed by the landlords, Mr. and Mrs. Calvin Walker (563 - 58th Street, Oakland, California), or by any other person, that she was to pay for utility service in any apartment other than her own.

Mack became concerned about the charges on her gas bills in the summer of 1983. She complained to PG&E regarding her high gas bills. A PG&E inspector checked her gas meter and found it to be operating properly. The inspector told Mack that her gas meter was registering the gas used to heat water for all four units in the building. However, he refused to unhook the meter without the landlord's permission.

Mack asked the landlords to correct the situation regarding her gas meter, but they were unresponsive. Mack alleges that her apartment was previously occupied by the landlords and that they knew that her gas meter was registering the gas used to heat water for all four units.

Mack contacted PG&E again. PG&E reiterated its policy of not adjusting any meter unless expressly authorized by the landlord.

PG&E, however, adjusted Mack's bill by allowing her higher baseline usage to account for the gas used to provide hot water for the other dwellings in the building.

Mack withheld a portion of her rent to compensate for the gas being used to heat the water for all the units in the building.

After being threatened with eviction for not paying the full rent, she moved to another residence in September 1984.

Statement of Facts for Complainant Standley

Standley occupied an apartment at 1721 - 86th Avenue, Oakland, California in August 1985.

The usage of electricity in her September and October, 1985 electric bills were reasonable. However, the usage in her November, 1985 electric bill was very high. She suspected a fault in her meter and complained to PG&E about her high electric bill. PG&E examined the meter and could find nothing wrong with its operation.

Standley became aware that the unit above her had had its electric service disconnected for nonpayment in October 1985. Nevertheless, the unit's lights were still operating. When Standley complained to PG&E about the suspected tap on her meter, she was informed that the problem should be addressed to her landlord.

Standley contacted her landlord who discovered that her meter was tapped by the unit upstairs. The landlord told PG&E about the tap but PG&E refused to disconnect it. Upon PG&E's refusal, the landlord hired an electrician to remove the tap.

Standley requested PG&E to adjust her bill to account for the electricity diverted from her meter. PG&E refused to adjust her bill. She paid her past due bills under protest.

Standley contends that the payment of the bills created an enormous financial hardship for her. She maintains that she is entitled to a refund of at least \$169.35 from PG&E. This amount represents the difference between the amount she paid PG&E and her average electric bill.

PG&E admits that it was aware that there was a partial tap on Standley's electric meter. However, PG&E maintains that it has no knowledge of who was responsible for placing the tap on Standley's meter.

Complainants' Position

Complainants contend that PG&E's practice of charging victims of diversion is unreasonable and unjust. According to complainants, Rule No. 1 of PG&E's tariff, which defines a customer as one who receives and pays the bill regardless of who uses the energy, is faulty because the practice violates the mandate of PU Code § 451 that charges be just and reasonable. Complainants contend that the definition of customer in Rule 1 was designed to deal with a submetering situation which is not present in this case. Complainants also disagree with PG&E's position that if energy registered on a customer's meter it is "received" and the customer is liable for it.

Complainants opine that while there are no cases which deal directly with the issue of utility diversion and the "just and reasonable rules and charges" language of PU Code § 451, a look into contract principles and rate charge cases should provide the Commission guidance in deciding whether PG&E's practice of charging for diverted service violates state law.

According to complainants, absent a specific regulation and case, the Commission can look by analogy to the Uniform Commercial Code (UCC), and must look to general principles of contract law in determining whether billing innocent victims of diversion is reasonable and just under PU Code § 451.

In commercial transactions, when a seller and a buyer are located on different sites, a question frequently arises as to who must pay for goods that are lost, stolen, destroyed or disappear somewhere in transit between the seller and buyer. Complainants maintain that although both parties are innocent with regard to the loss, the law requires that the seller remain liable for goods until they actually reach the buyer.

Complainants contend that under UCC, the liability for the goods or the responsibility for the replacement costs does not pass to the buyer until he/she actually possesses them.

Complainants believe that by applying the same analysis, in an instance of utility diversion, a customer should not be liable for gas or electricity that he/she has not actually possessed. According to complainants, mere transmittal to a customer's meter cannot signify receipt by the customer if it is not actually available for his/her use.

Complainants assert that this analysis was relied upon by the Illinois State Utilities Commission in its decision cited infra. to disallow billing for diverted utility service.

Complainants cite Sherwood v. County of Los Angeles (1962) 203 Cal. App. 2d 354 at 359, which held that the pertinent rules and regulations (tariffs) of the Commission and utilities become part of a contract and define a customer's liability. Complainants also cite Masonite Corp. v. Pacific Gas and Electric Company (1976) 65 Cal. App. 3d, 135, in which the court concluded that PG&E was liable for breach of contract when it collected for an overcharge that occurred "because appellant billed and collected money for gas actually not delivered." In that case PG&E's meters registered the gas as having been diverted. According to complainants, it is noteworthy that the courts also found in Masonite, that the tariffs relied upon by PG&E did not take precedence over the wider provisions of the Code.

Complainants contend that beyond contract law and common sense which say it is unjust and unreasonable to pay for something not received or used, PG&E's charges are invalid because they violate several other tenets set forth in rate cases.

According to complainants, receivers of diverted service are in a position similar to that of flat-rate customers in that both are allowed to use energy in a wasteful and extravagant fashion without requirement to pay for overuse; indeed diverters under PG&E's current practice never pay. Complainants contend that PG&E's tariff rules violate the principle that conservation and efficiency are essential part of a utility's operation.

Complainants maintain that while there is no ideal rate design, economic regulation must strive for a policy structure that achieves maximum economic efficiency while minimizing major disruptions or disparities in the area of social equity.

Complainants disagree with PG&E's assertion that it must pass on its expenses to the ratepayers even if they were victims of energy diversion. According to complainants, PG&E's rationale ignores its ability to identify the real beneficiary of its service and its ability to pursue to collect from them, if under no other authority than Civil Code § 1882.1, which allows a utility to sue for diversion. It also ignores Commission decisions which state that only reasonably incurred costs can be passed to the ratepayers.

Complainants contend that PG&E's practice of billing innocent victims of diversion also violates PU Code § 453 which prohibits discrimination and preferential treatment. According to complainants, PG&E's practice of billing innocent victims of diversion creates a preference and discriminates in two ways: the diverter gets service for free and the victims pay for more than they received without recourse, unlike other customers who are expected to pay only for what they get.

Notwithstanding Tariff Rule 1, PG&E's tariff Rule 17 allows it to bill a customer for PG&E's estimate of unauthorized use of electric or gas service. Complainants argue that the obvious rationale of such a policy is that the beneficiary or the actual user should pay for the energy. Complainants maintain that despite PG&E's claim that the procedure under Rule 17 is limited to situations on "PG&E's side of the meter" or where PG&E is the victim, there is no language in Rule 17 that limits use of the rule to such situations. According to complainants, it would be unjust to allow PG&E to rely on such a rationale when it is the victim but ignore it when a customer is the victim. Complainants believe that

PG&E is clearly defining customer in ways other than in Rule 1; for instance in Rule 17 PG&E bills the actual user, despite Rule 1.

Complainants opine that PU Code § 532 and PG&E Rule 1 do not validate what is otherwise PG&E's unfair and unreasonable practice of billing innocent victims of diversion. PU Code § 532 requires PG&E to charge uniform rates for services rendered. However, according to complainants, the issue at hand is whether PG&E should be allowed to bill for services never received by the person billed.

Complainants recommend that the Commission institute an investigation or adopt on its own motion a rule dealing with diversion which will "protect innocent victims from unreasonable, unjust, excessive and discriminatory practices." According to complainants, at least 8 jurisdictions- Arkansas, Colorado, the District of Columbia, Illinois, Maine, Michigan, New Jersey and New York - bar termination of customer service for failure to pay for service delivered to other locations or other customers without the customer's consent.

In April 1977, the New York Public Service Commission (NYPSC) instituted a proceeding on its own motion to develop procedures for billing cases involving diversion of service.

In Georgia Clay v. Peoples Gas Light and Coke Company (Decision 80-0534 dated January 27, 1982), the Illinois Commerce Commission found that the complainant did not take physical possession of the gas diverted as a result of tapping, nor did the complainant receive the benefit of such tapping. Therefore, the Commission did not find complainant liable for the gas diverted from her line and ordered Peoples Gas Light and Coke Company to recalculate complainant's bill for the disputed period based on historical usage.

Other jurisdictions cited by complainants have similar provisions for treatment of diverted energy. We are also mindful of at least one recent legislative proposal which dealt with this

problem and which this Commission supported. We note that the measure failed passage.

Complainants claim that the Commission has the power to hear and rule on both individual and class complaints.

Complainants contend that PG&E's assertion that 25 signatures are needed arises from a misunderstanding of the nature of this case. According to complainants, plaintiffs in this case are not asking for a rate increase (or decrease) but are alleging that the application of the rate was unlawful.

Complainants maintain that this complaint is filed under the subsection of PU Code § 1702 which allows a person to file a complaint to challenge an action, or inaction, which violates any other part of the code or law.

#### PG&E's Position

PG&E contends that by accepting and paying bills regularly issued in their names, complainants became customers of record and as such are responsible for energy consumed on their account. According to PG&E its tariff Rule 1 requires it to bill the person in whose name service is rendered as evidenced by the signature on the application, contract, or agreement for that service, or, in the absence of a signed instrument, by the receipt and payment of bills regularly issued in his name, regardless of the identity of the actual user of the service.

PG&E asserts that the statements of account for Mack, Thorne and Standley reveal that each complainant paid his or her monthly gas and electric bills without objection for some period of time; each of them therefore became the customer of record pursuant to Rule 1. Accordingly, complainants are responsible for the bills regularly issued and paid in their names. According to PG&E, if complainants now allege that another party used the energy registered on their meters, their remedy is against that party, not PG&E. PG&E maintains that it cannot, pursuant to Rule 1, bill some other party for energy shown on the account of a customer of

record, when such customer later claims some other party should be responsible. Nor should PG&E estimate in this situation how much energy billed to a customer of record was actually used by that customer.

PG&E maintains that, pursuant to Electric Rules 11 and 16 and Gas Rules 11 and 20 of its tariffs, it cannot assume responsibility for facilities beyond the point of delivery which it does not maintain. Once the service passes through the meter it is no longer the property or responsibility of PG&E, but rather it is the property and responsibility of the customer.

PG&E rebuts complainants' claim that PG&E tariffs do not address the instant case. In fact, PG&E asserts that its tariffs speak directly to the situation presented here and mandate a finding that it acted properly and in compliance with such tariffs.

PG&E disagrees with complainants' assertion that they never agreed with PG&E to pay for all registered energy. According to PG&E, by regularly paying the bills issued in their names, complainants became customers-of-record under Rule 1, and as such did agree to pay for all gas and electricity registering on their meters.

PG&E believes that, as a matter of law, it was obligated to bill complainants for all energy registering through their meters and, also as a matter of law, each complainant agreed (and was obligated) to pay for all such energy.

PG&E contends that complainants have failed to set forth any erroneous act by PG&E in violation of law or Commission rule.

PG&E refutes complainants' allegation that PG&E violated PU Code § 453 prohibiting discrimination and preferential treatment by a utility. PG&E opines that the event resulting in "discrimination," namely, the diversion of service on the customer's facilities, should not be attributed to PG&E since it is the landlord or an unscrupulous fellow tenant, not PG&E, who caused the diversion and no property or facility of PG&E was involved.



Thus, according to PG&E, it did nothing to cause the "diverter getting service for free and the victim paying more" and the blame for the diversion and any resulting differential in payment should be laid to rest where it properly belongs, with the landlord or diverter, not the utility and its ratepayers.

PG&E maintains that no different results would occur if UCC principles were applied to this proceeding. PG&E contends that complainants use a flawed argument in insisting that since complainants never took "physical possession" of the gas and electricity they should not be billed for that service. According to PG&E, complainants fail to recognize that since PG&E's delivery obligation ends at the customer's meter, both physical possession of and control over the gas or electricity passes to the customer after that point. Thus, the risk of loss due to diversion resulting from the configuration of or tampering with electric or gas service on customer's facilities must be borne by the customer or landlord, not the utility.

PG&E points out that this concept of control over electricity or gas has been consistently embraced by the courts. In Hill v. Pacific Gas and Electric Co. (1913) 22 Cal. App. 788, the court noted at p. 790 that "after the electricity passed through the meter it was no longer under the control of the electric company" Similarly, in Ray v. Pacific Gas and Electric Co. (1934) 3 Cal. App. 2d 329, 337, the court stated that "The cases are uniform in holding that a person supplying gas or electricity is not responsible for the condition of the conductors or pipes on the premises of consumers which the former does not own or control."

PG&E believes that resort to general contract law would not change the conclusion that PG&E acted properly and in compliance with PU Code § 451. While PG&E does not argue with the proposition cited in Sherwood that the Commission's tariffs represent a contract binding both the customer and the utility,

PG&E notes that when the language of a contract is clear and unambiguous, such language will govern its interpretation.

PG&E maintains that in this proceeding the "contract" as defined by PG&E's filed tariffs is quite clear and unambiguous and dictates that the Company bill a customer for energy use registering on that customer's meter. PG&E also maintains that it is not unreasonable to interpret PG&E's tariffs according to their plain meaning and conclude that such tariffs, and PG&E's actions in accordance therewith, were proper and fully comport with PU Code § 451's just and reasonable standard. PG&E states that it is both just and reasonable to expect full payment from a customer for all of that customer's meter-registered energy, particularly since PG&E generally has no way of knowing who actually used the service from month to month or whether such use was consensual.

According to PG&E, in Masonite, plaintiff was charged for natural gas delivered due to a malfunction of metering equipment owned and controlled by PG&E. Thus, the failure to deliver contractually agreed upon quantities of natural gas could be directly traced to a breach of the contract provision calling for adequate maintenance of defendant's metering equipment. PG&E contends that this is exactly the opposite of complainants' situation. Here, loss of energy was directly due to the configuration of or tampering with facilities under the sole ownership and control of parties other than PG&E. PG&E claims that it would indeed have violated its tariffs if it had attempted to tamper with facilities on the customer's side of the meter.

PG&E points out that in Masonite, the court also found that provisions relied on by defendant concerning meter inaccuracy were in apparent conflict with other rules of the Commission as well as state law. In this proceeding, according to PG&E, there is no conflict between PU Code § 451's mandate that the rates be just and reasonable and PG&E's actions under its filed tariffs.

3. The energy theft or diversion in each instance occurred on the customer side of the meter.
4. In each case, usage registered by the complainants' meter included consumption in addition to that attributable to complainant's own premises.
5. Energy diversion was caused by either the landlord or another tenant in the building.
6. PG&E adjusted the gas bills for Thorne and Mack by providing them additional baseline allowance for the water heaters served by their meters.

Complainants request an order requiring PG&E to ascertain the amount of gas and electricity used by their landlords or other tenants, requiring P&GE to refund that amount to complainants and directing the company to seek recovery of those sums from the beneficial users of the energy, regardless of the fact that the energy was diverted from facilities on the customer's, rather than the utility's, side of the meter. PG&E objects to such an order.

Both parties rely on PG&E's tariff rules to argue their positions. The parties have framed the controversy in terms of whether Rule 1 mandates recovery from the "customer" or Rule 17 authorizes PG&E to recover from the person who benefitted from the use of the metered energy. The parties agree that someone other than the customer of record benefitted from the use of energy metered under the customers' accounts. ✓

Unfortunately, part of the difficulty of resolving these claims arises from the fact that Rule 17 is not exactly applicable to these facts showing that the metered energy was commingled or used directly by a third party without the customer's express consent. We do not find that the evidence supports a finding of a violation of any law, order, or rule of the Commission by PG&E. Thus, complainants are denied the individual relief sought. At the

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In so far as the relief which complainants desire may be construed to be a request for an inquiry into the reasonableness of PG&E's gas and electric billing practices, PG&E believes that under PU Code § 1702 complainants are not the right party to bring such and inquiry before the Commission.

PG&E disagrees with complainants' contention that they have no recourse to remedy the situation. According to PG&E, in Alameda County where each complainant resides, relief can be obtained quickly and at little cost in small claims court where a claimant may represent himself/herself in matters up to \$1500. PG&E points out that in Alameda County there is also an organization, Operation Sentinel, which is specifically designed to provide advice to tenants and landlords on their respective rights and responsibilities, to help with legal remedies and to arbitrate landlord-tenant disputes. PG&E contends that if such legal remedies are considered inadequate, rather than to inject the utility into landlord-tenant disputes, the preferred course of action would be to change California landlord-tenant law to provide for the right of a tenant to offset against rents any payment by the tenant to the utility of the claimed diversion amounts.

PG&E requests that for the reasons stated above the complaints in these proceedings be dismissed.

Discussion

The undisputed facts in this case are:

1. The complainants were PG&E's customers of record because each of them received and paid bills issued by PG&E on a regular basis.
2. There was nothing wrong with the operation of the meters in question.

3. The energy theft or diversion in each instance occurred on the customer side of the meter.
4. In each case, usage registered by the complainants' meter included consumption in addition to that attributable to complainant's own premises.
5. Energy diversion was caused by either the landlord or another tenant in the building.
6. PG&E adjusted the gas bills for Thorne and Mack by providing them additional baseline allowance for the water heaters served by their meters.

Complainants request an order requiring PG&E to ascertain the amount of gas and electricity used by their landlords or other tenants, requiring P&GE to refund that amount to complainants and directing the company to seek recovery of those sums from the beneficial users of the energy, regardless of the fact that the energy was diverted from facilities on the customer's, rather than the utility's, side of the meter. PG&E objects to such an order.

Both parties rely on PG&E's tariff rules to argue their positions. The parties have framed the controversy in terms of whether Rule 1 mandates recovery from the "customer" or Rule 17 authorizes PG&E to recover from the person who benefitted from the use of the metered energy. The parties agree that someone other than the customer of record benefitted from the use of energy metered under the customers' accounts.

Unfortunately, part of the difficulty of resolving these claims arises from the fact that Rule 17 is not exactly applicable to these facts showing that the metered energy was commingled or used directly by a third party without the customer's express consent. We do not find that the evidence supports a finding of a violation of any law, order, or rule of the Commission by PG&E. Thus, complainants are denied the individual relief sought. At the

same time, we do not believe that any failure or reluctance on the part of the complainants to pay the amounts billed to them by PG&E should necessarily provide grounds whereon PG&E should consider any of the complainants to be credit risks.

Nonetheless, we anticipate that additional cases such as this may be brought to our attention. Rather than continue to resolve each case in an ad hoc basis, we should address the generic issue of commingling of energy usage on the customer's side of the meter in an Order Instituting Investigation (OII) to which the major energy utilities and DRA will be made respondents.

The issues to be addressed in the OII differ from those usually presented in the "diversion" cases. There, the utility suspects that its customer has had the beneficial use of energy which has not registered on the customer's meter. The utility attempts to "backbill", or collect revenues it estimates are owed by the customer. In the instant case, the utility has continued to receive its revenues. Since the general body of ratepayers are not harmed by this form of diversion, in contrast to the unmetered diversion of energy, the utility has no incentive to identify and collect from the unauthorized user. Another difficulty lies in the fact that the beneficial user is not the customer of record, but a third party. The usual utility response to diversion cases, i.e. "backbilling", is not appropriate here. New approaches must be devised to ensure that customers are not required to pay for common usage or diverted energy under the threat of termination of service and negative credit ratings. That will be the purpose of the OII. ✓

In addition, there are the real additional costs due to the inefficient use of diverted energy. SDGE& stated in its filing in compliance with D.86-06-035, "...it is unlikely that even the most basic of conservation measures have been employed by a person who is receiving 'free' energy." This lack of incentive is particularly glaring in the Thorne and Mack cases, where the landlord, who is responsible for supplying each tenant with a ✓



source of hot water, has no incentive to provide that service in an energy efficient manner because he is not paying the gas bill. Our carefully balanced conservation policies should not be undermined by the "free" use of energy. Given these costs, from the standpoint of pure economic efficiency, it may well be cost effective for all energy utilities to devote some effort to resolving these cases, for exactly the same reasons that the utility sponsors conservation programs.

Our legal staff should prepare an OII to suggest a procedure which would involve the utility, on a carefully limited basis, in helping to resolve these cases. The extent of utility involvement should be examined in an investigation pursuant to a Order Instituting Investigation. The parties should compare the approaches to this issue taken by our counterparts in the various jurisdictions as discussed in complainants' briefs and as subsequently developed in the course of our investigation. Parties should comment on the following procedure:

1. The utility would, upon request or inquiry by a customer, visit the customer's premises and investigate the cause of the customer's complaint (which it would do in any event where "diversion" of energy is suspected by the customer).
2. If the utility finds that due to a physical condition on the premises, persons other than the customer are directly benefitting without the customer's consent from the customer's metered energy, then the utility would adjust baseline allowances and credit ratings (as PG&E was willing to do in this case).
3. The utility would then provide the customer of the unauthorized use with a certified statement that unauthorized use was occurring, along with an estimate of the amount being diverted and where the energy was being diverted to.

from unauthorized use of energy are likely also to be PG&E customers, PG&E has the administrative ability to bill the beneficial users. These are factual questions for the OII.

Complainants also requested much broader relief in the nature of a class action suit and an order instituting investigation, or the adoption of a rule dealing with energy diversion. We believe that the OII which we have provided for is a better forum for instituting any changes in PG&E's tariff rules. While the existing complaint procedure is available to those complainants who need relief before the Commission acts in the OII, we note that we will most likely reserve judgment on such cases until a uniform policy and procedure has been developed to deal with the commingling of energy usage as in the cases before us.

Findings of Fact

1. Complainants were PG&E's customers of record by virtue of their receiving and paying bills issued by PG&E.
2. There was nothing wrong with the operation of complainants' meters.
3. Complainants were victims of unauthorized energy use by third parties.
4. The unauthorized usage by third parties was metered on the complainants' accounts.
5. The unauthorized use in each instance was caused by either the landlord or another tenant in the building.

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(Footnote continued from previous page)

documentation, and publicizing successful recovery in energy diversion cases. The difficulty of tracing or identifying the customer who has diverted energy in remote or resort areas is mentioned. ("Energy Diversion", a report by the Service and Safety Branch of Evaluation and Compliance Division (now Commission Advisory and Compliance Division), October 7, 1986.

# **CORRECTION**

**THIS DOCUMENT HAS  
BEEN REPHOTOGRAPHED  
TO ASSURE  
LEGIBILITY**

source of hot water, has no incentive to provide that service in an energy efficient manner because he is not paying the gas bill. Our carefully balanced conservation policies should not be undermined by the "free" use of energy. Given these costs, from the standpoint of pure economic efficiency, it may well be cost effective for all energy utilities to devote some effort to resolving these cases, for exactly the same reasons that the utility sponsors conservation programs.

Our legal staff should prepare an OII to suggest a procedure which would involve the utility, on a carefully limited basis, in helping to resolve these cases. The extent of utility involvement should be examined in an investigation pursuant to a Order Instituting Investigation. The parties should compare the approaches to this issue taken by our counterparts in the various jurisdictions as discussed in complainants' briefs and as subsequently developed in the course of our investigation. Parties should comment on the following procedure:

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3. The utility would then provide the customer of the unauthorized use with a certified statement that unauthorized use was occurring, along with an estimate of the amount being diverted and where the energy was being diverted to.

4. Only if the utility is clearly able to establish that the beneficial user was also a customer of record, and the amount of unauthorized energy use, would the utility be required to bill that beneficial user for the unauthorized energy use. If the utility is able to collect the money, it would then provide a refund to the customer.

There is strong reason to believe that an efficient procedure to resolve disputes over the unauthorized use of energy must involve the utility. First, PG&E's inspectors will be on the scene in any event, due to routine inspections such as meter reading, and they possess the expertise to identify clearcut cases of unauthorized energy use. Second, using the sophisticated capabilities which it has developed to deal with energy diversion, it may be feasible for the utility to estimate readily the amount of unauthorized energy use and determine who should pay which portion of the total bill.<sup>1</sup> Third, because those who benefit

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<sup>1</sup> D.86-06-035 ordered utilities to amend their service tariffs to provide that, "When regular, accurate meter readings are not available or the electric/gas usage has not been accurately measured, the utility may estimate the customer's energy usage for billing purposes on the basis of information including but not limited to the physical condition of the metering equipment, available meter readings, records of historical use, and the general characteristics of the customer's load and operation."

In compliance with that decision, the CACD reviewed utility reports on unauthorized energy use and prepared a report recommending means for improving the utilities' energy theft and backbilling programs. According to the report, the initial responsibility for detection of meter irregularities lies with the meter readers. Their suspicions may be raised by bills with unusual consumption patterns, unauthorized connections, or other occurrences. The most effective ways of moderating energy diversion include immediately reporting all possible energy diversion situations which come to their attention, photo

(Footnote continues on next page)

from unauthorized use of energy are likely also to be PG&E customers, PG&E has the administrative ability to bill the beneficial users. These are factual questions for the OII.

Complainants also requested much broader relief in the nature of a class action suit and an order instituting investigation, or the adoption of a rule dealing with energy diversion. We believe that the OII which we have provided for is a better forum for instituting any changes in PG&E's tariff rules. While the existing complaint procedure is available to those complainants who need relief before the Commission acts in the OII, we note that we will most likely reserve judgment on such cases until a uniform policy and procedure has been developed to deal with the commingling of energy usage as in the cases before us.

Findings of Fact

1. Complainants were PG&E's customers of record by virtue of their receiving and paying bills issued by PG&E.
2. There was nothing wrong with the operation of complainants' meters.
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6. PG&E billed complainants for the energy registered on their meters and in the cases of Thorne and Mack, the billing rates were adjusted for additional baseline allowances.

7. Complainants allege that they should not be held liable for energy consumed by any party other than the customer of record.

8. Complainants request an inquiry into the reasonableness of the rules in PG&E's tariffs.

9. A proceeding pursuant to an Order Instituting Investigation is the appropriate proceeding to modify PG&E's tariff rules.

#### Conclusions of Law

1. Complainants have not demonstrated any violation by PG&E of any law, rule, or order of the Commission.

2. Complainants are not entitled to refunds, credits, or relief from liability for the cost of energy registered on their meters but consumed by unauthorized third parties.

3. Thorne should be allowed to establish PG&E service in his own name.

4. Except as ordered herein, the complaints should be dismissed for failure of complainants to show a cause of action.

5. Complainants should not be considered credit risks.

6. The Commission's legal staff should prepare an Order Instituting Investigation into the practices of the major energy utilities subject to our jurisdiction when the utility has reason to know that energy registered on a customer's account is being used by unauthorized third persons for our consideration and possible adoption.

ORDER

IT IS ORDERED that:

1. The complaint of Wilbert Thorne, Daria Mack, and Sheila Standley against Pacific Gas and Electric Company (PG&E) are denied except as granted herein.

2. PG&E shall allow Wilbert Thorne to establish service in his own name without the need for the deposit required of customers considered to be "credit risks."

3. PG&E shall remove and refrain from imposing any credit restriction or limitation that has been applied to Daria Mack and Sheila Standley on the basis of the facts giving rise to these complaints.

4. We direct our legal staff to prepare an Order Instituting Investigation into the practices of the major energy utilities subject to our jurisdiction when the utility has reason to know that energy registered on a customer's account is being used by unauthorized third persons for our consideration and possible adoption. The OII will consider the proposal for utility action contained in this order, above, as well as the approaches to these issues which have been adopted by our counterpart Commissions in other jurisdictions and by legislative bodies.

5. Cases 85-08-071 and 87-04-004 are closed.

This order becomes effective 30 days from today.

Dated December 19, 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 Weiss*  
Victor Weiss, Executive Director  
WB



Decision 88 12 080 DEC 19 1988

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Wilbert Thorne and Daria Mack,

Complainant,

vs.

Pacific Gas and Electric  
Company,

Defendant.

Case 85-08-071  
(Filed August 30, 1985)

Sheila Standley,

Complainant,

vs.

Pacific Gas and Electric  
Company,

Defendant.

Case 87-04-004  
(Filed April 6, 1987)

Katherine E. Weiss, Attorney at Law, for  
Daria Mack, Wilbert Thorne, and Sheila  
Standley, complainants.

Howard V. Golub, Mark R. Huffman, and  
Alice W. Reid, Attorneys at Law, for  
Pacific Gas and Electric Company,  
defendant.

O P I N I O N

Summary of Decision

This decision dismisses the complaint of Wilbur Thorne and grants limited relief to complainants Daria Mack and Shiela Standley.

History of Proceeding

On August 30, 1985, Legal Aid Society of Alameda County filed a complaint, Case (C.) 85-08-071, on behalf of Wilbert Thorne and Daria Mack requesting that the Commission:

1. Enjoin defendant, PG&E from:
  - a. Denying complainants and others similarly situated, gas and electric service for their failure to pay for past service diverted without their consent to a third party or parties, and
  - b. Requiring complainants and others similarly situated to provide extra security deposits, advance payments or any other requirements for future gas or electric service which places a heavier burden on them than is placed on customers with good credit standing; and
2. Order PG&E to:
  - a. To adjust complainants' bills and bills of others similarly situated to reflect service actually used by them, and
  - b. To credit, pursuant to Public Utilities (PU) Code § 734, complainants and others for amounts paid by them towards bills for diverted services; and
3. To declare that complainants and others similarly situated are not liable for services diverted by their landlords without the tenants' knowledge or consent; and
4. To promulgate a rule to be applied in cases of utility diversion. Such a rule should include at a minimum provisions:
  - a. Prohibiting defendant from terminating a user's service on account of failure to pay for diverted services, and

- b. Prohibiting defendant from billing a user for diverted services when defendant becomes aware of the diversion, and
  - c. Requiring a utility to adjust the innocent user's bill to reflect actual usage, deleting charges for diverted services; and
5. To declare a policy and promulgate procedures to specifically address instances of utility diversion, including a recognition that a utility, due to its unique position as a monopoly supplier of services so essential and basic to the welfare of the region's residents, has a responsibility to take affirmative action to alleviate the inequities, injustices, and hardships caused by utility diversion.

Evidentiary hearing in the matter was scheduled for January 8, 1986. At the request of complainants the hearing was rescheduled for January 29, 1986.

By a letter dated January 17, 1986, the counsel for complainants requested that the hearing be taken off calendar and postponed indefinitely.

On April 6, 1987, Legal Aid Society of Alameda County filed another complaint (C.87-04-004) on behalf of Sheila Standley requesting relief similar to the relief requested in C.85-08-071.

C.85-08-071 was consolidated with C.87-04-004.

Evidentiary hearing in the consolidated matter was held on July 22 and 23, 1987.

The matter was submitted on October 5, 1987 upon receipt of concurrent reply briefs.

Background

Wilbert Thorne, Daria Mack, and Sheila Standley (complainants) allege that they were victims of what is known as utility "diversion" or theft of service. Diversion of the type complained of here occurs when a utility user's meter registers not only that user's service but also the service provided to others;

In so far as the relief which complainants desire may be construed to be a request for an inquiry into the reasonableness of PG&E's gas and electric billing practices, PG&E believes that under PU Code § 1702 complainants are not the right party to bring such and inquiry before the Commission.

PG&E disagrees with complainants' contention that they have no recourse to remedy the situation. According to PG&E, in Alameda County where each complainant resides, relief can be obtained quickly and at little cost in small claims court where a claimant may represent himself/herself in matters up to \$1500. PG&E points out that in Alameda County there is also an organization, Operation Sentinel, which is specifically designed to provide advice to tenants and landlords on their respective rights and responsibilities, to help with legal remedies and to arbitrate landlord-tenant disputes. PG&E contends that if such legal remedies are considered inadequate, rather than to inject the utility into landlord-tenant disputes, the preferred course of action would be to change California landlord-tenant law to provide for the right of a tenant to offset against rents any payment by the tenant to the utility of the claimed diversion amounts.

PG&E requests that for the reasons stated above the complaints in these proceeding be dismissed.

#### Discussion

The undisputed facts in this case are:

1. The complainants were PG&E's customers of record because each of them received and paid bills issued by PG&E on a regular basis.
2. There was nothing wrong with the operation of the meters in question.

source of hot water, has no incentive to provide that service in an energy efficient manner because he is not paying the gas bill. Our carefully balanced conservation policies should not be undermined by the "free" use of energy. Given these costs, from the standpoint of pure economic efficiency, it may well be cost effective for all energy utilities to devote some effort to resolving these cases, for exactly the same reasons that the utility sponsors conservation programs.

Our legal staff should prepare an OII to suggest a procedure which would involve the utility, on a carefully limited basis, in helping to resolve these cases. The extent of utility involvement should be examined in an investigation pursuant to a Order Instituting Investigation. The parties should compare the approaches to this issue taken by our counterparts in the various jurisdictions as discussed in complainants' briefs and as subsequently developed in the course of our investigation. Parties should comment on the following procedure:

1. The utility would, upon request or inquiry by a customer, visit the customer's premises and investigate the cause of the customer's complaint (which it would do in any event where "diversion" of energy is suspected by the customer).
2. If the utility finds that due to a physical condition on the premises, persons other than the customer are directly benefitting without the customer's consent from the customer's metered energy, then the utility would adjust baseline allowances and credit ratings (as PG&E was willing to do in this case).
3. The utility would then provide the customer of the unauthorized use with a certified statement that unauthorized use was occurring,

along with an estimate of the amount being diverted and where the energy was being diverted to.

4. Only if the utility is clearly able to establish that the beneficial user was also a customer of record, and the amount of unauthorized energy use, would the utility be required to bill that beneficial user for the unauthorized energy use. If the utility is able to collect the money, it would then provide a refund to the customer.

There is strong reason to believe that an efficient procedure to resolve disputes over the unauthorized use of energy must involve the utility. First, PG&E's inspectors will be on the scene in any event, due to routine inspections such as meter reading, and they possess the expertise to identify clearcut cases of unauthorized energy use. Second, using the sophisticated capabilities which it has developed to deal with energy diversion, it may be feasible for the utility to estimate readily the amount of unauthorized energy use and determine who should pay which portion of the total bill.<sup>1</sup> Third, because those who benefit

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1 D.86-06-035 ordered utilities to amend their service tariffs to provide that, "When regular, accurate meter readings are not available or the electric/gas usage has not been accurately measured, the utility may estimate the customer's energy usage for billing purposes on the basis of information including but not limited to the physical condition of the metering equipment, available meter readings, records of historical use, and the general characteristics of the customer's load and operation."

In compliance with that decision, the CACD reviewed utility reports on unauthorized energy use and prepared a report recommending means for improving the utilities' energy theft and

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from unauthorized use of energy are likely also to be PG&E customers, PG&E has the administrative ability to bill the beneficial users. These are factual questions for the OII.

Complainants also requested much broader relief in the nature of a class action suit and an order instituting investigation, or the adoption of a rule dealing with energy diversion. We believe that the OII which we have provided for is a better forum for instituting any changes in PG&E's tariff rules. While the existing complaint procedure is available to those complainants who need relief before the Commission acts in the OII, we note that we will most likely reserve judgment on such cases until a uniform policy and procedure has been developed to deal with the commingling of energy usage as in the cases before us.

#### Finding of Facts

1. Complainants were PG&E's customers of record by virtue of their receiving and paying bills issued by PG&E.
2. There was nothing wrong with the operation of complainants' meters.

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backbilling programs. According to the report, the initial responsibility for detection of meter irregularities lies with the meter readers. Their suspicions may be raised by bills with unusual consumption patterns, unauthorized connections, or other occurrences. The most effective ways of moderating energy diversion include immediately reporting all possible energy diversion situations which come to their attention, photo documentation, and publicizing successful recovery in energy diversion cases. The difficulty of tracing or identifying the customer who has diverted energy in remote or resort areas is mentioned. ("Energy Diversion", a report by the Service and Safety Branch of Evaluation and Compliance Division (now Commission Advisory and Compliance Division), October 7, 1986.

3. Complainants were victims of unauthorized energy use by third parties.

4. The unauthorized usage by third parties was metered on the complainants' accounts.

5. The unauthorized use in each instance was caused by either the landlord or another tenant in the building.

6. PG&E billed complainants for the energy registered on their meters and in the cases of Thorne and Mack, the billing rates were adjusted for additional baseline allowances.

7. Complainants allege that they should not be held liable for energy consumed by any party other than the customer of record.

8. Complainants request an inquiry into the reasonableness of the rules in PG&E's tariffs.

9. A proceeding pursuant to an Order Instituting Investigation is the appropriate proceeding to modify PG&E's tariff rules.

#### Conclusions of Law

1. Complainants have not demonstrated any violation by PG&E of any law, rule, or order of the Commission.

2. Complainants are not entitled to refunds, credits, or relief from liability for the cost of energy registered on their meters but consumed by unauthorized third parties.

3. Thorne should be allowed to establish PG&E service in his own name.

4. Except as ordered herein, the complaints should be dismissed for failure of complainants to show a cause of action.

5. Complainants should not be considered credit risks.

6. The Commission's legal staff should prepare an Order Instituting Investigation into the practices of the major energy utilities subject to our jurisdiction when the utility has reason to know that energy registered on a customer's account is being used by unauthorized third persons for our consideration and possible adoption.



O R D E R

IT IS ORDERED that:

1. The complaint of Wilbert Thorne, Daria Mack, and Sheila Standley against Pacific Gas and Electric Company (PG&E) are dismissed except as granted herein. ✓

2. PG&E shall allow Wilbert Thorne to establish service in his own name without the need for the deposit required of customers considered to be "credit risks."

3. PG&E shall remove and refrain from imposing any credit restriction or limitation that has been applied to Daria Mack and Sheila Standley on the basis of the facts giving rise to these complaints.

4. We direct our legal staff to prepare an Order Instituting Investigation into the practices of the major energy utilities subject to our jurisdiction when the utility has reason to know that energy registered on a customer's account is being used by unauthorized third persons for our consideration and possible adoption. The OII will consider the proposal for utility action contained in this order, above, as well as the approaches to these issues which have been adopted by our counterpart Commissions in other jurisdictions and by legislative bodies.

5. Cases 85-08-071 and 87-04-004 are closed.

This order becomes effective 30 days from today.

Dated DEC 19 1988, at San Francisco, California.

STANLEY W. HULETT  
President

DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners