

Decision 89 08 008 AUG 3 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Frank C. Eck, General Partner of Kew)
Investment Enterprises,)

Complainant,)

v.)

Southern California Gas Company,)

Defendant.)

Case 88-01-031
(Filed January 27, 1988)

Cummins & White, by David B. Shapiro, Attorney
at Law, for complainant.

Peter N. Osborn, Attorney at Law, for
defendant.

OPINION

Summary of Decision

This decision denies Frank C. Eck's complaint against Southern California Gas Company (SoCalGas). The complaint relates to a request for retroactive adjustment of baseline allowance for an apartment building.

Background

Complainant, Frank C. Eck, is the general partner of Kew Investment Enterprises (KEW), a builder and manager of income property. In 1977, KEW purchased a lot and built a 20-unit apartment building at 1125 Pico Boulevard (Pico Building) in Santa Monica.

On October 6, 1977, KEW submitted to SoCalGas a contract for "Extension of Gas Line" for the Pico Building. The contract states that the building has 20 gas ranges, two clothes dryers, and one water heater with an input rating of 250,000 Btu. The form was completed by complainant's partner, Mr. Klein.

From approximately mid-1978 to March 1981, SoCalGas allowed the tariff-authorized baseline allowance for the Pico Building. Under the tariff provisions applicable at that time, no additional baseline allowance was available for central facilities which provide water and space heating for baseline uses of their tenants.

On December 5, 1980, the Commission issued Decision (D.) 92498 (in Application 59929) which modified SoCalGas's tariff provisions applicable to the baseline allowance for owners of central facilities. D.92498 increased the baseline allowance for central facilities' customers and made a corresponding reduction in the baseline allowance for individually metered units.

D.92498 also required SoCalGas to inform central facilities' customers regarding the tariff changes and to establish their eligibility. Accordingly, SoCalGas conducted a survey of customers supplying central facilities (such as complainant) by requesting each customer to complete a "Central Facilities Verification Form."

On January 7, 1981, complainant returned a completed Central Facilities Verification Form for the Pico Building to SoCalGas. The form was incorrectly marked and indicated that the building's central facilities meter did not supply hot water for the individual living units. According to complainant, he may have marked the form incorrectly because he confused the Pico Building with another he owned which had individually metered water heaters.

As a result, complainant did not receive the correct baseline allowance for the Pico Building.

During October 1986, complainant noticed that one of KEW's similar buildings typically received much lower gas bills than the Pico Building. He brought this to SoCalGas's attention. While SoCalGas corrected the baseline allowance prospectively, it refused complainant's request to refund any portion of the overpayment made during the period 1981 through 1986.

After failing to resolve this matter informally with the Commission's Consumer Affairs staff, complainant filed a formal complaint on January 27, 1988. On March 7, 1988, complainant amended the complaint by citing portions of D.86-06-035 (in I.84-05-046) in support of his position.

Hearings

Duly noticed hearings were held in Los Angeles before Administrative Law Judge Garde on May 5 and October 14, 1988. The matter was submitted upon receipt of concurrent briefs on January 6, 1989.

Complainant's Position

According to complainant, since long-standing law protects smaller and less knowledgeable parties against the full brunt of contractual errors, complainant should not bear the entire burden of his mistake. Complainant believes that the overbilled amount be shared equitably between the parties. Complainant points out that Public Utilities (PU) Code § 451 requires that all charges received by any public utility be "just and reasonable." Complainant contends that the Commission cannot uphold this rule without assuring, in cases of billing mistakes, that each mistake's loss be shared fairly.¹

According to complainant's calculation, the overbilled amount from 1981 through 1986 is \$5,823.95. Complainant opines that this large loss results from a long chain of causation and that SoCalGas should not construe this mistake to deny him the correct baseline allowance. Complainant believes that he should not share the entire burden of the overpayment, which would likely have continued today had he not noticed it.

¹ In the original and amended complaint, complainant requests full refund of overpayments from 1978 to 1986. However, in his brief, complainant requests that the overbilled amount be equitably shared by the two parties.

Complainant maintains that the Commission has already noted that it is inequitable to require one party to share the entire loss in cases of billing errors. In support of his position, complainant points out that the Commission, in D.86-06-035, the retroactive billing investigation, has noted the following regarding billing errors:

"In the case of an overcollection, however, a single ratepayer bears the cost (the excess charges) and should recover the money that was mistakenly billed by the utility. In addition, we note that the utilities' comments indicate that their practice is to refund overcharges whenever possible. The rules will reflect this practice."

According to complainant, although SoCalGas denies that this case presents a "billing error," the Commission's observation in D.86-06-035 applies here with similar force and is not destroyed by semantics.

Further, complainant asserts that SoCalGas's tariff Rule 16, which excludes such mistakes from "billing errors", became effective on May 25, 1988, long after the events occurred. Therefore Rule 16 does not apply to this case.

Next, complainant maintains that he did not cause the mistake alone. According to complainant, he had provided SoCalGas a contract for Extension of Gas Line on October 7, 1977, and that form clearly indicated that the Pico Building had only one water heater. Therefore, complainant argues that SoCalGas had the ability to find the error on the Central Facilities Verification Form and the opportunity to rectify it. Complainant argues that since SoCalGas failed to reconcile its own records, the error in this case is mutual.

Finally, complainant believes that his high gas usage should have alerted SoCalGas that the Pico Building indeed had one water heater. According to complainant, SoCalGas should have inspected the building to ascertain that the appliances were

correctly marked on the Central Facilities Verification Form. It did not do so. Therefore, complainant argues that SoCalGas shares the responsibility of the error and should share the loss fairly.

SoCalGas's Position

SoCalGas contends that at all times complainant was billed for gas use in strict accordance with SoCalGas's tariff and with D.92498 which allowed an increase in baseline allowance for central facilities.

According to SoCalGas, provisions of D.92498 were applicable only after SoCalGas provided notice to the affected customers and only after such affected customers responded to SoCalGas with appropriate information showing eligibility. SoCalGas maintains that this provision of D.92498 is important because the customer is the only one who can provide information regarding eligibility. SoCalGas contends that the provision is also important because the information furnished by central facilities' customers is also used to modify the baseline allowance applicable to the individually-metered residents in the multi-family unit dwelling.

As to facts applicable to this proceeding, SoCalGas contends that complainant was mailed a notice in accordance with D.92498 indicating that the Pico Building may be eligible for central facilities baseline allocation and requesting relevant information. According to SoCalGas, complainant responded to the notice by filling out the Central Facilities Verification Form in a manner indicating that neither water heating nor space heating was being provided through central facilities at the Pico Building. Therefore, SoCalGas claims that it continued to bill complainant with no central facilities baseline allowance for the Pico Building.

SoCalGas points out that because of complainant's error, the occupants of the individual units in the Pico Building received excessive baseline allowances. SoCalGas argues that just as it is

legally barred from rebilling the occupants of the individual units, complainant too should be barred from seeking a refund.

SoCalGas disagrees with complainant's claim that it should have detected the error in the Central Facilities Verification Form through the contract for Extension of Gas Line for the Pico Building. SoCalGas argues that the contract for Extension of Gas Line was completed in 1978, three years before the central facilities provisions were made available. Moreover, SoCalGas maintains that the contract does not provide sufficient information to ascertain whether the Pico Building has central facilities.

Further, SoCalGas maintains that the rule against retroactive ratemaking, as embodied in PU Code §§ 728 and 734, prohibits the Commission from ordering a utility to refund revenues collected pursuant to a lawfully filed tariff.

Next, SoCalGas takes issue with complainant's claim for refund covering the period from June 1978 to November 1986. SoCalGas contends that in no case should complainant be awarded a refund for the period before the effective date of D.92498, or March 5, 1981. In addition, SoCalGas asserts that the three-year statute of limitation for refunds bars complainants from claiming a refund for the period earlier than January 26, 1985.

Finally, for the reasons stated above, SoCalGas asserts that for both policy and legal reasons the Commission should not order a refund in this matter. SoCalGas maintains that it has a right to retain revenue collected pursuant to a lawful tariff. Therefore, SoCalGas requests that the complaint must be dismissed.

Discussion

The undisputed facts in this proceeding are:

1. Complainant provided incorrect information on the Central Facilities Verification Form and consequently received less than the authorized baseline allowance for the apartment building since March 1981.

2. In October 1986, complainant realized his error and notified SoCalGas.
3. SoCalGas corrected complainant's baseline allowance prospectively after being notified of the error.

We note that complainant contends that he should not be held wholly responsible for the error on the Central Facilities Verification Form and that SoCalGas be required to refund an equitable portion of the overpayment from March 1981 through October 1986. SoCalGas refuses to do so.

In considering complainant's request for refund, we look to D.92498 which provides a procedure whereby the baseline allowance for the central facilities customer could be increased only with the corresponding reduction in the baseline allowance to the individually-metered units. The Commission used the following rationale for the procedure:

"Owners of central facilities who provide hot water heating and space heating for lifeline uses of their tenants are not receiving allowances and rates for providing that service. On the other hand, individual tenants receive full lifeline allowances and rates even though some of them are provided hot water and space heating through central facilities. . . . The staff believes that the application of the lifeline concept should result in lifeline rates and appropriate lifeline volumes for those who provide such service. Conversely the lifeline rates and volumes should not be provided to those customers who are provided lifeline service through central facilities."

* * *

". . . The staff recommendation does not 'reduce' the lifeline allowance, it simply shifts it to the party providing the associated service. We see no vested interest in maintaining a lifeline allowance for nonexistent uses. There is no allegation by TURN that the remaining lifeline allowance is unreasonable or inadequate. The staff proposal

is reasonable and is adopted." (D.92498, p. 8.)

It is clear from the above rationale that the central facilities baseline procedure simply shifts the baseline allowance to the party providing the associated service.

From March 1981 through October 1986, complainant did not receive an appropriate baseline allowance for central facility water heating and consequently paid higher than necessary gas bills. However, the occupants of the individual units or complainant's tenants in the Pico Building received a correspondingly higher baseline allowance and consequently paid lower gas bills. In effect, SoCalGas collected from complainant what it would have collected from the tenants of the Pico Building, if complainant had provided SoCalGas with correct information. In this instance, unlike instances involving billing errors, SoCalGas did not receive the benefit of complainant's overpayment. SoCalGas cannot now rebill the tenants of the Pico Building to recover the excess baseline allowance.

The intent of D.92498 was not to provide baseline allowance twice, but only once to either the tenant/user or the owner/provider of hot water. To require SoCalGas to refund the overbilled amount to complainant would in effect be granting two baseline allowances on behalf of one end user. Other ratepayers would have to absorb the revenue shortfall, if in this instance two baseline allowances were allowed. On the other hand, if this amount was not charged to other ratepayers, but was to be recovered from SoCalGas's shareholders, this would amount to a penalty. For reasons set forth below we are not persuaded that SoCalGas has been derelict in its duties and should be penalized.

Turning to complainant's contention that SoCalGas is partially responsible for the error because SoCalGas could have detected the error by reviewing the 1977 contract for Extension of Gas Line, we note that the information contained in the contract

was outdated and incomplete to determine complainant's eligibility to receive central facilities' baseline allowance. In addition, D.92498 required SoCalGas to establish the eligibility of central facilities customers, which SoCalGas did by requiring each customer with central facilities to complete the Central Facilities Verification Form. By complainant's own admission the form (Exhibit 2) is fairly easy to understand. Therefore, we believe that SoCalGas complied with the requirements of D.92498 by establishing the eligibility of central facilities customers through the completion of a simple form. We do not expect SoCalGas to rely on the information furnished on the contract for Extension of Gas Line. The information was provided for a different purpose, was furnished more than three years before, and may not have represented the actual appliances installed. To expect SoCalGas to check its construction records for purposes of verifying baseline allowance claims made by its customers is not reasonable. Therefore, SoCalGas does not share the responsibility for the error in the Central Facilities Verification Form.

Next, we will consider the issue of retroactive adjustment or refund of revenues collected pursuant to a utility's tariffs filed with the Commission. The Commission addressed this issue in Eldridge v. PT&T, D.83-05-007, dated May 4, 1983. In Eldridge the complainant alleged that dormitory residents at University of California, Berkeley were charged a higher service connection charge than typical residential customers and that the higher charge was therefore unlawful. The Commission ordered PT&T to modify its charges prospectively. As to the request for refund of the earlier charges, the Commission stated the following:

"The installation rates at issue were established in ratemaking proceedings in which cost of service studies were reviewed and ratemaking policies were adopted. Once these rates were established by Pacific in a ratemaking proceeding and then approved by the Commission, they could be adjusted only on a prospective basis. The Commission cannot

retroactively adjust these rates and we do not intend to do so in this case." (Eldridge, p. 13.)

As with the rates at issue in Eldridge, the procedure used by SoCalGas to charge complainant for gas service was in strict accordance with the terms of SoCalGas's tariff approved by the Commission. Under SoCalGas's tariff, the central facilities baseline allocation was to operate only prospectively from the date the central facilities customer provided the necessary information to SoCalGas. The notice and customer response requirements embodied in SoCalGas's tariff have been approved by the Commission. Therefore, we cannot require SoCalGas to retroactively adjust complainant's rates and refund him the overcharges resulting from his error.

Finally, we recognize that complainant, through his own error, did not receive the appropriate baseline allowance and consequently paid higher gas bills than he should have. The benefits of complainant's overpayment were received by his tenants, not SoCalGas. We cannot require SoCalGas to rebill complainant's tenants nor can we require SoCalGas to refund complainant's overpayment. Complainant is a professional in the business of managing apartment buildings. He cannot expect the ratepayers or SoCalGas shareholders to compensate him for his mistake. We will deny complainant's request for refund and deny the complaint.

Findings of Fact

1. Complainant is the general partner of KEW, a builder and manager of income property.
2. KEW owns a 20-unit apartment building at 1125 Pico Boulevard in Santa Monica.
3. D.92498 dated December 5, 1980 modified SoCalGas's tariff provisions applicable to baseline allowance for owners of central

facilities who provide water and space heating for baseline uses of their tenants.

4. D.92498 increased the baseline allowance for central facilities' customers and made a corresponding reduction in the baseline allowance for individually-metered units.

5. D.92498 required SoCalGas to inform central facilities' customers regarding the tariff changes and to establish their eligibility.

6. In January 1981, SoCalGas requested complainant to complete a Central Facilities Verification Form for the Pico Building to determine complainant's eligibility as a central facilities' customer.

7. Complainant marked the Central Facilities Verification Form incorrectly and indicated that the Pico Building's central facilities meter did not supply hot water to the individual units.

8. As a result of his error, complainant did not receive baseline allowance for central water heating for the Pico Building and consequently paid higher gas bills from 1981 to 1986.

9. Complainant discovered his error in 1986 and notified SoCalGas.

10. After being notified of the error, SoCalGas corrected the baseline allowance for the Pico Building prospectively.

11. Complainant contends that he was not wholly responsible for the error on the Central Facilities Verification Form and that SoCalGas should refund an equitable portion of the overpayment from 1981 to 1986. SoCalGas refuses to do so.

12. While complainant received lower than allowable baseline allowance, tenants in the Pico Building received a corresponding higher baseline allowance.

13. SoCalGas does not share responsibility of the error in completing the Central Facilities Verification Form.

14. SoCalGas did not receive any benefit as a result of complainant's error.

15. SoCalGas billed complainant in accordance with its tariff.

16. The Commission will not order a utility retroactively to adjust revenues collected pursuant to its approved tariffs.

Conclusions of Law

1. Complaint should be denied.
2. Case 88-01-031 should be closed.

ORDER

IT IS ORDERED that:

1. Frank C. Eck's complaint against Southern California Gas Company is denied.

2. Case 89-01-031 is closed.

This order becomes effective 30 days from today.

Dated AUG 3 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Commissioner Stanley W. Hulett,
being necessarily absent, did not
participate.

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

Victor Weisser
Victor Weisser, Executive Director

OB