

Decision 90 01 018 JAN 9 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consolidated Fiber Glass
Products Company,

Complainant,

vs.

Pacific Gas and Electric
Company,

Defendant.

ORIGINAL

Case 89-01-008
(Filed January 10, 1989)

O P I N I O N

Procedural History

Complaint was filed January 10, 1989 by Consolidated Fiber Glass Products Company (Conglas or complainant). The complaint alleged that Pacific Gas and Electric Company (PG&E or defendant) should not be allowed to backbill and charge Conglas for deliveries of natural gas made under the utility's "interruptible service" rate schedule (Schedule G-50 and its successor, G-IND). PG&E had sought payment of the difference between the interruptible rate and the higher non-interruptible rate for deliveries of natural gas made to complainant from September 1986 through September, 1988 because it believed that complainant did not qualify for the interruptible rate. The difference in rates amounts to \$348,145.07. Conglas' informal complaint with the Commission's Consumer Affairs Branch was decided against complainant. After depositing \$43,099.20 with the Commission, pursuant to Rule 10 of the Rules of Practice and Procedure, complainant filed the instant action.

A prehearing conference was held on April 5, 1989. In accordance with the schedule for pre-trial motions and discovery established at the prehearing conference, a Stipulated Factual Chronology (Chronology) containing statements of fact that were agreed on by complainant and defendant was served on the Administrative Law Judge (ALJ) on May 26, 1989. PG&E filed a "Motion of Pacific Gas and Electric Company for Summary Judgment" on May 31, 1989. Conglas submitted its "Opposition to Motion of Pacific Gas and Electric Company for Summary Judgment" on July 3, 1989.

Evidentiary hearing in this matter was postponed. The ALJ proposed by letter that this case be submitted on briefs without evidentiary hearing. This proposal was discussed and agreed to in a conference call between counsel for the parties and the ALJ. The parties agreed that materials which had been submitted under oath or penalty of perjury, along with the Chronology, constitute the record on which the Commission's decision shall be made. The foregoing was summarized in the ALJ's Ruling dated September 27, 1989.

The parties' briefs have been filed and the matter is ready for ex parte disposition. The Chronology and the parties' affidavits and statements under oath will be relied on extensively in this decision.

Facts

On June 2, 1986, PG&E account representative Mark Cunningham met with John (Jack) Pfeffer, president of Conglas, and discussed various gas and electric rate options for Conglas' fiberglass mat plant located in Bakersfield. At that time, Conglas was receiving gas service from PG&E for that plant under Schedule G-2. The parties discussed the cost of PG&E natural gas service under Conglas' existing G-2 rate and other PG&E rates, G-50 and G-58. Service under Schedule G-50 was cheaper than under Schedule G-2 because it was subject to interruption or curtailment

without notice in case of actual or anticipated shortage of natural gas (interruptible service). Cunningham cited the standby alternate fuel system requirement for the G-50 rate and explained that alternate fuels were defined as non-gaseous fuels, such as gasoline, jet fuel, or No. 2 diesel fuel oil. Cunningham directed Pfeffer's attention to the standby fuel system requirement in the G-50 schedule. Pfeffer represented to Cunningham that while he was willing to install the alternate fuel system, he never intended to use it. Cunningham indicated to Pfeffer that in order to qualify for the interruptible rate, a customer must install an alternate fuel system, although the alternate fuel storage system did not have to be any particular size. Cunningham left copies of PG&E's Rate Schedules G-2, G-50, and G-58, and Gas Rule 21 with Pfeffer.

Pfeffer advised Conglas' principal shareholder, various directors and other personnel in a memo that potential savings were very attractive under the interruptible rate, and acknowledged that a standby system installed and approved for operation was a requirement for eligibility for the interruptible rate.

Conglas advised Cunningham that a standby fuel installation for the G-50 rate had been approved by Conglas' management. Pfeffer informed Cunningham by letter dated August 14, 1986 that Conglas was currently installing the fuel oil standby system. In response, Cunningham mailed Pfeffer a contract for gas service at Conglas' mat plant under Rate Schedule G-50.

On August 28, Cunningham met with Pfeffer and was given a tour of Conglas' mat plant facility. Outside the mat plant building, Cunningham saw a 100 barrel diesel oil storage tank, an oil pump, and a 1" oil line running from the oil tank into the mat plant building. Inside the building, Cunningham saw where the 1" oil line was connected to the 4" natural gas house line, which, in turn, ran into the combustion chamber for the mat plant oven. Cunningham was never told that the standby diesel fuel oil apparatus could not actually burn diesel fuel. He could not

inspect the burners within the combustion chamber because the plant was in operation.

Under cover of a letter dated August 28, 1986, Pfeffer transmitted to Cunningham contracts which he had signed for gas service for Conglas under Rate Schedule G-50. The letter stated, "I believe everything is now in place for the new rate to commence on September 5, 1986." PG&E signed the contract and on September 5, 1985, switched Conglas from the G-2 rate to the G-50 rate.

Pursuant to Commission decisions involving restructuring of the gas industry, on May 1, 1988, PG&E switched Conglas from Schedule G-50 to Schedule G-IND, the unbundled rate for interruptible transportation service to noncore commercial/ industrial customers and Schedule G-PN, the non-core procurement rate. Subsequently Conglas purchased gas from PG&E under Schedule G-PC, the core procurement portfolio.

Two years after Conglas had switched to the interruptible rate, an informant advised a PG&E employee that Conglas' alternate fuel system was inoperative. On October 4, 1988, PG&E personnel visited Conglas' mat plant and inspected the standby alternate fuel system with Conglas employees.

PG&E's employees observed that diesel fuel oil could not flow from the 1" diesel line to the 4" natural gas house main because the diesel line was simply welded onto the outside of the gas line. They also learned that the burners inside the mat plant could not burn diesel fuel but only natural gas or propane. This was confirmed by the manufacturer of the burners and Conglas' plant maintenance superintendent. Finally, the PG&E employees saw that the "diesel fuel line" solenoid did not have electrical wires leading from it and that the electrical switch marked "gas/oil" on the mat plant oven control panel was not wired. Conglas had no permit to operate the standby fuel system from the local air quality control board.

On October 10, 1988, PG&E employees reviewed the result of the site visit with Pfeffer. Pfeffer stated that he had decided to install the "standby system" that way. Pfeffer stated that because the G-50 rate had been approved for Conglas, he felt no need to complete the hook-up. It was unreasonable for PG&E to require Conglas to install a functional standby fuel system in order to qualify for a lower gas rate; in the event of a gas curtailment, the plant could have shut down, he stated.

On October 13, 1988, PG&E rebilled Conglas on the G-2 rate from September 5, 1986 through April 10, and the G-NR2 rate from May 1, 1988 through September 4, 1988. Since that time, PG&E has billed Conglas on the G-NR2 rate. The difference between the rebilled rate and the rate actually paid by Conglas at the time of service is \$348,145.08.

Conglas' Position

Conglas alleges that it paid the proper rate for gas service during the relevant period. PG&E should not have backbilled it because "this is not a situation where a customer received service pursuant to one rate schedule, yet paid a lesser amount for that service than was called for in the schedule." Conglas states that it received service pursuant to the terms and conditions of Schedules G-50 and G-IND, that is, the service was "interruptible", and it paid the rates specified in those schedules. During the period in question, Conglas' fiberglass mat plant has not operated continuously. It operated 3 days per week and was down 4 days, with an activity factor of about 30 percent. Due to its low activity, Conglas could afford interruption of its gas service; Conglas could shut the plant down for 3 weeks without its revenues being affected.

Conglas believes that the tariffs themselves provide the remedy if the customer fails to meet any of the terms of the agreement. That remedy is to discontinue the delivery of interruptible gas.

Conglas admits that the alternate fuel system was not operable but claims that it satisfied the terms of the tariff because the use of the word "immediate" in the tariff is ambiguous.¹ Because of that ambiguity, Conglas asserts that it, as the customer, may construe the term in the way most favorable to itself. Conglas quotes Black's Law Dictionary, emphasizing: "(Immediate) denotes that action is or must be taken either instantly or without any considerable loss of time. A reasonable time in view of particular facts and circumstances of (the) case under consideration."

Conglas proffers various interpretations of what is a reasonable time: the time within which Conglas could obtain fuel, the time in which the transition from PG&E gas service to the alternative fuel system can be made, i.e., a minimum of eight hours, or the period of time until Conglas' normal operations would be disrupted from lack of the mat plant combustion facilities. Since normal operations ordinarily include shut down of several days, the word "immediate" as used in the interruptible schedules should be construed to permit a lapse of several days before the alternate fuel system need be operable, according to Conglas.

Finally, Conglas asserts that it is "improper and inequitable for PG&E to backbill Conglas under these circumstances

¹ Schedule G-IND--Gas Transportation Service to Noncore Commercial/Industrial Customers states:

STAND-BY FUEL REQUIREMENT: No customer shall be entitled to service under this rate schedule unless adequate standby equipment and non-gaseous alternative fuel are provided and are ready at all time for immediate operation in the event that natural-gas transportation service is interrupted or curtailed in whole or in part.

Former Schedule G-50 was substantially identical. Schedule G-IND merely added the words "non-gaseous."

after it inspected and approved the fuel system in question." It suggests that PG&E's belief that Conglas was intentionally trying to cheat PG&E has colored the utility's conduct and prevented the resolution of the parties' differences.

PG&E's Position

PG&E claims that Conglas did not satisfy the requirements for service under the G-50 or G-IND rate. Citing Commission Decision (D.) 34797, D.43368, and D.88-03-085, PG&E states that both Rate Schedules G-50 and G-IND require that in order for a customer to be entitled to service under such rate schedule, "adequate standby equipment and (nongaseous) fuel (must be) provided and ready at all times for immediate operation." According to PG&E, this means that standby equipment must actually be installed as a condition of service under Rate Schedule G-50 and Schedule G-IND. At a minimum, an alternate diesel fuel system should have installed parts for fuel storage, fuel delivery, and fuel combustion, plus any and all other parts necessitated by the customer's application so that the standby fuel system can be operated immediately. During the period Conglas was receiving service under the interruptible rate Conglas never provided any immediately operable standby equipment at its mat plant which could burn non-gaseous alternate fuel. Therefore, Conglas did not qualify for the G-50 rate or G-IND rate. PG&E has since learned that it was billing Conglas under the incorrect rate, and now wishes to backbill Conglas to collect the revenues it should have collected under the rate for which Conglas did qualify. PG&E claims that Section 532 of the Public Utilities Code (all references to the Code are to the Public Utilities Code) authorizes it to backbill Conglas for service at the correct rate, while Section 453 of the Code mandates such collection to avoid bestowing

a discriminatory benefit on Conglas. PG&E asserts that it is authorized to backbill Conglas by its Gas Rule 17.²

Discussion

The issue in this case is whether Conglas qualified for natural gas service at the PG&E tariffs under which it received service and was billed, Schedule G-50 and its successor, Schedule G-IND. If Conglas did not qualify, then can PG&E backbill Conglas for the difference between the rates paid and the rates Conglas should have paid? To answer these questions, we think it helpful to consider the following:

- a. What are the requirements for service under Schedule G-50? Must the "alternate fuel system" required by Schedule G-50 consist of a complete, integrated system which includes all the components necessary for operation?

Schedule G-50 service is subject to special conditions listed in the tariff. Special Condition 2, which requires "adequate standby equipment and nongaseous fuel," has been quoted above.

The genesis of this tariff schedule can be traced to a 1941 Commission decision following an investigation into the availability of standby fuel systems for natural gas customers taking service under non-firm rate schedules, D.34797. At that time, the demands of the defense program and growth within the state caused concern over available gas supplies. The Commission expressly considered the case of customers who were not engaged in direct government defense work, and customers who, in their own

² Section D of that rule states, "Where PG&E overcharges or undercharges a customer as the result of a billing error, PG&E may render an adjusted bill for the amount of the undercharge, without interest, and shall issue a refund or credit to the customer for the amount of the overcharge, without interest, for the same periods as for meter error."

judgment, had no need for standby capability under normal conditions of operation because of the seasonal nature of their operations. Even though these customers had no imminent need for standby service, the Commission ordered that customers who thereafter took "surplus" service must first show that they have provided an adequate, usable standby fuel supply or special authorization from the Commission. (Emphasis added.)

This requirement was based on the historical development of the "surplus" gas rate. Originally, the "surplus" gas rate was a discounted rate used to market natural field gas that was a previously wasted by-product of oil production. In contrast, in order to provide "firm" service to its customers who had no alternative facilities in case natural gas was not available, utilities were required to invest in gas manufacturing and distribution facilities. These customers were served at the firm rate, which was designed to recover the utility's investment needed to provide a firm level of supplies and service. A customer was entitled to the "surplus" rate because it did not cause the utility to incur the cost of providing it firm service. The Commission found that the most reasonable way to ensure that the utility would not have to incur the expense of providing firm service is to require the "surplus" customer to install and maintain its own alternate fuel capability. The Commission further stated that industrial customers may not transfer at will between the firm and the surplus schedules, "as to do so would destroy the value of the classification built over the years and would transfer to the domestic and commercial users the burden which properly belongs to the industrial customers requiring firm service." (Investigation of Gas Utility Schedules, etc., relating to sale of surplus natural gas, D.34797, 43 CPUC 841 853.)

Subsequently, the Commission merged the "surplus" and "interruptible" rate schedules and authorized a single set of interruptible service rate schedules for all customers who have

equipment and fuel available to supply their own needs during periods of interruption. (D.43368.)

The requirement of alternate fuel capability for interruptible utility gas service was affirmed in the Commission's investigation into rate design for unbundled gas utility services. "The existing standby requirements will be retained, with exceptions possible in cases where the customer has the clear technological capability to install alternate fuel facilities, and where the cost to do so and then to use alternate fuel would be less than the cost of core service. These exceptions will require the specific approval of the Commission." (D.88-03-085, mimeo. p. 15.)

The complainant has not plead facts to bring it within the exceptions to the standby requirement. This Commission has not approved interruptible service to Conglas absent alternative fuel capability. We find that PG&E's interruptible gas tariff, formerly G-50 and now G-IND, requires a customer to maintain a complete, fully integrated and operational combustion system permitting the use of a non-gaseous alternate fuel. Conglas' installation did not provide it with alternate fuel capability, as there was no physical way the diesel oil could have flowed into the burners, the burners were incapable of burning diesel oil, and there was no means of switching from natural gas to diesel oil combustion. Conglas admits that while the fuel delivery system was in place, it was not operational. Conglas never requested its contractor to complete installation of the burner system. For the purposes of Schedule G-50 and G-IND, Conglas did not provide an "adequate standby equipment and fuel...ready at all times for immediate operation".

- b. May each customer under a tariff schedule which requires an alternative fuel system define the alternative fuel system to meet his particular operational needs? What does the term "capable of immediate operation" require of an alternate fuel system?

The Commission has held that customer's own operational need for natural gas is irrelevant to the requirement that each customer under the interruptible schedule maintain its own alternate fuel system (D.34797). It follows then, that the customer cannot claim that an alternate fuel system is sufficiently capable of operation simply because the customer's business practices would allow enough time for the system to become operational before the customer suffered any financial consequence from curtailment.

The complainant dwells on the definition of "immediate", and argues that its own needs comprise the "particular facts and circumstances of the case under consideration." We find that the regulatory history of the interruptible rate, and not its own needs, constitutes the context within which the term "immediate" is to be read. An interruptible customer may not enlarge the time within which the alternate fuel system must be operational to match the degree of risk of curtailment he is willing to take.

- c. Did Conglas qualify for the rate because it believed that it had met the requirement?

Conglas had not installed a completed alternate fuel system. Conglas' claim that it believed that it had met the tariff requirements is not convincing. Correspondence between Conglas' president and the contractor shows that the complainant knew that a combustion system was needed for the alternate fuel system to operate, and that the combustion system had not been installed. The interruptible schedules require actual installation of an operable alternate fuel system. This is susceptible to objective verification. Whether the customer subjectively believed it had met the standby requirement is irrelevant. Conglas did not meet the conditions stated in Schedules G-50 and G-IND for interruptible service.

- d. Does PG&E have discretion to backbill for the difference between the G-50 and G-IND rates?

Section 532 of the Code prohibits public utilities from charging or receiving a different compensation for any product or commodity furnished than the rates and charges in its schedules on file and in effect at the time. Section 453 of the Code prohibits a public utility from making or granting any preference or advantage to any corporation or person as to rates, charges, services, facilities, or in any other respect. "Scheduled rates must be inflexibly enforced in order to maintain equality for all customers and to prevent collusion which might otherwise be effectively disguised." (Empire West v. Southern California Gas Company (1974) 12 Cal. 3d 805,809.) "Tariffs are strictly construed and no understanding or misunderstanding of either or both of the parties is enough to change the rule." (Transmix Corp. v. Southern Pac Co. (1960) 187 Cal. App. 2d 257, 264.) The law requiring public utilities to collect the tariffed rate is well established. PG&E is authorized by its Rule 17 to render a bill for undercharges to a customer where PG&E undercharges a customer as a result of a billing error.

Whether PG&E is motivated by a sense of embarrassment is irrelevant because we find in this case that PG&E has a legal duty to backbill. If the alternate fuel requirement of the interruptible rate is not enforced, then Conglas would have obtained a rate even though it had not met the conditions of service set forth in the tariff. It would constitute an advantage to Conglas, which is prohibited by Section 453 of the Code. Also, PG&E would have received less compensation from Conglas than it is to receive under the tariff for which Conglas actually qualifies, in violation of Section 532 of the Code. This is not fair to the customers who have invested in alternate fuel capability in order to properly qualify for the interruptible rate or to the other ratepayers who are burdened with the difference in margin contribution between the G-2/G-NR2 and G-50/G-IND rates. Moreover, if a customer is allowed to disregard the conditions of

service under the tariff it prefers, may the utility not also ignore the conditions of service?

Conglas argues that backbilling is not warranted because neither party received a financial gain or incurred a financial loss as a result of Conglas being billed at the interruptible rate. This is wrong. As PG&E points out, the difference in the firm and interruptible gas rates constitutes margin which would have to be collected from other ratepayers since it had not been collected from Conglas. In this case, the fact that other ratepayers would be injured lends palpable substance to the rule prohibiting the granting of any rate preferences. However, as a rule, whether either party received a financial gain or incurred a financial loss is irrelevant to the Commission's enforcement of Sections 453 and 532 of the Code.

In any event, we would not find that PG&E has been "embarrassed" by its failure to discern that the alternate fuel system was inoperable. PG&E made a reasonable error because the PG&E employee, Cunningham, relied in good faith upon Conglas' representations that the customer qualified for the G-50 rate. The law imposes a duty of fair dealing in the course of contractual relations. PG&E was entitled to assume that Conglas' assertions could be taken at face value. PG&E did perform a reasonable inspection of Conglas' purported alternate fuel system prior to commencement of service under Schedule G-50. Under the circumstances presented here, nothing more could be expected of PG&E.

Conglas claims that PG&E was negligent in failing to adequately describe to Conglas the requirements of the subject rate schedules. The Chronology convinces us that the opposite is true.

Conclusion

Conglas did not meet the conditions for service under the interruptible tariffs for which it was billed because it did not have a complete alternate fuel system capable of operation during

those time periods, nor was the provision of standby facilities excused by order of this Commission. Conglas should have been served under the non-interruptible rates for industrial customers, G-2 and G-NR2, respectively. PG&E should backbill Conglas for the difference between the rates paid and the rates for which Conglas qualified. That difference amounts to \$348,145.08.

Findings of Fact

1. Conglas applied for and received interruptible natural gas service under PG&E Tariff Schedule G-50 from September 5, 1986 to April 30, 1988 and interruptible gas transportation service under PG&E Tariff Schedule G-IND from May 1, 1988 to September 4, 1988.

2. Conglas had installed a diesel fuel tank and a pipe leading to its fiberglass mat plant. The pipe was incapable of delivering diesel fuel to the plant's burners. No combustion system had been installed. Conglas had no usable standby equipment capable of burning an alternate fuel.

Conclusions of Law

1. Schedule G-50 and Schedule G-IND require as a condition of service that adequate standby equipment and non-gaseous fuel must be provided and ready at all times for immediate operation.

2. The requirement for standby equipment and non-gaseous fuel applies to all customers under Schedule G-50 and Schedule G-IND, regardless of their willingness to accept interruptions in natural gas service or delivery and curtailment of their operations due to lack of an alternate fuel supply.

3. Regardless of the time needed to put a customer's alternate fuel supply and standby equipment into operation in case of interruption by PG&E, the standby equipment must consist of a complete non-gaseous fuel storage, delivery, and combustion system that can be operated without further additions to plant.

4. Conglas was not qualified to receive natural gas service under PG&E Schedule G-50 and Schedule G-IND from September 5, 1986 to September 4, 1988.

5. PG&E should have provided service to Conglas under the G-2 rate from September 5, 1986 to April 30, 1988 and under the G-NR2 rate from May 1, 1988 to September 4, 1988.

6. Section 532 of the PU Code prohibits PG&E from charging Conglas for service under the G-50 and G-IND rate schedules because those are rates for which Conglas did not meet the conditions of service listed in the schedules on file and in effect at the time.

7. Section 435 of the PU Code prohibits PG&E from granting Conglas the advantage of receiving the lower interruptible rate provided in Schedules G-50 and G-IND when Conglas has not made the necessary investment in an alternative fuel system.

8. PG&E should backbill Conglas to recover the difference between rates paid and rates it should have paid.

O R D E R

IT IS ORDERED that:

1. The request of Consolidated Fiber Glass Products Company (Conglas or complainant) for an order finding that Conglas paid the proper rate for gas service provided from September 1986 through April 30, 1988, and directing PG&E to cease backbilling for that service is denied.

2. PG&E shall backbill Conglas in the amount of \$348,145.08 for service rendered from September 5, 1986 through April 30, 1988 at the G-2 rate. PG&E shall backbill Conglas for service rendered from May 1, 1988 to September 4, 1988 at the G-NR2 rate.

3. PG&E shall collect \$348,145.08 from Conglas as the backbilled difference. Conglas shall have the option of making one payment to PG&E or paying the backbilled difference in four or fewer installments, with interest calculated from the date of this

decision at the rate equal to the then-current rate on the balance in PG&E's core gas fixed cost account accumulating on the unpaid portion of the backbilled difference.

This order is effective today.

Dated JAN 9 1990, 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.

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director

PB