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Decision 91-08-009 August 7, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SALZ LEATHERS, INC., A California Corporation, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.	ORIGINAL Case 90-04-030 (Filed April 19, 1990)

Graham & James, by Melissa Waksman and Peter Hanschen, Attorneys at Law, for Salz Leathers, Inc., complainant.
Harry W. Long and Roger J. Peters, Attorneys at Law, for Pacific Gas and Electric Company, defendant.

O P I N I O N

1. Summary of Decision

Pacific Gas and Electric Company (PG&E) is ordered to refund $41,524.16, plus interest, to complainant Salz Leathers, Inc. (Salz) for gas transportation charges which were billed under PG&E's Schedule G-IND but should have been billed under Schedule GC-2, in accordance with a "Transportation Service Agreement Between Pacific Gas and Electric Company and Salz Leathers, Inc." (Agreement).

The Agreement is ambiguous in the specification of PG&E's obligations and is construed against PG&E, which caused the ambiguity. Commission policy on long-term gas transportation agreements also supports the relief sought by Salz.

2. Factual Background

On December 20, 1985, the Commission approved Decision 85-12-102[1], which required natural gas distribution utilities to file tariffs offering transportation services for customer-owned gas. The Commission found that in order to be long-term in nature, the minimum duration of any transportation provision should be five years. In June 1986, the Commission opened Rulemaking (R.) 86-06-006, which among other things introduced a rule reducing the minimum period to three years.

On July 21, 1986, PG&E submitted Advice No. 1369-G, seeking approval of Schedule GC-2--Long-Term Transportation Service. The tariff went into effect in August of that year. Provision 8 of the rate schedule states, in part, "The minimum term for Schedule GC-2 service is three years; the maximum is ten years."

PG&E rates for transportation service are set on a forecast basis, without balancing account protection against sales or expense forecast inaccuracies. Billing adjustments resulting from customer disputes such as this one are not recovered from other ratepayers.

Salz operates a leather tannery in Santa Cruz, California, within PG&E's gas service territory. Salz uses natural gas in its manufacturing processes. Soon after Commission approval of Schedule GC-2, Salz arranged to buy gas from Windward Energy & Marketing Co. (Windward), signing a gas supply contract on November 10, 1986. The gas supply contract was effective through the end of 1989 and was for a quantity of 719,000 therms per year. This converts to 215,700 thousand cubic feet (Mcf) of gas over the term of the contract. On November 26, 1986, Salz and PG&E signed

1 20 Cal. PUC 2d 6 (1985).

the Agreement, which specifies a three-year term and service under Schedule GC-2.

Between December 1, 1986 and April 20, 1989, a period of approximately two years and five months, PG&E transported 183,000 Mcf of gas for Salz. PG&E charged Salz the Schedule GC-2 rate for the transportation service, in accordance with the Agreement. On approximately April 1, 1989, PG&E notified Salz that it would cease service under Schedule GC-2 upon delivery of 183,000 Mcf since the effective date of the Agreement. During the period from April 21, 1989 to November 30, 1989, PG&E continued to transport gas for Salz, but PG&E charged Salz under Schedule G-IND, which is available to customers without transportation service agreements. The rate in Schedule G-IND was higher than the rate in Schedule GC-2 at the time. Salz paid all amounts charged by PG&E under Schedule G-IND.

3. Procedural Background

On April 18, 1990, following efforts to resolve this matter through discussions with PG&E, Salz filed the instant complaint. Salz states two causes of action. First, Salz alleges that PG&E violated Schedule GC-2 and Public Utilities (PU) Code § 532 by ceasing to charge Salz under Schedule GC-2 after only two years and five months of service. Second, Salz alleges that PG&E breached the Agreement by ceasing the Schedule GC-2 charges prematurely. Salz's requested relief is a finding that PG&E is in breach of the Agreement and a Commission order refunding to Salz the difference in charges between the Schedule GC-2 and Schedule G-IND rates, as applied to service for the period from April 21, 1989 to November 30, 1989, plus interest.

PG&E answered the complaint on May 21, 1990. PG&E asserts that the Agreement has a specific limit on the quantity of gas that PG&E must transport, and PG&E's obligation has been met.

A prehearing conference was convened on July 25, 1990. An evidentiary hearing was held on September 26, 1990. Opening and

reply briefs were filed by both Salz and PG&E. The case was submitted on receipt of reply briefs on October 31, 1990.

On April 30, 1991, Salz filed a "Petition of Salz Leathers, Inc. to Set Aside Submission and to Reopen the Record for the Admission of New Evidence" (Petition). Salz has learned of a dispute between PG&E and another Schedule GC-2 customer, which Salz claims is relevant to the issues in this case. That dispute arose after the submission of this case. Salz seeks admission of new evidence on PG&E's treatment of other customers, to rebut PG&E's testimony on treatment of similarly situated customers. PG&E did not respond to the Petition.

4. Position of Salz

Salz maintains that the plain language of Schedule GC-2, which is incorporated into the Agreement, obliges PG&E to provide service under Schedule GC-2 for at least three years. The requirement for a three-year term appears both in Schedule GC-2 and on page 1 of PG&E Form No. 62-5667, which was used to create the Agreement. Salz argues that the tariff language must be strictly construed, in accordance with well established rules of tariff interpretation. Salz believes that PG&E is in breach of the Agreement because of its unjustified and unexcused failure to perform under a valid contract.

If the Commission does not conclude that the duration provision in the Agreement clearly obliges PG&E to charge only Schedule GC-2 rates for the full three years, then Salz argues that the Commission should find that the Agreement is ambiguous. The Agreement is ambiguous because it does not explain the interaction between its explicit duration term and separate specification of a "Total Quantity Contracted For," which appears in a table in Attachment A to the Agreement and is described in Attachment B, the "General Terms and Conditions of Service." The Agreement is also ambiguous because: (1) terms for take-or-pay obligations are inadequately defined, (2) the purpose of an entry entitled "Daily

Receipts" on Form No. 62-5667 is unclear, and (3) the terms "agreement" and "contract" are used in a confusing and inconsistent manner. The Commission should resolve the ambiguities in favor of the customer, because PG&E caused the uncertainty in its drafting of the standard agreement.

Salz believes its interpretation of this dispute is consistent with the Commission's long-term transportation program. If PG&E's interpretation were adopted, PG&E could sign agreements for small quantities of gas, undermining the Commission's goal of a three-year service minimum.

Finally, Salz argues that the Commission should reject PG&E's claim that Salz has dealt with PG&E in bad faith. First, PG&E did not plead bad faith as an affirmative defense in its answer to the complaint, which is required by Rule 13.1[2] of the Commission's Rules of Practice and Procedure. Second, even if the Commission considers this defense, Salz believes that its own conduct has been reasonable and in good faith. Colin Campbell, an attorney formerly employed by PG&E and later the consultant who negotiated the Agreement on behalf of Salz, testified for Salz. He understood that the only purpose of the "Total Quantity Contracted For" was as a basis for Salz's take-or-pay obligation. There was no relationship between take-or-pay quantities and total quantities to be transported. Campbell stated this his interpretation is consistent with PG&E's own practices for gas supply contracts between PG&E and gas producers.

2 "Rule 13.1. **Contents of Answers.** The answer must admit or deny each material allegation in the complaint and shall set forth any new matter constituting a defense. Its purpose is to fully advise the complainant and the Commission of the nature of the defense. ..."

5. Position of PG&E

PG&E does not dispute the facts outlined in the Factual Background section above.

PG&E has calculated the difference in revenues between Schedule GC-2 and Schedule G-IND rates during the period from April 21, 1989 to November 30, 1989. The amount is $41,524.16, a figure accepted by Salz.

PG&E denies that it violated either the Agreement, Schedule GC-2, or PU Code § 532. PG&E believes that the Agreement contains a maximum quantity of gas which must be transported by PG&E. Beyond that quantity, which is explicitly set forth as the "Total Quantity Contracted For," PG&E has no obligation under the Agreement. This maximum quantity defines PG&E's requirement to transport gas and is binding on Salz. As Attachment B to the Agreement states:

> "3.A. Transport Quantities: The quantity of gas to be transported over the whole of the contract period (the 'contract quantity') is shown as 'TOTAL QUANTITY CONTRACTED FOR' on page 1 of Attachment A."

Attachment A clearly shows that the contract quantity was 1,830,000 therms (equal to 183,000 Mcf). PG&E argues that it did allow the Agreement to run for its full three-year term, but its obligations to transport gas were extinguished when the quantity of 183,000 Mcf was reached.

According to PG&E, Salz showed bad faith by intentionally understating the total amount of gas transportation service that Salz would require over three years, in order to lower its take-or-pay obligations, which are linked to the contract quantity. Salz had 215,700 Mcf under contract with Windward, but specified only 183,000 Mcf in the Agreement. Even if the Commission finds that the Agreement is ambiguous, it should be construed against Salz because Salz's intentional misstatement has caused the uncertainty to exist.

PG&E asserts that it has not violated PU Code § 532 because it has not treated similarly situated customers in a discriminatory manner. PG&E witness Mr. Harold LaFlash testified that when Schedule GC-2 was available, 75 long-term transportation agreements were executed, and 29 of those customers completed their contract quantities before the end of their agreement terms. At the time of the hearing, no other customer except Salz had disputed PG&E's obligations once the contract quantity was transported.

6. Discussion

The single issue before the Commission is determination of PG&E's obligation to transport gas under the Agreement. Salz claims that PG&E should have transported gas for three years. PG&E claims that its obligation ended when the contract quantity was transported.

To resolve the dispute we will first inspect the claims of both parties that the plain language of the Agreement is sufficient to settle the complaint. If resolution is not possible because the Agreement is ambiguous, then we will review the record for clear evidence of the intentions of the parties when the Agreement was executed. If that effort is unproductive, we must then construe the Agreement against the party causing the ambiguity.

Both Salz and PG&E point to express terms in the Agreement which favor their positions. Salz relies on the language of Schedule GC-2 and page 1 of the Agreement, which states that the term of the Agreement is and must be three years. PG&E relies on Attachments A and B to the Agreement, which state that the quantity of gas to be delivered is 183,000 Mcf. Considerated separately, each provision is clear, but ambiguity must be determined for the Agreement taken as a whole. The provisions are in conflict and cause confusion over PG&E's exact obligations. There is no statement that the duration is three years or until the contract quantity is transported.

Salz also points out that use of the terms "agreement" and "contract" is confusing. We agree with Salz, especially when Advice No. 1369-G purportedly "changed all references to contracts from 'contracts' to 'service agreements,'..." That goal was not reached, and interpretation of the word "contract" remains at the heart of the present dispute. The express terms of the Agreement are not sufficient to resolve the complaint. We conclude that the Agreement is ambiguous in the specification of PG&E's obligations.

The intentions of the parties are the paramount feature of any contract, but the provisions of the Agreement do not establish the intentions of the parties regarding the duration of transportation service under Schedule GC-2. Turning to evidence outside the provisions of the Agreement, we find that the intentions of Salz and PG&E diverge. We use that evidence to search for the parties' intentions, not to interpret the express terms of the Agreement. Salz certainly intended that more than 183,000 Mcf might be transported, dependent on plant loads, because its supply contract with Windward allowed for 215,700 Mcf of gas. PG&E intended that 183,000 Mcf was the limit of its obligations, because it ceased service to other customers when their contract quantities were transported. The evidence before us does not remove the uncertainty in the Agreement about PG&E's obligations.

Because the ambiguity in the Agreement remains, we must construe the Agreement against the party causing the uncertainty to exist. Salz claims that PG&E caused the uncertainty because it drafted Form No. 62-5667, the standard document used to create the Agreement. PG&E believes Salz caused the uncertainty by not disclosing the quantity in its supply contract with Windward. We agree with PG&E that Salz should have inserted 215,700 Mcf in the "Quantity Under Contract" blank in Attachment A to the Agreement, but the uncertainty concerns the "Total Quantity Contracted For," which appears elsewhere in the Agreement. These two quantities are different, despite their similarity. Even if Salz had completed

Attachment A as PG&E desired, the uncertainty would remain. The ambiguity in the Agreement is contained in its terms, not Salz's filling in the blanks. PG&E has caused the uncertainty. Therefore, we must construe the Agreement against PG&E and in favor of Salz.

Commission policy on transportation agreements also supports Salz's position. Schedule GC-2 rates were lower than rates in Schedule G-IND, but PG&E received from customers three substantial guarantees: (1) minimum transportation quantities, (2) take-or-pay obligations, and (3) the three-year minimum term that is the subject of this complaint. There is no evidence that in 1986 PG&E intended to serve Salz for less than three years, but construing the Agreement in PG&E's favor would allow PG&E to sign agreements for small quantities of gas, weakening the customer obligations in our long-term transportation program.

We will order PG&E to refund to Salz $41,524.16, plus interest from the dates the overcharges were paid by Salz to the date the refund is made. The interest rate should be the rate for prime, three-month commercial paper, as reported in the Federal Reserve Statistical Release, G.13, or its predecessor. This is the rate applied to PG&E's gas balancing accounts.

A finding that PG&E is in breach of the Agreement is not necessary to resolve Salz's complaint.

The evidence does not support a finding that PG&E has violated PU Code § 532. Whether PG&E had met its obligations or not, Salz has not shown discriminatory treatment. The Petition, if granted, might allow introduction of evidence on discrimination, but the complaint has already been resolved in Salz's favor from the record before us. The Petition is moot and will be denied.

Findings of Fact

1. In its complaint, Salz requests a Commission finding that PG&E is in breach of the Agreement and a Commission order refunding to Salz $41,524.16, plus interest.

2. Salz argues that PG&E is obliged to transport gas for the three-year term of the Agreement.

3. PG&E opposes the requested relief, arguing that its obligations were met by transportation of 183,000 Mcf of gas.

4. From December 1, 1986 to April 20, 1989, PG&E transported 183,000 Mcf of gas for Salz, charging the Schedule GC-2 rate for the service.

5. From April 21, 1989 to November 30, 1989, PG&E transported additional gas for Salz, charging the Schedule G-IND rate for the service.

6. For the April 21, 1989 to November 30, 1989 period, the difference in charges between service under Schedule GC-2 and service under Schedule G-IND is $41,524.16.

7. Salz has paid the Schedule G-IND charges to PG&E.

8. Schedule GC-2 and the Agreement state that the minimum term for Schedule GC-2 service is three years.

9. Attachments A and B to the Agreement state that the "quantity of gas to be transported over the whole of the contract period" is 183,000 Mcf.

10. Salz contracted with Windward for 215,700 Mcf of gas.

11. Use of the terms "agreement" and "contract" in the Agreement is confusing.

12. The provisions of the Agreement are in conflict, causing uncertainty and confusion over PG&E's obligations.

13. The express terms of the Agreement are not sufficient to resolve the dispute between Salz and PG&E.

14. The intentions of Salz and PG&E regarding PG&E's obligations under the Agreement are different. Salz intended that more than 183,000 Mcf might be transported, and PG&E intended that 183,000 Mcf was the limit of its obligations.

15. PG&E caused the uncertainty about PG&E's obligations under the Agreement.

16. Construing the Agreement in PG&E's favor would allow PG&E to sign agreements for small quantities of gas, weakening the customer obligations in the Commission's long-term transportation program.

17. Salz has not shown that PG&E has discriminated against Salz.

18. PG&E's gas transportation rates are set on a forecast basis, without balancing account protection against sales or expense forecast inaccuracies.

Conclusions of Law

1. The Agreement is ambiguous in the specification of PG&E's obligations to transport gas for Salz.

2. The Agreement should be construed against PG&E and in favor of Salz because PG&E caused the uncertainty.

3. PG&E should be ordered to refund to Salz $41,524.16, plus interest from the dates the overcharges were paid by Salz to the date the refund is made.

4. The appropriate interest rate is the rate for prime, three-month commercial paper, as reported in the Federal Reserve Statistical Release, G.13, or its predecessor.

5. The amount refunded to Salz should not be recovered by PG&E from other ratepayers.

6. The record does not show that PG&E is in violation of PU Code § 532.

7. The Petition is moot and should be denied.

O R D E R

1. Within 15 days of the effective date of this order, Pacific Gas and Electric Company (PG&E) shall refund to Salz Leathers, Inc. (Salz) the amount of $41,524.16, plus interest from the dates that the overcharges were paid by Salz to the date the refund is made.

2. Interest shall be calculated monthly at 1/12th of the annual rate for prime, 3-month commercial paper, as reported in the Federal Reserve Statistical Release, G.13, or its predecessor.

3. PG&E shall not recover the amount refunded to Salz from other ratepayers, including debiting of any balancing or memorandum accounts.

4. The request by Salz for a finding that PG&E is in breach of the "Transportation Service Agreement Between Pacific Gas and Electric Company and Salz Leathers, Inc." is denied.

5. The "Petition of Salz Leathers, Inc. to Set Aside Submission and to Reopen the Record for the Admission of New Evidence" is denied.

6. This proceeding is closed.

This order becomes effective 30 days from today.

Dated August 7, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Daniel Wm. Fessler, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director