ALJ/ks

Decision 82 04 081 APR 2 1 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SOLAR TURBINES INCORPORATED, Complainant, vs SAN DIEGO GAS & ELECTRIC COMPANY, a California public utility corporation, Defendant.	Case 10970 (Filed March 23, 1981)

Latham & Watkins, by David L. Mulliken and Kelley M. Gale, Attorneys at Law, for Solar Turbines Incorporated, complainant.
Maya Sanchez, Attorney at Law, for San Diego Gas & Electric Company, defendant.

O P I N I O N

Solar Turbines Incorporated (Solar)[1] seeks a determination that San Diego Gas & Electric Company (SDG&E) incorrectly assessed Solar for its electric bill for the period May 2, 1980 to October 31, 1980 and that the disputed amount on deposit with the Commission be refunded.

[1] This complaint was originally filed by Solar Turbines International as an operating group of International Harvester. Solar was sold to the Caterpillar Corporation, and the title of the complaint was corrected to Solar Turbines Incorporated.

Solar is engaged in the manufacturing, testing, and selling of gaseous and distillate fuel-powered turbine engines. The complaint states:

1. Because of its significant electric power needs and because it manufactures turbine engines which may be used as cogeneration or self-generation equipment, in early 1977 Solar began investigating the concept of using one of its own turbine engines as an emergency power and peak-shaving unit at its Harbor Drive facility.
2. In February 1979 Solar submitted a proposal to SDG&E to install one of its Patio Centaur gas turbine generator packages (the Centaur generator) at its Harbor Drive facility.
3. Solar informed SDG&E that it intended to use the Centaur generator to shave peak demand during SDG&E's on-peak periods and as a "standby" generator to supply power to the Harbor Drive facility in case of an SDG&E system failure.
4. In April 1979, SDG&E agreed to Solar's proposal subject to the condition that Solar comply with all of SDG&E's specifications for installation of interconnection equipment.
5. SDG&E informed Solar in a letter dated April 3, 1979 that "actual contracts and agreements will be negotiated as the necessary information becomes available this summer."
6. During the remainder of 1979 and through the first four months of 1980, Solar and SDG&E held meetings and discussions in order to work out the technical details of interconnecting the Centaur generator to SDG&E's system.
7. Solar installed an extensive array of safety and control equipment in response to SDG&E's requirements for interconnection.
8. In a letter dated April 16, 1980, SDG&E informed Solar that its proposal met the technical requirements satisfactorily and stated as follows:

"As of this time the customer generation rates have not been approved by the California Public Utilities Commission (PUC). You will remain on present A-6 General Service-Large rate schedule until the customer generation rates are approved.

"In that your relays are set up to prevent customer generated power from being fed into SDG&E's system, there will be no need for a parallel service agreement at this time."

9. In a letter dated April 25, 1980 Solar notified SDG&E that it would begin initial testing operations on May 5, 1980.

10. Solar engaged first in system component verification and then full-scale testing of its generating system, including ability and endurance testing.

11. By mid-October 1980 Solar completed the testing and modifications of its Centaur generator and determined that its reliability was sufficient to warrant continuous on-line operation.

12. In mid-September 1980 SDG&E, contrary to its April 16, 1980 letter, informally stated to Solar that the PUC approved and published Schedule A-6. General Service-Large (A-6 TOU) was inapplicable to Solar's operations.

13. SDG&E did not direct Solar to disconnect or discontinue the operation of its Centaur generator or provide Solar with information regarding what schedule or under what circumstances Solar could or could not operate its Centaur generator.

14. SDG&E never submitted a proposed contract, which could have been approved by the PUC, to Solar to govern the operation of the Centaur generator.

15. During the May through September 1980 time period, SDG&E billed Solar under Schedule A-6 TOU.

16. Solar promptly paid the bills presented by SDG&E which, save for two backbills which are the subject of this dispute, all have been for demand actually placed on SDG&E's system.

17. On October 9, 1980 SDG&E submitted a backbill to Solar in the amount of $60,724.47 alleged to be an additional amount owing for the period May 2 through September 30, 1980.

18. In its October 9 backbilling, SDG&E asserts that the additional amount represents demand not actually placed on SDG&E's system but which would have been had Solar's Centaur generator not been operating.

19. A second backbill in the amount of $14,484.74 was submitted on November 7, 1980 under this same theory for the period October 1 through October 31, 1980.

20. On October 20, 1980 SDG&E responded to Solar that it was required by Public Utilities (PU) Code § 532 to collect the full rate as published in its rate schedules.

21. SDG&E misstates the applicable law and fails to consider the SDG&E actions which are the sole cause of the dispute.

22. SDG&E had complete discretion to give or to withhold permission for Solar to interconnect its Centaur generator.

23. SDG&E by its written authorization led Solar to believe that operation of its Centaur generator was allowed under Schedule A-6 TOU.

24. Had SDG&E determined at some point subsequent to authorizing Solar to interconnect that the operation of the Centaur generator was not allowed under Schedule A-6 TOU it could have directed Solar to disconnect its generator and/or request Solar to enter into a deviation contract approved by the Commission.

25. The backbills are invalid because PU Code § 532 allows SDG&E to only charge for services rendered at the rates specified in PUC schedules in effect at the time.

26. SDG&E's actions are a unilateral administrative attempt to engage in unlawful retroactive ratemaking.

In its answer filed April 30, 1981 SDG&E admitted its negotiations with Solar for connection of its Centaur generator but denies misstating the law relative to the allegation that it had complete discretion to approve or disapprove operation and interconnection of the Centaur generator, that the backbills tendered are invalid, or that its actions were a unilateral attempt to engage in retroactive ratemaking. For affirmative defenses, SDG&E alleges that: (1) the complaint is defective for failing to allege a breach of duty, (2) § 532 requires full collection of the rate published in SDG&E's tariffs, and (3) the remedy requested is not supported by SDG&E's tariffs and would provide a preferential reduction in rates to complainant.

Hearing on the matter was held September 23 and 24, 1981 at San Diego before Administrative Law Judge Banks. The matter was submitted with the filing of briefs on December 3, 1981.

Testifying for Solar was Paul J. Kopcha, group energy administrator. His responsibilities involve the effective use of energy, developing energy budgets, apprising management of the current projected availability and costs of energy, and acting as solar energy representative before various outside entities. He stated that he was familiar with the various SDG&E rate schedules and how to calculate bills, but that for details of special conditions he relied on the company representative.

He stated that Solar did preliminary feasibility studies in 1976 which resulted in a capital commitment in 1977-78. Initial discussions were held with SDG&E in March 1979 at which time Solar was to be provided with any interconnection requirements. SDG&E was concerned with Solar's system and indicated that some service agreements with it would be necessary. He stated that in a February 22, 1980 letter SDG&E was advised that the basic construction was complete and that the plant was to operate the unit

in a standby mode which would be a loss of power from SDG&E during the weekend of March 1 and 2, 1980. There was no reply from SDG&E and the tests were conducted. On April 16, 1980 SDG&E advised that no parallel agreement would be necessary and that until customer generation rates were approved Solar would remain on the A-6 General Service-Large rate schedule. He stated he was not aware of any special condition in the A-6 rate schedule relying on SDG&E's representative to keep him abreast of any necessary information.

On April 25, 1980 Solar advised SDG&E that it intended to operate its Centaur unit during all on-peak time periods identified in the A-6 TOU rate schedule and to operate in parallel with the SDG&E system on May 5, 1980. Testing began on May 5, 1980 with SDG&E's concurrence. He stated he was unaware of any special conditions in the A-6 TOU schedule. At the time of interconnection there was no communication from SDG&E that such parallel operation was not authorized. Nor was there any indication that Solar was operating in violation of the A-6 TOU schedule or any other schedule.

In mid-June 1980 the SDG&E representative advised by telephone that he was preparing a parallel service agreement. The representative indicated that this agreement was an instrument to bridge the gap until the customer generation rate schedules became effective. There was no indication at that time that Solar was operating in violation of the A-6 TOU schedule. At no time during the June 1980 discussions did SDG&E request that the Centaur be disconnected or indicate there was a problem.

In mid-September the SDG&E representative visited Solar with a copy of the A-6 TOU tariff pointing out Special Condition 9 and advising that the operation of the Centaur generator was in violation of that condition. At that time SDG&E gave no guidance of what Solar should do. On October 9 the SDG&E representative hand-carried the first backbill with a covering letter (Exhibit 13) which provided that, pending approval by the PUC of SDG&E's proposed customer generation rate schedule, future billings would be adjusted to reflect the peak-shaving reduction in billing demand caused by

parallel operation of the Centaur generator. No justification was given for the backbilling.

On cross-examination Kopcha stated he was not aware of Special Condition 9 of rate schedule A-6 TOU until the SDG&E representative showed it to him in mid-September. He stated he had no reason to read the full tariff because he felt everything he needed to know was on the first page. He explained that he relied on SDG&E's representative for all necessary information because in the past all questions were funneled through the representative and he always received a written response after a personal contact.

When asked why Solar continued to operate its Centaur generator for two months after it found out such operation was prohibited, Kopcha stated:

> "A Well, that was in my testimony. I told Bill that when SDG&E -- until SDG&E tells me, gives me direction and since the customer generation schedules were as close to being implemented as I thought they were, and since we were almost through with our testing, that I was going to continue."

Testifying for SDG&E was William H. Neild, energy utilization engineer. He stated that he attended several meetings in 1979 with Solar people relative to whether it would be advisable for Solar to install a standby generator or a peak-shaving generator. He stated that he was a coordinator with Solar transferring paper between SDG&E protection people and Solar. Among the topics discussed with Solar's Kopcha on a regular basis were proposed customer cogeneration rates and rates in general. He stated that he advised all customers that SDG&E rates do not permit peak-shaving, that the question of peak-shaving came up with most customers after time-of-use rates became effective.

Neild stated that as the date for Solar to test the Centaur generator came closer, Kopcha advised by letter (Exhibit 2) how they were going to operate but that he was unable to reply because SDG&E rules prevented his written reply. While unable to respond by mail, Neild stated he advised Kopcha that SDG&E would not interfere with

the operation of the Centaur generator as long as it did not impact the rates, i.e. the peak-shaving. He stated Kopcha disagreed with SDG&E's interpretation. He explained to Solar that testing the Centaur generator should not impact the normal billing demand. When discussing this Kopcha reminded Neild that Solar's president was on SDG&E's board of directors. He stated it was in September 1980 that he pointed out that Special Condition 9 of the tariff did not allow parallel generation. It was subsequent to this meeting that the first backbill was presented to Solar.

On cross-examination Neild explained that SDG&E's peak hours are from 10 a.m. to 5 p.m. and that if the Centaur generator was not tested during these hours Solar would only be billed for the electricity actually delivered.

On cross-examination Neild confirmed that in 1979 a parallel service agreement was mentioned to Solar but that no agreement was tendered because it was expected that the A-6 CG rate would be approved before operations began. He stated he was aware in mid-June 1980 that Solar was testing its Centaur generator during SDG&E's system peak, but again did not advise Solar that a parallel agreement or special deviation could be obtained because it was felt that the A-6 CG rate would soon be available. It was his opinion that the Centaur could operate in parallel so long as it did not impact the rates. He stated that it was not his but a management decision that Solar was not notified until October 9, 1980 that the testing of the Centaur was impacting the demand during the system's peak period. When asked to explain why SDG&E did not notify Solar that it was not in compliance with its effective rules as required by Rule 11-D, Neild stated it was hoped that the problem would be resolved.

Discussion

The general facts surrounding this controversy are not in dispute. Discussions for the project were initiated in early 1979. There were countless meetings and personal contacts in addition to telephone calls and correspondence.

We have consistently held that PU Code § 532 requires utilities to collect and recover the full lawful rates published in their tariffs. In Van Ness Restaurant, Inc. v Pacific Gas & Electric Company (1975) 78 CPUC 299 we stated:

> "It is a well established principle of public utility law that a utility 'cannot directly or indirectly change its tariff provisions by contract, conduct, estoppel or waiver....' (Mendence v PT&T Co. (1971) 72 CPUC 563, 565; Johnson v PT&T Co. (1969) 69 CPUC 290, 295-96; Transmix Corp. v Southern Pacific Co. (1960) 187 CA 2d 257, 264-66; Pittsburgh, C.C. & St. L.R. Co. v Fink (1919) 250 US 577.) The principle and its rationale has recently been restated by the California Supreme Court:
>
> > 'Section 532 forbids any utility from refunding "directly or indirectly, in any manner or by any device" the scheduled charges for its services. In addition, a public utility "cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff...." (Transmix Corp. v Southern Pac. Co., 187 Cal.App. 2d 257, 264 [9 Cal. Rptr. 714]; accord South Tahoe Gas Co. v Hofmann Land Improvement Co., 25 Cal. App. 3d 750, 760 [102 Cal. Rptr. 286].) Scheduled rates must be inflexibly enforced in order to maintain equality for all customers and to prevent collusion which otherwise might be easily and effectively disguised. (R. E. Tharp, Inc. v Miller Hay Co., 261 Cal. App. 2d 81 [67 Cal. Rptr. 854]; People ex rel. Public Util. Com. v Ryerson, 241 Cal. App. 2d 115, 120-121 [50 Cal. Rptr. 246].) Therefore, as a general rule, utility customers cannot recover damages which are tantamount to a preferential rate reduction even though the utility may have intentionally misquoted the applicable rate. (See Transmix Corp. v Southern Pac. Co., supra, p. 265; Annot. 88 A.L.R. 2d

1375, 1387; 13 Am. Jur. 2d, Carriers, § 108, p. 650; United States v Associated Air Transport, Inc. 275 F. 2d 827, 833.)

'These principles are most commonly applied in cases which involve mistaken rate quotations whereby the customer is quoted a lower rate than set forth in the published tariff. Upon discovery of the error, the utility may initiate an action against the customer to recover the full legal charges for the service, as filed and published in rate schedules. (See, e.g., Gardner v Basich Bros. Construction Co., 44 Cal. 2d 191 [281 P.2d 521]; R. E. Tharp, Inc. v. Miller Hay Co., supra, 261 Cal. App. 2d 81.) In granting recovery to the utility, the courts usually rely on the fact that the rates have been filed and published and have thereby become part of the contract between the utility and the customer. (Gardner v. Basich Bros. Construction Co., supra, p. 193; Transmix Corp. v Southern Pac. Co., supra, 187 Cal. App. 2d 257, 265.) Under these circumstances the customer is charged with knowledge of the contents of the published rate schedules and, therefore, may not justifiably rely on misrepresentations regarding rates for utility service. (See Transmix Corp. v Southern Pac. Co., supra, p. 265; 13 Am. Jur. 2d, supra, § 108, p. 649; Annot. 88 A.L.R. 2d, supra, 1375.)' (Empire West v Southern California Gas Co. (12 C 3d 805, 809-10.)" (Emphasis added.)

From this it is clear that a utility cannot refund directly or indirectly or by any device or manner the charges for its service. Tariffs must be enforced to prevent collusion and customers are generally charged with knowledge of the contents of the published tariffs. This principle is particularly applicable when the customer has the appropriate tariff provisions in hand.

By letter dated April 16, 1980 SDG&E advised Solar that the proposed customer generation rates had not yet been approved by the PUC and that it would remain on the A-6 TOU rate schedule until such rates were approved. That letter also advised that with the relays set to prevent customer-generated power from being fed into SDG&E's system there was no need for a parallel service agreement. In response to this letter, on April 25, 1980 Solar advised SDG&E that it intended to operate the Centaur unit during all on-peak time periods identified in the A-6 TOU schedule. That April 25, 1980 letter also expressed dissatisfaction with SDG&E's proposed customer generation rate. From this we must assume that Solar was familiar with the provisions of the A-6 schedule. Whether Solar read and understood the tariff provisions is not at issue. The tariff was in Solar's hands. Solar had been advised that testing could not impact the tariff and that the A-6 TOU tariff was applicable to its operations until the customer generation rates were approved.

Under these circumstances Solar must be charged with knowledge of the contents of the published A-6 TOU rate. Its argument that it was unaware of the special provisions regarding parallel generation and that it relied on the representations of the SDG&E representative cannot be sustained.

Solar's argument that SDG&E had no authority to charge for demand not placed on its system is without merit. The utility is required by its filed tariffs to provide customers with their demand requirements. It must have the standby capacity to meet customer demand. Indeed, as Solar's witness Kopcha testified, during the month of September 1980 the Centaur generator did fail during the system on-peak thereby increasing the September demand by some 1,857.6 kW. The fact that the customer did not place that demand on the system at all times is of no consequence. Schedule A-6 TOU requires the peak demand charge as calculated.

Solar also argues that § 532 requires that a utility charge and collect amounts specified in its tariffs for products and service it actually renders. We believe Solar misreads § 532. That

section provides that a utility shall not charge a different compensation for any product or commodity furnished or to be furnished or the service rendered or to be rendered. It also provides that charges for a product or service rendered or to be rendered shall not be different than the rates, tolls, rentals, and charges "applicable thereto as specified in its schedules on file and in effect at the time." Solar was receiving service under the A-6 TOU schedule. It was the filed schedule and in effect during the period in question.

Solar also contends that § 734 requires that the PUC order reparation. We disagree. Section 734 provides that reparation may be ordered where it is found that a utility has charged an unreasonable, excessive, or discriminatory amount if no discrimination would result. There is no evidence that the A-6 TOU rate charged Solar was unreasonable, excessive, or discriminatory. The charge is the peak-demand charge based on the average kilowatt input to the customer during the 15-minute interval coinciding with the system's highest demand. Its purpose is to encourage high demand customers to reduce their demand for power when the system is operating at near-maximum load.

Solar states that a standby charge may be appropriate to compensate SDG&E but that a full-demand charge should not be levied because Solar generated a portion of its own power. This ignores the fact that the tariff under which it knowingly was operating precluded self-generation.

For the reasons expressed, SDG&E properly assessed Solar for undercharges for the period that the Centaur generator was being tested. The relief requested should be denied.

Findings of Fact

1. SDG&E provides electric service to Solar at its Pacific Highway location in San Diego County.

2. Solar manufactures industrial gas turbines for use as cogeneration facilities by industry.

3. Solar received service under SDG&E's A-6 General Service-Large rate schedule during the time period covered in this complaint.

4. In March 1979 Solar initiated discussions with SDG&E with respect to the installation of a cogeneration gas turbine at its Harbor Drive facility for use as a peak-shaving unit.

5. It was understood that before interconnection of the self-generation unit to the SDG&E system could take place, specific safety requirements would have to be met.

6. Solar made the requested safety and control requirement installations before testing began.

7. On April 16, 1980 SDG&E notified Solar that its customer generation rates had not yet been approved by the PUC and that Solar would continue to receive service under the A-6 General Service-Large rate schedule until the customer generation rates were approved.

8. Solar notified SDG&E by letter dated April 25, 1980 that it planned to begin testing operations May 1, 1980. Testing continued through mid-October 1980.

9. On October 9, 1980 SDG&E submitted Solar a bill in the amount of $60,724.47 to cover the period May 2, 1980 through September 30, 1980 for service under its A-6 rate schedule.

10. On November 7, 1980 SDG&E submitted Solar a bill in the amount of $14,484.74 to cover the period October 1 through October 31, 1980 for service under its A-6 rate schedule.

11. Solar was advised on several occasions prior and subsequent to testing the Centaur generator that during testing it would remain on the A-6 General Service-Large rate schedule and that testing could not impact SDG&E's rate schedule.

12. SDG&E forwarded draft copies of its proposed A-6 CG General Service-Large - Including Customer Generation to the Commission on April 11, 1979.

13. SDG&E's A-6 CG General Service-Large - Including Customer Generation was not in effect during the period Solar tested the Centaur generator.

Conclusions of Law

1. PU Code § 532 requires utilities to collect and recover the full legal rates published in its tariffs. A utility cannot change directly or indirectly its tariff provisions.

2. Filed tariffs become a part of the contract between the utility and the customer. The customer is charged with knowledge of the contents of the published rate schedules.

3. SDG&E could not unilaterally deviate from its filed tariffs by approving the interconnection and parallel generation by Solar.

4. Reparation can only be ordered when the Commission finds after investigation that the utility has charged an unreasonable, excessive, or discriminatory amount. The amount charged Solar for the demand portion of the A-6 TOU schedule was not unreasonable, excessive, or discriminatory.

5. The relief requested should be denied.

O R D E R

IT IS ORDERED that:

1. The relief requested is denied.

2. Solar Turbines Incorporated's deposit of $75,209.21, and any other deposit made by it in connection with this complaint shall be disbursed to San Diego Gas & Electric Company.

This order becomes effective 30 days from today.

Dated April 21, 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
Commissioners

I abstain.

/s/ PRISCILLA C. GREW
Commissioner

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

Joseph E. Bodovitz, Executive Director

1375, 1387; 13 Am. Jur. 2d, Carriers, § 108, p. 650; United States v Associated Air Transport, Inc. 275 F. 2d 827, 833.)

'These principles are most commonly applied in cases which involve mistaken rate quotations whereby the customer is quoted a lower rate than set forth in the published tariff. Upon discovery of the error, the utility may initiate an action against the customer to recover the full legal charges for the service, as filed and published in rate schedules. (See, e.g., Gardner v Basich Bros. Construction Co., 44 Cal. 2d 191 [281 P.2d 521]; R. E. Tharp, Inc. v. Miller Hay Co., supra, 261 Cal. App. 2d 81.) In granting recovery to the utility, the courts usually rely on the fact that the rates have been filed and published and have thereby become part of the contract between the utility and the customer. (Gardner v. Basich Bros. Construction Co., supra, p. 193; Transmix Corp. v Southern Pac. Co., supra, 187 Cal. App. 2d 257, 265.) Under these circumstances the customer is charged with knowledge of the contents of the published rate schedules and, therefore, may not justifiably rely on misrepresentations regarding rates for utility service. (See Transmix Corp. v Southern Pac. Co., supra, p. 265; 13 Am. Jur. 2d, supra, § 108, p. 649; Annot. 88 A.L.R. 2d, supra, 1375.)' (Empire West v Southern California Gas Co. (12 C 3d 805, 809-10.)" (Emphasis added.)

From this it is clear that a utility cannot refund directly or indirectly or by any device or manner the charges for its service. ~~Rates~~ Tariffs must be ~~inflexibly~~ generally enforced to prevent collusion and customers are charged with knowledge of the contents of the published ~~rate schedules~~ tariffs. This principle is particularly applicable when the customer lists the appropriate tariff provisions in hand.

Conclusions of Law

1. PU Code § 532 requires utilities to collect and recover the full legal rates published in its tariffs. A utility cannot change directly or indirectly its tariff provisions.

2. Filed tariffs become a part of the contract between the utility and the customer. The customer is charged with knowledge of the contents of the published rate schedules.

3. SDG&E could not unilaterally deviate from its filed tariffs by approving the interconnection and parallel generation by Solar.

4. Reparation can only be ordered when the Commission finds after investigation that the utility has charged an unreasonable, excessive, or discriminatory amount. The amount charged Solar for the demand portion of the A-6 TOU schedule was not unreasonable, excessive, or discriminatory.

5. The relief requested should be denied.

O R D E R

IT IS ORDERED that:

1. The relief requested is denied.
2. ~~Complainant's~~ Joint Interim Complainants' deposit of $75,209.21, and any other deposit made by ~~complainant~~ it in connection with this complaint shall be disbursed to San Diego Gas & Electric Company.

This order becomes effective 30 days from today.

Dated APR 21 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
Commissioners

I abstain.

PRISCILLA C. CREW, Commissioner