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EX-2

Decision No. 91892 JUN 3 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

KENT C. McKINNEY, an individual, TOWARD UTILITY RATE NORMALIZATION, a non-profit organization, Complainants, v. PACIFIC GAS AND ELECTRIC COMPANY, a California corporation; SAN DIEGO GAS & ELECTRIC COMPANY, a California corporation; SOUTHERN CALIFORNIA GAS COMPANY, a California corporation; and SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation; Defendants.	Case No. 10737 (Filed April 30, 1979)

ORDER MODIFYING DECISION NO. 91375 AND DENYING REHEARING

A petition for rehearing of Decision No. 91375 has been filed by the complainants in this proceeding. Responses thereto have been filed by Southern California Edison Company (Edison) and Pacific Gas and Electric Company (PG&E), asking that the petition be denied.

We have carefully considered all the allegations of error in the petition and are of the opinion that good cause for granting rehearing has not been shown. However, Decision No. 91375 should be modified to clarify our rationale in dismissing this complaint as to PG&E, San Diego Gas and Electric Company and Southern California Gas Company, to make the dismissal, as to the allegations made regarding Edison, to be a dismissal without prejudice, and to deal with the request for the appointment of a special counsel on its merits. Therefore,

IT IS HEREBY ORDERED that, Decision No. 91375 is modified to read in full as follows:

ORDER OF DISMISSAL

Kent C. McKinney (McKinney), an individual, and Toward Utility Rate Normalization (TURN), a nonprofit organization representing consumer interests (complainants) allege in their complaint that Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCal Gas) which operate as public utility gas and electric companies, have violated their tariffs filed with the Commission with respect to the manner in which bills are prorated for partial monthly usage of monthly gas and electric lifeline allotments. As to Southern California Edison Company (Edison) the complaint alleges that Edison has failed to prorate lifeline allowances during transition months, thereby depriving its customers of the full allowance provided by law.

There are further allegations that PG&E, SDG&E and SoCal Gas have filed changed tariff rules respecting prorating lifeline allowances while the question was still being litigated in Case No. 10648.

Complainants also request that Ann Murphy, an attorney at law in the employment of TURN, be appointed as special counsel to represent complainants. TURN alleges that it represents the interests of all of the people of the State, that representation of the public by the Commission staff in a prior proceeding (McKinney v. PG&E, Case No. 10648) was inadequate and that complainants have insufficient funds to pay Ann Murphy any counsel fees in the instant proceeding.

Defendants deny the material allegations of the complaint and move for dismissal of the complaint and denial of the request for the appointment of special counsel.

Background

Case No. 10648 (McKinney v. PG&E) initially raised the question of an appropriate method of prorating gas bills. McKinney alleged that PG&E had improperly prorated his gas bill

and thereby had overcharged him. As a basis for his overcharge allegation, McKinney had developed a proration method that he claimed was correct under the then applicable provisions of PG&E's gas tariff. Decision No. 90258, issued May 8, 1979, denied relief on the basis that, while PG&E had in fact used a method which did not agree with its tariff, no overcharge had resulted. McKinney's method was found to be unreasonable and discriminatory. PG&E was ordered to amend its gas tariff to apply in the manner which the decision found reasonable.

Mckinney's petition for rehearing of Decision No. 90258 was denied by Decision No. 90576. McKinney's petition for a writ of review and/or mandate (S.F. 24057) was denied by the California Supreme Court on November 29, 1979. (That order was final on December 29, 1979.)

Advice Letter No. 1052-G was filed by PG&E in compliance with the order in Decision No. 90258 to put into effect the method of prorating gas lifeline allowances found reasonable in that decision. The advice letter was suspended in order to review the protest filed by TURN alleging that the new proration method constituted a rate increase. Resolution No. G-2312 found the protest to be without merit and allowed the tariff revision to go into effect.

On November 21, 1979 TURN and McKinney filed a petition for rehearing and suspension of Resolution No. G-2312. By Decision No. 91224 dated January 9, 1980 in Application No. 59294, the Commission denied the request for rehearing or suspension of Resolution No. G-2312.

Discussion

The defendants' position is that the issues raised in Case No. 10737 with respect to the methods employed by PG&E, SDG&E and SoCal Gas in prorating lifeline amounts during transition months were decided in Case No. 10648.

Decision No. 90576 in Case No. 10648, which modified Decision No. 90258 and denied rehearing of that decision, stated as follows:

"As we have repeatedly held, in a complaint seeking reparations the burden is on the complainant to show, by affirmative evidence, that an injury in a certain amount has been incurred and that the rate or billing he alleges to be the correct one is both reasonable and nondiscriminatory (Southern Pipe and Casing Co. v. Pacific Elec. Rwy. Co., (1950) 49 CPUC 567; Pillsbury Mills, Inc. v. Southern Pacific Company (1946) 46 CRC 564; Richardson v. Pacific Motor Trucking, (1965) 64 CPUC 398).

"In determining that the Complainant's suggested method of prorating lifeline allowances is unreasonable, we pointed out that, under that method ' ... allowance for space heating can be allocated to the nonspace heating fraction of the transitional billing period. No grounds have been offered to justify this result, which was not contemplated in the Commission's calculation of lifeline allowances ...' (Decision No. 90258, page 4, mimeo). That the Complainant's method worked in that manner was pointed out in the testimony of PG&E's rate expert as follows:

> "'... the method you [Complainant] have suggested is a method which always allocates the 80 therm allowance to the winter usage, and to the winter lifeline rates even though that usage may have occurred during the summer period ...' (Transcript, page 17)

"We also determined that using Complainant's method would give a '...special advantage to customers with mid-month reading dates.' (Decision No. 90258, page 5 mimeo, fn. 1). This special advantage, which could result in different charges for the same usage merely because of different meter reading dates, is discriminatory. We will clarify our determination on this issue by adding a finding and conclusion to our decision hereinafter.

"This discriminatory effect is well established by the evidence. Exhibit No. 3 shows, in a chart form, "... how [using Complainant's method] customers with meter readings near the middle of the month will receive greater lifeline allowances than other customers ...' (Exhibit No. 3, page 1). Exhibit No. 4, shows how such a customer with mid-

month meter reading could receive up to seven months of winter lifeline allowance whereas a customer with end-of-month readings receives only a six month allowance. Exhibit No. 5 shows how such an advantage could amount to a considerable difference in charges between the use of one method or another. Exhibit No. 6, the prepared testimony of PG&E's rate expert, explains how the charts and proration comparisions in Exhibits 3, 4 and 5 quantify this special advantage. (Exhibit No. 6, page 2, lines 11-16, page 4, lines 8-12). This is persuasive evidence that using the Complainant's method would be unduly discriminatory. Such discrimination is prohibited by Sections 734 and 453(a) of the Public Utilities Code."

Decision No. 90258 was modified by Decision No. 90576 by adding Finding 5 and Conclusion 2(a) as follows:

Finding 5. Complainant's method of proration gives a special advantage to customers with mid-month meter reading.

Conclusion 2(a). Complainant's method of proration is unduly discriminatory. Sections 734 and 453(a) of the Public Utilities Code prohibit such discrimination.

Defendants argue that, even assuming that they should have prorated transitional bills in a different manner, complainant's method of prorating such bills has been found to be unreasonable, and the Commission has demonstrated that prorating bills in the manner found reasonable produces a result which is virtually identical to the result which complainants allege defendants have been using, and that the Commission has found that the method used by defendants produced no unlawful charges.

Decisions Nos. 90258 and 90576 directed PG&E to change its tariff provision so that its method of prorating transitional bills and its tariff provision are consistent. PG&E filed Advice Letter No. 1052-G, in response to that directive, which was approved by Resolution No. G-2312 (supra). On October 19, 1978 SoCal Gas filed Advice Letter No. 1154 in which it changed its tariff to allow proration of the bill itself as opposed to the lifeline

allowance. SoCal Gas asserts that its tariff is consistent with the method of prorating used in its bill compilation.

We agree with defendants that, as to SDG&E, SoCal Gas and PG&E, there appear to be no issues which were not resolved in substance by Decision No. 90258 as modified by Decision No. 90576. It is undisputed that the prorating methods used by those defendants were the same as those complained of in Case 10648. We determined there that use of such methods does not result in any overcharges. Moreover, the exhibits attached to the complaint show that the allegations of overcharges are based on the same prorating method which we expressly found to be unreasonable and unduly discriminatory. Under these circumstances, the issues raised with respect to the propriety of the prorating methods used, and any any overcharges which could result therefrom are moot. (William v. L.A. County Civil Service Assn. (1952) 112 CA 2d 450, 453.)

As to the allegations that SDG&E, SoCal Gas and PG&E wrongfully changed their tariffs while Case No. 10648 was being litigated, those allegations fail to state a cause of action inasmuch as they do not allege wherein such filings violated any law or any order or rule of this Commission. They are also moot by reason of the fact that Case No. 10648 is no longer being litigated.

For all the above reasons we shall grant the motions to dismiss the complaint as against SDG&E, SoCal Gas and PG&E.

As to Edison, a somewhat different situation exists. No tariff violations are alleged, merely that Edison has failed to prorate lifeline allowances thereby depriving its customers of their full allowance. But the complaint fails to state which order or rule of this Commission Edison is alleged to have violated. We have never ordered Edison to provide lifeline allowances by any particular method. It should be obvious that proration is merely one method by which transition month billing could be done.

As it stands, the complaint against Edison must be dismissed for failure to state a cause of action. However, we believe that in this instance the dismissal should be without prejudice. If the complainants are able to state a cause of action and make specific allegations as to how, in what manner and to what extent any of Edison's customers have failed to receive their full life-line allowances, as well as a specific amount of overcharge which is alleged to have resulted, we will consider such a filing.

As to the request to appoint Ann Murphy as a special counsel for the complainants, that request should be denied. The complainants have failed to persuade us that we should expend public funds in such a manner in a private complaint brought against a public utility.

We do not understand the complainants to assert that they have a right to a publicly compensated attorney in an administrative proceeding [1/] but, rather, that such counsel should be provided in this instance because without a special counsel the "public interest" would not be adequately represented and also because of complainants' alleged inability to pay for private counsel.

Assuming for the purposes of argument that we have the discretion to provide a complainant with a publicly funded counsel of its choice, we do not see this proceeding as being a proper one in which to do so. We are not convinced that either McKinney or TURN could not adequately pursue a complaint before this Commission. Mr. McKinney already has the experience gained in one formal complaint, while TURN's ability to represent its members is evidenced by its frequent appearances over many years before this Commission. We fail to see how this complaint finds TURN in a unique financial situation.

1/ It is well settled in California that no such right exists (Borror v. Dept. of Investment 15 CA 3d 531).

We are likewise unconvinced that the public interest requires us to provide publicly funded counsel in this instance. The question of where any public interest lies could only be determined after a decision in the matter. If the complainants ultimately prevail, they may be entitled to recovery of attorney fees (CLAM et al. v. Public Util. Comm., (1979) 25 C3d 891). We believe this opportunity adequately assures that any public interest will not go unrepresented.

Findings of Fact

1. Defendants' methods of computing charges involving life-line allowances in transitional billing periods from July 12, 1976 through January 5, 1979 were found reasonable with respect to PG&E in Decisions Nos. 90258 and 90576 in Case No. 10648.

2. Decision No. 90576 found that complainant McKinney's method of proration gives a special advantage to customers with mid-month meter readings and concluded that complainant McKinney's method of proration is unduly discriminatory.

3. Decision No. 90258 directed PG&E to refile its tariff in order to make its tariff conform to its method of bill proration found reasonable in that decision. PG&E has complied with that directive by filing Advice Letter No. 1052-G.

4. On November 29, 1979 the California Supreme Court (in S.F. 24057 McKinney et al. v. PUC, PG&E real party in interest) denied complainants' request for a writ of review or writ of mandate with respect to Decisions Nos. 90258 and 90576.

5. This Commission on January 8, 1980 denied complainants' petition for rehearing or reconsideration of Resolution No. G-2312 which allowed Advice Letter 1052-G to go into effect (Decision No. 91224 in Application No. 59274).

Conclusions of Law

1. The issues raised with respect to PG&E, SDG&E and SoCal Gas Co. were decided in principle in Case No. 10648 and are therefore moot.

2. The allegations made with respect to Edison do not state a cause of action.

3. The complaint in Case No. 10737 should be dismissed with prejudice as to PG&E, SDG&E and SoCal Gas Co., and dismissed without prejudice as to Edison.

4. The request for special counsel should be denied.

IT IS ORDERED that:

1. The complaint in Case No. 10737 is dismissed with prejudice as to PG&E, SDG&E and SoCal Gas Co. and without prejudice as to Edison.

2. The request for special counsel is denied.

IT IS FURTHER ORDERED that rehearing of Decision No. 91375 as modified herein is denied.

The effective date of this order is the date hereof.

Dated JUN 3 1980, at San Francisco, California.

President

Commissioner

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.