

ORIGINAL

Decision No. 92798

MAR 17 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RACHEL L. ZERMENO and KAREN HIGGINS,)

Complainants,)

vs.)

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,)

Defendant.)

Case No. 10774
(Filed August 20, 1979)

Robert Ohlbach, Robert B. McLennan, and Harry W. Long, Jr., Attorneys at Law, for Pacific Gas and Electric Company, defendant.
California Rural Legal Assistance, by Ellen M. Peter and Daniel P. Murphy, Attorneys at Law, for Rachel Zermeno and Karen Higgins, complainants.

O P I N I O N

The complaint of Rachel L. Zermeno (Zermeno) and Karen L. Higgins (Higgins) arises out of disputed bills. The facts regarding each of the disputed bills were developed at public hearings held on April 21 and May 27, 1980, before Administrative Law Judge Robert T. Baer in San Francisco, after which briefs were filed.

Zermeno's Dispute

On February 21, 1979, Zermeno requested that Pacific Gas and Electric Company (PG&E) establish electric service at her apartment at 3 - 13th Street, Marysville, where she lived with her 2-1/2-year-old son. Service was established the same day. No credit deposit was required in advance of establishing service, but PG&E

advised Zermeno that she would receive a request for a \$35 credit deposit. On February 26, the first credit deposit request for \$35 was mailed by PG&E to Zermeno. When Zermeno made no credit deposit PG&E mailed a 7-day discontinuance of service notice to her on March 14. On March 22, a 24-hour discontinuance of service notice was mailed to Zermeno by PG&E because she had made no credit deposit. On April 10 Zermeno's service was discontinued because the deposit was still unpaid. The next day, on April 11, Zermeno called at the Marysville office and paid the \$35 credit deposit. Her electric service was immediately reestablished.

Due to an error made by PG&E, Zermeno's account was closed April 16 for record purposes only, and her credit deposit of \$35 was applied to the closing bill of \$3.68, covering the period April 11 to 16. PG&E issued a refund check to Zermeno dated April 16 in the amount of \$31.35, representing the difference between the \$35 credit deposit and the closing bill, plus interest.

PG&E discovered its error on April 24, reestablished Zermeno's account in its records, and requested that Zermeno return the refund check of \$31.35 plus a cash payment of \$3.65 to reestablish her credit deposit. That request was confirmed by letter mailed April 26. Zermeno did not respond, so PG&E issued a 7-day notice on May 4 and a 24-hour notice on May 14, both regarding the nonpayment of the credit deposit. On June 22 Zermeno's service was discontinued for nonpayment of the credit deposit. The same day Zermeno contacted the Marysville business office to inquire about having service reconnected. The company representative explained the refunding of her prior credit deposit and requested that she reestablish her credit by means of a \$35 cash deposit. However, Zermeno contended that since she had paid the deposit once and since the deposit had been returned, she was not going to pay again.

An attorney for California Rural Legal Assistance contacted the Commission on June 28 regarding PG&E's actions. That same day PG&E contacted the attorney and offered to accept a bill guarantee from a third party as an alternative method of establishing credit. On June 29, Amelia Marquaid signed the guarantee form and Zermeno's service was reestablished the same day.

The only disputed factual issue is whether Zermeno was able to pay the credit deposit when the second demand was made. She does not dispute the appropriateness of the original \$35 credit deposit but merely the idea that she had to pay it again. Zermeno testified that she cashed the refund check for \$31.35 about a week after she received it. However, testimony sponsored by PG&E established that the check was cashed either May 15 or 16.

The check is dated April 16. PG&E's witness testified that in the normal course of business the check would probably have been mailed to the customer two or three days after preparation by the computer. It is, therefore, probable that the check reached Zermeno by April 20 or 21 at the latest.^{1/} If, as Zermeno testified, she cashed it about a week after its receipt, then April 30 would have been about the latest date for cashing the check possible in her scenario.

PG&E's witness testified that the stamps on the back of the check indicate that it was cashed at a market by Zermeno, as she testified. No date of that transaction appears. The check was then deposited with Lloyds Bank of California in Marysville. The date of deposit is May 17. Further testimony by a PG&E witness established that it is the policy and practice of the chain of stores

^{1/} Zermeno testified she received the check about a week after she made her original deposit, which occurred on April 11.

to which the subject market belonged to subscribe to the Loomis Courier (Loomis) banking service. Loomis picks up the checks from the markets daily and delivers them to the appropriate banks. At the same time Loomis delivers cash to the market. A few checks received by the market after the daily Loomis pickup are deposited the following day. Thus, it is reasonable to infer that since the check in question was deposited May 17, it was first presented to the market either May 15 or 16.

Discussion

Zermeno had the check in her possession from approximately April 21 until May 15 or 16, the period during which PG&E was requesting the return of the check, plus a small cash deposit, in order to re-establish Zermeno's credit. In the face of a 7-day notice dated May 4 and a 24-hour notice dated May 14, Zermeno cashed the check on May 15 or 16. Thus, PG&E's clerical error, which should have had no adverse consequences, was escalated by Zermeno's unwise actions into a termination of her service. No culpability for this unfortunate consequence attaches to PG&E, since it did nothing unlawful. We do not believe that the foregoing events even involve a disputed bill. It is not contended that Zermeno should not have been required to make a \$35 deposit to establish her credit, but only that once PG&E's mistake had been made, it had somehow waived the requirement. No law is cited for this novel proposition. A public utility may not waive the requirements of its tariffs, and no principle of law of which we are aware requires a public utility to accept some other indication of credit worthiness once it has mistakenly returned a credit deposit. It was reasonable for PG&E to insist upon the return of the refund check, especially in light of its lack of prior experience with Zermeno as a utility customer and her failure to make the initial credit deposit until after her service was first terminated.

Higgins' Dispute

Higgins lived with her two sons, ages 7 and 10, at 665 Queens Avenue, Apartment 44, in Yuba City. Approximately September 1978 they moved to the Spencer Arms Apartments at 1340 Gray Avenue. Shortly after the move Higgins received a closing bill of approximately \$190 from PG&E for her service at Queens Avenue. About November 1, 1978 she states that she went to the PG&E business office with her mother and paid the bill with cash loaned to her by her mother. Thereafter, the same charges reappeared on her monthly bills. She contacted PG&E, which could find no record of the payment. When no payment was made and no record of any prior payment was discovered, PG&E disconnected Higgins' service. With no electric service, she was forced to move to a new residence, where her PG&E service is received under the name of her fiance. ✓

PG&E's records show that utility service was established November 15, 1977 in the name of Karen L. May at 665 Queens Avenue, Apartment 44, Yuba City, and was billed in this name until April 17, 1978, when the account at the above address was changed from Karen L. May to Karen L. Higgins. On September 6, 1978, service was discontinued and the resulting closing bill of \$197.64 was mailed to Higgins' new address of 1340 Gray Avenue, Apartment 8, Yuba City. Service at that address had been established September 11, 1978, in the name of Karen Higgins.

Since the closing bill of \$197.64 remained unpaid, it was transferred on December 15, 1978 to Higgins' account at 1340 Gray Avenue and a 7-day notice was issued. According to PG&E's witness, Higgins subsequently disputed the closing bill charges as too high. Pending further investigation of her

complaint, the closing charges of \$197.64 were removed from her account on February 13, 1979. PG&E concluded that the charges were accurate and so advised Higgins by telephone in April 1979. PG&E's witness states that it was during this telephone conversation that Higgins first indicated that she had paid the charges in cash. However, a review of the office records failed to reveal any cash discrepancies related to the Higgins' closing bill. PG&E advised Higgins that unless she could produce a receipt, PG&E would consider the amount due and would expect full payment within 30 days. On May 17, 1979 the charges were again transferred to Higgins' account at Gray Avenue. A 7-day notice was issued for the \$197.64 closing bill on May 29, 1979. Following receipt of this notice, Higgins called the PG&E office to report that she had a receipt showing payment of the closing bill and would bring it in to resolve the matter. PG&E delayed further credit action to allow her to produce the receipt. When a receipt was not forthcoming, a 24-hour notice was mailed June 6, 1979, and electric service was discontinued June 20, 1979.

The Higgins' complaint, of course, turns on the disputed fact of her payment or nonpayment of the closing bill of \$197.64. The resolution of this factual issue in turn hinges primarily on Higgins' credibility. While PG&E's evidence tended to impeach Higgins in her assertion that she had paid the bill, it is primarily her own testimony which leaves us in doubt that her closing bill was actually paid.

Several pieces of evidence could have been produced by Higgins to corroborate her story but were not produced. First, she testified that her mother was present at and was inside the PG&E office with her when she made the payment. Yet the mother was not

called to testify on Higgins' behalf. During the first day of hearing the following exchange took place between the Administrative Law Judge and Higgins on this point:

"ALJ BAER: Q You stated that when you went down to pay your utility bill of \$197 that your mother was with you?

"A Yes.

"Q Did you ask her to come down to testify on your behalf at this hearing?

"A Her?

"Q Yes.

"A. No." [2/] (Transcript, p. 34.)

Even though the suggestion was made at the first day of hearing on April 21, 1980, Higgins' mother was not called as a witness on the second day of hearing, May 5, 1980, almost 5 weeks later.

The second piece of evidence which Higgins did not produce was her mother's bank records. Higgins testified that either that day or the day or two before she paid the closing bill, her mother withdrew money from the bank, \$200 of which was given to Higgins to pay her closing bill. Higgins' mother's passbook, canceled check, withdrawal receipt, or bank statement would reflect a substantial withdrawal on or about the date when Higgins testified she paid her closing bill, i.e., November 1, 1978. No such document was produced.

Third, Higgins produced no receipt for payment of the \$197.64 closing bill.

2/ Only those actually present during this testimony could appreciate the tone with which these answers were given, i.e., surprise in the first instance and rejection of the idea in the second.

Higgins' failure to produce corroborative evidence in her favor when it was under her control and when she had the burden of proof is both a serious legal defect and grounds for doubting her credibility. However, Higgins' account of the facts lacks consistency in still other ways.

She testified that it was her custom to pay her bills in person and in cash and to have her bills stamped with PG&E's "PAID" stamp. However, none of the three bills she did produce (for February, March, and April 1979) was stamped "PAID".^{3/}

She also testified that her closing bill of \$197.64 was for two months' service or almost \$100 per month for service to an apartment. That figure appears exaggerated to us, and a PG&E employee testified that the sum of \$197 was not an average bill for the apartments on Queens Avenue where Higgins was living and that normal monthly bills for customers in that area were \$50-60. Even Higgins' own testimony suggests that more than two months were involved in the \$197.64 closing bill, as the following exchange indicates:

"Q [ALJ] ...does the closing bill for \$197 represent more than one month's service?

"A [Higgins] I believe it may be two. That's one reason why I moved. My PG&E was running me 70, \$80 a month. I think one month it was eighty some dollars. I am not sure. I would have to go back and look, but it was quite expensive." (Transcript, p. 32.)

Even at \$80 per month there is still \$37.64 unaccounted for. The testimony strongly implies that the closing bill was for more than two months.

^{3/} She did not have a checking account until July 18, 1979.

One final inconsistency impresses us. Higgins testified that she received a receipt (her bill was stamped) when she made her cash payment, that she showed her receipt to Dennis Thomas,^{4/} a PG&E employee, but that later she was unable to produce the receipt. However, twice Higgins suggested that she keeps her utility records. As quoted material above indicates, Higgins stated that she "would have to go back and look" to determine the source of her closing bill total. Where would she look? Her own testimony on page 33 of the transcript suggests where she would look, as follows:

"A [Higgins] Usually what I do is I keep the part, this part [of her bill] (indicating) in my file box, where it says 'Payment Thank You' until I have my cancelled checks which I didn't at that time." (Emphasis added.)

PG&E's impeaching testimony further weakens Higgins' credibility. Dennis Thomas, a PG&E employee, testified that Higgins telephoned the office in November 1978, and disputed the amount on her bill. She later came into the office and discussed the bill with Thomas. She disputed the amount transferred to her open account. What happened during that visit is disclosed in the following exchange:

"Q But her complaint to you was that the bill was too high?

"A [Thomas] Right. ...the bill was under the name Karen Higgins. I know her as Karen May. She was disputing the bill being hers at first.

"Q Did she ever tell you that she had already paid the bill?

"A No, she didn't.

"Q Did she show you a receipt?

"A No." (Transcript, pp. 74-75.)

^{4/} Thomas denies that she showed him a receipt.

If we were to accept Higgins' account, we would be forced to believe that a PG&E cashier absconded with her cash payment of \$197.64, knowing that when the charges reappeared on the next bill, Higgins would return with a stamped bill showing payment. Discovery of the defalcation and the culprit would then be virtually certain. In light of the testimony in this record, that scenario is less probable than PG&E's position that Higgins never paid the closing bill.

We feel compelled to conclude that Higgins has failed to establish the existence of the fact of her payment of the closing bill by a preponderance of the evidence. Accordingly, her complaint should be denied.

The Constitutionality of the
Disputed Bills Rule

Complainants have attacked the constitutionality of the disputed bills rule, arguing that to require deposit of the disputed charges before a hearing deprives them of their property without due process of law.

An analysis of this claim must begin with a discussion of whether PG&E's actions in applying the disputed bills rule are those of the state for purposes of the due process clauses of the federal^{5/} and state^{6/} constitutions. Although the due process clause of the

^{5/} Section 1 of the Fourteenth Amendment reads in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, or deny any person within its jurisdiction the equal protection of the laws."

^{6/} Article I, Section 7, subdivision (a) of the California Constitution states: A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws."

constitution contains no explicit state action requirement, the court has held that such a requirement is implied. (Kruger v Wells Fargo Bank (1974) 11 C 3d 352, 366-367.) The court has also held that it is not bound by federal decisions analyzing the state action requirement under the federal constitution.

Complainants cite Gay Law Students Assn. v PT&T (1979) 24 C 3d 458 for the proposition that PG&E's acts in the instant case are those of the state for purposes of the due process clauses. Gay Law Students was decided under the equal protection clause of the state constitution. In that case the court held that The Pacific Telephone and Telegraph Company's actions in arbitrarily denying employment to homosexuals were those of the state for purposes of the state equal protection clause. We do not assume, as do complainants, that because certain acts of a public utility were held to be state action in Gay Law Students, that PG&E's acts in this case are those of the state for purposes of the due process clauses. Nor does the court in Gay Law Students make such assumptions for due process cases. This the court made clear when it discussed Jackson v Metropolitan Edison Co. (1974) 419 US 345. In that case the United States Supreme Court held that the injury caused by the summary termination of service at issue was insufficiently related to the utility's monopoly status to warrant a finding of state action. In discussing Jackson (24 C 3d at p. 474, fn. 9) our court stated:

"...we need not comment on the substantive merits of the Jackson decision, for it is clear that the arguably minor procedural due process violation at issue in that case is a far cry from the wholesale practice of employment discrimination allegedly undertaken by a state-protected public utility in the instant case. Numerous federal decisions have recognized that the federal courts have applied a different standard of state action

in cases presenting procedural due process questions than has been traditionally applied in cases involving discrimination under the equal protection clause (see, e.g., Weise v Syracuse University (2d Cir. 1975) 522 F.2d 397, 403-408; R. I. Chapter, Assoc. Gen. Contractors v Kreps (D.R.I. 1978) 450 F. Supp. 338, 350, fn. 6 and cases cited)..."

Although we cannot, with complete certainty, predict what our court would hold in a due process case involving termination of service, we conclude that there is ample authority for the proposition, and so we hold, that PG&E's actions in terminating service to complainants did not involve state action under either the federal or state due process clauses.

The analysis of the complainants' due process argument does not, however, end at this point; for, assuming for the sake of argument only that the court should disagree with our holding on the state action issue, PG&E's actions in terminating service to complainants and the disputed bills rule still afforded due process of law to complainants. In Memphis Light, Gas & Water Div. v Craft (1978) 436 US 1, 16, a case involving a municipal utility's service termination procedures, the court held that:

"...due process requires the provision of an opportunity for the presentation to a designated employee of a customer's complaint that he is being overcharged or charged for services not rendered."

That this minimal due process hearing was afforded to complainants in this case is undeniable. The bill itself invites consumers who question their bills to "request an explanation from the Company" and informs them where inquiries may be made. In this case Exhibit 2, a copy of Higgins' February 1979 bill, states:

"When making inquiries contact our office at

530 E Street
Marysville, CA 95901
742-3251"

No copy of the Seven-Day Notice or the 24-Hour Service Extension Forms was offered in evidence, no doubt because neither complainants nor PG&E disputed the fact that complainants were sent and received all notices required by law and by PG&E's tariff rules regarding the pendency of PG&E's termination procedures. However, both forms are on file with the Commission as part of PG&E's tariffs. (Revised Cal. P.U.C. Sheet No. 7094-E and Original Cal. P.U.C. Sheet No. 5899-E).^{7/} Both forms state:

"If a customer believes he has been billed incorrectly he should first review the bill with PG&E."

The Seven-Day Notice again invites consumers to contact a specific PG&E office with their inquiries.

From this record it is clear that neither complainant had any problem with notice. Both complainants knew their utility services were liable to discontinuance for nonpayment.

The facts of this case also amply demonstrate that each complainant had ample opportunity to dispute the correctness of her bill. On April 26, 1979, PG&E sent a written request to Zermeno to reinstate her credit deposit. When no response was received PG&E issued a 7-day notice on May 4 regarding the credit deposit. On May 14 PG&E issued a 24-hour notice due to nonpayment of the credit deposit. Finally, on June 22, almost two months after Zermeno was first sent written notice of PG&E's demand, it discontinued her service. Only then did she contact the PG&E office, at which time PG&E's representative explained the refunding of her prior credit and requested that she reestablish her credit by means of a \$35 cash

^{7/} We take official notice of these tariff sheets. We have caused copies thereof to be placed in the formal file and have marked them Exhibit 17.

deposit. However, she contended that she had paid the deposit once and that since it had been returned she was not going to pay again.

In Zermeno's case she had notice and opportunity to be heard before a PG&E employee regarding her dispute but did not take advantage of it until after termination. Due process is satisfied simply by the opportunity itself.

In the case of Higgins a closing bill for \$197.64 was first issued on September 6, 1978, and discontinuance of service for non-payment of that bill did not occur until June 20, 1979, more than nine months later. During that interval PG&E twice removed the charges from her account while it investigated her claim that she had paid the bill in cash, PG&E's employees discussed her claim with her at its office, it withheld collection action to allow Higgins time to produce a receipt, and it issued two 7-day notices and a 24-hour notice. Due process does not require more.

Complainants contend that they are entitled to a hearing before an employee of the Commission before their service is terminated or they are required to pay the disputed bill. However, the requirements of the state and federal due process clauses are satisfied if a hearing before a PG&E employee is offered and afforded to consumers who dispute their bills before they are required to pay. As this hearing was indisputably offered and afforded in these cases, no denial of due process of law can reasonably be found.

Findings of Fact

1. Complainant Higgins has failed to show by a preponderance of the evidence that she paid her closing bill of \$197.64.
2. PG&E refunded complainant Zermeno's credit deposit in error.
3. PG&E's error did not prejudice complainant Zermeno in any way, since she could have returned the refund check and made a small additional payment to reinstate her credit and to avoid discontinuance of service.

4. Complainant Zermeno unreasonably refused to return the refund check.

5. Complainants' services were discontinued in full compliance with the applicable statutes and tariff rules.

Conclusions of Law

1. PG&E's tariff rules, notices, and practices afforded to complainants notice and opportunity to be heard regarding their disputed bills before their utility services were terminated and before they were required to pay the disputed amounts. PG&E's rules, notices, and practices are in full compliance with the due process clauses of the federal and state constitutions and the case law interpreting those clauses.

2. The complaint should be denied.

O R D E R

IT IS ORDERED that the complaint of Rachel L. Zermeno and Karen Higgins in Case No. 10774 is denied.

The effective date of this order shall be thirty days after the date hereof.

Dated MAR 17 1981, at San Francisco, California.

John E. Coyne
 President

Richard D. [unclear]

[unclear]

[unclear]

Commissioners