ALJ/md

Decision 93679 NOV 3 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CHARLES E. and MYRNA BLOMGREN,

Complainants,

vs.

JAMES J. DOWNEY, Owner, KENWOOD VILLAGE WATER COMPANY,

Defendant.

Case 10840
(Filed March 18, 1980)

Jan Eric Bolt, Attorney at Law, for Charles E. and Myrna Blomgren, complainants.
John Downey, for James J. Downey, defendant.

FINAL OPINION

The Pleadings

The complaint alleged that the complainants' water meter was not read for a period of 15 months and that defendant had overestimated water usage during that period. It also claimed that defendant, by means of false meter readings and overestimates, had charged complainants for water not used. Complainants deposited $511.96 with the Commission under the disputed bill procedure.

Defendant's answer stated that, "[c]omplainants' contention that subject water meter had not read [sic] for at least 15 months is erroneous, wrong, and untrue; and is denied." The answer also alleged that the estimates used during the period March through September 1979 were based on complainants' previous

water consumption and hence were not excessive. Defendant specifically denied that he cheated complainants or charged them for water not used.

Initial hearing was held under the expedited complaint procedure before Administrative Law Judge (ALJ) Gilman in San Francisco on May 27, 1980. Under that procedure, Charles Blomgren and John Downey, defendant's manager and representative, presented exhibits and made unsworn statements of fact. The ALJ directed that defendant's representative supply for the record a declaration under penalty of perjury by the utility's water meter reader, explaining how he read Mr. Blomgren's meter during the period immediately following June 27, 1978. A declaration covering the months in question was received as a late-filed exhibit and the matter was taken under submission. Subsequently, a member of the Commission's Utilities Division was assigned to observe and photograph the meter site and pavement. The ALJ provided copies of his report and photos and proposed to enter them as a further late-filed exhibit. Defendant objected to the proposal under Rule 74. This document was stricken and was not in evidence at the time that the Commission issued Interim Decision (D.) 92575 in January 1981.

D.92575 found that the matter should be reopened for taking of further evidence and that in the future all testimony should be reported and taken under oath. It also found that the document prepared by the Commission employee should be considered and that therefore he should be made available as a witness subject to cross-examination. The Commission further determined that it would be useful to have additional evidence concerning complainants' and their neighbors' consumption patterns.

Finally, the decision determined that the meter test performed by defendant's manager at complainants' request was

improper since it was incapable of determining whether or not the meter was accurate within 0.3 percent (cf. General Order 103 (GO 103)). Defendant was ordered to perform a new test in conformity with GO 103.

The second hearing was held with a reporter present before the same ALJ in San Francisco on February 24, 1981. Complainants appeared at the time noticed for hearing, represented by counsel. Mr. Blomgren testified and presented exhibits; the Commission employee also testified. Because counsel had a conflicting court engagement, complainants and counsel were excused at the close of the morning session. Defendant's representative did not appear until after complainants' attorney and witness had been excused. He asserted that his lateness had been caused by a car breakdown. He testified and presented exhibits.

Subsequently, on July 17, 1981, the ALJ visited the meter site in the presence of Mr. Blomgren and defendant's representative. He also took photographs and a sample of the paving material near the meter, which were made exhibits.

Facts and Contentions

Complainants' water meter is located in the center of a private road which runs behind their house and the houses of several neighbors. The private road was originally covered with gravel. On June 27, 1978, complainants' neighbors had an oil covering applied to the gravel. This oil and gravel combination was spread evenly to a depth of at least an inch over the meter. During the period between June 27, 1978 and March 9, 1979, defendant's meter reader purportedly read the meter and reported a new cumulative consumption reading to his employer every month. Based on these figures, defendant sent out a bill each month; each of them was paid in full. During the period June 1978 through mid-September 1979, complainants observed the pavement several

times per week and assertedly did not notice any disturbance of the surface. Meanwhile, during the period from January 1979 to September 1979 complainants received no water bills.

The original meter reader left defendant's service in April 1979. According to defendant, the meter reader's replacement could not find the complainants' meter for the April 1979 billing. Therefore, no cumulative readings were recorded between March 9 and September 13, 1979. Defendant's representative explained that he did not immediately start a search for the meter when the replacement meter reader reported it lost, since his underground metal detector was broken.

Defendant claims that his employees on September 13, 1979 discovered the meter and performed the first reading since at least March 9, 1979. Complainants partially confirm this; they observed that the driveway pavement had been disturbed in mid-September. On September 28, complainants received the disputed bill. That bill for $511.96 was stated as follows:

Period	Present Reading	Previous Reading	Cu.Ft. Used	Due
Feb. 1979	243640	224850	18790	$ 78.46
Mar. 1979			2050	11.60
Apr. 1979	(Estimated per same		2180	12.12
May 1979	period of 1978)		3320	16.68
June 1979			11740	73.51
July 1979			29380	182.88
Aug. 1979	313300		20990	130.86
		Balance Past Due Jan. 1979		5.85
				$511.96

Defendant contends that the meter was read and the cumulative reading for each month properly recorded until March 1979. Defendant did not explain why no bill was sent for January or February 1979 service.

Defendant concedes that the March through September 1979 billings were estimates. He claims that it is immaterial whether any of the estimates for these months was in error; if one was too high, the error would automatically be offset by a corresponding underestimate in the remaining months. As for the preceding months, he asserts that it was possible for the meter reader to brush aside the oiled gravel, read the meter, and replace the paving material so neatly that the disturbance would be unnoticed. Alternatively, he theorized that sun and traffic would cause the pavement to become re-amalgamated, concealing breaks in the pavement. Accordingly, he claims that we should believe the meter reader's declaration that he read the meter monthly. He argues that there is no reason to question the accuracy of any of the readings recorded prior to March 1979, or of the total billing for the 15 months.

Complainants, on the other hand, contend that the road surface is much like a tar and gravel pavement and that the only way the meter could have been read would be to break through the pavement, thus leaving traces which could not be overlooked. They claim that the billed consumption for the period March through September is much larger than their prior consumption, and reason that such a large discrepancy could only be explained as having resulted from meter-tampering.[1/]

1/ Complainants have now conceded that the meter test which defendant provided after the second hearing was conducted in compliance with GO 103. The tester's report shows that the meter now installed is accurate enough so that no fast-meter refund is due.

Chronology 2/

Prior to June 1978	Complainants' water meter was read regularly.
June 13, 1978	The cumulative meter reading was 158,320 cu.ft. on this date.
June 27, 1978	Oil was applied to the gravel roadway.
June 27, 1978 to mid-September 1979	The meter was covered by paving and impossible to read.*
July through December 1978	Complainants received and paid a monthly bill. Each bill was based on beginning and end of period cumulative meter readings.#
January 1979 to September 28, 1979	No bills were sent.
January 11, February 8, March 9, 1979	The meter was read# but no bill was submitted. The March 9 reading was 243,640 cu.ft.#
April 1979	Defendant's meter reader quit. The new reader could not find the meter.
Mid-September 1979	The pavement was broken. The meter was read displaying a cumulative consumption of 313,300 cu.ft.#
September 28, 1979	The disputed bill was received.

2/ All unmarked statements are undisputed.
Disputed statements are indicated thus:
* Disputed by defendant.
# Disputed by complainants.

Early October 1979	Mr. Blomgren told defendant that the dispute would be referred to the Commission.
October 15, 1979	The disputed bill deposit was sent to the Commission.
Mid-October 1979	The meter box was raised to pavement level. A substitute meter was installed or the original was tampered with.*
February 1980	The noncomplying meter accuracy test was performed.
January 6, 1981	D.92575 was issued, ordering defendant to perform a meter test.
February 24, 1981	The second hearing was held.
March 14, 1981	The complying meter test was conducted.
July 17, 1981	An ALJ's view was held.

Summary

As explained in more detail below, we have determined:

a. That the meter was not read between June 1978 and March 1978, and that the recorded "readings" were estimates.

b. That complainants did not consume the full amount of the water billed for the period between July 1978 and September 1979. An overcharge in the amount of $254.08 is to be returned to complainants.

Was the Meter Read Between June 1978 and March 1979?

We have determined that the oiled gravel surrounding the meter site forms a hard amalgamated pavement. This same material covered the meter until it was rediscovered and raised

to pavement level in the fall of 1979. While not as thick or as tough as the pavement in a normal public street, it nevertheless could not be brushed or shoveled aside as defendant claimed. The only way to view an object covered by such a pavement would be to break through it. It would be impossible to restore a break in such a surface by simply putting the debris back into the hole. The resulting surface would exhibit a strikingly different texture and color, a discontinuity which could not be overlooked.

Defendant claims that the surface would heal itself under the influence of hot sun and vehicular traffic, quickly making a new surface indistinguishable from the old. He did not introduce any evidence to support this theory. In our opinion, this theory could not explain away the conflict between the meter reader's declaration and Mr. Blomgren's reported observations. First, the meter is located near the end of a dead-end alley; it is unlikely that more than a handful of vehicles cross the site in a month. Secondly, this healing process would have to restore a uniform surface in a day or two at most, even during winter months, in order for the break to escape the frequent observations claimed by Mr. Blomgren.

Consequently, we cannot reconcile the meter reader's declaration and Mr. Blomgren's testimony. If the meter reader read the meter once a month as he declared, then complainants could not have had the meter site under almost daily observation. Conversely, if we believe Mr. Blomgren, then no one could have read the meter during the 15 months in question.

We have chosen to believe Mr. Blomgren and disbelieve the meter reader. The latter's statement that the surface is "dirt/shale" is completely in conflict with the observable

character of the pavement, and discredits the rest of his declaration, i.e. that he read the meter regularly. Moreover, his testimony was hearsay; defendant could have, but did not, request or demand that he be present at the second hearing. In contrast, Mr. Blomgren was present in person so that his demeanor was observable and he was available for cross-examination at either hearing. Once we have found that Mr. Blomgren's report of his observations is correct, we must also find that the meter was not read after the oil was applied until the meter was rediscovered in September 1979. Therefore, consumption was estimated in each of the 15 months, not just in the last six as defendant contends. It follows therefore that the latest undisputed consumption figure we have is that of June 13, 1978.

Were Complainants Overcharged?

Complainants' theory is that the amount of water they were charged for in the disputed bill is so large that the September reading must also have been falsified. They contend that the meter was subsequently set ahead so that its reading would conform to the amount of water they were charged for. Alternatively, they contend that another meter with a larger reading was substituted for the one originally installed.

Defendant's representative testified that the meter was not reset. He also stated that the meter now in place is the same meter which was installed when service to the Blomgren residence began; that same meter has assertedly been in place ever since.

He claims that both the March and the September recorded figures were the result of readings and that the difference between the two represents the amount actually consumed in that

period. While conceding that the breakdown of that total consumption between individual months was based on estimates, he argues that it is immaterial whether any of these estimates is accurate. He points out that any overestimate in one part of the period would automatically be offset by an equal underestimate in the remainder.

He did not challenge complainants' contention that the billed consumption was extraordinarily large or attempt to find an explanation.

Complainants' presentation was designed to show that the recorded consumption for the period March through September was abnormally large. However, a favorable finding on this point would not have supported their conclusion that the meter was tampered with. On the contrary, we would expect that any bill which closes out a series of estimated bills would exhibit an apparently abnormal consumption, since it would include not only the amount actually consumed in the last billing period but any errors accumulated from preceding estimates.

Therefore, once complainants proved that the March "reading" (and each of the eight prior readings) was in fact an estimate, they made the difference between the March and September cumulative consumption figures irrelevant, unless accompanied by evidence showing that any abnormality was not due to a prior cumulative underestimate.[3/] As a practical matter, the only

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3/ We have not accepted defendant's argument that a customer is never injured by billings based on incorrect estimates since there would be an offsetting error when the meter is finally read. In this case, the utility was granted a substantial rate increase effective on May 1, 1979; under the new schedule, the tail block rate increased from $0.30 to $0.62. Thus, an underestimate in a March or April bill, even though offset by a billing for more than actual consumption in a subsequent month, would effectively double the charge for the water billed for in the wrong month.

feasible method to demonstrate this would be to show that the total consumption for the entire 15-month period of 154,980 cu.ft. is too large to be accounted for as being within the normal range of variation.

We will not reject a consumer's reparation claim solely because he has adopted a fallacious theory or mistakenly failed to submit evidence to support all the findings it would require.

In this instance, the only question which should have been submitted to us is whether the consumption for the whole 15-month period is abnormally high. There is now enough evidence in the record so that we can examine that question on our own motion, and we will do so.

Much of the data in the record cannot be relied on to provide a basis for establishing a normal consumption pattern for complainants. For example, we cannot rely on their neighbors' consumption. Their landscaping is dissimilar, and they can therefore be expected to have different irrigation needs. The record bears this out. In 1980, two neighbors consumed almost twice the amount complainants used; another used less than half.

Several of complainants' bill comparisons contrasted their consumption for July through September 1979 with their own recorded consumption in the same months in 1978. Since we have determined that the 1978 figures were in fact themselves estimates, they cannot be used to verify other estimates. In order to establish a normal consumption, we must look for figures recorded before or after the 15-month period.

Complainants' pre-1978 consumption is not directly comparable even if we assume that all of the recorded readings actually occurred. The residence was first occupied in the spring of 1975; in the next three years, complainants made

several significant additions to their landscaping each of which would tend to increase water consumption. There was another factor; they added large amounts of peat moss to the soil, which would significantly decrease the need for irrigation. Furthermore, as the plantings matured, they would normally tend to require less water. Attempting to adjust for these countervailing changes would merely pile uncertainty on top of uncertainty. Consequently, we will not rely on any figure recorded before the oil paving was installed.

Therefore, by a process of elimination, we have selected complainants' 1980 consumption figures for use as a standard for comparison. Adjusted to a 15-month basis, those figures support an estimate that complainants would normally have used no more than 114,000 cu.ft. during the period in question.[4/]

In most cases, we presume that a meter accurately records consumption even when the figure appears to be greatly in excess of normal. However, this presumption is rebuttable (Bettman v PG&E, D.93379, C.10872). When, as in this case the recorded consumption is approximately 136% of normal, it becomes very difficult to presume that the difference can be accounted for by normal variations in consumer habits or weather patterns. The presumption can be further weakened by a showing of other circumstances tending to show that a customer's billings were dealt with in an irregular manner.

In this instance, the extraordinary reading is accompanied by several other unusual circumstances. The first is the fact

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4/ It should be noted that the June 1977 to June 1978 consumption was approximately 20% less than the January to December 1980 consumption.

that this meter was not sealed when it was tested for accuracy. Even though the meter seal is usually viewed as a deterrent to meter-tampering by consumers, its absence is of significance in a case where the consumption is suspiciously large, rather than suspiciously small. We also note that the observation was made many months after the challenged consumption was recorded. However, in the absence of any claim to the contrary, there is little reason to doubt that the meter was also unsealed in the fall of 1979.

Even more significant is defendant's apparent failure to keep normal records of meter history, and the fact that this meter does not display an observable serial number. Because of these omissions, we cannot determine with any assurance whether the meter which supposedly measured the extraordinary consumption is the same meter which was recently tested to be accurate, nor can we say that defendant has successfully refuted complainants' theory of meter substitution.

We also note that defendant failed to render a bill for nine months, and knowingly failed to read this meter for six consecutive months. In a context such as this, a utility should be prepared to explain such omissions and to show that they are not connected with a contemporaneous abnormal consumption. Defendant, however, offered no explanation for the first omission, and an inadequate and unsatisfactory explanation for the second.

In our opinion, there have been too many extraordinary incidents involving this one account, to be accounted for by coincidence alone. Standing alone each of these incidents (which are also violations of statute or General Order) might have an innocent explanation. When considered together, however, they lead us to the conclusion that defendant or his employees have

tried to conceal material information concerning complainants' consumption. We are thus impelled to distrust the cumulative consumption figure recorded in September 1979.

Since we have no trustworthy consumption figures for the 15-month period, complainants should not be required to pay for more than estimated normal consumption. Therefore, the quantity of water stated in the disputed bill will be reduced by 40,980 cu.ft.

Complainants paid for a substantial portion of the estimated 114,000 cu.ft. at less than the current tail block rate of $0.62 per 100 cu.ft. However, by failing to read the meter after it was reported lost, defendant made it impossible for us to determine whether and to what extent the lower rate levels should be applied in calculating the overcharge; it should be noted that this omission involved a knowing violation of both PU Code § 770(d) and GO 103.[5/] Consequently, we will not give defendant the benefit

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5/ PU Code § 770(d) provides in part:

> ". . . The commission shall require a public utility that estimates meter readings to so indicate on its billings, and shall require any such estimate which is incorrect to be corrected by the next billing period, except that for reasons beyond its control due to weather, or in cases of unusual conditions, corrections for any over- or underestimate shall be reflected on the first regularly scheduled bill and based on an actual reading following the period of inaccessibility."

We interpret it to require defendant, once he became aware that the meter was covered, to take reasonable steps to locate it in time to read it for the next regular bill. While it does not affect the outcome, it should be noted that the lack of a meter seal violates paragraph VI.3.d of GO 103. The defendant apparently does not have the meter records required by paragraph VI.8 of that order; his failure to bill monthly was a violation of paragraph VII.2.

of the doubt on this point but will assume that the overcharge affected only the months after the rate increase. Accordingly, the dollar amount of the overcharge will be calculated by applying the new tail block rate of $0.62.

We have in this manner calculated that $254.08 of the last bill represents an overcharge for water not actually consumed; that sum will be deducted from the sum deposited with us and returned to complainants. The remainder, $257.88, represents the portion of the estimated total consumption which complainants have not yet paid for; that amount will be forwarded to defendant.

Findings of Fact

1. Complainants' meter was covered by a solid asphaltic material from June 27, 1978 through mid-September 1979.

2. If this pavement had been broken it would have left visible traces which would have been impossible to overlook.

3. The surface of the pavement over the meter was regularly observed and was never broken until September 13, 1979.

4. Defendant's employee recorded that he read the meter subsequent to July 27, 1978. These representations were untrue. He could not have read the meter.

5. Each entry in defendant's records which purports to show complainants' consumption from July 27, 1978 to March of 1979 was an estimate.

6. Defendant admittedly did not read the meter between March and mid-September 1979.

7. The meter now installed at complainants' residence lacks a seal and has no serial number.

8. That meter is not more than 2% fast. We cannot determine whether this meter was the meter installed while the meter box was covered by pavement.

9. Defendant has not demonstrated that he has written meter records.

10. Defendant did not make reasonable efforts to discover and read the meter once informed that it was missing. If he had read the meter when required we would know which rates to apply in calculating any overcharge.

11. Complainants could reasonably have been expected to consume no more than 114,000 cu.ft. between mid-June 1978 and mid-September 1979.

12. It is not credible that complainants consumed 154,980 cu.ft. in that period.

13. We should calculate the dollar amount of the overcharge at today's rates.

14. Complainants were overcharged $254.08, which amount should be returned to them.

Conclusions of Law

1. The Executive Director should return the amount of the overcharge to complainants, and forward the remainder to defendant.

2. Defendant violated PU Code § 770(d) and paragraphs VI.3.d, VI.8, and VII.2 of GO 103.

3. Complainants are not entitled to an additional adjustment of their bill on the basis of meter error.

4. Once he became aware that the meter was covered, defendant was obligated to take reasonable steps to read it for the next scheduled billing.

5. Since this order affects the disposition of a deposit, it should be effective on the date of signature.

FINAL ORDER

IT IS ORDERED that the Executive Director shall disburse the funds deposited by complainants by forwarding $257.88 to James J. Downey and returning $254.08 to complainants.

This order is effective today.

Dated NOV 3 1981, at San Francisco, California.

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

I certify that this decision was approved by the above Commissioners today.