

COM/DWF:001 8 February 8, 1995 We held the agenda item at our meeting on February 8, 1995. On February 11, 1995, the assigned Commissioner issued a ruling. ^{mailed} **AUG 11 1995**
Decision 95-08-023 August 11, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Simpson Paper Company,)
Complainant,)

vs.) **Case 94-07-023**
Pacific Gas and Electric Company,) (Filed July 19, 1994)

Defendant)

ORIGINAL

OPINION

We disapprove of Simpson's extraordinary step of filing a motion in this proceeding two days before we were to take up a proposed decision ruling on Simpson's motion. **SUMMARY**

This case began as a dispute about whether a gas customer was entitled to stop paying for service when it notified the utility that the customer was forced by circumstances beyond its control to suspend plant operations. Simpson Paper Company (Simpson) asks us to dismiss with prejudice the complaint it filed against Pacific Gas and Electric Company (PG&E) on July 19, 1994, and PG&E now joins in that request. Jointly, the parties ask that the amount in dispute, which has been on deposit with the Commission, be remitted to Simpson. This resolution is part of a settlement of other litigation between the parties. We will grant such dismissal and order such amount so remitted.

II. PROCEDURAL HISTORY

We disseminated a proposed decision (that would have denied Simpson's earlier motion to dismiss without prejudice and granted PG&E's motion for summary judgment) in anticipation of our February 8, 1995 meeting. On February 6, 1995, Simpson filed its "Motion for Emergency Stay of Action on Proposed Decision." On February 7, 1995, PG&E filed its response to Simpson's motion.

We held the agenda item at our meeting on February 8, 1995, and on February 16, 1995, the assigned Commissioner issued a ruling, sua sponte, pursuant to Rule 75 ordering the parties to file concurrent briefs on whether this Commission has and ought to exercise jurisdiction. Simpson and PG&E each filed its respective brief on March 22, 1995. While a revised proposed decision was being reviewed by the assigned Commissioner, the parties informed the Commission that they were in settlement negotiations and requested that no decision issue.

III. "EMERGENCY" MOTION

We disapprove of Simpson's extraordinary step of filing a motion in this proceeding two days before we were to take up a proposed decision ruling against it. Nothing in Simpson's motion established facts showing any emergency. Simpson used this pleading merely to make another argument -- that it would hold this Commission liable for conversion of the deposit it chose to submit with us in order to continue to obtain service from a utility we regulate. Simpson also argued extensively that it had not had an opportunity to oppose PG&E's summary judgment motion when, if fact, it had. Simpson responded with procedural arguments, but had every opportunity to file substantive opposition. Its litigation strategy was its decision and entirely within its control. To find otherwise would require us to assume Simpson's counsel incompetent, which we cannot do. If Simpson were to have found itself aggrieved by our decision, it would have had adequate remedies through a petition for rehearing or through review by the Supreme Court. Simpson should have confined itself to advocacy that was not clearly frivolous and not proclaimed an emergency wholly unsupported by any new facts or change in law. On February 8, 1995 meeting, its "Motion for Emergency Stay of Action on Proposed Decision" was filed. On February 7, 1995, PG&E filed its response to Simpson's motion. Simpson's counsel is advised that failure to heed this warning may lead to sanctions in the future and that

its clients' choices to oppose a pleading on the merits or procedurally is one we reasonably assume is informed.

In light of the proposed dismissal, it is unnecessary for us to complete the jurisdictional analysis contemplated by the assigned Commissioner's order.

IV. JURISDICTION

In light of the proposed dismissal, it is unnecessary for us to complete the jurisdictional analysis contemplated by the assigned Commissioner's order.

V. MOTION TO DISMISS

Our decision in Miller Brewing Co. v. Southern Cal. Gas Co. (D.91-09-075) is relevant to the present joint motion to dismiss. In Miller, a brewery disputed the calculation of demand charges under a gas service tariff and filed a complaint that

charged improper billing. The complainant deposited \$190,619.78 with the Commission. We decided that the disbursement of the deposit in accordance with a proposed settlement was a matter requiring consideration of the interests of ratepayers, thus precluding voluntary dismissal, applying Rule 51.1(e) (whether contested or uncontested a stipulation or settlement must be

reasonable in light of the whole record, consistent with law, and in the public interest). We found that the proposed disbursement of the deposit met our standard and approved the settlement.

In 1992, we adopted a policy on all-party settlement proposals that requires any such settlement to (a) command the unanimous sponsorship of all active parties to the proceeding, (b) have sponsoring parties that are fairly reflective of the affected interests, (c) not contravene statutory provisions or prior Commission decisions, and (d) convey to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests.

(In re San Diego Gas & Elec. Co. (D.92-12-019) 46 CPUC2d 538, (550-51).) Although some of these elements are satisfied, neither Simpson nor PG&E fairly reflects one important affected interest, that of the ratepayers.

Simpson was asserting in its complaint that it was not indebted to PG&E for \$231,643,10, representing obligations incurred under a gas transportation agreement. PG&E took the opposite position. Had PG&E prevailed, it would have collected such amount toward utility revenue. Therefore, we grant the parties request for dismissal, but will protect ratepayers from any undisclosed ratepayer impacts of the settlement. PG&E shall not record in balancing accounts, recover in rates, nor include in cost allocation forecasts, revenue shortfalls, if any, resulting from the settlement of this complaint without prior order of the Commission. For purposes of this decision, PG&E should assume that it would have prevailed in its interpretation of the force majeure provision for the duration of the term of Simpson's contract. PG&E should track revenue and revenue shortfalls, if any, for the Simpson account and segregate any such shortfalls in any relevant proceeding establishing rates during the term of Simpson's contract. PG&E should provide written notice to the Executive Director within 20 days if it intends that shareholders will bear responsibility for any shortfall, and provide the basis for its calculation of such a shortfall.

Findings of Fact

1. Simpson is a Washington corporation doing business in California and operated a wood pulp paper mill and cogeneration plant at Fairhaven, California (Fairhaven Facility) and PG&E is a California corporation providing gas and other utility service under authority granted by this Commission.

2. PG&E and Simpson entered into the Gas Agreement on August 14, 1991, for service from August 1, 1991 through July 31, 1993. In early March, 1993, Simpson suspended most of its receipt of gas at the Fairhaven Facility, claiming that it should be excused from performing its obligations under the Gas Agreement.

PG&E rejected Simpson's claim and billed Simpson for a net amount of \$231,643.10.

3. PG&E and Simpson have requested that Simpson's complaint be dismissed with prejudice and that \$231,643.10 on deposit with this Commission be remitted to Simpson.

Conclusions of Law

1. Simpson's counsel of record may be subject to sanctions if any other unsupported motion alleging an emergency is filed.

2. Simpson's complaint should be dismissed with prejudice, and the amount on deposit with this Commission should be remitted to Simpson.

3. PG&E's ratepayers should be protected from any undisclosed rate impacts of the settlement.

DAVID W. FESSLER
President
GREGORY GORDON
JESSIE J. KNIGHT, JR.
HENRY M. DUNN
IT IS ORDERED that

1. Simpson Paper Company's (Simpson's) and Pacific Gas and Electric Company's joint motion to dismiss Simpson's complaint with prejudice is granted.

2. The \$231,643.10 on deposit with this Commission from Simpson representing the disputed amount shall be remitted to Simpson.

3. PG&E shall not record in balancing accounts, recover in rates, nor include in cost allocation forecasts, revenue shortfalls, if any, resulting from the settlement of this complaint without prior order of the Commission.

4. PG&E shall track revenues and revenue shortfall, if any, for the Simpson account and segregate any such shortfalls in any relevant proceeding establishing rates. In determining whether there is a shortfall, PG&E should assume it would have

prevailed in its interpretation of the force majeure provision for the duration of the Simpson contract.

5. PG&E shall inform the Executive Director within 20 days if it intends shareholders will bear the responsibility of any revenue shortfall caused by the settlement, and provide the basis for its calculation of such a shortfall that is consistent with this decision.

This order is effective today.

Dated August 11, 1995 at San Francisco, California.

PG&E's ratepayers should be protected from any

undisclosed rate impacts of the settlement.

DANIEL Wm. FESSLER
President

B. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

1. Simpson Labor Company's (Simpson's) and Pacific Gas and Electric Company's joint motion to dismiss Simpson's complaint with prejudice is denied.

2. The \$231,643.10 on deposit with this Commission from

Simpson representing the disputed amount shall be remitted to

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

rates not include in cost allocation forecasts, revenue from the settlement of this

Wesley Franklin
Acting Executive Director

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