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Decision 97-06-014 June 11, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

REGENTS OF THE UNIVERSITY
OF CALIFORNIA, DEPARTMENT
OF HOUSING AND DINING
SERVICES/CHILD CARE SERVICES,

Complainant,

vs.

PACIFIC GAS AND ELECTRIC
COMPANY,

Defendant.

(U 39 E)

ORIGINAL

Case 96-08-022
(Filed August 9, 1996)

O P I N I O NBackground

This is a complaint of the Regents of the University of California, Department of Housing and Dining Service/Child Care (U.C. Berkeley or complainant) against Pacific Gas and Electric Company (PG&E). U.C. Berkeley seeks a refund or credit for alleged overcharges on two of its PG&E accounts, account number BJR 64 85001 for electric service and account number BJR 65 10001 for gas service. The request is for a refund for the three-year period ending April 24, 1990, on the premise that while these accounts were billed under residential rate schedules EM-ITB and GM-IT, respectively, they should have been billed under commercial rate schedules E-19P and GNR-2.

Complainant argues that this complaint is not time barred since the statute of limitations is tolled, citing TURN v. Pacific Bell, 49 CPUC2d 299 (1993) ("TURN I"), and on rehearing, 54 CPUC2d 122 ("TURN II"). Alternately, complainant argues that the statute of limitations was tolled under the doctrine of equitable estoppel.

By letter dated March 7, 1990, U.C. Berkeley asked PG&E to review the potential cost advantages of certain alternate rate schedules for various electric and gas accounts on the campus. On April 24, 1990, PG&E responded that there are financial advantages from switching the then current residential rate schedules to appropriate commercial rate schedules for the two accounts indicated above. PG&E indicated that since those accounts have a large percentage of usage for research, they qualify for commercial rates, and mentioned a potential annual savings of \$40,000 in electric costs and \$38,000 in gas costs from switching. The accounts were switched to the commercial rate schedules. PG&E did not mention any other potential benefits such as refunds.

In its answer to the complaint PG&E argues that this complaint is time barred under Public Utilities (PU) Code §§ 736 and 738. U.C. Berkeley's claim is not sufficient to support a claim of equitable estoppel to toll the statute of limitations. U.C. Berkeley failed to use reasonable diligence in pursuing its claim of overcharges for the retrospective period when it contacted PG&E seeking the best rates in 1990. PG&E requests that the complaint be dismissed with prejudice.

Discussion

The viability of the complainant hinges on the issue of whether it is either time barred, or the statute of limitations is tolled. The complaint was filed more than six years after complainant inquired about alternate rates. It seeks refunds for alleged overcharges on those accounts for the three-year period preceding the schedule change, April 24, 1987 to April 24, 1990.

We find that public hearings in this matter are not necessary. The parties have fully argued their positions in pleadings and in responses to pleadings.

Under PU Code §§ 736 and 738 the statute of limitations for damages resulting from violation of PU Code § 532, regarding utility rates, is three years from the time the cause of action

accrues. However, in TURN I, supra, the Commission held that "[t]he statute of limitations is tolled until a plaintiff discovers or should have discovered the facts essential to the cause of action." (49 CPUC2d 299, 311.) The phrase "should have discovered" implies that the complainant has a duty to make a reasonable investigation using information available.

U.C. Berkeley argues that it acted reasonably when it contacted PG&E about the possibility of switching rate schedules, and that PG&E's response was intentionally or negligently incomplete or misleading since it did not address refunds. Thus U.C. Berkeley could reasonably assume that no other financial advantages such as refunds were available.

PG&E responds that it answered complainant's question about the availability of more beneficial rate schedules. PG&E argues that its answer was not evasive or incomplete; rather, it was responsive to the request. Complainant made no mention of possible refunds in its inquiry, thus PG&E did not address that issue.

In TURN I, the Commission held that Pacific Bell (Pacific) had a duty to inform its customers about all the overcharges and remedies available to them. In that case, Pacific's notification program made it appear that the only overcharges were due to customer payments being made in plain envelopes rather than the bar-coded envelopes furnished by Pacific with the bills. The notification failed to inform of other overcharges, including improper connection charges and returned check charges, "[w]here a utility knew or should have known that it was overcharging its customers, the benefit of the doubt must go to the customers." (49 CPUC2d at 312.) The statute of limitations was tolled because it was not reasonable to expect customers to know if they were entitled to refunds for overcharges. In TURN II, the Commission upheld its decision that the statute of limitations was tolled, finding that:

"Pacific may not rely on its customers to identify improper charges and tariff violations. ...it defies logic to assume customers knew they were being improperly charged... Pacific did not notify customers that it had internal billing problems, and some managers appear to have directed service representatives not to discuss known internal problems with customers who took the initiative to ask. Some service representatives may have reversed the charges of some inquiring customers. Millions of other customers, however, did not receive refunds and cannot be reasonably assumed to have known about the improper charges. Indeed, Pacific would hold its customers to a standard to which it would not hold its own officers and managers: it seeks to avoid liability in this complaint by claiming officers and managers were ignorant of payment processing problems while asking us to assume that its customers should have known about the same problems. Pacific cannot have it both ways." (54 CPUC2d 125.)

This case is distinguishable from TURN I and TURN II. Complainant has not shown that PG&E knew it was entitled to refunds when complainant inquired of PG&E about possible advantages of alternate rate schedules. We note that many customers' usage habits change over time, especially those who have both residential and commercial uses. Thus the most beneficial rate schedule available to a customer may change over time due to changing types of usage. With this type of customer, PG&E would not know if the amount of residential usage has changed compared to that used for research, unless informed by the customer, or without conducting a study of complainant's prior usages.

We believe that PG&E could reasonably have assumed that changing types of usage led to the inquiry about alternate rate schedules. Unless the customer inquires, the utility cannot reasonably be expected to survey the customer's usage habits. It is the customer's obligation to make such an inquiry, and to request an analysis of potential refunds, if it so desires. Refunds were

never mentioned by complainant, although complainant knew that substantial prospective savings could result from the changes in rate schedules. Realizing that the commercial rate schedules offer substantial savings over the prior residential rate schedules, we believe that complainant had adequate knowledge in order to request information or a study from PG&E to determine whether refunds were available. Complainant's level of knowledge is demonstrated by its inquiry in its March 7, 1990 letter to PG&E, which states:

"In some old records I found that this account was on a time-of-use A22 schedule for a short time before mid-1981. At that time, the account number was BJR T1 99011. It just barely qualified for the E20P rate schedule. Now it probably still does- if not, then it surely qualifies for E19P."

We believe that this demonstrates that complainant had sufficient knowledge to inquire about possible refunds. Had complainant inquired, it would have been PG&E's responsibility to investigate and respond about whether refunds were available.

We conclude that since the complainant did not timely raise the issue of refunds, the statute of limitations is not tolled based on TURN I and TURN II.

Now we consider complainant's alternate claim that the time is tolled based on the doctrine of equitable estoppel. "Under the doctrine of estoppel, a person may not lull another into a false sense of security by conduct causing the latter to forbear to do something which he or she otherwise would have done and then take advantage of the inaction caused by his or her own conduct. To establish estoppel, the plaintiff must show that the party to be estopped was apprised of the facts; he or she intended that his or her conduct be acted upon, or so acted that the party asserting the estoppel had a right to believe it was so intended; the other party was ignorant of the true state of facts; and he or she reasonably relied upon the conduct to his or her injury." (Biss v. Bohr (1995) 40 Cal. App.4th 1246, 1248.)

We address the four components necessary to establish a claim of equitable estoppel:

First, whether the party to be estopped, PG&E, was apprised of the facts. As we discussed above, U.C. Berkeley has not established that PG&E knew that refunds were available. We believe that PG&E would not necessarily know whether complainant was entitled to refunds without conducting a study. While we have no way of knowing PG&E's actual state of knowledge in this matter, we believe that it would have been reasonable for PG&E to assume that U.C. Berkeley's inquiry could have resulted from changing types of usage that made the two accounts then eligible for commercial rate schedules when they previously were not eligible.

Second, we find no indication of intent by PG&E to derail further investigation or action by complainant. While complainant argues that PG&E's response was incomplete and misleading, we disagree. PG&E directly answered complainant's inquiry. It did not suggest that a refund was not possible, and it further indicated that complainant should contact PG&E if further information is needed.

Third, we believe it is unlikely that complainant was ignorant of the facts regarding the potential for refunds, having demonstrated significant knowledge of PG&E's tariffs. In order to reach the level of knowledge of tariffs that U.C. Berkeley has demonstrated, we believe it most likely would have studied the tariffs and conditions of service quite thoroughly. Yet it failed to make a reasonable investigation by inquiring about possible refunds. We conclude that the lack of action by complainant concerning refunds was most likely not due to lack of knowledge.

Fourth, there was no conduct by PG&E intended to injure complainant or to prevent complainant from asserting its rights. PG&E was forthright in its answer to complainant's inquiry, and left the door open for further inquiries. Complainant merely failed to act on its own behalf.

Since the components necessary to support the claim of equitable estoppel have not been shown by complainant, we find that the doctrine of equitable estoppel does not apply in this case.

In conclusion, we find that the statute of limitations is not tolled, and therefore the complaint is time barred under PU Code §§ 736 and 738.

We will deny the complaint in the order that follows.

Findings of Fact

1. Unless tolled, the statute of limitations of three years applies and this case is time barred.

2. A public hearing is not necessary.

3. U.C. Berkeley requested information from PG&E on potential savings due to a change in rate schedules on the two accounts at issue.

4. PG&E fully answered the inquiry of U.C. Berkeley, estimated the annual savings, and changed the accounts to commercial rate schedules.

5. U.C. Berkeley made no inquiry of PG&E for information on possible refunds relating to the two accounts until more than six years after the 1990 inquiry into rate schedule changes.

Conclusions of Law

1. The statute of limitations in this case is not tolled based on TURN I and TURN II.

2. The doctrine of equitable estoppel does not toll the statute of limitations in this case.

3. This complaint is time barred by the statute of limitations under PU Code §§ 736 and 738.

4. This complaint should be denied.

5. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The complaint of the Regents of the University of California, Department of Housing and Dining Service/Child Care, against Pacific Gas and Electric Company is denied.

2. This proceeding is closed.

This order becomes effective 30 days from today.

Dated June 11, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners