

Mailed
SEP 5 1997

Decision 97-09-043 September 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Producers Dairy Foods, Inc.,)
Complainant,)
vs.)
Pacific Gas and Electric Company,)
(U 39 E))
Defendant.)

ORIGINAL

Case 96-09-021
(Filed September 16, 1996)

Paul Kerorian, for Producers Dairy Foods, Inc., complainant.
Terrie L. Robinson, Attorney at Law, for Pacific Gas and Electric Company, defendant.

O P I N I O N

Background

This complaint of Producers Dairy Foods, Inc. (Producers or complainant), filed on September 16, 1996, argues that the operations at its dairy at 144 E. Belmont Avenue in Fresno are entitled to agricultural (AG) rates. Producers seeks AG rates and refunds for the difference between the actual charges and the charges that would have been made under the appropriate AG rate schedules for the three-year period prior to October 30, 1995, the date it contacted defendant Pacific Gas and Electric Company (PG&E) regarding AG rates.

AG rates were ordered by legislation to help California's agricultural producers, and are available under PG&E's tariffs if 70% or more of the energy use is for agricultural end-uses, and the form of the agricultural product is not changed.

Producers both has its own dairy cows and buys raw milk from others, then prepares the milk for the retail market by pasteurizing, homogenizing, vitaminizing, and standardizing the fat content. Producers argues that the processed milk is in the same form as the raw milk, and the processing steps are necessary in order to market the milk commercially. Producers contends that its processing does not change the form of the product, liquid milk, and thus it is clearly entitled to AG rates under the tariffs.

PG&E, on the other hand, contends that the processing changes the form of the milk, and refuses to place Producers on AG rates. PG&E is particularly concerned about the impact on other customers such as cotton ginners and nut processors, if Producers is allowed AG rates.

Hearing

A duly noticed hearing was held in Fresno on January 30, 1997.

Producers presented the testimony of:

- Ray C. Grewe, Facility Engineer for Producers;
- William J. Bordessa, Regional Administrator of the Milk and Dairy Foods Control Branch of the California Department of Food and Agriculture;
- Dwayne Siekman, Plant Manager of Producers' Dairy;
- Richard Shehadey, President of Producers; and
- Michael Kerkorian, Partner with Utility Cost Management.

PG&E presented the testimony of:

- Harold Hirsch, Tariff Analyst; and
- Terry A. Langiano, Business Customer Services Supervisor.

Grewe testified about the uses of energy at Producers Fresno facility, which has seven PG&E electric meters. The bulk of

the usage is for refrigeration, plastic milk container production, and packaging.

Bordessa testified that federal law prohibits the interstate sale of unpasteurized (raw) milk to consumers. In his opinion, unpasteurized milk is unsalable to the general public due to the risk of disease-causing bacteria and reduced shelf-life. Although some raw milk is sold in California, those sales account for less than 2/10th of one percent of the total fluid milk consumption in the state. Vitamins A and D are required to be added during pasteurization by the Food and Drug Administration (FDA) to restore the natural levels of these vitamins, since some are lost during pasteurization and storage.

Siekman testified that homogenization is not required to make milk safe for human consumption, but without it the shelf life is reduced to six or seven days, while pasteurized milk has a shelf life of 14 to 21 days, both based on keeping the milk at 40 degrees (°) Fahrenheit (F). The reason for the shortened shelf life of unhomogenized milk is that the fat which rises to the top becomes oxidized through light irradiation or oxygen exposure, causing the fat to turn into fatty acids and alcohol that can sicken people who drink it.

Shehadey testified that unagitated raw milk separates to various fat content levels, ranging from heavy whipping cream on top with about 40% fat, to nonfat milk at the bottom with about 0.25% fat. Raw milk has fat content that varies by season from about 3.4 to 3.7% fat, but in all cases the products with varying fat content come from the raw milk. The FDA requires milk products to be sold at precise levels of fat.

Shehadey stated that the quantity of vitamins added is minuscule at about an ounce per thousand gallons of milk.

Michael Kerkorian testified that he believes Producers is eligible for AG rates because it does not change the basic form of the product, which is fluid milk. The processing steps taken are

necessary in order to market milk in the quantities it handles. The end products with different fat content are essentially indistinguishable from the raw milk, which has not been processed into changed forms such as butter or cheese.

Hirsch testified that PG&E looks at each account separately in determining eligibility for AG rates in instances where there are several accounts or meters at a given location, unless it is an integrated operation. In that case, the whole operation must be looked at to see if 70% of the use is for qualifying agricultural use. As an example, if a feed mill that supports a cattle ranch is to qualify for AG rates, 70% of the feed must go to the cattle operated by the account owner, i.e. not more than 30% of the feed may be sold to others.

Hirsch determined that Producers was not eligible for AG rates because each of the processes of pasteurization, homogenization, standardization, and vitaminization changes the form of the raw milk. In his opinion, pasteurization is an additional step beyond that necessary to bring the milk to market. It is done to extend the shelf life of milk, and is not a necessary step since milk can be sold for other than human consumption, such as for industrial processes, for grain, and for animal food. The tariff language describes "production for sale," and PG&E interprets this to mean sale to anyone at wholesale or retail.

Hirsch considers pasteurization to be different than washing fruits and vegetables by a packager, as regards eligibility for AG rates. Washing and packaging do not change the form of the product, but heating during pasteurization does. Milk that has been homogenized also cannot be eligible for AG rates, in order to be consistent with eligibility of other AG production processes. Standardization is the most dramatic change in the form of milk since it results in specific levels of fat, while raw milk has varying levels of fat. Finally, vitaminization also changes the

form of the milk by adding substances, in itself making Producers ineligible for AG rates.

Hirsch testified that separating eggs into differing sizes of large, extra large, and jumbo, and grades of A, AA, and AAA, does not disqualify the egg producer from AG rates. Washing and waxing apples also does not change the form of the product.

Langiano testified that pasteurization itself would not necessarily disqualify a process from AG rates. Rather it would have to be taken in the context of the end-product.

The case was submitted for decision upon receipt of concurrent reply briefs on May 1, 1997.

Discussion

The tariff language for AG qualification in PG&E's tariffs derives from Conclusion of Law 10 in Decision (D.) 88-12-031, 30 CPUC 2d 44, 56, which states: "...all agricultural accounts must meet the condition that 70% or more of the energy usage on the account be dedicated to agricultural end-uses, defined to include growing crops, raising livestock, pumping water for irrigation and other uses involving production for sale which do not change the form of the agricultural product."

We note that Producers and PG&E are in agreement that the bottle manufacturing operation is an integrated part of Producers' milk production operation, and thus if Producers qualifies for AG rates, the bottle production also qualifies. The parties also agree that Producers uses 70% or more of its energy for processing the raw milk.

But we have two very different perceptions of what constitutes a change in the form of the product. Producers contends that the processing steps it takes makes the milk safe for human consumption, emulsifies the fat for health and shelf-life reasons, restores the milk to the preprocessing levels of vitamins, and standardizes the fat levels which is necessary for marketing the milk products. All the liquid milk end-products have fat

contents that exist in the raw milk. If the fat is allowed to float to the top, and milk or cream were drawn from varying levels of the product, the same fat levels that exist in all the milk products could be drawn from the raw milk.

PG&E, on the other hand, is concerned mainly with the overall impact that AG rates for Producers would have on other agricultural processors, such as cotton ginners and nut processors. PG&E stresses that this case should be viewed in the context of agricultural production in general. Witness Hirsch argues that each of the processes changes the form of the product and thus disqualifies it from AG rates. Pasteurizing cooks the milk, homogenizing changes the particle size of the fat, standardizing changes the fat levels from those in the raw milk, and vitaminization adds substances to the milk. Thus the amount of energy used in any or all of these processes is immaterial, and the operation does not qualify for AG rates because the form of the milk is changed.

PG&E witness Langiano testified that pasteurization would not necessarily disqualify the milk. He used an example of allowing AG rates for carrot processing which cut the carrot tops off if less than 30% of the energy is used in cutting the tops off, even though cutting the tops off carrots changes the form of the product. Yet in Producers' case he believes that one must start with the end-product in determining eligibility for AG rates. Langiano could not explain the logic of why Producers would not be eligible for AG rates if less than 30% of the energy on a given meter was used for a process that he believes changes the form of the product. Langiano is also concerned that if Producers were allowed AG rates, it would be difficult for PG&E to explain why other agricultural operations such as cotton ginning would not qualify.

But we are not concerned with other agricultural users; the issue is simply whether Producers qualifies for AG rates under

the tariffs. PG&E attempts to treat this case as a generic matter dealing with the agricultural industry, when it is quite simply a case dealing with an individual milk processor. Eligibility for AG tariffs is not dependent on an analysis of the impact on AG rate availability for other customers. They too are either eligible or not, depending on whether they qualify under the tariffs.

We find PG&E's reasoning to be inconsistent. On the one hand even though the processed milk cannot be distinguished from raw milk by sight or smell, the form of the product nevertheless has been changed, in its view. On the other hand, according to Langiano, carrots can be topped and yet qualify, even though PG&E acknowledges that the form has been changed. That change in form is obvious, since topped carrots have a different appearance than carrots with tops, which can be readily seen. In addition, the content of that product has been changed, since there are no green tops on the finished product. Yet Langiano testified that Producers could not be viewed similarly; rather, one needs to look at the end-product.

If the rationale PG&E uses for topping carrots is applied in this case, Producers clearly qualifies for AG rates, since more than 70% of the energy usage on its meters is used for refrigeration and packaging, or for manufacture of plastic bottles. On the meter with the largest usage at 46% of Producers' total, pasteurizing, standardizing, and homogenizing consume 2%, 5%, and 9% of the usage on the meter, for a total of 16%, with the remainder used for refrigeration and packaging. On the meter serving bottle production with usage at 31% of the total, 80% of usage is for bottle manufacturing, with 20% used for case washing. On the meter with the third largest usage at 16%, most of the usage is for refrigeration, with some usage for packaging. These three meters represent 93% of Producers' total usage at the Fresno facility.

However, according to the relevant tariff, and contrary to Langiano's testimony, the amount of energy expended in cutting the tops off carrots is irrelevant, since by changing the form of the product for sale, the process would not qualify for AG rates. We conclude that this position of Langiano is flawed. If the form of the product is changed, the process is not eligible for AG rates, regardless of the amount of energy used in changing the form.

Thus whether the processing changes the form of the product is determinative regarding Producers' eligibility for AG rates. We consider whether Producers qualifies for AG rates based on whether the form of the product is changed in each of the production processes.

Pasteurization is a process which heats milk quickly and for a short time to destroy bacteria and make the milk safe for human consumption. This is not a cooking process as Hirsch contends. Rather it is a nearly flash heating process which heats the milk to 168° F. for 30 seconds, then cools it to 38° F. The pasteurized milk cannot be distinguished from raw milk. We conclude that this does not cause a change in the form of milk. Since pasteurization is required by federal law for milk sold for human consumption, it a necessary process for Producers.

Next, the milk is homogenized to prevent the fat globules from separating and floating to the top of the milk when the milk is left undisturbed for 24 hours or more. Homogenization reduces the fat globules to a small enough size that they will not float to the top. The stated benefit of homogenization is longer shelf life for the milk. The globules are not visible, except as they group together when they float to the top of unhomogenized milk. At that time, the fat is visible as a distinct layer on top of the milk. Once the milk is agitated, the fat again disburses and is no more visible in raw or unhomogenized milk than in homogenized milk.

Hirsch testified that this changes the form of the product. Yet he believes that waxing apples does not change the form of the product. We find this reasoning to be flawed. Waxing apples adds an ingredient, wax, that was not a part of the raw apples, to obtain a more pleasing appearance. One might conclude that waxing apples changes the form of the agricultural product by adding wax, or by making the apples shinier. However, homogenizing adds no ingredient to the raw milk. We conclude that it does not change the form of the product.

Vitaminizing adds Vitamins A and D to restore the amounts that naturally occur in the raw milk, but partially deplete both from pasteurizing and from storage. These minuscule amounts are required to be added by the FDA and California for milk sold to the public. Considering that the result is milk with the same quantities of vitamins as naturally occurs in milk, we do not see this as a change in form.

Regarding standardization, PG&E argues that since the end-products are different in fat content than the raw milk, the form has changed. Producers states that all fat from the raw milk is processed into the various milk products that go to market, and standardization is required by the FDA.

We observe that Hirsch testified that sorting eggs by size and quality does not change the form of the product and thus the process qualifies for AG rates. Grading and separating eggs by size results in containers of eggs, each of which is different in size than the average size of eggs from the hen, quite the same as processing milk results in various products, many of which have fat contents different than the average fat content in raw milk from the cow. Both the resulting egg and milk products are identical to portions of the raw product. We fail to see any distinction between sorting eggs and standardizing milk, as regards change in form of the product. We conclude that standardization does not change the form of the milk.

The processes used by Producers are necessary in order to realistically market the milk in the quantities Producers handles. Hirsch states that the milk could be sold for purposes other than direct human consumption, but offers no evidence that such markets exist for the quantities involved here. Regardless, a major market for milk is for human consumption. Here, too, we note a major inconsistency in PG&E's position. PG&E states that it is allowable to wax apples to improve appearance by adding an ingredient, yet apples could be sold without waxing, perhaps obtaining lower prices due to their being less visually appealing. Eggs, too, perhaps could be sold in random size and quality, but practical marketability may deem otherwise. Regardless, we do not believe that the intent of the legislature was to force milk producers to find less viable markets in order to benefit from AG rates.

Finally, we note that at the hearing even PG&E's own witnesses could not distinguish raw milk from processed milk that had been pasteurized, homogenized, vitaminized, and standardized. Due to health hazards associated with raw unpasteurized milk, a taste comparison is not appropriate, but it is unlikely that a person could even reliably distinguish between the two by taste.

We find that Producers does not change the form of the product in processing raw milk, and therefore qualifies for AG rates. We will order PG&E to place Producers' accounts at the 144 E. Belmont Avenue facility in Fresno on the appropriate AG rate schedules, and refund the difference between the commercial rates it was on at the Fresno milk production facility, and the appropriate AG rates.

The refund period Producers requests is the three-year period prior to the October 30, 1995 date of Producers contact with PG&E by letter requesting AG rates. The three-year refund period was established in D.86-06-035, 21 CPUC 2d 270 at 278. Also see Public Utilities Code § 736.

5. Homogenizing breaks the fat globules into a smaller size that does not float to the top, which extends the shelf life of the product and reduces health hazards.

6. Vitaminizing, required by the FDA and California, restores the vitamins lost in processing and storage to the natural levels of vitamins found in the raw milk.

7. Standardizing the fat content of the milk products is necessary in order to offer milk products to consumers at precise levels of fat as required by the FDA.

8. Agricultural rates are available if 70% or more of the energy use is for agricultural end-uses, and if the production for sale does not change the form of the product.

9. The processes Producers uses are necessary in order to market the milk in the quantities Producers markets.

10. The processed milk products cannot be distinguished from the similar raw milk products by sight or smell; taste comparisons are not practical due to health hazards of raw milk products.

11. Processing raw milk for human consumption by pasteurizing, homogenizing, vitaminizing, and standardizing the fat content does not change the form of the product.

12. Producers uses 70% or more of its energy for agricultural end-uses associated with milk processing.

13. PG&E argues that carrots can be topped, which changes the form of the carrot, yet the process qualifies for AG rates if less than 30% of the total energy is used in topping.

14. PG&E argues that Producers does not qualify for AG rates even if less than 30% of the total energy is used in pasteurizing, homogenizing, vitaminizing and standardizing.

15. PG&E argues that apples may be waxed without changing the form of the product.

16. PG&E argues that eggs may be sorted by size and quality without changing the form of the product.

It is clear that Producers is entitled to a refund; at issue is the appropriate three-year period. The complaint case was filed on September 16, 1996, which included a letter, attached as Exhibit A, from Michael Kerkorian to Lindley Fellender of PG&E dated February 2, 1996, which provides requested information on Producers' facilities and operations. There is no evidence of the October 30, 1995 letter in the record. According to Attachment F to the complaint, Fellender informed Kerkorian in March 1996 that PG&E would change Producers' accounts to AG schedules. Finally on June 28, 1996, Hirsch informed Kerkorian that PG&E determined that Producers did not qualify for AG rates.

We believe that the appropriate period for refunds begins three years prior to the February 2, 1996 date of Exhibit A, the earliest date of contact in the record about AG rates.

We will order refunds to be made for the period February 2, 1993 until implementation of AG rates for Producers' accounts. The refunds are to be made with interest based on the rate for prime, three-month commercial paper, as reported in the Federal Reserve Statistical Release G.13.

Findings of Fact

1. Producers filed a complaint requesting that its dairy processing operations at 144 E. Belmont Avenue in Fresno be placed on AG rate schedules, and that refunds be ordered for the period from October 30, 1992 to the present.

2. PG&E initially indicated that Producers would be placed on AG rates, later concluding that Producers was not eligible.

3. Producers processes raw milk for human consumption by pasteurizing, homogenizing, vitaminizing, and standardizing the fat content.

4. Federal law requires pasteurization for interstate sale of milk to consumers.

3. PG&E shall include in the refund interest calculated based on the rate for prime, three-month commercial paper, as reported in the Federal Reserve Statistical Release, G.13.

4. This proceeding is closed.

This order becomes effective 30 days from today.

Dated September 3, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners

17. PG&E's own witnesses do not agree on what constitutes a change in form of the product.

18. PG&E is inconsistent in interpreting its AG tariffs.

19. The impact of Producers qualifying for AG rates on PG&E's other customers is not at issue.

Conclusions of Law

1. Producers qualifies for AG rates.

2. PG&E should be ordered to place Producers' accounts on appropriate AG rate schedules.

3. PG&E should be ordered to refund to Producers the difference in charges as rendered and charges that would have been rendered under AG rates for a three-year period prior to requesting AG rates, with interest.

4. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall place Producers Dairy Foods, Inc.'s (Producers) accounts at 144 E. Belmont Avenue in Fresno on appropriate agricultural rate schedules.

2. PG&E shall refund to Producers the difference in charges between the charges rendered and charges that would have been rendered under the appropriate agricultural rate schedules on Producers seven accounts at 144 E. Belmont Avenue in Fresno for the period from February 2, 1993 to the date of change of Producers accounts to agricultural rate schedules.

A.96-11-020 COM/PGC/RB1/gab *

sale of such assets, or file an application to retain such assets pursuant to PU Code Section 377.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

approved, PG&E should file an application with a proposal for disposition of any amounts realized.

8. SAEJ's motion to prepare an EIR prior to any interim decision is denied without prejudice as moot.

9. Our final decision should consider whether the sale of the plants is in the public interest, with special attention to market power issues and the fairness of the auction procedure.

INTERIM ORDER

THEREFORE, IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) may commence an auction of the Morro Bay Power Plant, Moss Landing Power Plant, and Oakland Power Plant, but shall not accept final bids until further order of the Commission. PG&E shall permit bids on any combination of plants.

2. The sale of the plants shall be subject to conditions that we may require (a) to avoid or reduce to non-significant levels any adverse environmental impacts that we may determine will arise from physical changes reasonably foreseeable in connection with the transfer of the plants and (b) in connection with ensuring the continued availability of must-run plants consistent with maintaining open competition and avoiding an overconcentration of market power.

3. If the plants are sold, and if PG&E's proposed CTC Revenue Account is approved in A.96-08-070, PG&E may apply the accounting and ratemaking treatment described in this application; provided, however, that if the CTC Revenue Account is not approved, PG&E shall promptly file an application with a proposal for disposition of any amounts realized, and the net book value of any asset to be transferred shall be determined by order of the Commission in A.96-08-001 *et al.*

4. For all unsold generation-related assets (such as emissions reduction credits), PG&E shall either file an application pursuant to PU Code Section 851 for the