

Decision 00-04-038 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

William A. Kent,

Complainant,

Case 98-06-037
(Filed June 18, 1998)

vs..

Southern California Edison Company,

Defendant.

**ORDER DENYING REHEARING
OF DECISION 00-02-010**

I. SUMMARY

This order denies an application for rehearing of Decision (D.) 00-02-010, Kent v. Southern California Edison Co. [D.00-02-010] (2000) __ Cal.P.U.C.2d __, referred to as the "Decision." The application for rehearing was filed by complainant, Mr. William A. Kent (Kent). It was opposed by defendant Southern California Edison Company (Edison). The application is denied because, after careful consideration, we conclude that none of its allegations demonstrate legal error.

II. BACKGROUND

Mr. Kent is a customer of Edison. In Complaint (C.) 98-06-037, Mr. Kent asserted that Edison billed him for electricity he did not use. Mr. Kent based his complaint on the fact that in certain months Edison billed Mr. Kent for significantly higher electricity usage than in other months. As described in the Decision, Mr. Kent discussed his contention that these bills were too high with

Edison on numerous occasions. However, the utility's investigations, which included testing and replacing his meter, did not indicate that Mr. Kent was not using the electric power for which he was billed. (Kent v. Southern California Edison Co., supra, at pp. 6-7 (mimeo.)) Mr. Kent also contended that Edison unlawfully disconnected his service on certain occasions. However, Edison followed established procedures when it disconnected Mr. Kent. (Id., at pp. 7-9 (mimeo.))

The Decision holds that Edison did not overcharge Mr. Kent. The Decision finds that the evidence indicates Mr. Kent's meter was working properly, and that Mr. Kent used the electricity measured by his meter. (Kent v. Southern California Edison Co., supra at pp. 20-21 (mimeo.) (Findings of Fact 3-7).) The discussion portion of the Decision notes that a "plausible" cause of Mr. Kent's random high usage was a broken timer on his pool motor. (Id., at p. 6 (mimeo.)) The Decision also finds that Edison acted properly when it disconnected Mr. Kent because he failed to pay his bills. It reviews the procedures Edison used, and compares them with the requirements established in Public Utilities Code sections 779 and 779.1, concluding that these statutory provisions were followed.¹ (Id., at pp. 13-17 (mimeo.))

III. DISCUSSION

Mr. Kent has now applied for rehearing of the Decision. The application does not contest the finding that Mr. Kent used the electricity for which he was billed. Instead, the application asserts that the Decision allows Edison to follow legally inadequate procedures when it disconnects customers who have not paid their bills. The bulk of the application claims that Edison was required to give Mr. Kent a "hearing" before it disconnected him. The application asserts that the U.S.

¹ Section references will indicate the Public Utilities Code unless otherwise stated.

Supreme Court's holding in Memphis Gas Light and Water Co. v. Craft (1978) 436 U.S. 1 requires all utilities to hold a hearing before disconnecting customers.

Memphis Gas Light and Water Co. v. Craft, *supra*, establishes that "procedural constraints on the action of government" apply when a government-owned utility disconnects a customer. (*Id.*, 436 U.S., at p. 9.) The Due Process Clause of Fourteenth Amendment prohibits "any State" from depriving "any person of life, liberty, or property without due process of law." This provision requires government entities to give citizens notice and a hearing before depriving them of those things to which they have a "legitimate claim of entitlement." (*Id.*, 436 U.S., at p. 9.) Memphis Gas Light and Water Co. v. Craft concludes that a Tennessee prohibition on utilities disconnecting customers except for good cause created an entitlement to receive electric power. (Memphis Gas Light and Water Co. v. Craft, *supra*, 436 U.S. at pp. 11-12.) Thus, the Supreme Court required the municipal utility in that case to provide hearings before disconnecting its customers.

However, as the Decision correctly points out, procedural due process requirements do not automatically apply to privately owned utilities. (Kent v. Southern California Edison Co. [D.00-02-010], *supra*, at p. 20 (mimeo.)) The U.S. Supreme Court's decisions all follow this principle: "As a general matter, the protections of the Fourteenth Amendment do not extend to private conduct" (N.C.A.A. v. Tarkanian (1988) 488 U.S. 179, 191.) The procedural due process requirements of the Fourteenth Amendment only apply to a private entity when that entity engages in "state action." The United States Supreme Court insists on "[c]areful adherence to the 'state action' requirement" (*Id.*, 488 U.S. at p. 191.) In Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, the Court determined that the actions of privately-owned utilities did not amount to state action, even if those utilities were pervasively regulated. (*Id.*, 419 U.S. at pp. 350-351.)

The application claims that procedural due process requirements apply to Edison because California law,² like Tennessee law, guarantees customers the right to continue to receive electric power unless the utility has good cause to disconnect them. However, the U.S. Supreme Court's decisions indicate that a utility must afford its customers procedural due process only when its action amounts both to state action and a deprivation of a service to which the customer has a "legitimate claim of entitlement." (Compare, Jackson v. Metropolitan Edison Co., supra, 419 U.S., at p. 349, Memphis Gas Light and Water Co. v. Craft, supra, 436 U.S. at pp. 9-10.) The claim that Edison's provision of electric power might amount to an entitlement does not show that Edison engaged in state action.³ The application is incorrect when it claims that different rules cannot be established for government-owned and privately-owned utilities. Procedural due process requirements, which stem from the fact that a utility is, or is acting on behalf of, a government entity properly apply only to municipal utilities.

The application similarly misunderstands the holding in Perez v. City of San Bruno (1980) 27 Cal.3d 875, 893-895. That case does not conclude that privately owned California utilities engage in state action. Rather, it concludes that the

² This analysis focuses on the application's federal constitutional claims and assumes that the application correctly describes California law. In fact, the requirements of California law applicable to private utilities are contained in sections 779 and 779.1 and not in cases that pre-date the Public Utilities Code or describe the common law duties of municipal water corporations. Edison's compliance with these statutory requirements is discussed in detail below.

³ Whether or not state action exists is determined by whether or not "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." (Jackson v. Metropolitan Edison Co., supra, 419 U.S., at p. 351.) Here, Edison stopped selling electric power to Kent because Kent was not paying his bills. The state did not require or request that Edison terminate Kent's service, nor did the state "provide a mantle of authority that enhanced the power" of Edison to stop selling to Kent. (Cf., N.C.A.A. v. Tarkanian, supra, 488 U.S., at p. 192.) The California Supreme Court has only found termination of private utility service to constitute state action when the termination was directly requested by the state, for example by law enforcement officials trying to shut down "bookie" operations. (Sokol v. Public Utilities Com. (1966) 65 Cal.2d 247, 256, Goldin v.

holding in Memphis Gas Light and Water Co. v. Craft, *supra*, applies to a California city government providing utility services because California common law applicable to municipal utilities creates an entitlement to receive service. (Perez v. City of San Bruno, *supra*, 27 Cal.3d, at p. 894.) In that case, the city exercised its police power by requiring all residents to subscribe to its services creating the necessary state action. (*Id.*, 27 Cal. 3d at pp. 880-881.) The application also mistakenly claims that the provisions of the California constitution on procedural due process contain no state action requirement. (Cf., Cal. Const., art. I, § 19.) However, Perez v. City of San Bruno, *supra.*, and other California Supreme Court cases treat the two constitutional provisions as being parallel. (E.g., Sokol v. Public Utilities Com., *supra*, 65 Cal.2d at p. 256.)

In any event, the process that Edison used to disconnect Mr. Kent does not seem to be procedurally improper. At least twenty days before disconnecting him, Edison sent Mr. Kent a notice indicating that he would be disconnected if his overdue bill remained unpaid. Edison then attempted to contact Mr. Kent by phone near the time his service would be disconnected. If it could not make such telephone contact, Edison mailed Mr. Kent a "Final Call Notice." Only after having notified Mr. Kent in this fashion did Edison disconnect Mr. Kent's service. (Kent v. Southern California Edison Co. [D.00-02-010], *supra*, at p. 8 (mimeo.))⁴

Public Utilities Com. (1979) 23 Cal.3d 638, 647.)

⁴ In fact, Edison's procedures are comparable to those described by the U.S. Supreme Court in Memphis Gas Light and Water Co. v. Craft, *supra*. Mr. Kent received notice, and as discussed below, he had the ability to have access to a "responsible employee with the authority to resolve the dispute." (*Id.*, 436 U.S. at p. 18.) Here, Mr. Kent discussed his dispute with customer service and field representatives. However, none of these representatives determined that Mr. Kent's bill actually was in error. The fact that Mr. Kent did not prevail in his dispute does not indicate that the employees he interacted with were somehow powerless to address his concerns or not responsible enough to handle his dispute properly. The fact that Edison's procedures were not as formal as Mr. Kent would have liked also does not indicate that they would automatically fail to meet procedural due process requirements. According to the court, the provision of "some kind of hearing" should not be "burdensome." (Memphis Gas Light and Water Co. v. Craft, *supra*, 436 U.S. at p. 18.)

Each of Edison's notices contained information about what customers should do if they disputed their bill, or if they were unable to pay. This information is detailed on pages 15 through 17 of the Decision. In brief, Edison's notices tell customers who cannot pay to "call us now" to make "payment arrangements" or be put in touch with "agencies that can assist." (Exhibit 5.) The notices also tell customers who believe their bill is incorrect to contact Edison, and that they may make a complaint to the Commission if they are "unsatisfied after the Edison review." (Exhibit 5.) The Commission's toll-free telephone number, web site address, and Los Angeles Street address are listed.

The Decision finds that Mr. Kent presented his concerns to Edison on numerous occasions, and the record indicates that Edison responded to Mr. Kent's requests for customer service and did not disconnect Mr. Kent while it was handling the billing disputes raised by Mr. Kent. (Kent v. Southern California Edison Co. [D.00-02-010], supra, at p. 14 (mimeo.)) In particular, on two occasions Edison tested Mr. Kent's meter and determined it was accurate. Edison even took the step of replacing Mr. Kent's meter even though it was not faulty, in an attempt to ensure his bills were correct. Moreover, Edison checked for ground conditions and foreign load, and found none. (Exhibit 10, Historical Order, dated March 20, 1997.) After taking these steps, however, Edison concluded that Mr. Kent had used the electricity for which he was being billed, and took the position that it expected Mr. Kent to pay his bills. Similarly, Edison did not disconnect Mr. Kent during the pendency of this proceeding, except for one occasion when Commission staff—incorrectly—informed Edison that no funds were on deposit here. (Cf., Pub. Util. Code, § 1702.2.)

These actions meet the requirements of the Public Utilities Code with respect to billing disputes and termination of service. Section 779.1 specifies the manner in which customers will be notified if their service is to be terminated. The Decision reviews each of the statute's requirements and correctly finds that they

were complied with. The application repeats Mr. Kent's prior claims, but the Decision's analysis—which is not repeated here—correctly explains that Edison complied with section 779.1.

Section 779 discusses termination and billing disputes. Again, the Decision correctly explains how it was followed. However, the application focuses on subdivision (c), which provides that customers who dispute the amount they have been billed have may request a review of their bill and have their service continued while such a review is pending. According to the statute, such a review must be conducted by a "review manager." The Decision found that Edison's Customer Service Department could serve in the role of review manager. The application asserts that Edison must assign each customer a specific customer service representative, maintain a written file, and take several other steps in order to comply with this provision. This claim does not demonstrate error. The language of section 779, subdivision (c) simply indicates that a responsible person must handle each dispute. Currently, customers with billing disputes are placed in contact with an employee who has access to Edison's electronic customer service files and who can handle the problem. The statute does not require anything further. In fact, policy reasons weigh against requiring that each dispute be handled by the same employee, or that Edison maintain written files. Such a result would prevent prompt handling of the dispute, as customers queued for their assigned customer representative, and waited for written files to be retrieved.

The application also asserts, generally, that Edison's current customer service standards are extremely poor and must be improved. These claims do not demonstrate error. As the Decision points out, after serious consideration of Mr. Kent's claims, it appears that the record indicates Edison's actions were appropriate to the circumstances, complied with relevant legal standards, and were sufficient to determine that Mr. Kent's consumption of an amount of electricity that Mr. Kent felt was excessive was beyond Edison's control. Mr. Kent appears to

feel that Edison's customer service is deficient because the utility failed to understand his problem. However, the record indicates that Edison understood—and responded to—Mr. Kent's position, but that, after analysis, it disagreed with Mr. Kent. Under these circumstances, Edison's inability to be convinced does not amount to poor customer service, or to a utility practice that falls below legal minimum requirements.

Finally, the application claims that Edison improperly destroyed notes and files about Mr. Kent's electric power usage maintained by its service personnel. The testimony presented at the hearing indicates that Edison maintains a computer record of all relevant customer service information, and this record is available to all customer service representative and constitutes the main file for a customer. The record also indicates that personal files of Steve Teter, which included write-ups of visits to Mr. Kent's house, were destroyed along with a large number of other records. These documents were destroyed when Edison determined not to retain them because of their age. Other than conclusory assertions by Mr. Kent, no evidence indicates that the destruction of these records had anything to do with the fact that a small part of their contents related to Mr. Kent's billing dispute.

The application asserts the Decision errs when it fails to presume this evidence would have supported Mr. Kent. However, California rules of evidence do not require such a presumption. (Ev. Code, § 412.) The trier of fact may determine what inference is to be drawn from the non-production of evidence. (3 Witkin Cal. Evidence (3d ed. 1986) Introduction of Evidence, § 1775, p. 1727.) The California Supreme Court has also clearly established that if an agency is not required to follow technical rules of evidence (Cf. Pub. Util. Code, § 1701) it is not required to make such a presumption. (Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1226, 1230, Gikas v. Zolin (1993) 6 Cal.4th 841, 859.)

IV. CONCLUSION

We have carefully reviewed the allegations of error contained in the application for rehearing and conclude that they do not show the Decision to be improper. As explained above, Edison complied with all applicable law, and most likely complied with the requirements of procedural due process for governmental utilities, even though those requirements are inapplicable to Edison. Therefore, we will deny the application for rehearing.

THEREFORE, it is ordered:

1. The application for rehearing of Decision 00-02-010 is denied.
2. This proceeding is closed.

This order is effective today.

Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners