

Decision 18-08-005 August 9, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Dr. Amy Gelfand, David Misch,

Complainants,

vs.

Southern California Edison Company (U338E),

Defendant.

(ECP)
Case 17-10-014

DECISION DENYING THE RELIEF SOUGHT IN THE COMPLAINT

Summary

This decision denies the relief sought in the complaint filed by Dr. Amy Gelfand and David Misch (Complainants) against Southern California Edison Company (U338E) (Defendant). This proceeding is closed.

1. Procedural History and Positions of the Parties

Dr. Amy Gelfand and David Misch (Complainants) filed the above-captioned complaint against Southern California Edison Company (SCE) (U338E) (Defendant), claiming the Defendant overbilled their account for the 12-month period between April 2016 to April 2017 (Disputed Billing Period) for the electricity usage at 1027 Princeton Street, in Santa Monica, California (Subject Property.) They claim they were billed approximately \$882 for that period which was about three times the average of their annual bills from the preceding five years.

The Complainants do not seek reimbursement or bill adjustment but request only that SCE's smart meter be replaced by SCE at the Subject Property.

SCE filed an answer¹ and responded in essence that they deny the Complainants allegations, that the smart meter at the Subject Property was tested on May 4, 2017 and that the meter passed the test. As such, SCE's argument is that it has established the legal presumption, and to overcome that presumption, the Complainants must present substantial evidence that they were overbilled, despite SCE's test result and finding, and the overbilling was due to causes within SCE's control.

Evidentiary hearing was held on February 27, 2018 at 9:45 a.m. in the Commission's Los Angeles Court Room. The Complainants appeared on their behalf, presented testimony and evidence. The Defendant appeared through its representatives, Prabha Cadambi and Greg Sheran, and presented testimony and evidence.

The assigned ALJ ordered SCE to file a brief on a legal issue by March 23, 2018. The ALJ also permitted the Complainants an opportunity to file a reply brief by April 6, 2018. On March 23, 2018, SCE filed its brief. The Complainants did not file reply.

¹ A public and confidential versions of SCE's Answer was submitted and served on November 22, 2017, along with an accompanying Motion to File the Confidential Version Under Seal. At the direction of the assigned Administrative Law Judge (ALJ) (see ruling dated December 13, 2017), SCE submitted and served a public and confidential versions of SCE's Amended Answer, on December 21, 2017.

2. Burden of Proof

California law has long held that the party bringing a claim has the burden of proving that claim.² The Commission follows this rule in its complaint cases.³ This means that the Complainants have the burden to prove by a preponderance of the evidence (a majority or 51 percent or more) that their allegations are true.

3. Discussion

The Complainants are served by SCE under Schedule TOU-D-T, Time of Use Tiered Domestic, and Schedule NEM. NEM stands for Net Energy Metering. With a NEM account, such as the one at issue in this case, SCE's smart meter measures the amount of kilowatt-hour (kWh) of electricity the customer consumes from SCE, which would be the amount of electricity beyond that generated on site. The meter would also measure the excess electricity that is sent to the grid (i.e. exported) when the customer's on-site system generates more electricity than that which is used at the site. In terms of billing, if a NEM customer consumes more electricity than the amount generated on site, SCE will bill the customer for the electricity SCE provided, in excess to the amount of solar generation on site. SCE's example for this is that if its customer consumes 500 kWh in a month and generated 200 kWh the same month, the customer would be billed for 300 kWh for that month.

² Cal. Evid. Code. Section 500 (2008). *See Sargent Fletcher Inc. v. Able Corp.* (2003) 110 Cal. App. 4th 1658, 1667 (citations omitted.)

³ *See In Complaint of Service-All-Tech, Inc. v. PT&T Co.* (Cal. PUC, 1977) 83 CPUC 135, Decision (D.) 88223 (complaint relating to the disconnection of telephone service where the court found that complainant had the burden of proof and that complainant's "failure to present any evidence present[ed] a total lack of meeting that burden"). *See also Pacific Bell Telephone Company, d/b/a AT&T California vs. Fones4All Corporation* (Cal. PUC, 2008) D.08-04-043, 2008 Cal. PUC LEXIS 132.

As SCE's customers under Schedule TOU-D-T, Time of Use Tiered Domestic, and Schedule NEM, there are several different and possible reasons as to why the Complainants experienced an increased bill during the Disputed Billing Period.⁴ One such reason could be that their solar panels malfunctioned. Another could be that their inverter malfunctioned. Yet another could be that the Complainants' usage increased or usage pattern/schedule changed. Another explanation for the increased bill is the combined effect of usage increase and/or usage pattern/schedule change further compounded by time of use rate structure under Schedule TOU-D-T, Time of Use Tiered Domestic, and Schedule NEM. Lastly, it is also possible that the increased bill resulted from SCE's smart meter malfunction or error.

To prevail here, the Complainants must prove by preponderance of evidence that SCE's smart meter malfunctioned and that malfunction was the reason for the overbilling during the Disputed Billing Period. Conversely, the other potential reasons/causes must be ruled out as the reason for that alleged overbilling.

Based on the evidence presented in this case and as discussed below, the Complainants failed to prove by preponderance of evidence that they were overbilled for electricity during the Disputed Billing Period at the Subject Property.

⁴ It is always possible that the increased bill resulted from theft. But there was no evidence in this proceeding to suggest any plausibility of this, one way or another. As such, this possible reason is not discussed in this decision.

3.1. Annual Usage History

The Complainants testified that they have not significantly changed their usage pattern during the past several years, through and including the Disputed Billing Period. The Complainants and SCE presented a chart at the evidentiary hearing which showed that the overall total annual electricity consumption at the Subject Property. The total annual consumption amount looks relatively consistent from 2013 to 2016 (2013-2014 (5361 kWh); 2014-2015 (5251 kWh) and 2015-2016 (5132 kWh)). Then for 2016-2017 period the total consumption amount increased to 6593 kWh. Based thereon, we can infer that actual and increased total annual usage many have contributed, to some degree, to the tripling of the Complainants' annual bill in 2017.

Their chart and the Complainants' testimony also do not explain when (time of day) the electricity was consumed by the Complainants and what corresponding rate(s) was/were charged for such use under the applicable rate schedule. As such, we suspect some part of the bill increase may also be due to possible changes in the Complainants' usage pattern during the various times of day, from their past practices, and possibly also as combined with the applied time of use rate structure.

3.2. Solar Panels and Inverter

Another reason(s) for the Complainants' increased annual bill could be the Complainants' solar panels and inverter. In other words, it is possible that the solar panels are malfunctioning or working less optimally to generate less energy and/or the inverter is not properly registering the captured energy. To refute this point, the Complainants testified that the solar panels are regularly maintained and cleaned and the nearby trees are trimmed every two years. The Complainants also submitted a letter from California Solar Electric (CSE) stating

that CSE tested the panels and inverter, and CSE representative found them to be functioning properly on May 28, 2017.

The problem with this last piece of evidence is that it is hearsay evidence from CSE representative, and the Complainant provided no other independently corroborating evidence. No one from CSE was present to testify to explain the test that was conducted. No one testified to solar panel and inverter industry testing standards. There was no other evidence or witness to offer testimony to explain how the conclusion was reached, the basis for that conclusion, and even who and how the test was accomplished. There was no evidence of what was done to make that test and resulting conclusion reliable and trustworthy. There was no evidence to corroborate any part of it.

Under *Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, the Commission cannot base its finding of fact solely on hearsay evidence where the truth asserted in such statements was disputed. This means hearsay evidence is generally admissible in administrative proceedings; however, the under the “residuum rule,” an agency’s decision must be supported by substantial evidence that consists of “at least ‘a residuum of legally admissible evidence[.]’” That Court found guidance in California Government Code section 11513, subdivision (d), which provides that although hearsay evidence is admissible in administrative hearings, it cannot be the basis for the administration’s finding without corroboration of the contested out of court statements.

Therefore, the Commission cannot base its finding solely on the hearsay statements contained in CSE’s letter regarding the CSE’s findings. Accordingly, we cannot find, based solely on the hearsay statement contained in that CSE’s letter, that the panels and inverter were functioning properly. Without that

finding, we cannot rule out the potential that malfunctioning and/or inefficient solar panels and/or inverter affected the tripling of the Complainants' annual bill in 2017 for the Disputed Billing Period.

As for the possibility of malfunctioning solar panels and/or inverter, we also refer to the Complainants' own contentions. Specifically, the Complainants noted that from Mid-November 2015 to mid-April 2016, the total net generation SCE recorded at the Subject Property was -584 as compared to the same period (mid-November 2016 to mid-April 2017 - Billing Dispute Timeframe) during which the total net generation SCE recorded was -131. The Complainants suggest that such disparity in record evidences SCE's meter malfunction and that this large dip in solar generation recorded by SCE may explain the inexplicable and tripled annual bill for the Disputed Billing Period. We agree, in part, that such comparison informs us of the two very different quantities of electricity generations had been recorded from similar times of the year. But the question remains, was this dip of different quantities of recorded generations a result of solar panels and/or inverter malfunction or error (leading to low or no actual generation to be recorded by smart meter) or smart meter malfunction or error (leading to low or no recording of actual generation)?

3.3. SCE's Smart Meter

We now address the Complainants' contention that their increased annual bill was the result of a malfunctioning smart meter. The Complainants testified that, on May 4, 2017, SCE inspector inspected the smart meter, at the Subject Property. The Complainants testified that, during this inspection, the SCE's inspector made two observations to the Complainants that (1) the smart meter had registered high usage during the hours between mid-night and 6:00 a.m. and (2) smart meter showed "intermittent and low-level" solar generation.

SCE, in its Answer and through testimony at the evidentiary hearing, presented the following, based on SCE's record of the Complainants' smart meter and in response to the above allegations of the Complainants:

1. The high usage, referenced by SCE's inspector, registered between 12:30 a.m. to 6:30 a.m., in November 2015 to April 2016.⁵ This is outside of the Disputed Billing Period (of April 2016 to April 2017), and no similar high usage was registered at the Subject Property after April 2016 and within the Disputed Billing Period; and
2. The smart meter test result showed "no device error."⁶ SCE's inspector documented his review of SCE's record that the Complainants' solar generation was intermittent and low level with "multiple days of little to no generation in load profile."⁷ SCE's representative re-reviewed its record and testified of their review of SCE's record which confirmed SCE's inspector's documentation of observations.

Based on the usage history data submitted in this case, by agreement of the parties, it is evident that the unusual high usage (between 12:30 a.m. to 6:30 a.m.) occurred in November 2015 to April 2016. This is indeed outside of the Disputed Billing Period (of April 2016 to April 2017), and since no similar high usage was registered after April 2016 and within the Disputed Billing Period, we find this data to be irrelevant to our understanding of what has occurred (and affected the alleged overbilling) during the Disputed Billing Period.

The Complainants testified that, after the May 4th inspection, they did not receive SCE's test result but were instead informed by a customer service representative of SCE that a new smart meter would be installed by end of

⁵ See Answer labeled Confidential Version, at 5 to 7.

⁶ See *id.* at 12 and Attachment A to Answer.

⁷ See Answer labeled Confidential Version, at 12.

May 2017. The Complainants contend this representation evidences SCE's finding that its meter was malfunctioning. The Complainants also testified that they contacted SCE again on June 1, 2017 because the new smart meter was not installed as previously promised and then was informed that it would not be replaced.

In SCE's Answer and in testimony during the evidentiary hearing, SCE stated that its test result found the smart meter at the Subject Property to be functioning properly and apologized for failing to mail out its May 4th test result. At the hearing, SCE's inspector was not present, but SCE's representatives instead testified that SCE's record⁸ did not confirm that SCE's customer service representative informed the Complainants that the meter would be replaced. Instead, SCE's representative explained that the May 4th inspection by SCE's inspector resulted in a finding that the smart meter was fully and properly functioning at the Subject Property in compliance with SCE's Tariff Rule 17.C.1 which sets the standard for meter tests.⁹ Thus, per SCE's Tariff Rule 17.C.1, the meter met the standard, and the meter need not be replaced. More specifically, SCE's representatives also explained that the smart meter did not register any of the potential error messages such as "low or high voltage, fluctuating voltage, an interruption in circuits, a fatal error, and [] no communication." One of SCE's representatives was from its engineering group who also corroborated SCE's

⁸ SCE's representatives testified and presented recorded documentations of its customer service representatives' notes of conversations with the Complainants; none of those notes reflected any discussion with the Complainants that a new smart meter would be installed at the Subject Property at any time.

⁹ Tariff Rule 17.C.1 provides that if a meter is "found to be registering more than 2% fast, SCE will refund to the customer the amount of the overcharge based on corrected meter readings or SCE's estimate of the energy usage either for the known period of meter error, or if the period of error is not known, for the period during which the meter was in use...."

May 4th test result and explained that he reviewed the test result and related data and discovered “no discrepancy.”

With SCE’s May 4th test result and related findings, the testimony by SCE’s representatives sufficiently corroborated the hearsay statements in that test result report. Accordingly, we find here that the hearsay statement contained in that test result (of May 4, 2017 inspection) submitted by SCE provides support for a finding that the smart meter was functioning properly. This suggests that the malfunctioning smart meter is likely not the cause or contributing reason for the Complainants’ tripled annual bill in 2017.

3.4. Legal Presumption and Conclusion

Based on the foregoing evidence that SCE’s meter met the testing standard established by the Commission and was functioning properly, SCE cites to Decision (D.) 92577, dated January 6, 1981. In D.92577, the Commission found that if a utility’s meter is tested and proved to be accurate within the acceptable limits as established by the Commission, a legal presumption exists that the customer, in one way or another, consumed the energy as shown on the meter; and that it would not be wise or practical policy to require the utility to prove, through whatever devices, that a customer actually did or did not use the energy registered on the meter.

To rebut such legal presumption, the Complainants must present substantial evidence that they were overbilled for the energy, despite the test result finding, and the overbilling was due to causes within the utility’s control. Otherwise, the Complainants cannot prevail.

Based on the review of evidence in this case, there remain various potential reasons that are not within the control of SCE. For instance, we noted several

potential reasons for increased bill for the Disputed Billing Period in Sections 3.3 and 3.4 above.

Based on all of the foregoing, the Complainants failed to prove by preponderance of evidence that, more likely than not, SCE has improperly and excessively billed them.

4. Pending Motions

This decision denies the Motion and Amended Motion, filed in this proceeding by SCE, based on confidentiality grounds (Motions). The grounds for the Motions were to file certain customer information that identify and use related facts under seal to protect the Complainants' customer data and identification. We find that the Complainants, by filing this instant Complaint put those data and facts at issue, and by doing so they waived confidentiality.

Therefore, SCE's Answer (marked public and confidential versions) as well as the Motions (marked public and confidential versions) shall be filed.

5. Assignment of Proceeding

President Michael Picker is the assigned Commissioner, and Kimberly H. Kim is the assigned ALJ in this proceeding.

6. Waiver of Comment Period

Under Rule 14.7(b) of the Commission's Rules of Practice and Procedure, the Commission may waive the otherwise applicable 30-day period for public review and comment on the decision of the assigned ALJ in a complaint under the expedited complaint procedure. Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

O R D E R

IT IS ORDERED that:

1. The relief sought by the Complainants in the instant complaint, Expedited Complaint Case 17-10-014 is denied.
2. Southern California Edison Company's Answer (marked public and confidential versions), Southern California Edison Company's Amended Answer (marked public and confidential versions) and all related pending motions (marked public and confidential versions) shall be filed.
3. Case 17-10-014 is closed.

This order is effective immediately.

Dated August 9, 2018, at San Francisco, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners