

Decision **PROPOSED DECISION OF ALJ THOMAS** (Mailed 2/7/2008)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ANDRADE & ASSOCIATES, a Professional Law Corporation,

Complainant,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY (U338E), a California Corporation,

Defendant.

Case 07-05-014
(Filed May 10, 2007)

OPINION DISMISSING COMPLAINT

1. Summary

This decision dismisses the complaint of law firm Andrade & Associates (Andrade) against Southern California Edison Company (SCE) for failure to state a cause of action or set forth a violation of any statute, Commission order, rule or regulation. In this case, SCE back-billed Andrade for electric bills not paid because Andrade's meter was accidentally crossed with that of another customer. Case (C.) 07-05-014 is closed.

2. Background

This matter arises out of a billing dispute between Andrade and SCE. In October 2004, SCE issued Andrade a supplemental electric utility bill for approximately \$35,745.99 for previously unbilled charges. SCE submitted the bill

to Andrade pursuant to its Rule 17 tariff, after determining that electric meters to Andrade's office (Subject Property) and another customer were mis-marked (*i.e.* crossed), resulting in a billing error. The bill represented undercharges to Andrade over a three-year period from September 2002 through September 2005. In its Complaint against SCE, Andrade objects to the back-billing, and seeks to be relieved from all or a portion of its debt on the ground that SCE's negligence caused the error. SCE contends it was authorized to render an adjusted bill to Andrade for the amount of undercharges resulting from the crossed meters, not exceeding three years, pursuant to its Rule 17 tariff.

On November 14, 2005, Andrade submitted a letter to the Commission's Consumer Affairs Branch objecting to the bill on the ground that SCE's negligence caused the billing error. The Consumer Affairs Branch decided in favor of SCE, determining that SCE validly billed the disputed charges under its Rule 17 tariff.

On October 24, 2006, Andrade filed a complaint against SCE in state court, again alleging that SCE was negligent in causing the billing error, and that Andrade should not be responsible for the undercharges. SCE filed a motion for judgment on the pleadings arguing that the court lacked jurisdiction to consider Andrade's complaint, which essentially concerned a billing dispute within the Commission's jurisdiction. The court granted SCE's motion and entered judgment in favor of SCE.

SCE claims it is not liable because Andrade fails to state a cause of action on which relief may be granted and because SCE complied with the applicable tariff, Rule 17. Andrade claims the tariff is irrelevant because it only allows SCE to adjust a bill for a billing error. Andrade claims the adjustment here is not for a billing error, but instead is due to switched or mis-marked meters caused by a

party other than SCE. Andrade contends a Tariff 17 error for which SCE may back-bill is only one caused by SCE itself and not one caused by a negligent third party.

A prehearing conference was held on July 11, 2007. The assigned Administrative Law Judge (ALJ) gave the parties the option of stipulating to all material facts and submitting legal briefs, or proceeding to hearing. The parties opted to stipulate to facts and submit briefs.¹ No evidentiary hearings were held.

3. Discussion

SCE's Rule 17² authorizes SCE to retroactively re-bill Andrade for uncollected charges for a number of reasons, regardless of whether SCE is at fault or not, so that SCE receives full compensation for electric service provided.

3.1. Tariff Rule 17(D) Allows SCE Recovery

SCE's re-billing was proper under Tariff Rule 17(D), even if SCE's actions caused the error leading to the retroactive bill. Rule 17(D) defines a "Billing Error" as "an error by SCE which results in incorrect billing charges to the customer." Under Rule 17(D), "where SCE overcharges or undercharges a customer as the result of a Billing Error, SCE may render an adjusted bill for the amount of the undercharge." Andrade's complaint alleges nothing more than that SCE followed this procedure, which by the express terms of Tariff Rule 17(D) was permissible.

¹ The parties' Joint List of Stipulated Facts is attached hereto and is admitted into the record of this proceedings as Exhibit A.

² SCE's Rule 17 Tariff is attached hereto and admitted into the record of this proceeding as Exhibit B.

3.2. Tariff Rule 17(E) Also Favors SCE

Andrade asserts that because a contractor caused the crossed meters, SCE is precluded from rendering an adjusted bill to Andrade. However, SCE's re-billing was proper under Rule 17(D) regardless of whether SCE or any other party caused the error. Rule 17(E) governs the adjustment of bills for unauthorized use, which is defined as including any "intentional or unintentional use of energy whereby SCE is denied full compensation for electric service provided."

Under Rule 17(E), "where SCE determines that there has been Unauthorized Use of electric service, SCE may bill the customer for SCE's estimate of such unauthorized use . . . for the most recent three years" The estimated use may be determined by accurately metered use, which in this case was measured by the other crossed meter billed to Williams Real Estate Management. (Stipulated Fact Nos. 11-14, Exhibit A hereto.) Andrade admits that it received energy from SCE, but did not pay for it. (Stipulated Fact Nos. 13-14.) Whether or not Andrade received the unbilled energy through intentional or unintentional conduct, SCE may properly collect the unbilled amount under Rule 17(E) because SCE has not received full compensation for electric service provided to Andrade.³

3.3. Tariff Rule 17(F) Also Allows SCE to Recover

Providing a catchall, Rule 17(F) provides, "any billing adjustment not specifically covered in the tariffs for an undercharge or overcharge shall not

³ See *Brixey v. SCE*, D.93-05-004, 49 CPUC 2d 159 (1993) (providing that a utility can retroactively recover for energy used, but not paid for, by a customer).

exceed three years.” Consequently, even if the error in billing does not fit squarely within Rule 17(D) or Rule 17(E), SCE is also authorized to re-bill Andrade under Rule 17(F) to obtain full compensation for the energy provided to Andrade. The Rule does not preclude recovery if SCE or another party is negligent.

3.4. Tariff Rule 17 Allows the Back-Billing Even If SCE or a Third Party Were Negligent

Rule 17 authorizes SCE to receive full compensation for electric service provided even if SCE or a third party were negligent. In *Re Retroactive Billing*, the Commission stated that its “only concern is that a customer who has received energy should pay what the applicable tariffs prescribe for that energy.” Questions concerning “guilt, innocence, or intent” (*i.e.*, responsibility for the error) are irrelevant.⁴

In applying Rule 17 here, the Commission need only determine whether SCE has re-billed Andrade for payment of energy that Andrade used, but for which Andrade did not pay, and both facts are present here. Accordingly, Rule 17 establishes as a matter of law that SCE’s re-billing to collect the unpaid charges from Andrade was proper.

3.5. Distinction Andrade Makes Between Active and Passive Negligence is Irrelevant Here

Andrade claims SCE is guilty of “active negligence” and that SCE cannot therefore be excused from liability, citing *Caza Drilling v. Teg Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453 (2006). However, the passive negligence/active

⁴ See *Re Retroactive Billing by Gas and Electric Utilities to Correct Alleged Meter Underbillings Due to Meter Error and Meter Fraud (Re Retroactive Billing)*, D.86-06-035, 21 CPUC 2d 270 (1986) (adopting uniform rules for all gas and electric utilities concerning retroactive billing).

negligence distinction is irrelevant here; whether something is active or passive negligence only matters when a plaintiff claims a defendant had a duty to rescue or act as a Good Samaritan. *See, e.g., Minch v. Calif. Hwy Patrol*, 140 Cal. App. 4th 895 (2006).

This is a case of ordinary negligence, and no one disputes there was a duty of care. The issue is whether Rule 17 requires Andrade to pay for electricity it used, regardless of whether SCE breached that duty, and we so find here.

3.6. SCE is Not Guilty of Gross Negligence

Andrade claims incorrectly that SCE is guilty of gross negligence, and states that a party may not limit its liability for acts rising to this level. However, all we have here is a simple error in marking electric meters, not a “want of even scant care” or “extreme departure from the ordinary standard of conduct” the courts require for a finding of gross negligence.

3.7. SCE’s Tariffs Are Contracts That Authorize The Bill Adjustment And Debt Collection Over a Three-Year Period

Utility tariffs become the contract for service between the utility and the customer.⁵ Rule 17, a contract between SCE and Andrade, expressly provides that SCE can retroactively bill for a time-period covering three years. These contractual terms are binding upon Andrade as a matter of law, and Andrade cannot object to them.

We reject Andrade’s claim that its debt should be forgiven because the three-year limitations period is too long to allow Andrade to pass the costs on to

⁵ *See Waters v. Pacific Telephone Company*, 12 Cal. 3d 1 (1974) (tariff schedules become the contract between the utility and its customers).

its customers. If we were to deny a utility payment every time the payment obligation lasted the full three-year statute of limitations period, we would be undermining the limitations period. Since other ratepayers must pay for any amount SCE cannot recover here, it is unfair to excuse Andrade from payment for the full three-year period simply based on an allegation that it cannot now pass along the cost to clients.

**3.8. SCE's Rule 17 Tariff Is Consistent
With and Derivative of Statutory Law
Setting Three-Year Limitations Period
Concerning Utility Charges**

In addition, SCE's Rule 17 three-year limitations period for retroactive billing is consistent with and derivative of California statutory law concerning the collection of a utility bill. In *Re Retroactive Billing (supra)*, the Commission considered the appropriate length of a limitations period for retroactive billing. In adopting a three-year limitations period under Rule 17, the Commission noted that there are several statutes that provide a three-year limitations period in analogous billing-dispute situations. Section 736, for example, sets a limitation of three years for a customer to file any action to recover overcharges. Section 737 sets a three-year limitations period for a utility to file an action "for the collection of lawful tariff charges." Andrade's assertion that Rule 17 violates public policy is incorrect. Rule 17 is entirely consistent with, and indeed, derivative of California public policy, as provided in Pub. Util. Code §§ 736 and 737.

4. Categorization and Need for Hearings

We confirm the categorization of this case, in the Instructions to Answer, as an adjudicatory proceeding but conclude that hearings are not necessary.

5. Comments on Proposed Decision

The proposed decision in this matter was mailed to parties in accordance with § 311 of the Pub. Util. Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Andrade filed comments pointing out a factual error in the proposed decision (which we have corrected) and otherwise reargued its earlier positions. SCE filed comments and reply comments supporting the decision. Neither sets of comments changes the outcome.

6. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. A prehearing conference was held on July 11, 2007; no evidentiary hearing was held.
2. In or around May 2001, two SCE meters were installed that were later discovered to be crossed with one another.
3. As a result of the meters being crossed, the electricity use of Andrade was billed to a third party, and the electric use of a third party was billed to Andrade.
4. Once SCE discovered the crossed meter situation, it issued corrected bills under the applicable rate schedule.
5. Andrade used and benefited from the electricity retroactively billed by SCE.
6. Andrade did not pay in full for the electricity retroactively billed by SCE.

Conclusions of Law

1. Recovery under Tariff Rule 17 is not barred because SCE's contractor mis-marked the premises, resulting in crossed meters.

2. Rule 17 is a contract between SCE and Andrade.
3. Rule 17 does not improperly limit SCE's liability for negligence.
4. SCE's conduct did not constitute gross negligence.
5. Andrade must pay the full amount it failed to pay covering the applicable three-year statute of limitations period, less any credits for amounts it paid toward the back-bill.
6. An evidentiary hearing is not necessary.
7. This order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint of Andrade & Associates (Andrade) against Southern California Edison Company (SCE) is dismissed for failure to set forth a cause of action or a violation of any statute, Commission order, rule or regulation.
2. Andrade must pay the full amount it failed to pay covering the applicable three-year statute of limitations period, less any credits for amounts it paid toward the back-bill.
3. Case 07-05-014 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Exhibit A C0705014 Thomas

EXHIBIT B C0705014 Thomas