Decision **DRAFT DECISION OF ALJ BROWN (Mailed 1/29/2002)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

County Sanitation District No. 2 of Los Angeles County, Complainant, v. Southern California Edison Company, Defendant.	Case 99-10-037 (Filed October 27, 1999)

OPINION GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT AS TO THE 3RD CAUSE OF ACTION

I. Summary

This decision grants Complainant County Sanitation District No. 2 of Los Angeles County's (District) Motion for Summary Judgment as to the 3rd cause of action: violation of Southern California Edison Company's (Edison) Tariff Rule 12 (Rule 12). We do so because we have determined that Defendant (Edison) failed to meet its Rule 12 obligation to use "reasonable means" to inform District that a more favorable pricing option was available for the purchase of stand-by electric service. As a result, District did not become aware of the "compensated metering option" until early 1999, and thus, did not take advantage of a pricing option that would have saved District approximately $6,000 per month for electrical service from April 24, 1990 (the date

"compensated metering" became available) until January of 1999, when the District inquired of Edison as to a more favorable rate.

Because Edison failed to use reasonable means to notify District of the option for compensated metering, District claims damages in excess of $250,000.

However, we will apply the three-year statute of limitations as set forth in Pub. Util. Code[1] § 736, and incorporated in Edison's Tariff Rule 17(c), and reduce District's refund accordingly. We therefore order Edison to refund the difference between the amount District was billed for standby service and the amount District would have paid under the revised rates for the period of time from January of 1996 to January of 1999.

To understand why we grant District's motion for summary judgment, it is necessary to review the procedural history of the proceeding that is the basis for our decision.

II. Background

District brought five causes of action[2] against Edison alleging that Edison violated its duties under its tariffs by overbilling District for electricity sold to it under a standby contract. A previous decision granted Edison summary judgment on the 1st, 2nd, 4th, and 5th causes of action. The sole remaining issue, whether Edison violated its duty under Rule 12 to notify customers of a more favorable rate, is the subject of this opinion.

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[1] Unless otherwise indicated, all citations to sections refer to the Public Utilities Code.

[2] Billing error; violation of Tariff under schedule YOU-8; violation of Tariff under Rule 12; Breach of the Covenant of Good Faith and Fair Dealing; and Unjust Enrichment.

The District is an operator of a generating plant, known as the "Spadra Project," that burns methane gas that is produced at its landfill in Pomona California.[3] In June 1986, District and Edison entered into a Power Purchase Contract (Purchase Contract), whereby the District agreed to sell and Edison agreed to purchase electricity produced by the Spadra Project. To deliver the electricity to Edison, District had to pay for the design, construction, and maintenance of a substation.

District and Edison entered into an Interconnection Facilities Agreement (Facilities Agreement), dated December 1988, regarding the construction of the substation. The Facilities Agreement called for placement of a 12 kilovolt (kV) revenue meter on the District side of the substation. Since 1991, when the Spadra Project began operation, Edison has applied a loss factor adjustment to the metered quantities of purchased electricity from District, and has paid District at an amount consistent with a 66 kV interconnection.

Separate and distinct from the Power Purchase Contract which governs the District's sale of electricity to Edison, District entered into an Application and Contract for Electric Service (Electric Service Contract), dated December 1989, for the purchase of standby electricity from Edison when District's facility was not generating electricity. This Contract specifies that service to the District's Spadra Project would be provided under Schedule TOU-8 and would be at a service voltage of 12 kV. Edison made its applicable prices and rules under Schedule

[3] District also operates other generating plants including one in Palo Verde. The Palo Verde plant, although smaller than the Spadra facility, operates under similar buy/sell contracts.

TOU-8 available to District before the Contract was signed. In essence, the District paid a higher price for electricity purchased from Edison under the standby service contract [12 kV rate] than Edison paid to District for electricity generated by the Spadra Project [66 kV rate].[4]

At the time District selected 12 kV metering for the electricity it purchased from Edison, compensated metering[5] was not available. Compensated metering became available in May of 1990 under Special Condition No. 16 of Schedule TOU-8. By utilizing compensated metering, the disparity between District's sales at the 66 kV rate and purchases at the 12 kV rate would be mitigated.

In order to utilize the compensated metering option, a customer must request such service and request installation of a compensated metering device. When District learned of the availability of compensated metering in January 1999, it requested installation of the device, incurred a one-time cost of under $3,000, and began saving approximately $6,000 per month in electricity purchased from Edison for standby service.

On October 27, 1999, District filed a complaint against Edison for alleged billing overcharges and tariff violations. The complaint requested relief in the form of a refund in the amount the District alleges it was overcharged due to Edison's violations. On December 9, 1999, Edison filed an answer to the complaint admitting that the issues are whether Edison overcharged the District

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[4] In contrast to the Spadra facility, at District's Palo Verde facility, electricity purchased from Edison is connected at 12 kV but is billed at the lower 66 kV rate.

[5] Compensated metering allows for an adjustment for transformer losses so that a customer pays for electricity at 66 kV level, which is less expensive than electricity measured at 12 kV level.

for electric services and violated the tariffs. In addition, Edison raised numerous affirmative defenses it alleges support the dismissal of the complaint and the denial of relief sought by District.

On September 22, 2000, the Administrative Law Judge (ALJ) issued a Draft Decision (DD) granting Edison's motion for summary judgment as to all five causes of action. District filed comments to the DD, raising the issue that District did not receive notice, as required by Rule 12, of the new or revised rate available under Special Condition 16.

In summary, Rule 12 required Edison to inform its customers when a new or revised pricing option is available. In April 1990 Edison received authorization to offer compensated metering for certain customers. Such metering could result in service at a "more favorable" rate. Edison notified its customers in May 1990 of this new option by way of Advice Letter 864 (AL-864).

District claimed in its comments to the DD that it did not receive AL-864. To support this contention District submitted Edison's own service list for the AL—a list that did not include an entry for District, or indicate that the AL had been sent to any District address.

Accordingly, the Commission found that a material issue remained; namely, whether Edison served AL-864 on District, or used other reasonable means to inform District of the availability of compensated metering. Because a material issue remained unresolved, D.01-02-071 denied Edison's motion for summary judgment/adjudication on the 3rd cause of action and ordered the parties to submit additional briefing and testimony on this issue.

III. Motions for Summary Judgment/Summary Adjudication

The Commission has not established a rule that explicitly governs summary judgment or summary adjudication of issues, so both District and Edison structured their respective motions to follow the requirements of Code of Civil Procedure (Code Civ. Proc.) § 437c(c), modified to reflect Commission practices. The Commission has looked to the requirements of that statute for guidance in resolving motions for summary judgment or summary adjudication. (Westcom Long Distance, Inc. v. Pacific Bell et al., D.94-04-082, (1994) 54 CPUC2d 244, 249.)

Code Civ. Proc. § 437c(c) provides in relevant part:

> "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

While there is no Commission rule expressly for summary judgment motions, the Commission does have Rule 56, which governs motions to dismiss. Rule 56 "is analogous in several respects to a motion for summary judgment in civil practice." (Westcom Long Distance, supra.) The basis for a motion to dismiss under Rule 56 may include "the pleadings or any other matter occurring before the first day of the hearing." (Rule 56.) The purpose of such a motion, the

Commission has explained, is to permit determination "before hearing whether there are any triable issues as to any material fact." (Id.)

Like a motion for summary judgment under Code Civ. Proc. § 437c(c), a second purpose of a Rule 56 motion to dismiss is "that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials." (Westcom Long Distance, supra.) However, declarations and evidence offered in opposition to the motion must be liberally construed, while the moving party's evidence must be construed strictly, in determining the existence of a "triable issue" of fact. (Sprecher v. Adamson Companies, (1981) 30 C3d 358, 373.)

These legal standards provide the analytical framework for considering the cross motions for summary judgment/summary adjudication brought by District and Edison. In addition, we note that the parties have stipulated to submitting this matter to the ALJ on the pleadings and foregoing trial.

IV. The Parties' Arguments

On March 22, 2001, District filed its opening brief on the alleged violation of Rule 12. District contends that it: (1) was not on the service list for AL-864; (2) did not receive AL-864; and (3) was not otherwise notified of the new pricing option until it made inquiries in early 1999.

In support of its position, District submitted the Declaration of Edwin Wheless (Wheless), Division Engineer, Solid Waste Management Department. Among Wheless' duties in developing and reviewing District's Spadra Project is meeting regularly with Edison's Accounts Managers to discuss issues that arise in the course of the relationship between the utility and the District. Wheless stated that to his knowledge no Edison Accounts Manager ever informed him of

the compensated metering option. Additionally, his review of Edison's Service list for AL-864 did not include the address of the District.

The Service list did include the address for Los Angeles County ISD Energy Management. Wheless stated that the address for Los Angeles County ISD Energy Management was not, and never has been, the address of the District.

District requests that the Commission conclude that Edison did not meet the requirements of Rule 12 and grant District's motion for summary judgment on this issue and order Edison to make appropriate reparations to District.

To retort, Edison makes several arguments in support of its motion for summary judgment.

First, Edison claims that even if District was not on the service list for AL-864, Wheless admitted to Edison Accounts Manager Rick Raskin, that District did receive a copy of AL-864.

Next, Edison offers its interpretation of Rule 12. Edison claims that the Rule does not require the utility to notify customers of new or revised rates; instead, it is up to a customer to inquire about new or revised rates. Additionally, Edison asserts that District bears the burden of proving a violation of Rule 12. Under this theory, since District cannot meet its burden that Edison did not notify District of the new compensated metering option, District loses on this cause of action.

Finally, Edison states that the District is on Edison's list of Rate Book holders, and therefore, received actual notice of the approval of AL-864 as well as the actual revised tariff sheets.

Thus, Edison claims to be in compliance with its tariffs.

V. Discussion

We recognize that since compensated metering became available in early 1990 and District filed its complaint in 1999, time has passed, memories may have faded, personnel have left both entities, and neither Edison nor District have a copy of the Rate Book that contains the revised tariffs. Therefore, we must decide this issue based upon the best evidence available: the record and evidence provided by the parties.

Rule 12(c) "New or Revised Rates," provides that:

> "Should new or revised rates be established after the time application is made, SCE (Edison) will use such means as may be practicable to bring to the attention of those of its customers who may be affected that such new or revised rates are effective. Customers may be eligible for service under new or revised rates subsequent to notification by the customer and verification by SCE of such eligibility."

Rule 12 speaks for itself and is the best evidence of its own terms and conditions. Additionally, we believe that the Purchase Contract, Facilities Agreement, and Electric Service Contract between Edison and the District speak for themselves and are the best evidence of their own terms and contents.

District submitted a copy of the Purchase Contract as Exhibit A as an attachment to its original claim against Edison. The Agreement covers the terms and conditions in which Edison agrees to buy electricity generated by the Spadra Project in excess of the amount required by the District. Section 1.1 of the Agreement states: "All notices shall be sent to the seller (District) at the following address: P.O. Box 4998 Whittier, CA 90607. Attn: Chief Engineer and General Manager."

The parties entered a second contract, the Facilities Agreement, regarding the construction of the substation. This contract was submitted with District's

claim as Exhibit B. Page 8 of the document includes the signatures of District's Chief Engineer and General Manager Charles Carry and Edison's Vice President Robert Dietch. This document was signed and dated December 22, 1988. Also included in the Facilities Agreement is the mail address for the District: 1955 Workman Mill Road, Whittier, CA 90607.

Edison's answer to the original complaint includes an attachment identified as "Exhibit A." Exhibit A consists of an Edison form utilized for billing for standby service. This form identifies District as the party requesting service and includes the 1955 Workman Mill Road address as the billing address.

We therefore determine the 1955 Workman Mill Road address to be the correct address for correspondence regarding issues related to the Power Purchase Contract, the Facilities Agreement, and billing as between the District and Edison. Because the Workman Mill Road address does not appear on Edison's service list for AL-864 we must conclude that there is no evidence that Edison served District with AL 864.

However, we must now determine whether Edison met its duty under Rule 12 to use reasonable means, other than the Advice Letter, to notify District of the revised rates.

The parties have offered conflicting testimony regarding whether District's Division Engineer, Wheless, had actual knowledge of the new tariff. Edison's Accounts Manager Rick Raskin's testimony states that Wheless admitted receiving, but not reading the Advice Letter, while Wheless has testified that he neither received nor admitted receipt. It is unlikely that further testimony on this contentious point will clarify the issue. While conflicting testimony normally presents a triable actual issue and results in the denial of Summary Judgment, we

again note that the parties have foregone trial and submitted this matter on the pleadings. Thus, we will not rely on it to make our determination.

Our next line of inquiry is whether Edison used any other reasonable means to notify District of the availability of the compensated metering option prior to Districts own inquiry early in 1999.

District claims that it did not receive notice, despite the fact that District had regular contact with Edison's Accounts Managers. Edison claims that its customers must request information regarding new or revised rates, and that providing such information is not the responsibility of the Accounts Managers.

We disagree with Edison that the customer must request information on new or revised rates. The terms of Rule 12(c) (see above) clearly state that the responsibility of providing notification to customers of new or revised rates is Edison's. However, Rule 12 does not place the duty to notify customers upon Edison's Accounts Managers, even though we believe that if an Account Manager had informed customers of new or revised rates in the course of regular meetings, such notification would satisfy Rule 12.

Edison has not submitted evidence or testimony that its Accounts Managers took the opportunity to notify District of the compensated metering option. In addition, District denies receiving notification by way of Edison's Accounts Manager, despite regularly scheduled meetings with their assigned Accounts Manager to address metering, billing, and service related issues.

Therefore, we find that Edison did not utilize its Accounts Manager assigned to the District account to notify District of the revised rates.

Edison asserts, and District does not deny, that District is on the list of Edison's Rate Book holders, and therefore, received the Rate Book containing both the notice of approval of AL-864 and the revised tariff sheets. We must

determine whether receipt of a Rate Book is sufficient to satisfy Edison's duty under Rule 12. To make that determination, we look to case law.

While there is no prior case law interpreting Edison's Tariff Rule 12 we can look to an analogous case, Shimek v. Pacific Gas and Electric Company (PG&E), (1993) 51 CPUC2d 513, for guidance. At issue in Shimek, was an alleged violation of PG&E's Rule 12, which is almost identical to Edison's Rule 12. The relevant portion of PG&E's Rule 12 states:

> "In the event of the adoption by PG&E of new or optional schedules or rates, PG&E will take such measures as may be practicable to advise those of its customers who may be affected that such new or optional rates are effective."

In Shimek, the Commission found that when rate changes occur that potentially make a particular rate schedule more economical for a group of customers than the schedule for their existing service, the utility is responsible for taking reasonable steps to get the word out to the affected customer on a timely basis. The Commission went on to explain that the customer cannot reasonably be expected to follow the effect of each rate change . . . [and] the customer should not be penalized by PG&E's lack of timely notification.

Applying the reasoning from Shimek, we conclude that Edison cannot rely upon its Rate Books to satisfy Rule 12's duty to notify its affected customers in a timely manner. We find that Edison's failure to use reasonable means to notify District of the compensated metering option when that revised rate schedule became available in 1990, prevented District from taking advantage of cost savings that compensated metering provides. As a result, we agree with District's argument that it was overbilled for standby service for the period of time that the new pricing option became available until the District sought information from Edison in early 1999.

VI. Statute of Limitations

Pub. Util. Code § 736 states in pertinent part:

> "All complaints for damages resulting from the violation of any of the provisions of Section 494 [common carriers shall not charge other than applicable rates] or 532 [public utilities shall not charge other than rate specified in its schedules] shall either be filed with the commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this state, in any court of competent jurisdiction within three years from the time the action accrues, and not after."

Edison's Tariff Rule 17(d) is consistent with Section 736 and states in pertinent part:

> "Where SCE overcharges . . . a customer as the result of a Billing Error, SCE . . . shall issue a refund or credit to the customer for the amount of the overcharge for the period of the billing error, but not exceeding three years in the case of an overcharge . . ."

When these sections are read together, a reasonable inference is that there is a three-year statute of imitations on filing a complaint for a refund, or on receiving a refund.

On January 7, 1999, District sent a fax to Edison questioning why the District was being charged for 12 kV service on its standby contract. This fax was followed up with a letter to Edison on February 25, 1999, referencing a February 10th, meeting between District and Edison in which the parties discussed the overbilling. The February 25th letter also requested that Edison propose a settlement to compensate District for the overcharge. Edison responded in a letter dated June 2, 1999, stating that any overbilling would be subject to Edison's tariff Rule 17, limiting any credit or refund to a three year period.

We agree that Edison's three-year statute of limitation applies to this matter.

The violation of a tariff constitutes a new cause of action for every day that the utility deviates from its tariff duties. Thus, when the District discovered the discrepancy between billing rates for electricity purchased and sold in early January of 1999, the statute of limits began to run. District filed its claim with the commission on October 27, 1999. The District's filing was well within the three-year statutory period.

We will apply the three-year statute of limitations in Edison's tariff Rule 17 and limit the period of time that District may seek a refund from Edison. Because the first piece of evidence of discovery we have is the January 7, 1999, fax, we will use that as the 'triggering date' for purposes of establishing a date from which to apply the statute of limitations. We will allow District to seek a refund from Edison for a three-year period from January 7, 1999, back to January 7, 1996.

Finally, we note that had District used reasonable diligence, it would have discovered the discrepancy between the rates long before 1999. By the time District made its discovery, the revised rates had been in effect for almost a decade. A business enterprise should use reasonable diligence in tracking a major cost item such as the price of stand-by electric service. Had District compared its monthly billing records to determine if the charges were correct, it would have noticed the difference in billing rates between electricity sold and electricity purchased. Of particular note to the Commission is the fact that District was billed for electricity it purchased from Edison for its Palo Verde facility at the lower 66 kV rate. Again, if District had exercised reasonable

diligence it could have discovered this billing discrepency sooner and made inquiries to institute cost savings mechanisms.

As a result of its failure to use reasonable diligence, District's damages are limited to a three-year period and not the entire period from May 1990 through January 1999.

Edison is ordered to review its billing records for that period and refund the difference between the rate District actually paid and the amount they would have paid had they selected the compensated metering option.

VII. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

Findings of Fact

1. District's electric service at 1955 Workman Avenue in Whittier is governed by the Electric Service Contract dated December 15, 1989, and was initially properly placed on rate schedule TOU-8.

2. Compensated metering was not available when Contract signed in December 1989.

3. Compensated billing under Special Condition No. 16 of schedule TOU-8 became available in April of 1990.

4. Edison has a duty under Tariff Rule 12 to notify its customers, who may be affected, of a new or revised rate if such rate is established after the time application is made to Edison for service.

5. Edison notified affected customers in May 1990 of the availability of compensated metering under Special Condition No. 16 of schedule TOU-8 by way of AL- 864.

6. Edison's service list for AL-864 does not include an entry for District, nor was AL-864 sent to the address for District as set forth in the Power Purchase Contract and the Facilities Agreement or the address used by Edison for billing District.

7. Edison assigned an accounts manager to District's account and despite regularly scheduled meetings to address service, metering, and billing issues, the accounts manager never advised District of the availability of compensated metering under its schedule TOU-8.

8. District inquired about its schedule TOU-8 12 kV billing rate in January 1999.

9. Once District was advised in 1999 of the availability of compensated metering under Special condition No. 16 for schedule TOU-8, District requested installation of the device.

10. Defendant Southern California Edison failed to meet its tariff Rule 12 duty to notify District of the availability of compensated metering.

11. District incurred losses due to over billing as a result of Edison's failure to notify District of the availability of compensated metering.

12. Pub. Util. Code § 736 and Edison's tariff Rule 17(c) impose a three-year statute of limitations on billing error claims, and District's claim is subject to these statutes of limitations.

Conclusions of Law

1. Complainant County Sanitation District No. 2 of Los Angeles County is entitled to judgment as a matter of law as to the 3rd cause of action.

2. Defendant Southern California Edison Company's motion for summary judgment as to the 3rd cause of action is denied.

3. Complainant County Sanitation District's recovery of damages on the 3rd cause of action, pursuant to the three-year statute of limitations in Pub. Util. Code Section 736 and Edison's Tariff Rule 17, is limited to the time-frame from January 7, 1996, to January 7, 1999.

O R D E R

IT IS ORDERED that:

1. Complainant County Sanitation District No. 2 of Los Angeles County's motion for summary judgment as to the 3rd cause of action is granted.

2. Defendant Southern California Edison Company's (Edison) motion for summary judgment as to the 3rd cause of action is denied.

3. Southern California Edison Company is ordered to review its billing records from January 7, 1996, to January 7, 1999, and refund the difference to County Sanitation District between the rate District actually paid and the amount it would have paid if the compensated metering device were in place.

4. This proceeding is now closed.

This order is effective today.

Dated _____, at San Francisco, California.