PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 25, 2004

TO: PARTIES OF RECORD IN CASE 04-01-020

This proceeding was filed on January 21, 2004, and is assigned to Commissioner Loretta Lynch and Administrative Law Judge (ALJ) Myra Prestidge. This is the decision of the Presiding Officer, ALJ Prestidge.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (*i.e.,* the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (*See,* generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG:avs
Attachment

ALJ/TOM-POD/avs

PRESIDING OFFICER'S DECISION (Mailed 10/25/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Almond Tree Hulling Co.; Arakelian Farms; Baugher Ranch; Beretta Property Management; Campos Brothers Farms; Central California Almond Growers Association; Central Valley Almond Association, Inc.; CF Koehen & Sons, Inc.; Dairyland Hullers; Farmers Cooperative; Harriet Baldwin; Harris-Woolf Almond Huller; Hashem Naraghi; Hilltop Circle L. Ranch; James M. Paiva; James R. Lewis Orchards Inc.; John Wynn; Mintum Almond Coop, Inc.; North State Hulling Co-op, Inc.; Pacific Almond Co.; Paramount Farms, Inc.; Paramount Farming Company; Parreira Almond Processing Co.; Peter D. Peterson; Stewart and Jasper Orchards; South Valley Farms; Strain Orchards; The Hulling Company; TM Duche Nut Co. Inc.; Vernon Paddack; West Valley Hulling/Barry Baker; Xcel Shelling, LLC., Complainant, vs. Pacific Gas and Electric Company and DOES 1 through 100, Defendant.	Case No. 04-01-020 (Filed January 21, 2004)

Paul G. Kerkorian, Attorney at Law,
Utility Cost Management, Inc. for Complainants.
Daniel F. Cooley, Attorney at Law, for
Pacific Gas and Electric Company, Defendant.

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Introduction

This case involves a determination of whether almond hulling and/or shelling operations qualify to receive electric service at an agricultural rate under PG&E's tariffs.[1] We find that almond hullers and/or shellers do not qualify for a discounted agricultural rate for electricity because the form of the almond is changed during hulling and shelling, which involves cracking, breaking open, splintering and severing the hulls and shells, and separating the raw almond into three agricultural products, the almond meat, the hull, and the shell. Since a viable market exists for almond hulls and shells, which can be sold as cattle feed and cattle bedding, respectively, and there is a strong demand for almond meats, our decision today does not compel almond growers, hullers and shellers to forego profitable markets for their products in order to qualify for an agricultural rate.

[1] In PG&E's bankruptcy proceeding (Case No. 01-30923), PG&E and Complainants stipulated that Complainant's claims against PG&E in this case shall be allowed by the Bankruptcy Court in the amount or manner determined by the Commission, the Court of Appeal or California Supreme Court, or a binding agreement, award or settlement. However, PG&E preserved its rights and defenses that exist under the applicable non-bankruptcy law and certain provisions of the bankruptcy statutes. Complainants were relieved from the automatic stay to pursue this matter before the Commission through judgment and any appeal.

We note that the Pacific Gas and Electric Company (PG&E) tariff has necessitated several Commission decisions to resolve disputes between PG&E and customers regarding their eligibility for agricultural rates. Also, the eligibility statement for the PG&E agricultural tariff (the PG&E tariff) differs from the comparable tariff for Southern California Edison Company (Edison). As a result, the eligibility of utility customers engaged in the same activity for an agricultural rate may differ based solely on whether their operations are located within the PG&E or Edison service territory.

In addition, in 2001, the Legislature enacted Public Utilities Code Section 740.11,[2] which strongly encourages the Commission to consider permitting all agricultural commodity processing customers to be eligible for agricultural rates for electricity, to the extent that this change would not result in cost shifting to other customer classes. Since previously enacted Section 740.1 defines customers eligible for an agricultural rate as "persons or corporations whose primary purpose is the agrarian production of food or fiber," the change proposed by Section 740.11 could significantly broaden the types of uses that qualify for agricultural rates.

[2] All subsequent Code references are to the Public Utilities Code, unless otherwise stated.

The adoption of Section 740.11, the different approaches of agricultural rate tariffs, and the need to treat similarly situated utility customers equitably with regard to their eligibility for agricultural rates, all suggest that a re-examination of the Commission's policies regarding agricultural tariffs may be timely.

Background

California produces approximately 80% of the world's almond crop. During the l980's and l990's, because of increasing demand,[3] almond production in the state rose dramatically. Almonds remain a top agricultural commodity for California.

Almonds grow on almond trees in orchards throughout the state. The almond meat (almond) is enclosed by a hard shell, which is in turn enclosed in a soft, pulpy outer covering known as the hull. The almond is not attached to the shell. The hull is attached to the tree and the shell. Over time, as the almond matures, the hull hardens. In some cases, around August, the hull begins to open while the almond is still on the tree, exposing the shell.

In at least 50 percent of cases,[4] hulling and shelling occur away from the orchard at which the almonds are grown.[5] Almond growers may join a hulling

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[3] For example, in 1992, California produced 548,000,000 pounds of almonds at a total value of approximately $691,340,000. In 2001, California produced 830,000,000 pounds of almonds at a total value of $731,880,000. See 2002 California Department of Food and Agriculture Resource Directory entitled California Agriculture: A Tradition of Innovation at p. 92, referred to as Exhibit (Exh.) 102.

[4] According toAntonio Campos, who testified on behalf of Complainants, approximately 50 % of the time, some smaller almond growers hull and/or shell their own almonds on or adjacent to the property at which the almonds are grown and may also hull and/or shell almonds grown by family members or a few neighboring orchards at the site. Id. at 25:1-10, 45:1-25. However, Gordon Doughty testified on

Footnote continued on next page

and/or shelling cooperative or may contract with a commercial hulling and/or shelling operator. Cooperatives usually require the growers to pay a fee to join, but sometimes return to the grower all of part of the value of the hulls (which may range from $40 to $70 per ton) and the shells (whose energy value may be $20 per ton). Almond hullers and/or shellers may also receive the hulls and shells, which can then be sold, as compensation for this work.[6] Commercial operators generally charge higher fees and do not return any of the hulls or shells to the grower.

Almond hulling and shelling is a seasonal operation, which usually begins in August and ends in December or January. Although there are some variations in the process, the hulling and shelling process generally occurs as follows:

- Removal of Almonds from the Tree/Drying of Almonds on the Orchard Floor. First, the almond trees are shaken by a device known as a "shaker," knocking the almonds, which are still enclosed in the hull and shell, to the orchard floor. The almonds remain on the orchard floor for approximately 7 to 10 days for drying. The almonds

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behalf of PG&E that in almost 100 percent of cases, hulling and shelling occur away from the property at which the almonds are grown. Exh. 201, at page 5:23-25. Complainants' own responses to PG&E data requests show that Complainants generally hull and/or shell almonds grown in orchards located from 8 to 45 miles away from the hulling/shelling facility. Exh. 201, Attachment E. Growers often send their almonds to the closest hulling/shelling facility, but may sometimes use a more distant facility affiliated with a cooperative of which they are a member or an operator with whom they have a personal relationship.

[5] However, as we will discuss later, under PG&E's tariff, eligibility for an agricultural rate does not depend on whether the activity for which the electricity is used occurs on or off the property at which the agricultural product was raised or grown.

[6] Id. at 41:14-26.

are then raked into rows by a sweeper machine and are left on the orchard floor for several more days.

- Sweeping of Almonds from Orchard Floor/Transportation of Almonds to Huller/Sheller. After drying, the almonds are removed from the orchard using large mobile bins, which either have rotating paddle-like appendages to sweep the almonds into the bin or vacuums to suck the almonds into the bin. As the almonds are swept or vacuumed into the bins, leaves, twigs, and dirt from the orchard floor (trash) are also swept into the bins. The almonds and the trash are then transported to the hulling and/or shelling facility. Hulls and shells sometimes break away as the almonds are propelled into the bins, are transported to the huller/sheller, or are unloaded at the hulling and/or shelling facility.[7]

  After drying, the almonds must be promptly removed from the orchard floor and should generally be hulled within 90 days, in order to avoid insect infestation or the development of fungus, mold, mildew and salmonella, which make the almonds inedible. [8]

- Separation of Almonds from Trash By Vibrating Screens. At the hulling and shelling operation, the trash is separated from the almonds by putting the material through a series of vibrating screens, sometimes called scalping decks. The almonds fall through the vibrating screen, away from the trash which remains in the screen.

- Cracking/Breaking of Hulls and Shells by Shear Rolls and/or Hulling Cylinders. The almonds are then placed

[7] According to Campos, approximately 30 to 50 % of the time, the hulls have already fallen off of the almonds by the time that the almond reaches the hulling/shelling facility. RT 18:21-22. Approximately 5 to 10% of the time, the shells also fall off before the almonds reach the hulling/shelling facility. RT 19:4-10.

[8] RT 13:1-27.

on conveyor belts and moved to shear rolls and/or hulling cylinders. Shear rolls are hard rubber rotating cylinders. The conveyor belt moves the almonds under the sheer rolls in order to crack the hulls. The almonds move under a series of shear rolls, each of which has a smaller clearance between the cylinder and the almonds, so that the hulls crack gradually.

A small portion of almond hulling and shelling is accomplished with hulling cylinders. Hulling cylinders are rotating drums, which have prongs and bars inside. The almonds are placed in the hulling cylinders, which bang the almonds against the prongs and bars, causing the hull and shell to crack. Hulling cylinders are generally used in addition to shear rolls, rather than instead of shear rolls.

The hulling and shelling equipment squeezes the hulls and shells, causing them to crack, splinter and fracture.[9]

- Removal of Loose Hulls and Shells by Vibrating Screens. The almonds are then moved to vibrating screens. The vibrations knock the loose hulls and shells and pieces of hulls and shells off of the almonds. The hulls and shells fall through the screens, leaving the raw almonds unhulled and unshelled.
- Use of Aspirators to Blow Away Lighter Pieces of Hulls and Shells. As the almonds move along the conveyor belt, aspirators blow air on the almonds, which also blows away lighter pieces of the hulls and shells.
- Separation of Unhulled/Unshelled Almonds from Hulled/Shelled Almonds by Gravity Tables. The almonds then move to gravity tables, which are vibrating tables with a slight incline. The vibrations separate any heavier unhulled or unshelled or partially unhulled or unshelled almonds from the hulled and shelled almonds.

[9] RT 48:17-28, 49:1-23.

- Repetition of Hulling/Shelling Process if Almonds Are Not Fully Hulled or Shelled. If the hull or shell has not been fully removed, the almonds are put back through the shear rolls or hulling cylinders. The almonds often go through 14 to 22 shear rolls before the hulls and shells are fully removed and the process is complete.[10]
- Shelling Process as Distinguished from Hulling Process. Most of the time, the same operator performs both hulling and shelling at the same facility. However, in a smaller percentage of cases, operators hull, but do not shell, the almonds.[11] In this case, hullers use the same process as described above, but generally put the almonds through only 7 or 8 shear rolls so that the shell will not be removed.

Hullers and shellers may also perform additional functions required by the USDA, such as weighing the almonds, sorting them by size, fumigating them to prevent insect infestation, and inspecting the almonds to remove any which are damaged or inedible.

According to the California Almond Board, approximately 92% of almonds sold in California are both hulled and shelled at the time of sale. Approximately 79% of these almonds are sold as raw, whole almonds, and approximately 19% undergo a manufacturing process, such as roasting, blanching, slicing, slivering, or salting, before sale. Approximately 80% of almond sales in California are to industrial users who use almonds as an ingredient in manufactured food items, such as cookies, cakes, etc.

In-shell almonds comprise approximately 8% of almonds sold in California. Approximately 84% of these almonds are sold to India and China.

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[10] RT 26:17-27.

[11] RT 54:7-12.

The governments of India and China have specified that only in-shell almonds may be sold to their countries, in order to provide their citizens with jobs shelling almonds. When almonds are sold to India and China, the huller is asked to set the shear rolls to make slight indentations in the shell so that Indian and Chinese workers can shell the almonds more easily.

On a national level, approximately 67% of almonds sold within the United States are shelled, and 2% of these almonds are sold in their shells, and the rest of the 31% of almonds sold in the United States undergo some manufacturing process before sale.

Approximately 75% of the almonds exported out of the United States are shelled, and only 11% of these almonds are exported in-shell. Approximately 14% of the almonds exported out of the United States undergo a manufacturing process before sale.

There is no market for in-hull almonds because of health risks associated with the high moisture content in the hull.

However, a significant market for almond hulls, to be used as cattle feed, exists in California. For example, California produces approximately 800,000 tons of almond hulls, which have a market value of approximately $100 per ton, or 80 million dollars.[12] Complainants alone sell over 500,000 tons of almond hulls annually, which at even $50 per ton, have a value of 25 million dollars.[13] According to Complainants, the shells may be sold for approximately

[12] Exh. 205, 206.

[13] Exh. 201.

1¢ per pound.[14] Complainants produce approximately 190,000 tons of almond shells annually,[15] which would have an approximate value of $3,800,000 per year.

Discussion

PG&E's Agricultural Rate Applicability Statement (the PG&E tariff) states:

> A customer will be served under this schedule if 70% or more of the energy use is for agricultural end-uses. Agricultural end-uses include growing crops, raising livestock, pumping water for irrigation, or other uses which involve production for sale, and which do not change the form of the agricultural product. (Emphasis added.)

PG&E does not dispute that at least 70% of the electricity used by Complainants is utilized in hulling and shelling. Therefore, under the plain language of the tariff, whether almond hullers and shellers are entitled to receive electric service at a discounted agricultural rate depends solely on whether the hulling and shelling process changes the form of the agricultural product.[16]

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[14] RT 39:13-14.

[15] Exh. 201, Attachment B; Exh. 201B.

[16] Tariffs filed with the Commission are administrative regulations and are subject to the same rules that govern the interpretation of statutes. Zacky & Sons Poultry Co., dba Zacky Farms, vs. Southern California Edison Company (Zacky Farms), D.03-04-058. To interpret a tariff, the Commission must first look at its language, giving the words their ordinary meaning and avoiding interpretations which make any language surplus. Id. The Commission must interpret the words of a tariff in context and in a reasonable, common-sense way. Id. If the tariff language is clear, the Commission need not look further to interpret the tariff. Id.

If the tariff language is ambiguous, the Commission may rely on additional sources, such as the regulatory history and principles of statutory construction. Id. An ambiguity exists if the language of a tariff may reasonably be interpreted in more than one way. Id. Ambiguities in a tariff must generally be resolved in favor of the ratepayer. Ortega v. Fresno MSA Limited Partnership, D.95-09-116. However, the Commission retains discretion to determine whether an interpretation of a tariff sought by a party is reasonable. Zacky Farms, supra.

We have previously addressed the applicability of the PG&E tariff to the processing of agricultural products in Harris Farms, Inc. v. Pacific Gas and Electric Company, D.92-02-025 (Harris Farms), Producers Dairy Foods, Inc., v. Pacific Gas and Electric Company, D.97-09-043 (Producers Dairy) and Air Way Gins v. Pacific Gas and Electric Company, D.03-04-059 (Air Way Gins).

In Harris Farms, we found that a feedmill operated by a livestock-raising operation was entitled to receive electric service under an agricultural tariff, rather than a commercial tariff. The livestock operator used all of the product of the feedmill as feed for its livestock, and there was not a reliable or economical outside supplier of livestock feed. We reasoned that whether the form of the agricultural products used as livestock feed was changed during processing was not relevant, because the feedmills were an integral part of the livestock raising operation, not a separate commercial enterprise. Harris Farms does not apply to this case, because hulling and shelling is not an integral part of growing almonds and occurs after the almonds are grown.

In Producer's Dairy, we found that a dairy, which pasteurized, homogenized, and added vitamins to raw milk and separated the raw milk into different milk products based on the fat content, such as whole milk, skim milk, and cream (standardization), qualified for agricultural rates under PG&E's tariff because these activities do not change the form of the milk. We noted that these processes do not alter the appearance of the milk and prepare the raw milk for human consumption. For example, pasteurization quickly heats the milk in approximately 30 seconds to make it safe for human consumption, homogenization prevents fat globules from floating to the top and thereby increases the shelf life of the milk, and adding vitamins A and D to the pasteurized milk restores the vitamins that naturally exist in raw milk but are

destroyed during pasteurization and storage. We stated that standardizing the milk also does not change its form because all of the resulting milk products were originally contained in the raw milk. We also found PG&E's reasoning in denying agricultural rates for milk processing inconsistent because processing raw milk does not change the form of the product more than other agricultural processing activities that receive service at an agricultural rate, such as sorting eggs by size and grade, waxing apples to improve their appearance, and cutting the leafy tops off of carrots.

In addition, we reasoned that although a market might exist for raw, unprocessed milk, the major market for milk is for human consumption, and the Legislature did not intend to force milk producers to find less viable markets for their products in order to benefit from lower agricultural rates for electricity.

In Air Way Gins, we found that cotton ginning qualifies for electric service at an agricultural rate under PG&E's tariffs, because cotton ginning separates two agricultural products, the cottonseed and the cotton fiber, without damage to either one of them. We rejected arguments by PG&E that separating the fiber from the seeds involves a change in the form of the cotton because both the seed and the fiber emerge intact from the process, even if some "tearing" or "disassociation" occurs. We further stated that even if some severing or tearing were to occur, the ginning process seemed less drastic a change to the form of the product than the removal of leaves and cutting tops off of carrots that PG&E treats as eligible for agricultural tariffs. We distinguished cotton ginning from removing the pits from peaches or apricots, a process which clearly changes the form of the fruit, because cotton ginning is essentially a separating and cleaning process that does not involve severing, crushing, or cutting into the cotton fiber or cotton seed.

In Air-Way Gins, we did not decide whether the standard for determining if an agricultural product has undergone a change in form is whether the process for which an agricultural rate is sought "invades the corpus" of the product, as argued by PG&E. However, we stated that in determining whether an agricultural product has undergone a change in form due to processing, the relevant analysis involves a before-and-after comparison of the constituent parts of the agricultural product, such as the cottonseed and the cotton fiber, rather than the before-and-after condition of the raw product as it is harvested from the field.[17] We also reasoned that severing, crushing, or cutting into an agricultural product "are processes that would seem to come within a common-sense definition of a change in form."[18] We also stated that we tend to agree that, "… obvious invasions of the corpus of an agricultural product, such as animal slaughtering and peach pitting, constitute a change in the form of the product."[19]

As in Producer's Dairy, Air-Way Gins finds that in determining whether a particular activity involves production of an agricultural product for sale or processing of an agricultural product under the PG&E tariff, the Commission must consider the nature of the actual markets for the products, not theoretical markets. We also noted that the intent of the Legislature in enacting Section 744[20]

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[17] Id. at p. 22

[18] Id. at p. 17.

[19] Id. at p. 22, n. 15.

[20] Section 744 directs all electrical corporations, including PG&E, to file tariffs with the Commission for optional interruptible service and optional off-peak demand service for "agricultural producers," which are defined under Section 744(a) as "any person or corporation whose principal purpose is the agrarian production of food or fiber."

was not to expand the class of customers entitled to an agricultural rate to include a broad group of agricultural processors.[21]

Here, applying Air-Way Gins, we find that almond hulling and/or shelling changes the form of the agricultural product by separating the almond into three constituent products: the almond meat, the hull, and the shell. The appearance of the almond changes dramatically from a fuzzy hull, surrounding the hard shell that completely encloses the almond meat, to the three constituent agricultural products. Almond hulling and shelling may therefore be distinguished from the processing of milk discussed in Producer's Dairy, which did not significantly change the appearance of the milk, and from the ginning discussed in Air-Way Gins itself, which did not significantly change the cottonseed or cotton fiber. In contrast, the almond hulls and shells are squeezed, crushed, cut into, broken, and fractured during hulling and shelling. Complainants therefore do not qualify for an agricultural rate.

We reject Complainants' arguments that almond hulling and shelling are analogous to other activities that qualify for an agricultural rate under PG&E's tariff, such as cutting the leafy tops off of carrots, removing the stems from raisins, or removing the outer leaves from cabbage and lettuce, or waxing applies to improve their appearance. All of these activities are distinguishable because the agricultural product itself remains intact.[22] Since the hulls and shells are broken and cut into during processing, hulling and shelling more closely

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[21] AirWay Gins, supra., at p. 20-21.

[22] Moreover, we find that cutting the tops off of carrots and garlic and removing the stems from raisins more closely resembles removing the in-hull almond off of the almond tree, because it separates the agricultural product from the plant on which it was grown.

resemble removing the pits from peaches and apricots, which as noted in Air-Way Gins, change the form of the agricultural product.

We recognize that it could be argued that Complainants are entitled to an agricultural rate because the principal agricultural product, *e.g.*, the almond meat, is not cut into, severed, crushed, or changed as a result of hulling and/or shelling. However, in Section 740.11, the Legislature indicates that agricultural commodity processors should not be eligible for discounted agricultural rates at the expense of cost-shifting to other classes of customers. It appears that granting hullers and shellers a discounted agricultural rate would inevitably shift costs to other customer classes, possibly including low-income customers. Moreover, as discussed later in this decision, we believe that the Commission should further consider the appropriate scope of agricultural tariffs, in view of Section 740.11, at a policy level, to ensure that similarly situated customers are treated consistently. Since this proceeding results from a customer complaint, it is not the proper forum for us to develop broad policies regarding eligibility for agricultural tariffs.

We also reject Complainants' argument that hulls and shells are merely agricultural residues, rather than agricultural products. Although in the past, hulls and shells would have constituted agricultural residues because almond growers did not have a viable economic use for these products, the development of markets for hulls and shells as cattle feed and cattle bedding means that hulls and shells are now agricultural products in their own right.[23]

[23] The California Integrated Waste Management Board Feasibility Study on the Expanded Use of Agricultural and Forest Waste in Commercial Products (January 1999)

Footnote continued on next page

Our determination that hulling and shelling does not qualify for an agricultural rate does not force almond producers or hullers and shellers to find less profitable markets for their almond products in order to qualify for favorable electricity rates. California's market for unshelled almonds generates substantial revenue for almond growers.[24] Although the primary market exists for unshelled almonds, there is a smaller, but viable market for in-shell almonds, especially almonds to be sold to India and China. In addition, a substantial market exists for the hulls to be used as cattle feed in this State. The sale of shells also generates revenue, albeit less than the sale of hulls. The existence of a market for almond hulls and shells enable hullers and shellers who accept the hulls and shells as payment for their work to have viable businesses and almond growers that utilize these businesses to produce the almonds at a lower cost because of reduced expenses for hulling and shelling.[25]

Our decision today also does not unfairly penalize utility customers who have found an economically viable use for what would otherwise be agricultural residues. Almond growers, hullers and shellers who are able to develop markets for hulls and shells and generate revenue through the sale of these products will be rewarded for their efforts by their profits. The role of agricultural tariffs is to

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notes that if an economically viable use is found for agricultural residue, the residue becomes an agricultural resource. Exh. 104 at p. 1.

[24] Exh. 205, 206.

[25] Although almonds must be hulled quickly to avoid health risks, hulling equipment is very expensive for an individual almond grower. RT 25:20-28, 26:1-5. The existence of a market for almond hulls and shells eliminates the need for almond growers to pay for hulling and shelling if the huller/sheller accepts the hulls and shells as payment. If the huller/sheller returns the hulls and shells to the grower, the grower may recover at least part of the costs of hulling and shelling by selling hulls and shells.

provide discounted rates for customers engaged in truly agricultural activities, and eligibility for an agricultural rate must be based on the nature of the particular activity involved and the language of the tariff. In addition to the economic benefits from sale of hulls and shells for cattle feed and bedding, we acknowledge that such sale may mitigate the environmental problem that disposal of the hulls and shells otherwise would create. However, regardless of the applicability of the PG&E tariff, air pollution requirements prohibit the burning of hulls and shells (RT 17:21-27), and almond growers will use caution in putting hulls and shells into the ground to avoid making the soil too acidic (RT 17:4-19). Although we support the environmentally sound processing of agricultural products, we are not authorized under the statute to promote environmental goals by expanding the applicability of the tariff to customers who are otherwise not entitled to an agricultural rate.

As a result, Complainants do not qualify to receive electric service at an agricultural rate under PG&E's tariff and are not entitled to a refund or an award of interest.[26]

We note, further, that the language of the PG&E tariff does not give clear guidance as to when utility customers involved in producing or processing an agricultural product (except for customers directly growing crops or livestock or pumping water for irrigation) qualify to receive electric service at an agricultural rate. The key phrase which determines eligibility for an agricultural rate for these processes, "which do not change the form of the product," is subject to conflicting interpretations by customers, PG&E, and the Commission. As noted

[26] *See* Insert A.

in Air-Way Gins, the tariff has led to almost metaphysical arguments about whether a particular agricultural process should qualify for an agricultural rate and has necessitated several Commission decisions to adjudicate disputes between PG&E and its customers.[27]

The PG&E tariff also differs from the comparable Edison tariff, which provides that eligibility for an agricultural rate depends on whether the electricity is used in connection with the production, harvesting and preparation of agricultural products for market on land owned by the same utility customer for the production of agricultural products.[28] In contrast, PG&E's tariff was modified in 1988 to remove the "on the farm/off the farm" standard for whether a particular activity qualified for an agricultural rate.[29] Under the Edison tariff, an agricultural rate is not available to customers who process agricultural products raised by others. As a result, utility customers performing the same activity could receive inconsistent treatment as to eligibility for an agricultural

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[27] Air-Way Gins, supra., at p. 17-19.

[28] Zacky Farms, supra; see also Edison Tariff Schedule TOU-PA-5, Edison Rule 1 definition of "agricultural power service."

[29] As noted in Air-Way Gins, before l988, PG&E's agricultural rates only applied to general agricultural services on the farm. In mid-l986, a task force including representatives of major California farm organizations was formed to review the eligibility statement for PG&E's agricultural tariff. As a result of task force discussions, PG&E's tariff eligibility statement was revised to include the current "change in form" language and to delete language which limited eligibility to agricultural services performed on the farm. This change resulted from the perception that the previous "on the farm/off the farm" standard had resulted in the inequitable treatment of utility customers as to their eligibility for an agricultural rate. Id.

rate based solely on whether their businesses are located in PG&E's or Edison's service territory.[30]

In addition, in 2001, the Legislature enacted Section 740.11, which urges the Commission to consider extending agricultural rates to all agricultural commodity processing customers, as consistent with other constitutional and statutory objectives, to the extent that applying agricultural rates to these customers would not result in cost shifting to other customer classes. (However, neither PG&E nor Complainants discussed Section 740.11, and given the precatory language of the statute, we conclude that it has no impact on the interpretation of the PG&E tariff as it now exists.)

Since in Section 740.1, the Legislature previously defined customers eligible for an agricultural rate to include "persons or corporations whose primary purpose is the agrarian production of food or fiber," the change proposed by Section 740.11 could broaden the applicability of agricultural tariffs. The Commission may wish to consider the question of what types of customers should be eligible for agricultural rates in view of Sections 740.1 and 740.11. Moreover, the development of a Commission policy regarding agricultural rates would help to ensure that similarly situated customers are treated consistently statewide, rather than being subject to different eligibility criteria based on the language of the particular utility's tariff.

In short, there are good reasons for the Commission to reconsider its rules and policies regarding discounted agricultural rates. The result of that reconsideration, however, would have prospective effect only. In terms of

[30] The Edison agricultural tariff is also not completely clear as to when a customer is entitled to an agricultural rate. *See* Zacky Farms, supra.

Complainants' eligibility under the PG&E tariff as it exists today, they fail to qualify for an agricultural rate for these specific almond hulling and/or shelling operations.

Conclusion

For the reasons discussed above, Complainants do not qualify to receive electric service at an agricultural rate under the PG&E tariff, they are not entitled to a refund or an award of interest, and their complaint must be dismissed.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Myra J. Prestidge is the assigned ALJ and the presiding officer in this proceeding.

Findings of Fact

1. Almonds grow commercially in orchards and are enclosed by a hard shell, which is enclosed in a fuzzy hull.

2. Almonds must generally be hulled within 90 days of removal from the tree and must be both hulled and shelled for human consumption.

3. There is no market for in-hull almonds. Although the primary market is for hulled and shelled almonds, a smaller market exists for in-shell almonds.

4. Almond hulls can be sold as cattle feed in California.

5. California annually produces approximately 800,000 tons of almond hulls, which have a market value of approximately $100 per ton, or $80 million.

6. Almond shells can be sold as cattle bedding in California.

7. Complainants produce approximately 190,000 tons of almond shells annually, which may be sold for at least 1 cent per pound, or approximately $3,800,000 per year.

8. Almond growers may join a hulling and shelling cooperative or may contract with a private operator to have the almonds hulled and shelled.

9. Hulling and shelling cooperatives usually require almond growers to pay a fee to join, but sometimes return all or part of the value of the hulls and shells to the grower.

10. Hullers and shellers may also receive the hulls and shells, which may then be sold, as payment for their work.

11. Hulling and shelling is a highly mechanized process, which generally includes the following steps:

a. Removal of the almonds, still in their hulls and shells, from almond trees with a "shaker."

b. Drying of the almonds on the orchard floor for at least 7 to 10 days.

c. Sweeping of almonds from the almond floor using large mobile bins, which either have rotating paddle-like appendages to sweep the almonds into the bins or vacuums which suck the almonds into the bin.

d. Transportation of the almonds to the huller/sheller.

e. Separation of the almonds from dirt, twigs, leaves, etc., by putting the material through the series of vibrating screens.

f. Placement of the almonds on conveyor belts.

g. Moving the almonds through a series of shear rolls and/or a hulling cylinder to gradually crack, break open, fracture, or splinter the hulls and shells.

h. Movement of the almonds to a series of vibrating screens, which separate the unhulled, unshelled almonds from loose hulls and shells or pieces of hulls and shells.

i. Use of aspirators to blow away lighter pieces of hulls and shells as the almonds move along the conveyor belt.

j. Separation of unhulled/unshelled almonds from hulled and shelled almonds by gravity tables.

k. Putting any unhulled or unshelled almonds back through the shear rolls or hulling cylinders until the hull and shell are completely removed.

12. Hullers and shellers must generally put the almonds through 14 to 22 shear rolls before the hulls and shells are fully removed.

13. In the small percentage of cases in which the almonds are hulled but not shelled, the almonds generally go through only 7 or 8 shear rolls so that the shell remains intact.

14. The hulling and shelling process breaks, cuts into, cracks, fractures, and splinters the hulls and shells.

15. The PG&E tariff in relevant part states that a customer is entitled to an agricultural rate for electricity if at least 70 percent or more of the electricity used is for an "agricultural end-use."

16. The PG&E tariff defines "agricultural end uses" to include "growing crops, raising livestock, pumping water for irrigation, or other uses which involve production for sale, and which do not change the form of the product."

17. The parties do not dispute that Complainants use at least 70% of the electricity at their facilities for hulling and shelling operations.

18. Hulling and shelling changes the form of the almond because the almond is separated into three agricultural products, *i.e.*, the almond meat, the hull, and the shell.

19. Hulling and shelling changes the form of the almond because the appearance of the almond is dramatically changed by the removal of the almond meat from the hull and shell, and the cracking, cutting, and breaking open of the hull and shell.

20. Hulling and shelling differs from the processing of raw milk found eligible for an agricultural rate in Producer's Dairy, because the processing of raw milk does not significantly change the appearance of the milk.

21. Hulling and shelling changes the form of the almond because the hulling and shelling equipment cuts into, cracks, breaks open, splinters, and fractures the hulls and shells.

22. Hulling and shelling differs from certain other agricultural activities that qualify for an agricultural rate under PG&E's tariff, such as removing the stems from raisins, cutting the leafy tops off of carrots, removing the outer leaves of cabbage and lettuce, and waxing apples, because these processes do not involve cutting into, breaking open, fracturing, or splintering the agricultural product.

23. Since there is a viable market for almond hulls to be used as cattle feed, and for shells to be used as cattle bedding, almond hulls and shells are agricultural products in their own right, not merely agricultural residue.

24. Our finding that hulling and shelling changes the form of the almond does not force almond producers to forego profitable markets in order to qualify for agricultural rates because there are viable markets for in-shell almonds, almond hulls and almond shells, in addition to the well-established market for hulled and shelled almond meats.

25. The existence of markets for almond hulls and shells enables hullers and shellers to operate viable businesses and may reduce hulling and shelling costs for almond growers.

Conclusions of Law

1. Utility tariffs are administrative regulations that are subject to the same rules that govern the interpretation of statutes.

2. Ambiguities in a tariff must generally be resolved in favor of the ratepayer, but the Commission retains discretion to determine whether an interpretation of a tariff sought by a party is reasonable.

3. Eligibility for an agricultural rate under PG&E's tariff does not depend on whether the activity for which the electricity is used occurs on or off the property at which the agricultural product was raised or grown.

4. In determining whether an agricultural activity, other than raising crops or livestock or pumping water for irrigation, qualifies for an agricultural rate under PG&E's tariff, the Commission must determine whether the activity changes the form of the agricultural product.

5. Under Air Way Gins, whether an agricultural product has undergone a change in form due to processing is based on a before-and-after comparison of the constituent parts of the agricultural product, rather than the before-and-after comparison of the raw product as it is harvested from the field.

6. Under Air-Way Gins, the separation of an agricultural product into two or more constituent agricultural products, without damaging, tearing or cutting into, any of the products does not constitute a change in form under PG&E's tariff.

7. Under Air-Way Gins, some kinds of processing of an agricultural product, such as animal slaughtering and peach pitting, change the form of the product.

8. Under Air-Way Gins, severing, crushing or cutting into an agricultural product generally falls within a common-sense definition of a change in form.

9. Under Producer's Dairy and Air-Way Gins, the Commission must consider the existence of actual markets for the agricultural products, rather than theoretical markets, in determining whether a particular activity qualifies for an agricultural rate.

10. The Legislature did not intend agricultural customers to be forced to forego profitable markets for their products in favorable of less viable markets in order to qualify for an agricultural rate.

11. The role of an agricultural tariff is to provide discounted rates for customers engaged in truly agricultural activities.

12. Eligibility for an agricultural rate under PG&E's tariff must be based on the particular use of electricity involved and a reasonable, common-sense interpretation of the tariff based on its language, or if the language is ambiguous, the regulatory or legislative intent behind the tariff.

13. Under PG&E's tariff, a reasonable, common-sense definition of "change in form" would generally include, but would not be limited to, cutting into, breaking open, crushing, fracturing, splintering, or slicing the agricultural product.

14. Regarding the relevant agricultural products, Complainants' almond hulling and/or shelling operations effect a "change in form" within the meaning of the PG&E tariff. Consequently, Complainants' electricity consumption for these operations does not qualify for the agricultural rate under the PG&E tariff.

15. In Pub. Util. Code § 740.11, the Legislature urged the Commission to consider providing the option for agricultural commodity processors to be eligible for discounted agricultural rates, as consistent with other constitutional and statutory objectives, if to do so would not result in cost-shifting to other customer classes.

16. Complainants are not entitled to relief. Their complaint should be dismissed, and this proceeding should be closed, effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint is denied.
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.