

Decision 07-01-027 January 25, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bee Sweet Citrus, Inc.,

Complainant,

v.

Southern California Edison Company
(U 338-E),

Defendant.

Case 05-11-004
(Filed November 1, 2005)

James Sherwood, Vice President-Operations, for Bee Sweet
Citrus, Inc., complainant.

Stacie Schaffer, Attorney at Law, for Southern California
Edison Company, defendant.

DECISION DENYING RELIEF

Bee Sweet Citrus, Inc. (Bee Sweet) alleges that Southern California Edison Company (SCE) wrongfully charged Bee Sweet for on-peak electric usage penalties¹ of \$22,785.96 in 2004 and \$20,613.34 in 2005. Bee Sweet paid the 2004

¹ Bee Sweet refers to the difference between on-peak use and off-peak use as a penalty. The tariff does not refer to a penalty for on-peak use, rather, it is a demand charge, but the difference in charges is so substantial that as a matter of convention Bee Sweet believes the descriptive "penalty" is appropriate. We will use the term "demand charge."

demand charge and seeks reparations plus interest; Bee Sweet has not paid the 2005 demand charge and seeks its cancellation. SCE denies the allegations, asserting that Bee Sweet was properly charged for its electric use. Public hearing was held May 11, 2006 in Fresno, when the matter was submitted. Relief is denied.

1. Bee Sweet's Evidence

Bee Sweet acquired Mar River Ranch, a citrus ranch of 125 acres, in December 2003. The ranch had a water supply system, including wells, pumps, controllers, a reservoir, and electrical panels. The ranch has two wells each with its own pump, electrical panel, and time clock to control use. SCE supplies power to the two well pumps, which are approximately 1/4 mile apart in a remote area at the end of the SCE distribution line. The pumps are wired so that they cannot be operated by hand; they can only be operated through programmable time clocks. Both pumps were programmed and tested to shut down during peak times.

When discussing rate plan options with SCE's service representative, Bee Sweet was told that each of the two pumps on the ranch was already installed with an SCE-provided time management load control (TMLC) unit to prevent the pumps from operating during on-peak times. The SCE representative said that there would be a charge of approximately \$2,500 per pump to activate the units. Bee Sweet felt that, since the TMLC units were already installed and wired at the pumps, the \$5,000 SCE charge seemed inequitable. It did not connect the units. SCE removed the units.

During the time periods at issue, Bee Sweet chose to take service under SCE's Schedule Time-of-Use – Agricultural and Pumping, Super Off-Peak-Demand Metered (TOU-PA-SOP-1). TOU-PA-SOP-1 benefits customers who can

shift load to the super-off-peak time period – it provides a discount on energy- and time-related demand in exchange for interrupting power when requested by SCE. Super-off-peak is defined as midnight to 6:00 a.m., all year, every day. On-peak is defined as 1:00 p.m. to 5:00 p.m. summer weekdays, except holidays. Under TOU-PA-SOP-1, the summer season starts at 12:00 a.m. on the first Sunday in July and continues until 12:00 a.m. on the first Sunday in October. Off-peak is defined as all other hours not super-off-peak or on-peak.

To ensure compliance with the SOP tariff, Bee Sweet took the precautionary steps of programming its pumps to go off at least 30 minutes before the on-peak time period and not to go back on until at least 15 to 30 minutes after the on-peak time period. Bee Sweet's manager checked the operation of the pumps' time clocks by personally programming the clocks and checking the time of operation. During July 2004, Bee Sweet employees would go by the pumping stations to verify that neither pump was operational during the on-peak time period.

SCE's August 2004 bill for the period July 3, 2004 to August 4, 2004, showed energy and demand charges for on-peak usage; the demand charges alone amounted to \$6,452.75. Bee Sweet immediately contacted its SCE service representative, who said that it was probably just a power surge issue or some other anomaly in the line and not to worry about it; SCE would investigate the problem and take care of it. Bee Sweet again checked the time clocks at both pumps and verified that they were programmed correctly, and that no one had access to the locked pumping stations. Bee Sweet's employees said there is no way the pumps ran because they would have noticed water on the ranch and would have heard the pumps.

SCE's September 2004 bill contained not only the demand charges from the prior month, but also additional demand charges for on-peak usage in violation of the SOP during the month of August. The September bill showed a total demand charge for August of \$10,292.57. Bee Sweet again contacted SCE and was assured that SCE was investigating the problem. Bee Sweet again checked the pumps and verified that they were properly programmed and that the time on the clocks matched the actual time to insure everything was properly set up for accurate operation and compliance.

Bee Sweet's monitoring of the pumps showed that in July the pumps were never operational during the on-peak time period. Further, the pumps showed no evidence of operation during the restricted time period during the month of August. Bee Sweet claims that SCE's records show that the pumps only came on during the on-peak time period for a brief time. Bee Sweet stresses the importance of this because the brief time period when they supposedly came on would not have been long enough to pump sufficient water from the 800 feet depth to the surface and then distribute the water to the ranch.

In September, Bee Sweet and SCE representatives discussed the possibility that power fluctuations were causing the problem, and that since the pump sites are at the end of the SCE distribution line, just beyond a large industrial user, the problem could be the result of line abnormalities. SCE's bill in October for the billing period September 3, 2004 to October 2, 2004, showed on-peak usage for that billing period with demand charges of \$6,040.64. On October 26, 2004, there was a meeting at the ranch at which an SCE service representative, an SCE meter technician, and the CEO of Bee Sweet were present. During the site visit, the meter technician checked the meters to see if they were operating properly.

On January 15, 2005, Bee Sweet received a letter stating that SCE had found “no electrical revenue metering abnormalities or distribution circuit events that correlated with the on-peak kilowatt billing usage.” The letter went on to state that an SCE engineer had determined that the internal batteries in the Bee Sweet time clocks that keep time during voltage outages were inoperative, “ ... which could allow the pumps to operate during on-peak if not reset.” The letter further states that it is “[m]y recommendation ... to install Edison TMLC devices at both of the pumping locations to avoid further on-peak billing usage.” The installation of the TMLC devices will “prevent any on-peak usage in the future.” ... “[t]his is accomplished because the internal clock within the Edison electrical revenue meter controls the TMLC device and the operation of the motor contactor relay, preventing on peak usage.”

Bee Sweet’s expert testified that the internal batteries in each of the pumps’ Alex-Tronix time clocks were operational during the entire 2004 SOP period (July-October). The time clocks also confirm that there were a number of power surges or fluctuations at the pump sites. Between July 2004 and October 2004, the time clocks were checked on numerous occasions to verify that they were properly programmed and that the time set on the clocks matched the true time of the day. On several occasions, the screen on the clocks stated “Power Failure-Press Adjust.” This meant that there had been an SCE power failure, not a failure of the battery backup in the clock. When “Adjust” was pressed on the clock, the main screen returned to normal. Nevertheless, in an abundance of caution, in early 2005 Bee Sweet authorized SCE to install the TMLC units and paid the installation fee of \$5,077.50.

After the TMLC units were connected on SCE’s equipment, Bee Sweet’s electrician hooked up the TMLC units to Bee Sweet’s pumps pursuant to the SCE

diagram.² In order to hook up the wires, no access was necessary to the TMLC units. Bee Sweet believes there is no doubt that the wires at the junction boxes were correctly hooked up because the units would not have functioned at all if the hook-ups were not accurate and complete. As soon as the wires were hooked up, SCE tested the units to ensure that they were working properly. Notwithstanding, the August energy bill for July service showed on-peak charges.

In 2005, SCE's September billing and October billing showed on-peak usage. As with previous on-peak usage, the actual usage is minimal and would not have benefited the ranch because the water could not have pumped from well depth and be disbursed out to the trees during the brief usage. During August and September, Bee Sweet employees scrutinized the ranch to further verify that Bee Sweet was not using the pumps during the restricted on-peak time period. In addition, the time clocks were checked on numerous occasions to verify the programming was correct. On several occasions the clocks showed that SCE had a power failure in the area because the clocks would state "Power Failure – Press Adjust." If that message was showing on the clock, an employee would press Adjust and then verify that the clock itself had not lost power and that the time on the clock was accurate and the program for watering was still intact. The on-peak charges for 2005 were \$20,613.34; the total amount in dispute for 2004 and 2005 is \$43,399.30 (see Appendix A-2).

² SCE's policy is that SCE will not hook up the TMLC unit to the customer's equipment.

2. SCE's Evidence

An SCE meter technician on or about October 2004 inspected the SCE meters at the ranch in connection with the 2004 on-peak usage charges. He read the meters through a laptop computer using a multi-vendor program, which reads the meter, provides interval data, and indicates if there are any errors with the meters. He reviewed the interval data (which includes pulse data), and verified that on-peak usage occurred. He then read the meters through the laptop computer using a meter-specific program, which verified the date and time of the meter, the meter information, and the rate associated with the meter. He found the meters to be working properly. No error messages appeared on the meters.

In November 2004, an SCE representative reviewed the troubleman's log – a daily log that the troublemen use to record the investigation of customer complaints – related to Bee Sweet for the period May 2004 through October 2004 for any information that might indicate outages or other problems with SCE's equipment. SCE's investigation revealed no distribution circuit events that correlated with the on-peak usage in 2004. The ranch is located on SCE's Welch circuit out of the Vestal substation. The Welch circuit was reviewed for any SCE events that would correlate with the on-peak usage. The only circuit events found were two outages, on April 17 and December 27, 2004, that were associated with inclement weather. Neither outage correlates with the on-peak usage dates and times. The substation which serves the Welch circuit was also reviewed for interruptions or abnormalities. Nothing unusual was found. Finally, the daily logs for the Welch circuit that correspond with the on-peak usage dates in 2004 were reviewed for any abnormalities or reported problems. Again, nothing out of the ordinary was found.

An SCE engineer testified that there is evidence that suggests that Bee Sweet's system caused or contributed to the on-peak kilowatt usage in 2004. On or about late December 2004 or early January 2005, he conducted a site review at the ranch. During the inspection, he reviewed Bee Sweet's Alex-Tronix timing control devices which are used to keep date/time information and turn the pump motors off during on-peak billing time periods. The Alex-Tronix timing controller had a working cover panel. One timer had no cover at all, while the other timer's cover did not lock, thereby exposing the controls to the weather. Both timing controllers were found with the display blank, but when activated, the display indicated "Power Failure-Press Adjust." He contacted Alex-Tronix and spoke with its technical support expert who indicated that the models used by Bee Sweet had been out of production for several years. The Alex-Tronix expert also indicated, considering the display information and the problems encountered with on-peak usage, that the 10-year internal lithium battery, which is embedded in a solid state chip, likely was discharged and needed to be sent in for repairs. The discharged lithium battery (which keeps time during outages), if not repaired, can cause the Alex-Tronix timing controller to have no control outputs, erratic control outputs, or delayed control outputs, and thus cause the pumps to operate during on-peak billing periods.

An SCE manager reviewed the basic data upon which SCE billed Bee Sweet. He testified that the registered on-peak usage was not "minimal" as Bee Sweet claims. The pumps, in most instances, ran for at least an hour during the on-peak period. Additionally, a majority of the on-peak usage resulted when the pumps were running prior to 1:00 p.m., failed to stop at 1:00 p.m., and ran into the on-peak period. On four occasions – July 27, 2004, August 31, 2004, July 29, 2005, and August 5, 2005 – the pumps ran continuously from before or around

midnight and failed to stop at 1:00 p.m. On five occasions – August 6, 2004, August 13, 2004, October 1, 2004, July 13, 2005, and August 9, 2005 – the pumps ran for approximately two to five hours prior to 1:00 p.m., and again failed to stop at 1:00 p.m. Similarly, on August 2, 2004, one pump started at 4:57 p.m., just minutes before the on-peak period ended, and ran for approximately seven hours thereafter. A summary of SCE records showing Bee Sweet’s on-peak use is set forth in Appendix A.

In regard to power fluctuations caused by a “large industrial user” and whether it could affect Bee Sweet’s power quality and/or cause the on-peak billing, SCE’s investigation showed that there was a large industrial user 10 miles from Bee Sweet, but it is served by a different circuit and a different substation, and therefore has no bearing on the power quality of Bee Sweet’s service. He said that during his career as a meter technician, he has never seen fluctuating voltage cause a meter to register usage when, in fact, no electricity was actually used.

3. Discussion

We deny the relief requested because Bee Sweet has not sustained its burden of proof. The standard was succinctly reviewed in Sargent Fletcher Inc. v. Able Corp. (2003) 110 CA 4th 1658, 1667.

The terms burden of proof and burden of persuasion are synonymous. (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof, § 3, p. 157; 2 McCormick, Evidence, *supra*, Burden of Proof, § 336, p. 409.) Because the California usage is “burden of proof,” we use that term here.

“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.) To prevail, the party bearing the burden of

proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). (Evid. Code §§ 115, 520.) The burden of proof *does not shift* during trial – it remains with the party who originally bears it. (Evid. Code, § 500; *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346 [13 Cal.Rptr.2d 819]; *Smith v. Santa Rosa Police Dept.* (2002) 97 Cal.App.4th 546, 569 [119 Cal.Rptr.2d 72]; 2 McCormick, Evidence, *supra*, Burden of Proof, § 336, pp. 409-410.)

Under Pub. Util. Code § 1702, a complainant must prove an alleged violation of a specific requirement contained in a statute, rule, or order of the Commission, or a tariff which has been approved by the Commission. The standard of proof is by a preponderance of the evidence. (See, e.g., D.97-05-089, 72 CPUC2d 621, 633-634. “It is well settled that the standard of proof in Commission investigation proceedings is by a preponderance of the evidence.”)

In this case Bee Sweet has the burden to show that SCE was at fault and that that fault caused electricity to flow through Bee Sweet’s meter during on-peak time. We are not persuaded.

Bee Sweet’s witnesses’ testimony is mere speculation. They testified that a large industrial user near Bee Sweet might have caused line abnormalities. SCE testified the user was on a different circuit which had no bearing on Bee Sweet’s service. Bee Sweet asserts that line fluctuations may have caused the problem. SCE records showed that two minor outages occurred in 2004 long before and long after either could have affected Bee Sweet’s summer operations. Bee Sweet asserts that the TMLC equipment connected to SCE’s line in 2005 did not operate properly. Bee Sweet had on-peak problems in 2004, before the TMLC units were installed and had similar problems after they were installed. Finally, SCE disputed whether the Alex-Tronix time clocks were operating properly. Bee Sweet’s witnesses said they were; SCE’s witnesses said they were not. What is

clear is that the time clocks were attached in 2004 prior to installation of the TMLC units, yet on-peak usage occurred. There is no persuasive evidence that electricity flowing through the meters caused the Alex-Tronix time clocks to fail. Appendix A shows the time of on-peak use. On all days which show on-peak use starting at 1:00 p.m. the pumps were operating continuously before 1:00 p.m. and failed to turn off. In the vast majority of days in 2004 and 2005 in which the on-peak schedule was applicable, the pumps did turn off prior to the on-peak period. There is no persuasive evidence that the sporadic failure to turn off the pumps prior to the on-peak schedule was the fault of SCE.

4. Appeal of Presiding Officer's Decision

The presiding officer's decision (POD) was filed and served on the parties to this proceeding on September 28, 2006. Pursuant to Rule 14.4 of the Commission Rules of Practice and Procedure, Bee Sweet filed its timely appeal of the presiding officer's decision seeking reversal. SCE responded, seeking affirmation. Bee Sweet's appeal is without merit and is denied. The appeal merely restates arguments that have already been rejected and ignores Bee Sweet's failure to meet its burden of proof.

Bee Sweet argues that the POD failed to make findings of fact regarding whether power was actually used during the on-peak time period. Contrary to Bee Sweet's claim, the POD does make a finding of fact that the meters were tested and found to be working properly.³ Implicit in this finding is a

³ POD Finding of Fact 9 ("An SCE meter technician on or about October 2004 inspected the SCE meters at the ranch in connection with the 2004 on-peak usage charges. He verified that on-peak usage occurred. He found the meters to be working properly.").

determination that energy was used during the on-peak time periods as registered by the meters. Other findings regarding energy use include Finding of Fact 13 (“There is no persuasive evidence that the sporadic failure to turn off the pumps prior to the on-peak schedule was the fault of SCE.”); and Finding of Fact 14 (“There is no persuasive evidence that SCE caused Bee Sweet’s use of electricity during the on-peak periods.”).

Bee Sweet argues that since there was substantial testimony by numerous Bee Sweet witnesses, both in the submitted testimony and in person at the hearing, that the pumps did not run, the failure of the POD to address and make findings of fact on this point is error.

First, we observe that the POD makes findings on those points, as discussed above. Second, we agree with SCE’s comment that “Bee Sweet relies only on the statements of its witnesses that they sometimes visited the property to make sure the pumps were not running during on-peak times. However, these visits are undocumented, and the dates, times and durations of these visits are unknown. Certainly, this is not substantial evidence that the pumps never ran, at any time whatsoever, during the 4-hour on-peak time period (1:00 p.m. – 5:00 p.m.) during the summer months.” (SCE response, p. 7.)

Bee Sweet contends that the POD fails to discuss or make findings whether SCE has the right to allege and/or bill for on-peak usage when it represented that if Bee Sweet paid SCE for the installation of TMLC units at the meters the TMLC units would prevent on-peak usage. This contention is without merit.

It is axiomatic that the tariff rate must be collected and that the utility may not waive the charge. Bee Sweet’s claim, if granted, would violate Section 453(a) of the Public Utilities Code, which provides:

No public utility shall as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

SCE's customers are responsible for charges applicable to their service. To the extent Bee Sweet seeks to avoid the charges mandated by SCE's tariffs, it is seeking an unlawful preference not accorded to other customers.

More specifically, at the time SCE installed the TMLCs, SCE provided Bee Sweet with a manual that set forth Bee Sweet's obligations with respect to the TMLCs and controlling its own load. The manual describes the operation, installation, and limitations of the TMLC, including SCE's responsibilities and the customer's responsibilities. Among other things, it states that "[t]he Customer is responsible for all on-peak charges incurred for all loads not interrupted by the TMLC including, but not limited to, those loads which have been bypassed intentionally or accidentally as well as all other applicable charges."⁴ Accordingly, Bee Sweet's claim that SCE had a contractual obligation to prevent all on-peak usage by virtue of the installation of the TMLCs is contrary to the most reasonable interpretation of the evidence.

Finally, Bee Sweet complains that the POD was not issued on the date estimated in the Scoping Memo. The memo, dated in December 2005, estimated

⁴ SCE provided Bee Sweet with the Spectra Laser Systems manual (the "SLS Manual," which was provided to Bee Sweet in connection with the installation of the TMLCs) and the "Appendix A, Normal/Bypass Key Switch Key Receipt Forms" in which Bee Sweet acknowledged that it "read the above description and acknowledge receipt of the Bypass Key and the manufacturer's TMLC operation and installation manual.") (Exhibit 9.)

a POD by August 2006. An estimated time for a POD to issue is just that, it is neither a guarantee nor jurisdictional.

5. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Robert Barnett is the assigned Administrative Law Judge (ALJ) and the presiding officer in this proceeding.

Findings of Fact

1. Bee Sweet acquired Mar River ranch, a citrus ranch of 125 acres, in December 2003. The ranch had a water supply system, including wells, pumps, controllers, a reservoir, and electrical panels. The ranch has two wells each with its own pump, electrical panel, and time clock to control use.

2. The pumps are wired so that they cannot be operated by hand; they can only be operated through programmable time clocks. Both pumps were programmed to shut down during peak times.

3. During the time periods at issue Bee Sweet chose to take service under SCE's Schedule Time-of-Use – Agricultural and Pumping, Super Off-Peak-Demand Metered (TOU-PA-SOP-1). TOU-PA-SOP-1 benefits customers who can shift load to the super-off-peak time period.

4. SCE's August 2004 bill for the period July 3, 2004 to August 4, 2004, showed charges for on-peak usage; the demand charges were \$6,452.75.

5. The September 2004 bill showed total on-peak demand charges for August of \$10,292.57.

6. SCE's bill in October for the billing period 9/3/04 to 10/2/04, showed on-peak usage for that billing period with demand charges of \$6,040.64.

7. In early 2005 Bee Sweet authorized SCE to install the TMLC units and paid the installation fee of \$5,077.50.

8. After the TMLC units were connected on SCE's equipment, Bee Sweet's electrician hooked up the TMLC units to Bee Sweet's pumps.

9. An SCE meter technician on or about October 2004 inspected the SCE meters at the ranch in connection with the 2004 on-peak usage charges. He verified that on-peak usage occurred. He found the meters to be working properly.

10. SCE's investigation revealed no distribution circuit events that correlated with the on-peak usage in 2004. The only circuit events found were two outages on April 17 and December 27, 2004, that were associated with inclement weather. Neither outage correlates with the on-peak usage dates and times. The substation which serves the Welch circuit was also reviewed for interruptions or abnormalities. Nothing unusual was found.

11. Bee Sweet's pumps, when operating in the on-peak period, usually ran for at least an hour during the on-peak period. Additionally, a majority of the on-peak usage resulted when the pumps were running prior to 1:00 p.m., failed to stop at 1:00 p.m., and ran into the on-peak period. On four occasions – July 27, 2004, August 31, 2004, July 29, 2005, and August 5, 2005 – the pumps ran continuously from before or around midnight and failed to stop at 1:00 p.m. On five occasions – August 6, 2004, August 13, 2004, October 1, 2004, July 13, 2005, and August 9, 2005 – the pumps ran for approximately two to five hours prior to 1:00 p.m., and again failed to stop at 1:00 p.m. Similarly, on August 2, 2004, one pump started at 4:57 p.m., just minutes before the on-peak period ended, and ran for approximately seven hours thereafter.

12. There is no persuasive evidence that electricity flowing through the meters caused the Alex-Tronix time clocks to fail.

13. There is no persuasive evidence that the sporadic failure to turn off the pumps prior to the on-peak schedule was the fault of SCE.

14. There is no persuasive evidence that SCE caused Bee Sweet's use of electricity during the on-peak periods.

Conclusions of Law

1. Complainant has failed to sustain its burden of proof.
2. The relief request should be denied.

O R D E R

IT IS ORDERED that:

1. The relief requested in the complaint is denied.
2. Case 05-11-004 is closed.

This order is effective today.

Dated January 25, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners