ALJ/BDP/jc

Decision 88 03 024 MAR 09 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Carmel Mountain Ranch, Inc. Complainant, vs. San Diego Gas & Electric Company (U-0902-E), Defendant.	Case 87-03-033 (Filed March 18, 1987)

O P I N I O N

Summary

Carmel Mountain Ranch, Inc. (complainant) requests that this Commission: (a) order San Diego Gas & Electric Company (SDG&E) to cease and desist from charging an alleged unreasonable price to re-route its transmission right-of-way; (2) order SDG&E to accept the estimate proposed by complainant or accept the estimate of a neutral, third-party expert; and (3) take all other actions it may deem appropriate.

The Commission grants SDG&E's motion to dismiss for lack of jurisdiction.

Procedural Summary

Complainant's initial filing was made on March 18, 1987. SDG&E filed its answer on April 24, 1987. On May 7, 1987 SDG&E filed a motion to dismiss for lack of jurisdiction. On June 9, 1987 complainant filed a response. On June 30, 1987 SDG&E filed supplemental argument and the question of jurisdiction was submitted for decision.

Facts

Complainant is a California corporation which owns a large piece of property known as the Carmel Mountain Ranch

(property). SDG&E, pursuant to negotiations with a previous owner of the property, was granted a 150-foot wide transmission right-of-way across the property. The transmission right-of-way is currently empty, and SDG&E has no immediate plans to use it. Complainant, in light of plans to develop the property, sought to have the right-of-way relocated. Complainant initiated discussions with SDG&E about April, 1984. After several meetings over a period of several months, SDG&E and complainant agreed upon a new location for the right-of-way, and all associated engineering problems were resolved to the satisfaction of both parties. The new route entailed an additional 3,090 feet of future electric line through the property.

In July 1986, SDG&E informed complainant that the additional cost of re-routing the right-of-way would be $830,000. Because this estimate seemed high, complainant asked Fluor Engineers, Inc. (Fluor), a nationally respected engineering firm, for its opinion of SDG&E's estimate. Fluor concluded that the estimate was overstated. Complainant, based on Fluor's advice, asked SDG&E to reconsider its estimate.

In August 1986, SDG&E informed complainant that its original estimate, due to an error in arithmetic, should have been $661,000. Complainant, believing that this new estimate still greatly exceeded the true cost of the additional work, retained Fluor to conduct a detailed cost analysis. Fluor's study estimated the additional cost of re-routing the right-of-way to be $399,000. SDG&E rejected Fluor's estimate and insisted that the cost was $661,000.

SDG&E by letter dated November 21, 1986 informed complainant that it must pay the $661,000 within 30 days or the project would be canceled. Further, SDG&E stated that if the project were canceled and complainant subsequently sought to revive the project, the price would rise by $1.4 million to approximately $2.1 million. SDG&E's explanation for the change in price is:

> "SDG&E management has recently approved a policy that affects projects of this type. From now on, when a transmission line or right of way for a future line is requested to be relocated to accommodate a developer, and that new line will be longer than it presently exists, the developer will pay for the increased operations, maintenance, and electrical line losses over the 35 year life expectancy of the additional line. The value of these additional charges is estimated to be in the neighborhood of $1.4 million for this project. However, since this policy was put into effect after negotiations had begun with Carmel Mountain Ranch, we have not included these values in the $661,000.00 cost." (SDG&E letter dated November 21, 1986.)

On April 21, 1987, complainant's attorney, along with its engineers and consultants, went to SDG&E's offices for settlement discussions. According to complainant, SDG&E not only refused to provide the detailed information underlying its $661,000 estimate, but SDG&E stated that it would henceforth seek $2.29 million for the relocation. The latest increase, SDG&E explained, reflected a new tax component.

Complainant's Position

Complainant states that our system of law has accorded special rights to monopoly utilities such as SDG&E. In particular, utilities (1) have the right to operate as a monopoly, (2) have the right to an opportunity to recover a reasonable return on their investments and (3) have the right of eminent domain, the authority to force landowners to transfer their property to the utilities.

In return for these and other privileges, complainant argues that utilities are obligated, among other things, to conduct their business affairs in a reasonable manner. (Gay Law Students Association v Pacific Telephone & Telegraph Company (1979) 24 Cal. 3d 458.)

Complainant submits that the Court's rationale for its decision in Gay Law Students provides clear support for the

proposition that utilities, by reason of their privileged status, must conduct themselves in a manner befitting their quasi-governmental position. In particular, utilities have an obligation to be reasonable and not to exploit the power which has been entrusted to them by the public. (Id. at 482.)

Complainant states that the Court in Gay Law Students relied upon what it described as the seminal decision of James v Marinship Corp. (1944) 24 Cal. 2d 721 which sets out the common law obligations of monopoly utilities.[1] The Marinship court held that:

> "...the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty." (Id. at 732.) (Emphasis added.)

Complainant argues that in addition to the common law and case law which establishes that utilities must conduct utility-related activities in a reasonable manner, statutory law reaffirms the higher duty imposed upon utilities. Public Utilities (PU) Code § 451, in pertinent part, reads as follows:

> "...all rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable." (Emphasis added.)

Complainant contends that while SDG&E will argue that PU Code § 451 only applies to rates and charges for tariffed utility services, the clear language of the statute supports a more expansive definition of a utility's obligation. Complainant points out that SDG&E undoubtedly has rules and procedures which govern its response to requests to relocate transmission line corridors. Complainant believes that it can establish that the impact upon

1 None of the parties in Marinship were utilities.

ratepayers' charges and service is one of the principal determinants of SDG&E's rules regarding relocations. As such, these relocation rules and their application most certainly affect charges or service to ratepayers. Consequently, PU Code § 451 requires that these rules be just and reasonable.

Position of SDG&E

SDG&E notes that complainant is a private property developer who is in the business of acquiring and developing real estate in residential and commercial ventures for profit. Complainant's intent in developing the property is to build residences for sale to the general public at a profit. According to SDG&E, the sole motivation for complainant's request to SDG&E to relocate the right-of-way is to enable it to build additional residences to increase its profits. There is no issue of safety, rate design or relief, the furnishing of public utility services, or benefit to the general public good involved.

SDG&E states that it acquired this right-of-way in 1959. The right-of-way was of record in the San Diego County Recorder's Office when complainant acquired the property from its predecessor in interest. Consequently, complainant was notified that this encumbrance existed against the property at the time of purchase.

SDG&E further states that as an accommodation to complainant and in the spirit of being a good neighbor, SDG&E told complainant that it would consider giving up the existing right-of-way if complainant would pay the differential in future costs between the existing and proposed rights-of-way as calculated by SDG&E. SDG&E's purpose for this condition was to protect the ratepayers from bearing the burden of the additional costs when facilities were installed.

SDG&E points out that there is no allegation that SDG&E has treated complainant differently from any other developer who has previously requested the relocation of one of SDG&E's rights-of-way during the course of a development project. Nor is there

any allegation that SDG&E used estimating procedures or quoted costs which varied from procedures or costs it has used in similar situations for similarly situated developers. Also, there is no allegation that SDG&E has any obligation whatsoever, contractually or by case or statutory law or regulation, to acquiesce to complainant's request to relocate.

SDG&E argues that the Commission has no jurisdiction over complainant's alleged cause of action under either PU Code § 1702 or the PU Commission Rule 9 because the acts set forth in the complaint do not demonstrate that SDG&E has committed any violation of any provision of law or any order or rule of the Commission. According to SDG&E, this fact is evident for the following reasons:

1. The alleged judicial "mandate requiring utilities to conduct themselves in a reasonable manner" as applied to the facts of this case does not exist. The California Supreme Court's Gay Law Students opinion cited by complainant as the embodiment of the alleged "mandate" violated by SDG&E has no bearing whatsoever on the reasonableness of costs charged by a utility to a private developer for relocation of a utility's rights-of-way. The Gay Law Students case addresses the discriminatory practices of utilities in their employment activities. Other than the nonexistent Gay Law Students "mandate," complainant points to no provision of law or any order or rule of the Commission regulating the relocation of utility private property rights, and any charges associated therewith, which has been violated by SDG&E.

2. The complainant simply addresses SDG&E's and complainant's conflicting interests in real property and their respective contractual rights relating to those interests. The Commission has consistently held that controversies related to such issues are not within its jurisdiction and are properly submitted to a court of a law.

3. SDG&E has not agreed to relocate the right-of-way. Any order the Commission might fashion in this case on the issue of costs which are reasonably chargeable for a relocation would, of legal necessity, have to be predicated upon a pre-existing obligation, either contractual or legal, to relocate. Otherwise, the issue as to costs chargeable for relocation is not ripe for litigation. Complainant alleges no provision of law or order or rule of the Commission requiring SDG&E to give up its private property right at complainant's request.

SDG&E agrees that the Gay Law Students case (and PU Code § 453) instruct public utilities that discrimination, in the conduct of the utility business, in virtually any form or against any type of individual, is prohibited. However, SDG&E points out that complainant is not complaining about discriminatory conduct on the part of SDG&E.

In any event, SDG&E states that complainant has not been subjected to discriminatory conduct in its review and analysis of complainant's request for relocation of the right-of-way. According to SDG&E, the gravamen of the complainant is SDG&E's "resort to unreasonable tactics" and its failure to conduct itself "in a reasonable manner." SDG&E submits that this activity, assuming it is true, neither violates any rule of law addressed in the Gay Law Students case nor PU Code § 453.

With regard to the Marinship rationale, which was cited in Gay Law Students, SDG&E points out that two appellate cases have reviewed Marinship and the Marinship doctrine has not been expanded to the extent complainant argues. (Pasillas v Agricultural Labor Relations Board (1984) 156 Cal. App. 3d 312, 349, and Leach v Drummond Medical Group, Inc. (1983) 144 Cal. App. 3d 362, 373.)

Turning to its argument that the matters addressed in the complaint concern the property and contractual rights of the

parties, and that these matters properly belong in the courts, SDG&E notes that the California Supreme Court has stated:

> "...with the rights of an intending purchaser the Commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the [Public Utilities] Commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public. If the owner does not desire to sell, the Commission cannot compel him to do so. If, having contracted to sell, he refuses to comply with his contract, the Commission is not empowered to determine that he should carry out his bargain." (Emphasis added.) (Hanlon v Eshleman (1915) 169 Cal. 200, 203.)

SDG&E further notes that even assuming that SDG&E has some contractual obligation to complainant to relocate, the enforcement of that contract, or of any of its terms, is an issue for the courts.

> "The California Supreme Court has clearly stated that the 'Commission is not a body charged with the enforcement of private contracts. [citation.] Its function, like that of the Interstate Commerce Commission, is to regulate public utilities and compel the enforcement of their duties to the public...not to compel them to carry out their contract obligations to individuals.'" (Atchison, T. & S.F. Ry. Co. v Railroad Commission, 173 Cal. 577, 582.)

Discussion

The issues to be considered in the following discussion are raised by SDG&E's motion to dismiss for lack of jurisdiction. SDG&E contends that this matter pertains to a proposed contract related to a relocation of private property rights and the courts are the proper tribunal for such litigation.

In any event, SDG&E states that complainant has not been subjected to discriminatory conduct.

Complainant's position is that this matter is not about contractual rights nor about respective rights of private property owners. Rather, the complaint is about unreasonable conduct and abuse of power by a publicly regulated utility, an entity which, by law, is held to a higher standard of duty than private parties.

In deciding this case our first task is to characterize the issues properly. Complainant seeks an order requiring SDG&E to exchange its prerecorded interest in a specific right-of-way over complainant's property for a new, more lengthy right-of-way over the same property. Moreover, complainant asks the Commission to determine the reasonable amount of monetary compensation that should flow from it to SDG&E as a part of the exchange transaction. In summary, complainant seeks an order compelling SDG&E to give up its interest in real property (the existing right-of-way) in exchange for a different right-of-way and an amount of cash to be determined by the Commission.

We believe complainant's characterization of the complaint would only be useful if the Commission determines the underlying jurisdictional issue in complainant's favor. That is, if the Commission has power to issue the orders complainant seeks, then SDG&E's alleged unreasonable conduct and abuse of power might be material to a disposition of the complaint. On the other hand, if the Commission does not have the power to issue such orders, then a factual inquiry into SDG&E's alleged unreasonable conduct or abuse of power would be fruitless.

It follows that the issues in this case are properly framed as follows:

1. Does the Commission have the power to compel a public utility to convey an interest in real property to another person or entity or to determine the price or terms of such a conveyance?

2. Can Marinship or PU Code §§ 453 or 451 be construed to confer a cause of action on complainant?

Issue No. 1 must be answered in the negative. We have found no case or statute that confers on the Commission the power to compel a public utility to sell and convey an interest in real property to another person or entity or to determine the price or terms of such a sale. Nor has complainant cited us to any decision or order in which the Commission has asserted such powers. We do not know of any judicial decisions or of any of our own decisions or orders that would support the exercise of such powers. The only case with language directly on point, Hanlon, supra, states explicitly that the Commission cannot compel an owner to sell property.

In Hanlon, Durfy, the owner of a water utility, contracted to sell the water system to Hanlon, subject to a condition that the permission of the Commission must be obtained before the transaction could be consummated. In derogation of his contract Durfy sold a portion of the property to the City of Los Angeles. Hanlon sought to enforce his contract by filing a petition with the Commission seeking an order authorizing the sale of the water system by Durfy and its purchase by Hanlon. Durfy also filed two petitions asking, first, that the Commission decide which transfer was in the public interest and second, for approval of the transfer to the City. According to the court, it is the property owner's submission of the question whether a particular transaction should be authorized that gives the Commission jurisdiction to authorize the sale. If the question is submitted by the buyer or if the question is submitted by the owner, who later withdraws, then the Commission lacks authority to authorize or compel the sale. Therefore, the Commission properly dismissed both Hanlon's and Durfy's petitions.

In Hanlon the court held that the Commission had no power to compel sale where a valid contract existed. If the Commission

lacks that power, it follows inexorably that it lacks the power to compel a sale of real property where, as here, no contract exists.

By necessary implication the Commission may not determine the price or terms of such a sale; for, if the owner did not agree to the price or terms set by the Commission, the Commission could not compel the owner to sell on those terms. Thus any attempt by the Commission to determine the price or terms would be empty, without the power to compel the owner to accept them.

What complainant asks us to do is to confer upon it the power of eminent domain. That request, if granted by the Commission, would confer upon a private corporation the power to seize the property of a public utility. It would further set the Commission up as the sole forum to hear such causes, to determine the form and amount of just compensation that should be paid by the private corporation to the public utility, and to order that the terms of the transaction, as found reasonable by the Commission, be carried out by the public utility.

The Legislature has granted to certain government agencies, such as cities, counties, and special districts, the power of eminent domain. The Legislature has also granted to certain classes of public utilities the power to condemn property for their facilities. (Public Utilities Code, §§ 610-624.) However, we know of no statute conferring upon private persons or corporations either: (1) the power to condemn the private property of others for their private gain; or, (2) the power to condemn property owned by a public utility and devoted to or held for a public use for their private gain. Moreover, we cannot conceive of an existing statute that could be construed to allow the Commission to create in private persons or corporations such powers or one that could be interpreted to grant us the necessary authority to administer such a program. Accordingly, we conclude that we do not have the constitutional or statutory authority to issue the

decisions or orders sought by complainant regarding the proposed property transaction described above.

We turn now to Issue No. 2 and to complainant's argument that the rationale of Marinship is applicable to the facts of this case. We note that the court in Marinship relied upon Wilson v Newspaper & Mail Deliveries' Union (1938) 123 N.J. Eq. 347 (197 A.720), quoting from Wilson, the court in Marinship noted:

> "...the union has created a monopoly of employment, and that a 'monopoly raises duties which may be enforced against the possessors of the monopoly. This has been recognized from earliest times. The rule that one who pursued a common calling was obliged to serve all comers on reasonable terms, seems to have been based on the fact that innkeepers, carriers, farriers, and the like, were few, and each had a virtual monopoly in his neighborhood. 17 Harv. Law R. 156. A monopoly is under a common-law duty to charge only reasonable rates. . . . The question presented in the instant case is not one of prices or of serving the public but one of employment. . . . However, the principle is the same; the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of duty.'" (Marinship at 732.)

Further, as noted by SDG&E, two appellate courts have reviewed Marinship. In Pasillas v Agricultural Labor Relations Board (1984) 156 Cal. App. 3d 312, 349, the Court stated:

> "The Marinship strand of the Gay Law Students decision also imposed no further obligation on the public utility then to refrain from arbitrary discrimination."

In of Leach v Drummond Medical Group, Inc. (1983) 144 Cal. App. 3d 362, 373, the Court stated:

> "A medical corporation which provides the only medical services in a given geographical area appears to be precluded from discrimination in providing services under the rationale of the Marinship case. However, we agree with

> defendants' contention that "[a]ppellants [plaintiffs] have not alleged sufficient facts in their complaint to show a monopoly exists in order to impose such a duty upon the respondents [defendants]." (Id. at 373.)

Addressing the last sentence in the prior quotation from Marinship, that "the nature of the monopoly determines the nature of the duty," there can be no dispute that the "nature of the monopoly" of SDG&E is the sale of electricity and gas to its customers. But the facts in this case involve the sale of an interest in real property by the utility purportedly, "in the interest of being a good neighbor." Such sales are an occasional activity, are incidental to the main business of the utility, and are not offered as a service to its customers. Accordingly, we believe that the subject of the complaint before us, is not one that comes under the umbrella of the Marinship rule, whereby SDG&E owes a duty to complainant.

Further, SDG&E's monopoly is not the business of selling interests in real property. Therefore, since no monopoly activity is involved, the common law rule, that "a monopoly raises duties which may be enforced against the possessors of the monopoly" (Marinship at 732), does not apply. As noted in Leach (at 373), a monopoly must be established before the Marinship doctrine may be applied. Complainant has failed to establish such a monopoly.

Lastly, with regard to Marinship, we do not believe that the doctrine can be read for the broad proposition being urged here - that a private party may compel a utility to give up property rights owned by the utility for a price that is not acceptable to the utility. We note that the Marinship rationale was initially applied by the Courts to arbitrary discrimination by a monopoly affecting an "individual's fundamental right to work." Later, it was expanded in Leach to address "monopoly control over medical care." We are not persuaded that the Marinship rationale should be further expanded to cover situations that do not involve an

individual's fundamental rights or needs. And we do not include private monetary gain in this category.

We now turn to complainant's argument that PU Code § 451 applies to more than tariffed utility services. The statute reads as follows:

> "451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
>
> "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and conveniences of its patrons, employees, and the public.
>
> "All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable." (Former Sec. 13. Amended 1977, Ch. 700.)

We interpret the above language to mean that a public utility must be reasonable in its charges for its products, commodities or services. The products, commodities, and services are those related to the utility business, i.e., SDG&E's gas and electricity service to its customers. We are not persuaded that PU Code § 451 applies to the facts before us.

With regard to complainant's argument that PU Code § 451 applies to this dispute because there is an effect on rates flowing from the price SDG&E charges for such relocations, we conclude that any effect on rates is remote at best. To pursue complainant's line of argument further, the Commission could, for example, have jurisdiction over a dispute between SDG&E and a purveyor of, say, nuts and bolts. The argument for jurisdiction would be that the

price for these items has an effect on rates. Clearly, the Commission does not decide such matters.

In like manner we conclude that SDG&E has not acted in a discriminatory manner vis-a-vis complainant and thus has not violated PU Code § 453. We interpret § 453 to apply to a utility's conduct vis-a-vis its customers; and complainant is not a customer. However, in any event SDG&E has not discriminated against complainant in any way that is justiciable before this Commission.[2]

In summary, we conclude that this complaint concerns a proposed contract between SDG&E and a private developer for the relocation of an interest in real property held by SDG&E. SDG&E's status as a regulated monopoly has no bearing on whether it should, or will, relocate its right-of-way. We have no jurisdiction to order SDG&E to relocate its right-of-way, much less dictate the terms under which such a relocation should take place.

Findings of Fact

1. The complaint concerns a proposed contract between SDG&E and complainant for the relocation of an interest in real property held by SDG&E.

2. There is no allegation of discriminatory treatment by SDG&E.

3. There are no existing utility facilities to be relocated.

4. There are no service or safety matters at issue.

5. The relocation is purely for the private gain of complainant.

---

2 SDG&E did offer a contract to complainant at a much lower price than the price it would charge today. Complainant refused this offer. These facts, however, can hardly be claimed to support a finding of discriminatory conduct.

6. Complainant requests that the Commission order SDG&E to relocate an interest in real property owned by SDG&E, and to dictate the terms of the relocation.

7. The complainant has failed to state a cause of action under PU Code §§ 451 or 453.

8. The complainant has failed to state a cause of action under the Marinship doctrine.

Conclusion of Law

The Commission does not have jurisdiction to compel SDG&E to relocate an interest in real property owned by SDG&E, or to dictate the terms of such a relocation.

O R D E R

IT IS ORDERED that the complaint is dismissed for lack of jurisdiction.

This order becomes effective 30 days from today.

Dated MAR 09 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director