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Decision 88-09-022 September 14, 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY, A Corporation, FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO EXERCISE THE RIGHTS, PRIVILEGES, AND FRANCHISE GRANTED TO APPLICANT BY ORDINANCE NO. 543 OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA, TO CONSTRUCT, OPERATE, ALTER, MAINTAIN, AND USE AN ELECTRIC DISTRIBUTION AND TRANSMISSION SYSTEM WITHIN SAID COUNTY. (U-338-E)	Application 30208 (Petition for Modification) Filed April 25, 1988)
And Related Matter.	Application 83-10-20

O P I N I O N

Motion to Dismiss Petition for Modification

Summary

The Commission concludes that an affected party has the right to petition the Commission to exercise its authority under Public Utilities (PU) Code § 1708 to reconsider one of its prior decisions even though the petitioner is not a utility and the petition relates to a Certificate of Public Convenience and Necessity (CPC&N) proceeding in which the petitioner had not previously participated. However, the Commission declines to exercise its discretion to modify its prior decision since the result would be circumvention of PU Code § 1001, which requires that, before any utility can expand into the service territory of a like utility, the utility wishing to expand must file an application with the Commission for a CPC&N requesting authorization to undertake the expansion.

Facts

On April 25, 1988, Coto de Caza, Ltd. (petitioner), a California Limited Partnership in the business of real estate development petitioned the Commission pursuant to Rule 43 of the Commission's Rules of Practice and Procedure for an Order modifying Decision (D.) 44086, dated April 26, 1950, one of a series of decisions, which established the boundary line between the electric service areas of the Southern California Edison Company (Edison) and the San Diego Gas & Electric Company (SDG&E) in the County of Orange, California.

Petitioner owns the Coto de Caza tract, consisting of approximately 4,929 acres, in southeastern Orange County, California. The boundary separating the electric service territories of Edison and SDG&E passes through the middle of the Coto de Caza tract, such that roughly one-half of the development is within each utility's service territory.

The modification requested is an adjustment of a segment of this boundary line which would transfer approximately 2,700 acres of land owned by petitioner from SDG&E's service territory to Edison's service territory. The effect would be that approximately 4,000 future residential units would be transferred from SDG&E's service territory to Edison's. The land, at this time, is essentially vacant.

Historically, the boundary between the Edison and SDG&E service territories in Orange County has been fixed by the Commission upon the application of Edison, joined, on most occasions, by SDG&E. On June, 28, 1949, the Commission issued Decision (D.) 43041 in which it granted Edison's application for "[a] certificate that public convenience and necessity require the exercise by it [Edison] of the right, privilege and franchise granted to it by Ordinance No. 543, adopted November 16, 1948, by the Board of Supervisors of the County of Orange, ..." This CPC&N permitted Edison to serve customers within a prescribed area in

Orange County. In a supplemental application dated January 17, 1950, Edison requested that D.43041 be amended to clarify the boundary separating its service territory from that of SDG&E. In D.44086 the Commission specifically delineated, by legal description per Edison's request, the boundary separating the utilities' service territories. On six occasions subsequent to D.43041 Edison, as applicant, and SDG&E, as an interested party, jointly petitioned and received Commission authorization to modify D.44086 for the purpose of adjusting the legal description of their common service boundary. The most recent realignment occurred in D.83-12-012 (December 7, 1983) which was a modification jointly requested to permit the boundary to coincide with certain newly developed roads, parkways, and tract boundaries.

No realignment of the SDG&E/Edison electric service boundary, as originally determined in D.44086, has occurred except on the application of Edison either independently or jointly with SDG&E. Petitioner was not a party to those applications.

Both Edison and SDG&E are currently providing service to petitioner in their respective service areas within the Coto de Caza tract.

The Motion

On May 3, 1988, SDG&E filed a Motion to Dismiss the Petition. Edison filed its response on June 1 and petitioner filed its response on June 15, 1988. SDG&E filed its reply to the responses of Edison and petitioner on June 24, 1988. On July 15 and 20, 1988 respectively, Edison and petitioner filed separate Motions to Strike portions of SDG&E's reply. SDG&E responded. The Motion to Dismiss the Petition was then submitted for decision.

The question as presented by SDG&E is: Can a utility customer obtain authorization from the Commission to realign the service boundary between competing utilities such that a portion of one utility's service territory is transferred to the other utility? According to SDG&E, the PU Code (§§ 1001 through 1005),

Commission decisions, and California Supreme Court Case law, Edison must obtain a CPC&N before it can extend electric service into SDG&E's certificated service territory. And Edison can be granted a CPC&N only upon its own application.

Position of Edison

Edison argues that by enacting PU Code § 1708, the California Legislature vested the Commission with broad powers to rescind, alter, or amend any of its prior decisions.

Edison further argues that Commission authority to change past decisions encompasses CPC&N proceedings. Edison notes that an argument that PU Code § 1708 does not apply to a CPC&N proceeding was unsuccessfully made by Pacific Gas and Electric Company (PG&E) when faced by an intervenor's Petition to Modify its Diablo Canyon CPC&N. Although ultimately deciding that the petitioners had not met their burden of persuasion to justify reconsideration of PG&E's CPC&N, the Commission, in D.92058 held that the authority vested in it under PU Code § 1708 applied with equal force to CPC&N proceedings:

> ". . . Section 1708 gives us the authority to reopen past proceedings, including those which have resulted in the granting of a certificate under Section 1001." (4 Cal. PUC 2d 139, 149.)

Also, Edison notes that in the complaint of Winton Manor Mutual Water Co., et al. v Winton Water Co., Inc., D.89708, the Commission determined the applicability of PU Code § 1708 in the context of a certification proceeding to determine service territory boundaries. Here again, the Commission found that jurisdiction did lie:

> "We recognize that Section 1708 of the California Public Utilities Code expressly confers continuing jurisdiction upon the Commission, upon notice and after opportunity to be heard, to alter, amend, or rescind a prior order and decision. We have repeatedly held that under such statute we have continuing authority to change or alter the certificated area of a public utility as an exercise of our

> legislative or quasi-legislative authority. Such jurisdiction and authority has been confirmed by the California Supreme Court. Sale v. Railroad Commission (1940) 15 Cal. 2d 612, 96 P.2d 125." (84-Cal. PUC 645, 651.)

According to Edison, as these and other decisions make clear, the Commission has the authority to reconsider any of its past decisions at any time. That authority encompasses CPC&N proceedings, including proceedings to determine the service territory boundary of a public utility.

Edison next addresses the question: Does any affected party have standing to petition the Commission to exercise its jurisdiction. In support of its position that both the Commission and California courts have long recognized that any affected party has the right to petition the Commission to exercise this authority, Edison cites D.60940, which involved a complaint by two Santa Clara County residents against the San Jose Water Works wherein the Commission stated that the nonutility complainants could seek relief by petitioning the Commission under PU Code § 1708:

> "Should complainants seek to have any decisions and orders of this Commission modified they may file a petition for such relief pursuant to Section 1708 of the Public Utilities Code." (58 Cal. PUC 204, 206.)

As further support for this rationale, Edison cites D.71293, dated September 20, 1966 in Case 8423; Complaint of Harold W. Mathewson v Great Western Water Service, 66 CPUC 224.

Also, as support for the principle that a nonutility may petition the Commission for modification of one of its previous decisions, Edison points to the 1966 decision of the California Court of Appeal in Pellandini v Pacific Limestone Products, Inc. (1966) 245 Cal. App. 2d 774, 54 Cal. Rptr. 290.

Edison argues that this right of a nonutility to petition the Commission pursuant to PU Code § 1708 also exists in the

context of a CPC&N proceeding. According to Edison, D.92058, supra, is illustrative of this principle. In that case, the Center For Law in the Public Interest filed a petition with the Commission to reopen PG&E's Diablo Canyon CPC&N proceedings although those proceedings had concluded and a decision had been rendered over ten years prior to the petition. The Commission held that it had jurisdiction to entertain the petition even though it had been filed, not by the subject utility, but by an intervenor group.

Next, Edison notes that, significantly, in the application of Gadsden Corporation, D.80108, the Commission recognized the right of a developer to file an application seeking a finding and order that its property was not within the service area of a utility.

Therefore, according to Edison, the above cases demonstrate that an affected party has the right to petition the Commission to exercise its authority under PU Code § 1708 to reconsider one of its prior decisions even though the petitioner is not a utility and the petition relates to a CPC&N proceeding in which the petitioner had not previously participated. Accordingly, Edison submits, that petitioner Coto de Caza has standing to file its petition in this proceeding and the Commission has both the jurisdiction and the obligation to decide it on the merits.

Edison next addresses SDG&E's argument that only the utility that is to extend its service can request a boundary modification to accomplish that result and any such modification request must be reviewed in a CPC&N proceeding.

Edison contends that the Commission has recognized that the full construction CPC&N information requirements of PU Code §§ 1001 through 1005 are both not required and not relevant to address service territory boundary realignment. According to Edison, this was made clear in the holding in D.86-01-025, which dealt with a complaint by Southern California Gas Company (SoCalGas) asking for an order that PG&E cease and desist from

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serving the enhanced oil recovery (EOR) customers in Kern County oil fields. Edison, in its Motion to Strike, notes that in resisting PG&E's Petition For Modification of D.62681, SoCalGas advanced the argument that reconsideration of service territory boundaries required a full CPC&N proceeding and the Commission disagreed:

> "We concur with PG&E and staff that the development in Kern County of the largest new market for natural gas in the United States constitutes a changed circumstance warranting a reexamination of the 1961 service territory agreement. The record in this case provides ample justification for our finding that certain service territory modifications are required in order to serve the EOR market in a timely fashion and in a manner that is equitable for both utilities.
>
> "In light of this conclusion, SoCal's argument regarding the necessity of a certificate of public convenience and necessity need not be addressed. In any event, we note that the 1962 Commission orders granting both utilities certificates of public convenience and necessity to serve Kern County incorporate and are conditioned upon the terms of the 1961 service territory agreement, which we find permit the modification we adopt herein." (D.86-05-008, dated May 7, 1986, mimeo. appendix, p. 18.)

Edison argues that like the agreement between PG&E and SoCalGas which was the subject of D.86-05-008, the Orange County boundaries between Edison and SDG&E were reached by an agreement between the utilities, which was then ratified by the Commission. Therefore, Edison submits that the mere fact that the issue presented by the petition does not arise in the context of a CPC&N proceeding under PU Code § 1001 is no bar to the Commission's lawful exercise of its authority to reconsider the Edison/SDG&E service territory boundary as it affects the Coto de Caza development.

Position of Coto de Caza (Petitioner)

Petitioner joins Edison in urging the Commission to deny SDG&E's motion.

In addition to the cases cited by Edison, petitioner argues that the Commission has specifically recognized the right of customers to petition the Commission for extension of service by utilities to contiguous territory defined by logical natural boundaries outside the borders of the utilities' service territories. (Radisavljevic, D.90262.) According to petitioner this is just the type of adjustment it is seeking here.

Petitioner argues that while in the Radisavljevic case the extension involved territory which was not within the certificated service area of a serving utility, it is still applicable to the present case. Petitioner points out that the southern portion of the Coto de Caza Development, which is the area to be transferred, is essentially unserved territory, and SDG&E's lines do not reach to the next portion of the development to be served. For these reasons alone, petitioner argues that SDG&E's contention that the Commission is prohibited from considering the merits of a customer's request in this context is incorrect and must be rejected.

Turning to the Orange County boundaries between Edison and SDG&E, petitioner points out that it is undisputed that since establishing the boundary at issue in D.44086, the Commission has, on several occasions, authorized modifications to this boundary. The most recent realignment occurred in D.83-12-012 (December 7, 1983) which was a modification jointly requested by Edison and SDG&E to permit the boundary to coincide with certain newly-developed roads, parkways, and tract boundaries. Petitioner contends that this is precisely the type of adjustment it is seeking. Petitioner argues that nothing in any of the previous boundary realignment decisions in this proceeding indicates that such adjustments could be made only at the behest of the utilities, or specifies any particular manner in which the request for

adjustment had to originate. Accordingly, petitioner contends that it is appropriate that the Commission consider the merits of its petition, and deny SDG&E's motion for summary rejection.

Further, petitioner submits that the Commission has addressed specifically the concerns raised by the petition in another context. In Alisal Water Company, 65 CPUC 197 (1966), the California water Company and Alisal operated water systems with adjoining service areas. The respective companies filed service territory maps of the utilities. Each embraced substantial undeveloped or uninhabited areas somewhat beyond the existing facilities of each. A developer proposed to build upon and sell lots on a tract of land which straddled the common boundary line shown on the respective maps of the utilities, like the Coto de Caza tract in the present case. In Alisal, according to petitioner, the Commission considered the same factors set forth in Coto de Caza's petition in selecting which utility would serve the area. Therefore, petitioner argues that it is reasonable that the Commission undertake the same type of evaluation when the question of designating a utility is brought before it by a potential customer or developer. Petitioner contends that nothing in the Alisal decision indicates that the proceeding necessarily had to be initiated by one of the utilities.

Petitioner argues that, as pointed out by Edison, the provisions of PU Code § 1001 applies essentially to construction of new facilities and the granting of CPC&Ns. According to petitioner, this case involves the modification of an existing certificate and only minimal additional extension of distribution facilities, not the construction of a whole new system. Thus, petitioner argues that a full CPC&N proceeding is not necessarily required. (D.86-01-025, supra.)

In addition, petitioner argues that, as SDG&E indicates, these PU Code sections apply to the extension of an electric utility's service into territory already served by another electric

utility. In the present case, petitioner is seeking an extension of service into what is essentially unserved territory, even though it technically lies within SDG&E's service area. Petitioner submits that the Commission has recognized that service territory maps filed by utilities may embrace undeveloped or uninhabited areas somewhat beyond the existing facilities of such utilities and has looked at the substantive nature of the service extension to be involved, rather than the artificial territory lines, in determining which utility should serve such areas when they become developed. (Alisal Water Company, supra.) SDG&E's facilities simply do not extend to the service territory boundary in the Coto de Caza development. Therefore, petitioner submits that any attempt at rigid application of PU Code § 1001 is inappropriate.

Position of SDG&E

According to SDG&E the issue in this case is not the Commission's right to modify its decisions. SDG&E acknowledges this jurisdiction. The issue is whether the particular order sought contravenes the law. That is, can the Commission authorize Edison to serve SDG&E's service territory without a CPC&N proceeding?

SDG&E submits that PU Code § 1001 requires Edison to obtain a CPC&N before extending its service territory:

> "No...electric corporation...shall begin construction...of a line, plant, or system, or of any extension thereof, without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction."

According to SDG&E, Edison and petitioner (respondents) are attempting to circumvent the mandate of PU Code § 1001 by advancing three arguments. These arguments are as follows: (1) this case does not involve the construction of new electric facilities outside of Edison's service territory; (2) PU Code § 1001 only applies to construction, not the operation of public

utility facilities; and (3) compliance with PU Code § 1001 is not required because Edison has a franchise with Orange County.

Addressing respondents' first argument against the applicability of PU Code § 1001, SDG&E argues that respondents are implicity stating that Edison can serve the Coto de Caza development without constructing new facilities. SDG&E points out that the petition on its face demonstrates that the petitioner wants Edison to construct electric facilities to serve the development.

> "Edison's existing facilities are installed adjacent to the next phase of development. The authorized development plan requires construction proceed from north to south; by changing the service area boundary as proposed, extension of Edison [sic] system would continue to match this pattern of development through completion of construction." (Emphasis added, Petition at 7.)

In addition, SDG&E points out that petitioner admits in its response to SDG&E's Motion to Dismiss that Edison will have to construct new facilities, if it extends service into SDG&E's service territory:

> "If Edison serves the new development, SCE will have to extend service from the existing Edison circuit in the [northern] Coto de Caza community to the [southern] development sites." (Petitioner Response at 15.)

Next SDG&E addresses respondents' second argument regarding the inapplicability of PU Code § 1001: that it only applies to construction, not operation of public utility facilities. SDG&E contends that this argument is irrelevant because respondents, as shown above, admit Edison must extend (construct) its facilities to serve that portion of the development presently in SDG&E's certificated service territory.

Finally, SDG&E addresses respondents' third argument that PU Code § 1001 is inapplicable because Edison has a franchise

agreement with Orange County. SDG&E notes that respondents state as follows:

> "Section 1003 through 1005... do not apply to applications under quondam Section 1002 for certification to exercise a franchise." (Edison Brief at 26.)

SDG&E points out that respondents admit that PU Code § 1002 was repealed because the Commission does have the power to protect the public from undesirable franchise authorizations to serve a certain area. According to SDG&E, a franchise agreement is nothing more than a right-of-way or right-to-use land agreement (State of California v Marin Mun. W. Dist. (1941) 17 C. 2d 699, 703-04). A franchise does not legally empower the utility to serve an area. Such empowerment can only be obtained from the Commission by issuance of a CPC&N authorizing (empowering) service pursuant to PU Code § 1001. SDG&E believes that any other conclusion would make the Commission subservient to local governments and contravene pertinent law.

Turning to the applicable case law, SDG&E maintains that the California Supreme Court requires a CPC&N be obtained before Edison can extend service. In Industrial Communications Systems, Inc., v Public Utilities Commission (1978) 22 Cal. 3d 572, 150 Cal. Rptr. 13, 585 P. 2d 863, the Commission approved tariffs that authorized General Telephone Company of California (General Telephone) to provide service in an area it had not previously served. The tariffs were approved without a CPC&N proceeding. As noted in Edison's response at page 19:

> "[t]he California Supreme Court nullified that action, holding that before the Commission could authorize General [Telephone] to expand into a new territory, it must first make a determination of public convenience and necessity for the extension." (Emphasis added.)

SDG&E agrees with Edison that Industrial Communications Systems stands for the proposition that before the Commission can authorize Edison to expand into new territory (that portion of Coto de Caza in SDG&E's territory), the Commission must first make a determination of public convenience and necessity.

However, SDG&E argues that respondents then turn logic upside down by concluding that the Commission can ignore Industrial Communications Systems and allow Edison to expand into SDG&E's service territory without a CPC&N proceeding, if expansion is done by redrawing boundary lines. According to SDG&E, this contradicts the explicit holding of Industrial Communications Systems. That is,

> "...new service to a large area that is more than incidentally outside the authorized service boundaries should be considered an extension by the wireline company into territory not already served by it. Otherwise, as this case illustrates, new service will be permitted [by the Commission] to previously unserved territory without certification, in contradiction of the clear mandate of Section 1001." (Emphasis added.)

SDG&E points out that the present case involves "new service to a large area that is more than incidentally outside [Edison's] authorized service boundaries..." (Id.). SDG&E notes that the petition states that approximately 2,700 acres of land, representing approximately 4,000 new homes would be transferred from the service territory of SDG&E to that of Edison, if the relief sought in the petition is granted (petition at 4,8). Therefore, SDG&E argues that to make the transfer of service territory requested by petitioner without a CPC&N proceeding would contravene the holding in Industrial Communications Systems and therefore, be unlawful.

Further, SDG&E argues that respondents also attempt to confuse the holding of Industrial Communications Systems by arguing that requiring a CPC&N proceeding before allowing a utility to

expand into new territory would insulate utilities from competition. SDG&E contends that the California Supreme Court has already rejected that argument:

> "To require certification of wireline utilities' initial radiotelephone extension into new territory does not reject the Commission policy of fostering limited competition between wireline utilities and RTUs. (Malis v. General Telephone Co., supra (1961) 59 Cal.P.U.C. 100, 115-116; see also Dec. No. 85356 (1976) 79 Cal.P.U.C. 404, 457-458; the FCC's Guardband Proceeding (1968) 12 F.C.C.2d 841, recon. den. 14 F.C.C.2d 269, affirmed sub.nom., Radio Relay Corporation v. F.C.C. (2d Cir. 1969) 409 F.2d 322.) But the competition should be allowed only after a commission determination of public convenience and necessity. In making that determination the Commission would consider factors related to the beneficial effect of competition (e.g., adequacy of existing service). (Dec. No. 85356 (1976) 79 Cal.P.U.C. 404, 428; Silver Beehive Telephone Co. (1970) 71 Cal.P.U.C. 304, 307.) Indeed, as we discuss below, the Commission is required in certification proceedings to consider competition as an element of the public interest." (Id. at 580.)

Next, SDG&E contends that the Commission has required a CPC&N proceeding in cases that are similar to the petition. In Southern Pacific Communications Company (SPCC), supra, the Commissison stated:

> "The relevant cases show that this Commission has consistently enforced the certificate requirement to preclude expansion of operating right through tariff filings or otherwise extending service without authorization.
>
> "(Cf. Motor Transit Company (1924) 24 DRC 807; Auto Transit Co. v. Pickwick Stages (1927) 30 CRC 32; Los Angeles and San Pedro Transp. Co. v. Richards Trucking and Warehouse Co. (1927) 30 CRC 40 and Blair v. Coast Truck Line (1922) 21 CRC 530.)"

SDG&E submits that the exception to the Commission's consistent practice of enforcing CPC&N requirements is Industrial Communications Systems wherein the California Supreme Court found the Commission's decision unlawful. And, according to SDG&E, examination of other Commission decisions is academic because Industrial Communications Systems is controlling.

Lastly, SDG&E argues that a CPC&N can be issued only upon application of the utility seeking to extend service into a new area. SDG&E cites PU Code § 1001 et. seq.; Industrial Communications Systems, Inc. v Public Utilities Commission (1978) 22 Cal. 3d 572; Richfield Oil Corp. v Public Utilities Commission (1960) 54 Cal. 2d 419; Harold W. Mathewson v Great Western Water Service (1966) 66 Cal. PUC 224.

In summary, it is SDG&E's position that not one of the decisions cited by respondents actually supports their position. Edison must obtain a CPC&N before it can extend electric service into SDG&E's certificated service territory. This certificate can be granted only upon Edison's own application.

Discussion

As a threshold matter we will clarify our authority under PU Code § 1708. Pursuant to a petition filed by the Center for Law in the Public Interest in the application of PG&E for a certificate to own, operate and maintain Units 1 and 2 of Diablo Canyon Nuclear Power Plant, the Commission in D.92058 stated:

"2. The Commission's Authority Under Section 1708

> "Petitioners contend that we have authority under Section 1708 to reopen the Diablo proceedings. That Section states:
>
> > 'The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties,

> have the same effect as an original order or decision.'
>
> "The Petition appears to assert that this statute imposes a mandatory duty on us to reopen in this case; however, Petitioners in their Reply Brief argue only that this authority is discretionary.
>
> "[8] We agree that Section 1708 gives us the authority to reopen past proceedings, including those which have resulted in the granting of a certificate under Section 1001. Both the language of the statute and the cases interpreting it make clear that this authority is discretionary. City of Los Angeles v. Public Utilities Comm. (1975 15 Cal.3d 680, 706; Northern Cal. Assn. v. Public Utilities Comm. (1964) 61 Cal.2d 126, 134-136.
>
> "By its very nature, Section 1708 provides the possibility of an extraordinary remedy. Res judicata principles are among the most fundamental in our legal system, protecting parties from endless relitigation of the same issues. Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed. Our past decisions recognize that the authority to reopen proceedings under Section 1708 must be exercised with great care and justified by extraordinary circumstances. See Golconda Utilities Co. (1968) 68 CPUC 296; Application of Southern Pacific (1969) 70 CPUC 150; Southern Pacific Transp. Co. (1973) 76 CPUC 2. . . ." (1980) 4 CPUC 2d, 149.)

Therefore, while PU Code § 1708 gives the Commission authority to reopen past proceedings to "rescind or amend its prior decisions," such authority is discretionary with the Commission and must be exercised with great care.

The situation now before us involves a boundary change between two like utilities. The unusual feature is that the request for the boundary change is brought before us by a customer, not by one or both of the utilities which is the usual case.

The respondents have cited numerous cases in support of their position, that there is no bar to a customer seeking such relief from the Commission, but they have not cited any case that is precisely on point, where the Commission has seen fit to grant such a request by a customer.

Except as discussed below, it is this Commission's policy that if the property to be expanded into is part of the established service territory of another utility, the utility wishing to expand must file an application with the Commission under PU Code § 1001 for a CPC&N authorizing the utility to undertake the expansion. PU Code § 1001 provides, in relevant part:

> "No...electrical corporation...shall begin the construction of...a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.
>
> "This article shall not be construed to require any such corporation to secure such certificate for an extension into territory either within or without a city or city and county contiguous to its...line, plant, or system, and not theretofore served by a public utility of like character... If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility...the commission, on complaint of the public utility...claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable." (Emphasis added.)

We note that the area in contention covers 2,700 acres and will accommodate approximately 4,000 future residential customers. It is beyond dispute that new "construction" will be required to serve these new customers; therefore, PU Code §1001 is

applicable. And since Edison is the utility that is "about to interfere" with SDG&E's certificated territory, Edison should apply for the necessary authorization. The proper procedure is for Edison to file an application with this Commission for a CPC&N.

The Commission has made exceptions to the requirement of a full-scale CPC&N proceeding in instances where there is mutual agreement by the competing utilities on the boundary relocation. In such instances we do not require the extensive information set out in PU Code §§ 1001 through 1005 and the Commission's investigation is less extensive, since the Commission only needs to satisfy itself that the boundary agreement is in the public interest (PU Code § 1005). This is the procedure that was adopted by the Commission in all the prior Edison/SDG&E boundary changes.

Turning to the role of customers and developers in boundary proceedings, we find that the Commission has previously considered the question of customer promoted expansion by one utility into the contiguous certificated service area of another like utility. The following excerpts from the decision on rehearing of the complaint of Clara Street Water Company v Park Water Company reflects the Commission's perception of the role of the prospective customer in such matters:

> ". . . Mr. Hunsakers (the prospective customer) feels that he has a right to decide which utility will serve his own property and desires to have defendant furnish the water service. . . ."
>
> * * *
>
> "Defendants relies on Section 50(a) of the Public Utilities Act (present PU Code § 1001) for authority to extend its facilities into complainant's certificated territory, contending that said territory is contiguous to defendant's system and that the property in dispute has not been served by another utility. Defendant gives no consideration to the fact that this area now is certificated nor of

> complainant's ability to provide adequate service therein. If defendant's contention should prevail, the establishing of service areas by this Commission would become meaningless and futile. Regulation would be transferred from this Commission to the whim or caprice of a utility and its prospective customers. . . ."
>
> * * *
>
> ". . . To permit the unlimited and unauthorized invasion of certificated territory by other utilities merely for the reason that the lands are contiguous and not being then actually and physically served, would result in curtailment of investments in utility properties, confusion and uncertainty in design of facilities, would retard expansion of utility systems into new territory and result in the supplying of inferior service. The granting of authority to a utility to invade an adjoining or contiguous service area without a showing of public convenience and necessity would be inconsistent with the principle of regulation in the public interest. . . ." (D.41682, Clara Street Water Company v Park Water Company (1948) 48 CPUC 154, 158.)

In a more recent case, in the application of California Water Service Co. to extend service in the territory of Westmilton Water System, the Commission in D.83-01-05 stated:

> "[2] If customers or would-be developers were allowed to pick and choose between neighboring utilities for their own economic advantage, the situation would be highly unstable and utility planning not only impossible but meaningless. Certainly the public interest always must enter into the consideration, but we must be concerned with the overall welfare of all the public involved in that utility's service territory, and not merely with

> that of a subdivider and his prospective customers located in the immediate area of the proposed subdivision." (10 CPUC 2d, 690, 697.)

Returning to Edison's status in the matter now before us, we should note for the record that Edison has not made any physical intrusion into SDG&E's service territory; however, in the context of PU Code § 1001, Edison is the utility that is "about to interfere" with SDG&E's certificated service territory, and Edison should make application to this Commission for a CPC&N if it wishes to follow through with such plans. As set forth in Clara Street Water Company, supra, we continue to hold the view that a CPC&N proceeding is required for a utility to invade an adjoining certificated service area, and we are not prepared to abandon such a requirement to "the whim or caprice of (the invading) utility and its prospective customers." (Ibid.)

As an alternative to a full scale CPC&N proceeding, we remind the parties that a further way for service boundaries to be changed is for the parties involved to negotiate the change. While the results of such negotiations would have to be approved by the Commission, this approach would be likely to entail less Commission involvement than would either a formal certificate proceeding or a complaint proceeding. Utility negotiations and settlement would obviate the need for the invading utility to make the necessary showing that SDG&E is not willing or able to provide adequate service at reasonable rates, a showing that would appear to be exceedingly difficult to make. Therefore, in our view it would be in the best interests of all parties concerned with controversies such as this one, as well as ones involving as yet unincorproated areas of Orange County, for SDG&E and Edison to negotiate a solution.

In summary, we point out that there are procedures in place for competing utilities to resolve boundary changes. Denying the petition will not deprive respondents the opportunity

to be heard on the merits. To use PU Code § 1708 to circumvent PU Code § 1001 requirements, as proposed by respondents, would be an abuse of the Commission's discretion. Accordingly, the Motion to Dismiss should be granted and the Petition for Modification should be denied.

Findings of Fact

1. The Coto de Caza tract consists of approximately 4,929 acres, in southeastern Orange County, California. The boundary separating the electric service territories of Edison and SDG&E passes through the middle of the Coto de Caza tract, such that roughly one-half of the development is within each utility's service territory. The land, at this time, is essentially vacant.

2. D.44086, dated April 25, 1950 delineated the boundary separating the service territories of SDG&E and Edison in the area which includes the Coto de Caza tract. There is no dispute with regard to the exact location of this boundary.

3. Petitioner, the owner of the Coto de Caza tract, filed a Petition for Modification of D.44086 requesting that the SDG&E/Edison boundary line be moved so that the whole Coto de Caza tract would fall into Edison's service area.

4. The modification requested would transfer approximately 2,700 acres of land owned by petitioner from SDG&E's service territory to Edison's service territory. The effect would be that approximately 4,000 future residential units would be transferred from SDG&E's service territory to Edison's.

5. Coto de Caza is a planned development. Significant new construction will be required by the electric utility that does provide service to this future development.

6. The area in dispute is in the certificated service area of SDG&E, pursuant to an application by Edison for a CPC&N to define the service territory of Edison and SDG&E, which was granted by the Commission by D.44086.

7. Both SDG&E and Edison stand ready to serve the area in dispute.

8. There has been no unauthorized invasion by Edison of SDG&E's certificated service area within the Coto de Caza tract.

9. Edison does not have the authority to provide service in the area in dispute.

10. Edison has not filed an application with the Commission for a CPC&N for authorization to serve the area in dispute.

Conclusions of Law

1. Since there is significant new construction required to serve the area in dispute, and the area is part of the certificated service territory of SDG&E, should Edison wish to expand into that area, it must file an application with the Commission under PU Code §1001 for a CPC&N requesting authorization to undertaken the expansion.

2. PU Code § 1708 permits the Commission to reconsider a prior decision made by it, including past decisions emcompassing CPC&N proceedings.

3. To use PU Code § 1708 as proposed by respondents to circumvent the requirements of PU Code § 1001, in this instance, would be an abuse of the Commission's discretion.

4. There is no need to separately address the Motions to Strike filed by respondents since none of the cases cited are precisely on point. The Motions to Strike should be denied.

5. The Motion to Dismiss should be granted and the Petition for Modification should be denied.

ORDER

IT IS ORDERED that the Motion to Dismiss filed by San Diego Gas & Electric Company is granted and the Petition for Modification filed by Coto de Caza, Ltd. is denied.

This order becomes effective 30 days from today.

Dated September 14, 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 ASOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

AG

ALJ/BDP/ltq

Decision 88 09 022 SEP 14 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY, A Corporation, FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO EXERCISE THE RIGHTS, PRIVILEGES, AND FRANCHISE GRANTED TO APPLICANT BY ORDINANCE NO. 543 OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA, TO CONSTRUCT, OPERATE, ALTER, MAINTAIN, AND USE AN ELECTRIC DISTRIBUTION AND TRANSMISSION SYSTEM WITHIN SAID COUNTY. (U-338-E)	Application 80208 (Petition for Modification) Filed April 25, 1988)
And Related Matter.	Application 83-10-020

O P I N I O N

Motion to Dismiss Petition for Modification

Summary

The Commission concludes that an affected party has the right to petition the Commission to exercise its authority under Public Utilities (PU) Code § 1708 to reconsider one of its prior decisions even though the petitioner is not a utility and the petition relates to a Certificate of Public Convenience and Necessity (CPC&N) proceeding in which the petitioner had not previously participated. However, the Commission declines to exercise its discretion to modify its prior decision since the result would be circumvention of PU Code § 1001, which requires that, before any utility can expand into the service territory of a like utility, the utility wishing to expand must file an application with the Commission for a CPC&N requesting authorization to undertake the expansion.

Facts

On April 25, 1988, Coto de Caza, Ltd. (petitioner), a California Limited Partnership in the business of real estate development petitioned the Commission pursuant to Rule 43 of the Commission's Rules of Practice and Procedure for an Order modifying Decision (D.) 44086, dated April 26, 1950, one of a series of decisions, which established the boundary line between the electric service areas of the Southern California Edison Company (Edison) and the San Diego Gas & Electric Company (SDG&E) in the County of Orange, California.

Petitioner owns the Coto de Caza tract, consisting of approximately 4,929 acres, in southeastern Orange County, California. The boundary separating the electric service territories of Edison and SDG&E passes through the middle of the Coto de Caza tract, such that roughly one-half of the development is within each utility's service territory.

The modification requested is an adjustment of a segment of this boundary line which would transfer approximately 2,700 acres of land owned by petitioner from SDG&E's service territory to Edison's service territory. The effect would be that approximately 4,000 future residential units would be transferred from SDG&E's service territory to Edison's. The land, at this time, is essentially vacant.

Historically, the boundary between the Edison and SDG&E service territories in Orange County has been fixed by the Commission upon the application of Edison, joined, on most occasions, by SDG&E. On June, 28, 1949, the Commission issued Decision (D.) 43041 in which it granted Edison's application for "[a] certificate that public convenience and necessity require the exercise by it [Edison] of the right, privilege and franchise granted to it by Ordinance No. 543, adopted November 16, 1948, by the Board of Supervisors of the County of Orange, ..." This CPC&N permitted Edison to serve customers within a prescribed area in

Orange County. In a supplemental application dated January 17, 1950, Edison requested that D.43041 be amended to clarify the boundary separating its service territory from that of SDG&E. In D.44086 the Commission specifically delineated, by legal description per Edison's request, the boundary separating the utilities' service territories. On six occasions subsequent to D.43041 Edison, as applicant, and SDG&E, as an interested party, jointly petitioned and received Commission authorization to modify D.44086 for the purpose of adjusting the legal description of their common service boundary. The most recent realignment occurred in D.83-12-012 (December 7, 1983) which was a modification jointly requested to permit the boundary to coincide with certain newly developed roads, parkways, and tract boundaries.

No realignment of the SDG&E/Edison electric service boundary, as originally determined in D.44086, has occurred except on the application of Edison either independently or jointly with SDG&E. Petitioner was not a party to those applications.

Both Edison and SDG&E are currently providing service to petitioner in their respective service areas within the Coto de Caza tract.

The Motion

On May 3, 1988, SDG&E filed a Motion to Dismiss the Petition. Edison filed its response on June 1 and petitioner filed its response on June 15, 1988. SDG&E filed its reply to the responses of Edison and petitioner on June 24, 1988. On July 15 and 20, 1988 respectively, Edison and petitioner filed separate Motions to Strike portions of SDG&E's reply. SDG&E responded. The Motion to Dismiss the Petition was then submitted for decision.

The question as presented by SDG&E is: Can a utility customer obtain authorization from the Commission to realign the service boundary between competing utilities such that a portion of one utility's service territory is transferred to the other utility? According to SDG&E, the PU Code (§§ 1001 through 1005),

Commission decisions, and California Supreme Court Case law, Edison must obtain a CPC&N before it can extend electric service into SDG&E's certificated service territory. And Edison can be granted a CPC&N only upon its own application.

Position of Edison

Edison argues that by enacting PU Code § 1708, the California Legislature vested the Commission with broad powers to rescind, alter, or amend any of its prior decisions.

Edison further argues that Commission authority to change past decisions encompasses CPC&N proceedings. Edison notes that an argument that PU Code § 1708 does not apply to a CPC&N proceeding was unsuccessfully made by Pacific Gas and Electric Company (PG&E) when faced by an intervenor's Petition to Modify its Diablo Canyon CPC&N. Although ultimately deciding that the petitioners had not met their burden of persuasion to justify reconsideration of PG&E's CPC&N, the Commission, in D.92058 held that the authority vested in it under PU Code § 1708 applied with equal force to CPC&N proceedings:

> ". . . Section 1708 gives us the authority to reopen past proceedings, including those which have resulted in the granting of a certificate under Section 1001." (4 Cal. PUC 2d 139, 149.)

Also, Edison notes that in the complaint of Winton Manor Mutual Water Co., et al. v Winton Water Co., Inc., D.89708, the Commission determined the applicability of PU Code § 1708 in the context of a certification proceeding to determine service territory boundaries. Here again, the Commission found that jurisdiction did lie:

> "We recognize that Section 1708 of the California Public Utilities Code expressly confers continuing jurisdiction upon the Commission, upon notice and after opportunity to be heard, to alter, amend, or rescind a prior order and decision. We have repeatedly held that under such statute we have continuing authority to change or alter the certificated area of a public utility as an exercise of our

> legislative or quasi-legislative authority. Such jurisdiction and authority has been confirmed by the California Supreme Court. Sale v. Railroad Commission (1940) 15 Cal. 2d 612, 96 P.2d 125." (84-Cal. PUC 645, 651.)

According to Edison, as these and other decisions make clear, the Commission has the authority to reconsider any of its past decisions at any time. That authority encompasses CPC&N proceedings, including proceedings to determine the service territory boundary of a public utility.

Edison next addresses the question: Does any affected party have standing to petition the Commission to exercise its jurisdiction. In support of its position that both the Commission and California courts have long recognized that any affected party has the right to petition the Commission to exercise this authority, Edison cites D.60940, which involved a complaint by two Santa Clara County residents against the San Jose Water Works wherein the Commission stated that the nonutility complainants could seek relief by petitioning the Commission under PU Code § 1708:

> "Should complainants seek to have any decisions and orders of this Commission modified they may file a petition for such relief pursuant to Section 1708 of the Public Utilities Code." (58 Cal. PUC 204, 206.)

As further support for this rationale, Edison cites D.71293, dated September 20, 1966 in Case 8423; Complaint of Harold W. Mathewson v Great Western Water Service, 66 CPUC 224.

Also as support for the principle that a nonutility may petition the Commission for modification of one of its previous decisions, Edison points to the 1966 decision of the California Court of Appeal in Pellandini v Pacific Limestone Products, Inc. (1966) 245 Cal. App. 2d 774, 54 Cal. Rptr. 290.

Edison argues that this right of a nonutility to petition the Commission pursuant to PU Code § 1708 also exists in the

context of a CPC&N proceeding. According to Edison, D.92058, supra, is illustrative of this principle. In that case, the Center For Law in the Public Interest filed a petition with the Commission to reopen PG&E's Diablo Canyon CPC&N proceedings although those proceedings had concluded and a decision had been rendered over ten years prior to the petition. The Commission held that it had jurisdiction to entertain the petition even though it had been filed, not by the subject utility, but by an intervenor group.

Next, Edison notes that, significantly, in the application of Gadsden Corporation, D.80108, the Commission recognized the right of a developer to file an application seeking a finding and order that its property was not within the service area of a utility.

Therefore, according to Edison, the above cases demonstrate that an affected party has the right to petition the Commission to exercise its authority under PU Code § 1708 to reconsider one of its prior decisions even though the petitioner is not a utility and the petition relates to a CPC&N proceeding in which the petitioner had not previously participated. Accordingly, Edison submits, that petitioner Coto de Caza has standing to file its petition in this proceeding and the Commission has both the jurisdiction and the obligation to decide it on the merits.

Edison next addresses SDG&E's argument that only the utility that is to extend its service can request a boundary modification to accomplish that result and any such modification request must be reviewed in a CPC&N proceeding.

Edison contends that the Commission has recognized that the full construction CPC&N information requirements of PU Code §§ 1001 through 1005 are both not required and not relevant to address service territory boundary realignment. According to Edison, this was made clear in the holding in D.86-01-025, which dealt with a complaint by Southern California Gas Company (SoCalGas) asking for an order that PG&E cease and desist from

serving the enhanced oil recovery (EOR) customers in Kern County oil fields. Edison, in its Motion to Strike, notes that in resisting PG&E's Petition For Modification of D.62681, SoCalGas advanced the argument that reconsideration of service territory boundaries required a full CPC&N proceeding and the Commission disagreed:

> "We concur with PG&E and staff that the development in Kern County of the largest new market for natural gas in the United States constitutes a changed circumstance warranting a reexamination of the 1961 service territory agreement. The record in this case provides ample justification for our finding that certain service territory modifications are required in order to serve the EOR market in a timely fashion and in a manner that is equitable for both utilities.
>
> "In light of this conclusion, SoCal's argument regarding the necessity of a certificate of public convenience and necessity need not be addressed. In any event, we note that the 1962 Commission orders granting both utilities certificates of public convenience and necessity to serve Kern County incorporate and are conditioned upon the terms of the 1961 service territory agreement, which we find permit the modification we adopt herein." (D.86-05-008, dated May 7, 1986, mimeo. appendix, p. 18.)

Edison argues that like the agreement between PG&E and SoCalGas which was the subject of D.86-05-008, the Orange County boundaries between Edison and SDG&E were reached by an agreement between the utilities, which was then ratified by the Commission. Therefore, Edison submits that the mere fact that the issue presented by the petition does not arise in the context of a CPC&N proceeding under PU Code § 1001 is no bar to the Commission's lawful exercise of its authority to reconsider the Edison/SDG&E service territory boundary as it affects the Coto de Caza development.

Position of Coto de Caza (Petitioner)

Petitioner joins Edison in urging the Commission to deny SDG&E's motion.

In addition to the cases cited by Edison, petitioner argues that the Commission has specifically recognized the right of customers to petition the Commission for extension of service by utilities to contiguous territory defined by logical natural boundaries outside the borders of the utilities' service territories. (Radisavljevic, D.90262.) According to petitioner this is just the type of adjustment it is seeking here.

Petitioner argues that while in the Radisavljevic case the extension involved territory which was not within the certificated service area of a serving utility, it is still applicable to the present case. Petitioner points out that the southern portion of the Coto de Caza Development, which is the area to be transferred, is essentially unserved territory, and SDG&E's lines do not reach to the next portion of the development to be served. For these reasons alone, petitioner argues that SDG&E's contention that the Commission is prohibited from considering the merits of a customer's request in this context is incorrect and must be rejected.

Turning to the Orange County boundaries between Edison and SDG&E, petitioner points out that it is undisputed that since establishing the boundary at issue in D.44086, the Commission has, on several occasions, authorized modifications to this boundary. The most recent realignment occurred in D.83-12-012 (December 7, 1983) which was a modification jointly requested by Edison and SDG&E to permit the boundary to coincide with certain newly-developed roads, parkways, and tract boundaries. Petitioner contends that this is precisely the type of adjustment it is seeking. Petitioner argues that nothing in any of the previous boundary realignment decisions in this proceeding indicates that such adjustments could be made only at the behest of the utilities, or specifies any particular manner in which the request for

adjustment had to originate. Accordingly, petitioner contends that it is appropriate that the Commission consider the merits of its petition, and deny SDG&E's motion for summary rejection.

Further, petitioner submits that the Commission has addressed specifically the concerns raised by the petition in another context. In Alisal Water Company, 65 CPUC 197 (1966), the California water Company and Alisal operated water systems with adjoining service areas. The respective companies filed service territory maps of the utilities. Each embraced substantial undeveloped or uninhabited areas somewhat beyond the existing facilities of each. A developer proposed to build upon and sell lots on a tract of land which straddled the common boundary line shown on the respective maps of the utilities, like the Coto de Caza tract in the present case. In Alisal, according to petitioner, the Commission considered the same factors set forth in Coto de Caza's petition in selecting which utility would serve the area. Therefore, petitioner argues that it is reasonable that the Commission undertake the same type of evaluation when the question of designating a utility is brought before it by a potential customer or developer. Petitioner contends that nothing in the Alisal decision indicates that the proceeding necessarily had to be initiated by one of the utilities.

Petitioner argues that, as pointed out by Edison, the provisions of PU Code § 1001 applies essentially to construction of new facilities and the granting of CPC&Ns. According to petitioner, this case involves the modification of an existing certificate and only minimal additional extension of distribution facilities, not the construction of a whole new system. Thus, petitioner argues that a full CPC&N proceeding is not necessarily required. (D.86-01-025, supra.)

In addition, petitioner argues that, as SDG&E indicates, these PU Code sections apply to the extension of an electric utility's service into territory already served by another electric

utility. In the present case, petitioner is seeking an extension of service into what is essentially unserved territory, even though it technically lies within SDG&E's service area. Petitioner submits that the Commission has recognized that service territory maps filed by utilities may embrace undeveloped or uninhabited areas somewhat beyond the existing facilities of such utilities and has looked at the substantive nature of the service extension to be involved, rather than the artificial territory lines, in determining which utility should serve such areas when they become developed. (Alisal Water Company, supra.) SDG&E's facilities simply do not extend to the service territory boundary in the Coto de Caza development. Therefore, petitioner submits that any attempt at rigid application of PU Code § 1001 is inappropriate.

Position of SDG&E

According to SDG&E the issue in this case is not the Commission's right to modify its decisions. SDG&E acknowledges this jurisdiction. The issue is whether the particular order sought contravenes the law. That is, can the Commission authorize Edison to serve SDG&E's service territory without a CPC&N proceeding?

SDG&E submits that PU Code § 1001 requires Edison to obtain a CPC&N before extending its service territory:

> "No...electric corporation...shall begin construction...of a line, plant, or system, or of any extension thereof, without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction."

According to SDG&E, Edison and petitioner (respondents) are attempting to circumvent the mandate of PU Code § 1001 by advancing three arguments. These arguments are as follows: (1) this case does not involve the construction of new electric facilities outside of Edison's service territory; (2) PU Code § 1001 only applies to construction, not the operation of public

utility facilities; and (3) compliance with PU Code § 1001 is not required because Edison has a franchise with Orange County.

Addressing respondents' first argument against the applicability of PU Code § 1001, SDG&E argues that respondents are implicity stating that Edison can serve the Coto de Caza development without constructing new facilities. SDG&E points out that the petition on its face demonstrates that the petitioner wants Edison to construct electric facilities to serve the development.

> "Edison's existing facilities are installed adjacent to the next phase of development. The authorized development plan requires construction proceed from north to south; by changing the service area boundary as proposed, extension of Edison [sic] system would continue to match this pattern of development through completion of construction." (Emphasis added, Petition at 7.)

In addition, SDG&E points out that petitioner admits in its response to SDG&E's Motion to Dismiss that Edison will have to construct new facilities, if it extends service into SDG&E's service territory:

> "If Edison serves the new development, SCE will have to extend service from the existing Edison circuit in the [northern] Coto de Caza community to the [southern] development sites." (Petitioner Response at 15.)

Next SDG&E addresses respondents' second argument regarding the inapplicability of PU Code § 1001: that it only applies to construction, not operation of public utility facilities. SDG&E contends that this argument is irrelevant because respondents, as shown above, admit Edison must extend (construct) its facilities to serve that portion of the development presently in SDG&E's certificated service territory.

Finally, SDG&E addresses respondents' third argument that PU Code § 1001 is inapplicable because Edison has a franchise

agreement with Orange County. SDG&E notes that respondents state as follows:

> "Section 1003 through 1005... do not apply to applications under quondam Section 1002 for certification to exercise a franchise." (Edison Brief at 26.)

SDG&E points out that respondents admit that PU Code § 1002 was repealed because the Commission does have the power to protect the public from undesirable franchise authorizations to serve a certain area. According to SDG&E, a franchise agreement is nothing more than a right-of-way or right-to-use land agreement (State of California v Marin Mun. W. Dist. (1941) 17 C. 2d 699, 703-04). A franchise does not legally empower the utility to serve an area. Such empowerment can only be obtained from the Commission by issuance of a CPC&N authorizing (empowering) service pursuant to PU Code § 1001. SDG&E believes that any other conclusion would make the Commission subservient to local governments and contravene pertinent law.

Turning to the applicable case law, SDG&E maintains that the California Supreme Court requires a CPC&N be obtained before Edison can extend service. In Industrial Communications Systems, Inc., v Public Utilities Commission (1978) 22 Cal. 3d 572, 150 Cal. Rptr. 13, 585 P. 2d 863, the Commission approved tariffs that authorized General Telephone Company of California (General Telephone) to provide service in an area it had not previously served. The tariffs were approved without a CPC&N proceeding. As noted in Edison's response at page 19:

> "[t]he California Supreme Court nullified that action, holding that before the Commission could authorize General [Telephone] to expand into a new territory, it must first make a determination of public convenience and necessity for the extension." (Emphasis added.)

SDG&E agrees with Edison that Industrial Communications Systems stands for the proposition that before the Commission can authorize Edison to expand into new territory (that portion of Coto de Caza in SDG&E's territory), the Commission must first make a determination of public convenience and necessity.

However, SDG&E argues that respondents then turn logic upside down by concluding that the Commission can ignore Industrial Communications Systems and allow Edison to expand into SDG&E's service territory without a CPC&N proceeding, if expansion is done by redrawing boundary lines. According to SDG&E, this contradicts the explicit holding of Industrial Communications Systems. That is,

> "...new service to a large area that is more than incidentally outside the authorized service boundaries should be considered an extension by the wireline company into territory not already served by it. Otherwise, as this case illustrates, new service will be permitted [by the Commission] to previously unserved territory without certification, in contradiction of the clear mandate of Section 1001." (Emphasis added.)

SDG&E points out that the present case involves "new service to a large area that is more than incidentally outside [Edison's] authorized service boundaries..." (Id.). SDG&E notes that the petition states that approximately 2,700 acres of land, representing approximately 4,000 new homes would be transferred from the service territory of SDG&E to that of Edison, if the relief sought in the petition is granted (petition at 4,8). Therefore, SDG&E argues that to make the transfer of service territory requested by petitioner without a CPC&N proceeding would contravene the holding in Industrial Communications Systems and therefore, be unlawful.

Further, SDG&E argues that respondents also attempt to confuse the holding of Industrial Communications Systems by arguing that requiring a CPC&N proceeding before allowing a utility to

expand into new territory would insulate utilities from competition. SDG&E contends that the California Supreme Court has already rejected that argument:

> "To require certification of wireline utilities' initial radiotelephone extension into new territory does not reject the Commission policy of fostering limited competition between wireline utilities and RTUs. (Malis v. General Telephone Co., supra (1961) 59 Cal.P.U.C. 100, 115-116; see also Dec. No. 85356 (1976) 79 Cal.P.U.C. 404, 457-458; the FCC's Guardband Proceeding (1968) 12 F.C.C.2d 841, recon. den. 14 F.C.C.2d 269, affirmed sub.nom., Radio Relay Corporation v. F.C.C. (2d Cir. 1969) 409 F.2d 322.) But the competition should be allowed only after a commission determination of public convenience and necessity. In making that determination the Commission would consider factors related to the beneficial effect of competition (e.g., adequacy of existing service). (Dec. No. 85356 (1976) 79 Cal.P.U.C. 404, 428; Silver Beehive Telephone Co. (1970) 71 Cal.P.U.C. 304, 307.) Indeed, as we discuss below, the Commission is required in certification proceedings to consider competition as an element of the public interest." (Id. at 580.)

Next, SDG&E contends that the Commission has required a CPC&N proceeding in cases that are similar to the petition. In Southern Pacific Communications Company (SPCC), supra, the Commissison stated:

> "The relevant cases show that this Commission has consistently enforced the certificate requirement to preclude expansion of operating right through tariff filings or otherwise extending service without authorization.
>
> "(Cf. Motor Transit Company (1924) 24 DRC 807; Auto Transit Co. v. Pickwick Stages (1927) 30 CRC 32; Los Angeles and San Pedro Transp. Co. v. Richards Trucking and Warehouse Co. (1927) 30 CRC 40 and Blair v. Coast Truck Line (1922) 21 CRC 530.)"

SDG&E submits that the exception to the Commission's consistent practice of enforcing CPC&N requirements is Industrial Communications Systems wherein the California Supreme Court found the Commission's decision unlawful. And, according to SDG&E, examination of other Commission decisions is academic because Industrial Communications Systems is controlling.

Lastly, SDG&E argues that a CPC&N can be issued only upon application of the utility seeking to extend service into a new area. SDG&E cites PU Code § 1001 et. seq.; Industrial Communications Systems, Inc. v Public Utilities Commission (1978) 22 Cal. 3d 572; Richfield Oil Corp. v Public Utilities Commission (1960) 54 Cal. 2d 419; Harold W. Mathewson v Great Western Water Service (1966) 66 Cal. PUC 224.

In summary, it is SDG&E's position that not one of the decisions cited by respondents actually supports their position. Edison must obtain a CPC&N before it can extend electric service into SDG&E's certificated service territory. This certificate can be granted only upon Edison's own application.

Discussion

As a threshold matter we will clarify our authority under PU Code § 1708. Pursuant to a petition filed by the Center for Law in the Public Interest in the application of PG&E for a certificate to own, operate and maintain Units 1 and 2 of Diablo Canyon Nuclear Power Plant, the Commission in D.92058 stated:

"2. The Commission's Authority Under Section 1708

"Petitioners contend that we have authority under Section 1708 to reopen the Diablo proceedings. That Section states:

'The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties,

> have the same effect as an original order or decision.'
>
> "The Petition appears to assert that this statute imposes a mandatory duty on us to reopen in this case; however, Petitioners in their Reply Brief argue only that this authority is discretionary.
>
> "[8] We agree that Section 1708 gives us the authority to reopen past proceedings, including those which have resulted in the granting of a certificate under Section 1001. Both the language of the statute and the cases interpreting it make clear that this authority is discretionary. City of Los Angeles v. Public Utilities Comm. (1975 15 Cal.3d 680, 706; Northern Cal. Assn. v. Public Utilities Comm. (1964) 61 Cal.2d 126, 134-136.
>
> "By its very nature, Section 1708 provides the possibility of an extraordinary remedy. Res judicata principles are among the most fundamental in our legal system, protecting parties from endless relitigation of the same issues. Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed. Our past decisions recognize that the authority to reopen proceedings under Section 1708 must be exercised with great care and justified by extraordinary circumstances. See Golconda Utilities Co. (1968) 68 CPUC 296; Application of Southern Pacific (1969) 70 CPUC 150; Southern Pacific Transp. Co. (1973) 76 CPUC 2. . . ." (1980) 4 CPUC 2d, 149.)

Therefore, while PU Code § 1708 gives the Commission authority to reopen past proceedings to "rescind or amend its prior decisions," such authority is discretionary with the Commission and must be exercised with great care.

The situation now before us involves a boundary change between two like utilities. The unusual feature is that the request for the boundary change is brought before us by a customer, not by one or both of the utilities which is the usual case.

The respondents have cited numerous cases in support of their position, that there is no bar to a customer seeking such relief from the Commission, but they have not cited any case that is precisely on point, where the Commission has seen fit to grant such a request by a customer.

Except as discussed below, it is this Commission's policy that if the property to be expanded into is part of the established service territory of another utility, the utility wishing to expand must file an application with the Commission under PU Code § 1001 for a CPC&N authorizing the utility to undertake the expansion. PU Code § 1001 provides, in relevant part:

> "No...electrical corporation...shall begin the construction of...a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.
>
> "This article shall not be construed to require any such corporation to secure such certificate for an extension into territory either within or without a city or city and county contiguous to its...line, plant, or system, and not theretofore served by a public utility of like character... If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility...the commission, on complaint of the public utility...claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable." (Emphasis added.)

We note that the area in contention covers 2,700 acres and will accommodate approximately 4,000 future residential customers. It is beyond dispute that new "construction" will be required to serve these new customers; therefore, PU Code §1001 is

applicable. And since Edison is the utility that is "about to interfere" with SDG&E's certificated territory, Edison should apply for the necessary authorization. The proper procedure is for Edison to file an application with this Commission for a CPC&N.

The Commission has made exceptions to the requirement of a full-scale CPC&N proceeding in instances where there is mutual agreement by the competing utilities on the boundary relocation. In such instances we do not require the extensive information set out in PU Code §§ 1001 through 1005 and the Commission's investigation is less extensive, since the Commission only needs to satisfy itself that the boundary agreement is in the public interest (PU Code § 1005). This is the procedure that was adopted by the Commission in all the prior Edison/SDG&E boundary changes.

Turning to the role of customers and developers in boundary proceedings, we find that the Commission has previously considered the question of customer promoted expansion by one utility into the contiguous certificated service area of another like utility. The following excerpts from the decision on rehearing of the complaint of Clara Street Water Company v Park Water Company reflects the Commission's perception of the role of the prospective customer in such matters:

> ". . . Mr. Hunsakers (the prospective customer) feels that he has a right to decide which utility will serve his own property and desires to have defendant furnish the water service. . . ."
>
> * * *
>
> "Defendants relies on Section 50(a) of the Public Utilities Act (present PU Code § 1001) for authority to extend its facilities into complainant's certificated territory, contending that said territory is contiguous to defendant's system and that the property in dispute has not been served by another utility. Defendant gives no consideration to the fact that this area now is certificated nor of

> complainant's ability to provide adequate service therein. If defendant's contention should prevail, the establishing of service areas by this Commission would become meaningless and futile. Regulation would be transferred from this Commission to the whim or caprice of a utility and its prospective customers. . . ."
>
> * * *
>
> ". . . To permit the unlimited and unauthorized invasion of certificated territory by other utilities merely for the reason that the lands are contiguous and not being then actually and physically served, would result in curtailment of investments in utility properties, confusion and uncertainty in design of facilities, would retard expansion of utility systems into new territory and result in the supplying of inferior service. The granting of authority to a utility to invade an adjoining or contiguous service area without a showing of public convenience and necessity would be inconsistent with the principle of regulation in the public interest. . . ." (D.41682, Clara Street Water Company v Park Water Company (1948) 48 CPUC 154, 158.)

In a more recent case, in the application of California Water Service Co. to extend service in the territory of Westmilton Water System, the Commission in D.83-01-05 stated:

> "[2] If customers or would-be developers were allowed to pick and choose between neighboring utilities for their own economic advantage, the situation would be highly unstable and utility planning not only impossible but meaningless. Certainly the public interest always must enter into the consideration, but we must be concerned with the overall welfare of all the public involved in that utility's service territory, and not merely with

> that of a subdivider and his prospective customers located in the immediate area of the proposed subdivision." (10 CPUC 2d, 690, 697.)

Returning to Edison's status in the matter now before us, we should note for the record that Edison has not made any physical intrusion into SDG&E's service territory; however, in the context of PU Code § 1001, Edison is the utility that is "about to interfere" with SDG&E's certificated service territory, and Edison should make application to this Commission for a CPC&N if it wishes to follow through with such plans. As set forth in Clara Street Water Company, supra, we continue to hold the view that a CPC&N proceeding is required for a utility to invade an adjoining certificated service area, and we are not prepared to abandon such a requirement to "the whim or caprice of (the invading) utility and its prospective customers." (Ibid.)

As an alternative to a full scale CPC&N proceeding, we remind the parties that a further way for service boundaries to be changed is for the parties involved to negotiate the change. While the results of such negotiations would have to be approved by the Commission, this approach would be likely to entail less Commission involvement than would either a formal certificate proceeding or a complaint proceeding. Utility negotiations and settlement would obviate the need for the invading utility to make the necessary showing that SDG&E is not willing or able to provide adequate service at reasonable rates, a showing that would appear to be exceedingly difficult to make. Therefore, in our view it would be in the best interests of all parties concerned with controversies such as this one, as well as ones involving as yet unincorproated areas of Orange County, for SDG&E and Edison to negotiate a solution.

In summary, we point out that there are procedures in place for competing utilities to resolve boundary changes. Denying the petition will not deprive respondents the opportunity

to be heard on the merits. To use PU Code § 1708 to circumvent PU Code § 1001 requirements, as proposed by respondents, would be an abuse of the Commission's discretion. Accordingly, the Motion to Dismiss should be granted and the Petition for Modification should be denied.

Findings of Fact

1. The Coto de Caza tract consists of approximately 4,929 acres, in southeastern Orange County, California. The boundary separating the electric service territories of Edison and SDG&E passes through the middle of the Coto de Caza tract, such that roughly one-half of the development is within each utility's service territory. The land, at this time, is essentially vacant.

2. D.44086, dated April 25, 1950 delineated the boundary separating the service territories of SDG&E and Edison in the area which includes the Coto de Caza tract. There is no dispute with regard to the exact location of this boundary.

3. Petitioner, the owner of the Coto de Caza tract, filed a Petition for Modification of D.44086 requesting that the SDG&E/Edison boundary line be moved so that the whole Coto de Caza tract would fall into Edison's service area.

4. The modification requested would transfer approximately 2,700 acreas of land owned by petitioner from SDG&E's service territory to Edison's service territory. The effect would be that approximately 4,000 future residential units would be transferred from SDG&E's service territory to Edison's.

5. Coto de Caza is a planned development. Significant new construction will be required by the electric utility that does provide service to this future development.

6. The area in dispute is in the certificated service area of SDG&E, pursuant to an application by Edison for a CPC&N to define the service territory of Edison and SDG&E, which was granted by the Commission by D.44086.

7. Both SDG&E and Edison stand ready to serve the area in dispute.

8. There has been no unauthorized invasion by Edison of SDG&E's certificated service area within the Coto de Caza tract.

9. Edison does not have the authority to provide service in the area in dispute.

10. Edison has not filed an application with the Commission for a CPC&N for authorization to serve the area in dispute.

Conclusions of Law

1. Since there is significant new construction required to serve the area in dispute, and the area is part of the certificated service territory of SDG&E, should Edison wish to expand into that area, it must file an application with the Commission under PU Code §1001 for a CPC&N requesting authorization to undertaken the expansion.

2. PU Code § 1708 permits the Commission to reconsider a prior decision made by it, including past decisions emcompassing CPC&N proceedings.

3. To use PU Code § 1708 as proposed by respondents to circumvent the requirements of PU Code § 1001, in this instance, would be an abuse of the Commission's discretion.

4. There is no need to separately address the Motions to Strike filed by respondents since none of the cases cited are precisely on point. The Motions to Strike should be denied.

5. The Motion to Dismiss should be granted and the Petition for Modification should be denied.

O R D E R

IT IS ORDERED that the Motion to Dismiss filed by San Diego Gas & Electric Company is granted and the Petition for Modification filed by Coto de Caza, Ltd. is denied.

This order becomes effective 30 days from today.

Dated SEP 14 1988, at San Francisco, California.

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