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MAY 23 1991

Decision 91-05-052 May 22, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Dr. Jeffrey R. Clark,

Complainant,

vs.

Pacific Gas and Electric Company,

Defendant.

ORIGINAL

Case 90-08-034
(Filed August 16, 1990)

Jeffrey R. Clark, for himself, complainant.
Richard F. Locke, Attorney at Law, for
Pacific Gas and Electric Company,
defendant.

OPINION

Statement of Facts

Pacific Gas and Electric Company (PG&E) since October 10, 1905 has been an operating public utility corporation organized under the laws of the State of California. PG&E is engaged principally in the business of furnishing electricity and gas service in northern and central California.

Incidental to provision of electric service in the Cameron Park area off Route 50 in El Dorado County, between Sacramento and Placerville, PG&E owns and maintains an overhead 12 kilovolt (kV) primary circuit electric feeder line extending northward through Unit No. 3 of Cameron Park and the Cameron Park Community Services District (CPCSD) property to the Lakeside Village Subdivision area.

In 1983, after crossing Knollwood Drive, the overhead feeder line entered upon Lot 1515 in Unit No. 3 of Cameron Park and extended diagonally across that quadrilaterally shaped property before entering upon the CPCSD property. At all times of the

contentions herein, PG&E has had a legal right of way for its 12 KV overhead feeder line across Lot 1515.

In January of 1983, Dr. and Ms. Jeffrey R. Clark purchased Lot 1515. Before purchasing the property Clark was aware of the presence of the power line. It was not until 1987 when Clark decided he wanted the line relocated so that he could either sell or build on the property, and notified PG&E to move the line, that he learned of PG&E's legally valid right of way or easement across his property. Clark's title insurance company had not ascertained the existence of the easement when it sold Clark his title policy. As construction of a home beneath a power line is not permissible, Clark asked PG&E about relocation. PG&E wanted to accommodate Clark, although a relocation had to be at Clark's expense. In March of 1987 Clark met at the property with PG&E's Wade Haley, local manager, to discuss relocation options. Clark also had retained legal counsel to negotiate a title insurance settlement. The Clark-Haley discussions resulted in turning to undergrounding because overhead relocations to either the east or west side of Clark's property required removing or trimming trees on the property or would involve existing valuable old oak trees on neighboring property. An alternate overhead route to another line two lots away also involved neighbor approvals.

In early October of 1987 Clark paid a pre-engineering advance fee and PG&E prepared an estimate based on a combination of overhead relocation and undergrounding which would relocate the feeder line underground along the easterly property line on Clark's property.¹ This estimate was \$26,642. Included was a

¹ At the initial site meeting Clark, his title insurance company representative, and Haley were to be present. The title insurance representative did not show. Clark then asked Haley to prepare a

(Footnote continues on next page)

contribution in aid of construction (CIAC) tax (the 67% federal tax rate gross-up resulting from the Tax Reform Act of 1986). This estimate was sent to Clark's attorney for the title company negotiations. Immediately thereafter the CIAC tax rate was reduced to 28% and Haley communicated to Clark's attorney the fact that the tax reduction would reduce the previously given estimate to \$20,421.

Shortly thereafter Clark's title insurance company settled Clark's claim for the \$17,000 maximum of his insurance policy. Afterward there was no immediate further activity, and when Haley asked Clark his intentions Haley was informed that no further action on the relocation project was to be taken at that time. Subsequently in October of 1988 part of Clark's engineering advance was refunded to him.

In January of 1990 Clark again contacted Haley stating that he was ready to build and wanted to discuss options. Again they met at the site. Again the pros and cons of overhead and underground were discussed. Haley's opinion was that overhead relocation along either side of Clark's property would not be feasible because the design and width of Clark's planned home would preclude the rights of way required to provide for trimming of neighbor-owned trees on either side. Haley further concluded against undergrounding on the east side because a deep trench would be required, impinging upon the root structure of the neighbor's overhanging large Heritage oak tree. Clark wanted a less expensive option than the 1987 estimate.

(Footnote continued from previous page)

cost estimate for relocation of the line, a "Cadillac" estimate that would reflect the most favorable option for Clark. This was the combination estimate.

Relying upon Haley's expertise, the parties then centered upon undergrounding along the west side with Clark's contractors doing the trenching. The plan contemplated using the existing pole at the right front of the property, thence going underground, crossing a frontage creek to Clark's west property line vicinity, thence on to the rear along the west side where the line would rise to a new pole before continuing into CPCSD's adjoining property. The new pole would require an anchor line extending back 20 - 25 feet, taking up room in Clark's backyard. Trying to be helpful, Haley suggested that if the pole could be placed over the rear property line into CPCSD's property and anchored back toward the Clark property, yard space could be saved. Haley told Clark that he was a member of the CPCSD Board and because of possible conflict of interest he could not himself ask the Board to consider it, but that another PG&E employee could ask. Before this was done Clark called Haley, saying the pole should be left on Clark's property as it would thereby save 20 feet of underground trenching. No contact therefore was made to CPCSD and PG&E proceeded on a formal estimate preparation. Clark later asserted that during these discussions Haley had stated that although he was not an engineer, he didn't see the cost going as high as \$10,000. Haley, on the other hand, states that to the degree \$10,000 was discussed, it related to overhead relocation, not to undergrounding work.

On April 16, 1990, PG&E provided Clark with an estimate of \$20,630.82 along with a contract offer to expire in three months.² Clark argued it was too high, and called Haley's supervisor, Richard Wright, saying Haley had a conflict of interest as a PG&E employee and CPCSD board member because in the latter

² This estimate in the form of an "Agreement to Install Facilities or Perform Other Work" appears as Appendix A to this decision.

capacity he would have an automatic bias toward undergrounding, and that he, Clark, was being charged to upgrade PG&E's feeder line. He also contended that PG&E should pay for the relocation as that would be an appropriate way to spread the cost of preserving valuable oak trees; and that preservation benefiting all ratepayers. On May 11, 1990, Clark, his brother, Wright, and Haley met at the site. Again the options were reviewed. Clark wanted overhead considered again, and in the discussion was given an off-the-cuff opinion that if neighbor right of way and trimming permission could be obtained, an east side relocation might cost between \$12,000 and \$15,000. Clark asked that this be pursued but that PG&E sound out the neighbor. PG&E got no positive response from the neighbor. Without this right of way from the neighbor and trimming, unless Clark was willing to relocate his planned home on the lot, which without redesign he could not do, there would be inadequate space on the east side to overhead. As Clark did not want to do this, and still insisted the relocation should cost him no more than \$10,000, an impasse was reached.

On May 22, 1990, Clark filed an informal complaint with the Commission's Bureau of Consumer Affairs (refiling the complaint on June 5, 1990 after the original was misplaced). Meanwhile, Haley having been transferred to Turlock and promoted, Daniel Edwards, PG&E New Business Representative, took over the Clark matter. On June 29, 1990 Edwards met Clark and Clark's wife at the site. Again the options were reviewed. The only option meeting Clark's cost objectives, apart from relocation of his planned house, would be to use the alternate line 2 lots away, but as anticipated, the neighbors involved flatly refused to grant a right of way. Clark was then told that undergrounding was the only option, and that pursuant to provisions of PG&E's Rule 20C, if Clark wanted the relocation he would have to pay the \$20,630.82 cost, that the utility could not pass to other ratepayers any part of the cost of the relocation to be made to accommodate him.

On July 12, 1990 Clark signed the PG&E April 16, 1990, \$20,630.82 estimate contract in order to meet the 90-day limit on the offer and to avoid delay in construction. To accommodate Clark's financing PG&E allowed time to August 3, 1990 when Clark submitted checks to cover the estimated cost. On August 2, 1990 a minor change involving installation of a splice box required to avoid excessive 90-degree turns was made.

As Clark's informal complaint did not produce the results he sought, Clark on August 14, 1990 filed the present complaint. In his lengthy complaint, besides reciting a detailed chronology of events, Clark also takes issue with PG&E's handling of his application, its interpretation of Rule 20C, its upgrading of the feeder line, the applicability of CIAC tax, and Haley's alleged "inherent conflict of interest." He seeks reparations for all costs above the \$4,010.50 he paid his contractor for trenching, backfill, and substructure installation; in essence, return of the \$20,630.82 paid PG&E. He also seeks an investigation of PG&E's general pricing/estimating policies applied at its El Dorado office, and some sanctions for PG&E's callous attitude and behavior.

A duly noticed public hearing was held in Sacramento on November 16, 1990 before Administrative Law Judge John B. Weiss. Clark presented his evidence and PG&E presented its evidence through witnesses Haley, Wright, and Edwards. Both parties made closing arguments after which the case was submitted for decision.

Discussion

When an electric public utility obtains a right of way to place poles and run a wire line across a parcel of private property, the electric utility acquires an easement consisting of that right of way. An easement is an interest in the land of another that entitles the owner of the easement to a limited use or enjoyment of the other's land (Rest., Property § 450). It is a property right which exists distinct from the ownership of the

land, and as such is entitled to all the constitutional protections afforded other property rights. Thus, PG&E, having previously acquired a legal right of way across Lot 1515 in Unit 3 of Cameron Park, was under no legal obligation or compulsion to relocate the overhead feeder line in its right of way to accommodate Clark.

At all times, since neighbors refused use of an alternate route two doors away, the only basic alternatives open were overhead or undergrounding on either the east or the west side of Clark's property. Clark would need cooperation from either neighbor to trim for an overhead option and a right of way grant, and it was Clark's responsibility to secure any such agreement, not PG&E's. In the 1987 phase, with plans still open, he was not inclined to seek trimming approval himself, reluctantly accepting the undergrounding option, and asking PG&E to prepare a "Cadillac" estimate for his insurance negotiation purposes. And once an insurance settlement was obtained from the title company, he dropped the power line relocation project for the time being.

In the 1990 phase, Clark had by then firmed-up the design and location of the projected home, placing it across the property east to west, so that there would be inadequate remaining side space to readily accommodate overhead options with tree root and trimming requirements. Furthermore, again Clark himself did not want to approach his prospective neighbors for approval of the radical trimming and right of way indicated as necessary to accommodate overhead, asking PG&E to make the overtures, albeit unsuccessfully.³ And Clark was against redesign of his planned home to provide side space otherwise necessary. Accordingly, the

³ A 12 kV primary circuit should not be overhung by trees and PG&E will not construct a line under the trees. With the set location of Clark's planned home, unless further right of way could be obtained from Clark's neighbors, there was insufficient space to permit overhead.

undergrounding option along the west side was the realistic option, offering as it did avoidance of a deeper creek bed on the east side, and a culvert. (See sketch map, Appendix B.)

Once PG&E decided as a matter of public relations that it would relocate its line to accommodate Clark, and undergrounding was the viable option, the provisions of PG&E's Rule 20 (Replacement of Overhead with Underground Facilities) dictated the terms PG&E would follow. Sections A and B of Rule 20 are not applicable: Section A because the relocation is not to accommodate an undergrounding determination of a local governmental entity; and Section B because no legislation is in effect requiring such a change applicable to all existing overhead communications and electric distribution facilities within the area. As the relocation is purely to accommodate Clark, Section C of Rule 20 applies,⁴ and Clark must be responsible for the estimated costs.

4 Rule 20C reads:

"C. In circumstances other than those covered by A. or B. above, when mutually agreed upon by the Utility and an applicant, overhead electric facilities may be replaced with underground electric facilities, provided the applicant requesting the change pays, in advance, a nonrefundable sum equal to the estimated cost of the underground facilities less the estimated net salvage value and depreciation of the replaced overhead facilities. Underground services will be installed and maintained as provided in the Utility's rules applicable thereto."

Clark objects to the estimated costs, asserting they are too high.⁵ He believes that by upsizing the conductor cable used in the undergrounding section, PG&E passed to him costs he should not pay for. The overhead 12 kV feeder line that traversed Clark's lot had 4/0 aluminum conductor wire carrying 12,000 volts. The underground replacement was installed with 700 aluminum conductor wire to carry 21,000 volts. But, as the PG&E witness testified, whenever overhead is undergrounded, it is resized for possible future requirements and to accommodate a greater heat generating factor. Undergrounding is expensive, and to avoid even more expensive replacement PG&E uses a ten-year average current construction standard, here one applicable to a rapid growth area.⁶ This is standard practice.

Clark further objects to being required to pay CIAC tax on the costs for this relocation, arguing that moving the line's location to underground is more comparable to a service extension than to new construction. But this project is not a service extension. Service was already available to Clark's property. This project is the replacement of an overhead primary 12 kV feeder

5 Clark raised some questions in his complaint, citing the opinion of his contractors on how things should be done and appropriate materials and charges. These questions centered on PG&E's requirement of six-inch PVC pipe rather than smaller size for burial cable use. However, Clark did not pursue these questions at the hearing. PG&E's witnesses testified that the particular materials, wire size, and other items used were those within PG&E specifications for undergrounding, including other than 20C applications. PG&E has the ultimate responsibility of the relocation, its adequacy and safety. On this record there is no basis to challenge PG&E's construction specifications or requirements.

6 That PG&E may within five years convert the existing overhead primary feeder line for 21,000 volts to serve future development is not material. But for Clark's request it would not be dealing with undergrounding much less replacement before demand requires it.

line with an underground feeder line through Clark's property. As PG&E's Rule 20C clearly states, "overhead electric facilities may be replaced with underground facilities..." [Emphasis added]. It is long settled that the applicant seeking such a replacement must contribute the cost, as he is the person considered as having benefited. Here he will be able to place a home on his lot and where he wants it. Prior to 1987 CIAC was not taxable. But the effect of the 1986 Tax Reform Act was to consider formerly nontaxable contributions as gross income for federal income tax purposes. The Act provided that "Contributions-in-aid-of-construction" are any items or amounts contributed to a "regulated public utility" to the extent that the purpose of the contribution is to provide for the expansion, improvement, or replacement of the utility's facilities (Prop. Reg. Sec. 1.118-2(a)). A "regulated public utility" is a utility required to furnish energy, gas, water or sewage disposal services to members of the general public (I.R.C. Sec. 118(b)(3)(c)). PG&E is such a "regulated public utility." The Commission concluded in Decision (D.) 87-09-026 (Re Tax Reform Act of 1986 (1987) 25 CPUC 299), that all contributions, except by governmental agencies, should be considered taxable, and placed the burden of the tax on the contributor, based on the premise that the person who causes the tax should pay the tax. Clark here causes the tax by requesting the relocation which must be at his expense, and he is properly charged for it. And the tax is properly calculated not only on PG&E's estimated costs, but also including the costs of the trenching, backfill, and substructures furnished and installed by Clark's contractor, all part of the overall project being contributed to PG&E.

Finally, Clark states his "seminal complaint" to be what he asserts were Haley's dual allegiances: Haley's obligations to CPCSD to preserve the beauty of the area and to save old oak trees versus his obligations to PG&E customers to identify the most cost-effective options. We ascribe no credence to this contention.

While PG&E admits Haley was president of CPCSD, it also points out, and the evidence is clear, that the less expensive overhead options were defined for Clark both in 1987 and in 1990. But it was Clark who agreed to proceed with undergrounding estimates for reasons of unwillingness of neighbors to grant rights of way and Clark's own decision not to cut trees on his own property. In the interim between 1987 and 1990 Clark knew of the tree problems, but none the less proceeded to design, estimate, contract, and finance, etc., the home in a location that virtually mandated undergrounding.

It is our conclusion that PG&E and its employees including Haley, worked to try to accommodate Clark and to help him resolve an unfortunate situation which he had not fully investigated before purchasing his lot in Cameron Park. The delays incurred were caused by Clark's persistent refusal to accept the reality of Rule 20C. In its dealings with Clark, PG&E at all times has complied with its own internal rules and practices, applicable rules and tariffs on file with the Commission, and with applicable sections of the Public Utilities Code. The utility has the right under Electric Rule 20C to charge a customer for all relocation costs associated with the undergrounding of power lines. The complaint must be dismissed with prejudice.

Findings of Fact

1. PG&E provides public utility electric service in many areas of Northern and Central California, including areas in and about Cameron Park in El Dorado County.
2. At all times relevant in the present proceeding, PG&E owned and maintained a 12 kV primary feeder power line that by right of PG&E's legally held easement diagonally traversed Lot 1515 in Unit 3 of Cameron Park.
3. The location of PG&E's 12 kV primary feeder line effectively precluded residential construction on Lot 1515 unless it was relocated.

4. Aware of the presence of the PG&E power line, Clark in 1987 purchased Lot 1515.

5. In 1987 Clark approached PG&E to seek relocation of the utility's power line in order to either sell or build a home on Lot 1515.

6. While under no legal compulsion to relocate its power line, PG&E, to accommodate Clark, was willing to relocate its facilities, if Clark provided an acceptable alternate right-of-way and paid all relocation costs.

7. Relocation to overhead facilities along either the east or west boundary of Lot 1515 would have provided the least expensive option for Clark.

8. Site examination by Clark and PG&E confirmed the existence of extensive overhang from valuable vintage oak trees on neighboring properties on the east and west sides of Lot 1515.

9. The necessity of extensive cut back and trimming of neighbors' trees as well as of trees on Clark's lot in order to accommodate an overhead relocation along either side border led to an initial decision favoring an overhead-underground combination to relocate on the eastern border.

10. After receiving the estimate from PG&E Clark called off further consideration of the project in late 1988.

11. In 1990, having completed preparation of plans, contracting, and financing for his home to be built on the lot, Clark again asked PG&E to discuss options for relocation, and PG&E again fully cooperated.

12. Clark's completed plans, contracts, and financing that fixed the planned home almost astride the lot so as to limit side clearances, and extensive cut back and tree trimming required for overhead relocation, when considered with unsuccessful attempts to obtain neighbor approvals, all led again in 1990 to undergrounding as the only realistic option.

13. After further consideration to avoiding the deep trenching that would be required with danger to the root structure of the neighbor's oak, east side undergrounding was abandoned, and with consideration to avoiding a creek bed deeper on the east side, and a culvert, the option selected was an all underground relocation across the south front and along the west side.

14. PG&E's Haley's suggestion that CPCSD's approval be sought to relocate a pole from Clark's property into CPCSD property (which would also serve to extend undergrounding 20 feet), which suggestion was made with a view to improve the aesthetics of Clark's future rear yard, did not, merely because Haley happened also to be the president of CPCSD, constitute a conflict of interest nor an inherent bias toward undergrounding.

15. The April 16, 1990 estimate and offer given Clark of \$20,630.82 for the relocation reflected PG&E's obligation under Rule 20C to require an applicant to pay the estimated cost of replacing overhead with underground, and further correctly reflected the Commission requirement of D.87-09-026 that the full burden of CIAC tax for the complete contribution, whether items of property or payments, be placed on the contributor.

16. In estimating and completing this relocation for Clark's benefit PG&E followed its standard construction practice and ten-year average current construction standard applicable to all undergrounding conversions.

Conclusions of Law

1. PG&E at all times on this relocation request project has complied with its own internal rules and practices, applicable rules and tariffs on file with this Commission, and with applicable sections of the Public Utilities Code.

2. The delays on this relocation project were the consequences of Clark's persistent reluctance to accept an undergrounding vis-a-vis an overhead relocation, with the

concurrent requirements of Rule 20C that the applicant pay the estimated costs for undergrounding.

3. The complaint should be denied with prejudice.

ORDER

IT IS ORDERED that:

Case 90-08-034 is denied with prejudice.

This order becomes effective 30 days from today.

Dated May 22, 1991 at San Francisco, California.

PATRICIA M. ECKERT

President

G. MITCHELL WILK

DANIEL Wm. FESSLER

NORMAN D. SHUMWAY

Commissioners

Commissioner John B. Ohanian, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director

Copies:

- Division
- Applicant
- Acct. Opers.
- District

PACIFIC GAS AND ELECTRIC COMPANY

Agreement To Install Facilities
Or Perform Other Work

Reference:

WH1/EB3091

6N4780276

C. 90-08-034

APPENDIX A

Jeffrey Clark, an individual

hereinafter called Applicant, has requested Pacific Gas and Electric Company, hereinafter called PG&E, to perform the work described below at or near Cameron Park County of El Dorado, State of California.

PG&E will perform the work and furnish all necessary labor, appliances, materials and facilities required, subject to the following conditions:

1. The required work shall be as follows:

(Describe in detail the materials and facilities to be furnished and/or work to be done. For each facility installed, specifically indicate whether ownership shall vest in PG&E or Applicant upon completion of work. If more space is required use other side and attach any necessary drawings.)

Non-Refundable Charges

- Rule 20C Costs - undergrounding existing overhead electric primary at customer expense per customer request \$15,168.50

- CIAC Tax (28% of \$19,144.00)

Rule 20C costs \$15,168.00

PG&E share of trench 3,976.00

\$19,144.00

5,360.32

Total undergrounding cost \$20,528.82

- Rule 16 Charges

Riser Material 52.00

Excess Service (beyond 100 free feet) 30.00

Total non-refundable charges \$20,630.82

Less credit for pre-engineering advance 300.00

Total Amount Due \$20,330.82

(Ownership of all facilities shall vest in PG&E.)

2. Whenever part or all of the required work is to be furnished or performed upon property other than that of Applicant, Applicant shall first procure from the owners thereof all rights of way and/or permits necessary in a form satisfactory to PG&E and without cost to it.

3. Applicant shall immediately, upon demand and prior to construction by PG&E, pay to PG&E as the complete contract price the sum of Twenty thousand six hundred thirty and 82/100

dollars (\$20,630.82).

Executed this day of , 19 .

Jeffrey Clark
Applicant

PACIFIC GAS AND ELECTRIC COMPANY

BY:

BY:

(Print or Type Name)

Richard L. Wright

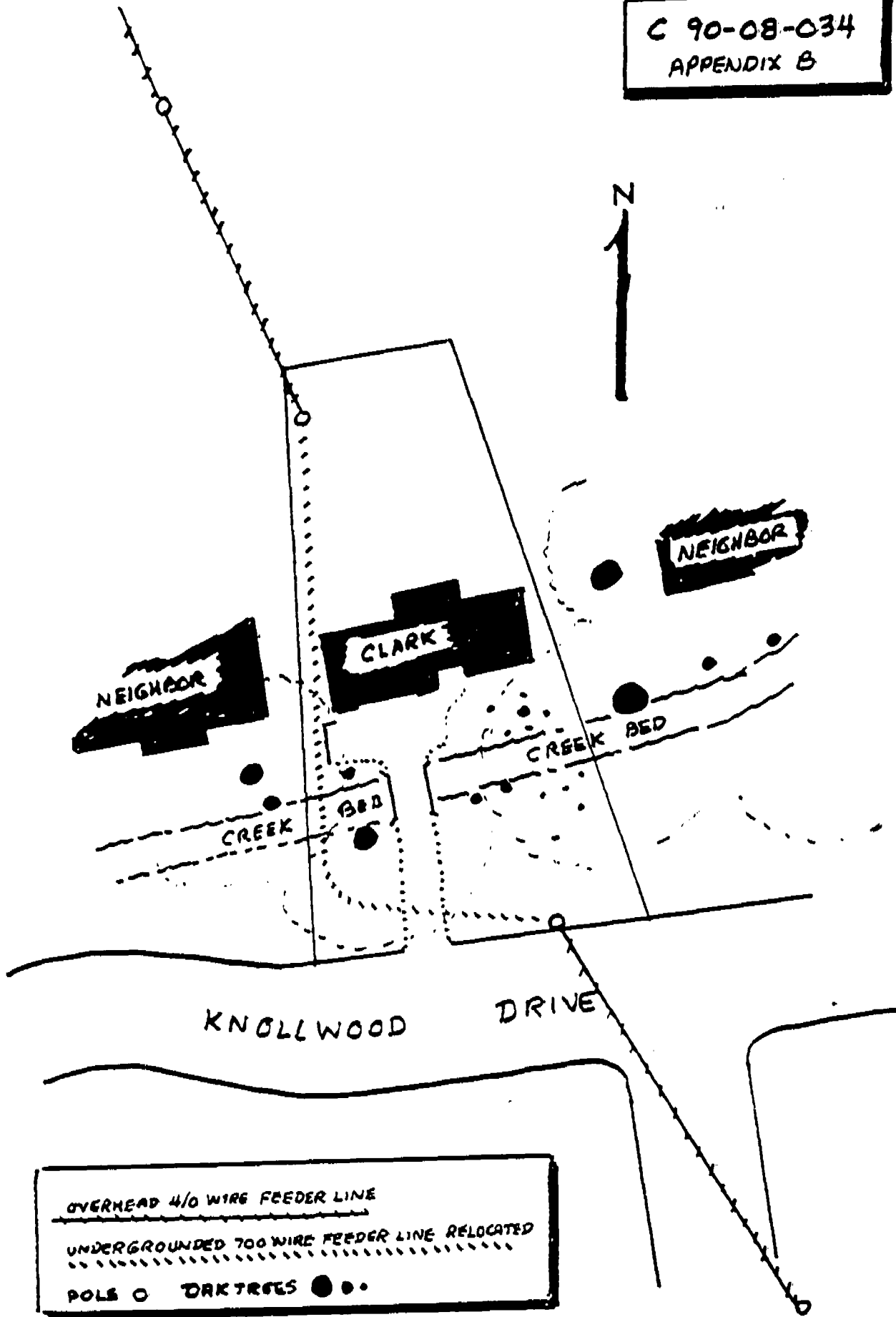
(print or type name)

Mailing Address: 1330 Solida Way

FOR: Manager, Drum Division

Sacramento, CA 95833

C 90-08-034
APPENDIX B



OVERHEAD 4/0 WIRE FEEDER LINE
UNDERGROUNDED 700 WIRE FEEDER LINE RELOCATED
POLE O DARK TREES