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Decision 96-03-009 March 13, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Emil L. Berezcky,

Complainant,

ORIGINAL

Case 95-05-020  
(Filed May 8, 1995)

Southern California Edison Company

Defendant

OPINION

Summary of Decision

This decision grants a motion by defendant Southern California Edison Company (SCE) to dismiss a formal complaint filed by Emil L. Berezcky (Berezcky) for money damages and other relief. Our decision signifies that the complaint fails to set forth a cognizable claim, and in any event, that the underlying problem may be addressed more effectively in a pending investigation proceeding, to the extent that we could conceivably address it in this proceeding. Although we dismiss this proceeding, the discovery process has already afforded Berezcky part of the remedy he seeks. Other relief may be available in the investigation proceeding, or from the courts.

Background

The complaint alleges that SCE "excessively trimmed spruce and pine trees" on Berezcky's property on November 17, 1994. He seeks various remedies in response to the alleged harm which resulted from these trimming activities, and particularly for the topping of a bluish spruce tree which he claims is located about a three-foot distance from the alignment of SCE's electric transmission wires overhead. The complaint further alleges that

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SCE had not trimmed "anywhere near this property as long as (he has) owned it (1972), nor, he believes, since construction of the electric lines in 1952.

Bereczky requests a declaratory order to the effect that topping of the spruce tree was not required by Commission regulations; an order that SCE produce its tree-trimming policy and historical tree-trimming records for his property and the road on which it is located; and a ruling reviewing the adequacy and appropriateness of SCE's tree-trimming policy and performance, as revealed in those disclosures. He asks the Commission to order SCE to use "better" tree-trimming techniques, and to require SCE to notify by mail all property owners at least 60 days in advance of all routine tree trimming. Finally, he seeks damages in the amount of \$4,999 for injury to the spruce tree.

SCE admits trimming trees on Bereczky's property on the date in question, but denies trimming excessively. SCE also denies that it has not trimmed trees on the property since 1972 or before. SCE avers the existence of a recorded utility easement for its electric lines on the property, which grants the right to clear away brush and tree growth as necessary for operation of the electric line.

By way of affirmative defense, SCE contends that it is required to perform a reasonable amount of trimming to keep its lines clear of branches and foliage pursuant to Rule 35 of our General Order (GO) 95, and that Sections 4293 and 4296 of the California Public Resources (Pub. Res.) Code provide additional guidance for determining standards or tolerances for trimming trees.

He seeks various remedies in response to the alleged harm which resulted from these trimming activities, and particularly for the topping of a bluish spruce tree which he claims is located about a

1 SCE also alleges that the center of the bluish spruce tree is 22 inches, rather than three feet, to the side of its electric lines, and that its canopy is directly under SCE's power lines.

in the vicinity of electrical lines across such forested areas as the Berezky's property, and in the general vicinity of the above-mentioned areas. We disagree that the reasonableness language in GO 95-05-020 is intended to require SCE's motion to be made on the grounds that the complaint does not satisfy the statutory requirements for complaint proceedings before this Commission, and that it should therefore be dismissed. SCE relies upon dicta contained in the conclusion of basic Law 1 in Leo Morgan v. Pacific Gas and Electric Company (1987) 25 CPUC 2d 393, 395-96, which states that, "Excessive trimming if proven would not violate any Commission order." Even if

Berezky responds that GO 95 "requires and/or implies" reasonable and consistent practices and action by the utilities. He argues that SCE's failure to adhere to such practices caused him to suffer "great financial loss (and) mental anguish" and that in this proceeding the Commission should provide safeguards against the recurrence of his experience with SCE and against "other persons' abuses associated with the use of rights of way." We sympathize with Berezky's plight, but we do not believe it would be appropriate to further entertain his request for relief in this proceeding for several reasons. First, Rule 35, as it is presently drafted, does not fix a maximum limit on the amount of trimming which a utility is permitted to do on easements under its power lines. The intent of the rule is to "insure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of overhead electrical lines and to the public in general." (GO 95, Rule 11.) It must be noted that the Commission has consistently held that the Commission's jurisdiction is limited to the enforcement of the Public Utilities Code, and that it does not have jurisdiction to award damages or to award costs in a proceeding brought by a person or corporation alleging that a utility is liable to any person or corporation for injury caused thereby or resulting therefrom. California Public Utilities (PU) Code Section 1702 permits any person to bring a complaint before the Commission setting forth the acts by a utility which are "in violation or claimed to be in violation of any provision of law or of any order or rule of the commission." Rule 9 of the Commission's Rules of Practice and Procedure restates this rule.

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therefore, be construed to fix a minimum, rather than a maximum, as a standard to effectuate the general safety and reliability purposes of GO 95. We disagree that the reasonableness language in Rule 351 should be construed as a safeguard for the individual property owner. Consequently, even if proven, the conduct alleged does not constitute the basis for a complaint under Rule 351. Bereczky has cited no other statute, rule, or other authority which would support the complaint. The complaint should therefore be dismissed.

Even if SCE's actions could be construed as a violation of Rule 351, we have no power to award money damages for injury to Bereczky's property, or for emotional distress. For incidents such as this, the only monetary relief at our disposal is a fine if we find that the utility violated a Commission rule or order. A fine, which would not be payable to the complainant, is not to say that Bereczky is without recourse for the property damage and other harm he allegedly suffered. If there is an express easement that defines the extent of permissible use, that document may afford him a basis for relief. If not, he may nevertheless be able to seek relief under civil law. In either instance, his recourse is to the courts rather than this Commission.<sup>3</sup>

<sup>3</sup> The Commission has consistently held that it may not award damages on the basis either of tort or contract. See, e.g., *Schumacher v. Pacific Tel. & Tel. Co.*, (1965) 64 CPUC 295, and cases therein cited. Instead, under PU Code Section 2106, ratepayers may pursue in court their damage claims against utilities. That section provides in pertinent part that a utility is liable to any person or corporation affected by the utility's wrongdoing "for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction." *Id.* As stated in *Violations of the Commission's Rule 9 of the Commission's Rules of Practice and Procedure* restates this rule.

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...Nor is this the appropriate forum in which to address Bereczky's request for relief of a more generalized, legislative, nature, whether or not SCE's actions went beyond any permissible bounds imposed by Rule 35. Issuing an order which would require SCE to observe "better" systemwide tree-trimming standards and practices, for example, is not an appropriate response to an individual claim of unreasonable conduct and is unduly unworkably vague. The question of appropriate tree-trimming standards and practices has a broad reach encompassing issues of worker safety, public safety, fire suppression, and environmental consequences, as well as those relating to individual property owners' aesthetic values and property rights. These issues are complex and interrelated. For precisely this reason, the Commission expanded the scope of its inquiry in I. 94-06-012 (the pending "Tree Trimming of OII"), which was originally instituted to investigate circumstances that resulted in the death of a farmworker who had come into contact with a utility's line while pruning trees in a orchard. In the first phase of that proceeding, which concluded with the approval of a settlement between the utility and the Commission's enforcement staff, we addressed the question of whether those circumstances constituted a violation of Rule 35. In the second phase of that proceeding, we addressed the question of whether the utility's actions constituted a violation of Rule 35. In the second phase of that proceeding, we addressed the question of whether the utility's actions constituted a violation of Rule 35.

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Tahoe Southside Water Utility (1965) 233 CA 2d 469, 479, Section 2106 is the only statutory authority, specific to public utilities, "for the recovery, by a person injured, of damages, compensatory and exemplary. The Commission has no authority to award damages." (2-S .IT) IIO paimrT eorT ed to epeo ds

phase of that proceeding we are investigating the tree-trimming practices of all utilities within our jurisdiction with the expectation that we will fashion a new general rule to correct the infirmities of the present Rule 3509. Because the new rule that will emerge from this effort will take into account the frequently competing concerns identified above, we believe that it will mandate better tree-trimming practices by SCE and other utilities. In the meantime, we do not want to create the risk of adopting an inappropriate or inconsistent rule by doing so within the narrow confines of a work complaint proceeding. The most effective way for Bereczky to pursue the changes he advocates is to become an active participant in the Tree Trimming OII, where his experience with SCE will be viewed in the context of the overall purpose of that proceeding, if he has not already done so. Finally, we note that Bereczky has already obtained part of the relief he seeks in this proceeding through the device of discovery which was instituted by ruling of the ALJ. At the PHC the ALJ fixed a discovery deadline and permitted each party to propound a data request to the other concerning the events surrounding the complaint, and required the responding party to answer in due course. (Tr. 19.) This procedure afforded Bereczky the opportunity to obtain the disclosures he sought in the complaint, and correspondence in the file indicates that in fact he did so. The issue of ordering such relief has thus become moot, and there is no need to maintain this proceeding to direct such disclosure by Commission order.

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 Tahoe-Southern Water Utility (1995) 233 CA 2d 444, 445.  
 Section 2106 is the only statutory authority specific to public  
 4 At the October 10, 1995 prehearing conference (PHC) the utility administrative law judge (ALJ) advised Bereczky about the pendency and scope of the Tree Trimming OII (Tr. 2-6).

For all of the foregoing reasons we dismiss Bereczky's complaint.

Findings of Fact

1. Complainant Bereczky alleges that defendant SCE "excessively trimmed spruce and pine trees" on his property. The complaint asks the Commission, inter alia, to order relief in the nature of a declaratory order, promulgation of a rule governing SCE's future tree-trimming conduct and prior notice of tree trimming to affected property owners, and money damages for the harm he allegedly suffered as the result of SCE's actions.

2. At the PHC, the ALJ permitted each party to request and obtain disclosure of the facts relating to this tree-trimming incident, with a completion deadline that has now passed.

Conclusions of Law

1. The complaint does not set forth acts by SCE which are in violation, or could be claimed to be in violation of any provision of law, or of any order or rule of the Commission, which we are empowered to enforce.

2. Irrespective of the merits of the complaint, issuing an order that would afford legislative relief in response thereto would be an inappropriate exercise of our jurisdiction.

Bereczky's request for a Commission order requiring SCE to disclose facts relating to his complaint is moot.

**ORDER** Complainant Bereczky's request for a Commission order requiring SCE to disclose facts relating to his complaint is moot. **IT IS ORDERED** that the Commission dismiss the complaint. The complaint is dismissed.

This proceeding is closed. This order is effective today. Dated March 13, 1996 at San Francisco, California.

At the EHC, the ALJ permitted each party to request and obtain disclosure of the facts relating to this free-riding incident with a condition binding that has now passed.

**DANIEL Wm. PESSLER**  
**President**  
**P. GREGORY CONLON**  
**JESSIE J. KNIGHT, JR.**  
**HENRY M. DUQUE**  
**JOSIAH L. NEPPER**  
**Commissioners**

Violation of any provision of law or rule of the Commission, which was enforced to enforce. Irrespective of the merits of the complaint, issuing an order that would afford legislative relief in response thereto would be an inappropriate exercise of our jurisdiction.