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Decision 97-01-033 January 23, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Alliance for)
 Utility Safety and Education,)
)
 Complainant,)
)
 vs.)
)
 San Diego Gas & Electric)
 Company,)
)
 Defendant.)
 _____)

ORIGINAL

Case 95-11-019
(Filed November 15, 1995)

Joan I. Tukey and Karen B. Johanson, for
 California Alliance for Utility Safety
 and Education, complainant.
Vicki L. Thompson, Attorney at Law, for
 San Diego Gas & Electric Company,
 defendant.

O P I N I O N

The California Alliance for Utility Safety and Education (CAUSE) is an unincorporated association, without membership dues, which claims to represent San Diego region ratepayers of the San Diego Gas & Electric Company (SDG&E). The complaint concerns the undergrounding of electric distribution and transmission lines in the City of San Diego and the responsibility of SDG&E to perform and pay for that undergrounding. CAUSE would have us rescind some of our undergrounding decisions, require SDG&E to modify tariffs approved by us, overrule agreements between SDG&E and the City of San Diego, and penalize SDG&E because it has misused the undergrounding program. SDG&E denies each and every allegation

of the complaint and moves to dismiss on the ground that complainant has failed to state a cause of action. We grant the motion.

Background

In 1967 this Commission adopted an undergrounding conversion policy for the State of California (Decision (D.) 73078 in Case 8209, 76 CPUC 490). We said "it is the policy of this Commission to encourage undergrounding." (Id. at 512.) In conformance with that policy, all major utilities in California filed their undergrounding rules. SDG&E's undergrounding rule is found in its tariffs as Rule 20a. The rule covers six pages in the tariff and is complex. For the purpose of this discussion, the pertinent portions of the rule are:

"Rule 20a. The utility will, at its expense, replace its existing overhead electric facilities with underground electric facilities along public streets and roads, and on public lands and private property across which rights-of way satisfactory to the utility have been obtained by the utility, provided that:

"1. The governing body of the city or county in which such electric facilities are and will be located has:

"a. Determined, after consultation with the utility and after holding public hearings on the subject, that such undergrounding is in the general public interest...."

That basic rule has been in existence for almost 30 years. In 1995 in D.95-04-048 in Application (A.) 91-11-024, we modified SDG&E's tariff by authorizing the following in Rule 20a:

"A. 4.

The utility may, at its sole discretion, enter into agreements with a governing body of a city or county to reduce the amount of funding for undergrounding of overhead facilities (see Form ____). The governing body will, at the time of entry into the agreement, be entitled to an agreement for a minimum of one year or as long as five years. Upon entry into the agreement, any specific projects that the governing body and the utility have previously agreed to will not be subject to the agreement. Any expenses incurred by the utility due to performance of agreements, as set forth in this subsection, shall be booked as normal utility expenses."

SDG&E operates in the City of San Diego under a franchise agreement by which SDG&E pays substantial sums to the City of San Diego based upon SDG&E's gross receipts. The franchise agreement is effective until 2020. In recent years SDG&E and the city have disagreed over certain franchise provisions and entered into a settlement of their dispute. The settlement includes SDG&E's contribution to underground funding for six years. The settlement was adopted by the San Diego City Council in April 1995. The settlement commits SDG&E to allocate and spend \$5 million for undergrounding projects in 1995 and \$10 million annually beginning in 1996 through the year 2000. SDG&E also agrees to pay the city \$1 million per year for 1996-1998. In exchange the city agreed to waive its claims to \$19 million of the \$51.4 million in unspent prior year undergrounding allocations. SDG&E has paid the city \$1.4 million in 1996 in performance of its obligations under the settlement.

CAUSE alleges that certain statements by council members of the City of San Diego show that those council members did not understand the settlement nor its effect on the city. Additionally, CAUSE spends approximately 20 pages of its voluminous complaint alleging various misrepresentations by SDG&E to both the city and the Commission. These allegedly false representations go back as early as February 4, 1980. Because of the alleged ignorance of the city council and the misleading statements of SDG&E employees, CAUSE would have us nullify the settlement agreement.

We have reviewed those allegations and conclude that they have no substance. CAUSE has merely pled conclusionary statements regarding supposed misrepresentations in documents over a 16-year period. Assuming that we had the power to negate the settlement agreement, CAUSE has not set forth any facts to show that any law has been broken.

CAUSE asserts that on the record which led to D.95-04-048 "SDG&E misled the Commission and others by stating unsupported beliefs as facts in violation of Rule 1 of the Public Utilities Commission's Rules of Practice and Procedure." CAUSE goes on to cite language in D.95-04-048, which language, CAUSE believes, is not supported by the record. SDG&E claims that the allegations of CAUSE are merely a belated attack on D.95-04-048, which decision having become final, cannot be attacked by complaint. We agree with SDG&E. A party may not, under the guise of a complaint, seek to reopen a proceeding after the time for filing an application for rehearing has passed. (Northern Calif. Ass'n v PUC (1964) 61 C.2d 126.)

In D.95-04-048, we had before us the issue of agreements between governmental agencies and utilities to reduce undergrounding; we concluded that an amendment to Rule 20a was

appropriate. That amendment gave utilities at their sole discretion authority to enter into agreements with the governing body of a city or county to reduce the amount of funding for undergrounding of overhead facilities. CAUSE is unhappy with that decision and recommends that it be deleted from Rule 20a. CAUSE's request is merely a disguised way to present a belated application for rehearing.

CAUSE alleges that SDG&E has refused to spend allocations in violation of Rule 20a. CAUSE has misinterpreted Rule 20a. The rule requires, among other things, "that the governing body of the city or county in which such electric facilities are and will be located has: (a) Determined after consultation with the utility and after holding public hearings on the subject that such undergrounding is in the general public interest." CAUSE has not specified any proposed undergrounding projects outside of the settlement agreement where the City of San Diego has held public hearings and found that undergrounding is in the general public interest, but SDG&E has failed to proceed.

CAUSE seeks more undergrounding in San Diego. It is unhappy because the City of San Diego has chosen not to require SDG&E to spend the maximum amount possible on undergrounding. CAUSE has failed to state a cause of action upon which the relief requested (canceling the settlement agreement between the City of San Diego and SDG&E, repealing a tariff provision authorized by this Commission, and ordering tens of millions of dollars of undergrounding in San Diego) can be granted. There is no showing of a violation by SDG&E of any provision of law or of any order or rule of this Commission, as required by Public Utilities Code § 1702. Accordingly, we will grant the motion to dismiss.

Finding of Fact

The complaint fails to show that the April 1995 agreement entered into by SDG&E with the City of San Diego violated any provision of law or any order or rule of this Commission.

Conclusions of Law

1. Insofar as the complaint seeks to have us rescind portions of D.95-04-048 it is nothing more than a late-filed application for rehearing and should be dismissed.

2. The motion to dismiss for failure to state a cause of action should be granted.

O R D E R

IT IS ORDERED that:

1. The motion of San Diego Gas & Electric Company to dismiss this complaint is granted.

2. Case 95-11-019 is closed.

This order is effective today.

Dated January 23, 1997, at San Francisco, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners