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Decision 97-02-010 February 5, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Committee to Retain Underground )  
Electricity, )

Complainant, )

vs. )

Pacific Gas and Electric Company, )

Defendant. )

Case 96-08-020  
(Filed August 7, 1996)

OPINION DISMISSING COMPLAINT

On August 7, 1996, the Committee to Retain Underground Electricity (complainant), a group of property owners residing in the Spring Creek Subdivision near Willits, California, filed a complaint with this Commission seeking an order prohibiting Pacific Gas and Electric Company (PG&E or defendant) from installing poles and overhead power lines along a portion of Spring Creek Road to supply power to a lot situated within the Spring Road Subdivision as requested by the owner of that lot.

On September 16, 1996, PG&E filed a Motion to Dismiss the complaint alleging the action cannot be maintained under the doctrine of collateral estoppel and that the complaint fails to state a claim upon which relief can be granted.

Because of extreme time pressures and with the consent of all parties, a hearing on PG&E's motion to dismiss was held before an administrative law judge (ALJ) on September 17, 1996. Upon the recommendation of the ALJ, we grant PG&E's Motion and dismiss the complaint on the ground that complainants are collaterally estopped from pursuing their complaint because the issue underlying the complaint (that lot owners be required to underground utilities)

has previously been decided in the matter of Kirk Lee Mather, et al. vs. Spring Creek Road Association, Case No. CV68309. (Opinion not officially reported). See Minute Order of Hon. James F. King, Judge, Superior Court of Mendocino County, February 20, 1995 (Exh. V to Declaration of Robert C. Wattenburger attached to PG&E's Motion to Dismiss) (Minute Order).

Background

In 1977, Harrah Industries Incorporated, a developer, prepared a subdivision map creating the Spring Creek Subdivision (Complaint, Exh. F). As part of the subdivision map, the developer offered to dedicate the following public utility easement:

"Right-of-way and easements for water, gas, sewer, and drainage pipes; and for poles and overhead and underground wires and conduits for electric, telephone, and television services; together with any and all appurtenances appertaining thereto; on, over, and across those strips of land designated public utility easements." (Minute Order, p. 1.)

On March 8, 1977, the Board of Supervisors accepted "on behalf of the public" the above dedication. The parcel map was recorded on March 9, 1977, and contained both the above dedication and the County's acceptance of the utility easements. Title to the easements passed to the public upon recordation of the map (Minute Order, p. 1).

Thereafter, in 1983, the Board of Directors of the Spring Creek Road Association "filed a document with the county 'to dedicate and transfer a part of the road easements to incoming utility and phone companies for the purpose of supplying [underground electric and telephone] service to residents therein.'" (Complaint, Exh. F.) This document, entitled "Amended Declaration of Covenants, Conditions and Restrictions of Spring Creek Road Association," attempted to amend the 1977 public utility easement (PUE) which permitted either overhead or underground

utility lines, to restrict new residential utility services to only underground lines. (Minute Order, p. 2.)

In 1992, the Association attempted to correct the 1983 document by recording a second document which stated that the 1983 document was intended to "evidence the dedication of an easement only, and not to amend the Declaration of Covenants, Conditions and Restrictions." However, it repeated the undergrounding restriction contained in the 1983 document. (Minute Order, p. 2.)

After reviewing the facts as above recounted, the Court stated:

"To the extent that either [of] these documents attempt to place an under-grounding restriction on the public utility easements which were conveyed to the public upon recordation of the 1977 parcel map, they are void and of no force or effect." (Minute Order, p. 2.)

The court went on to hold that the plaintiffs in that action were entitled to a decree quieting title in the public at large to the utility easements described in the 1977 parcel map against any attempts by the Spring Creek Road Association to place an undergrounding restriction on the right of the public to use and enjoy those specific easements. The record fails to disclose that the matter was pursued beyond the Superior Court level.

Thus, as far as the issue of whether individual parcel owners can be compelled by the homeowners association to place power lines underground, the court has spoken, and we are not at liberty to change that determination.

#### Tariff Restrictions

In general terms, the policy of the Commission is to require undergrounding of all line extensions to new residential subdivisions and residential developments within the state. Within PG&E's service territory, this policy is expressed in PG&E Tariff Rule (Rule) 15.1. While acknowledging the foregoing, PG&E argues that because the facts of this case fall within the provisions of

PG&E Rule 15 G.1.b., which has been approved by the Commission, compliance with the general undergrounding requirements expressed in Rule 15.1 is not mandatory. We agree.

It should be obvious that, because of the existence of extremely unfavorable terrain in certain parts of the state and the greatly increased cost entailed in undergrounding, even in ideal conditions, undergrounding may not be practical or desirable in certain situations. As a result, Rule 15 contains provisions where, if certain conditions exist, overhead service may be substituted in place of undergrounding. Those situations where overhead extensions for subdivisions or developments are permitted are specified in sections G.1.a. and G.1.b. of Rule 15. The evidence produced at the evidentiary hearing indicates that since the consumer who applied for electric service to his property within the Spring Creek Subdivision requested overhead service, and all conditions of Rule 15 G.1.b. have been met, PG&E is required to provide such overhead service.

Complainant contends that because of the extreme risk to life and property by fire in the area where the overhead wires would be erected, an exception should be made under the "Exceptional circumstances" provision contained in section G.1.b.4). In support of this position complainant argues that the area in question is extremely isolated and heavily wooded; is subject to excessively high winds during the summer "fire period;" and is accessible by only a single road so that in the event of a fire caused by downed power lines, persons farther from the main road would be trapped with no means of escape. Complainant points out the recent deaths and extensive property damage caused in the state by fires started by downed power lines, and claims the risk of such a catastrophe occurring in this remote area is simply too great to take. Complainant argues that under its tariff, PG&E is obligated to trim tree branches only within 6 to 10 feet from its

power lines, and that is insufficient due to the danger of tall trees falling across the power line during a period of high wind.

While we recognize that there is an element of risk in living where complainants choose to reside and desire to minimize that risk however we can, we will not dictate that PG&E obviate part of that risk by placing its power lines underground. The property owner who has requested overhead service desires to receive that type of service, and, under PG&E's approved tariff, PG&E is obligated to provide the requested service. If this were a single isolated instance, our experience indicates that PG&E might well, as a gesture of good will to avoid degrading the natural scenic beauty of the area, opt to underground at cost. However, given the rugged topography of much of PG&E's service territory and the number of similar situations that exist throughout PG&E's service area, it would be unrealistic to expect PG&E to underground at cost universally. Further, it would be discriminatory for PG&E to underground in this instance and not do the same for all others in similar circumstances. Of course, complainants have the option, either jointly with the unidentified property owner or on his behalf, to pay the difference between the cost of overheading and undergrounding.

#### Findings of Fact

1. Complainants seek to compel PG&E to underground electric service to a customer who has requested overhead service to property located within the Spring Creek Subdivision near Willits.
2. In 1977, the developer of Spring Creek Subdivision dedicated a utility easement to Mendocino County for undergrounding and overheading of utilities in the subdivision.
3. The dedication was accepted on behalf of the public and recorded in the land records of Mendocino County.
4. In 1983, the Spring Creek Road Association caused to be recorded a document which attempted to amend the 1977 dedication to require undergrounding of utilities.

5. In 1992, the Spring Creek Road Association recorded a document which stated that the 1983 document was "intended to evidence the dedication of an easement only, and not to amend the Declaration of Conditions, Covenants and Restrictions"; however, it repeated the undergrounding restriction contained in the 1983 document.

6. In a "Minute Order" dated February 20, 1995, in a proceeding then before it, the Mendocino County Superior Court held that to the extent either the 1983 or 1992 documents attempted to place an undergrounding restriction on the public utility easements conveyed to the public upon recordation of the 1977 dedication, "they are void and of no force or effect."

7. This Commission is bound by that determination of the Superior Court.

8. Under PG&E's filed tariffs, overhead extensions may be erected only where conditions specified in Tariff 15 G.1.a. or 15 G.1.b. are found to exist.

9. All of the conditions specified in Tariff 15 G.1.b. exist.

10. In this case the fire risk associated with overhead power lines does not qualify as an exceptional circumstance under Tariff 15 G.1.b.4) so as to warrant undergrounding in this instance.

11. Complainants have the option, either jointly with the unidentified property owner or on his behalf, to pay the difference between the cost of overheading and undergrounding.

#### Conclusions of Law

1. Complainants are barred by the doctrine of collateral estoppel from attempting to impose an undergrounding restriction on utilities in the Spring Creek Subdivision.

2. The party who requested the installation of overhead utilities is entitled to that service.

3. PG&E may not refuse to overhead the requested facilities.

4. In this case, the risk of fire does not constitute an exceptional circumstance within the meaning of Tariff 15 G.1.b.4).
5. The complaint should be dismissed with prejudice.

O R D E R

IT IS HEREBY ORDERED that:

1. The complaint is dismissed.
2. Pacific Gas and Electric Company may proceed with the installation of overhead electric facilities as requested.

This order is effective today.

Dated February 5, 1997, Francisco, California.

P. GREGORY CONLON  
President  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
RICHARD A. BILAS  
Commissioners