Decision 97-08-072 August 1, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

California Alliance For
Utility Safety And
Education

Complainant,

vs.

San Diego Gas And
Electric Company,

Defendant.

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

ORDER DENYING REHEARING AND MODIFYING D.97-01-033

The California Alliance for Utility Safety and Education ("Applicant") filed an application for rehearing of our Decision (D.) 97-01-033 in which we dismissed Applicant's complaint against San Diego Gas and Electric Company ("SDG&E") following a prehearing conference held April 29, 1996. The dismissal, on a motion by SDG&E, was based on our conclusion that Applicant had failed to state a cause of action.

Upon review of the application for rehearing, and the response of SDG&E, we deny rehearing of D.97-01-033. The application does not demonstrate legal error as required by Cal. Pub. Util. Code Section 1732.[1]

[1] Unless otherwise indicated, hereinafter all statutory references shall be to the California Public Utilities Code.

I. APPLICANT'S CONTENTIONS REGARDING AN AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND SDG&E DOES NOT DEMONSTRATE LEGAL ERROR IN OUR DECISION.

In support of the rehearing request, Applicant first discusses the predominant category of allegations in its complaint which relate to an April 11, 1995 agreement between SDG&E and the City of San Diego (also, City) in which, Applicant contends, SDG&E reduced its allocations for undergrounding distribution power lines. (Application for Rehearing, at p. 3.) This discussion, however, provides us with only a summary restatement of the allegations of its complaint relating to the April 11, 1995 agreement, with the addition of unsupported objections to the Commission's determination that the allegations of Applicant's complaint do not state a cause of action that would inform an orderly and purposeful evidentiary hearing.

The discussion relies on contradictory statements. Applicant states, initially, that "Applicant is not asking the Commission to void or rescind the April 11, 1995 agreement in the sense that a court might find the agreement void. This would be beyond the jurisdiction of the Commission ...." (Application for Rehearing, at pp. 3-4.) Applicant's concession, in fact, may or may not be correct, depending on the element of the agreement in question, and whether it is in conflict with duly issued orders and decisions of this Commission.[2] We cannot discern, however, in the application for rehearing, as we could not in the complaint, precisely what specific elements of the agreement conflict with a specific Commission order, rule or decision.[3]

---

[2] See, e.g., Southern California Gas Co. v. City of Vernon (1995) 41 Cal.App.4th 209, 217; People v. Levering (1981) 122 Cal.App.3d Supp. 19, 21; Abbott v. City of Los Angeles (1960) 53 Cal. 2d 674, 682; California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App.2d 16, 31-32.

[3] In the voluminous pages submitted by Applicant in this proceeding, there are several references to the modification to RULE 20A of SDG&E's tariff which we ordered in D.95-04-048. The modification adds a provision which permits SDG&E to enter, at its sole discretion,

Applicant also contends that at the prehearing conference of this case, it had cited a court decision which, according to Applicant, holds that an "action by the legislative body of a municipality contrary to or not authorized by the City Charter, is a nullity and void." (Application for Rehearing, at p. 5.) Applicant, however, fails to make any rational connection between this holding, quoted out-of-context, and its prior acknowledgment that it is not asking this Commission to find the agreement void or invalid. Nor does Applicant explain, either in the application for rehearing or in the complaint, the rational connection, if any, between the provisions of the City Charter and any other allegation against SDG&E presented in the complaint.

In addition, in the application, Applicant reiterates the charge that the Commission did not approve the April 11, 1995 agreement, as Applicant believes is required. However, Applicant does not clarify, as it failed to do in the complaint, how the subject of an amendment of a franchise agreement between the City and SDG&E is within this Commission's jurisdiction. Applicant does not identify either the legal authority for asserting the Commission's approval of the agreement is required, or the specific violation committed by SDG&E by entering into the agreement.

Adding to the confusion on this matter, the application for rehearing reargues one of the complaint's allegations which claims that the April 11, 1995 agreement was enacted without notice and public hearing by the City of San Diego. The issue raised for our consideration here is not evident. Furthermore, we believe the subject of noticing a public hearing by the City, or

---

into agreements with the governing body of a city or county to reduce the amount of funding for undergrounding of overhead facilities, as SDG&E did in the April 11, 1995 agreement. (D.95-04-048, Appendix A, at p.062.) We note that the fact that the April 11, 1995 agreement preceded the issuance of D.95-04-048 by a few days does not by itself support an allegation that the agreement between SDG&E with the City of San Diego violated a Commission order or rule. Applicant does not clearly state how the agreement it complains of violates any law, Commission rule or regulation, or SDG&E's tariff provisions as they existed on April 11, 1995.

failing to do so, is the basis of Applicant's civil suit against the City of San Diego filed in the Superior Court where matters concerning the procedures used by the city are properly heard.[4] Applicant fails to explain how an allegation against the City's legislative procedures constitutes a cause of action within this Commission's jurisdiction, or relates to any allegation of violations by SDG&E.

Allegations which vaguely describe a broad subject area of concerns are not enough to demonstrate legal error in D. 97-01-033. It also is not enough to claim Applicant deserves a hearing to find out "whether the Commission will decide whether the Agreement is subject to its jurisdiction and regulatory power under Rule 20-A and not a valid franchise agreement under the City Charter." (Application for Rehearing, at pp. 5-6, quoting Applicant's representative at the prehearing conference, Tr. 41:7-28 and 42:1-24.) The Commission's Rules 9 and 10 require that the complainant, not the Commission, set forth the act or thing done or omitted by any public utility in violation of, or claimed to be in violation of law or of any order or rule of the Commission. Most pertinent to Applicant's complaint, Rule 10 requires that allegations be stated in "ordinary and concise language" in order "to advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired." Emphasis added. The complaint must focus the issues and the specific facts to be considered, and must establish the Commission's jurisdiction to hear the issue before, not after, an evidentiary hearing is initiated. Applicant's complaint did not do so, and therefore failed to meet the standards of Rule 10.

The application for rehearing, therefore, does not persuade us that amongst the 15 compound and interwoven allegations of Applicant's complaint,

---

[4] CAUSE v. City of San Diego, Case No. 696935, filed February 5, 1996 alleging violations of the Brown Act (Government Code Section 54953 et seq.).

we overlooked any cause of action relating to the April 11, 1995 agreement entered into by SDG&E with the City of San Diego which could have formed the basis for ordering further argument or the taking of evidence and witness testimony in an orderly hearing.

II. APPLICANT HAS NOT BEEN DENIED DUE PROCESS

Applicant contends due process was denied because the complaint was dismissed without an evidentiary hearing. If Applicant were correct, there would be no provision in the law for demurrers, summary judgments, or dismissals prior to trial or an evidentiary hearing. Complaints, of course, may be dismissed not only by the courts, but by this Commission when a complaint fails to establish the facts, applicable law, and jurisdiction justifying a hearing. (See Rule 56, and Section 1701.) A hearing can be justified if the matters to be proven are understood, if there is a sufficient and comprehensible indication that the allegations are based on fact, not mere conclusory accusations, and if the allegations are sustainable under some theory of law. When those conditions are not met, a hearing is wasteful of the resources of the parties and the decisionmaker, and therefore is not required. Those conditions are not met by Applicant's complaint.

Applicant also contends that after the April 29, 1996 prehearing conference at which the motion to dismiss was considered, the presiding Administrative Law Judge (ALJ) reviewed material in camera and then improperly issued a ruling (on September 6, 1996), without an evidentiary hearing, recommending the dismissal of the complaint. Applicant claims due process was not afforded since Applicant was not given an opportunity to cross-examine witnesses about the material reviewed by the ALJ before the order dismissing the complaint was issued.

Applicant should recall, however, that the subject material was offered by Applicant to the ALJ for his consideration to dissuade him from the dismissal recommendation. At the prehearing conference, an issue arose regarding the ratemaking treatment of the costs of undergrounding. In response to arguments by Applicant that it could prove SDG&E's reduction of undergrounding projects unfairly impacted ratepayers, the ALJ agreed to review the information proffered by Applicant.[5] This information consists of a report, not a sworn affidavit, by Applicant's designated expert, William B. Marcus. The ALJ indicated that he would consider the information filed on behalf of Applicant to determine whether it could save the complaint. (Tr. 48:11-16; 53:13-23.)

The report of Mr. Marcus was filed on behalf of Applicant, with comments, by an intervenor in this docket, Utility Consumers' Action Network (UCAN) on July 29, 1996. SDG&E also filed additional evidence in response on August 23, 1996. Upon our present review of the material submitted, we affirm that with respect to the issues raised therein, no cause of action was stated by Applicant. Instead, the comments by UCAN and the report of Mr. Marcus strongly suggest that the real intent of the complaint was to challenge the findings and conclusions in an earlier general rate case decision, D.95-04-048, regarding SDG&E's undergrounding of distribution lines.[6] Both UCAN and Mr. Marcus address the impact on rates under performance-based ratemaking (PBR) of the number and the timing of SDG&E's undergrounding projects.

UCAN summarizes Mr. Marcus's report as follows:

---

[5] It would appear that at this time the ALJ was attempting to give Applicant every opportunity to demonstrate the complaint presented some violation of law or Commission orders and could go forward to a hearing.

[6] This decision became effective April 26, 1995, and was mailed April 28, 1995. Applicant's complaint was filed November 15, 1995, obviously beyond the 30-days filing deadline, starting April 28, 1995, for an application for rehearing of D.95-04-048. (See Section 1731(b).)

> "Mr. Marcus found that the PBR [performance based ratemaking] mechanism does, in fact, encourage SDG&E to reduce undergrounding expenditures. He finds that SDG&E's current projected undergrounding spending level is 6.5 million per year below the amount of Rule 20A spending included in SDG&E's PBR formula." (Utility Consumers' Action Network's Submission of Additional Evidence as Per ALJ Barnett's Order on Behalf of UCAN and Applicant (UCAN's July 29, 1996 filing), at p. 2.)

UCAN adds its own observation that:

> "The PBR rules are ambiguous and could have been interpreted in such a way as to either result in profits reaped by reducing undergrounding costs or in a pass through of such savings to ratepayers." Ibid.

Mr. Marcus, moreover, states in his report that the issue he addressed was "[W]hether SDG&E can profit under its performance-based ratemaking (PBR) plan from reducing current spending on undergrounding." (Report of William B. Marcus on Undergrounding, at p. 1, filed as Appendix A with UCAN"S July 29, 1996 filing.) It seems to us quite clear, first of all, that ratemaking and the reasonableness of SDG&E's undergrounding are the subjects of this material submitted by CAUSE to the ALJ, and secondly, that it concerns the undergrounding issues addressed by the parties at the hearing of SDG&E's rate case (Application 91-11-024) and decided in D.95-04-048, at pp. 8-11.[7]

Issues addressed and decided in the rate case proceeding were subject to an application for rehearing of D.95-04-048. Failure to timely file for

[7] See also, D.95-04-048, Finding of Fact 6 and the Conclusion of Law, at pp. 30-31, which explain that the decision emanated from the Joint Testimony of the parties, including UCAN.

rehearing of that decision cannot be cured by Applicant through a collateral complaint filing.

Furthermore, the reasonableness of SDG&E's rates as adopted under the PBR, including those related to undergrounding of distribution lines, may not be raised in a complaint. Pursuant to Section 1702:

> "No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, utility, water, or telephone service."

To the extent we have been able to discover the gist of Applicant's concerns, we recognize that one which prevails in the complaint is the belief that SDG&E's reduction of undergrounding projects are unfairly impacting SDG&E's ratepayers. The report of Mr. Marcus confirms our reading of the complaint. We interpret the complaint, therefore, as essentially a challenge to the reasonableness of SDG&E's PBR rates or charges, the kind of challenge generally excluded from complaint proceedings by Section 1702. We also note that the exclusion cannot be overcome since the complaint is not signed or joined by a city or county. And, although Applicant purports to represent a group of consumers, that representation does not substitute for the individual 25 complainants who must be signatories to the complaint to meet the conditions of Section 1702.

Therefore, any and all allegations of Applicant which relate to the impact of undergrounding on the reasonableness of rates under SDG&E's PBR may not be considered in a complaint proceeding before this Commission. Also, any and all allegations regarding ratemaking issues addressed in another proceeding may not be challenged in a complaint, but must instead be timely presented pursuant to statutory law and Commission rules applicable to rehearings. (See Section 1731 et seq. and Rules 85 to 86.2.) We accordingly find no legal error in our decision dismissing the complaint prior to initiating an evidentiary hearing.

III. APPLICANT MISPLACES RELIANCE ON SECTION 1705.

Applicant further argues for rehearing of D.97-01-033 on the grounds that the Commission failed to comply with Section 1705 which requires that the Commission support its decisions with separately stated findings of fact and conclusions of law. D.97-01-033 includes one statement under the Finding of Fact heading: "The complaint fails to show the April 1995 agreement entered into by SDG&E and the City of San Diego violated any provision of law or any order or rule of this Commission." It provides two determinations as Conclusions of Law. The first states: "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." The second states: "The motion to dismiss for failure to state a cause of action should be granted."

The one finding of fact , based on what could be gleaned from the complaint, and the two conclusions of law are legally sufficient. Section 1705 does not require more since the complaint did not proceed to an evidentiary hearing. In dismissing the case, we concluded that the complaint lacks sufficient facts to state a comprehensible cause of action and cognizable allegations. It is logically not possible, therefore, to determine what facts may be material in

reaching a judgment on the merits of the case. Separately stated findings of fact on every claim and argument of the voluminous complaint, therefore, cannot reasonably be made or required.

We did not, for example, make any finding of fact on the various Rule 1 claims in the complaint, and for good reason. As we found in D.97-01-033, Applicant merely pleaded conclusory statements covering a period of more than a decade based on "supposed misrepresentations." (D.97-01-033, mimeo, at p. 4.) We found the misrepresentations were "supposed" because the complaint failed to identify, clearly and concisely, the specific facts which Applicant could prove and which would demonstrate that the alleged statements of SDG&E were false statements of fact or law, or misled the Commission, or the staff. (See the Commission's Rules of Practice and Procedure, Rule 1.) A complaint must give the Commission some indication that if a hearing is instituted it will not embark on an uncharted voyage. Appropriately, therefore, the Commission dismissed the Rule 1 claims along with the other parts of Applicant's complaint because they did not provide sufficient facts to constitute a cause of action. Moreover, several of the alleged Rule 1 violations appear to relate to the rate case decision, D.95-04-048, and the proceeding leading to that decision. As we have discussed here, and in the order dismissing the complaint, a collateral attack on a rate case proceeding by way of a complaint is not permitted under Section 1702 (with exceptions not applicable to Applicant's complaint) and is nothing more than an untimely and hence unlawful attempt to avoid the statutory requirements for applications for rehearing. (See D.97-01-033, mimeo, at p. 4.)

Therefore, with respect to Applicant's reliance on Section 1705, we find no grounds to support granting the application for rehearing. However, consistent with our discussion herein, we will modify D.97-01-033. Finding of Fact No. 1 will be deleted, and modified more appropriately as a new Conclusion of Law No. 2 to state: "The complaint fails to show that the April 11, 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, or raised any issue within the jurisdiction of this Commission." The original Conclusion of Law No. 2 shall be renumbered as Conclusion Law No. 3.

CONCLUSION

Rehearing of D.97-01-033 is denied. We find no legal error in our dismissal of Applicant's complaint, filed November 15, 1995, against SDG&E. The complaint does not state facts sufficient to constitute a cause of action within the jurisdiction of this Commission and, contrary to Section 1732 and the Commission's Rules 9 and 10, does not state a cause of action that intelligibly informs the Commission of the grounds of a viable complaint. However, consistent with our discussion of Applicant's Section 1705 claims, we will modify D.97-01-033 as set forth in the following order.

IT IS THEREFORE ORDERED that:

1. The application for rehearing of D.97-01-033 is denied.
2. The Finding of Fact in D.97-01-033 is deleted.
3. A new Conclusion of Law No. 2 is hereby added to state: "The complaint fails to show that the April 11, 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, or raised any issue within the jurisdiction of this Commission."
4. Conclusion of Law No. 2 of D.97-01-033 is hereby renumbered as Conclusion of Law No. 3 without any modification to the statement therein: "The motion to dismiss for failure to state a cause of action should be granted."

5. This docket is now closed.

This order is effective today.

Dated August 1, 1997, at San Francisco, California.

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