

ALJ/XJV/avs

Mailed 4/1/99

Decision 99-04-001 April 1, 1999

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rick E. Thurber,

Complainant,

vs.

Pacific Gas and Electric Company and
Pacific Bell,

Defendants.

Case 98-09-036
(File September 30, 1998)

OPINION DISMISSING COMPLAINT

Summary

We grant the motion of Pacific Bell and dismiss the complaint for failure to state a cause of action for which relief might be granted. General Order 95, Rule 34 does not impose an affirmative obligation on utilities to actively and routinely remove all unauthorized, temporary signs and their fastenings or take legal action against persons who post them.

Procedural and Factual Background

Rick Thurber (Thurber) filed this complaint against Pacific Gas and Electric Company (PG&E) and Pacific Bell (PacBell) on September 30, 1998. The complaint alleges the utilities have violated California Public Utilities Commission (Commission or CPUC) rules concerning "foreign attachments" on overhead electric lines and other utility facilities, specifically General Order (GO) 95, Rule 34. The October 6, 1998 Instructions to Answer categorized the complaint as an adjudicatory proceeding; the categorization has not been

appealed. On November 5, PG&E and PacBell filed separate (but nearly identical) answers and PacBell also filed a motion to dismiss. At a prehearing conference (PHC) held on January 15, 1999, the Assigned Commissioner and administrative law judge (ALJ) heard oral argument on the motion to dismiss and solicited the parties' views on other procedural issues.

Thurber first contacted the Commission about some of the concerns which underlie his complaint several months before he filed. On March 6, 1998, Thurber wrote to Commission President Bilas requesting a deviation from GO 95, Rule 34 and permission to post a 4" x 6" decal on utility poles within the City and County of San Francisco. The sample decal contained the message: "Respect Our Neighborhood - Post No Signs or Handbills" and referenced various local ordinances, state statutes, and the CPUC's Rule 34. The Utility Safety Branch of the CPUC's Consumer Services Division held a public workshop on Thurber's request on April 29, 1998.

Subsequently, the Utility Safety Branch placed a draft resolution (Resolution SU-48) which recommended approval of Thurber's request on the Commission's July 23, 1998 public meeting agenda. The Commission withdrew the resolution at the next public meeting, August 6.

Discussion

Before explaining our disposition of this matter, we summarize the challenged law and the relevant pleadings.

GO 95, Rule 34

Rule 34, one of many rules that comprise GO 95, begins with the following text:

Nothing in these rules shall be construed as permitting the unauthorized attachment, to supply, streetlight or communication poles or structure, or antennas, signs, posters, banners, decorations,

wires, lighting fixtures, guys, ropes and any other such equipment foreign to the purposes of overhead electric line construction.

Nothing herein contained shall be construed as requiring utilities to grant permission for such use of their overhead facilities; or permitting any use of joint poles or facilities for such permanent or temporary construction without the consent of all parties having any ownership whatever in the poles or structures to which attachments may be made; or granting authority for the use of any poles, structures or facilities without the owner's or owners' consent. (GO 95, Rule 34, 1998.)

The rule then distinguishes between permanent and temporary attachments as follows:

All permanent attachments must be approved by the commission (see Rule 15.1) and the owner(s) involved.

All temporary attachments shall be restricted to installations where the period is estimated to be one year or less. (GO 95, Rule 34, 1998, italics added.)

The remainder of Rule 34 includes a statement of the right of the utilities or other governmental agencies to require more restrictive construction standards and sets out detailed requirements for "approved temporary foreign attachments" regarding permissible supports, climbing space, clearances, etc.

The Complaint and Answers

Thurber alleges that over the last ten years PG&E and PacBell have violated GO 95, Rule 34 in six ways. One, they have permitted "foreign attachments" on their utility poles and other facilities. The complaint defines foreign attachments to include "graffiti, promotional signs and attachment materials used to fasten the promotional signs, which include: adhesive tape, nails, staples, thumb tacks, plastic ties, wooden stakes, wheat paste or glue."

Two, the utilities have failed to take adequate steps to inform the public about GO 95, Rule 34 and "various local, state and federal laws and regulations" that prohibit use of private property without the consent of the owner or prohibit vandalism of public and private property. In addition, the utilities have taken inadequate measures to: three, provide routine care and maintenance of their facilities; four, prevent trespassers from violating utility property; and five, protect utility workers and the public from the safety hazard created by the foreign attachments complained of. Finally, the utilities have created a public nuisance because of the spill over effect of the vandalism alleged.

Thurber states that hearings are not necessary, suggests that mediation might be useful and requests relief in the form of a Commission order requiring PG&E and PacBell to comply with GO 95, Rule 34 by doing four things. One, repair, rehabilitate or replace vandalized facilities. Specifically, Thurber seeks removal of all graffiti and attachment materials from poles, phone booths, telephone relay cabinets and other utility facilities. Two, install a "high quality" notice on facilities which says something such as "No trespassing/Post No Signs or Graffiti." Three, provide routine care and maintenance necessary to maintain facilities free of graffiti, promotional advertising and the like. Four, take swift action against "vandals and abusers of utility facilities."

The utilities deny each of the complaint's six allegations. They assert Thurber has misconstrued GO 95, Rule 34. They cite the text, which we quote above, arguing that it imposes no affirmative obligations of the sort alleged. They assert, moreover, that Thurber has failed to demonstrate violation of any other law (e.g. utility tariff, Commission rule or order) which would permit the relief requested. The utilities particularly take issue with Thurber's allegation that their inaction has created safety hazards for the public or utility workers. PG&E attaches copies of bill inserts and letters it has sent to political campaigns

advising that it prohibits sign posting. PacBell attaches portions of its internal Safety Standards. The utilities ask the Commission to deny the complaint on the pleadings, without hearing.

PacBell's Motion to Dismiss

The motion to dismiss is virtually identical to PacBell's answer. Procedurally, it interposes a second formal opposition to Thurber's complaint and presents the Commission with an alternative avenue for disposition. Thurber did not file a written response, but along with PacBell and PG&E, participated in oral argument on the motion at the PHC which was held for this purpose.

PacBell's oral argument expresses some sympathy with Thurber's underlying goal of improving the appearance of San Francisco neighborhoods, but reiterates the utility's position that the complaint fails to state a claim for which relief might be granted. PacBell also raises several issues which need to be addressed, it argues, should the Commission determine to approve permanent decals prohibiting sign posting -- who should pay for the decals and the labor, who should provide and pay for enforcement and if (as Thurber's March 1998 letter proposed), a reward program were established, how it would be funded. PG&E states it had worked with PacBell and Thurber to try to reach a resolution prior to the filing of the complaint and still is not opposed in principle, but it does share PacBell's concerns.

Thurber explains that he represents an organization, Community Cleanup Effort, which has been actively engaged in some San Francisco neighborhoods to paint over graffiti, remove handbills and other notices from utility poles and other facilities and remove the materials used to affix such notices. He explains that though he is a utility shareholder, he filed the complaint against PG&E and PacBell after draft Resolution SU-48 was withdrawn from the CPUC agenda

because "[t]hey are not only a victim; they have become agents in urban blight because of their neglect and abuse of their property." (PHC Transcript, p.18.)

Arguing a variation of the position taken in the complaint, Thurber states he seeks recognition of the following: the poor state of utility property stemming from lack of maintenance to remove graffiti, handbills, etc.; that the utilities have a fiduciary obligation to maintain their property to avoid these conditions; and that cost of such maintenance is relatively low.

We Grant the Motion to Dismiss

After careful review and consideration of the pleadings and the PHC oral argument on PacBell's motion to dismiss, we conclude that the motion must be granted. Accordingly, we dismiss the complaint for failure to state a cause of action for which relief might be granted. At issue are the responsibilities and obligations GO 95, Rule 34 imposes upon utility companies regarding unauthorized, temporary attachments to their overhead electric lines and other utility facilities. In asserting that Rule 34 creates an affirmative obligation to police rigorously the unauthorized posting of handbills, fliers, signs, and the like, Thurber has misconstrued the purpose of GO 95 and the requirements of Rule 34.

GO 95 consists of over one hundred rules plus a number of appendices. Rule 11, entitled "Purpose of Rules," provides context for the application of the GO:

The purpose of these rules is to formulate, for the State of California, uniform requirements for overhead electrical line construction, the application of which will *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, 1998, italics added.)

Rule 12, entitled "Applicability of Rules" explains, in relevant part: "These rules apply to all overhead electrical supply and communication lines which come within the jurisdiction of the Commission..." (GO 95, Rule 12, 1998.)

First we note that the term "overhead electrical supply and communication lines" cannot reasonably be expanded to encompass virtually all electric, gas and telephone utility facilities. In this respect, Thurber's interpretation is overly broad. However, even if we focus more narrowly on those fixtures which meet the definition, we find Thurber's complaint deficient. Quite simply, Rule 34 -- on its face -- does not impose an affirmative obligation on utilities to actively and routinely remove all unauthorized, temporary signs and their fastenings or take legal action against persons who post them.

The specific, express reach of Rule 34 is two-fold: it provides that permanent signs (posted by third parties) require utility and CPUC approval and it sets out requirements applicable to "approved temporary foreign attachments installed on climbable poles and structures." The focus of these concerns is one we take seriously -- safe and reliable delivery of utility service.

While the complaint does assert that the posting of unauthorized, temporary signs has created unsafe conditions, the allegations are quite general. At oral argument, Thurber supplemented the complaint's allegations and offered, as an example, that members of his organization "in removing staples from these poles, have actually been punctured right down to the bone by just simply a standard staple." (PHC Transcript, p. 29.) However, neither GO 95, Rule 34 (were it applicable) nor other CPUC safety regulations are devised to safeguard against accidental injury of this kind. Furthermore, the CPUC has received no other reports of injury to members of the public attributable to the unauthorized posting of temporary signs, no reports of injury to utility workers and no reports

of service impairment. At this time, we cannot reasonably conclude that a safety problem exists.

Review of the complaint and oral argument makes clear that Thurber's basic grievance is with the "aesthetic blight" he attributes to unauthorized sign posting. Neither GO 95, Rule 34 nor other CPUC regulations address this sphere of concerns. Furthermore, we are not convinced by the allegations in the complaint or by the PHC arguments that the CPUC, on its own motion, should inject itself into a debate regarding establishment of a uniform community aesthetic or seek to mediate such a dispute. We recognize, however, that withdrawal of draft Resolution SU-48 without any public comment was unfortunate and gave the parties no guidance regarding our view of the underlying matter or our role.

In conclusion, we do not suggest that the utilities could not do the things that Thurber asks (e.g. remove unauthorized temporary signs; install a permanent *utility* notice -- which would not require our approval -- advising of GO 95, Rule 34 or other state or local law; prosecute violators). We conclude, rather, that GO 95, Rule 34 does not require them to do those things and consequently, that any omission is not a violation of GO 95, Rule 34 which we must order them to remedy.

No Hearing Is Necessary

In granting the motion to dismiss, we change the preliminary determination, in the instructions to answer, that this proceeding required a hearing and make a factual determination that no hearing is necessary, in accordance with Rule 6.6 of the Rules of Practice and Procedure.

Comments on Draft Decision

The draft decision of ALJ Jean Vieth in this matter was mailed to the parties in accordance with § 311(g) and Rule 7.1 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. The CPUC's GO 95 consists of over one hundred rules and a number of appendices concerning overhead electric line construction.

2. GO 95, Rule 11, entitled "Purpose of Rules," clarifies that the concerns underlying these rules are insuring adequate service and safety.

3. GO 95, Rule 12, entitled "Applicability of Rules," limits the GO's reach to "overhead electrical supply and communication lines."

4. GO 95, Rule 34, entitled "Foreign Attachments," sets out the approval requirements applicable to permanent attachments and establishes detailed standards for authorized, temporary attachments.

5. Thurber's complaint alleges PG&E and PacBell have committed six violations of GO 95, Rule 34 stemming from the unauthorized posting of temporary signs and the like on utility poles and other utility facilities.

6. At oral argument, Thurber supplemented the complaint's general allegations that the posting of unauthorized, temporary signs has created unsafe conditions with the example that members of his organization "in removing staples from these poles, have actually been punctured right down to the bone by just simply a standard staple."

Conclusions of Law

1. Thurber erroneously interprets GO 95, Rule 34 to apply broadly to the utility facilities owned by the electric and gas and the telecommunications utility defendants.

2. GO 95, Rule 34 does not impose an affirmative obligation on utilities to actively and routinely remove all unauthorized, temporary signs and their fastenings or take legal action against persons who post them.

3. Neither GO 95, Rule 34 (were it applicable) nor other CPUC safety regulations are devised to safeguard against accidental injury of the kind Thurber alleges.

4. Neither GO 95, Rule 34 nor other CPUC regulations address the sphere of concerns underlying Thurber's basic grievance, the alleged "aesthetic blight" in San Francisco's neighborhoods he attributes to unauthorized sign posting.

5. We should grant PacBell's motion and dismiss the complaint for failure to state a cause of action.

6. In granting the motion to dismiss, we make a final determination that no hearing is necessary in accordance with Rule 6.6 of the Rules of Practice and Procedure.

O R D E R

IT IS ORDERED that:

1. The motion of Pacific Bell to dismiss the complaint for failure to state a cause of action is granted.

2. The complaint is dismissed.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners