

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**08-19-11
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August 19, 2011

Agenda ID #10623
Adjudicatory

TO PARTIES OF RECORD IN CASE 11-03-016

This is the proposed decision of Administrative Law Judge (ALJ) MacDonald. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ MacDonald at kk3@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:avs

Attachment

Decision PROPOSED DECISION OF ALJ MACDONALD (Mailed 8/19/2011)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Octavia Diener,

Complainant,

vs.

Pacific Gas and Electric Company (U39E),

Defendant.

Case 11-03-016
(Filed March 22, 2011)**DECISION DISMISSING COMPLAINT FOR LACK OF
JURISDICTION TO AWARD DAMAGES****1. Summary**

Complainant Octavia Diener seeks a California Public Utilities Commission (Commission) order requiring Pacific Gas and Electric Company to pay \$58,000 in damages to compensate her for the loss of 58 acres of wheat as the result of fire that was started by sparks from a transmission tower. Although the Commission has jurisdiction to provide a number of remedies for violation of the Public Utilities Code, the Commission does not have authority to award damages.

2. Background

Olivia Diener (Complainant) filed a complaint against Pacific Gas and Electric Company (Defendant) on March 22, 2011. Complainant contends that Defendant's transmission tower, located on her property, caused a fire resulting in crop loss on May 31, 2008. On its face, the complaint seeks only damages in

what is essentially a tort action. On April 21, 2011, the assigned Administrative Law Judge (ALJ) issued a ruling requesting both parties to explain whether the Commission has jurisdiction to grant the remedy sought by Complainant. In a letter dated April 25, 2011, Complainant explained that the Commission's jurisdiction was unclear in light of the California Supreme Court's ruling in *San Diego Gas and Electric Company v. Superior Court*, (1996) 13 Cal.4th 893 (*San Diego Gas and Electric Company*). As a result, Complainant filed her claim with the Commission out of an abundance of caution. Defendant did not respond.

3. Discussion

The Commission has jurisdiction over a disputed issue if that issue falls within the scope of authority granted to this Commission by the California Constitution or the Legislature.¹ The Commission derives its broad authority to regulate utilities from the California Constitution, and the Public Utilities (Pub. Util.) Code. The Public Utilities Act (§ 201 et seq.) vests the Commission with broad authority to “supervise and regulate every public utility within the state” and grants the Commission certain specific powers for the purpose.² In connection with the Commission's broad inherent powers under Article XII of the California Constitution, and § 701, the courts recognize the Commission's authority to provide a number of remedies, should the Commission determine that the utility has violated the law. For example, Pub. Util. Code § 2100 et seq. provides a wide variety of remedies designed to redress violations of

¹ *USDA Forest Service v. Lukins Brothers Water Company, Inc.* (1999) Decision D.99-07-014.

² *San Diego Gas and Electric Company v. Superior Court* (1996) 13 Cal.4th 893 at 915.

Commission decisions committed by public utilities. These include orders to common carriers to collect under-charges or unlawful rebates, actions for mandamus or injunction, actions to recover penalties, imposition of fines, criminal prosecutions, and contempt proceedings.

The Commission has repeatedly found, however, that only a court has the power to award consequential damages as opposed to reparations.³ The Commission distinguishes reparations as “. . . . relief limited to a refund or adjustment of part or all of the utility charge for a service or group of related services. Consequential damages on the other hand is an amount of money sufficient to compensate an injured party for all the injury proximately caused by a tortious act.”⁴ Pub. Util. Code § 2106 authorizes an action for damages by an injured party in superior or municipal court against any public utility that does any act prohibited or omits to do an act required by “the Constitution, any law of the State, or any order or decision of the commission . . . ”⁵

The San Diego Gas and Electric case on which Complainant relies is distinguishable from the instant claim. In that case, homeowners brought an action against a public utility asserting that defendant ran electric currents through a power line adjoining their property that emitted high and unreasonably dangerous levels of electromagnetic radiation onto their property.⁶ At the time the matter was brought before the trial court, the Commission was

³ Westley Crawford Muhammad v. MCI, Inc. (2007) D.07-01-005; Joseph and Lyn Stadish v. Southern California Gas Company (1996) D.96-06-006; Ronald I. May & Associates v. Pacific Bell (1991) D.91-10-008.

⁴ Walker v. P.T.&T. Co., 1971 Cal. PUC LEXIS 1288.

⁵ Pub. Util. Code § 2106.

⁶ San Diego Gas and Electric Company v. Superior Court, 13 Cal.4th at 911.

investigating and formulating policy with respect to whether electromagnetic fields arising from the power lines of regulated utilities are a public risk and what actions the utilities should take to minimize that risk. The Court found that a judgment on any of the property damage causes of action could hinder and frustrate the Commission's general regulatory policy regarding power line electric and magnetic fields.⁷ In reaching its decision, the Court explained that where there was still an open question, such as whether electric and magnetic fields arising from the power lines of regulated utilities are a public risk, jurisdiction in superior court would be barred where such action would hinder or interfere with that policy.⁸ In contrast, we do not see, and Complainant does not suggest, that there is any open question before the Commission which would have any bearing on the fire that caused Complainant's losses.

4. Proceeding Category and Need for Hearing

The Instruction to Answer filed on April 19, 2011, categorized this Complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Due to the lack of jurisdiction for the Commission to award damages requested in this complaint, this complaint must be dismissed, and the evidentiary hearings determination is changed to state that no evidentiary hearings are necessary.

⁷ San Diego Gas and Electric Company v. Superior Court, 13 Cal.4th at 914.

⁸ San Diego Gas and Electric Company v. Superior Court, 13 Cal.4th at 935.

5. Comments on Proposed Decision

The proposed decision of ALJ MacDonald in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

6. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Katherine Kwan MacDonald is the assigned ALJ in this proceeding.

Findings of Fact

1. Olivia Diener filed a complaint against Pacific Gas and Electric Company on March 22, 2011.
2. Olivia Diener seeks only property damages.

Conclusions of Law

1. The Commission lacks jurisdiction to award property damages.
2. Hearings are not necessary.
3. The complaint should be dismissed and docket closed, effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed for lack of jurisdiction to award the requested relief.
2. The hearing determination is changed to no hearings necessary.

3. Complaint 11-03-016 is closed.

This order is effective today.

Dated _____, at San Francisco, California.