



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking To Revise
and Clarify Commission Regulations
Relating to the Safety of Electric Utility
and Communications Infrastructure
Provider Facilities.

R.08-11-005
(Filed November 6, 2008)

**RESPONSE OF THE CONSUMER PROTECTION
AND SAFETY DIVISION TO THE APPLICATIONS FOR REHEARING OF
DECISION 12-01-032 FILED BY THE LOS ANGELES DEPARTMENT OF
WATER AND POWER AND THE CALIFORNIA MUNICIPAL UTILITIES
ASSOCIATION**

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I. INTRODUCTION

Pursuant to Rule 16.1 of the California Public Utilities Commission's Rules of Practice and Procedure, the Consumer Protection and Safety Division (CPSD) submits this response to the Los Angeles Department of Water and Power (LADWP) and California Municipal Utilities Association's (CMUA) application for rehearing of Decision (D.) 12-01-032. Once again, the publicly owned utilities challenge the Commission's well established authority to adopt and enforce rules governing their electric transmission and distribution facilities. At best, LADWP and CMUA's applications tediously repeat the same arguments raised (and rejected) many times over; at worst, they constitute borderline vexatious litigation. LADWP in particular seeks to re-litigate precisely the same questions of law that were raised, and rejected, in Phase 1 of this proceeding. Not only did this Commission address and reject LADWP's jurisdictional arguments in D.10-02-034 (decision denying rehearing of Phase 1 decision D.09-08-029), but the California Supreme Court also summarily denied LADWP's petition for writ of review of the Phase 1 decisions.

LADWP and CMUA now attempt to seek review of D.12-01-032 on what they claim are "limited" grounds of "issues of enforcement." These claims should be rejected for three reasons:

(1) LADWP and CMUA's request for "clarity" on the Commission's jurisdiction to enforce its safety regulations vis-à-vis POU's amounts to nothing more than a request for an advisory opinion. As the Commission made clear in its decision, it has a long standing policy against issuing advisory opinions. LADWP and CMUA fail to demonstrate that the Commission committed legal error in declining to issue an advisory opinion.

(2) The issue of the Commission's jurisdiction to enforce its safety rules over POU's was raised by LADWP in its petition for writ of review to the California Supreme Court. That petition was summarily denied by the California Supreme Court on June 30, 2012 in Case No. S181305. It is therefore *res judicata* against LADWP.

(3) The attacks raised by LADWP and CMUA constitute an improper collateral attack on D.98-03-036 and D.09-08-029, wherein the Commission determined that Pub. Util. Code §§ 8001-8057 confer jurisdiction on the Commission to adopt and enforce safety regulations over municipally-owned electric distribution and transmission facilities.

For these reasons, as discussed in more detail below, the applications for rehearing should be denied.

II. DISCUSSION

A. Declining to Issue an Advisory Opinion Does Not Constitute Legal Error.

Both LADWP and CMUA state that their applications for rehearing are limited to “the issue of enforcement authority” or “issues and questions related to enforcement.” (CMUA App. at p. 3; LADWP App. at p. 6.) LADWP claims it has requested “clarification” of the scope of the Commission’s enforcement powers in order to understand the nature and extent of the penalties that it may face in the event of non-compliance with applicable safety regulations. (LADWP App. at p. 7.) Although LADWP acknowledges that the Commission does not issue advisory opinions in the absence of a case or controversy, LADWP claims that in this case, “extraordinary circumstances” call for the Commission to clarify its enforcement powers and explain how the Commission will enforce and impose penalties against POUs. (*Ibid.*) CMUA on the other hand, claims that its request for the Commission to identify the statutory authority for enforcement powers over POUs is *not* a request for an advisory opinion. (CMUA App. at p. 4.) CMUA argues that it is not asking how a statutory or regulatory requirement would be applied to a hypothetical set of facts, but apparently is asking the Commission to identify the source of its enforcement authority.

To the extent CMUA is asking the Commission to reference its statutory authority for the proposition that it has the ability to enforce its safety regulations over POUs, the Commission has already done so not only in D.12-01-032, but also in D.09-08-029 and

D.98-10-059. In D.12-01-032 and D.09-08-032, the Commission clearly stated that “Pub. Util. Code §§ 8002, 8037, and 8056 provide the Commission with authority to adopt *and enforce* rules governing electric transmission and distribution facilities of publicly owned utilities for the limited purpose of protecting the safety of employees and the general public.” (D.12-01-032, *mimeo*, at p. 11; *see also*, D.09-08-029, *mimeo*, at p. 8 (emphasis added).) Likewise, in D.98-10-059, the Commission stated:

The Commission has historically had authority over the public safety aspects of publicly-owned utilities. Public Utilities Code, Sections 8001-8057 confer on the Commission the authority to regulate the state’s electric systems “for the purpose of safety to employees and the general public.” The law provides that this Commission not only has the authority to regulate public safety aspects of the publicly-owned utilities’ operations, *but that it has a duty to do so*: Sections 8037 and 8056 *require the Commission to enforce these provisions*. The Commission’s authority over such regulation has been confirmed by the court, which has found that the Commission has jurisdiction over publicly-owned utilities’ maintenance and construction of electric systems (Polk v. City of Los Angeles (1945) 26 Cal.2d 519, 540).

(D.98-10-059, 78 C.P.U.C.2d 706, at p. 712 (emphasis added).) It is unclear what further reference to statutory authority CMUA requires to satisfy any doubt that the Commission has jurisdiction to not only adopt, but enforce, safety regulations over POU electric transmission and distribution facilities. As the Commission has clearly articulated the source of its statutory authority in this regard, CMUA’s argument must be rejected as it fails to establish any legal error in the Commission’s decision.

To the extent LADWP and CMUA are challenging *how* the Commission would enforce its safety regulations over POU (i.e., whether a hearing would occur, whether a penalty would be issued or a misdemeanor found, whether the matter would be pursued as an adjudicatory action before the Commission or a criminal trial initiated by the District Attorney’s Office, etc.) they are seeking an advisory opinion, which the Commission has declined to issue. As the Commission stated in D.12-01-032, “[l]ike the

courts, we have a long-standing policy against issuing advisory opinions, and we decline to do so here.” (D.12-01-032, *mimeo*, at pp. 150-51.) CMUA and LADWP fail to articulate any grounds for legal error in this determination. Contrary to LADWP and CMUA’s assertions, *how* the Commission would enforce the safety rules against POU was not at issue in this proceeding. Whether the Commission has the authority to adopt and enforce safety regulations governing POU electric facilities was not at issue either, contrary to what the POU believe. As the Commission stated in D.12-01-032, “[t]oday’s decision does not re-litigate the Commission’s determination in the OIR and the Phase 1 Decision that it may adopt and enforce safety-related regulations for POU electric transmission and distribution facilities.” (D.12-01-032, *mimeo*, at p. 11.) In fact, the only issue was whether the Commission should revise its General Orders to explicitly state that they apply to POU, and the Commission declined to address that issue again as well. (*See* D.12-01-032, *mimeo*, at pp. 35-36.)

Furthermore, although LADWP and CMUA express uncertainty concerning their own interpretative clarity, they present no extraordinary circumstances which would warrant this Commission issuing an advisory opinion. The fact that LADWP and CMUA express befuddlement over what the consequences of their non-compliance with safety regulations might be is hardly a compelling reason for the Commission to issue an advisory opinion on the matter.

**B. LADWP’s and CMUA’s Jurisdictional Arguments
Constitute An Improper Collateral Attack on D.98-03-036
and D.09-08-029.**

LADWP’s and CMUA’s arguments constitute a continuing attack on the Commission’s determination in D.98-03-036 and D.09-08-029 that §§ 8001-8057 confer jurisdiction on the Commission over the safety of municipally-owned electric distribution and transmission facilities. As noted above, in D.98-03-036, the Commission determined that it has “historically had authority over the public safety aspects of publicly-owned utilities.” (D.98-03-036, *supra*, 78 C.P.U.C.2d at p. 712. LADWP did not file an application for rehearing of D.98-03-036 or seek further appellate review of that decision,

despite the fact that it was a party to proceeding R.96-11-004. CMUA, which represented LADWP at the time D.98-03-036 was issued (*see* D.98-03-036, *supra*, 78 C.P.U.C.2d at p. 722, fn. 4), did file an application for rehearing of D.98-03-036 but also did not seek any further appellate review. In D.09-08-029, the Commission again stated that its “jurisdiction extends to publicly-owned utilities for the limited purpose of adopting and enforcing rules governing electric transmission and distribution facilities to protect the safety of employees and the general public.” (D.09-08-029, at pp.49-50, Conclusion of Law 3.) LADWP sought rehearing of that decision, which the Commission denied in D.10-02-034. As discussed further below, LADWP sought review of the Commission’s decisions D.09-08-032 and D.10-02-034 with the California Supreme Court. The California Supreme Court summarily denied LADWP’s appeal of these decisions. (*See LADWP v. Public Util. Comm’n*, Case No. S181305; 2010 LEXIS CalPUC 6304 (June 30, 2010).)

Section 1709 of the Pub. Util. Code states: “In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.” (Pub. Util. Code, § 1709.) Final decisions of the Commission are binding and conclusive on the parties thereto. (*See Hickey v. Roby* (1969) 273 Cal.App.2d 752, 763-764.) Commission decisions not directly attacked in an application for rehearing to the Commission and in a petition for writ of review to the Courts in the manner and time provided by law are final and are not subject to collateral attack. (*See, e.g., Marin Municipal Water District v. North Coast Water Company* (1918) 178 Cal. 324, 328-329; *Miller v. Railroad Comm. of California* (1937) 9 Cal.2d 190, 195-196; Pub. Util. Code, §§ 1709 & 1731, subd. (b).) The Commission has already addressed and resolved the issue of its jurisdiction to adopt, as well as enforce, safety regulations governing the electric systems of POUs in D.98-03-036 and D.09-08-029. Those decisions are final and conclusive, and cannot be attacked in this proceeding.

C. The Issue of the Commission’s Jurisdiction to Enforce Its Safety Regulations Over POU’s is *Res Judicata* Against LADWP.

In its petition for writ of review of D.09-08-029 and D.10-02-034, LADWP clearly challenged the Commission’s determination that it had authority to adopt *and enforce* safety regulations governing POU electric transmission and distribution facilities. LADWP’s writ petition states: “LADWP emphasizes that it is challenging Conclusion of Law No. 3 of Decision 09-08-029 which held that ‘[u]nder Pub. Util. Code §§ 8002, 8037, and 8056, the Commission’s jurisdiction extends to publicly-owned utilities for the limited purpose of adopting *and enforcing* rules governing electric transmission and distribution facilities to protect the safety of employees and the general public.’” (LADWP Pet. for Writ of Review of D.09-08-029 and D.10-02-034 (filed March 25, 2010), at p. 7 (emphasis added).) LADWP further argued that the Commission’s enforcement powers under sections 8037 and 8056 were “vastly different” from its broad enforcement powers over regulated public utilities under sections 701 and 761 (*Ibid.*, at p. 22.) and also raised the issue of whether a violation would constitute only a misdemeanor (*Ibid.*, at pp. 23, 25). LADWP thus put the issue of the Commission’s authority to enforce safety regulations governing POU’s in its petition squarely before the Supreme Court. That petition was summarily denied on June 30, 2010. That denial constitutes a decision on the merits and is *res judicata* against LADWP. (*See Consumer Lobby Against Monopolies v. CPUC* (1979) 25 Cal.3d 891, 901, 905 (holding that under California law, the California Supreme Court’s summary denial is a final decision on the merits with *res judicata* effect).)

III. CONCLUSION

For the reasons stated above, the Commission should deny CMUA and LADWP’s applications for rehearing of D.12-01-032.

Respectfully submitted,

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