

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



**FILED**  
9-19-16  
04:59 PM

David MacKinnon, Jr.,

Complainant,

vs.

San Diego Gas & Electric Company  
(U902M),

Defendant.

**Case No. C.15-02-022**

(Filed February 27, 2015)

**MACKINNON APPLICATION FOR REHEARING OF D.16-08-005**

David MacKinnon  
739 Madison Ave  
San Diego, CA 92116  
571-213-8479  
[mackinnondjr@gmail.com](mailto:mackinnondjr@gmail.com)

19 September 2016

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

David MacKinnon, Jr.,

Complainant,

vs.

San Diego Gas & Electric Company  
(U902M),

Defendant.

**Case No. C.15-02-022**

(Filed February 27, 2015)

**MACKINNON APPLICATION FOR REHEARING OF D.16-08-005**

**I. INTRODUCTION**

The Commission's Decision (16-08-005) in the above matter is unlawful and erroneous; ignoring both law and precedent, assuming facts not supported by evidence, and is a result of bias favoring regulated utilities. We respectfully ask the Commission to review the facts and schedule a hearing immediately.

**II. PROCEDURAL BACKGROUND**

On September 17, 2014, we filed Informal Complaint #314715 with the Commission's Consumer Affairs Branch ("CAB"). On October 3, 2014, the CAB denied the informal complaint after reviewing the information provided. On February 27, 2015, we filed an expedited formal complaint with the Commission. On August 18, 2016 the Commission Approved the Proposed Decision Submitted by ALJ Colbert and that decision document was served to the parties on August 24, 2016. On 19 September 2016 we filed an appeal. On 21 September we were notified by the Commission docket office that we must refile our appeal as an applications for rehearing under section 16.1 of the Commission's Rules of Practice & Procedure.

### **III. DISCUSSION**

The Decision issued on 24 August runs contrary to current law and precedent, assumes facts not in evidence, and is a result of bias favoring regulated utilities. As we will discuss below, the Commission is entering dangerous territory, ignoring its own precedent in order to protect a regulated utility from prior misdeeds.

#### **a. THE CASE IS NOT MOOT**

As alleged in our complaint, since the trimming occurred around a distribution line (around which SDG&E has no statutory authority for vegetation management), where SDG&E has no easement (as presented by us multiple times), they trespassed and damaged private property on multiple occasions from 2011 until 2015. This complaint is about issues that have occurred in the past. The fact that SDG&E has realized their error and attempted to correct the situation (albeit for a very limited time) does not render the complaint moot. The Decision indicates that SDG&E “has no plans to enter Complainant’s property to trim his palm trees,” however the utility has qualified these statements to suggest that they simply have no immediate interest in trimming the trees but reserve the right to do so in the future. The Decision also ignores the fact that SDG&E attempted full removal of palm trees on private property without an easement, a clear violation of State and Federal property law. There is nothing moot about repeated trespasses by a regulated utility that has specifically on the record stated that they have the right to do it again. If the Commission refuses to punish or admonish a utility for prior illegal behavior (behavior that SDG&E hasn’t denied) merely on the promise that SDG&E won’t do it again, then it is ceding that authority to the state courts and we will gladly file in Superior Court.

Likewise, it's concerning that the Decision doesn't mention the word "easement" once. SDG&E does not have an easement on our property and while the Commission prefers not to deal with easements, they have stipulated in *The Sarales vs PG&E* (C1106024) that "the Commission holds that, **should a proper easement exist**, Defendant has acted prudently and reasonably in accommodating the agricultural use of the land" [emphasis added]. The Commission's conclusion that PG&E's actions were reasonable in that case was contingent on the existence of a proper easement. It follows that in the absence of an easement, the Commission likely would have found that PG&E didn't act prudently and reasonably. SDG&E doesn't have an easement and by the logic supported by the Commission in *Sarale* that means SDG&E hasn't acted prudently and reasonably. These are matters that deserve a hearing and ruling based on facts.

Further, the Decision purports to rule on the Motion to Dismiss but then spends over half the discussion vetting out the underlying case without the benefit of a scoping memo, evidentiary hearings, or any evidence with which to base the discussion on. We've shown why the issue isn't moot, but the Commission has bypassed its own procedure laid out in the Commission's Rules of Practice & Procedure in favor of parroting SDG&E's unsupported argument. If the Commission wants to discuss the underlying case, it needs to schedule hearings and gather evidence.

#### **b. THE DECISION GOES AGAINST PRECEDENT**

"A utility is under a duty to strictly adhere to its lawfully published tariffs." *Temescal Water Co. v. West Riverside Canal Co.* (1935) 39 Cal RRC 398. "Tariffed provisions and rates must be inflexibly enforced to maintain equity and equality for all customers with no preferential treatment afforded to some." *Empire W. v. Southern Cal. Gas Co.* (1974) 38 Cal App 3d 38, 112 Cal Rptr. 925. These longstanding precedents are in direct conflict with the Decision approved

by the Commission. In addition to proclaiming our complaint moot, something we argue against above, the Decision asserts that the “vegetation management” provisions of Tariff Rule 16 (Service Extensions) applied to distribution lines, which are covered under Tariff Rule 15. Tariff Rule 15 (Distribution Line Extensions) makes no provision for vegetation management. Had the Commission desired to apply vegetation management practices to distribution lines they clearly would have added that provision into Rule 15 or broadened the definition of service extensions in Rule 16, which clearly states “This rule is applicable to both (1) Utility Service Facilities\* **that extend from utility's Distribution Line facilities to the Service Delivery Point**, and (2) service related equipment **required of Applicant on Applicant's Premises to receive electric service.**” [emphasis added] All other arguments are legal bootstrapping that ignore the clear language of the rule with potentially disastrous impacts on future matters before the Commission. Regulated utilities and the Commission have used these precedents to their advantage in the past and denied relief to ratepayers when promises have been made to individuals that are in conflict with the Tariff Rules. Should the Commission support the reversal of precedent in this Decision, they will be abandoning 81 years of well-worn precedent, opening utilities up to optionally conforming to Tariff Rules, and ratepayers to challenge utilities to accept deviations to the tariff rules. The utility lines in this case are distribution lines that do not service the property. We clearly met the burden of proving that SDGE did not correctly apply the Tariffs. Were the Commission to schedule hearings and read our filings, this would be abundantly clear. The Commission must consider the implications of this Decision: 1. Utility easements would be irrelevant for the purposes of tree trimming and removal; and 2. Utilities would be allowed to apply “vegetation management” provisions outlined in Tariff Rule 16 to distribution lines thereby broadly expanding the utilities’ power to remove trees in the vicinity of

basically any electrical power device regardless of whether those lines service the property owner.

**c. THE DECISION ASSUMES FACTS NOT IN EVIDENCE**

The following are “facts” the Commission cited in its decision that were not submitted as evidence by SDGE or are demonstrably false and would have been proven had evidentiary hearings been granted:

*“6. Adjacent to the Complainant’s property, Defendant owns and maintains a high voltage distribution 4 kilovolt circuit that serves Complainant and his neighbors.”*

This statement was never submitted as evidence by SDGE and is untrue. Were the 4 kV lines along Madison Ave to be cut and closed to the West, power would remain on for the MacKinnon’s and neighbors along New Hampshire Ave. Had evidentiary hearings been granted, this would have been made clear to the Commission. This also happens to be the crux of the Decision’s argument for applying Tariff Rule 16 vegetation management practices to Tariff Rule 15’s distribution lines. As we previously discussed, the Commission’s own precedent requires strict interpretation of Tariff Rules, but even if that were not the case the evidence doesn’t support the conclusion that the MacKinnon’s derive power service from the 4kV lines along Madison Ave West of New Hampshire Ave.

*“7. If vegetation comes into contact with high voltage lines, it can pose safety risks or risk of distribution outage.”*

This is supposition and not a fact. The trees on our property have never come in contact with distribution lines, even before SDG&E’s excessive trimming began. Further, this is irrelevant as there is no easement, and the line in question is a distribution line that doesn’t serve the MacKinnon’s house, but only serves properties to the west.

**d. THE DECISION IS BASED ON LONGSTANDING BIAS**

We believe the disposition of this matter is a result of Commission bias in favor of regulated utilities. At the outset we filed an “expedited complaint”; which was supposed to be a more informal process where neither party would be represented by counsel. Without discussion or involvement from the MacKinnon’s, the Commission escalated the complaint to a “Regular Complaint because of the nature of Mr. MacKinnon’s allegations and claims” (Public Advisor Email dated 17 April 2015). SDG&E then engaged multiple, full-time lawyers to fight on the elevated playing field. We believe this move was made solely to benefit SDG&E and remove the complaint from the faster and less bureaucratic “expedited process”. It makes no sense whatsoever that the nature of our claims necessitated the escalation to the “Regular Complaint” process but now are moot merely because SDG&E isn’t currently, actively trimming inside our property. The Commission can’t have it both ways; if the complaint’s “nature” necessitated the “regular process” then how could it be dismissed as moot when none of the relevant facts have changed?

Likewise, a simple search of complaints against regulated utilities on the CPUC’s website reveals that almost no complaints were decided in favor of the complainant. Further, a search of all ALJ Colbert’s cases involving complaints against electric utilities reveals that none were decided in favor of the defendant and most were dismissed. The disparate impact cannot be ignored and clearly shows bias in favor of regulated utilities.

<u>Proceeding</u>	<u>Date</u>	<u>Outcome</u>
Proceeding: C1002026	2/27/2013	Dismissed
Proceeding: C1104019	3/18/2013	Dismissed
Proceeding: C1106024	4/28/2014	Dismissed
Proceeding: C1106024	4/30/2012	Dismissed
Proceeding: C1110008	4/9/2012	Dismissed
Proceeding: C1203019	8/13/2012	Denied
Proceeding: C1205013	12/28/2012	Denied
Proceeding: C1210005	12/28/2012	Denied
Proceeding: C1302009	11/25/2013	Dismissed
Proceeding: C1309008	2/14/2014	Denied
Proceeding: C1408004	11/25/2014	Dismissed
Proceeding: C1409019	2/2/2015	Denied
Proceeding: C1502021	9/13/2016	Dismissed
Proceeding: C1502022	8/17/2016	Dismissed
Proceeding: C1507010	1/4/2016	Dismissed
Proceeding: C1508001	2/11/2016	Dismissed
Proceeding: C1512008	5/2/2016	Dismissed

*Figure 1- ALJ Colbert Cases Involving Electrical Utilities (<http://docs.cpuc.ca.gov/>)*

The above chart distinctly shows that when ALJ Colbert is deciding a case, the utility is clearly favored. A bias against ratepayers was indicated in our pre-hearing conference when ALJ Colbert suggested that SDG&E should just “just cut off your power if you want the trees...” (Transcript, 2 November, page 21, Line 17-18) or when he said “What I’m trying to get at, even though I love San Diego, is that I’m not coming down here again next year to deal with this.” (Transcript, 2 November, page 25, Line 14-17). Because of ALJ Colbert’s predilection to support utilities and his clear animosity toward complainants, we believe it is clear that the Decision is biased due to non-factual characteristics and should be decided by an impartial party.

#### **IV. CONCLUSION**

Wherefore, we move that that our application for rehearing be granted and this complaint be allowed to proceed to hearings and a decision based on the facts,

We also move the ALJ Colbert and Commissioner Randolph be replaced for Decision on this application and any subsequent motions or decisions.

Respectfully submitted,



9/23/2016

David MacKinnon  
739 Madison Ave  
San Diego, CA 92116  
571-213-8479  
[mackinnondjr@gmail.com](mailto:mackinnondjr@gmail.com)

19 September 2016