

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**03/19/18
02:04 PM

March 19, 2018

TO PARTIES OF RECORD IN CASE 17-11-002:

This proceeding was filed on November 6, 2017, and is assigned to Commissioner Clifford Rechtschaffen and Administrative Law Judge (ALJ) Hallie Yacknin. This is the decision of the Presiding Officer, ALJ Yacknin.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at www.cpuc.ca.gov.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANNE E. SIMONAnne E. Simon
Acting Chief Administrative Law Judge

AES:lil

Attachment

Decision **PRESIDING OFFICER'S DECISION OF ALJ YACKNIN**
(Mailed 3/19/2018)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Cable & Telecommunications
Association,

Complainant,

v.

San Diego Gas & Electric Company (U902E),

Defendant.

Case 17-11-002

J. Christopher Redding, Gary S. Lutzker, Attorneys at
Law, for California Cable and Telecommunication
Association, complainant.

Stacy Van Goor, John Pacheco, Christa Lim, Attorney at
Law, for San Diego Gas & Electric Company,
defendant.

PRESIDING OFFICER'S DECISION DISMISSING COMPLAINT

Summary

California Cable & Telecommunications Association brings this complaint against San Diego Gas & Electric Company seeking Commission resolution of their dispute regarding pole attachment fees. The complaint is dismissed as the complaint process is not the proper vehicle for resolving the dispute.

Background

Pub. Util. Code § 767 establishes the Commission's authority to determine the compensation, terms and conditions for a public utility's use of another

public utility's poles or other equipment whenever the public utilities are unable to reach agreement. Section 767.5(c)¹ establishes the Commission's similar authority to determine and enforce pole attachment rates, terms and conditions whenever a public utility and a cable television operator or association are unable to reach agreement. Decision (D.) 98-10-058 (the "Rights-of-Way (ROW) Decision") implements these sections by adopting rules, guidelines and performance standards for negotiated ROW access agreements and expedited dispute resolution procedures for resolving disputes relating to them.

California Cable & Telecommunications Association (CCTA) and San Diego Gas & Electric Company (SDG&E) entered into a settlement agreement that, among other things, established a pole rate schedule for the years 2009 through 2016 that culminated in a 2016 attachment rate of \$16.35. On September 16, 2016, SDG&E notified CCTA that its 2017 pole attachment rate would increase to \$30.58. Since then, the parties have engaged in negotiations over the proposed 2017 rate, but have reached an impasse.

CCTA brings this complaint seeking Commission resolution of the dispute pursuant to Section 767.5(c). SDG&E moves to dismiss on the basis that the ROW decision's expedited dispute resolution procedure, rather than a complaint, is the appropriate vehicle to resolve this dispute. I concur.

Discussion

The Commission's complaint procedure is not designed for purposes of the determination of rates, except on the Commission's own motion or upon petition of a local government or a group of 25 or more consumers of the utility service.² Rule 4.1(a) requires a complaint to "set[] forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any

¹ All subsequent statutory references are to the Public Utilities Code.

² CA Code of Regulations, Title 20, Div.1, Ch.1, Section (Rule) 4.1.

public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission.” Rule 4.2(a) requires the complaint to be “so drawn as to completely 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.” In other words, a complaint is required to allege what the utility did or didn’t do, what law or order or rule the action or omission violated, and what the complainant wishes the Commission to order by way of relief. CCTA’s complaint does not do that. Rather, it vaguely asserts that SDG&E’s proposed pole attachment rate is unreasonable and that SDG&E has inadequately explained the basis for it, and asks the Commission to determine a reasonable rate.

In contrast, the ROW decision was expressly drawn to establish the procedure for resolving disputes relating to access to public utility right-of-way, which is for the moving party to file a request for arbitration in the form of an application.³ That vehicle, not a complaint, is the appropriate one for resolving this dispute.

CCTA argues that precedent demonstrates that arbitration is not required because the Commission “has routinely accepted and determined pole attachment fee complaints both before and after adoption of the ROW Order.”⁴ More accurately, the Commission accepted five pole attachment fee complaints prior to the instant case, three of which were dismissed upon stipulation of the parties.⁵ The Commission determined the merits of one complaint before the adoption of the ROW decision⁶ and one complaint after it.⁷ It took two decisions to resolve the post-ROW decision complaint on its merits, neither of

³ D.98-10-058 at 109, “We shall therefore adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below.”

⁴ CCTA Opposition to Motion to Dismiss at 10.

⁵ See D.98-06-045, D.99-09-040, and D.11-03-002.

⁶ See D.98-04-062.

⁷ See D.01-03-048 and D.03-05-055.

which identifies or resolves the issue of whether the Commission’s complaint procedures or the ROW decision’s expedited dispute procedure is the appropriate vehicle for resolving a pole attachment fee dispute. Thus, this issue comes before us as a matter of first impression.

CCTA argues that the ROW decision limits the expedited dispute resolution procedures contained in Section XI of Appendix A to disputes over initial access to a utility’s facilities, and that the procedures do not apply to subsequent disputes such as this. In support of this argument, CCTA asserts that the ROW decision’s discussion of disputes “proceeds from the premise that ‘disputes over requests for initial access’ are distinguished from ‘all other disputes over access.’”⁸ and points to paragraph A of Section XI which states that “[d]isputes involving *initial* access to utility rights of way and support structures” are to be resolved through the procedure.⁹ As to its first point, CCTA misstates the ROW decision: The cited discussion merely describes the position of a specific party who asserts that initial access disputes should be processed through an expedited dispute resolution procedure (and who agrees that, for all other disputes, arbitration is a useful alternative to the Commission’s complaint process).¹⁰ The ROW decision does not discuss the merits of adopting different procedures for initial access disputes and other disputes. To the contrary, and notwithstanding the reference to “initial” access in paragraph A, the entirety of the ROW decision’s discussion of expedited dispute resolution refers simply to “ROW access” without regard to whether it is “initial” or continuing.¹¹

Furthermore, if the expedited dispute resolution procedure in Section IX were held to apply only to “initial” access disputes, it would leave a regulatory gap with respect to

⁸ CCTA Opposition to Motion to Dismiss at 9.

⁹ D.98-10-058, App. A, Section IX, “Expedited Dispute Resolution Procedures,” emphasis added.

¹⁰ *Id.*, at 105-106.

¹¹ *See id.*, at 109-112.

the regulation of the rates, terms and conditions of subsequent access. Section 244 of the Pole Attachments Act (47 U.S.C. § 224) gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms and conditions of attachments by cable television operators and telecommunications carriers to the poles, conduit or ROW owned or controlled by utility in the absence of parallel state regulation. However, as the ROW decision states, “By virtue of the rules we issue pursuant to the instant decision, we hereby certify to the FCC that we regulate the rate, terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224(c)(2) and (3).”¹² The expedited dispute resolution procedures in Section XI are the only rules in the ROW decision that address the resolution of complaints regarding ROW access. As the ROW decision is intended to fill the regulatory field, we interpret the expedited dispute resolution procedure in Section XI to apply equally to all ROW access disputes.

Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge in this proceeding.

Conclusions of Law

1. The ROW decision’s expedited dispute resolution procedures, rather than a complaint, are the appropriate vehicle to resolve this dispute.
2. This complaint should be dismissed.

¹² *Id.* at 9.

O R D E R

IT IS ORDERED that:

1. Case 17-11-002 is dismissed.
2. All pending motions are deemed denied.
3. Case 17-11-002 is closed.

This order is effective today.

Dated _____, at San Francisco, California.