

Decision PROPOSED DECISION OF ALJ MASON (Mailed 2/25/14)

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

Thomas W. Fenholt and Isabella M. Fenholt,

Complainants,

vs.

Southern California Edison Company (U338E),

Defendant.

Case 13-07-014  
(Filed July 15, 2013)

**DECISION GRANTING MOTION TO DISMISS COMPLAINT**

**1. Summary**

The Commission grants Southern California Edison Company’s Motion to Dismiss the Complaint filed by Thomas W. Fenholt and Isabella M. Fenholt on the grounds that the Complaint requests the recovery of compensatory damages, however, the Commission lacks jurisdiction to award compensatory damages.

This proceeding is closed.

**2. Background**

**2.1. The Complaint**

On July 15, 2013, Thomas W. Fenholt and Isabella M. Fenholt (Fenholt or Complainants) filed a Complaint against Southern California Edison Company (SCE) for damages to their household’s wiring and appliances that was allegedly caused by a power surge from a wire connecting from SCE Pole No. 797764E to

the Fenholts' home. The incident occurred on January 13, 2013, when smoke filled the living room of the Fenholts' home, surge protectors melted in the living room and bedroom, the wiring and appliances were damaged, and a number of light bulbs burned out. SCE was contacted and a Troublemaker replaced the service neutral connections at both the pole and the point of attachment at the Fenholts' home, but SCE has declined to pay for the damages to the Fenholts' home, estimated at \$49,000.00 to repair the wiring, and another \$2,000.00 to replace the damaged appliances and electronics. As support for their claim that SCE is liable for the damages, the Fenholts attach, as Exhibit B, a series of e-mails from Commission personnel who investigated their claim. In one of the e-mails, Derek Fong, Utilities Engineer in the Commission's Electric Safety & Reliability Branch, states "I'm leaning toward the SCE bad neutral connection being the only real culprit because it did not function as it was intended."

## **2.2. SCE's Answer and Motion to Dismiss**

On September 9, 2013, SCE filed an Answer to the Complaint. While SCE acknowledges that it dispatched one of its workers to the Fenholts' home and that the worker did find a bad service neutral connection at the pole to the Fenholts' home, SCE denied responsibility for the damages that occurred at the Fenholts' home. Per SCE, damage to the Fenholts' "home neutral could occur for a variety of reasons, [and] not necessarily as a direct result of the bad neutral connection incident that occurred on January 13, 2013."<sup>1</sup> SCE also asserted that the Fenholts' were seeking compensatory damages, and that the Commission lacked jurisdiction to award damages for the Fenholts' claimed losses.

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<sup>1</sup> Answer, at 4.

Along with its Answer, SCE filed a Motion to Dismiss the Complaint on the grounds that the Commission lacks jurisdiction to award compensatory damages.

### **2.3. The Fenholts' Response to SCE's Motion to Dismiss**

On September 21, 2013, the Fenholts filed their Response to SCE's Motion to Dismiss. The Response attempts to establish that SCE violated the Commission's rules regarding emergency notifications. The Commission's website states:

Electric Utilities must report, within two hours during working hours and four hours outside of working hours, any incident which results in...Damage to property of the utility or others estimated to exceed \$50,000 and are attributable or allegedly attributable to utility owned facilities.<sup>2</sup>

The Fenholts' assert in their Response that SCE "failed to report this damage, though it is clearly more than the required \$50,000. SCE, thumbing their nose at emergency reporting requirements is an example of their brazen disregard for CPUC rules."<sup>3</sup>

### **3. Standards for Ruling on a Motion to Dismiss**

Over the years, the Commission has developed two similar standards for ruling on a motion to dismiss, and we address and apply each standard in this decision.

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<sup>2</sup> Response, at 6.

<sup>3</sup> *Id.*

### **3.1. The First Standard: Do the Undisputed Facts Require the Commission to Rule in the Moving Party's Favor as a Matter of Law?**

In *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc. (Raw Bandwidth)*, the Commission stated that a Motion to Dismiss “requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice.”<sup>4</sup> A motion for summary judgment is appropriate where the evidence presented indicates there are no triable issues as to any material fact, and that based on the undisputed facts, the moving party is entitled to judgment as a matter of law. (California Code of Civil Procedure, § 437(c); Weil & Brown, *Civil Procedure Before Trial*, 10:26-27). While there is no express Commission rule for summary judgment motions, the Commission looks to § 437(c) for the standards on which to decide a motion for summary judgment. (*Id.*)<sup>5</sup> Section 437(c) provides:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if

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<sup>4</sup> (2003) Decision (D.) 03-05-023 (*Scoping Memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters* at 3, citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, Decision (D.) 94-04-082, 54 CPUC 2d 244, 249).

<sup>5</sup> See *Westcom*, *supra*, 54 CPUC 2d, 249-250.

contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

A further beneficial purpose of such a motion is “that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.” (*Westcom Long Distance, supra*, 54 CPUC2d, 249). As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication. (See Decision (D.) 07-07-040 [granting Chevron judgment against Equilon “as a matter of law”]; Decision (D.) 07-01-004 [granting Cox Telecom judgment against Global NAPs of California]; and Decision (D.) 02-04-051 [granting summary adjudication of a claim by County Sanitation District against SCE]).

### **3.2. The Second Standard: Is Defendant Entitled to Prevail Even if the Complaint’s Well-Pleaded Allegations are Accepted as True?**

In *Re Western Gas Resources-California, Inc.*, (1999) Decision (D.) 99-11-023, we articulated another standard for dismissing complaints and applications that is slightly different than what was adopted in *Raw Bandwidth*:

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (e.g., *MCI Telecommunications Corp. v. Pacific Bell*, D.95-05-020, 59 Cal. PUC 2d 665, 1995 Cal. PUC LEXIS 458, at \*29-\*30, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal. PUC 166), 3 CPUC 3d, 301.

This standard was employed more recently in *Everyday Energy Corporation v. San Diego Gas & Electric Company*, (2012) Decision (D.) 12-03-037, wherein the Commission added: “By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume

that complainant will be able to prove everything alleged in its complaint.” (Slip Op., 7.)

In determining if the complainant’s allegations are “well pleaded,” we are guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or Commission order or rule:

Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or anybody politic or municipal corporation, by written petition or complaint, setting 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 public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

As demonstrated by past precedent, the Commission will dismiss a complaint that fails to meet this two-pronged standard. (*See Monkarsh v. Southern California Gas Company*, (2009) (D.) 09-11-017; *Pacific Continental Textiles, Inc. v. Southern California Edison Company*, (2006) Decision (D.) 06-06-011; *Watkins v. MCI\_Metro Access Transmission Services*, (2005) Decision (D.) 05-03-007; *Rodriquez v. Pacific Gas and Electric Company*, (2004) Decision (D.) 04-03-010; *AC Farms Sheerwood v. So. Cal Edison*, (2002) Decision (D.) 02-11-003; and *Crain v. Southern California Gas Company*, (2000) Decision (D.) 00-07-045.)

**4. The Undisputed Facts Establish that SCE is Entitled to Judgment as a Matter of Law as the Commission Lacks Authority to Award Compensatory Damages to the Fenholts**

The facts are undisputed that the Fenholts’ wiring and personal property were damaged and that there was a bad service neutral connection at an SCE

pole. It is also undisputed that as a result of this incident, the Fenholts seek the following remedy:

The Powell Electric quote for \$49,000 is the amount we seek as this will give us the repairs needed. In addition we need a new stove, new color laser printer and battery for an Apple computer, CD player, clock radio, three extension cords, and 20 light bulbs \$2,000.00.<sup>6</sup>

While we certainly sympathize with the Fenholts' plight, it is not within the Commission's power to grant the requested compensatory damages.

In order to explain our rationale, it is necessary to discuss the extent of the Commission's jurisdiction over regulated utilities in general and the Commission's specific authority to remedy wrongs committed by regulated utilities against California ratepayers. Pursuant to Article XII, §§ 1-6 of the Constitution, the Commission "has broad authority to regulate utilities." (*Ford v. Pacific Gas & Electric Company*, (1997) 60 Cal. App.4<sup>th</sup> 696, 700, citing to *San Diego Gas & Electric Company v. Superior Court*, (1996) 13 Cal. 4<sup>th</sup> 893, 914-915). The California Legislature enacted the Public Utilities Act which authorized the Commission to supervise and regulate every public utility in California and to do all things which are "necessary and convenient in the exercise of such power and jurisdiction." (Pub. Util. Code § 701.) In the event the Commission determines that a utility has violated the law, there are a number of remedies at the Commission's disposal. In *Diener v. Pacific Gas and Electric Company*, (2011) Decision (D.) 11-09-027, the Commission explained that:

Pub. Util. Code § 2100 *et seq.* provides a wide variety of remedies designed to redress violations of Commission decisions committed by public utilities. These include orders

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<sup>6</sup> Complaint, at 3.

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.

But in granting and exercising this regulatory authority to provide remedies, the Legislature and the Commission drew a distinction between the Commission's authority to award reparations as opposed to compensatory or consequential damages. In *Walker v. P.T. & T. Co.*, 1971 Cal. PUC LEXIS 1288, the Commission restricted reparations to:

relief limited to a refund or adjustment of part of all of the utility charge for a service or group of related services. Consequential damage 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.

This Commission has repeatedly ruled that only the Superior Court has the power to award consequential damages as opposed to reparations. (*See, e.g., Balassy v. Sprint Telephony PCS, LP*, (2012) Decision (D.) 12-04-031; *Gregory v. Pacific Bell Telephone Company*, (2011) Decision (D.) 11-11-003 ["It is clear that complainant seeks damages for defendants' alleged improper conduct. As we have no jurisdiction to award damages, we dismiss the complaint for failing to plead a cause of action within our jurisdiction"]); (*Day v. Verizon California*, (2006) Decision (D.) 06-06-061 ["Complainant's remedy for any alleged intentional damage to her DSL service is with the courts, not the Commission"]; and *Sweepston v. California-American Water Company*, (2004) Decision (D.) 04-12-032 ["Since the Commission has no jurisdiction to award damages, the courts have held that complaints alleging breach of contract should be brought in civil courts"].)

The Commission's interpretation of the extent of its ability to redress economic harms to ratepayers is consistent with Pub. Util. Code § 2106, which authorizes an action for monetary damages by a ratepayer in Superior Court:

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

In *Ford*, the Court interpreted § 2106 as authorizing "a supplementary private remedy in the form of an action for damages" in superior or municipal court. (*Ford, supra*, 60 Cal. App.4<sup>th</sup>, at 701.); (*see also Diener, supra.*)

As the only compensation the Fenholts are seeking is compensatory damages, the law does not permit the Commission to grant such a recovery. Instead, the Fenholts must pursue their claims against SCE in the Superior Court of the State of California.

**5. Assuming the Fenholts' Factual Allegations are accepted as True, Their Remedy for Financial Compensation Lies in Pursuing a Lawsuit in Superior Court, Rather than with This Commission**

**5.1. A Violation of a Commission Statute, Rule, or Order Does Not Give Rise to A Claim for Compensatory Damages that the Commission can Award**

In our review of the Complaint, the attached exhibits, and the Response, the Fenholts are asking this Commission to find that SCE has violated a Commission statute, rule, or order. As noted above in their Response, the

Fenholt's claim that SCE violated the Commission's reporting requirements by not reporting the damage to their property as the damage exceeded the \$50,000.00 threshold. In addition, it appears that the Fenholt's are suggesting that SCE violated General Order (GO) 95. They attach to their Complaint a letter dated May 2, 2013 from Rosario Cervantes, Commission's Consumer Affairs Branch, which states, in part, that the Commission's engineer "did not find any conclusive evidence of nonconformance with GO 95."

While it is not clear what aspect of GO 95 that the engineer was referencing, it is of no consequence. Even if we were to assume that the Fenholt's can prove SCE had violated a Commission statute, rule, or order, that fact would not permit the Commission to award the Fenholt's the compensatory damages they seek from SCE. In so ruling, however, we stress that we are sympathetic to the Fenholt's predicament. Therefore, we instruct our Safety and Enforcement Division to conduct an investigation of the January 13, 2013 incident at the Fenholt's home to determine if SCE has violated any of the Commission's statutes, rules, or orders, and, if so, to determine if a fine or penalty would be appropriate pursuant to, at a minimum, Pub. Util. Code §§ 2100 through 2105.

## **5.2. The Commission is not Bound by the Statements Made by its Employees**

As the Fenholt's have placed great stock in the comments of a Commission employee as to SCE's possible culpability, it is necessary to address the extent that an employee's comments may bind the Commission. In the *Order Modifying*

*Resolution ROSB-002 and Denying Rehearing of Resolution, as Modified*,<sup>7</sup> the Commission explained its role in approving ministerial acts delegated to staff:

Generally, the commission has stated that powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal. 3d 22, 24; *California School Employees Association v. Personnel Commission* (1970) 3 Cal. 3d 139, 144; *Schecter v. County of Los Angeles* (1968) 258 Cal. App.2d 391, 396.) Public agencies, however, may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action (*California School Employees, supra*, at 144), functions relating to the application of standards (*Bagley, supra*, at 25), and the making of preliminary recommendations and draft orders (*Schecter, supra*, at 397). Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself. (At \*3-4.)

Thus, the opinion of a staffer would not become binding on the Commission unless and until the Commission approves or ratifies the opinion, as this Commission made clear in *Moore v. PG&E Co.* (1992) Decision (D.) 92-04-022 43 Cal. PUC 2d 629 [not published in full], 1992 Cal. PUC LEXIS 345, at \*18-19:

We are of the opinion that the prior determination of the Commission staff is not binding on this Commission simply because it was a staff determination and not a Commission determination. No formal proceedings

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<sup>7</sup> *Application of Union Pacific Railroad Company and BNSF Railway Company for Rehearing of Resolution ROSB-002*, (2009) Decision (D.) 09-05-020; Application 08-12-004; 2009 Cal. PUC LEXIS 250.

were undertaken, no evidentiary hearings were held, no witnesses were examined and subjected to cross-examination, and no decision was issued by this Commission.

## **6. Categorization and Need for Hearings**

The Instructions to Answer filed on August 9, 2013, categorized this complaint as adjudicatory and that a Prehearing Conference (PHC) will be scheduled unless the matter is resolved by the parties. However, because of the reasoning set forth in this proposed decision, this complaint must be dismissed, so there is no need for a PHC.

There was a preliminary determination that hearings were needed. But since we have determined that the Complaint must be dismissed as a matter of law, there is no need for Evidentiary Hearings.

## **7. Comments on Proposed Decision**

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Commission Rules of Practice and Procedure, Rule 14.3.

### **7.1. SCE**

On March 17, 2014, SCE served and filed comments to the proposed decision. While SCE agrees with the proposed decision's dismissal of the complaint, SCE disagrees with Ordering Paragraph 3, which requires the Commission's Safety and Enforcement Division (SED) to investigate the Fenholt's loss to determine if SCE "violated a Commission statute, rule, or order, and, if so, determine if a fine or penalty should be imposed." SCE asserts that SED has already completed an investigation--referring to Exhibit B to the Complaint as proof -- making a further investigation unnecessary.

The Commission disagrees with SCE's claims that an investigation was completed and that further investigation is unnecessary. Exhibit B consists of a series of e mails from and to Commission staff regarding the damage to the Fenholts' residence, and we discuss some of these e mails below.

On March 8, 2013, Derek Fong, a utilities engineer in SED's Electric Safety & Reliability Branch (ESRB), stated to Mr. Fenholt that ESRB was conducting its investigation.

On April 4, 2013, Fadi Daye states that he believes the damage to the Fenholt's wiring and appliances "seem to be a result of bad SCE service neutral connections[.]"

On April 4, 2013, Rosario Cervantes states that SCE "may be responsible for this safety issue."

On April 4, 2013, Derek Fong states he is "leaning toward the SCE bad neutral connection being the only real culprit because it did not function as it was intended."

While there are indications in these e mails that SCE may be at fault, there are no conclusions from ESRB that SCE has, in fact, violated a Commission statute, rule, or order. As such, we will require SED to investigate and prepare a report in accordance with Ordering Paragraph 3 of the proposed decision.

## **7.2. Fenholts**

Complainants did not file any comments.

## **8. Assignment of Proceeding**

Carla J. Peterman is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding.

## **Findings of Fact**

1. Thomas W. Fenholt and Isabella M. Fenholt are SCE customers who

reside in Long Beach, California.

2. On January 13, 2013, the Fenholts notified SCE that there had been a power surge in the line emanating from an SCE pole and to the Fenholts' residence.

3. The Fenholts claim that as a result of the power surge, the wiring, appliances, and electronic equipment were damaged.

4. The Fenholts request that SCE be ordered to pay compensatory damages to the Fenholts in the amount of \$49,000.00 (to repair the damaged wiring), and \$2,000.00 (to replace the stove, color laser printer, battery for an Apple computer, CD player, clock radio, three extension cords, and 20 light bulbs).

5. An SCE Troublemaker replaced the service neutral connections at both the pole and the point of attachment to the Fenholts' home.

6. SCE denies responsibility for the damages that the Fenholts' sustained.

7. On July 15, 2013, the Fenholts filed the instant Complaint.

8. On September 9, 2013, SCE filed both an Answer to the Fenholts' Complaint and a Motion to Dismiss Complaint.

9. On September 21, 2013, the Fenholts filed and served a Response to SCE's Motion to Dismiss Complaint.

### **Conclusions of Law**

1. The Complaint only seeks the recovery of compensatory damages.

2. The Commission cannot award the Fenholts compensatory damages as the Commission has no jurisdiction to award compensatory damages, as opposed to reparations.

3. Even assuming the validity of the facts alleged in the Complaint, the Complaint must be dismissed.

4. The Complaint must be dismissed for failure to state a cause of action upon which relief may be granted.
5. Hearings are not necessary.

**O R D E R**

**IT IS ORDERED** that:

1. The Complaint filed by Thomas W. Fenholt and Isabella M. Fenholt against Southern California Edison Company is dismissed.

2. If Thomas W. Fenholt and Isabella M. Fenholt wish to pursue their damage claims against Southern California Edison Company, they must pursue them in the Superior Court of the State of California pursuant to Public Utilities Code § 2106.

3. The Commission's Safety and Enforcement Division is ordered to investigate the Fenholts' loss to determine if Southern California Edison Company violated a Commission statute, rule, or order, and, if so, determine and recommend if a fine or penalty should be imposed.

4. No hearings are necessary.

Case 13-07-014 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.