Decision **PROPOSED DECISION OF ALJ COLBERT (Mailed 7/18/2016)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

David MacKinnon, Jr., Complaint, vs. San Diego Gas & Electric Company (U902E), Defendant.	Case 15-02-022 (Filed February 27, 2015)

DECISION DISMISSING THE COMPLAINT OF DAVID MACKINNON, JR.

Summary

This Decision denies the requested relief and dismisses the complaint filed by David MacKinnon, Jr., against San Diego Gas & Electric Company (U902M).

Case 15-02-022 is closed.

1. Parties

David MacKinnon, Jr. (Mr. MacKinnon or Complainant) owns and resides at 739 Madison Avenue, San Diego, California. Complainant is a customer of San Diego Gas & Electric Company (SDG&E or Defendant).

Defendant is a provider of electricity and natural gas service and is an investor-owned public utility under the jurisdiction of the California Public Utilities Commission (Commission).

2. Factual and Procedural Background

On September 17, 2014, Complainant filed an informal complaint (#314715) with the Commission's Consumer Affairs Branch (CAB). In this complaint, Mr. MacKinnon requested that SDG&E refrain from performing vegetation management on the palm trees on his property, or alternately, that SDG&E relocate its electricity distribution/transmission lines further from the trees. CAB denied the informal complaint on October 3, 2014.

On February 27, 2015, Complainant filed a formal complaint alleging that SDG&E had improperly threatened to trim or remove his trees.[1] He asked the Commission to determine (1) whether SDG&E's Tariff Rule 16 permitted SDG&E to enter his private property and conduct vegetation management to protect distribution lines, as opposed to his personal service line, and (2) whether SDG&E's practice of applying more than the minimum clearance required at time-of-trim between vegetation and power lines was permissible under General Order 95. Complainant requested that the Commission direct SDG&E to pursue alternate methods for meeting clearance requirements between the trees and SDG&E conductor lines, such as relocating its distribution lines or trimming multiple times per year (so as only to trim the parts of the palm fronds that grow outside his property borders).[2]

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[1] Complaint (C.) 15-02-022 at 2.

[2] Complaint at 3.

Mr. MacKinnon's property is located at the corner of Madison Avenue and New Hampshire Street in San Diego, California. Mr. MacKinnon maintains several palm trees within his property. Some of these trees are located on the border of the property, which abuts a city sidewalk on Madison Avenue and New Hampshire Street. Others are situated nearer to Complainant's home.[3]

SDG&E owns and maintains a 4 kilovolt residential electric distribution circuit on the city sidewalk adjacent to Complainant's property, which provides power to Mr. MacKinnon and his neighbors.[4] In order for Mr. MacKinnon to receive electric service from SDG&E, power flows from the electric grid through the primary conductors, overhead transformer, and secondary conductors that comprise this distribution circuit, before moving through the service line conductor to the electric meter installed at Complainant's home. This system is suspended above ground on poles to protect people and property from coming into contact with high voltage line conductors.

SDG&E operates a Commission-approved Vegetation Management Program to ensure that plant growth does not contact or come within a certain distance of its high voltage conductor lines. The program is designed to ensure that these distances, or clearance requirements, are met throughout a one-year cutting cycle despite variables such as vegetation growth rate, wind sway and line sag.[5] Accordingly, SDG&E applies more than the minimum clearance requirements at the time-of-trim.

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[3] Motion for Summary Judgment of SDG&E at 3-4.

[4] *Id.* at 4.

[5] *Id.*

Five of the palm trees on Mr. MacKinnon's property are cataloged in SDG&E's Vegetation Management Program software program, which is used to dispatch orders for tree trimming to SDG&E's contractor.[6] SDG&E has trimmed these trees in the past.[7] In the instance of attempted tree trimming giving rise to this dispute, SDG&E sought to apply 10 feet of clearance between the adjacent distribution lines and Complainant's palm tree fronds.[8]

Disagreeing with SDGE's proposed treatment of his trees, Complainant exchanged a series of letters with SDG&E during the spring of 2014 that culminated in the instant complaint. On April 7, 2015, SDG&E answered and moved for summary judgment. SDG&E did not dispute any material facts. Complainant responded to the motion for summary judgement on April 13, 2015, and requested and received approval to submit a modified response on April 22, 2015. On May 1, 2015, SDG&E submitted a reply to Complainant's response.

Assigned Administrative Law Judge (ALJ) W. Anthony Colbert initially scheduled a prehearing conference on this proceeding for June 1, 2015. SDG&E and Mr. MacKinnon concurrently engaged in settlement discussions. During these discussions, SDG&E discovered a loading factor issue with the pole located in front of Mr. MacKinnon's property on Madison Avenue (the Madison Pole). On May 29, 2015, the parties jointly moved for a six-month abeyance of the proceeding in order for SDG&E to replace the Madison Pole and reconfigure its facilities.[9]

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[6] Response of SDG&E to MacKinnon Motion to Supplement the Record, Attachment A.

[7] *Id.*

[8] Answer of SDG&E at 5.

[9] Joint Motion to Hold the Proceeding in Abeyance at 1.

As described in the joint status report filed on September 25, 2015, SDG&E subsequently replaced the Madison Pole with a taller pole. This increased the clearance between SDG&E's equipment and the palm trees located on Complainant's property.[10] SDG&E concurrently moved to dismiss the complaint on the grounds that the increased clearances had rendered the tree-trimming issues moot. SDG&E asserts that these increased clearances now exceed 10 feet, and that it has no plans to enter Complainant's property to trim his palm trees to protect equipment on the replacement Madison Pole.[11] Complainant responded to the motion to dismiss on October 5, 2015, seeking a statement from the Commission clarifying SDG&E's legal rights to enter his property to trim or remove trees in the future.

A prehearing conference was held on November 2, 2015. The parties each submitted post-prehearing conference statements on November 20, 2015, and SDG&E submitted a reply in support of its post-prehearing conference statement on November 30, 2015. On January 23, 2016, Mr. MacKinnon submitted a motion to supplement the record, contending that a notice for tree trimming that he had received from SDG&E made the case no longer moot.[12] SDG&E submitted a response to Complainant's motion on January 27, 2016, asserting that the notice in question referred to another tree, and Mr. MacKinnon's five palm trees had all been assigned "refusal status" in the SDG&E vegetation management software dispatch system.[13]

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[10] Joint Status Report of SDG&E and David MacKinnon, Jr. at 2.

[11] Motion to Dismiss of SDG&E at 5.

[12] MacKinnon Motion to Supplement the Record, Exhibit A.

[13] Response of SDG&E to MacKinnon Motion to Supplement the Record, Attachment A.

On February 26, 2016, an order was issued to extend the statutory deadline for resolving this proceeding until August 26, 2016.

3. Standard for Ruling on a Motion to Dismiss

SDG&E has moved to dismiss the complaint on the grounds of mootness, and alternately moved for summary judgment.

The purpose of both motions to dismiss and motions for summary judgment before the Commission is to promote judicial efficiency by determining whether there are any triable issues of material fact in advance of a hearing.[14] As described in *Fenholt v. Southern California Edison Company* (2014) D.14-03-032, the Commission has developed two similar standards for ruling on a motion to dismiss. The first looks to the evidence presented to determine whether, based on undisputed facts, the moving party is entitled to judgment as a matter of law.[15] The second test also asks whether the moving party is entitled to judgment as a matter of law, but based on an assumption that the well-pleaded factual allegations of the complaint are true.[16]

In evaluating the sufficiency of a complaint's allegations, the Commission is guided by the standards set forth in Public Utilities Code Section 1702, which provides that a complainant must: (a) allege that a regulated utility has engaged in an act or failed to perform an act; and (b) in violation of any law or commission order or rule.[17] Similar to courts in civil practice, the Commission

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[14] *Westcom Long Distance v. Pacific Bell* (1994) Decision (D.) 94-04-082.

[15] *See Fenholt* at 4, citing Raw Bandwidth v. SBC California (2003) D.03-04-023; California Code of Civil Procedure, § 437(c).

[16] *Id.*, citing *ReWestern Gas Resources-California, Inc.* (1999) D.99-11-023).

[17] Cal. Pub. Util. Code. § 1702.

will dismiss cases if the issues raised in a complaint are resolved during the course of proceedings (become moot).[18]

With these standards in mind, we will examine the parties' responses to determine whether the issues raised in the complaint continue to state a cause of action under any law or Commission order or rule. If not, the case can be dismissed on the grounds of mootness.

4. Parties' Positions

SDG&E asserts that the replacement of the Madison Pole and subsequent reconfiguration of its facilities by Complainant's home has rendered this case moot.[19] SDG&E analogizes to *Hanlon v. Cox Communications* (2002) D.02-12-040, where the Commission dismissed a complaint regarding placement of telephone equipment on shared property when the defendant telephone company relocated the equipment during the course of the proceeding. Despite a continued disagreement between the parties about the defendant's legal rights to place the equipment in its original location, the Commission found that the principal grievance giving rise to the complaint had been resolved, and dismissed the complaint as moot.[20] SDG&E asserts that the principal grievance giving rise to the instant case was its need to enter Complainant's property to maintain clearance between his palm tree fronds and the conductors attached to the Madison Pole. SDG&E argues that replacing the Madison pole with a higher pole is like the telephone equipment relocation in *Hanlon*. It resolves the

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[18] *See BudSco Chemical Enterprises, Inc. v. Adcock*, 2012 Cal. P.U.C. LEXIS 295 at 19-20.

[19] Post-Prehearing Conference Statement of SDG&E at 3.

[20] D.02-12-040.

principal issue in the complaint because SDG&E no longer needs to enter Complainant's property to protect the Madison Pole and its associated power lines from Complainant's palm trees.[21]

We also note that Mr. MacKinnon has submitted a Motion to Supplement the Record, contending that a notice for tree trimming he received from SDG&E contradicts SDG&E's assertion that it does not anticipate entering his property to trim trees in the foreseeable future. He argues that this evidence makes the case no longer moot.[22] In response, SDG&E has provided a declaration by Mr. Don Akau, its Vegetation Program Manager, stating that the notice in question refers to a different tree not located on Complainant's property.[23] Mr. Akau asserts that Mr. MacKinnon's five palm trees have all been assigned "refusal status" in the SDG&E Vegetation Management Program's software dispatch system, meaning that the system cannot send prompts to the SDG&E vegetation contractor to trim those trees.[24]

Mr. MacKinnon objects to the characterization of his complaint as a moot issue. He asks the Commission to "admonish" SDG&E for its prior actions and to clarify SDG&E's legal rights under Tariff 16 to enter his property for vegetation management purposes in the future.[25] SDG&E asserts that this amounts to a request for an advisory opinion, and cites to *BudSco Chemical Enterpises, Inc. v. Adcock*, 2012 Cal. P.U.C. LEXIS 295 to illustrate the

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[21] Motion to Dismiss of SDG&E at 6.

[22] MacKinnon Motion to Supplement the Record, Exhibit A.

[23] Response of SDG&E to MacKinnon Motion to Supplement the Record, Attachment A.

[24] *Id.*

[25] MacKinnon Prehearing Conference Statement at 5.

Commission's "long-standing policy" against issuing such opinions.[26] In *BudSco*, the Commission declined to address the complainant's concerns about the legal implications of discontinuing water service where the complainant alleged that the defendant had threatened to, but had not actually discontinued water service.[27] These concerns were found to be "mere speculation on BudSco's part as to what Alco might do in the future."[28] SDG&E asserts that Mr. MacKinnon's concerns about future entry and trimming or removal of trees are similarly speculative.[29] Since SDG&E states that it does not anticipate needing to enter Complainant's property to trim or remove trees in order to protect the Madison Pole facilities in the foreseeable future, which could be eight to 10 years or more, Mr. MacKinnon is asking the Commission to opine on "future events and potential legal consequences."[30]

Mootness notwithstanding, SDG&E asserts that the issues Mr. MacKinnon raises in his post-prehearing conference statement are purely legal issues that do not necessitate hearings.[31] SDG&E contends that, if the case is not dismissed for mootness, it is entitled to judgement as a matter of law on these issues. SDG&E asserts that its Tariff Rule 16 allows it to access Complainant's property "for any purpose connected with the furnishing of electric service," which explicitly

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[26] Motion to Dismiss of SDG&E at 7.

[27] BudSco Chemical Enters., Inc. v. Adcock, 2012 Cal. P.U.C. LEXIS 295 at 19-20.

[28] *Id.*

[29] Post-Prehearing Conference Statement of SDG&E at 4.

[30] *See Budsco* at 19.

[31] Reply in Support of Post-Prehearing Conference Statement of SDG&E at 3-5.

includes vegetation management.[32] SDG&E argues that logically, this authorizes them to protect the distribution equipment associated with delivering power to Complainant's service line, as well as the service line itself.[33]

In addition, SDG&E asserts that its prior actions to trim palm fronds on Complainant's property cannot be found to have unlawfully exceeded its discretion under General Order 95 because Mr. MacKinnon has not alleged that his palm fronds did not previously pose a safety risk to SDG&E facilities.[34] Even taking the well-pleaded factual allegations of the complaint to be true, therefore, Mr. MacKinnon has failed to state a claim under Section 1702 of the Public Utilities Code with respect to SDG&E's prior vegetation management activities.[35]

5. Discussion

The primary issue giving rise to Mr. MacKinnon's complaint, regarding whether SDG&E has the right to enter his property to maintain clearances between his palm tree fronds and SDG&E's electric distribution equipment, is moot. SDG&E has replaced the Madison Pole adjacent to Complainant's property with a taller pole and reconfigured its facilities such that its clearance requirements between the trees and the power lines are now satisfied. Although Mr. MacKinnon may still worry that SDG&E may at some point in the future need to access his property to trim his trees, these concerns are speculative and may never come to fruition. SDG&E has accurately characterized the Commission's policy on advisory opinions. In the absence of extraordinary

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[32] Post-Prehearing Conference Statement of SDG&E at 5.

[33] *Id.*

[34] *Id.* at 6.

[35] *Id.*

circumstances, which these are not, the Commission declines to speculate on the legal implications of hypothetical future actions by SDG&E. The primary issue in Mr. MacKinnon's complaint is resolved.

SDG&E has alternately moved for summary judgment with regards to the legal issues of (1) SDG&E's authority to access private property for vegetation management to protect not only service lines, but the distribution conductors and other equipment associated with the delivery of electric service; and (2) SDG&E's authority to apply clearance distances between vegetation and high voltage conductor lines in excess of the minimum requirements defined by General Order 95. Since we find that the issue in the instant case is moot, it is not necessary for us to comment on whether SDG&E has the right to enter Mr. MacKinnon's property to maintain clearances. However, we note that protecting high voltage electric equipment from contact with vegetation is a priority both to ensure uninterrupted delivery of electric service to the public, as well as to prevent fire and other dangerous hazards. It is reasonable to expect that, as a condition of receiving electric service, private citizens may be required to cooperate with vegetation management practices by the utility to protect the equipment that provides power to their home, and for those practices to be administered in a practical and cost-effective way that does not pose an undue burden to ratepayers. We see nothing inconsistent between these principles, as embodied by General Order 95 and SDG&E's Rate Tariff 16, and the practices described in the facts of this complaint.

6. Conclusion

The Complainant has failed to demonstrate that the Defendant has engaged in any activity or violated any applicable rule, law or tariff of the Commission. The primary issue giving rise to the complaint has been resolved.

There is no disputed or triable issue of material fact before and/or under the Commission's jurisdiction in this proceeding. The Complainant's request for relief is denied and the case is dismissed. This proceeding is closed.

7. Categorization and Need for Hearing

This decision confirms the categorization of Case 15-02-022 as adjudicatory, as defined in Rule 1.3(a). The evidentiary determination is that no evidentiary hearings are necessary, because there is no triable issue of material fact. Because the issue presented by this complaint is now moot, the complaint is dismissed.

8. Comments on Proposed Decision

The proposed decision (PD) of ALJ Colbert 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 due on August 8, 2016 and Reply Comments were due on August 15, 2016. On August 14 the Complainant attempted to file his Comments to the PD. The Comments were rejected by the Commission's Docket Office as being late filed pursuant to Rule 14.3. On August 15 the Complainant filed a Motion to be allowed to late-file his Comments. That Motion was granted by the assigned ALJ on the same day. The assigned ALJ also allowed the Defendant to file Reply Comments by August 16. Complainant's Comments were filed on August 15. There have been no changes to the PD in response to Comments.

9. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ in this proceeding.

Findings of Fact

1. Complainant owns and resides at 739 Madison Avenue, San Diego, California, which is located at the corner of Madison Avenue and New Hampshire Street in the City of San Diego.

2. Defendant is a provider of electricity and natural gas service and is an investor-owned public utility under the jurisdiction of the Commission.

3. Complainant is a customer of SDG&E.

4. Several palm trees are situated on the Complainant's property, five of which are cataloged in SDG&E's vegetation-management program that is used to dispatch orders for tree trimming to SDG&E's contractor.

5. SDG&E has previously dispatched contractors to perform vegetation management on the palm trees on the Complainant's property.

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

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

8. SDG&E's Vegetation Management Program applies 10 feet of clearance between vegetation and electric supply equipment at time-of-trim. These clearance requirements are designed around a one-year cutting cycle.

9. Subsequent to the filing of this Complaint, SDG&E replaced a pole located adjacent to the Complainant's property at the corner of Madison Ave and New Hampshire Street (the Madison Pole). The replacement pole is taller than the original pole, and provides for greater clearance from the palm fronds on the Complainant's property.

10. SDG&E has labeled the palm trees on Complainant's property with "refusal status," which prevents SDG&E's vegetation management program from initiating an order to its contractor to trim the trees.

11. Absent an extraordinary, emergency or storm-type situation, or a change in clearance regulations, SDG&E asserts that it does not anticipate needing to enter Complainant's property to trim trees in the next eight to 10 years.

12. SDG&E issued a Power Line Clearing Notification regarding a tree near, but not on, Complainant's property, which Complainant received on January 19, 2016.

13. Complainant has filed a motion to amend the record with a copy of this notice, as evidence that the case is not moot.

14. SDG&E requests that the Commission dismiss this case on the grounds of mootness.

15. There is no disputed or triable issue of material fact within the Commission's jurisdiction in this proceeding.

Conclusions of Law

1. Since SDG&E does not anticipate needing to trim or remove the palm trees on Complainant's property after installing a taller replacement pole, Complainant's continued disagreement with SDG&E's vegetation management practices is purely speculative and this case is moot.

2. The vegetation management program is a condition of Complainant's electric service under SDG&E's Tariff Rule 16.

3. Rule 16 gives SDG&E authority to perform vegetation management necessary to protect to those facilities owned by Defendant that are used to provide service to Complainant's home, regardless of whether those facilities are located on the Complainant's property.

4. Reasonable vegetation management practices, including applying clearance distances in excess of the minimum requirements to avoid trimming more than once per year, are within the purview of SDG&E in accordance with General Order 95.

5. Evidentiary hearings are not necessary.

6. Defendant's Motion to Dismiss the Complaint on grounds of mootness should be granted.

7. The Complaint against the Defendant should be dismissed, effective immediately.

O R D E R

IT IS ORDERED that:

1. The Complaint of David MacKinnon, Jr. (Complainant) against San Diego Gas and Electric Company is dismissed. The Complainant's request for relief is denied.

2. The hearing determination is changed to "no hearings are necessary."

3. All motions not previously ruled on are denied.

4. Case 15-02-022 is closed.

This order is effective today.

Dated _____, at San Francisco, California.