

Decision 12-07-025

July 12, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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 on November 6, 2008)

ORDER DENYING REHEARING OF DECISION 12-01-032

On February 17, 2012, Los Angeles Department of Water and Power (“LADWP”) and California Municipal Utilities Association (“CMUA”) filed applications for rehearing of Decision (D.)12-01-032 (“Phase II Decision”). The Commission opened the in Rulemaking (R.) 08-11-005 (*Rulemaking re Safety of Electric Utility and Communication Facilities* [“Rulemaking”] after the 2007 Southern California wildfires, “to consider and adopt regulations to reduce the fire hazards associated with overhead power-line facilities and aerial communications facilities in close proximity to power lines.” (Phase II Decision, at p. 6.) The Phase II Decision adopts comprehensive regulations to ensure fire safety, and initiates a Phase III to consider and adopt further regulations.

We have carefully considered the arguments in the applications for rehearing, and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, in today’s order, we deny the applications for rehearing of the Phase II Decision.

I. Discussion

In its rehearing application, CMUA alleges: (1) CMUA’s request that the Commission identify statutory authority for its enforcement authority is not a request for an advisory opinion; and (2) the Commission must identify a statutory source for its

enforcement authority against POUs. LADWP alleges that: (1) there is an actual controversy concerning the Commission's enforcement jurisdiction; and (2) the Phase II Decision constitutes a legislative act which must include notice of a penalty thereof. The Commission's Consumer Protection and Safety Division ("CPSD") filed a response to the applications.

Notably, the scoping memo for the proceeding specifically provided that our jurisdiction over POUs is not within the scope of the proceeding. As that ruling explained:

This proceeding will not litigate the Commission's determination in the OIR that it may adopt safety-related regulations for publicly owned utility (POU) electric transmission and distribution facilities. As explained in the OIR, the Commission has the authority under Pub. Util. Code §§ 8002, 8037, and 8056 to adopt *and enforce rules* for POU electric transmission and distribution facilities for the purpose of protecting the safety of employees and the general public.

(January 6, 2009 Assigned Commissioner's Ruling and Scoping Memo, at p. 4, emphasis added.)

The reason why this jurisdictional issue fell outside the scope of the instant rulemaking is because, in 1998, we definitively decided the issue of POU safety jurisdiction, including enforcement, in a proceeding adopting safety regulations for emergencies and major power outages, to which both CMUA and LADWP were parties. In that earlier proceeding, we unequivocally held that, pursuant to the Public Utilities Code, the Commission has the authority and duty to regulate and enforce safety aspects of POUs. (*Rulemaking for Electric Distribution Facility Standard Setting* (1998) [D.98-03-036] 78 Cal.P.U.C.2d 706, 1998 Cal. PUC LEXIS 71, at *13-*16.) We subsequently recited this conclusion of law in 2009 in this proceeding (D.09-08-029 ["Phase I Decision"] and D.10-02-034). In a 2010 court challenge, LADWP unsuccessfully challenged the Phase I Decision, and our assertion of enforcement authority over POUs. (*Los Angeles Dept of Water and Power v. Public Util. Comm.* (2010) Case No. S181305, California Supreme Court.)

Neither our enforcement authority over POUs, or specific enforcement mechanisms which would be used against POUs, is at issue in the Phase II Decision. The authority issue is barred by section 1709, as well as by *res judicata*, and the issue of particular enforcement mechanisms is not ripe. The only justiciable issue, therefore, in the applications for rehearing, is whether we were legally required to discuss enforcement mechanisms in the Phase II Decision, despite the fact that it is outside the scope of the proceeding, and there is no enforcement that is currently contemplated. As discussed below, we were not required to discuss enforcement against POUs in the Phase II Decision.

A. *Res Judicata*

As an initial matter, as CPSD argues, LADWP's current claims are barred by the doctrine *res judicata*. LADWP challenged the Phase I Decision on judicial review in 2009 on the same cause of action and lost. For this reason, LADWP is unable to challenge issues concerning the Commission's safety jurisdiction over POUs.

“The doctrine of *res judicata* precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined...” [Citations]. The rule is the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated, or litigable.” [Citations.]

(*Thibideau v. Crumb* (1992) 4 Cal.App.4th 749, 754 (citations omitted).)

A cause of action for *res judicata* purposes refers to, “the right or obligation which is sought to be enforced,” regardless of whether different relief or remedies are requested. (*Stafford v. Yerge* (1954) 129 Cal.App.2d 165, 171.) “Otherwise a party could keep litigating the same claim over and over so long as he, or his counsel, was ingenious enough to contrive new theories.” (*Ibid.*)

“If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by

negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." [Citations] "[T]he law will not allow litigation to be conducted in a piecemeal fashion."; Code Civ. Proc., § 1908, subd. (a)(2), 1911; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 188 et seq., p. 621.)

(*Thibideau, supra*, 4 Cal.App.4th at 755.)

Here, LADWP is attempting to challenge our assertion of safety jurisdiction over POUs in a piecemeal fashion. Although it requested relitigation of the jurisdiction issue in the underlying proceeding (LADWP App. Rehg., at p. 4), LADWP now states that it is limiting its rehearing to questions of “enforcement” as distinct from jurisdiction. (*Id.*, at p. 6.) However, it is clear that the same “right or obligation” is involved – LADWP is again challenging our safety jurisdiction over POUs.

Although LADWP claims merely to be seeking clarity regarding possible enforcement as part of the Phase II proceeding, this claim is not credible. Any concerns LADWP may have about the underpinnings of the Commission’s enforcement jurisdiction would have applied equally to Phase I, which also adopted regulations applicable to POUs. Neither Phase I nor Phase II specifically concern enforcement against POUs. As mentioned, LADWP already challenged our jurisdiction in the Phase I Decision, and could have raised all of its enforcement arguments at that time. LADWP’s current enforcement argument is only a subset of its jurisdictional challenge to the new rules, and one that it could have easily raised earlier. Thus, LADWP’s raising enforcement at this stage is an effort to relitigate LADWP’s main contention – that we lack jurisdiction to regulate the POUs regarding safety concerns. Because LADWP’s could have been raised during its first challenge to our adoption of fire safety regulations, it is barred from raising those issues at this stage.

B. Need to Discuss Enforcement

Even apart from the fact that LADWP is barred from challenging our enforcement authority at this stage, both rehearing applications otherwise lack merit. The

rehearing applicants' main contention is that we were required to discuss the specifics of its enforcement authority over POU's in the Phase II Decision. They assert that discussion of enforcement would not be an advisory opinion because an actual controversy exists, and that the Commission must identify the statutory source of its enforcement authority. LADWP adds that the Phase II Decision is a legislative act that must include notice of any penalty. Neither rehearing application demonstrates legal error in the Phase II Decision.

Rehearing applicants' assertion that there is an actual controversy and a need for ruling on the enforcement issues does not withstand scrutiny. As CPSD explains, there are two components of LADWP's and CMUA's request for discussion of the Commission's POU enforcement authority. The first component is a challenge to the basis for the Commission's assertion that it has enforcement authority over POU's. The time for challenging this assertion, whether framed as safety jurisdiction over POU's, or the subset of enforcement of safety jurisdiction, is past. We considered this issue in 1998 and ruled that we have safety jurisdiction over POU's, in D.98-03-036. Thereafter, following issuance of the Phase I decision in the instant rulemaking, LADWP challenged our safety jurisdiction over POU's in a petition for writ of review, which the California Supreme Court denied. Thus, both parties are barred from challenging our safety jurisdiction, because these holdings became final in 1998. (See Pub. Util. Code, § 1709.) In addition, LADWP is barred because of the doctrine of *res judicata*. Thus, the Commission's safety jurisdiction over POU's, has already been conclusively determined, and there is no need for another Commission determination.

The second component of LADWP's and CMUA's current request concerns "how the Commission will impose penalties against publicly-owned utilities...." (LADWP App. Rehg., at p. 7.) As the Phase II Decision states, "We interpret CMUA and LADWP's request as seeking an advisory opinion. Like the courts, we have a long-standing policy against issuing advisory opinions, and we decline to do so here." (Phase II Decision, at p. 151.)

CMUA and LADWP challenge our conclusion that their request for clarification regarding penalties and enforcement is a request for an advisory opinion.

The authorities weigh against this challenge. As the California Supreme Court has explained:

The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. (See, generally, *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910 [Citations].) It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion.

(*Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 170.)

We have adopted the same policy and refrains from issuing advisory opinions. (*Re Relationships between Energy Utilities and Their Affiliates* (2000) [D.00-01-052] 2000 Cal. PUC LEXIS 108, at p. 5.)

In this case, CMUA and LADWP are seeking an advisory opinion about how enforcement would work, because there is no enforcement action currently at issue, or even contemplated. In this way, the current situation is much like the situation in *Lynch, supra*. In that case, the Supreme Court declined to rule on the Attorney's General request for opinion determining the validity of an enforcement statute. The Court reasoned that there was no party faced with enforcement that was seeking relief from the statute. (*Lynch*, at p. 911.)

Similarly, unless a party is actually facing the threat of an enforcement action, it is established that a mere request for clarity about the means of enforcement is advisory in nature, and the issue is an unripe controversy. (See also *PG&E Corp. v. Public Utilities Comm.* (2004) 118 Cal.App.4th 1174, 1220 [declining to rule on a challenge to the Commission's interpretation of one of its regulations].) "We must wait until an administrative agency has issued a decision with concrete consequences from which relief may properly be sought." (*Ibid.*)

LADWP also argues that the Commission can issue advisory opinions and make an exception to its general rule against doing so. LADWP fails to acknowledge that, at the rehearing stage, rehearing will only be granted when legal error has been demonstrated. “The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.” (Pub. Util. Code, § 1732; see, also, Commission Rules of Practice and Procedure, Rule 16.1 (c).) Therefore, the arguments that the Commission *could* have discussed specific enforcement mechanisms, or that there are reasons why that discussion would have been appropriate, do not support the granting of a request for rehearing.¹

In order to succeed in their current filings, rehearing applicants would need to demonstrate that it was legal error for the Commission to decline to rule on the enforcement issue. LADWP and CMUA make no credible argument that we were in any way required to discuss enforcement mechanisms. CMUA asserts that we “must provide a statutory basis” for its asserted enforcement authority. (CMUA App. Rehg., at p. 8.) However, CMUA fails to cite any authority that supports the contention that we were required to discuss all the foundations of its enforcement in the Phase II Decision. Similarly, LADWP asserts that the Phase II Decision “must include notice of any penalty...,” but does not provide any legal authority that supports that contention. (LADWP App. Rehg., at pp. 9-10.)

II. CONCLUSION

Because LADWP and CMUA fail to demonstrate any legal error, the applications for rehearing are denied.

¹ Nor have the rehearing applicants demonstrated any extraordinary circumstance which would justify departure from the Commission’s policy against issuing advisory opinions. The Commission’s statutory sources of authority against entities other than regulated privately-owned utilities, as well as specific types of penalties, are easily found in the Public Utilities Code. However, as explained, the nature of those penalties is not at issue in the current applications for rehearing.

THEREFORE, IT IS ORDERED that:

1. LADWP's and CMUA's applications for rehearing of D.12-01-032 are denied.

This order is effective today.

Dated July 12, 2012 at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK FERRON

Commissioners