

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

04-16-12
04:59 PM

Leatherbury & Lowell Family Trusts.

Complainant,

vs.

San Diego Gas & Electric Company (U902E),

Defendant.

C.11-02-009

(Filed February 9, 2011)

**REPLY OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) TO
THE OPENING COMMENTS OF LEATHERBURY & LOWELL FAMILY TRUST ON
THE PROPOSED DECISION DISMISSING COMPLAINT FOR FAILURE TO STATE
A CLAIM ON WHICH RELIEF MAY BE GRANTED**

ALLEN K. TRIAL
101 Ash Street, HQ-12
San Diego, California 92101
Telephone: (619) 699-5162
Facsimile: (619) 699-5027
ATrial@semprautilities.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

April 16, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION.....	1
II. LEATHERBURY’S OPENING COMMENTS VIOLATE RULE 14.3 AND SHOULD BE GIVEN NO WEIGHT	2
III. BURDEN OF PROOF	4
IV. THE PROPOSED DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.....	5
V. CONCLUSION	6

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
D.11-02-025	1, 2
D.10-10-035	2
D.07-01-010	2
D.01-08-067	4
D.97-05-089	4
Resolution E-4373	1, 2, 3
Mathis v. Morrissey (1992) 11 Cal.App.4th 332, 346 [13 Cal.Rptr.2d 819]	4
Smith v. Santa Rosa Police Dept. (2002) 97 Cal.App.4th 546, 569 [119 Cal.Rptr.2d 72]	4

STATUTES

Pub. Util. Code Section 1702	4
Evid. Code, Section 500	4
Evid. Code, Section 520	4
Evid. Code, Section 115	4
Pub. Util. Code, § 1757	5

RULES

Commission Rule of Practice and Procedure 14.3	2, 3, 4
--	---------

OTHER AUTHORITIES

2 McCormick, Evidence, supra, Burden of Proof, § 336, pp. 409-410	4
9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 362, p. 412	5

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

Leatherbury & Lowell Family Trusts.

Complainant,

vs.

San Diego Gas & Electric Company (U902E),

Defendant.

C.11-02-009

(Filed February 9, 2011)

**REPLY OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) TO
THE OPENING COMMENTS OF LEATHERBURY & LOWELL FAMILY TRUST ON
THE PROPOSED DECISION DISMISSING COMPLAINT FOR FAILURE TO STATE
A CLAIM ON WHICH RELIEF MAY BE GRANTED**

I. INTRODUCTION

Pursuant to Rule 14.3(d) of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, San Diego Gas & Electric Company (“SDG&E”) respectfully submits these reply comments to the April 9, 2012, opening comments of Chuck Leatherbury (“Leatherbury”) on behalf of the Leatherbury & Lowell Family Trust (“Trust” or “Complainant”) on Administrative Law Judge (“ALJ”) Bemserfer’s March 20, 2012, Proposed Decision (“Proposed Decision”) *Dismissing Complaint For Failure To State A Claim On Which Relief May Be Granted*.¹ The Proposed Decision is limited to resolving whether SDG&E complied with the Resolution E-4373, FOF 10, modified in Decision (D.) 11-02-025, issued February 24, 2011. SDG&E respectfully requests the Commission to give no weight to Leatherbury’s comments, which merely repeat the arguments Leatherbury made in prior briefs, which the

¹ A copy of the Proposed Decision is available at: <http://docs.cpuc.ca.gov/efile/PD/162086.pdf>.

Proposed Decision and Decision 11-02-025 had already reviewed and rejected, and are thus filed in violation of Commission Rule of Practice and Procedure 14.3 (“Rule 14.3”). In addition, Leatherbury’s comments and selective citations fail to present the full breadth of the direct evidence before the Commission. The Proposed Decision is supported by substantial evidence and should be adopted by the Commission.

II. LEATHERBURY’S OPENING COMMENTS VIOLATE RULE 14.3 AND SHOULD BE GIVEN NO WEIGHT

Rule 14.3(c) states: “Comments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law. Comments which fail to do so will be accorded no weight.” Based on this standard, the Commission should accord Leatherbury’s comments no weight, as the comments cite no factual, legal, or technical errors in the Proposed Decision, but rather merely repeat the arguments Leatherbury made in its prior briefs, which the Proposed Decision and Decision 11-02-025 has chosen not to adopt. Commission precedent demonstrates that comments that serve only to reargue previous positions are to be afforded no weight. *See* D.10-10-035 (“To the extent parties reargued their previous position, we accord the comments no weight.”); *see also* D.07-01-010 (disregarding comments that reargued issues previously raised in briefs).

In its comments, Leatherbury rehashes the same main argument (that “SDG&E only has an easement that is 12 feet wide and that the scope of the easement is not broad enough to cover the type of facilities proposed by SDG&E in AL 2106-E.”) it has presented to the Commission in numerous separate briefings on Resolution E-4373, as well as in its Complaint and Request for a Cease and Desist Order, dated February 8, 2011; Application for Rehearing Resolution E-4373,

dated December 22, 2010; and most recent comments of July 14, 2011, to evidence presented by SDG&E.

Leatherbury argues that the Proposed Decision is unfair and improper because: (i) changes the burden of proof from the Defendant to the Complainant; and (ii) SDG&E is exceeding the 12-foot maximum easement width specified by Resolution E-4373; (iii) and the ALJ erroneously dismissed Complainant’s evidence. *See* Leatherbury Opening Comments at pp. 1-13. Table 1, below, shows where Leatherbury previously presented the same arguments to the Commission in prior briefing and the Commission already disregarded them.

Table 1: Leatherbury’s Arguments in Comments and Briefing

<i>Argument</i>	<i>Location Argued in Leatherbury’s Comments</i>	<i>Location Argued in Leatherbury’s Previous Briefing</i>
The Project violates the 12-foot maximum easement width specified by Resolution E-4373	Opening Comments at 2-4	Comments to Evidence at 2 - 12 Application for Rehearing Resolution E-4373 at 1-4. Motion for Injunction / Stay of Resolution E-4373 at 1.
Defendant has burden of proof	Opening Comments at 2 and 6-8	Comments to Evidence at 2 and 7-12. Application for Rehearing Resolution E-4373 at 3.
Assertion that the decision of the Commission is unlawful or erroneous	Opening Comments at 3 and 6	Application for Rehearing Resolution E-4373 at 1.

As Table 1 demonstrates, Leatherbury attempts to gain its third bite at the apple for each of the issues raised in its comments. In accordance with Rule 14.3(c), the Commission should disregard Leatherbury’s repetitious claims.

Rule 14.3 further requires that “[c]omments proposing specific changes to the proposed or alternate decision shall include supporting findings of fact and conclusions of law.”

Leatherbury has provided no specific changes to the Proposed Decision or any additional findings of fact or conclusions of law in support of its proposed changes to the Proposed Decision besides those that have already been considered and rejected by the Commission. Accordingly, the Commission should give no weight to Leatherbury’s comments.

III. BURDEN OF PROOF

Leatherbury argues that the Proposed Decision is unfair or improper because it changes the burden of proof from the Defendant to the Complainant. Under Pub. Util. Code Section 1702, a complainant must prove an alleged violation of a specific standard contained in a statute, rule, or order of the Commission, or a tariff which has been approved by the Commission. The standard of proof for Complainant to prevail in this case has been well settled and is by a preponderance of the evidence. *See, e.g.*, Decision (D.) 01-08-067; D.97-05-089. “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.). To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). (Evid. Code §§ 115, 520.). The burden of proof does not shift during trial - it remains with the party who originally bears it. (Evid. Code, § 500; *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346 [13 Cal.Rptr.2d 819]; *Smith v. Santa Rosa Police Dept.* (2002) 97 Cal.App.4th 546, 569 [119 Cal.Rptr.2d 72]; 2 McCormick, *Evidence, supra*, Burden of Proof, § 336, pp. 409-410.)

In this case Leatherbury on behalf of the Trust has the burden to show that SDG&E has failed to comply with the Resolution E-4373, FOF 10. Leatherbury fails to meet this burden of proof.

IV. THE PROPOSED DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Leatherbury erroneously argues that the Proposed Decision is flawed. A Commission decision in a complaint case will only be found to be erroneous if the decision's findings “are not supported by substantial evidence in light of the whole record.” (Pub. Util. Code, § 1757, subd. (a)(4).) Well-established black letter law provides that under the substantial evidence test arguments about the weight of the evidence do not demonstrate error. If there is substantial evidence to support a decision-maker’s findings, “it is of no consequence that the [decision-maker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.” (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 362, p. 412.). Here, the Proposed Decision is clearly supported by ample evidence in the record and Leatherbury’s arguments are both factually misleading and legally wrong. Leatherbury argues that the Proposed Decision is incorrect because Leatherbury again claims that SDG&E is exceeding the 12-foot maximum easement width specified by Resolution E-4373. There is no support for this contention in the record, and Leatherbury cites to none. SDG&E, however, produced substantial evidence demonstrating compliance with the terms of Resolution E-4373.² The Proposed Decision appropriately finds that SDG&E fully complied with the Resolution E-4373.

² See Compliance Affidavit of SDG&E, dated March 18, 2011, which is available at: <http://docs.cpuc.ca.gov/efile/RESP/132725.pdf> ; see also Answer of SDG&E, dated March 18, 2011, which is available at: <http://docs.cpuc.ca.gov/efile/ANS/132319.pdf>

V. CONCLUSION

For the reasons set forth herein, the Proposed Decision is supported by substantial evidence and should be adopted in full.

Respectfully submitted this 16th day of April, 2012.

/s/ Allen K. Trial
ALLEN K. TRIAL
101 Ash Street, HQ12
San Diego, California 92101
Telephone: (619) 699-5162
Facsimile: (619) 699-5027
E-mail: atrial@semprautilities.com

Attorney for Defendant:
SAN DIEGO GAS & ELECTRIC COMPANY