

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**03-20-12
12:25 PM

March 20, 2012

Agenda ID #11188
Adjudicatory

TO PARTIES OF RECORD IN CASE 11-02-009

This is the proposed decision of Administrative Law Judge (ALJ) Bemederfer. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Bemederfer at kjb@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:jt2

Attachment

Decision PROPOSED DECISION OF ALJ BEMESDERFER (Mailed 3/20/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Leatherbury & Lowell Family Trusts,

Complainant,

vs.

San Diego Gas & Electric Company (U902E),

Defendant.

Case 11-02-009
(Filed February 9, 2011)

**DECISION DISMISSING COMPLAINT
FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED**

1. Summary

The complaint is dismissed without prejudice. Under Commission rules, the burden of proof is on Complainant to prove a violation of law. The violation alleged in the complaint, that Defendant has constructed new poles, cross-bars and guy wires that are wholly or partly outside its existing easement, requires us to determine questions of real property law that are outside our jurisdiction.

2. Discussion

This case arises from the decision of Defendant San Diego Gas & Electric Company (SDG&E) to replace certain wooden transmission line poles located in an easement over Complainant's property (Easement) with metal poles to reduce future fire danger. SDG&E notified the Commission of its decision to replace the poles via Advice Letter (AL) 2106-E, filed on August 31, 2009. On October 9,

2009, Chuck and Ann Leatherbury and Mark Lowell, on behalf of the Leatherbury and Lowell Family Trusts (Leatherbury), protested AL 2106-E. The protest alleged that the Easement is 12 feet wide and that the cross-arms and guy wires of the replacement poles would extend beyond the 12 foot limit. In AL 2106-E, SDG&E stated that the Easement is 20 feet wide. Notwithstanding its belief that it has a 20-foot-wide Easement, in its response to the Leatherbury protest, SDG&E undertook to remain within the 12 foot easement where the width of the right of way is in dispute.

In Resolution E-4373, the Commission approved AL 2106-E over Leatherbury's protest.

On December 22, 2010, Leatherbury filed a timely application for rehearing of Resolution E-4373 (Rehearing Application) alleging that: (1) Resolution E-4373 contains inconsistent and erroneous Findings of Fact; (2) the Commission erred implicitly, if not explicitly, in presuming that there is a prescriptive easement to install a new or additional 69 kilovolt (kV) line(s); (3) Resolution E-3473 fails to conclude that the standards for a 69 kV easement normally exceed 12 feet; and (4) the Commission fails to provide necessary oversight to ensure compliance with the 12 foot limitation. SDG&E filed a response opposing the Rehearing Application. On January 27, 2011, Leatherbury also filed a motion for injunction or stay of Resolution E-4373 (Stay Motion) while the Commission considered the Rehearing Application. The Commission reviewed the Rehearing Application and the Stay Motion and denied them both in Decision (D.) 11-02-025 (February 24, 2011). However, D.11-02-025 also revised two Findings of Fact (FOFs) in Resolution E-4373:

Revised FOF 8: "In considering whether to approve the Advice Letter, it is reasonable for the Commission to construe the scope of the easement in order to exercise its regulatory authority."

Revised FOF10: "SDG&E currently has a 69 kV line that occupies a 12 foot wide easement and cannot exceed the currently occupied easement in the disputed sections."

Revised Resolution E-4373 approved the pole replacement program subject to the requirement that SDG&E comply with revised FOF 10. Complainants allege that SDG&E has failed to comply with this requirement. On March 2, 2011, the assigned Administrative Law Judge (ALJ) directed SDG&E to produce evidence demonstrating compliance with the terms of revised Resolution E-4373. On March 18, 2011 SDG&E filed a compliance affidavit and supporting documentation in which it stated its reasons for believing that the pole replacement program complied with the requirements of revised Resolution E-4373, specifically including the requirement that new construction not exceed the currently occupied Easement in the disputed sections. On July 15, 2011, Leatherbury filed comments that disputed whether the new poles, including cross-arms and guy wires, were located entirely within the currently occupied Easement. Leatherbury attached to the comments a survey drawn by Jeffrey Safford, a licensed surveyor employed by SDG&E, which locates the new poles by reference to their distance from the center line of R/W 28726, [the surveyor's designation of the Easement].

Neither the survey nor the metes and bounds description on which it is based state the width of the Easement. Indeed, Mr. Safford notes in capital letters on the face of each of his survey drawings "NO EASEMENT WIDTH GIVEN FOR R/W 28726."

While we might have jurisdiction to decide whether the new poles lie within the currently occupied Easement if its boundaries were definitively

established,¹ we cannot independently establish them. A basic factual question is whether the currently occupied Easement is 20 feet wide, as SDG&E contends, 12 feet wide, as Leatherbury contends, or some other width altogether. That is a matter of California real property law over which we have no jurisdiction. Whether cross-arms or guy wires attached to a pole that is in the Easement are themselves in the Easement is also a question of California real property law. The parties engaged in months of Commission-assisted mediation² in an effort to reach agreement on these questions without success. In the absence of an agreement between the parties, only a court of competent jurisdiction can definitively resolve them.

It follows that the complaint fails to state a claim on which relief can be granted and should be dismissed without prejudice.

¹ In *Camp Meeker Water System, Inc. v. Public Utilities Commission* (1990) 51 Cal.3d 845, the Commission construed the deeds and easements at issue pursuant to its ratemaking authority and did so only for the limited purpose of ascertaining facts relevant to an application for increased rates. The Commission acknowledged in *Camp Meeker* that it does not have jurisdiction to adjudicate incidents of title. (*Id.*, at 850.) See also, *Koponen v. Pacific Gas & Electric Co.*, (2008) 165 Cal. App. 4th 345, "Plaintiffs contend the commission has no regulatory authority or interest in private disputes over property rights between PG&E and private landowners. We agree." (*Id.* at 353) In *Kaponen*, the Commission further stated that with regards to utility easements "It is important to note that, in the Commission decisions cited by PG&E, the Commission did not (and could not) authorize PG&E to do more than what is legally permitted under the scope of PG&E's existing easements." (*Id.* at 356.)

² ALJ David Gamson was assigned as the neutral mediator on April 1, 2011. ALJ Gamson met with the parties in person and by telephone throughout the balance of 2011 before reporting to the assigned ALJ that the mediation had concluded without success in early December 2011.

3. Proceeding Category and Need for Hearing

The Instruction to Answer filed on February 18, 2011, categorized this complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Since we determine that we lack jurisdiction to decide essential factual disputes, the evidentiary hearings determination is changed to state that no evidentiary hearings are necessary.

4. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) Bemserfer 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 filed on _____, and reply comments were filed on _____ by _____.

5. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Karl J. Bemserfer is the assigned ALJ in this proceeding.

Findings of Fact

1. Land owned by the Leatherbury and Lowell Family Trusts is burdened by the Easement in favor of SDG&E.
2. Pursuant to authority granted by this Commission in Resolution E-4373, SDG&E has removed wooden poles from the Easement and replaced them with metal poles.
3. The width of the Easement, its boundaries and whether the new poles, their cross-arms or their guy wires are located within the Easement are undetermined.

Conclusions of Law

1. The width of the Easement, its boundaries, and whether the new poles, their cross-arms or their guy wires are located within the Easement are questions of California real property law.
2. The Commission lacks jurisdiction to decide questions of California real property law.
3. The complaint fails to state a claim on which relief may be granted.
4. Hearings are not necessary.
5. The complaint should be dismissed without prejudice

O R D E R

IT IS ORDERED that:

1. The complaint of the Leatherbury and Lowell Family Trusts is dismissed without prejudice.
2. The hearing determination is changed to no hearings necessary.
3. Case 11-02-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.