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

Charles I. Donald,

Complainant

vs.

Pacific Gas and Electric Company (U39E),

Defendant

Case No. (C.)11-09-005
(Filed September 8, 2011)

**PACIFIC GAS AND ELECTRIC COMPANY'S
RESPONSE TO COMPLAINANT'S APPEAL OF THE
PRESIDING OFFICER'S DECISION**

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July 31, 2012

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Pursuant to Rule 14.4(d) of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), defendant Pacific Gas and Electric Company (PG&E) submits this Response to the Appeal of the Presiding Officer's Decision filed by the Charles I. Donald on July 16, 2012.

Rule 14.4(c) requires that an appeal set forth specifically the grounds on which the appellant believes the Presiding Officer's Decision to be unlawful or erroneous. Using this standard, Appellant has failed to establish any procedural or legal error in the Presiding Officer's Decision.

**I. THE CLAIM OF PROCEDURAL ERROR IN THE SERVICE OF PG&E'S
MOTION TO STRIKE AND THE PRESIDING OFFICER'S DECISION IS
WITHOUT ANY SUPPORT.**

Appellant asserts that he did not receive service of PG&E's Motion To Strike Portions of Complainant's Reply Brief and the Presiding Officer's Decision. The record in this proceeding on which the Commission may take official notice demonstrates both PG&E's Motion to Strike Portions of Complainant's Reply Brief and the Presiding Officer's Decision were served

electronically on the official service list in accordance with Rule 1.10, including to Appellant at the e-mail address that appears on the Complaint.

A party consents to electronic mail (e-mail) service of documents in the proceeding by providing an e-mail address for the official service list in the proceeding.¹ Here, Paragraph I of the Complaint listed Appellant's e-mail address ("chuck.donald@att.net"), indicating Appellant's consent to receive filings and notices by email.² Appellant's email address appears on the official service list for this proceeding, which was last updated on November 22, 2011.³

Appellant was advised at the conclusion of the March 27, 2012 evidentiary hearing that the time and place for taking evidence was at the evidentiary hearing.⁴

On May 15, 2012, PG&E filed a Motion to Strike Portions of Complainant's Reply Brief. In accordance with Rule 1.10(c), PG&E's motion included a certificate of service as a separate document that certified the motion was served to the official service list for C.11-09-005 by electronic mail for those that provided an email address.⁵ Under Rule 1.9(c), service by email is complete when the document was transmitted. The record in this proceeding shows that PG&E has fully complied with the Rule 1.10(c) for effecting service on the parties. In contrast, there is no evidentiary support for Appellant's claim he did not receive service of the motion.

The Presiding Officer's Decision was served electronically on the parties on the official service list on June 18, 2012. A document accompanied the Presiding Officer's Decision that

¹ Rule 1.10.

² Complaint, Paragraph I.

³ PG&E requests the Commission take Official Notice of the official service list for C.11-09-005.

⁴ Presiding Officer's Decision, pp. 4-5.

⁵ PG&E requests the Commission take Official Notice of the Certificate of Service that accompanied PG&E's Motion To Strike Portions of Complainant's Reply Brief, filed May 15, 2012.

notification of the filing was provided to the official service list.⁶ The record demonstrates that service of the Presiding Officer's Decision was made in accordance with Public Utilities Code section 1701.2 and Rule 1.10.

For these reasons, the Appeal fails to establish any procedural error in the service of PG&E's Motion to Strike or the Presiding Officer's Decision.

II. THERE WAS NO LEGAL ERROR IN GRANTING PG&E'S MOTION TO STRIKE COMPLAINANT'S POST-HEARING BRIEFING RELATING TO HIS QUALIFICATIONS.

The Appeal claims legal error in granting PG&E's Motion To Strike Portions of Appellant's Reply Brief. The Reply Brief attempted to introduce additional evidence of Appellant's professional qualifications after the close of the evidentiary record. As noted in the Presiding Officer's Decision, the parties were advised at the pre-hearing conference and the evidentiary hearing that the direct testimony should include the entirety of the witnesses' testimony and in the case of expert testimony, a statement of qualifications.⁷ Appellant's direct testimony included a statement of his qualifications.⁸

The introduction of additional testimony is governed by Rule 13.8(b), which provides "[d]irect testimony in addition to prepared testimony previously served, other than the correction of minor typographical or wording errors that do not alter the substance of the prepared testimony, will not be accepted into evidence unless the sponsoring party shows good cause why the additional evidence could not have been served with the prepared testimony or should otherwise be admitted." Under this standard, Appellant has failed to show good cause exists for

⁶ PG&E requests the Commission take Official Notice of the Information Regarding Service that accompanied Presiding Officer's Decision dated June 18, 2012.

⁷ Presiding Officer's Decision (POD), page 6.

⁸ Direct Testimony of Charles I. Donald, page 2 (Hearing Exhibit 1).

allowing him to re-open the evidentiary record to introduce additional evidence of his professional background.

The Appeal argues that without additional evidence of Appellant’s professional background, the “resulting impression” in record is that his experience is irrelevant to his claims relating to seismic design of wood poles.⁹ This same argument was raised in Appellant’s Reply Brief,¹⁰ which the Presiding Officer’s Decision considered and rejected.¹¹ In granting PG&E’s Motion To Strike such additional evidence, the Presiding Officer’s Decision concluded Appellant was afforded opportunity to testify at the evidentiary hearing regarding the basis for his opinions that seismic analysis of wood poles is a professional standard.¹² The Presiding Officer’s Decision also concluded it would be unduly prejudicial to allow Appellant to present new evidence after the adjournment of the evidentiary hearings, depriving PG&E of any opportunity to cross-examine or rebut such evidence.¹³ There was no legal error in striking such additional testimony relating to Appellant’s qualifications. Appellant has failed to make the requisite showing of good cause under Rule 13.8(b).

The Appeal also asserts that additional evidence of his professional qualifications should be allowed as it has some bearing “in the context of a heavily loaded pole at #237 San Carlos Ave. in Sausalito.”¹⁴ This alternative theory for allowing additional evidence of Appellant’s

⁹ Appeal, p. 2.

¹⁰ Complainant’s Reply Brief dated May 7, 2012, pp. 3-4, in which appellant argued “disregard of my ... career experiences has allowed the CPUC Records to erroneously give the impression that I do not have the credentials to speak authoritatively about present-day seismic design standards in the power industry.”

¹¹ POD, pp. 5-6.

¹² POD, p. 6.

¹³ POD, p. 5.

¹⁴ Appeal, p. 2.

qualifications fails because evidence relating to the pole at 237 San Carlos was the subject of an earlier Motion To Strike and stricken from Appellant's testimony.¹⁵ PG&E's motion to strike the testimony relating to the pole at 236 San Carlos Avenue was made on grounds that the pole was located 500 feet away from the pole on Bulkley Avenue that was identified in the Complaint and the Scoping Memo and Ruling dated November 15, 2011. Because the testimony relating to the pole at 236 San Carlos Avenue has been stricken as outside the scope of these proceedings, this stricken testimony cannot provide the basis for allowing Appellant to introduce additional evidence on his professional qualifications.

Finally, the Appeal impermissibly asserts new factual allegations relating to the pole at 236 San Carlos Avenue. The Appeal refers to "new heavy equipment (transformers, circuit breakers, insulators, etc.) were added to this pole" and that "[t]he conductors from this pole were recently the cause of a fire in an overhanging tree."¹⁶ The reasons supporting PG&E's Motion To Strike the testimony concerning the pole at 236 San Carlos Avenue apply equally to these allegations in the Appeal. Furthermore, under Rule 13.14, no additional evidence should be submitted without a motion to set aside the submission and reopen the record.

III. THERE WAS NO LEGAL ERROR IN THE PRESIDING OFFICER'S DECISION IN FINDING IT UNNECESSARY TO NOT REACH THE ISSUE OF THE ALLEGED REDUNDANCY OF THE "A/B" LINE.

The Appeal claims error in "striking" the direct testimony of PG&E's witness, Joseph Fong, which Appellant claims is not credible on the issue of whether the "A/B" pole line is redundant. Contrary to the Appeal, the Presiding Officer's Decision did not strike Mr. Fong's testimony. Mr. Fong's direct testimony was served prior to the hearing. Appellant's rebuttal

¹⁵ PG&E's Motion to Strike Testimony of Charles I. Donald filed March 6, 2012, page 2. The Presiding Officer granted this motion at the March 27, 2012 evidentiary hearing.

¹⁶ Appeal, page 2.

testimony provided comments on Mr. Fong's testimony concerning the A/B pole line.¹⁷

Mr. Fong appeared at the evidentiary hearing. Appellant was afforded full opportunity to cross-examine Mr. Fong on his direct testimony, including his opinions on whether the "A/B" pole line could be removed without lessening the quality of service in the area. However, Appellant declined to conduct any cross-examination of Mr. Fong. Mr. Fong's direct testimony was admitted into the record without objection.

Appellant repeats the argument made in his Reply Brief, that Mr. Fong's testimony is not credible on the issue of system redundancy.¹⁸ The Presiding Officer's Decision concluded the issue of whether the "A/B" pole line is redundant goes to the issue of whether PG&E should be ordered to remove facilities to remedy an alleged GO 95 violation or industry standards.¹⁹ Because the Presiding Officer's Decision found no GO 95 violation or industry standards, it did not reach the issue of whether the "A/B" pole line was redundant.

The framing of the issues to be decided in the Scoping Memo supports the conclusion in the Presiding Officer's Decision that the alleged redundancy of the pole line relates to the form of relief that may be awarded. As the Scoping Memo recognized, a violation of GO 95 or industry standards must be shown as a prerequisite to ordering any relief:

3. Is there excessive mass attached to the distribution pole near 176 Bulkley Avenue in violation of GO 95 and/or industry standards?

¹⁷ Complainant's Rebuttal Testimony dated March 20, 2012, pp. 4-5 (Hearing Exhibit 3).

¹⁸ Appeal, p. 3; compare, Complainant's Reply Brief dated May 7, 2012, p. 5.

¹⁹ POD, p. 6.

4. If so, should PG&E be ordered to remedy the violation by bringing the facilities into compliance or by removing or undergrounding the facilities?²⁰

The Appeal does not challenge Finding of Fact No. 1 that there was no GO 95 violation. The Appeal also fails to show any error in Finding of Fact No. 2 that the record does not support a finding of an industry standard for the condition of the distribution poles. Based on these findings, there was no error in the Presiding Officer's Decision conclusion that it did not need to further consider Mr. Fong's testimony relating to the potential effect removal of the pole line would have on quality of service in the area.

IV. THERE IS NO ERROR IN CONCLUSION OF LAW NO. 1 THAT APPELLANT LACKS STANDING TO ASSERT CLAIMS RELATING TO PG&E'S OPERATION WITHOUT A VALID FRANCHISE OR EASEMENT.

Conclusion of Law No. 1 ruled that Appellant lacks standing to bring any claim that PG&E may be operating in violation or in the absence of either a franchise agreement (authorizing use of public property) or an easement (authorizing use over private property).

Contrary to the Appeal, there is no "misstatement" in the Presiding Officer's Decision that Appellant has renewed his assertion that PG&E is operating on public property in the absence of a franchise agreement. The Presiding Officer's Decision correctly noted that this argument was raised in Appellant's Reply Brief.²¹

Appellant claims standing as a resident, property owner, and taxpayer with respect to the claim PG&E is operating without a valid franchise agreement. Appellant's residency in Sausalito and ownership of private property within the City is not sufficient to confer standing to

²⁰ Assigned Commissioner's Scoping Memo and Ruling filed November 15, 2011, page 4 (emphasis added) ("Scoping Memo").

²¹ Complainant's Reply Brief dated May 7, 2012, p. 6 (Asserting that "...other hazardous factors ... still exist. ... [T]he major issue to be adjudicated is ... that the hazardous span continues to cross properties over which PG&E has neither Municipal Franchise Rights nor private Easement Rights.").

challenge PG&E's rights to occupy public rights of way. By statute, municipalities have the authority to grant franchises to use poles, wires, conduits and appurtenances for transmitting and distributing electricity under, along, across, or upon public streets, ways, alleys, and places within the municipality.²² As such, only the City of Sausalito would have the legal standing to bring any claim that PG&E is operating without a valid franchise within the City. Appellant has failed to show he holds any interest that is not held in common with the public at large, or in any way more compelling than anyone else who may use the streets within the City.

In addition, Appellant's reliance on standing to pursue this claim as a taxpayer is misplaced. As an exception to the general rule of standing, there are circumstances under which certain property owners, taxpayers, and voters may compel a governmental agency to comply with its constitutional or statutory duty. In this case, Appellant's claim is not directed at any governmental agency. Because Appellant's claim is that PG&E is making unauthorized use of the public right of way without a valid franchise, only the City of Sausalito would have standing.

Appellant also argues on the merits that a valid franchise agreement with the City of Sausalito has not been produced.²³ Alternatively, Appellant argues that all existing franchises were "restructured" in 1951 by some unspecified provision of the Public Utilities Code. Because Conclusion of Law No. 1 found Appellant lacked standing to assert the claim that PG&E is operating in violation of a franchise agreement, the Commission need not address the merits of these unsupported contentions.

²² Public Utilities Code section 6202.

²³ Appellant concedes that PG&E presented at the prehearing conference a copy of its electric franchise agreement with Sausalito (Ordinance No. 453) but Appellant claims--without any support--that this document does not represent the actual franchise agreement. In addition, the Complaint shows that in 1954 the Commission issued a Certificate of Public Convenience and Necessity to PG&E relating to its exercise of the rights under this electric franchise, Ordinance No. 453 [attachment 12a of the Complaint].

Appellant also claims standing to assert a claim that PG&E is operating on private property without a valid easement by virtue of a Power of Attorney to represent the owner of 833 Bridgeway, one of the properties crossed by PG&E's distribution pole line. At the pre-hearing conference, Appellant admitted that he does not own any of the properties crossed by the pole line that is the subject of the Complaint.²⁴ The Scoping Memo determined that Appellant lacked standing to assert any claim based on a lack of easement rights over private property.²⁵ This determination is supported by Appellant's own admission that he lacked any property interest in the lands crossed by PG&E's pole line.

Over four months after the ruling in the Scoping Memo and just one week before the March 27, 2012 evidentiary hearing, Appellant presented a Power of Attorney from the owner of 833 Bridgeway.²⁶ At the evidentiary hearing, the Presiding Officer found the after-the-fact acquisition of this Power of Attorney was untimely and prejudicial. The Power of Attorney relied upon by Appellant was obtained long after the Assigned Commissioner's ruling in the Scoping Memo that he lacked standing to assert this claim, and it was presented at the eleventh hour, just prior to the evidentiary hearing. Appellant has failed to show any procedural error in the Presiding Officer's refusal to recognize the Power of Attorney, or any error in Conclusion of Law No. 1 that he lacks standing to bring this Complaint relating to the claims PG&E lacks land rights over the public right of way or private property.

²⁴ Scoping Memo, p. 3.

²⁵ Scoping Memo, p 3.

²⁶ Exhibit 2 to Appellant's Rebuttal Testimony served on March 20, 2012 (Hearing Exhibit 3).

V. CONCLUSION

Appellant has failed to meet his burden of establishing any procedural error in the service of the Motion To Strike or the Presiding Officer's Decision to the official service list. On the merits, the Appeal has failed to establish that the Presiding Officer's Decision is unlawful or erroneous. The grant of PG&E's Motion To Strike was well supported because Appellant had a full opportunity to present his qualifications, both in prepared testimony and under cross-examination. No good cause exists for re-opening the evidentiary record to allow Appellant to expand on his own professional qualifications. As to Appellant's claim that PG&E's witness lacked credibility on the issue of redundancy of the pole line, Appellant submitted rebuttal testimony on this point and was allowed the chance to cross-examine the witness. The Presiding Officer's Decision correctly concluded that it need not reach the issue of replacing the pole line because as framed in the Scoping Memo, this was a remedy in the event the pole line was found to violate GO 95 or industry standards. Finally, there is no error in Conclusion of Law No. 1 that Appellant lacked standing to assert claims relating to PG&E's land rights. Appellant has failed to show he has a special interest to be served or some particular right to be preserved or

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