

Decision 01-02-057 February 22, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Quality Conservation Services, Inc.,

Complainant,

vs.

San Diego Gas & Electric Co.,

Defendant.

Case 00-07-025
(Filed July 21, 2000)

O P I N I O N

1. Summary

This decision grants the motion of San Diego Gas & Electric Company (SDG&E) to dismiss this breach-of-contract complaint for failure to state a cause of action for which relief can be granted by this Commission. Complainant may seek its remedy in civil court.

2. Positions of the Parties

In 1998, MaxLite/SK America (MaxLite) submitted its bid to SDG&E to obtain an \$810,000 contract to furnish all labor, equipment and material necessary to install energy-saving devices and measures at residential customer sites in the SDG&E service territory. The contract was part of the Residential Energy Efficiency Service Providers Program approved by this Commission in Decision (D.) 97-12-103.

MaxLite subsequently filed for bankruptcy. With approval of the Bankruptcy Court and of SDG&E, the contract for energy savings work was assigned to Quality Conservation Services, Inc. (Quality Conservation), an energy efficiency provider with principal offices in Oak Ridge, New Jersey.

Quality Conservation states that, pursuant to the contract, it replaced incandescent light bulbs with more efficient fluorescent bulbs and replaced showerheads with low-flow devices in numerous multiple-family residential facilities. The company states that it completed the work in or about November 1999. It alleges that SDG&E has refused to pay for the work, and it seeks an order from this Commission finding that the work has been completed and directing SDG&E to pay the contract amount, plus interest.

SDG&E responds that Quality Conservation breached its agreement by, among other things, failing to provide pre-install reports. According to SDG&E, pre-install reports are essential for SDG&E to verify that the work performed by Quality Conservation resulted in energy savings. SDG&E also alleges that Quality Conservation installed ineligible measures and misrepresented itself to customers.

SDG&E asserts that even if it is found that Quality Conservation complied with all material terms of the contract, it would be eligible for at most 60% of the contract price, with the remainder due following persistence studies performed nine months after the last installation.

The parties state that they sought to resolve their difference through alternative dispute resolution procedures, but were unsuccessful.

3. Motion to Dismiss

On September 19, 2000, SDG&E moved to dismiss this complaint on grounds that (1) the parties have agreed that complaints alleging breach of

contract because of non-payment are to be brought in civil court rather than in a Commission proceeding, and (2) the complaint fails to allege a violation of any provision of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702.

SDG&E asserts that the parties agreed that disputes of this nature were to be taken to civil court in San Diego County and not to the Commission, citing Section 25 of the parties' agreement:

“Except for matters and disputes with respect to which the CPUC is the sole proper venue for dispute resolution pursuant to applicable law or this Agreement, the federal and state courts located in San Diego County, California shall constitute the sole proper venue for resolution of any matter or dispute hereunder, and the Parties submit to the exclusive jurisdiction of such courts with respect to such matters and disputes.”

SDG&E states that the parties further agreed in Section 24.1 of their agreement on the limited types of disputes that would be taken to the Commission:

“Disputes regarding the interpretation of this Agreement or relating to the Administrators' performance of CPUC rules, orders, or other requirements shall be taken to the CPUC for resolution before pursuing any other remedies at law or in equity.”

As an alternative ground for dismissal, SDG&E asserts that the complaint fails to state a violation of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702. Instead, according to SDG&E, the complaint simply seeks a Commission ruling that the work was substantially performed and that the contractor is entitled to payment.

Quality Conservation on November 17, 2000, responded to the motion to dismiss. It argues that since SDG&E takes the position that it is not required to

pay under the terms of the agreement, the dispute involves “the interpretation of this Agreement” under Section 24.1. Moreover, it contends that in approving the language of Section 24 (entitled Alternative Dispute Resolution), the Commission in effect established a binding arbitration clause, agreeing to arbitrate disputes between the parties. Quality Conservation cites *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, as establishing a broad definition of arbitration even when an agreement does not use the word “arbitration.”

Quality Conservation concedes that the Commission lacks jurisdiction to award damages. (*Penaloza v. P.T.& T.* (1965) 64 CPUC 496, 497.) Nevertheless, complainant argues that the Commission may make findings of fact and conclusions of law in an arbitration decision that then could be filed and enforced in civil court.

4. Discussion

As a general rule, this Commission does not adjudicate contract disputes merely because one party is a public utility. Indeed, the California Supreme Court in *Hempey v. Public Utilities Commission* (1961) 56 C.2d 214, has held that the Commission may not adjudicate contract disputes absent express authorization by the Legislature. This rule is based on Article VI of the California Constitution, which assigns purely judicial functions to the courts. Under Article XII, Section 5, of the Constitution, the Legislature has plenary authority, unlimited by conflicting provisions of other parts of the Constitution, to confer jurisdiction on this Commission. (*See, In re City of Fairfield* (1984) 21 CPUC2d 404.)

Neither party here has addressed this constitutional issue. Nor has either directed us to a legislative enactment conferring jurisdiction on the Commission where the dispute involves alleged breach of contract for non-payment under the

Residential Energy Efficiency Service Providers Program. The parties, however, have agreed in their contract that breach-of-contract disputes, as opposed to disputes about Commission rules or orders, should be heard by the civil courts in San Diego County.

We find no merit in complainant's claim that the dispute here centers on Commission rules or orders, rather than on breach. Complainant's suggested Scoping Memo seeks Commission resolution of such issues as "Did Complainant perform the work?"; "How much does Defendant owe Complainant for the work performed?"; "Has the Complainant substantially performed?"; "If the contract has failed, what is the fair value [of the work performed]?" These issues as framed by complainant present a straight-forward contract dispute, not a violation of any Commission rules, provisions or orders.

As both parties agree, the Commission is authorized to award reparations, but not damages. Yet, essentially, damages are the relief sought by the complainant if the trier of fact finds that Quality Conservation has substantially performed its obligations under the contract. It follows that for reasons of comity, if not of jurisdiction, both adjudication of the claim of breach of contract for non-payment and the award of damages, if any, should be dealt with by an adjudicator authorized to accomplish both.

By the same token, we do not agree with complainant that the alternative dispute resolution provisions of the contract require this Commission to take on the role of arbitrator. The contract provisions do not so provide, nor is there anything in D.97-12-103 that suggests such a role. Had the parties intended to bind themselves to arbitration, they would have said so in unequivocal terms. The *Renaissance Hotel* decision cited at length by complainant confirms that

parties must specifically agree to a process that constitutes binding arbitration, which is not the case here.

We turn then to SDG&E's contention that the complaint fails to state a violation of any provision of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702. Complainant argues that an alleged breach of contract by refusal to pay constitutes a violation of D.97-12-103. But that vague and conclusory statement directs us to no provision of D.97-12-103 nor to any other law, order or rule of the Commission that is claimed to have been violated.

In the absence of any alleged violation by the utility under § 1702, and in the absence of any proposed relief that this Commission is empowered to provide, the motion to dismiss is granted. This complaint proceeding is closed.

The scope of this proceeding is set forth in the complaint. Our order today confirms that Administrative Law Judge Walker is the presiding officer, and no hearing is necessary.

5. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Quality Conservation in comments on February 15, 2001, raised essentially the arguments it had advanced earlier in response to the motion to dismiss. We believe that those arguments have been dealt with sufficiently in the draft decision.

Findings of Fact

1. Following bankruptcy proceedings by the original contractor, Quality Conservation assumed an \$810,000 contract to install residential energy-saving measures in the SDG&E service territory.

2. Quality Conservation claims that it has completed its work under the contract and that SDG&E has breached the contract by refusing to pay.

3. SDG&E has refused to pay for the work performed by Quality Conservation, alleging that the latter is in breach.

4. The parties in their contract agreed that any dispute would be taken to the civil courts in San Diego County if the dispute did not involve the interpretation of their agreement or administrator performance of Commission rules, orders or other requirements.

5. As a general rule, the Commission does not adjudicate contract disputes merely because one party is a public utility.

6. The Commission is not authorized to award damages.

7. The administrative dispute resolution provisions of the contract do not require the Commission to perform binding arbitration.

Conclusions of Law

1. The complaint fails to state a violation of any provision of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702.

2. SDG&E's motion to dismiss should be granted.

3. The case should be closed, effective immediately, so that complainant can pursue other avenues for obtaining relief.

O R D E R

IT IS ORDERED that:

1. The motion of San Diego Gas & Electric Company to dismiss this complaint for failure to state a violation of any provision of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702, is granted.

2. Case 00-07-025 is closed.

This order is effective today.

Dated February 22, 2001, at San Francisco, California.

LORETTA M. LYNCH
President

HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners