

Decision **PROPOSED DECISION OF ALJ BARNETT (Mailed 11/3/2011)****BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Hamilton Cove Homeowners Association, a California Mutual Benefit corporation, and its members: Gordon Anderson, Mimi Assanti, Shu-Hun Baran, Stuart Baron, Norris J. Bishton, Jr., Tom Cappannelli, John Cullens, Martin Curtin, Barbara Ehert, The Erb Family Trust, Bart Glass, Peter R. Giulioni, Jr., Ellen Greenhill, Tom Gross, Clifford Hague, as member and as the Owner of a Multiunit Apartment in Avalon California, and all others similarly situated, Ladon Hix, Ron Hoffman, William Hurst, The Longpre Family Trust, Craig C. Manger III, Michael Margulis, Patricia McCormick, Jeffrey P. McCormick, Jeffrey P. McIndoo, Doug Meissner, Duane Miller, Thomas R. Murphy, Mike Owens, Kathy Patterson, Carol Peck, James P. Selles, Frank R. Randall, Dave Schmitz, Sharon Stow, Jack & Cathy Sweeny, Judy Tejada, Will Von der Aha, John Willett, and Phillip Williams; Catalina Island Camps, Inc., Tom Sawyer Camps, Inc., Guided Discoveries, Inc., Western Los Angeles County Council - Boys Scouts of America at Camp Emerald Bay on Catalina Island, Santa Catalina Island Conservancy, and all other persons similarly situated,

Complainants,

vs.

Southern California Edison Company (U338E),

Defendant.

Case 09-12-006
(Filed December 10, 2009)

DECISION DISMISSING COMPLAINT

On December 10, 2009, complainants filed this complaint against Southern California Edison Company (SCE) seeking to review the revenue requirement and to modify the rate design adopted November 1, 2007, in Resolution (Res.) W-4665 for SCE's water company on Catalina Island.

Complainants include the Hamilton Cove Homeowners Association (HCHOA), which consists of 185 condominiums located in the City of Avalon (30 water meters are billed to HCHOA, the 185 members of HCHOA are separately metered); The Catalina Island Conservancy (Conservancy), which owns 88% of Catalina Island (the land owned by the Conservancy is largely unoccupied); and other large water users.

One percent of Catalina Island is owned by individuals, primarily by owners of single family and multiple family residences in the City of Avalon. SCE serves approximately 1,515 residential water customers and 392 non-residential water customers on Catalina Island. Complainants do not represent the great majority of residential customers.

Complainants assert that after 22 years of no increase in water rates, SCE, operating as a Class C water utility, filed Advice W000144 in 2005 seeking not only a large increase in water rates but also seeking a complete restructuring of how water is billed to customers on Catalina Island. SCE's request was granted in Resolution W-4665, which increased rates by \$2,569,000, or 198%. The Resolution stated (in part):

The [Water] Division staff and Catalina Island representatives held two sessions of a public meeting at the City of Avalon City Hall on

April 19, 2006. The Division of Water and Audits (Division) received letters of protest against the proposed increase from 38 customers and local government officials. Most of the protests were based on the anticipated hardship to both residents and businesses alike that will be caused by the proposed large increase. (R-4665 at 3.)

Complainants contend that this was the total input from customers considered by the Commission. Complainants argue that having gone 22 years without a rate increase, interested parties were ill equipped to understand what was being requested or the ramifications of what was being requested. The matter was handled as an informal procedure. As a consequence no one questioned the justification for the huge rate increase requested or the new rate design. Complainants state that the Commission, in Resolution W-4665, basically gave SCE everything it requested.

Complainants maintain that because of the far reaching nature of what was being requested, the advice should have been handled as a formal matter, assigned to an administrative law judge, and litigated with all interested parties allowed to present evidence and cross examine SCE witnesses as to both SCE's revenue requirement and its proposed rate design. Complainants assert that the information provided by SCE in Advice W000144 was inaccurate and incomplete and failed to provide the Commission with the true picture regarding water on Catalina Island.

Resolution W-4665 not only increased rates but also instituted a three-tier rate system. Pre-Resolution W-4665 there were two tiers - 0-2,000 gallons, and 2,001+ gallons with a differential between tiers of 235% in the winter rates and 273% in the summer rates. The rates approved in Resolution W-4665 resulted in a differential between the lowest and highest rates in the winter of 307% and of 362% in the summer. Resolution W-4665 also approved an increase in meter

service charges ranging from 360% to 504% of the meter service charges prior to Resolution W-4665.

As an example of the increased rates, complainants allege that in 2007, HCHOA paid SCE \$88,624 for water including service charges. If HCHOA uses the same amount of water in 2009 as in 2007, the cost will be \$326,314, a 383% increase over 2007. The Hamilton Cove (HC) residential user pays a service fee for the meter for his individual condominium. The cost to an HC residential user per month before using one drop of water in the condominium:

2007	\$48.02
2008	\$143.68
2009	\$184.05

Complainants conclude that because of conditions on Catalina Island water conservation is a must for all water consumers not just for the large users, but the third tier rate at a significantly higher rate than the first two tiers inequitably punishes the large users in order to provide unreasonably low rates to Avalon residential users.

SCE answered the complaint asserting that the complaint fails to state a cause of action and is a collateral attack on Res. W-4665. SCE asserts that the complaint improperly seeks a review of SCE's revenue requirement for water service on Catalina Island and a modification of the rate design adopted in Res. W-4665. First, SCE states the complaint is procedurally improper. Review of the adopted revenue requirement and rate design adopted in Res. W-4665 should not be conducted pursuant to a customer complaint. Second, beyond its procedural defects, the complaint fails to demonstrate that the Commission-adopted revenue requirement and rate design for Catalina Island water service have ceased to be as reasonable today as they were when Res. W-4665 was

adopted. Complainants fail to identify any factual or procedural errors in the adoption of Res. W-4665 which would support reconsideration of the Resolution or re-examination of the findings and conclusions adopted therein.

On November 15, 2010, SCE filed an application for a Test Year 2011 General Rate Case for its Catalina water operation (2011 Catalina Water GRC Application10-11-009). The 2011 Catalina Water GRC application seeks new rates for 2011 and going forward. The application proposes a new revenue requirement, as well as changes to the current rate design. On December 28, 2010, a coalition of Catalina entities that includes complainants and is represented by complainants' counsel filed a protest to the 2011 Catalina Water GRC application. SCE has filed a motion to dismiss Case 09-12-006, urging that the issues in the complaint case have been superseded by the 2011 rate case and the complaint therefore should be dismissed; complainants have answered challenging the motion. The matter is ripe for decision. We dismiss.

SCE argues that the complaint case is moot because only prospective relief is available and the 2011 Catalina Water GRC is the forum for establishing prospective rates. The complaint case no longer serves any purpose. Retroactive relief is unavailable, and the issue of SCE's proper rates for 2011 and going forward will be decided in SCE's 2011 Catalina Water GRC. The complaint cannot be used to obtain any retroactive relief. Complainants have recently acknowledged that they are seeking no retroactive relief at the Commission and will seek such relief, if anywhere, in court.

The rule against retroactive ratemaking was established in *Pacific Telephone and Telegraph Co. v. PUC*, 62 Cal. 2d 634, 649 (1965). In that case the Supreme Court held that the Commission lacks "the power to roll back general rates already approved by it under an order, which has become final, or to order

refunds of amounts collected by a public utility pursuant to such approved rates and prior to the effective date of a commission decision ordering a general rate reduction." The Supreme Court explained that this rule flows directly from Section 728 of the California Public Utilities Code, which expressly limits the Commission's power to establishing rates "to be thereafter observed."¹ The Court further held that the rule is reinforced by Section 734 - the statutory provision governing complaint cases such as this one - which "directs that when a rate has been formally found reasonable by the commission and charges collected accordingly, the commission shall not order the payment of reparation upon the ground of unreasonableness."²

Res. W-4665 found just and reasonable SCE's Catalina water rates and rate design for 2007-2010. This complaint case thus cannot be used to revisit rates for that period. Complainants are active participants in the 2011 Catalina Water GRC proceeding and will have the opportunity to litigate prospective rates. Because the only relief available in this complaint case is already at issue in the application, the complaint case is now moot and should be dismissed.

The complaint must also be dismissed because it constitutes an untimely collateral attack on a final Commission decision. The subject matter of the complaint is the reasonableness of the rates established by the Commission in

¹ *Pacific Telephone and Telegraph Co.*, 62 Cal. 2d at 650-51.

²² *Id.* at 654-55. See also *City and County of S.F. v. PUC*, 39 Cal. 3d 523, 534-35 (1985) ("[T]he commission may prescribe rates only prospectively" and cannot "reopen" rates developed in a "general rate proceeding, which is now final and no longer subject to review"); Decision 93-04-046, 49 CPUC 2d 60, 62-64 (1993) (relying upon rule against retroactive ratemaking established in *Pacific Telephone* in rejecting request to retroactively adjust water company rates based on an unforeseen change in tax rules).

Res. W-4665. The proper means to challenge the validity of that ruling would have been in a timely application for rehearing or petition to modify, which complainants failed to undertake. Public Utilities Code Section 1709 states that “[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.” This provision prevents complainants from using the device of a complaint case to collaterally attack the determinations made in Res. W-4665 after the deadlines for an application for rehearing or petition to modify have lapsed.

Under our rules, an application for rehearing must be filed within 30 days of the mailing date of the challenged decision, and a petition to modify must be filed “within one year of the effective date of the decision” unless “the petition could not have been presented within one year.”³ Complainants waited more than two years before filing a complaint that raises challenges to the process through which Res. W-4665 was adopted and the resulting rates. The issuance of Res. W-4665 and its resulting rate increases were well known, and complainants’ challenge easily could have been raised within the one-year period for a petition for modification. Having failed to file a timely direct challenge, petitioners cannot cure their delay by collaterally attacking Res. W-4665 through the device of a complaint.

Proceeding Category and Need for Hearing

The Instruction to Answer filed on December 22, 2009 categorized this Complaint as ratesetting as defined in Rule 1.3(e) and anticipated that this proceeding would require evidentiary hearings. Because the complaint is a

³ Rule 16.1(a), 16.4(d).

collateral attack on Resolution w-4665 and does not state a cause of action, this complaint must be dismissed. The evidentiary determination is changed to state that no evidentiary hearings are necessary.

Comments on Proposed Decision

The proposed decision of ALJ Barnett 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 November 23, 2011, by SCE. The comments pointed out proposed clarifications, which have been incorporated where appropriate.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Robert Barnett is the assigned ALJ in this proceeding.

Findings of Fact

1. Res. W-4665 found the current rates now charged by SCE and the current rate design to be just and reasonable.
2. This complaint seeks to revisit those rates (including rate design) and also challenge those rates going forward.
3. SCE in Application (A.)10-11-009 seeks to establish new rates and a new rate design going forward.
4. Complainants are parties to A.10-11-009.

Conclusions of Law

1. Complainants' challenge to Res. W-4665 is banned by the prohibition on retroactive rate relief.

2. Complainants have an adequate forum to challenge SCE Catalina Water rates in A.10-11-009.
3. A.10-11-009 has rendered this complaint moot.
4. Hearings are not necessary.
5. The complaint should be dismissed and the docket closed effective immediately.

O R D E R

IT IS ORDERED that:

1. Complaint Case 09-12-006 is dismissed.
2. The hearing determination is changed to no hearings necessary.
3. Case 09-12-006 is closed.

This order is effective today.

Dated _____, at San Francisco, California.