STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

February 13, 2004 Agenda ID #3267

TO: PARTIES OF RECORD IN CASE 03-08-024

This is the draft decision of Administrative Law Judge (ALJ) Vieth. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft 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 draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN BY PSW
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

Attachment

Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 2/13/2004)

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

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| Joseph S. and Delores K. Rodriguez,<br><br>Complainants,<br><br>vs.<br><br>Pacific Gas and Electric Company,<br><br>Defendant. | Case 03-08-024<br>(Filed August 25, 2003) |

Joseph S. and Delores K. Rodriguez, in pro. per., complainants.
Grant Guerra, Attorney at Law, for Pacific Gas and Electric Company, defendant.

# OPINION DISMISSING COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION

## Summary

We dismiss the complaint filed by Joseph S. and Delores K. Rodriguez (the Rodriguezes) for failure to state a cause of action that this Commission may adjudicate.

## Procedural Background

PG&E filed a timely answer to this complaint on October 2 and, pursuant to ruling of the assigned administrative law judge (ALJ), PG&E filed an amended

answer on October 15. The ALJ set a telephonic prehearing conference (PHC) for November 13, but at the request of the Rodriguezes, who stated their preference to attend in person, the ALJ held the PHC in the Commission courtroom, with both parties present. Thereafter, on November 24, Commissioner Geoffrey F. Brown, the Assigned Commissioner, issued a scoping memo as required by Pub. Util. Code § 1702.1. Among other things, the scoping memo memorialized the schedule agreed upon at the PHC for the filing of consecutive briefs on Commission jurisdiction. Accordingly, on December 11, 2003 PG&E filed an opening brief; on January 7, 2004 the Rodriguezes filed their brief in response, and on January 28, 2004 PG&E filed its reply brief.

## The Parties' Dispute: Factual Background

Review of the parties' initial pleadings establishes the following. The Rodriguezes wish to extend electric service to real property they own at 130 Corey Road, Aromas, in Monterey County. The Rodriguezes contacted PG&E about this extension and, in March 2002, obtained a proposal for the extension (Attachment G to the Complaint), which they executed and returned to PG&E. However, PG&E has refused to proceed until the Rodriguezes provide it with a necessary easement over an adjacent parcel, as required by Section 15 of the proposal, entitled "Land Rights."

The Rodriguezes point to a copy of an unrecorded easement (Attachment E to the Complaint) that the prior owners of the adjacent parcel (Paul and Helen Tripp) granted to PG&E in 1974 for the purpose of extending service to the Rodriguez parcel. PG&E admits that it did not record the easement. PG&E contends it had no reason to do so because, as the Rodriguezes admit, they declined to execute a service extension proposal, which PG&E prepared for them in 1974. The Rodriguezes contend they were not in the position to develop their

property then and did not solicit the service extension proposal, but expected to develop at some future time.

However, the Rodriguezes contend that PG&E should have recorded the 1974 easement from the Tripps, since it was part of a bi-lateral agreement. The Rodriguezes point to a copy of a handwritten letter addressed to them, dated November 25, 1973, and signed "Helen L. Tripp" and "Paul Tripp" (Attachment C to the Complaint), which requests an easement from them. The letter also states, "We pledge to you that we will not permit the power lines to be extended beyond the boundaries of our present property, unless you should want service to your property, which we do agree to." The Rodriguezes also point to their 1973 easement to PG&E (Attachment D to the Complaint), which was recorded and which enabled PG&E to extend service to the Tripps.

Now, nearly 30 years later, the Rodriguezes wish to develop their property. The problem, however, is that the Tripps' heirs, who are the current owners of the Tripp parcel, dispute the validity of the unrecorded easement.

## Commission Jurisdiction

As we explained in a prior complaint:

> The CPUC has subject matter jurisdiction over a disputed issue if that issue falls within the scope of the authority granted the CPUC by the California Constitution or the Legislature. Lack of subject matter jurisdiction is a fundamental defect that cannot be waived, nor can the parties confer jurisdiction by stipulation. (*National Union Fire Ins. Co. v. Stites Prof. Law Corp*. (1991) 235 CA3d 1718, 1724.) Further, "[a] judgment rendered by a court that does not have subject matter jurisdiction is void and unenforceable and may be attacked anywhere, directly or collaterally, by parties or by strangers. (*Marlow v. Campbell* (1992) 7 CA4th 921, 928.) These fundamental principles are equally applicable to the jurisdiction of administrative agencies like the

Commission. (*USDA Forest Service vs. Lukins Brothers Water Company, Inc.*, D.99-07-01, 1999 Cal. PUC LEXIS 481, *3.)

Pub. Util. Code § 1702 (which governs the proper content of a complaint and the identity of a complainant) provides, in relevant part, that a complaint against a public utility must establish a cause of action by "setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission."

This complaint contends, in essence, that PG&E acted unlawfully by failing to record the 1974 easement and by failing to notify the Rodriguezes that it had not recorded the easement. They seek a Commission order compelling PG&E to (1) record the 1974 unrecorded easement, and then (2) honor the March 2002 service extension proposal. In the alternative, they ask the Commission to order PG&E to provide service to the Rodriguez parcel via some other route, which does not require an easement over the adjacent Tripp parcel and which complies with Monterey County's Building/Planning Department regulations. Finally, they ask the Commission to order that PG&E absorb the increased cost of such service extension because of its failure to record the 1974 easement.

The scoping memo rules that the relief the Rodriguezes prefer is unavailable in this forum, since the Commission lacks jurisdiction to adjudicate rights in real property. (See *Camp Meeker Water System, Inc. v. Pub. Util. Com.* (1990) 51 Cal.3d 845, 850, distinguishing the Commission's lawful construction of a deed, for the purpose of ascertaining facts relevant to the merits of an application for increased rates, from resolution of disputes between parties claiming rights under a deed or enforcement of rights under a deed.) The

Commission cannot determine the validity of the unrecorded easement and absent a valid easement, it cannot order PG&E to comply with the March 2002 service extension proposal.

The scoping memo also rules that the Commission's subject matter jurisdiction must be established before the Commission may consider the Rodriguezes' alternative request (that PG&E be ordered to provide service by a different and more costly route). The scoping memo identifies the relevant inquiry:

> … the Commission must conclude that the law applicable at the time and enforceable by the Commission, or PG&E's own established practices and policy enforceable by the Commission under then existing law, required PG&E to act differently than it did (for example, PG&E should have recorded the easement in 1974 or notified plaintiffs in writing that it would not record the easement, etc.). (Scoping memo, p. 3.)

## Discussion

### The Law Applicable in 1974

We first examine whether PG&E's actions in 1974 complied with existing law, including its own tariffs and any applicable Commission mandates. Neither PG&E nor the Rodriguezes point to any statute, Commission general order or Commission decision that governs the respective obligations of a utility and applicant regarding fact patterns such as this one, and we are aware of none.

We turn next to PG&E's tariffs. In 1974, like today, extensions of electric distribution lines were governed by PG&E's Rule No. 15 (entitled "Line Extensions") and Rule No. 16 (entitled "Service Connections and Facilities on Customer's Premises"). As the title suggests, Rule No. 16 pertains to various kinds of equipment and connections on the property of the service extension

applicant and, thus, is not relevant to the facts presented by this case. Therefore, we focus exclusively on Rule. No. 15.

The 1974 version of Rule No. 15 forms part of the 1974 service extension proposal package that the Rodriguezes received from PG&E. PG&E has also included the Rule as Attachment A to its Opening Brief. The 1974 Rule provides, in relevant part:

> A. General
>
> *The utility will construct, own, operate and maintain lines only* along public streets, roads and highways which the utility has the legal right to occupy, and *on* public land and *private property across which rights of way satisfactory to the utility may be obtained without cost or condemnation by the utility*. (Rule No. 15.)

Thus, as it does today, in 1974 PG&E required a valid right of way, such as an easement, before undertaking a line extension project. The Rule does not address the respective rights or obligations, of the utility or of any of the property owners, when an easement is obtained for a service extension and that service extension does not go forward. Since the tariff is silent on this point, there is no legal basis for finding that PG&E violated its Rule No. 15.

### PG&E's Policy and Practice in 1974

The Rodriguezes assert that PG&E treated the Tripps differently than it treated them because it recorded the 1973 easement that benefited the Tripps but did not record the 1974 easement that benefited them. We examine whether PG&E complied with its established practices and policies when it did not record the 1974 easement or advise the Rodriguezes, in writing, that it would not record the easement. The distinguishing facts are undisputed—the Tripp service extension was built in 1973 but the proposed service extension to the Rodriguez

parcel in 1974 was not built because the Rodriguezes declined to execute the proposal and proceed with construction.

PG&E's brief includes the declaration of Alfred Soller (Soller), Senior Land Rights Specialist in PG&E's Corporate Real Estate Department. Soller states that he has been employed by PG&E in that Department and its predecessor, known as "General Services--Land Department," since 1967. Soller describes PG&E's recordation policy from 1974 to the present as one designed "not to over-encumber the lands of third parties or the applicant, or unnecessarily encumber these lands." (Soller declaration, paragraph 4.) Soller explains the process followed upon the cancellation of a service extension proposal: PG&E would retrieve any easements that it had obtained from the Document Information Center, the PG&E office charged with filing such documents, and then either would return them to the grantor or mark them "cancelled" and retain the documents in the closed file. If cancellation of the service extension proposal occurred after the easement had been recorded, then upon the grantor's request, PG&E would quitclaim its interest in the easement. Soller states that PG&E had no policy or practice, upon cancellation of the service extension proposal, to notify the applicant that it would not record the easement because the applicant already had actual knowledge that the project was not going forward.

PG&E argues that it acted in accordance with these internal practices and policies. When the Rodriguezes declined to execute the 1974 service extension proposal, PG&E cancelled the project and placed the unrecorded easement from the Tripps in the closed file, since PG&E had no operational need for the easement. The Rodriguezes respond that, nevertheless, PG&E's conduct, on which they relied, led them to think it would act otherwise:

> At the time of the original agreement, Rodriguez was asked by both Tripp and PG&E to enter into reciprocal easements with the Tripps, to facilitate the installation of powerlines to their respective properties. It was reasonably understood between the parties that a timely recordation of these documents would be accomplished by PG&E. (Rodriguez Brief, p. 1.)

These allegations (that the Rodriguezes "reasonably understood" PG&E would record both easements) raise contractual issues, which we address below. The undisputed facts, however, indicate that PG&E acted in conformance with its internal practices and policies when it did not record the 1974 easement. As such, there is no legal basis to find that PG&E did not deal with the Rodriguezes in accordance with its internal policies and procedures.

### Contractual Theories

The Rodriguezes argue that because of the parties' mutual understanding that PG&E would record the 1974 easement, as a matter of equity the Commission should order PG&E to extend service to them via an alternative route and to bear the cost differential as damages. Though contractual theories were not discussed at the PHC or identified in the scoping memo, we address them—and dispose of them--here, since language in the complaint that refers to "verbal, implied, and written agreements," arguably can be construed to raise such theories. (See form Complaint, Paragraph (F.2), subparagraph 3.(c).)

Quite simply, the Commission is not the appropriate body to adjudicate the private agreements alleged or the expectations arising from them. While such allegations may create a cause of action in the courts, they suffer from a jurisdictional defect here. Over the years the California Supreme Court consistently has held that the Commission lacks jurisdiction over private contracts between public utilities and individuals. (See *Cal. Water & Tel. Co. v*

*Public Util. Com. (1959) 51 C.2d 478, 488-89* [Commission cannot modify a public utility's contract or order a public utility to perform a contract, whether modified or unmodified]; *Atchison, etc. Ry. Co. c. Railroad Comm. (1916) 173 Cal. 577, 582* [Commission is not a body charged with enforcement of private contracts].)

We must conclude that we have no jurisdiction to determine the legal or equitable rights and obligations of the Rodriguezes and PG&E with respect to the 1974 unrecorded easement under any verbal, implied, or written agreements.

### Dismissal of the Compliant is Warranted

Because the complaint fails to state a cause of action under § 1702, we must dismiss it. Construed in the light most favorable to the Rodriguezes, the complaint asserts theories that concern matters beyond our jurisdiction (i.e. rights in real property, rights and obligations under a private contract or contracts). Moreover, as discussed above, the subsequent briefing identifies no factual issues for hearing—instead, we conclude, as a matter of law, that PG&E's actions did not violate its tariffs, or other law which this Commission may enforce.

## Categorization

We confirm the categorization of this case, in the Instructions to Answer, as an adjudicatory proceeding but conclude that hearings are not necessary.

## Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

## Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure.

## Findings of Fact

1. It is undisputed that the current owners of the Tripp property contest the validity of the unrecorded 1974 easement.

2. The 2002 service extension proposal requires a valid easement across the Tripp property.

3. The undisputed facts indicate that PG&E acted within its established practices and policies when it did not record the 1974 easement.

## Conclusions of Law

1. The Commission lacks jurisdiction to order PG&E to record the 1974 easement.

2. The Commission should not order PG&E to perform the 2002 service extension proposal because of the lack of a valid easement as required by the proposal.

3. PG&E's failure to record the Tripp easement in 1974 did not violate its Tariff Rule No. 15 or other law enforceable by the Commission.

4. The Commission lacks jurisdiction to determine the legal or equitable rights and obligations of the Rodriguezes and PG&E with respect to the 1974 unrecorded easement under any verbal, implied, or written agreements.

5. No hearing is necessary.

6. The complaint should be dismissed.

7. In order to provide certainty to the parties regarding their rights in this forum, this decision should be effective immediately.

## O R D E R

**IT IS ORDERED** that:

1. The Complaint of Joseph S. and Delores K. Rodriguez against Pacific Gas and Electric Company is dismissed for failure to state a cause of action within the jurisdiction of this Commission.
2. The need for hearing determination is changed. No hearing is necessary.
3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.