

Decision 12-06-001 June 7, 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**

**Summary**

The complaint is dismissed with prejudice. Complainant alleges that Defendant has constructed new poles, cross-arms and guy wires in violation of a Commission order. Defendant denies these allegations and has filed an affidavit demonstrating compliance with the Commission order. Complainant has not presented evidence supporting a finding that Defendant violated the Commission order. Accordingly, the complaint is dismissed.

**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 Easement. 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.<sup>1</sup>

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 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

---

<sup>1</sup> According to Complainant, SDG&E obtained an easement over Complainant's property in 1952 according to deeds recorded in January and May, 1952. The 1952 easement is designated as R/W 28726 in the land records of San Diego County. It has no stated width. SDG&E constructed its first set of poles within the easement in 1955. In 1971, it replaced those poles with new poles and raised the power level of the line from 12 kilovolt (kV) to 69 kV. *Comments to Evidence: Answer and Affirmative Defenses to SDG&E's Counter-Claims (July 15, 2011)* at 3-4.

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. On February 9, 2011 Leatherbury filed the instant complaint alleging that SDG&E has failed to comply with the construction conditions imposed by revised Resolution E-4373. On March 2, 2011, the assigned Administrative Law Judge (ALJ) directed SDG&E to produce evidence demonstrating compliance with revised Resolution E-4373. On March 18, 2011 SDG&E filed its answer to the complaint together with a compliance affidavit and supporting documentation. The answer denies the allegation that the replacement poles have not been constructed in compliance with revised Resolution E-4373. The compliance affidavit states that (1) the new poles are installed along the same center line as the existing poles, (2) the new poles have cross-arms that are 12 feet or less in width, and (3) most of the new poles are stabilized using existing guy wires. SDG&E also states that the use of guy wires located outside the currently occupied Easement has never been in dispute.

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 recorded easement]. The survey does not 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." The survey locates the poles at distances ranging from 8 feet to 11 feet from the center line of R/W 28726. According to the compliance affidavit filed by SDG&E, "the replacement poles on Leatherbury property are installed within 3-5 feet of the existing pole[s] **along the same centerline**, in accordance with standard construction practices and within accepted construction tolerances." [Emphasis supplied.]<sup>2</sup>

We find that SDG&E complied with revised Resolution E-4373 by locating the new poles along the same centerline as the existing poles and limiting cross-arm width to 12 feet. If Leatherbury seeks a judicial determination of the width of R/W 28726 and its relation to the location of the metal poles, the proper venue for such an action is the Superior Court.<sup>3</sup>

---

<sup>2</sup> *Compliance Affidavit of San Diego Gas & Electric Company (March 18, 2011)* at 13.

<sup>3</sup> 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 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

*Footnote continued on next page*

### **Categorization and Need for Hearing**

The proceeding was initially categorized as adjudicatory and it was determined that hearings are required. We affirm the initial categorization and change the hearing determination to “not required” in view of our finding that Defendant has demonstrated compliance with Resolution E-4373.

### **Comments on Revised Proposed Decision**

The revised proposed decision of ALJ Bemederfer 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. Initial comments were received on April 9, 2012. In response to the initial comments, the proposed decision was substantially revised and re-circulated for comments on May 8, 2012. Comments on the revised proposed decision were received from Leatherbury on May 29, 2012. The comments were general in nature, contained no additional arguments, and were accorded no weight.

### **Assignment of Proceeding**

Timothy Alan Simon is the assigned Commissioner and Karl J. Bemederfer is the assigned Administrative Law Judge.

### **Findings of Fact**

1. Resolution E-4373 found that the wooden poles occupied a 12-foot wide easement on Complainant’s property and ordered that the metal poles be constructed within that easement.

---

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. SDG&E has removed the wooden poles and replaced them with the metal poles.
3. The metal poles are installed along the same centerline as the wooden poles they replaced.
4. The cross-arms of the metal poles are 12 feet or less in width.

**Conclusions of Law**

1. SDG&E has complied with revised Resolution E-4373.
2. The complaint should be dismissed with prejudice.

**O R D E R**

**IT IS ORDERED** that:

1. The complaint of the Leatherbury and Lowell Family Trusts is dismissed with prejudice.
2. Case 11-02-009 is closed.

This order is effective today.

Dated June 7, 2012, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
Commissioners