

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-4281

October 29, 2009

R E S O L U T I O N

Resolution E-4281. San Diego Gas & Electric Company (SDG&E) Advice Letter (AL) 2101-E.

PROPOSED OUTCOME: Denies SDG&E's Request to establish a Pole Attachment Communication Maintenance Memorandum Account (PACMMA).

ESTIMATED COST: None

By Advice Letter 2101-E Filed on August 4, 2009.

SUMMARY

This Resolution denies as moot or premature San Diego Gas and Electric Company's (SDG&E's) request to establish a memorandum account to record the costs of enforcing compliance with CPUC General Order (G.O.) 95 on the facilities of Communications Infrastructure Providers (CIPs) that are installed on SDG&E electric structures.

BACKGROUND

On October 22, 1998 the Commission issued Decision (D.) 98-10-058 governing access of telecommunications carriers and cable television companies to public utility right-of-way and support structures. Signed copies of joint pole agreements with CIPs are filed with the Commission prior to installation. CIPs are responsible for correcting infractions they find in their inspections required under G.O.95.

NOTICE

Notice of AL 2101-E was made by publication in the Commission's Daily Calendar. SDG&E states that a copy of the Advice Letter was mailed and distributed in accordance with Section 4 of General Order 96-B.

PROTESTS

Advice Letter 2101-E was protested.

SDG&E's Advice Letter AL 2101-E was timely protested on August 24 by the California Cable & Telecommunications Association (CCTA) and Pacific Bell Telephone Company d/b/a AT&T California¹, and by Davis Wright Tremain, LLP on behalf of CoxCom Inc and Cox California Telecom, LLP (collectively "Cox"), and by Goodin, MacBride, Squeri, Day & Lamprey, LLP on behalf of CTIA-The Wireless Association^R (CTIA).

SDG&E responded to all protests on August 3, 2009.

DISCUSSION

Energy Division has reviewed SDG&E's AL, the protests and SDG&E's response to the protests.

SDG&E's Proposal

SDG&E proposes to establish a memorandum account to record incremental third party costs incurred by SDG&E associated with the maintenance and repair of Communication Infrastructure Provider (CIP) facilities attached to SDG&E's distribution structures that do not comply with G.O.95 standards (SDG&E

¹Joining AT&T California are AT&T Communications of California, Inc; TCG San Francisco; TCG Los Angeles, Inc; TCG San Diego; AT&T Mobility LLC; New Cingular Wireless PCS, LLC; Cagal Cellular Communications Corporation; Santa Barbara Cellular Systems, Ltd; Visalia Cellular Telephone Company d/b/a AT&T Mobility LLC

erroneously says G.O.165 standards). The PACMMA would also record bill payments received from third parties, and would apply to all customer classes, unless excluded by the Commission. SDG&E would recover any remaining costs through base rates set in the next general rate case or other proceeding as appropriate.

SDG&E performs detailed inspections of its electric distribution and transmission systems under G. O.165. During these inspections, SDG&E documents facilities that do not comply with GO 95 installed on joint poles by CIPs. SDG&E then notifies CIPs to request their cooperation in resolving the infractions and reports them to the CPUC in its G.O.165 Annual Report.

In Phase 1 (addressing measures to reduce fire hazards) of the electric safety OIR (R.08-11- 005), SDG&E provided documentation on several thousand CIP infractions. SDG&E had developed an internal plan to resolve the CIP infractions located within its high fire risk areas as defined in OIR R.08-11-005 and its Emergency Power Shut Off Plan. CIPs are responsible in SDG&E's internal plan for correcting their infractions. However, if the CIPs are unable to make the necessary corrections, SDG&E proposes to have qualified contractors make the facilities comply and to invoice the CIPs for the cost of the work.

Staff Analysis

Underlying issues raised in the protests are similar to those the Commission resolved or addressed in its Phase 1 decision D.09-08-029 in its ongoing Rulemaking R.08-11-005 to revise G.O. 95 rules governing safety of electric and communication facilities in high fire hazard areas.

The protests urge rejection of SDG&E's proposal in its entirety for three reasons.

The PACMMA is not needed because pole attachment agreements already address the issues raised.

Protest: While CTIA does not contest SDG&E's right to ask for approval of the PACMMA, CTIA and CCTA reject SDG&E's premise for the PCMMA. This remedy for alleged infractions of CIP pole attachments to G.O. 95 is not necessary. The pole attachment agreements between the electric utilities and CIPs are sufficient and the CPUC has no jurisdiction over those private contracts. Those agreements require CIPs "at their risk and expense" to conform their facilities to G.O. 95 and clearly define the notice, repair and cost allocation.

SDG&E's reply: Until disputes on the responsibility of infractions are resolved, SDG&E should be allowed to track costs for repairs and not risk its ability to recover later from the CIPs or ratepayers.

Analysis: We agree with the CIPs that private agreements are an acceptable means of allocating the rights and obligations of parties to conform to G.O. 95 requirements. Such agreements are not subject to CPUC jurisdiction and should not involve ratepayers.

Moreover, D.09-08-029 states that the forum and mechanisms for addressing future costs will be decided in phase 2 of that rulemaking. It refers to increased inspections in high fire risk areas but does not exclude this issue of related costs:

We will address costs more fully in phase 2 and expect cost-of-service regulated utilities to provide cost data. We will decide the appropriate forum for seeking recovery of these costs in phase 2. In phase 2, we will also develop an appropriate tracking mechanism for these additional costs and decide how to incorporate these costs into each utility's general rate case.

Absent any ruling in Phase II of R.08-11-005 on cost recovery by SDG&E for correcting alleged G.O. 95 infractions by CIPs, remedy for nonpayment is available in civil courts. Therefore the PACMMA is not needed.

SDG&E seeks to assume the Commission's authority to enforce G.O. 95.

Protest: CCTA protests that SDG&E's proposal is contrary to the new Rule 18 in G.O. 95 and cannot be done by the AL process and no Commission decision or contract requires SDG&E to resolve CIP infractions. Cox objects that SDG&E unilaterally tries to determine whether CIP facilities are in compliance with G.O. 95 and undertake corrective action. It agrees that protecting the public from wildfires is critical but proposes that this be accomplished by cooperation between the electric utilities and the CIPs. SDG&E's proposal fails to promote this.

SDG&E's reply: Rules and laws require SDG&E to manage its electrical system in a safe and reliable manner. Neither D.98-10-058, nor G.O. 95 prohibits SDG&E from taking action to correct an infraction on its poles that the attaching CIP has failed to repair. Contracts with CIPs granting them access to SDG&E's poles include provisions that permit SDG&E to repair their infractions that a CIP has failed to repair.

Analysis: We have not reviewed the private agreements the electric utilities have with the CIPs regarding access to poles. However D.98-10-058, Appendix A Section XI.B, Safety, states:

The incumbent utility shall not be liable for work that is performed by a third party... [or] work that does not pass inspection ...
and

The incumbent utility and its customers shall be immunized from financial damages in these instances.

SDG&E's AL was submitted before D.09-08-029 was adopted. The decision clarifies that Rule 12 of G. O. 95 includes CIPs and adds temporary Rule 18 to require auditable utility maintenance, notification of safety hazards and prioritizing corrective actions.

For communication facilities on joint poles, therefore, the CIPs not SDG&E must inspect, correct safety hazards, and keep records for Commission review.

Past experience shows that SDG&E's findings of CIP infractions of G.O. 95 are fraught with errors.

Protest: CTIA disputes the allegations in rulemaking R.08-11-005 that there are "several thousand" infractions by CIPs on shared poles, which will go unresolved unless SDG&E intervenes. CTIA claims that the ALJ in that proceeding expected SDG&E to verify the infractions but that SDG&E never did so, and that even SDG&E's data shows a steep decline in alleged CIP infractions over five years. In fact Cox cites a July 2009 "Notice to Correct G.O. 95 Violations" from SDG&E, and says it determined that the 26 alleged infractions were not caused by Cox, not infractions at all, not a fire risk, not located in the High Fire Risk or Wildland Fire Area, or were erroneously listed.

SDG&E's reply: SDG&E disputes the accuracy of Cox's assessments of the alleged infractions but maintains that even if true, there are at least some infractions which CIPs did not repair that are the basis for opening the PACMMA. Without it SDG&E would risk violate the rule against retroactive ratemaking when attempting to recoup its repair expenses.

Analysis: Prior to the new Rule 18 in G.O. 95 requiring CIPs to inspect and maintain their facilities the cost to verify "alleged" violations may have been a disincentive to CIPs. Correcting their violations is now an explicit G.O. 95

requirement. Since CIPs must document “uncorrected infractions” there should be a marked decrease.

COMMENTS

Public Utilities Code section 311(g) (1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g) (2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from today.

On October 21 CCTA urged the Commission to adopt the resolution as drafted, except to eliminate the language (1) suggesting that costs SDG&E inappropriately seeks to recover in the PACMMA may be examined in Phase II of R. 08-11-005, and (2) indicating that the cost to verify alleged G.O. 95 violations was a disincentive to CIPs to inspect and maintain their poles.

No comments or reply to the comments were received from SDG&E.

Analysis

- (1) We modified the language stating that absent any ruling in Phase II of R.08-11-005, remedy for non-payment of costs to SDG&E for correcting alleged G.O. 95 infractions by CIPs is available in civil court.
- (2) Since the language surmising costs as a disincentive to inspect and maintain poles per G.O. 95 by CIPs is just that, we changed to “ ...violations may have been a disincentive to CIPs”.

FINDINGS

1. D.98-10-058 requires CIPs to correct G.O.95 infractions by CIP equipment discovered during facility inspections.
2. SDG&E proposes to establish a memorandum account to record incremental third party costs incurred by SDG&E to bring CIP facilities

- attached to SDG&E's distribution structures into compliance with of G.O.95.
3. SDG&E notifies CIPs when alleged infractions of their facilities with G.O. 95 on joint poles are discovered, requesting their cooperation in inspecting and resolving the infractions.
 4. If a CIP is unable to make its facilities comply SDG&E states that it will have qualified contractors do so and invoice the CIP for the cost.
 5. Private agreements between the pole owners (electric utilities) and CIPs are an acceptable means of allocating the rights and obligations of parties to conform to G.O. 95 requirements.
 6. SDG&E may pursue civil remedies if CIPs violate their contractual agreements with SDG&E.
 7. D.98-10-058, Appendix A states that

The incumbent utility shall not be liable for work that is performed by a third party... [or] work that does not pass inspection ...
and

The incumbent utility and its customers shall be immunized from financial damages in these instances.

8. For communication facilities on joint poles D.09-08-029 orders CIPs not SDG&E to inspect for G.O. 95 compliance, correct safety hazards, and keep records for Commission review.
9. Uncorrected CIP infractions on joint electric facilities should decrease because G.O. 95 now places on CIPs the burden of periodic CIP facility inspections and prompt correction of CIP violations, with documentation of uncorrected infractions.

THEREFORE IT IS ORDERED THAT:

1. The request by SDG&E to establish a Pole Attachment Communication Maintenance Memorandum Account (PACMMA) is denied.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on October 29, 2009; the following Commissioners voting favorably thereon:

/s/ Paul Clanon

Paul Clanon
Executive Director

MICHAEL R. PEEVEY
PRESIDENT
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners