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Decision 05-04-001 April 7, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City of San Diego, a Charter City, The Redevelopment Agency of the City of San Diego, a public entity, and Padres, L.P., a limited partnership, Complainants, vs. San Diego Gas and Electric Company, a California Public Utility, Defendant.	Case 04-03-025 (Filed March 10, 2004)

OPINION DISMISSING COMPLAINT

I. Summary

The City of San Diego (City), the City's Redevelopment Agency (Agency) and the Padres, L.P. (Padres) (jointly, complainants) brought this complaint to determine whether they, or defendant San Diego Gas & Electric Company (SDG&E), should bear the cost of installation work within a City redevelopment area. We grant complainants' motion to withdraw and / or dismiss the complaint because in this case the Superior Court has jurisdiction to interpret the Franchise Agreement between the City and SDG&E, and the statute it is derived from, Pub. Util. Code § 6297.

II. The Dispute

The installation work at issue consists of trenching and installing conduit and substructures for gas and electric service for underground distribution facilities within the East Village Redevelopment Project. This Project includes, among other things, the new Padres Ballpark. Pursuant to a Cooperation Agreement, complainants and defendant each paid 50% of the total cost of the installation work, $652,575.30, into an escrow account pending resolution of the dispute.

Complainants believe that SDG&E should bear the costs of the installation work, because this work represents the completion of SDG&E's duty under the Franchise Agreement and Pub. Util. Code § 6297 to relocate its facilities at its own cost to make way for a valid public use. SDG&E believes it has met the requirements of the Franchise Agreement and § 6297 by removing and relocating its facilities out of the vacated streets. According to SDG&E, the installation work represents a new line extension, the costs of which are governed by Tariff Rule 15, under which complainants are obligated to bear these costs.

III. Procedural Background

On May 24, 2004, a prehearing conference was held. The scoping memo determined that hearings were necessary unless the parties could fully stipulate to the material facts. On June 18, 2004, complainants filed a motion to withdraw and/or dismiss this complaint, which SDG&E opposed. On September 1, 2004, the parties filed a Joint Stipulation of Facts, thus eliminating the need for evidentiary hearings. We therefore change the initial determination and conclude that hearings in this case are not necessary. The case was submitted with the filing of reply briefs on October 1, 2004.

IV. Motion to Withdraw and/or Dismiss the Complaint

A. Background

On August 5, 2002, the parties entered into a Cooperation Agreement where the complainants and defendant, subject to the reservation of their respective rights, shared the cost of the installation work. Section 303 of the Cooperation Agreement provides that, within one year of the agreement, any party to the agreement may bring a legal action in the Superior Court of California for declaratory relief concerning the parties' respective financial responsibility for the installation work.

SDG&E timely filed a declaratory relief action in the Superior Court on January 8, 2003. During the pendency of the Superior Court litigation, the California Court of Appeal published *City of Anaheim v. Pacific Bell Telephone Company (City of Anaheim I)*, 109 Cal. App.4th 381 (4th Dist., Div. 3), which held that the Commission, rather than the Superior Court, had jurisdiction with respect to issues which the parties determined to be similar to those presented in the SDG&E Superior Court action. In *City of Anaheim I*, the issue was cost responsibility for undergrounding utility facilities.

Complainants and SDG&E agreed to stay the Superior Court action until resolution of the jurisdictional issue. Complainants then filed this complaint at the Commission in cooperation with SDG&E in order to resolve the issues in a timely fashion.

The California Supreme Court subsequently granted review in *City of Anaheim I*, and transferred the case back to the Court of Appeal with directions to vacate and reconsider its earlier decision in light of *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132. On June 18, 2004, complainants filed a motion at the

Commission to withdraw and/or dismiss this complaint. In the motion, complainants tried to anticipate the outcome of the Court of Appeal's decision on remand, and believed the court would now hold that it has the jurisdiction to hear the case.

Prior to SDG&E filing its opposition, the Court of Appeal issued a new decision, *City of Anaheim v. Pacific Bell Telephone Company (City of Anaheim II)*, 119 Cal.App.4th 838, review denied at 2004 Cal. LEXIS 9685 (October 13, 2004). In *City of Anaheim II*, the court again determined that the Commission has exclusive jurisdiction to determine whether a defendant is required to pay for putting its facilities underground, and affirmed a ruling sustaining a demurrer without leave to amend.

SDG&E opposes complainants' motion to withdraw. SDG&E argues that the complaint raises issues of Tariff Rule 15 construction and the parties' rights and obligations relative thereto, and that resolution of these matters, and available remedies for a tariff violation, are governed by the Public Utilities Code. SDG&E argues there is an existing policy or ongoing regulatory effort at the Commission that the present action may frustrate because of a potential inconsistent ruling between the Superior Court and the Commission. SDG&E also believes this is a matter of statewide concern and the Commission's relinquishment of its jurisdiction could undermine the consistency of its regulatory regime relative to line extension regulation.

Complainants argue that the facts of this case differ from those in *City of Anaheim II*, in that this matter arises from the Franchise Agreement between SDG&E and the City. Therefore, according to complainants, this case does not fall within the Commission's exclusive jurisdiction.

B. Discussion

City of Anaheim II analyzed a three-pronged test set forth in *People ex rel. Orloff v. Pacific Bell (Orloff)* (2003) 31 Cal.4th 1132 to determine whether the Commission has exclusive jurisdiction concerning who must pay for the relocation of defendant's overhead facilities to underground. According to *City of Anaheim II,* the relevant inquiry is whether the Commission is authorized to make certain policy, whether the Commission has adopted regulations to effect that policy, and whether maintenance of the Superior Court action would interfere with that policy.

The court determined that the first two factors were met because the Commission, through its ongoing proceedings, would continue to oversee and regulate where and when utility facilities are put underground for the foreseeable future. As to the third factor, the court held that pursuit of the Superior Court case would interfere with Commission policy regarding relocation of overhead utility infrastructure underground. The court reasoned that plaintiff's attempt to obtain reimbursement for its individual undergrounding expenses might interfere with the equitable determination of the order in which communities throughout the state should have their overhead facilities moved underground, a matter of statewide concern over which the Commission has jurisdiction. The court then concluded that the existing policy or ongoing regulatory effort would be frustrated by the Superior Court action.

We now apply this three-pronged test to this case. In making its arguments on the merits, SDG&E starts with the premise alleges that it has complied with the Franchise Agreement and the statute it is derived from, Pub. Util. Code § 6297. Thus, in order to resolve this controversy, it is necessary to determine if SDG&E is correct in its initial premise.

Jurisdiction for interpreting the parties' rights and obligations under a municipal franchise agreement (and Pub. Util. Code § 6297), in general, lies with the Superior Court.[1] Therefore, the factors of *City of Anaheim II* are not met here, because the Commission is not generally authorized to interpret the parties' rights and obligations under the Franchise Agreement, nor has it adopted policies or regulations regarding franchise agreements.

The Commission does have exclusive jurisdiction over line extension tariffs, which the Commission is authorized to adopt and has adopted. SDG&E's Rule 15 is such a tariff. To the extent the Commission may view Rule 15 as being implicated after the Superior Court's review of the parties' rights and obligations under the Franchise Agreement and § 6297 (for example, if SDG&E is responsible for the costs of installing larger facilities than those removed, so as to serve additional load), the Commission would have jurisdiction over Rule 15 issues to the extent that the parties could not otherwise reach a mutually agreeable solution.

V. Comments on the Draft Decision

On December 14, 2004, the draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure (Rules). SDG&E filed comments and complainants filed reply comments to the December 14, 2004 draft decision (draft decision).

[1] While the Superior Court is the proper venue for determining the rights of the City and SDG&E under § 6297 and the Franchise Agreement at issue here, there are certain other matters relating to franchise agreements over which this Commission regularly exercises jurisdiction, such as determining how franchise fees should be recovered in rates.

Additionally, at the time comments to the draft decision were due, Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (Edison) filed motions to intervene in the proceeding in order to file comments to the draft decision, and contemporaneously tendered their comments. Complainants oppose these motions to intervene as untimely.

Although the parties primarily argued cost responsibility for the installation work based on the Franchise Agreement and Tariff Rule 15, the draft decision primarily relied upon Pub. Util. Code § 6297. Because PG&E and Edison could have been affected by the precedent of the first draft decision, and because PG&E and Edison's comments helped us reach our current decision, we grant PG&E and Edison's motions to intervene and accept their comments to the draft decision.

We make substantive changes to the draft decision in response to the comments. We delete the discussion on the merits and grant complainants' motion to dismiss and/or withdraw the complaint on the grounds that the Superior Court is the proper forum to determine Franchise Agreement and § 6297 issues present here. We also make changes to the findings of fact, conclusions of law, and ordering paragraph to reflect this result.

Although not required by Commission procedure, pursuant to Rule 87, the ALJ mailed the revised draft decision to the parties for additional comment. Opening comments were due by March 16, 2005 and replies due by March 23, 2005. The comments were to conform in all other respects with Rule 77.7 of the Commission's Rules of Practice and Procedure. Complainants filed comments and PG&E and Edison filed reply comments. We make no substantive changes to the revised draft decision, but make minor nonsubstantive changes to our rationale for granting intervention.

VI. Assignment of Proceeding

Geoffrey F. Brown is currently the Assigned Commissioner and Janet A. Econome is the assigned ALJ in this proceeding.

Findings of Fact

1. The installation work at issue in this complaint consists of trenching and installing conduit and substructures for gas and electric service for underground distribution facilities within the East Village Redevelopment Project.

2. Pursuant to a Cooperation Agreement, complainants and defendant each paid 50% of the total cost of the installation work, $652,575.30, into an escrow account pending resolution of the dispute.

3. In making its arguments, SDG&E starts with the premise that it has complied with the Franchise Agreement and the statute it is derived from, Pub. Util. Code § 6297. Thus, in order to resolve this controversy, it is necessary to determine if SDG&E is correct in its initial premise.

4. Jurisdiction for interpreting the parties' rights and obligations under a municipal franchise agreement (and Pub. Util. Code § 6297), in general, lies with the Superior Court.

5. Although the parties primarily argued cost responsibility for the installation work based on the Franchise Agreement and Tariff Rule 15, the December 14, 2004 draft decision primarily relied upon Pub. Util. Code § 6297.

6. PG&E and Edison could have been affected by the precedent of the December 14, 2004 draft decision, and PG&E and Edison's comments helped us reach our current decision.

Conclusions of Law

1. Complainants' June 18, 2004 motion to withdraw and/or dismiss the complaint should be granted because the Superior Court has jurisdiction to interpret the Franchise Agreement between the City and SDG&E, as well as Pub. Util. Code § 6297, in this case.

2. PG&E and Edison's January 3, 2005 motion to intervene should be granted, and their contemporaneously served comments to the December 14, 2004 draft decision should be filed.

3. In order to promote finality to this dispute, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) and Southern California Edison Company's (Edison) January 3, 2005 motions to intervene are granted. The Commission's Docket Office shall file PG&E and Edison's January 3, 2005 comments on the draft decision.

2. Complainants' June 18, 2004 motions to withdraw and/or dismiss this complaint is granted, and this case is dismissed.

3. Case 04-03-025 is closed.

This order is effective today.

Dated April 7, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH

Commissioners