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Decision 10-02-034 February 25, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities.	Rulemaking 08-11-005 (Filed November 6, 2008)

ORDER DENYING REHEARING OF DECISION (D.) 09-08-029

I. SUMMARY

In Decision (D.) 09-08-029 (or "Decision"), which is the Phase I decision in Rulemaking (R.) 08-11-005 ("OIR"), issued on August 25, 2009, we implemented measures for electric transmission and distribution lines and related communication facilities to reduce fire hazards in California before the start of the 2009 fire season. We adopted statewide fire prevention and safety measures, as well as measures applicable only in certain geographic areas in Southern California defined as "Extreme and Very High Fire Threat Zones." Specifically, we revised several portions of General Order 95 to clarify utility obligations with respect to fire safety and prevention, including a new rule within General Order 95 which establishes a notification procedure for safety hazards and a method to prioritize corrective actions for violations of this general order. (D.09-08-029, pp. 2-3 & 17-22.) We also determined in D.09-08-029 that our "jurisdiction extends to publicly-owned utilities [("POUs")] for the limited purpose of adopting and enforcing rules governing electric transmission and distribution facilities to protect the safety of employees and the general public." (D.09-08-029, pp. 49-50, Conclusion of Law 3.)

Los Angeles Department of Water and Power ("LADWP") filed a timely application for rehearing of D.09-08-029 on September 17, 2009. LADWP is a POU. In its rehearing application, LADWP challenges D.09-08-029 on the following grounds: (1) the Commission deprived LADWP of due process by failing to consider and address LADWP's argument that it is exempt from our jurisdiction pursuant to Public Utilities Code section 22;[1] (2) the Commission deprived LADWP of due process by failing to consider and rule upon its argument that LADWP has vested powers as of August 23, 1880 which exempt it from our jurisdiction; (3) the Commission deprived LADWP of due process by failing to consider and rule upon its argument that a historical analysis of sections 8001-8057 does not support our exercise of jurisdiction over POUs; and (4) the Commission continues to exceed its jurisdiction pursuant to Conclusion of Law 3 in D.09-08-029 by asserting jurisdiction over POUs in contradiction of section 364(a). The Commission's Consumer Protection and Safety Division filed a response to LADWP's rehearing application on October 2, 2009.

We have reviewed all of the allegations of error raised in the rehearing application, and determine that rehearing of D.09-08-029 should be denied because no legal error has been demonstrated.

II. DISCUSSION

A. Public Utilities Code section 22 does not exempt LADWP from the Commission's jurisdiction.

In its rehearing application, LADWP claims that we failed to render any conclusions of law pertaining to LADWP's argument that it is exempt from our jurisdiction under section 22. (Rehearing Application ("Reh. App."), pp. 4-5.) Specifically, LADWP asserts that the California Legislature "created an exemption from Division 4 of the Public Utilities Code for corporations formed or existing before January 1, 1873 in accordance with Pub. Util. Code § 22" (Reh. App., p. 5.), and that, as such, LADWP is not subject to our jurisdiction. This allegation of error lacks merit.

[1] Unless otherwise noted, all statutory references herein are to the Public Utilities Code.

As an initial matter, we did not deprive LADWP of due process in terms of reviewing and considering the arguments LADWP raised in the underlying proceeding. At the outset of the proceeding, we noted in the OIR that our safety-related jurisdiction with respect to municipally-owned overhead electric distribution and transmission facilities is settled. (OIR, pp. 5-6.) That issue was fully considered in an earlier Commission decision, D.98-03-036, and we made clear in the OIR that we did not intend to reexamine that issue in this proceeding. (*Id*.) Commission decisions not directly attacked in an application for rehearing to the Commission and in a petition for writ of review to the Courts in the manner and time provided by law shall become final and conclusive, and are not subject to collateral attack. (*See, e.g.*, *Marin Municipal Water District v. North Coast Water Company* (1918) 178 Cal. 324, 328-329; *Miller v. Railroad Comm. of California* (1937) 9 Cal.2d 190, 195-196; Pub. Util. Code, §§ 1709 & 1731, subd. (b).)

In addition, we amply complied with the requirements of section 1705 by including an extensive jurisdiction discussion at the beginning of the Decision (*see* D.09-08-029, pp. 8-9), and by including a separate conclusion of law directly addressing our safety-related jurisdiction over POUs (*see* D.09-08-029, pp. 49-50, Conclusion of Law 3). Despite these detailed discussions and findings, LADWP maintains that it was deprived of due process because we failed to address its jurisdictional arguments. (Reh. App., pp. 4-6.) LADWP makes this vague assertion of legal error with no citation to any statutory or constitutional provision, no citation to any case law in support of its claim, and no analysis as to how its due process rights were violated. As the applicant for rehearing, LADWP bears the burden of demonstrating that the Commission erred. (*See* Rule 16.1(c) of the Commission's Rules of Practice and Procedure ("[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.").)

As to the substantive issue raised by LADWP, namely whether it is exempt from our jurisdiction pursuant to section 22, this argument also lacks merit. Section 22 provides:

> No corporation formed or existing before 12 o'clock m. of January 1, 1873, is affected by the provisions of Division 4 of this code unless the corporation has elected to continue its existence under the provisions of the Civil Code repealed by this code, or elects to continue its existence under this code, but the laws under which such corporations were formed and exist continue to apply to all such corporations, notwithstanding their repeal by this code or prior to its enactment.

(Pub. Util. Code, § 22.)

According to LADWP, section 22 is applicable because it is a proprietary department of the City of Los Angeles, which was incorporated in 1850. (Reh. App., p. 5.) Since sections 8001 *et seq*. fall within Division 4 of the Public Utilities Code, LADWP argues that we cannot exercise jurisdiction pursuant to these sections over LADWP because it is a "corporation" formed before January 1, 1873 within the meaning of section 22. (Reh. App., p. 5.) We reject this argument because it rests on the incorrect assumption that LADWP is a "corporation" within the meaning of section 22. Section 22, enacted in 1951 by Stats. 1951, Ch. 764, does not define "corporation." However, section 204 defines a "corporation" as "a corporation, a company, an association, and a joint stock association." (Pub. Util. Code, § 204.) It mentions nothing about a municipality, and indeed the California Supreme Court has determined that a municipality or municipally-owned utility is not a "corporation" within the meaning of section 204. (*See County of Inyo v. Pub. Util. Comm*. (1980) 26 Cal.3d 154, 165.) Section 204's definition of "corporation" was enacted in 1915 as section 2 of the Public Utilities Act, and became section 204 upon the adoption of the Public Utilities Code in 1951. Section 204 thus predates section 22 by more than thirty-five years. Since section 204 is contained in the "General Provisions and Definitions" portion of the Public Utilities Code, and since it existed for decades before the enactment of section 22, it can

be presumed that the Legislature relied upon this existing definition of "corporation" when it enacted section 22 in 1951. Thus, utilizing the definition of "corporation" contained in section 204 to interpret the same term contained in section 22, it is clear that LADWP is not a corporation within the meaning of either section 204 or section 22. As such, LADWP's argument that it is exempt from our jurisdiction pursuant to section 22 lacks merit.

B. LADWP is not exempt from the Commission's safety-related jurisdiction for those municipal affairs claimed by LADWP prior to October 10, 1911.

LADWP next alleges that we failed to address its argument that it is exempt from our jurisdiction by virtue of the fact that "it had 'vested powers' upon the enactment of Article XII § 23 added by Stats. 1911, c. 60, p. 2164 and is not subject to our regulation for those municipal affairs that it expressly claimed prior to October 10, 1911." (Reh. App., pp. 5-6, fn. omitted; *see also* LADWP's Opening Comments, filed March 27, 2009, at p. 12; LADWP's Opening Brief, filed May 22, 2009, at p. 20.) This allegation of error is wrong.

The issue raised by LADWP was decided by the California Supreme Court in *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 540-541. In *Polk*, the Court held that the Legislature is empowered to pass a safety-related statute applicable to municipally-operated electric systems even though the municipality is chartered and has control over municipal affairs. (*Id*.) The Court stated that "[t]he safety of overhead wire maintenance is a matter of statewide, rather than local, concern, and the state law is paramount." (*Id.* at p. 540.) In later cases, courts have similarly held that matters such as the location, construction and maintenance of telephone lines and electric power poles are matters of state concern, not municipal affairs. (*See*, *e.g.*, *Pacific Tel. & Tel. Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 768; *Modesto Irrigation District v. City of Modesto* (1962) 210 Cal.App.2d 652, 654-655.) There can be no serious question that we have comprehensive jurisdiction over issues related to the health and safety implications of utility operations within the State of California. (*See*, *e.g.*, Cal. Const. art.

XII, §§ 3 & 6; Pub. Util. Code, §§ 216, 451, 701, 702, 761, 767.5, 768, 768.5, 770, 1001, 2101 & 8001 *et seq*; *San Diego Gas & Electric Co. v. Superior Court* ("*Covalt*") (1996) 13 Cal.4th 893, 923-924.) In D.09-08-029, we discussed our jurisdiction at length with respect to both POUs and privately-owned utilities, and as to POUs, concluded that our jurisdiction "extends to POUs for the limited purpose of adopting and enforcing rules governing electric transmission and distribution facilities to protect the safety of employees and the general public." (D.09-08-029, pp. 8 & 49-50, Conclusion of Law 3.)

As such, there is no support for LADWP's argument that, simply by virtue of certain municipal affairs claimed by LADWP, we lack jurisdiction to regulate safety-related aspects of municipally-owned electric systems in conjunction with telephone lines.

C. The legislative history of Public Utilities Code sections 8001-8057 does not exempt LADWP from the Commission's jurisdiction.

LADWP next claims that we erred by failing to address its argument that the legislative and historical origins of sections 8001-8057 do not support our exercise of authority over POUs. (Reh. App., p. 6.) This claim is without merit.

Other than citing sections 8001-8057 and stating that these sections do not grant the Commission jurisdiction over LADWP, the rehearing application contains no discussion whatsoever of the relevant statutes or legal authorities. Instead, LADWP's rehearing application refers the Commission to its May 22, 2009 Opening Brief in the underlying proceeding. Reference to a brief filed in the proceeding is insufficient to comply with section 1732, which requires a rehearing applicant to set forth the basis of error with specificity. (*See* Pub. Util. Code, §1732.) LADWP's claim may be rejected on this basis alone.

However, a review of the issue set forth in the Opening Brief demonstrates that the claim has no merit. The crux of LADWP's argument is that sections 8001 *et seq*. do not grant us any regulatory authority over POUs, even for matters of public safety. According to LADWP, our enforcement powers with respect to POUs "are limited to the

penalties set forth in §§ 8037 and 8057" and our only remedy for such violations would be to "refer such matters to the appropriate agency for criminal prosecution since a misdemeanor is the only penalty for any violation of §§ 8026-8036 and §§ 8051-8055." (LADWP Opening Brief, filed May 22, 2009, p. 16 (fn. omitted).)

LADWP's interpretation of the relevant statutes is incorrect. Sections 8001 *et seq*. expressly provide for Commission jurisdiction over the safety of surface or underground wires used to conduct electricity, and provide that we may adopt additional requirements it deems necessary to ensure the safety of employees and the general public. (*See*, *e.g.*, Pub. Util. Code, §§ 8037, 8056.) Our jurisdiction under sections 8001 *et seq*. extends to POUs for safety-related matters, as section 8002 clearly applies these statutory provisions to "any commission, officer, agent, or employee of this State, or of *any county, city, city and county, or other political subdivision thereof*, and any other person, firm, or corporation." (Pub. Util. Code, § 8002 (emphasis added).) Contrary to LADWP's assertions, California courts have determined that the Legislature may certainly grant jurisdiction to the Commission over municipalities for safety-related matters. For example, in *Polk*, *supra*, 26 Cal.2d at p. 540, the Court found that the Legislature had adopted a statute with safety requirements for electric equipment, which expressly applied to municipalities, and authorized the Commission to make changes or additions to the safety requirements and to enforce those provisions. Further, in *Los Angeles Metropolitan Transit Authority v. Public Utilities Commission* (1963) 59 Cal.2d 863, the California Supreme Court held that the California Constitution does not limit the Legislature in granting the Commission regulatory authority over safety-related aspects of publicly-owned transit districts. (*Id*. at p. 870.) Indeed, in *Los Angeles Metropolitan Transit Authority*, the Court expressly disapproved language from an earlier decision, which found that regulatory jurisdiction under article XII of the California Constitution extends only to private utility corporations. (*Id*. at p. 869, disapproving language in *City of Pasadena v. Railroad Commission* (1939) 183 Cal. 526, 533.)

Thus, pursuant to sections 8001 *et seq*., we did not exceed our authority in asserting jurisdiction over POUs like LADWP for the limited purpose of adopting and

enforcing safety rules governing electric transmission and distribution facilities to protect the general public and utility employees. LADWP's argument to the contrary has no merit.

D. The Commission did not err in asserting its safety-related jurisdiction over POUs in Conclusion of Law 3 of D.09-08-029.

LADWP's final allegation of error is that Conclusion of Law 3 in D.09-08-029 exceeds our legislative authority because section 364(a) does not apply to POUs. (Reh. App., p. 7.) LADWP further asserts that we have not been legislatively granted the authority to adopt inspection, maintenance, repair and replacement standards for POUs, and that in the absence of express legislative authority, we are powerless to do so. (Reh. App., pp. 7-8.) We reject this allegation as without merit.

LADWP observes that the language contained in section 364(a) is limited to investor-owned electric utilities. However, this argument ignores the express language contained in sections 8001-8057, which clearly applies to entities such as LADWP. The language of sections 8026-8034, 8036, and 8051-8055 uniformly states, in each section, "No person shall . . .". As noted above, section 8002 provides: "'Person' includes any commission, officer, agent, or employee of this State, or of *any county, city, city and county, or other political subdivision* thereof, and any other person, firm, or corporation." (Pub. Util. Code, § 8002 (emphasis added).) Thus, the term "person" clearly applies to POUs such as LADWP and its agents and employees. Sections 8037 and 8056 specifically authorize the Commission to inspect all work and facilities undertaken pursuant to the provisions of this article, and to "make such further additions or changes as the commission deems necessary for the purpose of safety to employees and the general public." (Pub. Util. Code, §§ 8037 & 8056.) Sections 8037 and 8056 further authorize the Commission to "enforce the provisions of this article." (Pub. Util. Code, §§ 8037 & 8056.)

In D.09-08-029, we took great care to emphasize that our jurisdiction over POUs such as LADWP was being invoked only for the very "limited purpose of adopting

and enforcing rules governing electric transmission and distribution facilities to protect the safety of employees and the general public." (D.09-08-029, pp. 49-50, Conclusion of Law 3.) Nothing contained in our Decision goes beyond the scope of this limited purpose or the authority granted to the Commission under sections 8001 *et seq*. As noted above, we have comprehensive jurisdiction over issues related to the health and safety implications of utility operations within the State of California. (*See* Cal. Const. art. XII, §§ 3 & 6; Pub. Util. Code, §§ 216, 451, 701, 702, 761, 767.5, 768, 768.5, 770, 1001, 2101 and 8001 *et seq*; *Covalt, supra,* 13 Cal.4th at pp. 923-924.) Thus, LADWP's arguments to the contrary lack merit.

III. CONCLUSION

Rehearing of D.09-08-029 is hereby denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED THAT:

1. Rehearing of D.09-08-029 is hereby denied.

This order is effective today.

Dated February 25, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners