

Decision 12-03-037 March 22, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Everyday Energy Corp. d/b/a Everyday
Energy,

Complainant,

vs.

San Diego Gas & Electric Company,

Defendant.

Case 11-09-013
(Filed September 19, 2011)

John L. Clark, Goodin, MacBride, Squeri, Day &
Lamprey, LLP; for Everyday Energy Corp.
d/b/a Everyday Energy, complainant.

Emma D. Salustro, Attorney at Law, for
San Diego Gas & Electric Company, defendant.

DECISION GRANTING MOTION TO DISMISS

1. Summary

Everyday Communications Corp. dba Everyday Energy (Complainant or Everyday Energy) complains against defendant San Diego Gas & Electric Company (SDG&E), and requests the Commission issue an order determining that SDG&E improperly refused to allow a property, where Complainant has contracted to install a solar photovoltaic generating system, to take service under SDG&E's electric tariff Schedule VNM-A and ordering SDG&E to pay

reparations for amounts that Complainant incurs in making the modification needed for the property to receive service under SDG&E's direct net metering tariff schedule. SDG&E moves to dismiss for failure to state a cause of action. We grant the motion.

2. The Complaint

Everyday Communications Corp. dba Everyday Energy (Complainant or Everyday Energy) is a California-based corporation and B license Contractor (license #949535) that specializes in the design and installation of solar photovoltaic (PV) generating systems. Complainant contracted with Community Housing Works (Community Housing) to install a solar PV system at the Los Robles Apartment Complex (Los Robles). Los Robles, a 76-unit apartment complex, is master-metered and served through a single-phase 240 volt, 400 amp system that serves the common areas and all residential units.

Complainant alleges it requested that the generator be interconnected with San Diego Gas & Electric Company (SDG&E) through a separately-metered interconnection and that the property, which was served through a master meter, be served under SDG&E's virtual net metering tariff schedule, Schedule VNM-A, but that SDG&E refused. Complainant alleges it proposed separate energy metering because the original master-metered, single-phase 240 volt, 400 amp electrical systems cannot support a direct net-metering arrangement without substantial upgrades.

Complainant alleges that Tariff Schedule VNM-A is available to Community Housing as a "Qualified Customer" owning, renting, or leasing in a Multi-Family Affordable Housing Accommodation, where the owner of the complex has installed a solar 'eligible customer generator' with the requisite capacity. Complainant alleges that SDG&E's refusal to allow Community

Housing to take service under Schedule VNM-A is a violation of Pub. Util. Code § 532 because it constitutes a failure to offer and provide service in accordance with its tariff. Finally, Complainants contend SDG&E's failure to allow Community Housing to take service under Schedule VNM-A violates Decision (D.) 08-10-036, which Complainant argues requires SDG&E to offer virtual net metering arrangements to Multifamily Affordable Solar Housing (MASH) properties that install eligible customer generators to offset common area and tenant loads.

2.1. Community Housing and the Subject Property

Community Housing is the owner of the Los Robles apartment complex. Los Robles is "low-income residential housing" as defined by Pub. Util. Code § 2852. Electric service to the tenants and common areas of the property is delivered by SDG&E through a single master meter. There are no sub-metered units or areas. Community Housing is the customer-of-record for all electric service to Los Robles.

2.2. The Project

Complainant contracted with Community Housing to install a 140.5 kilowatt (kW) alternating current (AC) solar PV generator at Los Robles. Community Housing secured a reservation for funding under the Commission's MASH program. Complainant is responsible for installation of the PV generator, associated facilities and equipment at Los Robles. Complainant is responsible for procuring, on Community Housing's behalf, appropriate interconnection and serving arrangements to allow the power produced by the PV generator to be delivered to SDG&E for the purpose of offsetting tenant and common area loads. SDG&E denied Complainant's request to be served under SDG&E's virtual net metering tariff schedule, Schedule VNM-A. Following SDG&E's denial for

service under Schedule VNM-A, Complainant modified the electrical system serving the Los Robles apartments at its own expense to allow direct net metering.

3. Motion to Dismiss

Pursuant to Pub. Util. Code § 1702, a complaint must show an “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.” SDG&E argues it properly adhered to the applicable tariff provisions, Commission rules and decisions when it refused to allow Community Housing to take service under Schedule VNM-A and that Complainant impermissibly uses the Amended Complaint to collaterally attack Commission D.08-10-036 in violation of Pub. Util. Code § 1709. SDG&E moves to dismiss the complaint on the following grounds:

A. SDG&E argues D.08-10-036 requires tenants be individually metered to be eligible for service under virtual net metering

D.08-10-036 established virtual net metering to address the challenges of installing one solar PV system in multifamily housing complexes where each tenant’s unit has a separate meter. As a result, the Commission ordered SDG&E to develop a virtual net metering tariff that would “allow for the allocation of net energy metering benefits from a single solar energy system to all meters on an individually metered multifamily affordable housing property.”¹ SDG&E states

¹ D.08-10-036 at 38; also Ordering Paragraph 5; Appendix B.

that, in establishing virtual net metering, the Commission clearly stated that virtual net metering can only work when tenants are individually metered.²

According to SDG&E, nowhere in D.08-10-036 or D.11-07-031, the decision modifying D.08-10-036, does the Commission extend virtual net metering applicability to master-metered facilities.

B. SDG&E argues Schedule VNM-A precludes SDG&E from providing services to a Master-Metered Complex

SDG&E argues Los Robles and its tenants are ineligible to take service under VNM-A for the following reasons:

- The billing process demands that the tenants are individually metered.
- The tenants of Los Robles do not qualify as “Qualified Customers.” Because the tenants are not individually metered they are not currently SDG&E customers, and as a result, are not currently receiving service on a rate schedule like Schedule NEM.
- Under Schedule VNM-A a building owner may be considered a “Qualified Customer” if the owner provides virtual net metering to common areas and unoccupied areas. Community Housing is not a “Qualified Customer” because its master meter not only provides service to the common areas and unoccupied units, but also to occupied units.

According to SDG&E, allowing the tenants of Los Robles to take service under Schedule VNM-A frustrates the Commission’s specific intent of creating virtual net metering to provide individually-metered tenants of multifamily affordable housing with a beneficial credit. Indeed, there is nothing preventing

² D.08-10-036 at 34.

Community Housing from providing tenants credit for the solar energy system's production without virtual net metering.

C. SDG&E argues § 532 prevents SDG&E from deviating from the applicable Tariff

Pub. Util. Code §532 prohibits a public utility from charging or collecting compensation that differs from what it is authorized to charge or collect under its "rates, tolls, rentals and charges applicable thereto as specified in its schedules on file." A public utility's tariff filed with the Commission has the force and effect of law.³ A utility must strictly adhere to its lawfully published tariffs.⁴

SDG&E argues it is prohibited from deviating from its tariff to permit Los Robles to take service under Schedule VNM-A. To do so would be a violation of both the terms of the tariff and Pub. Util. Code § 532 because SDG&E would be charging Los Robles a rate and collecting an amount different from what it is legally allowed to charge and collect under its tariff.

D. SDG&E contends the Amended Complaint is a Collateral Attack on D.08-10-086

SDG&E believes the Amended Complaint should be dismissed as an unlawful collateral attack on D.08-10-036. According to SDG&E, Complainant's request for a Commission determination that master-metered buildings, such as Los Robles, are eligible for virtual net metering is an attempt to reopen D.08-10-036 and related orders, to modify the Commission's decision. If Complainant seeks such action, it should file a petition to modify D.08-10-036

³ Dollar-A-Day Rent-A-Car Sys. v. Pac. Tel & Tel. Co., 26 CA 3d 454,457 (1972).

⁴ Solomon d/b/a Regency Homes v. Southern California Edison Company 2010 Cal. PUC Lexis 515 at 15.

under Rule 16.4 rather than continue to prosecute this complaint in violation of § 1709.

4. Discussion

In D.99-11-023 in Application (A.) 99-04-010, we reviewed our standards for dismissing complaints and applications.

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (e.g., *MCI Telecommunications Corp. v. Pacific Bell*, D.95-05-020, 59 Cal. PUC 2d 665, 1995 Cal. PUC LEXIS 458, at *29-*30, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal. PUC 166.) In addition, the Commission may properly take official notice of, and consider, the files and records of court and Commission proceedings in ruling on a motion to dismiss. (e.g., *Upper Kern Island Water Assn. v. Kern Delta Water District*, D.91-05-019, 40 Cal. PUC 2d 65, 1991 Cal. PUC LEXIS 244, at *14; *City of El Monte v. San Gabriel Valley Water Co.*, D.87-09-065, 25 Cal. PUC 2d 393, 1987 Cal. PUC LEXIS 238.) (D.99-11-023 at 7.)

By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that Complainant will be able to prove everything alleged in its complaint. We do not accept as true the ultimate facts, or conclusions, that Complainant alleges, for instance, that SDG&E has violated its tariffs. After accepting the facts as stated, the Commission examines them in the light of applicable law and policy.

Contrary to Complainant's assertions, the Commission clearly intended that virtual net metering be made available only to buildings where tenants are

individually metered utility customers.⁵ The Commission directed the utilities to create virtual net metering tariffs to “allow for the allocation of net energy metering benefits from a single solar energy system to all meters on an individually-metered multifamily affordable housing property⁶ ... Virtual net metering would allow the electricity produced by the system to be net-balanced against total building electricity consumption, as if the building had a single, or virtual master meter.”⁷ In adopting virtual net metering, the Commission specifically stated unambiguously, “indeed, VNM can only work when tenants are individually metered.”⁸

Schedule VNM-A only applies to individually metered units. In order to take service under Schedule VNM-A, one must be a Qualified Customer that is either (a) located on the same property as the Owner’s eligible customer generator and physically connected to the Same Delivery Point (as defined by Rule 16) as the Owner’s eligible generator, or (b) located on the same property as the Owner’s eligible customer-generator, and is physically connected to a different Service Delivery Point, where the Owner is a Multifamily Affordable Solar Housing Program Participant.⁹ In addition, those customers wishing to take service under VNM-A must currently receive service on a rate schedule that

⁵ D.08-10-036 at 30-31.

⁶ D.08-10-036 at 31.

⁷ D.08-10-036.

⁸ Indeed, when the Commission decided to extend virtual net metering in D.11-07-031, the Commission did so only to residential, commercial, and industrial multi-tenant and multi-meter properties. Again, the Commission did not consider extending virtual net metering to master-metered buildings.

⁹ SDG&E Schedule VNM-A at ¶ 4.

would be applicable to a similar customer receiving service in combination with Schedule NEM.¹⁰

The tenants at Los Robles are not Qualified Customers because they are not SDG&E customers and therefore do not currently receive service on a rate schedule like Schedule NEM. Community Housing cannot be a Qualified Customer because its master meter not only provides service to common areas and unoccupied areas (as permitted by Schedule VNM-A) but also to occupied units. Thus, SDG&E did not violate the tariff when it refused to provide service under virtual net metering to the tenants of Los Robles.

For these reasons, SDG&E's Motion to Dismiss is granted.

With respect to SDG&E's concern that the complaint is an attack on Commission decisions and orders in violation of § 1709, we agree that a complaint proceeding is not the proper forum in which to propose changes to the Commission's Virtual Net Metering policy. If Complainant seeks to alter the Commission's virtual net metering policy, Complainant must file a petition to modify D.08-10-036 and D.11-07-031.

5. Proceeding Category and Need for Hearing

The Instruction to Answer filed on October 7, 2011, categorized this complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Because this matter can be resolved by a motion to dismiss, the evidentiary hearings determination is changed to state that no evidentiary hearings are necessary.

¹⁰ SDG&E Schedule VNM-A at ¶ 4.

6. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter 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. No reply comments were received.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Katherine MacDonald is the assigned ALJ in this proceeding.

Findings of Fact

1. Everyday Energy Corporation, d/b/a/ Everyday Energy, is a B licensed contractor who specializes in the design and installation of solar PV generating systems.
2. Everyday Energy contracted with Community Housing, the owner of the Los Robles apartment complex, to install a 140.5 kW AC solar PV generator at the Los Robles apartment complex.
3. Everyday Energy was required by its contract with Community Housing to secure appropriate interconnection and serving arrangements on Community Housing's behalf to allow the power produced by the PV generator to be delivered to SDG&E for the purpose of offsetting tenant and common area loads.
4. Complainant's request to be served under SDG&E's tariff Schedule VNM-A was denied by SDG&E.
5. Complainant modified the existing electrical system at the Los Robles Apartments to allow direct net metering.
6. D.08-10-036 established virtual net metering as part of the Commission's MASH program.

7. D.08-10-036 required SDG&E to establish a tariff that would allow for the allocation of net energy metering benefits from a single solar energy system to all meters on an individually metered multifamily affordable housing complex. SDG&E established tariff Schedule VNM-A.

8. Schedule VNM-A defines a Qualified Customer as either (a) “located on the same property as the Owner’s eligible customer generator and physically connected to the Same Delivery Point (as defined by Rule 16) as the Owner’s eligible generator” or (b) “located on the same property as the Owner’s eligible customer-generator, and is physically connected to a different Service Delivery Point, where the Owner is a Multifamily Affordable Solar Housing Program Participant.”

9. Customers wishing to take service under VNM-A must currently receive service on a rate schedule that would be applicable to a similar customer receiving service in combination with Schedule NEM.

10. The tenants of the Los Robles apartment complex are not SDG&E customers and do not currently receive service on a rate schedule that could be in used in combination with Schedule NEM.

11. The Los Robles apartment complex is master-metered. Community Housing is the customer of record to SDG&E.

12. The relief requested by Complainant, for an order determining that SDG&E improperly refused to allow Community Housing to take service under SDG&E tariff Schedule VNM-A and requiring SDG&E to pay reparations to Everyday Energy for amounts they incurred making the modifications needed to take service under SDG&E’s direct net metering tariff schedule, does not comport with Commission decisions and policy.

Conclusions of Law

1. Even assuming the validity of the facts alleged in the Complaint, the case should be dismissed.
2. The Commission designed virtual net metering for individually metered units in multifamily residential housing and limited the use of virtual net metering to instances where units are individually metered.
3. Neither Community Housing nor the tenants of the Los Robles Apartments meet the tariff requirements to be considered “Qualified Customers” under SDG&E tariff Schedule VNM-A.
4. Neither Community Housing nor the tenants of the Los Robles Apartments currently receive service under a rate schedule that would be applicable to a similar customer receiving service in combination with Schedule NEM.
5. Community Housing is not eligible to take service under SDG&E Schedule VNM-A.
6. The tenants of the Los Robles Apartments are not eligible to take service under SDG&E Schedule VNM-A.
7. SDG&E should not be required to offer service to Community Housing under tariff Schedule VNM-A.
8. The complaint should be dismissed for failure to state a cause of action.
9. Hearings are not necessary.

O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric Company's Motion to Dismiss dated November 28, 2011, is granted.
2. The hearing determination is changed to no hearings necessary.
3. Case 11-09-013 is dismissed.
4. Case 11-09-013 is closed.

This order is effective today.

Dated March 22, 2012, at San Francisco, California.

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