

Decision 05-06-011 June 16, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Dick Schattinger,

Complainant,

vs.

Southern California Edison Company,

Defendant.

Case 04-06-036
(Filed June 29, 2004)

Dick Schattinger, for himself, complainant.

James M. Lehrer, Attorney at Law, for defendant.

**DECISION PERMITTING TREE REMOVAL
COST RECOVERY STARTING MARCH 12, 2002**

Summary

This complaint began when complainant sought \$4,450 in reimbursement from defendant for his cost of tree removal. Defendant refused to pay because Resolution (Res.) E-3824 and Advice Letter (AL) 1730-E permitted reimbursement only for the cost of tree removal which occurred after April 2, 2003. Complainant's costs were incurred on December 11, 2002. This decision authorizes payment for tree removal costs occurring after March 11, 2002.

Background

Over 12 million trees in the mountainous regions of Riverside, San Bernardino, and San Diego counties have been weakened by years of drought and are dead or dying due to an infestation of bark beetles. This situation has created a potential hazard to the people and property in these communities due to imminent fire danger.

On March 12, 2002, the Board of Supervisors of Riverside County passed a resolution finding “that due to the Epidemic Infestation of bark beetles problems causing a condition of extreme peril to life and property necessitates the declaration of the existence of an emergency.” It based that finding on findings:

- that the method for eradicating and stopping the spread of this voracious insect is to fell infected trees and treat the stumps with insecticide;
- that the existence of these extremely dangerous conditions is beyond the control of the services, personnel, equipment, and facilities of the County of Riverside; and
- that this declaration is being sought to assist us in dealing with this very serious threat to our public safety as well as the destruction of our forested communities.

On April 23, 2002, the Board of Supervisors of San Bernardino County adopted a resolution that proclaimed the existence of a local emergency on both public and private lands (emphasis added) located in the San Bernardino National Forest and requested the Governor to proclaim a state of emergency due to the bark beetle infestation. On September 24, 2002, the Board amended the resolution to include the Angeles National Forest, Mt. Baldy and Lytle Creek communities. This resolution addressed drought, bark beetle infestation, fire conditions, flood control, ecological, environmental, and economic issues. The supervisors said “Since the original April 2002 emergency proclamation, the bark

beetle infestation has increased in an exponential manner based primarily upon severe and extended drought conditions in addition to unseasonably high summer weather temperatures. The bark beetle infestation has now developed into a much larger and more diversified problem, which encompasses fire, environmental, ecological, flood control, and economic implications. The communities of Wrightwood, Crestline/Lake Gregory, Lake Arrowhead, Running Springs and the Big Bear Lake area are affected by this emergency. Based upon this scope, mitigation efforts will be extensive and multi-jurisdictional.”

On March 7, 2003, the Governor issued a Proclamation declaring a State of Emergency in the impacted areas of Riverside, San Bernardino, and San Diego counties. The Emergency Proclamation requested the Commission to “direct utility companies with transmission lines in Riverside, San Bernardino, and San Diego counties to ensure that all dead, dying and diseased trees and vegetation are completely cleared from their utility right-of-ways to mitigate the potential fire danger.”

In response to the Emergency Proclamation, the Commission issued Res. E-3824 dated April 3, 2003, which ordered Southern California Edison Company (SCE) and other utilities to work with the California Department of Forestry and Fire Protection (CDF) and other appropriate agencies to, “take all reasonable and necessary actions to implement the applicable provisions of the Emergency Proclamation to mitigate the increased fire hazard by removing dead, dying or diseased trees from falling or contacting distribution and transmission lines within their rights of way. . . .” Res. E-3824 also directed SCE to activate its

Catastrophic Event Memorandum Account (CEMA)¹ to record the costs of tree removal and incremental support costs. SCE notified the Commission that it activated its Bark Beetle CEMA as directed effective April 3, 2003. The Resolution also authorized SCE to submit annual advice letters requesting recovery of the bark beetle costs and to recover in rates the amounts determined to have been reasonably incurred. The resolution did not set a date for commencement of the tree removal period for reimbursement.

During the following months SCE received numerous inquiries from property owners who had actively removed dead or dying trees that could have impacted SCE lines about whether it would reimburse their past or future costs for tree removal. On August 8, 2003, SCE filed AL 1730-E which requested Commission authorization to begin providing property owners reimbursement for necessary tree removals that occurred after April 3, 2003, the date Res. E-3824 was issued, and directed SCE to activate its CEMA. AL 1730-E also presented other possible dates for the Commission to consider when establishing a date that would be used as the commencement of the period for reimbursements.²

¹ CEMA is Preliminary Statement, Part N.4, which is an existing tariff that sets forth the generic requirements for any catastrophic event and is not specific to any one event (*e.g.*, bark beetle infestation).

² The dates mentioned in AL 1730-E for consideration as possible dates for commencement of the tree removal period for reimbursement included: 1) a date specified by the CDF or another state agency with the expertise to determine when the combination of the drought and bark beetle infestation combined to create the extraordinary situation; 2) March 7, 2003, which is the date of the Emergency Proclamation; 3) April 3, 2003, which is the effective date of Res. E-3824 and the date SCE activated its CEMA; or 4) the effective date of the Commission's resolution of AL 1730-E.

Some property owners filed comments on AL 1730-E requesting that the Commission consider a commencement date prior to April 3, 2003.

On August 29, 2003, SCE received notification from the Director of the Energy Division that AL 1730-E was approved effective April 3, 2003 and directed SCE to “. . . reimburse eligible property owners in accordance with SCE’s proposed criteria for trees necessarily removed after April 3, 2003.”

In his complaint, Dick Schattinger (Schattinger), who lives in Lake Arrowhead, San Bernardino County, requests the Commission to change the start date for tree removal reimbursement from April 3, 2003 to a date in the summer of 2002 to include those parties who removed trees quickly because of the urgency of the situation (Schattinger’s trees were removed December 11, 2002). The tree removal cost to Schattinger was \$4,450. He filed a claim for reimbursement with SCE, but was rejected because the costs were incurred prior to April 3, 2003. He then sued SCE under our Expedited Complaint Procedure (ECP).³ The presiding Administrative Law Judge (ALJ) terminated the ECP and recalendared the case under our regular procedures in the public interest. Public hearing was held November 15, 2004.

SCE is sympathetic to Schattinger’s situation and also to that of the many other property owners who have requested SCE to issue reimbursements for trees removed prior to April 3, 2003. However, it says it cannot resolve this matter because to do so would be in conflict with the Commission’s directive on this matter and would jeopardize SCE’s ability to seek recovery of these costs in rates. SCE does not have the authority to record costs in its CEMA account that

³ Rule 13.2 of the Commission’s Rules of Practice and Procedure.

were incurred prior to April 3, 2003. SCE argues that if the Commission grants Schattinger's request there will be no avenue for SCE to seek rate recovery for the reimbursement paid to Schattinger, and a precedent will have been established for hundreds, and possibly thousands of other property owners to seek similar reimbursements. The costs for these reimbursements are estimated to be millions of dollars.

The presiding ALJ determined that the evidence was persuasive that persons in complainant's position should receive reimbursement for tree removal in response to the emergency proclamations issued by the Boards of Supervisors of San Bernardino, Riverside, and San Diego counties in 2002. Persons who promptly responded to the proclamations should not be barred from recovery because they were prompt, while persons who delayed their response until April 2003 are compensated. The ALJ agreed with SCE's argument that under Res. E-3824 and AL 1730-E it cannot compensate persons in Schattinger's position and recover those costs in its CEMA account. In the ALJ's opinion these persons should be compensated by SCE and SCE should be reimbursed. To reach this result, he determined that Res. E-3824 should be modified to allow for reimbursement to those who removed infected trees in response to the emergency proclamation of San Bernardino, Riverside, and San Diego counties. To provide the necessary procedural foundation for a possible modification of Res. E-3824, on January 27, 2005, he issued an ALJ Ruling (Ruling) as follows:

1. This complaint shall be deemed a Petition to Modify Resolution E-3824, pursuant to Commission Rules of Practice and Procedure 42 and 47.

2. The Process Office shall serve copies of this Ruling on all parties to Resolution E-3824 and Application 02-05-004.
3. The procedures set forth in Rule 47 shall apply to this Ruling.
4. I recommend that the date for commencement of the tree removal period for reimbursement be March 12, 2002.

Discussion

On February 7, 2005, The Utility Reform Network (TURN) filed its response to the Ruling which challenges it on various grounds. SCE supports the recommendations made in the Ruling and recommends that TURN's arguments be rejected.

TURN contends that the Ruling recommends modification of Resolution E-3824 so to backdate the effective date of Edison's CEMA from April 3, 2003 to March 12, 2002. TURN's contention is incorrect. The Ruling only changes the effective date used for determining eligibility for reimbursement from April 3, 2003 to March 12, 2002. The Ruling does not modify the April 3, 2003 effective date for the bark beetle CEMA.

TURN contends that the period for reimbursement to property owners for tree removal cannot be changed without an evidentiary hearing because the cost consequences of this modification to Res. E-3824 could be substantial. However, as SCE points out, we established the current reimbursement period by AL 1730-E without holding any evidentiary hearing, and any change to that period is a policy and legal issue the Commission can resolve on the basis of

pleadings without evidentiary hearing.⁴ TURN has not identified any material factual issue that the Commission must decide in order to rule on the Petition to Modify.

⁴ cf. Pub. Util. Code § 1708.5(f), under which the Commission may amend a “regulation” without an evidentiary hearing provided the regulation had originally been adopted without an evidentiary hearing.

The Ruling reclassifies the adjudicative complaint filed by Schattinger for \$4,450 into a Petition to Modify Res. E-3824, pursuant to Rule 42 and 47 (Rules). SCE agrees with TURN that it is not clear whether Rule 47 permits reclassification of a complaint into a Petition to Modify, but it believes the presiding ALJ has applied the Rules to this proceeding with flexibility to efficiently resolve the issue presented by the complaint. In addition, Rule 87 states that “[t]hese rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause show, the Commission may permit deviations from the rules.” To hold the complaint in abeyance while Schattinger filed a Petition to Modify, citing the same facts as in his complaint would exalt form over substance and delay, rather than speed up, “an inexpensive determination of the issues.” Certainly, TURN is not prejudiced. Its objections would be the same no matter what the title of the document.

Both Section 454.9(a) of the Public Utilities Code and Res. E-3238 allow utilities to establish a CEMA and record their costs of: (a) restoring utility service to customers; (b) repairing, replacing or restoring damaged utility facilities; and (c) complying with governmental agency orders in connection with events declared disasters by competent state or federal authority. TURN claims that the Ruling violates Section 454.9 by allowing a local, rather than a competent state authority, to declare a disaster. SCE contends that the ALJ’s Ruling does no such thing. Rather, the Ruling is using the date of a local declaration of a disaster as a possible date for commencement of the tree removal period for purposes of reimbursement to property owners who proactively removed dead and dying trees that SCE would have otherwise had to remove. A competent state authority did declare the bark beetle infestation a disaster on March 7, 2003 when

the Governor issued his Proclamation declaring a State of Emergency. However, the date that the competent state or federal authority declared a disaster is immaterial as to the commencement of the event, particularly where there is no clear-cut date when the disaster commenced. Here, it is clear that the bark beetle infestation commenced prior to March 12, 2002 and that the “competent state or federal authority” requirement found in both Section 454.9 and Res. E-3238 was met. The Ruling does not delegate the declaration of emergencies to local agencies or expand the scope of declared disasters; it merely looks to find an appropriate commencement date for reimbursements to property owners.

TURN argues that the Ruling constitutes retroactive ratemaking to the extent that the Ruling creates a requirement for ratepayers to pay now for past activities in 2002-2003. This argument is wrong. TURN brushes aside SCE’s position that retroactive ratemaking is avoided because SCE will not incur any costs prior to the April 3, 2003 effective date of its CEMA. TURN claims that SCE’s position conflicts with general accrual accounting methods and that SCE records other credits and debits when they are incurred, not when they are paid. SCE says TURN conveniently ignores the fact that the costs associated with property owner tree removals prior to April 3, 2003 have not accrued to SCE because SCE does not have any current obligation to pay such costs nor did it have any obligation at the time those costs were incurred by the property owners. The costs associated with property owner tree removals only become an SCE cost when SCE pays the property owner the reimbursement amount. Until that time, SCE has not incurred any costs. Permitting SCE to now incur costs to reimburse property owners for costs associated with the removal of dead or dying trees prior to the date that SCE’s CEMA became effective (April 3, 2003) is not retroactive ratemaking since SCE will not incur these costs until sometime in

2005 or beyond, well after the April 3, 2003 effective date of its bark beetle CEMA.

Further, the prohibition against retroactive ratemaking only applies to general rates of the utility. (See, e.g. D.01-11-031, page 10.) A pass-through reimbursement of costs by property owners would not constitute a general rate case. In D.95-10-018, we reviewed our disposition of a utility's post-retirement benefits other than pensions (PBOP) costs against a challenge that we were involved in retroactive ratemaking. In denying the challenge we said:

Our review of the narrow category of PBOP costs does not constitute general ratemaking and, under *Southern California Gas Co.* [23 Cal.3d 470], *Southern California Edison* [20 Cal.3d 823], and *California Manufacturers Association* [24 Cal.3d 251], is not restricted by the rule against retroactive ratemaking. *Southern California Edison* described general ratemaking as a comprehensive review of utility's rate base, revenues, expenses, and earnings, as distinguished from other Commission actions of a more limited nature. That decision found that while general ratemaking is governed by the rule against retroactive ratemaking, other proceedings are not. *California Manufacturers Association* explained further that the rule against retroactive ratemaking does not apply to limited issue proceedings, even though they may involve major policy determinations. (See 24 Cal.3d at 258-261.) (61 CPUC.2d 687 at 690.)

A catastrophic earthquake event was the subject of D.92-02-037 where a retroactive ratemaking challenge was rejected in regard to insurance proceeds. The headnote reads:

No retroactive ratemaking was involved in an electric and gas utility's allocation of earthquake-related insurance proceeds back to the date of the earthquake, rather than to the date its earthquake recovery account was established, since the insurance proceeds were related to casualty losses occasioned

by property damages, not losses attributable to a past incorrect rate, and since past rates included no allowances for earthquake-related costs. (43 CPUC.2d 274, digest.)

In Schattinger's case, the casualty losses were occasioned by property damage, not a past rate. And the losses relate back to the date the emergency was declared rather than to the date the CEMA account was established. We reiterate, any costs incurred by SCE were incurred after the CEMA account was activated.

Nor does TURN's argument consider the chronology of the CEMA account. The Governor issued his proclamation on March 7, 2003, Res. E-3824 was issued April 3, 2003, and AL 1730-E was approved on August 29, 2003 "effective April 3, 2003." Certainly an approval on August 29 effective April 3 has not been challenged as retroactive ratemaking. In fact, SCE suggested the following dates in AL 1730-E:

"(1) a date specified by the CDF or another state agency with the expertise to determine when the combination of the drought and bark beetle infestation combined to create the extraordinary situation; (2) March 7, 2003, which is the date of the Governor's Proclamation; (3) April 3, 2003, which is the effective date of Resolution E-3824 and the date SCE activated its CEMA; or (4) the effective date of the Commission's resolution on this advice letter."

Clearly, the first date suggested by SCE is a date which would, by definition, be before March 7, 2003 – the extraordinary situation occurs, then it is declared a disaster. SCE's AL 1730-E proposal suggested that the beginning of the bark beetle infestation would be an appropriate date for the commencement of the tree removal period for reimbursement purposes.

A comparable situation occurred in D.02-01-054 where we considered a petition to modify Res. E-3707. Certain customers of SCE had subscribed to an economic development rate (EDR) which was lower than the customers'

otherwise applicable tariff (OAT). At that time, EDR customer bills were subject to a minimum charge which, because of the spike in electric prices in 2000, resulted in charges under the EDR exceeding charges under the OAT.

Res. E-3707, dated December 7, 2000, modified the minimum charge effective December 7, 2000, but declined to limit the minimum charge to the amount that would result under the OAT. Based on events after December 7, 2000, the petitioner sought modification of Res. E-3707 to permit EDR customers to opt-out of EDR agreements effective December 7, 2000.

We granted the petition, citing, among other reasons, that on January 17, 2001, Governor Davis proclaimed a State of Emergency. The proclamation was based on the electricity market experiencing shortages, blackout, and dramatic price increases, thereby creating a condition of extreme peril to the safety of persons and property within the state. We said:

“We grant the application based on developments after December 7, 2000, the continuing State of Emergency, similar treatment for interruptible rate customers, and our commitment to re-examine special rate discounts and ratemaking when needed as restructuring unfolds.”
(D.02-01-054, *mimeo.*, 6.)

We then considered a customer who prematurely terminated its EDR agreement and paid liquidated damages prior to December 7, 2000. Additional pleadings had suggested that other EDR customers may have terminated their EDR agreement and paid liquidated damages. We said:

“In fairness to all similarly situated customers, we apply this relief to all EDR customers from July 1, 2000, or mid-2000, when wholesale prices began to increase unreasonably.”
(*Mimeo.*, 7.)

The result was that on January 23, 2002, we adopted Res. E-3707-A, effective December 7, 2000, which we applied to EDR customers who opted-out of EDR tariffs on or after July 1, 2000. Modifying resolutions to reach back to expand the universe of persons entitled to relief is a function of our authority to regulate utilities and our commitment to re-examine special rate discounts and ratemaking when needed.

Res. E-3824 did not prescribe a start date for incurring tree removal costs which would be reimbursed. SCE, in its AL 1730-E compliance filing noted this omission stating “it is not clear (1) whether reimbursements should be made by SCE to property owners for the removal of trees which SCE would eventually have removed....” SCE then recommended cost reimbursement for tree removals on or after April 3, 2003. SCE’s AL 1730-E recommendation was approved by the Energy Division on August 29, 2003. The facts of this complaint persuade us that AL 1730-E should be superseded. However, rather than modifying Res. E-3824, we believe the most efficient procedure to reimburse this expanded universe of persons is to order SCE to supplement AL 1730-E with an advice letter requesting authorization to record in its bark beetle CEMA reimbursements to property owners for removal of trees, on or after March 12, 2002, that could have impacted SCE’s electric lines.

Determination of Category

This complaint case was originally categorized as an adjudicatory proceeding, but having been reclassified as a petition for modification pursuant to Rule 6.1(c) and (d), we recategorize the proceeding as “ratesetting” so that we may “achieve a full, timely, and effective resolution of the substantive issues presented in the proceeding.” (Rule 6.1(d).)

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Robert Barnett is the ALJ and Presiding Officer in this proceeding.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed by TURN and SCE. TURN reiterated its prior position that an evidentiary hearing is needed to determine the financial impact of the change of the reimbursement effective date. SCE replied, supporting the proposed decision as written. SCE contends that TURN's comments regarding potential costs are mere hyperbole, with the object of creating a factual issue that has no basis in reality. We agree with SCE. An evidentiary hearing is not needed.

Findings of Fact

1. On March 12, 2002, the Board of Supervisors of Riverside County passed a resolution finding "that due to the Epidemic Infestation of bark beetles problems causing a condition of extreme peril to life and property necessitates the declaration of the existence of an emergency."

2. On April 23, 2002, the Board of Supervisors of San Bernardino County adopted a resolution that proclaimed the existence of a local emergency on both public and private lands located in the San Bernardino National Forest and requested the Governor to proclaim a State of Emergency due to the bark beetle infestation.

3. On March 7, 2003, the Governor issued a Proclamation declaring a State of Emergency in the impacted areas of Riverside, San Bernardino, and San Diego counties. The Emergency Proclamation requested the Commission to "direct

utility companies with transmission lines in Riverside, San Bernardino, and San Diego counties to ensure that all dead, dying and diseased trees and vegetation are completely cleared from their utility right-of-ways to mitigate the potential fire danger.”

4. In response to the Emergency Proclamation the Commission issued Res. E-3824 dated April 3, 2003, which ordered SCE to activate its CEMA to record the costs of tree removal and incremental support costs. SCE notified the Commission that it activated its bark beetle CEMA as directed effective April 3, 2003.

5. On August 8, 2003, SCE filed AL 1730-E which requested Commission authorization to begin providing property owners reimbursement for necessary tree removals that occurred after April 3, 2003. AL 1730-E was approved.

6. Complainant, who lives in Lake Arrowhead, San Bernardino County, requests the Commission to change the start date for tree removal reimbursement from April 3, 2003 to a date in the summer of 2002 to include those parties who removed trees quickly because of the urgency of the situation. His trees were removed December 11, 2002 at a cost of \$4,450. He filed a claim for reimbursement with SCE, but was rejected because the costs were incurred prior to April 3, 2003.

7. Persons in complainant’s position should receive reimbursement for tree removal in response to the Emergency Proclamations issued by the Boards of Supervisors of San Bernardino, Riverside, and San Diego counties in 2002. Persons who promptly responded to the Proclamations should not be barred from recovery because they were prompt, while persons who delayed their response until April 2003 are compensated.

8. March 12, 2002 should be the date for commencement of the period for reimbursement from SCE for tree removals that meet the standards of SCE's bark beetle CEMA.

Conclusions of Law

1. The date that the competent state or federal authority declared a disaster is immaterial as to the commencement of the event, particularly where there is no clear-cut date when the disaster commenced. The bark beetle infestation commenced prior to March 12, 2002, and the "competent state or federal authority" requirement found in both Section 454.9 and Res. E-3238 was met.

2. Permitting SCE to now incur costs to reimburse property owners for costs associated with the removal of dead or dying trees prior to the date that SCE's CEMA became effective (April 3, 2003) is not retroactive ratemaking since SCE will not incur these costs until sometime in 2005 or beyond, well after the April 3, 2003 date of its bark beetle CEMA.

3. The prohibition against retroactive ratemaking only applies to general rates of the utility. A pass-through reimbursement of costs by property owners would not constitute a general rate.

4. The petition to modify should be granted to the extent provided herein.

5. Property owners who removed trees in response to Emergency Proclamations issued by the Boards of Supervisors of San Bernardino, Riverside, and San Diego counties on or after March 12, 2002 and who meet SCE's standards for reimbursement, should be reimbursed for their reasonable costs of tree removal.

6. SCE should record such reimbursements in its CEMA for recovery.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company (SCE) shall supplement Advice Letter 1730-E, within 30 days from the effective date of this order, with an advice letter requesting authorization to record in its bark beetle Catastrophic Event Memorandum Account reimbursements to property owners who (i) removed trees in response to Emergency Proclamations issued by the Boards of Supervisors of San Bernardino, Riverside, and San Diego counties on or after March 12, 2002 and (ii) meet SCE's standards for reimbursement.
2. The advice letter shall be effective upon approval of the Energy Division.
3. In the interest of achieving a full, timely, and effective resolution of the substantive issues presented, this proceeding is recategorized from adjudicatory to ratesetting.
4. The Executive Director shall serve a copy of this decision on all parties to Resolution E-3824 and Application 02-05-004.
5. Case 04-06-036 is closed.

This order is effective today.

Dated June 16, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners