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Decision 90-01-049 January 24, 1990 JAN 25 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	I.84-04-077 (Filed April 18, 1984)

INTERIM OPINION ON REQUESTS OF SAVE OUR STREAMS COUNCIL AND RONALD E. RULOFSON FOR FINDINGS OF ELIGIBILITY FOR COMPENSATION

This decision addresses two requests for compensation from intervenors who protested the Petition for Modification of Decision (D.) 87-04-039 (Joint Petition) jointly filed by Pacific Gas and Electric Company (PG&E) and the Division of Ratepayer Advocates (DRA) on January 27, 1989. D.87-04-039 modified the Fifth Edition of the Qualifying Facility Milestone Procedure (QFMP), a procedure which establishes an orderly method for charting the progress of qualifying facilities (QFs) seeking to meet their on-line contractual commitment dates. The Joint Petition was an effort to cure a perceived problem among potential QFs in the northern, transmission-constrained portion of PG&E's service territory. The perception was that the QFMP in its current form did not give PG&E the leverage it needed to ferret out and remove lifeless projects from its transmission priority list. PG&E and DRA identified three goals of their Joint Petition:

1. To encourage those QFs which are not seriously proceeding with their projects to voluntarily remove themselves from PG&E's northern constrained area transmission allocation list,

2. To provide an opportunity for certain QFs in the constrained area to postpone operation by extending the five-year operation deadline, and

3. To strengthen the QFMP requirements in a manner intended to prevent projects from "stagnating" on the allocation list.

A deadline of April 18, 1989 was established for the filing of comments in response to the Joint Petition. Timely protests were submitted by several parties, including California Save Our Stream Council, Inc. (SOS) and Ronald E. Rulofson (Rulosfon). Final comments were received by June 5, 1989. On July 19, 1989, in D.89-07-058, we rejected the Joint Petition in its entirety. On July 13, 1989, SOS filed a request for a finding of eligibility for compensation for its work related to the Joint Petition. On July 31, 1989, Rulofson filed a similar request. PG&E has filed protests to both requests.

This decision finds Rulofson ineligible for compensation. Rulofson is an individual who also owns a QF which is on the waiting list for access to transmission capacity in the area which would have been affected by the Joint Petition.

This decision finds SOS eligible for compensation. SOS is a nonprofit corporation which has been opposing certain new diversion hydroelectric (hydro) projects since 1981. It asserts that 60 percent of its members are PG&E ratepayers.

The Rulofson Request

Rulofson identifies himself as a part time educator and a QF owner with an annual income of less than $11,000. He said that his minimum costs for participating in this portion of the proceeding were $1,330.60. In his July 31, 1989 pleading, he argues that he spoke as much on behalf of ratepayer concerns as he did for QFs, that DRA did not respond to issues concerning ratepayers, and that he was among the few commentors who did deal with ratepayer issues. PG&E responded to Rulofson's initial pleading with its protest on August 28, 1989.

In one caption to his initial pleading, Rulofson has requested a finding of eligibility pursuant to Article 18.7 of our

Rules of Practice and Procedure, which pertains to any proceeding initiated on or after January 1, 1985. In another caption, he has entitled his pleading "Notice of Intent to Claim Compensation," the terminology which applies not to Article 18.7 requests, but to pleadings pursuant to Article 18.6. Because the underlying investigation was initiated in April of 1984, Article 18.7 does not apply. Article 18.6 is the rule which governs requests in matters initiated on or before December 31, 1984. Nonetheless, counsel for PG&E has exclusively cited Article 18.7 in its protest. Thus, its protest is not precisely responsive to Rulofson's Notice of Intent. Since PG&E's arguments could be applied to largely equivalent sections in Article 18.6, we will assume that PG&E would apply the same arguments to an analysis based on Article 18.6.

PG&E protests the request for eligibility, arguing that Rulofson fails the "significant financial hardship test" which can be shown by participants:

> 1. Who have, or represent, an interest:
>
> (a) Which would not otherwise be adequately represented in the proceeding, and
>
> (b) Whose representation is necessary for a fair determination in the proceeding, and
>
> (c) Who have, or represent, an interest but are unable to participate effectively in the proceeding because such person(s) cannot afford to pay reasonable advocate fees, expert witness fees, and/or other reasonable costs of preparing for, and participating in such proceeding (including fees and costs of obtaining judicial review of such proceeding), or
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> 2. Who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in

comparison to the costs of effective participation in the proceeding. (Rule 76.25.)

PG&E asserts that Rulofson fails this test.

First, PG&E claims that Rulofson's interest was adequately represented by others. In its effort to prove this, the company does nothing more than to state that other parties represented the same interests, including other QFs on the waiting list. This argument is not persuasive. PG&E has not shown that a single other party had interests sufficiently similar to those of Rulofson to be motivated to adequately address his concerns. Even if such a party exists, PG&E has done nothing to demonstrate that such a party adequately addressed Rulofson's concerns.

Finally, PG&E argues that Rulofson has failed to establish that he was unable to pay for the cost of effective representation. To support this argument, PG&E has assumed that Rulofson should not be reimbursed for his labor (since it was presumably performed in his spare time) and that only the non-labor portion of the claimed expenses ($250) should be considered. PG&E then compares that reduced amount to Rulofson's annual salary and declares that such an expense is no burden.

We disagree with this argument as well. The time spent in preparing to advocate a position before the Commission can be a valid cost of litigation even if it occurs in what would otherwise be leisure time. First, leisure time has a value which should be recognized when it is sacrificed to improve participation before the Commission. Secondly, a participant could choose to seek supplementary income during what would appear to be leisure time and may be precluded from doing so because of the decision to intervene before the Commission. Finally, an intervenor's non-salaried hours may not be leisure time at all. For all we know a particular intervenor may need to help support a disabled dependent, be working on a novel for future publication, or

volunteering at a hospital. The participant's uses of his or her time is irrelevent to the merits of receiving compensation. We will not require intervenors to explain what they would otherwise be doing with their time in order to justify eligibility for compensation. In addition, Rulofson has done a reasonable job of placing a value on his efforts by discussing his normal hourly earnings.

Nonetheless, Rulofson has not demonstrated that he is unable to pay the reasonable costs of participation. Rulofson said that he owns a QF and has provided information concerning his annual income as a part-time educator. However, we know nothing else about his financial ability, such as the nature and extent of his financial interest in the QF, whether or not the QF is held by a separate entity which has the ability to expend funds on regulatory matters, or whether or not he has extensive savings which would allow for him to absorb the somewhat limited costs.

In most instances, the party requesting eligibility is a group or organization for which a financial report is less personal, or which is seeking eligibility based on the disparity between the reasonable cost of participation and the financial interest of the individual members of the organization in the outcome of the proceeding. It is rare that an individual would be required to make a personal financial disclosure in order to establish eligibility.

However, Rulofson has not made assertions as to the disparity between costs and personal benefits. This may be for one of two reasons. First, our rule seems to limit the use of that option to determining the eligibility of groups or organizations (and does not mention individuals). Second, Rulofson's interest in the proceeding as a QF places him in a peculiar position. If the outcome of the underlying proceeding could affect his ability to ultimately bring his QF on-line, his financial interest in that outcome may substantially outweigh the reasonable cost of

participation. Our rules appear to preclude a finding of eligibility in such circumstances.

In any event, Rulofson has made no such showing here and we lack a basis for finding significant financial hardship. We reach this conclusion without prejudice and Rulofson is free to issue a new Notice of Intent with more complete information demonstrating financial hardship. However, it is important to emphasize that we are not prepared to make a judgment as to whether or not Rulofson's participation in the Joint Petition process merits compensation, even if he were to be found to have experienced financial hardship. We encourage him to weigh those risks carefully when deciding whether or not to file a new notice.

SOS's Request

In its July 13, 1989 pleading, SOS filed a Request for Finding of Eligibility for Compensation pursuant to Articles 18.5, 18.6 and 18.7 of the Commission's Rules of Practice and Procedure.

Article 18.5 applies exclusively to fees and costs awarded to electric utility consumers pursuant to the federal Public Utility Regulatory Policies Act of 1978 (PURPA) Section 122(a)(2). SOS argues that this article applies because the QF program which is the subject of this proceeding was established pursuant to PURPA. However, the PURPA issues for which Article 18.5 apply are limited by Rule 76.01(c) to the following:

1. PURPA purposes:
    a. Conservation of energy supplied by electric utilities
    b. Optimization of the efficiency of use of facilities
    c. Equitable rates to electric consumers
2. PURPA Ratemaking Standards:
    a. Cost of Service
    b. Declining Block Rates
    c. Time-of-Day Rates
    d. Seasonal Rates

e. Interruptible Rates
f. Load Management Techniques

3. Other PURPA Standards:

a. Master Metering
b. Automatic Adjustment Clauses
c. Information to Consumers
d. Procedures for Termination of Electric Service
e. Advertising

While Article 18.5 specifically applies to many of the other electric utility rate issues addressed by PURPA, it does not apply directly to QF matters. Nor do the related ratepayer issues raised by SOS appear to fit within any of the above categories. Thus, Article 18.5 is not the appropriate rule to apply to SOS's request.

PG&E responded to the SOS's Request for a Finding of Eligibility on July 26, 1989. PG&E argues that Article 18.5 does not apply because SOS is not a consumer as defined in Rule 76.01(d). Because we find Article 18.5 to be inapplicable on other grounds, we do not reach that issue here.

In response to the SOS Request, PG&E did specifically address the applicability of Article 18.6. Rule 76.21 states that the purpose of Article 18.6 is "to establish procedures for awarding reasonable fees and costs to participants in proceedings before this Commission that were initiated on or before December 31, 1984" (emphasis added). PG&E argues that because the Joint Petition was filed on January 27, 1989, Article 18.6 is inapplicable. We disagree. Rule 76.229(h) says, "'Proceeding' means any application, case, investigation, rulemaking, or other formal matter before the Commission." The proceeding in which the Joint Petition was filed is Investigation 84-04-077, which was initiated on April 18, 1984. So long as matters are considered under this docket number, related compensation requests will be governed by Article 18.6. For the same reason, Article 18.7, which governs compensation requests in proceedings initiated on or after

January 1, 1985, does not apply here. PG&E has questioned the ability of SOS to qualify as a PG&E customer as is required for compensation under Article 18.7. The applicability of Article 18.6 makes this point irrelevant, since Article 18.6 merely requires that a party seeking compensation be a "participant" in a Commission proceeding.

PG&E also argues that SOS has failed to demonstrate financial hardship. SOS's Request for a Finding of Eligibility included an estimated budget for participation in this proceeding in the event that it went to hearings. The estimated budget was almost $400,000. In its July 26, 1989 response, PG&E attacked this estimate as "clearly erroneous" since the Joint Petition was resolved without going to hearing. It should be noted that the initial request from SOS was filed prior to our decision resolving the Joint Petition. PG&E argues that such an "erroneous" estimate cannot support a finding of financial hardship. We disagree. SOS has raised questions affecting ratepayer interest in a manner inconsistent with the position of DRA. In addition, SOS has made uncontested assertions that support a finding that economic interests of the individual members of the organization are small in comparison to the cost of effective participation. SOS argues that although its position in this proceeding could save ratepayers tens of millions of dollars, the difference on an individual bill would not be likely to exceed 1%. When an organization such as SOS spends thousands of dollars on properly presenting such a case it will almost certainly experience significant financial hardship.

On October 6, 1989, SOS filed a Motion for Compensation which reflected actual expenditures of $12,624.94. In a November 3, 1989 response, PG&E criticized this motion as premature (because a finding of eligibility had yet to be made), as failing to demonstrate that SOS made a substantial contribution to the outcome of the proceeding, and as inappropriately containing costs that were incurred for hearings that never took place.

Because we are finding SOS to be eligible for compensation, we will direct the organization to file a new Request for Compensation. This new filing should identify the issues concerning which it claims to have made a substantial contribution and itemize its expenses by issue. Without such an itemization, we would be left to make imprecise allocations of expenses, should we disagree with SOS's characterization of its contribution to the outcome of this proceeding.

In addition, we agree with PG&E that it would be inappropriate to compensate SOS for its preparation for hearings that did not take place. At the same time, we recognize that the time needed to thoroughly study the issues raised by this matter and carefully weigh the topics worthy of comment may not be significantly lessened simply because hearings are not held. However, under the existing rules, the line must be drawn after activities which contributed to the decision. Since hearings were not held, hearing-related expenses should not be included in the request.

Findings of Fact

1. On January 27, a Petition for Modification of D.87-04-039 (Joint Petition) was filed by PG&E and DRA.

2. On July 19, 1989, in D.89-07-058, we rejected the Joint Petition in its entirety.

3. Rulofson is an individual who also owns a QF which is on the waiting list for access to transmission capacity in the area which would have been affected by the Joint Petition.

4. PG&E has not demonstrated that any other party adequately addressed Rulofson's concerns.

5. Rulofson has not demonstrated that he is unable to pay the reasonable costs of participation.

6. SOS is a nonprofit corporation which has been opposing certain new diversion hydroelectric (hydro) projects since 1981.

7. SOS asserts that 60 percent of its members are PG&E ratepayers.

8. SOS's Request for a Finding of Eligibility included an estimated budget of $400,000 for participation in this proceeding in the event that it went to hearings.

9. On October 6, 1989, SOS filed a Motion for Compensation which reflected actual expenditures of $12,624.

10. SOS argues that although its position in this proceeding could save ratepayers tens of millions of dollars, the difference on an individual bill would not be likely to exceed 1%.

Conclusions of Law

1. Article 18.6 of the Commission's Rules of Practice and Procedure is the rule which governs requests for eligibility and compensation in this proceeding because it was initiated before December 31, 1984.

2. Article 18.5 does not apply to the instant requests for eligibility, since QF issues are not specifically included in the list of matters which fall within that article.

3. The time spent in preparing to advocate a position before the Commission can be a valid cost of litigation even if it occurs in what would otherwise be leisure time.

4. Rulofson has failed to demonstrate that he is eligible to request compensation for his participation in the Joint Petition process.

5. We are not prepared to make a judgment as to whether or not Rulofson's participation in the Joint Petition process merits compensation, even if he were to be found to have experienced financial hardship.

6. SOS is eligible to request compensation for its involvement in the Joint Petition process.

7. SOS should file a new Request for Compensation that identifies the issues concerning which it claims to have made a substantial contribution and itemizes its expenses by issue.

INTERIM ORDER

IT IS ORDERED that:

1. The request of Ronald E. Rulofson for a finding of eligibility for compensation under Article 18.6 of the Commission's Rules of Practice and Procedure is denied without prejudice.

2. The request of Save Our Streams Council for a finding of eligibility for compensation under Article 18.6 of the Commission's Rules of Practice and Procedure is granted.

This order is effective today.

Dated JAN 24 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director