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Decision 92-03-033 March 11, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Ex Parte
APPLICATION OF EOS (PETALUMA)
FOR FINDING OF EXEMPTION FROM
PUBLIC UTILITIES COMMISSION
REGULATION.

ORIGINAL

Application 91-07-046
(filed July 31, 1991)

O P I N I O N

On July 31, 1991, pursuant to California Local Government Privatization Act of 1985 (California Government Code, § 54250 et seq.) and California Public Utilities (PU) Code § 10013, Envirotech Operating Services, Inc. (EOS) filed an application with this Commission seeking a determination that a wastewater treatment project (the project) to be developed by EOS in Petaluma, Sonoma County, California is not a "public utility" within the meaning of PU Code § 216, and is therefore exempt from regulation by this Commission. Notice of the filing of the application was published in the Commission's Daily Calendar on Wednesday, August 7, 1991.

Formal protests to EOS's application were filed by the law firm of Kathryn Burkett Dickson, Esq. and Jeffrey A. Ross, Esq. also known as Dickson & Ross, 1970 Broadway, Suite 1045, Oakland, California 94612, on behalf of two "public interest" intervenors; Friends of Petaluma (FOP) and Petaluma River Council (PRC) (sometimes collectively referred to as Protestants).

Evidentiary hearings on EOS's application were held on September 23 and October 9, 1991, at which hearings, Kathryn Burkett Dickson, Esq., appeared and fully participated as counsel for FOP and PRC in opposition to the application. By Decision (D.) 91-11-054 issued November 20, 1991, this Commission found EOS's application failed to meet certain statutory requirements and denied the application without prejudice.

On November 22, 1991, pursuant to Rule 76.54 of the Commission's Rules of Practice and Procedure (Rules), Intervenor, through Attorney Dickson, filed a petition requesting a finding of eligibility for compensation for services performed on behalf of FOP and PRC. Opposition to the request for a finding of eligibility for compensation was filed by counsel for EOS on December 24, 1991.

Discussion

Intervenor's fees and expenses for services performed before the Commission in certain cases are governed by Article 18.7 (Rules 76.51 through 76.58 inclusive) of the Rules which, in general, set forth the procedure to be followed in requesting the allowance and payment of fees and expenses in those types of proceedings. As noted above, counsel for protestants has requested a finding of eligibility under Rule 76.54, which is contained within Article 18.7.

Rule 76.51 reads as follows:

"The purpose of this article [Article 18.7] is to provide compensation for reasonable advocate's fees, reasonable expert witness, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the Commission initiated on or after January 1, 1985, to modify a rate or establish a fact or rule that may influence a rate." (Emphasis added.)

As a condition precedent to the application of this section to the request before us, it must be determined whether the underlying proceeding in which FOP and PRC intervened was a "proceeding to modify a rate or establish a fact or rule that may influence a rate". We find that it is not, and for that reason, the request pursuant to Article 18.7 of the Rules for attorney's fees and expenses for counsel's services in opposition to EOS's application must be denied.

Rule 76.51 clearly states that the proceeding in which the services for which compensation is sought were performed must have (a) been initiated on or after January 1, 1985, (b) to modify a rate or establish a fact or rule that may influence a rate. There is no question that the first condition has been satisfied. EOS filed its application with this Commission on July 31, 1991, and notice of the filing was published in the Commission's Daily Calendar on August 7, 1991. Obviously, both of these dates are subsequent to January 1, 1985.

The question which remains to be answered is, was the purpose of the proceeding to modify a rate or establish a fact or rule that may influence a rate? It is this portion of the equation with which we have difficulty.

The City of Petaluma (the City) has an outdated and outmoded wastewater treatment facility badly in need of updating or replacement. In the opinion of the duly elected public officials of the City, replacement of the existing facility is the best solution to their problem. Under existing law, all "public utilities" within the State are, unless specifically exempted, subject to regulation by this Commission. Public utilities owned by a municipality are exempt from regulation by this Commission. In the event, however, that the ownership of a municipally-owned public utility is transferred to a private entity, that utility loses its exempt status and is considered a "public utility" within the meaning of § 216 of the PU Code and is then subject to regulation by this commission.

Due to a sharp decrease in the availability of Federal and State funding for projects such as that proposed by the City, the California legislature passed the Local Government Privatization Act of 1985, which authorized a local governmental agency to enter into an agreement with a private company (privatizer) under which the privatizer would perform some specified otherwise governmental service for the agency in exchange

for a negotiated fee. Before the parties may, however, enter into a binding agreement of this nature, certain statutory and regulatory prerequisites must be met and the approval of the agreement by this Commission obtained.

In furtherance of its desire to privatize its wastewater treatment facilities, the City and EOS entered into a Memorandum of Understanding (MOU) which set forth certain terms and conditions under which the privatization would take place and the facility constructed and operated by EOS at a charge to the City which, in turn, would charge a fee to its residents. When the application for this privatization was filed, FOP and PRC protested. As noted, following hearings and argument, the application was denied. Thus, the efforts of counsel on behalf of the protestants was successful.

By its nature, the proceeding in which FOP and PRC intervened was not a rate proceeding. Its purpose was not to set rates for wastewater treatment services, but to replace a wastewater treatment facility which has reached or exceeded its useful lifespan. The fact that rates for wastewater treatment services might have to be adjusted at some future time to accommodate increased costs of service occasioned by the expense of construction of a new plant does not change the situation. Further, the purpose of the proceeding was not to establish a fact or rule that may influence a rate. As noted, its purpose was to obtain the Commission's approval of a plan to rid the City of a worn out plant and to substitute private services for municipal services.

Since the nature of the underlying proceedings fails to fall within the criteria specified in Rule 76.51, the remaining provisions of Article 18.7 of the Rules have no application. This being the case, a finding of eligibility under Rule 76.54 as requested may not be granted.

Advocates Trust Fund Entitlement

Our inability to make a finding of eligibility, and a subsequent award under the provisions of Article 18.7 of the Rules does not conclude our inquiry into whether counsel for the Intervenors is entitled to an award of attorney fees and expenses for their contributions in the underlying proceeding. We must also consider whether an award from the Advocates Trust Fund would be appropriate under the circumstances of this case.

Under the provisions of Section 1.3 of the Advocates Trust Fund Declaration of Trust, fees will be awarded from the Trust Fund (a) where complainants have generated a common fund but that fund is inadequate to meet reasonable attorney or expert witness fees, (b) where a substantial benefit has been conferred upon a party or members of an ascertainable class of persons but no convenient means are available for charging those benefitted with the cost of obtaining the benefit, or (c) where complainants have acted as private attorneys general in vindicating an important principle of statutory or constitutional law, but no other means or fund is available for award of fees. After a review of the record, we are of the opinion that an award from the Trust Fund is justified in this case under concepts (b) or (c) above.

FOP is an unincorporated association of residents, workers, and business owners in Petaluma, whose goals include public education and public participation in governmental proceedings concerning issues related to quality of life for all citizens in the Petaluma area and has approximately 500 members. Among other things, FOP is particularly interested both in having an open government process with respect to the City's present and future responsibilities for providing sewage treatment services, and in protecting the residential and business ratepayers who will be affected by the City's decisions regarding such services.

The PRC is an unincorporated association of individuals and organizations concerned with the development and quality of the Petaluma River.

It appears from the record that while they have membership consisting of residents and business owners interested in the governmental process in Petaluma as well as members of the Petaluma community interested in the quality of the Petaluma River, neither FOP nor PRC had or now have sufficient financial resources, either individually or collectively, to hire counsel to represent their interests in this proceeding. Further, the interests of each of the individual members of these organizations are such that there could be no reasonable expectation that any such member would or could undertake or underwrite representation of FOP and/or PRC in opposition to the City and EOS. In short, no one individual's interest alone suffices to motivate his or her participation in the underlying proceeding.

We are of the opinion that the efforts of counsel for FOP and PRC were in furtherance of the public interest in that they resulted in obtaining or securing substantial due process rights that otherwise would have been denied the residents of the City. See Zermeno v. Pacific Gas and Electric Company, D.86-12-008. The obtaining or securing of those rights were of sufficient importance and magnitude to justify an award of attorneys fees from the Advocate's Trust Fund.

As a direct result of Intervenor's counsel's efforts, numerous serious shortcomings in the terms and conditions of the MOU were demonstrated. Without counsel's participation in the proceeding, it is possible, if not probable, that the privatization project would have gone forward without compliance with all statutory and/or regulatory requirements and without notice to those affected by the project. In all candor, it is unfortunately apparent that both the City and EOS displayed little or no interest in advising the public of the negotiations which had been going on

between the City and EOS for approximately three years prior to the signing of the MOU. Had it not been for counsel's efforts, the public might well have remained "in the dark" until it was too late to object. Prior to counsel's directing the spotlight of public scrutiny on the wastewater treatment plant project, the dealings between the City and EOS were, for all intents and purposes, private, if not secret.

Through the combined efforts of CPUC staff and intervenors' counsel's efforts, the dealings between the City and EOS were scrutinized and found wanting. Stock ownership by certain city officials in EOS's parent company was discovered and disclosed. It was also disclosed that certain City Council members had received political contributions from EOS's parent or an affiliated company. While the amount of stock held by these city officials was not sufficient to amount to a controlling interest and realistically could not result in a significant financial benefit to the City, EOS, or the officials involved, it was subsequently reported in the press that the stock ownership was determined by the body having jurisdiction over such matters to constitute a conflict of interest.

The contributions of counsel in this case, whether viewed broadly from an oversight point of view, or from a narrow compliance with law perspective, were substantial, significant, and successful. Without those efforts, the public interest would have been ill-served in this instance and the constitutional principle of due process reduced to a mere concept.

For all of the above reasons, we believe an award of attorney fees and related costs from the Advocates Trust Fund is appropriate.

Counsel for FOP and PRC should prepare and submit to the Commission within 30 days from the date of issuance of this decision, a request for an award complying with the terms and conditions set forth in Rule 76.56 of the Commission's Rules of

Practice and Procedure. Responses to the request and replies thereto may be filed as specified in said Rule.

Findings of Fact

1. FOP and PRC properly intervened (protested) in the proceeding which culminated in D.91-11-054, issued November 20, 1991.

2. The purpose of the underlying proceeding culminating in D.91-11-054 was not to modify a rate or establish a fact or rule that may influence a rate.

3. As a result of the efforts of Intervenor's counsel in the underlying proceeding, a substantial benefit has been conferred upon a party or members of an ascertainable class of persons, namely the residents of Petaluma, but no convenient means are available for charging those benefitted with the cost of obtaining the benefit.

4. In their actions, Intervenors acted as private attorneys general and their efforts, through counsel, vindicated an important principle of statutory or constitutional law, to wit: compliance with due process requirements, but no other means or fund is available for the award of fees.

5. Neither FOP nor PRC, nor their members, individually or collectively, have sufficient resources to hire counsel to represent their interests in the underlying proceeding.

6. The interest of no one individual member of FOP or PRC alone suffices to motivate his or her participation in the underlying proceeding.

7. Counsel for Intervenors should receive attorney fees and costs for their efforts on behalf of the public as represented by Intervenors.

Conclusions of Law

1. Article 18.7 of the Commission's Rules do not apply to this proceeding.

2. Protestants may not recover a fee under Article 18.7 of the Commission's Rules.

3. The contribution of counsel for Intervenors was significant and resulted in obtaining or securing substantial due process rights that otherwise would have been denied the residents of the City.

4. Protestants are entitled to an award of fees and costs from the Advocates Trust Fund.

ORDER

IT IS ORDERED that:

1. Within 30 days from the issuance of this decision, Counsel for Intervenors shall submit a request for an award from the Advocates Trust Fund, which request will comply with the terms and conditions set forth in Rule 76.56 of the Commission's Rules of Practice and Procedure (Rules).

2. Responses to the request for award may be filed in accordance with the provisions of Rule 76.56.

This order is effective today.

Dated March 11, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

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

Neal J. Shulman
NEAL J. SHULMAN, Executive Director
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