

APR 1 1992

Decision 92-03-090 March 31, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own)
 motion for the purpose of considering)
 a change to Paragraph 1.4 of the)
 Advocates' Trust Fund to allow the)
 Commission in its discretion to)
 consider an additional factor in)
 making compensation awards; the)
 magnitude of the party's own economic)
 interest in the litigation.)

ORIGINAL

R.91-09-001
(Filed September 6, 1991)

O P I N I O N

I. Background And Summary

On September 6, 1991, the Commission issued the above captioned Rulemaking (R.). In the Rulemaking, the Commission proposed modifying Paragraph 1.4 of the Advocates' Trust Fund (Fund). Interested parties were invited to submit comments or exceptions to the Commission regarding the proposed changes by October 23, 1991. Only two parties filed comments: David L. Wilner and Southwest Gas Corporation (Southwest). Both parties oppose the proposed changes.

This opinion addresses the points raised by the two commenting parties. It also finds that the proposed modification to the Fund should be instituted. To accomplish the change, the Donor of the Fund, Pacific Bell, is made a respondent to this proceeding. The Commission's Executive Director is ordered to meet with Pacific Bell and the Trustee of the Fund to carry out the modification to the Fund.

II. Proposed Modification

A. Introduction

The Commission staff has proposed making the following changes to Paragraph 1.4 of the Fund¹ (deletions are indicated by strikeout type and additions are underlined):

"1.4 An award will be based upon consideration of ~~three~~ four factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the complainant, and (3) the number of people standing to benefit from the decision, and (4) the magnitude of the party's own economic interest in the litigation. No award will be made without a specific finding by the CPUC of what would be a reasonable amount for advocates' attorneys', or expert witness fees, in view of the time spent, expenses proven, level of skill shown, and comparable fees paid to others practicing public utility law. ~~No award should be made where a party's own economic interest is sufficient to motivate participation.~~" (R., pp. 1-2.)

The proposed modification to the Fund was suggested because the Fund currently denies an award to a party where a party's own economic interest is sufficient to motivate participation. The Rulemaking envisions that the proposed changes will give the Commission more discretion to award fees from the fund. Instead of barring parties automatically because of an economic interest in the litigation, the proposed changes will allow fee recovery to parties even if they have an economic interest in the proceeding if the Commission finds good cause for it.

¹ The Fund's Declaration of Trust and By-Laws was approved in Decision (D.)82-05-009. Portions of the Declaration of Trust were modified in D.82-08-059.

B. Position of Southwest Gas Corporation

Southwest opposes the proposed changes to the Fund for three reasons. First, Southwest believes that there are adequate provisions in the Public Utilities Code which mandate that consumer interests be represented in Commission proceedings. The Division of Ratepayer Advocates (DRA) represents the interests of public utility customers and subscribers in Commission proceedings, while the Public Advisor assists members of the public and ratepayers who want to participate in Commission proceedings. Southwest argues that DRA and the Public Advisor's office "... ensure all consumers' interests are well represented in Commission proceedings and the broadest possible spectrum of society benefits from that participation." (Southwest Comments, p. 4.)

Southwest's second argument is that the proposed changes may encourage special interests to participate because of the possibility of compensation, and that this will burden the regulatory process and may give rise to inflated claims for reimbursement. Southwest contends that a party with a substantial economic interest in a proceeding goes through the process of calculating and weighing the cost of participation versus the benefits the party seeks to gain. Southwest opines that including the magnitude of a party's economic interest as one of four factors to be considered in making an award from the fund will encourage self-serving participation in Commission proceedings.

Southwest's third argument is that the Rulemaking did not indicate what new circumstances or events have led the Commission staff to recommend the proposed changes to the Fund. Without this explanation, Southwest contends it is difficult for any party to comment on the merits of the proposed changes, and that the changes will simply speed up the depletion of the Fund.

C. Position of David L. Wilner

Mr. Wilner, who was the force behind the initial formation of the Fund, also opposes the proposed changes. He makes four arguments in opposition to the changes.

His first argument is that the proposed changes will make it possible for a utility to file a complaint with the Commission against another utility or nonutility, and if the complaining utility can demonstrate that it meets certain criteria, to request an award from the Fund. Mr. Wilner contends that the Fund was established so that consumers, and not utilities, can be compensated when filing a complaint against a utility.

Mr. Wilner's second argument is that the Fund's objective is to provide compensation to individuals or groups that do not have the funds to undertake a complaint against a utility. He believes that it would be inappropriate for the Commission to make an award from the Fund to individuals or groups that obtain an economic benefit as a result of their litigation efforts against the utility.

The third argument is that there is no reason for the Commission to change the factors that it considers in making an award from the Fund. Mr. Wilner states that if the Commission is concerned that the Fund is not being utilized, then the Commission should consider making consumers aware of the Fund's availability, and suggests that public hearings may be a way to accomplish this.

Mr. Wilner's fourth point is that when the Fund was created, he believes that the Commission did not intend to exclude nonattorneys from being eligible for an award from the Fund. Mr. Wilner raises this point because the Rulemaking was mailed primarily to public utilities and attorneys practicing before this Commission in an attempt to provide notice to all parties who may be interested in the Fund.

D. Discussion

Both Southwest and Wilner argue that we have offered no reason why the Fund should be changed. We did, however, point out in the Rulemaking the reason for the changes. The proposed changes will permit an award to be made from the Fund to a party who has an economic interest in the outcome of the complaint proceeding if the Commission finds good cause. At present, the Commission is barred under the terms of the trust from making an award from the Fund when the complainant's economic interest motivates the participation. By adopting this proposed change, we stated that "the Commission would have more discretion to award fees from the Fund."

The following is an example of how this new factor may interact with the other three factors listed in Paragraph 1.4 of the Fund. When considering whether to grant an award from the Fund, the Commission may also weigh the complainant's own economic interest. Thus, if there was an important public policy issue decided in a case, the complainant was primarily responsible for pursuing the case, and a large number of ratepayers benefited from the decision, the Commission could then weigh the complainant's own economic interest. Even if the complainant's own economic interest is quite large, an award may still be warranted because of the importance of the decided issue. On the other hand, if the complainant's economic interest in the outcome of the decision is quite large, but the burden on the complainant in pursuing the case was not onerous, an award from the Fund may not be justified.

Simply put, we envision this proposed fourth factor as an additional factor to be considered in deciding whether an award from the Fund is warranted. Whether economic interest is the primary force motivating a complainant's participation is simply another factor that the Commission will weigh along with the three other factors.

Southwest points out that DRA was created to represent the consumer interest in Commission proceedings, and that the Public Advisor's office was created to assist members of the public and ratepayers who want to testify or present information to the Commission in any hearing or proceeding. Southwest believes that these resources render the proposed change unnecessary. Mr. Wilner comments that the objective of the Fund is to provide compensation to someone who does not have the money or resources to pursue a complaint against a utility, but that it is inappropriate for the Fund to make awards when the complaining party receives an economic benefit as a result of the litigation.

DRA and the Public Advisor's office are both important to the resolution of matters that come before this Commission. However, the DRA simply cannot represent all divergent individual interests, and the Public Advisor's office can only assist persons or entities in the procedural processes of the Commission. By modifying the Fund to consider a party's own economic interest, we may encourage those persons who otherwise would not file a complaint because of the lack of money and resources to do so. Such a change will open up the Commission process to all persons with valid complaints, and possibly award them for their cost of participation.²

² The Commission has in the past encouraged the public's participation in Commission proceeding involving the application process. We noted in D.87-05-072, "As we have stated in numerous prior decisions, the Commission encourages intervenor participation in its proceedings to facilitate the expression of various viewpoints that might otherwise be underrepresented and to provide a means whereby individual ratepayers may have a voice in proceedings that will directly affect them." (D.87-05-072 [24 CPUC2d 425, 427].) The time is now ripe to encourage more public participation in the complaint process.

We do not agree with Southwest's contention that permitting consideration of a party's economic interest will burden the regulatory process. In order to receive an award from the Fund, the party must first meet one of the three requirements set forth in Paragraph 1.3 of the Fund. (Decision (D.) 91-05-042, pp. 2-3; D.91-05-025, pp. 12-13; D.93251 [6 CPUC 2d 374, 378-379].) If the first part of the test is met, the Commission must still consider and weigh the proposed four factors in Paragraph 1.4 of the Fund. It is unlikely that the additional factor of considering a party's economic interest will open the doors to a flood of new complaints. For the same reasons, we do not agree with Southwest's comment that the proposed changes will speed up the depletion of the Fund.

Mr. Wilner comments that if the Fund is changed, it will be possible for a utility to file a complaint before the Commission against another utility or nonutility. First, we note that it will not be possible for a utility to file a complaint against a nonutility. This Commission has no jurisdiction over a nonutility. (Cal. Const., Art. 12, § 6; Public Utilities Code § 1702.) Second, as for Mr. Wilner's concern that a utility may be able to recover fees from the Fund, the second factor in Paragraph 1.4 of the Fund, as well as the proposed change, will provide a check on that type of request. In deciding whether to make an award from the Fund, the Commission must weigh as one of the factors "the necessity for private enforcement and the magnitude of the resultant burden on the complainant." The large utilities in California will have a difficult time showing that their participation was burdensome due to the many resources that they have at their disposal. In addition, under the proposed change to the Fund, we can also weigh the utility's economic interest in the outcome of the decision.

Mr. Wilner correctly points out in his comments that nonattorneys are also eligible for an award from the Fund. A review of the cases concerning the Fund confirms this. (See

D.91-06-015; D.90-08-007, p. 9.) Mr. Wilner apparently raised this point because the Rulemaking was mailed to "an extensive list of public utilities and attorneys practicing before this Commission." (R., Ordering Paragraph 2.) Our intent in mailing out the Rulemaking was to notify as many people as possible, both attorneys and nonattorneys, who might have an interest in this matter. That is the reason why the notice of the Rulemaking was published in the Commission's Daily Calendar, and why several service lists in recent major Commission proceedings were used.

Mr. Wilner suggests that the Commission consider taking steps to make consumers aware of the Fund's availability. One suggestion is to hold public hearings.

Mr. Wilner's suggestion to hold public hearings on the Fund is more in the nature of educating utility consumers about the Commission's processes and the availability of intervenor compensation programs, including the Fund. At the present time, when consumers call the Commission's Public Advisor's office to discuss how one can file a complaint or how to participate in a proceeding, the Public Advisor's office provides the consumer with a Commission publication called the "Guide for PUC Intervenors" (Guide). That Guide mentions both the Fund and the intervenor funding program contained in Article 18.7 of the Commission's Rules of Practice and Procedure. Although the Guide does not make the general population aware of the intervenor compensation programs, it does promote some awareness of the available programs. The Guide is also made available at various public participation hearings throughout the state. In addition, the Public Advisor's office is in the process of changing the complaint form to include a notice on the form about the availability of the Fund.

An effective method of disseminating information and educating the most consumers about the processes of the Commission is by way of a Commission sponsored bill insert in the utility bill of the customer. One possibility for educating more consumers

about the Fund and intervenor compensation is by way of a bill insert. An investigation into the extra space in billing envelopes, and what kinds of bill inserts, if any, should be permitted, is the subject of Investigation 90-10-042. That Investigation is the logical forum in which to consider whether a Commission sponsored bill insert, advising ratepayers of the availability of the Fund and the intervenor compensation program, should be included in the extra space of the billing envelope. Accordingly, we will direct that Investigation 90-10-042 consider this issue as part of that proceeding.

We do not believe that the comments of either Mr. Wilner or Southwest should cause us to reconsider the proposed modification to Paragraph 1.4 of the Fund. We believe that the modification will allow the Commission more latitude in making an award from the Fund. In particular, the change to the Fund will allow the Commission to consider the additional factor of one's own economic interest in the proceeding.

In order to modify the terms of the Fund, the Declaration of Trust for the Fund must be modified. Paragraph 8.1 of the Declaration of Trust requires that any amendment or modification must be agreed upon between the "Donor, the Trustee(s) and the CPUC". The original Donor in this case was the Pacific Telephone and Telegraph Company (PT&T). The Advocates Trust Fund involved the settlement of a case involving PT&T's failure to collect tariff charges for the removal of utility-owned PBX equipment when replacing it with newer equipment. (D.92914 (6 CPUC 2d 7, 8).) As a result of the 1983 divestiture of the Bell operating companies, it appears that Pacific Bell has succeeded to the interests of PT&T for the purposes of the Fund. (See D.84-08-015.)

Since Pacific Bell is the donor of the Fund, we will make Pacific Bell a respondent to this Rulemaking for the purpose of obtaining its consent and cooperation to modify the terms of the Fund's Declaration of Trust. We will direct the Commission's

Executive Director, or his designated representative, to work with Pacific Bell and the Trustee of the Fund, so that all the necessary paperwork to complete the modification to the fund, as described in the Rulemaking and in this decision, can be carried out. If any professional services are needed to carry out the modification, the Disbursements Committee of the Fund³ will determine if the fees for such services are reasonable, and if reasonable, will authorize the Trustee to pay out such fees. (See D.82-05-009, Appendix A, Section 5.3.)

Findings of Fact

1. On September 6, 1991, the Commission issued a Rulemaking, which proposed modifications to Paragraph 1.4 of the Advocates' Trust Fund and requested comments from interested parties.

2. The proposed changes to the Fund will permit the Commission to weigh, as one of four factors, the economic interest of the complainant in the proceeding.

3. Only two parties filed comments in response to the Rulemaking.

4. Under the proposed changes to the Advocates' Trust Fund, the Commission will have more discretion to award fees from the Fund.

5. In the past, the Commission has encouraged public participation in Commission proceedings involving the application process.

6. Modifying the Fund may encourage more public participation in the complaint process.

7. It is unlikely that the proposed changes to the Fund will unduly burden the regulatory process or accelerate the Fund's depletion.

³ The Disbursements Committee consists of all the current members of the California Public Utilities Commission. (See Appendix A to D.82-05-009, Section IV.)

8. An effective method of reaching and educating utility customers about the Commission's processes is by way of a Commission sponsored bill insert.

9. Investigation 90-10-042 should consider the issue of whether there should be a Commission sponsored bill insert advising ratepayers of the the Fund and the intervenor compensation program.

10. The proposed modification to the Advocates Trust Fund should be instituted.

11. If any professional services are needed to modify the Fund's Declaration of Trust, the Disbursements Committee should determine if the fees are reasonable, and if so, authorize the Trustee of the Fund to pay such fees.

Conclusions of Law

1. The Commission has jurisdiction over state regulated utilities.

2. Nonattorneys are eligible for an award from the Fund.

3. Modification of Paragraph 1.4 of the Fund requires the agreement of the Donor of the trust.

4. Because of the divestiture of the Bell operating companies, Pacific Bell succeeded to the interest of PT&T as the Donor of the Fund.

ORDER

IT IS ORDERED that:

1. Investigation 90-10-042 shall consider the issue of whether a Commission sponsored bill insert, advising ratepayers of the Fund and the intervenor compensation program, should be included in the extra space of billing envelopes.

2. Pacific Bell, as the Donor of the Advocates Trust Fund, shall be made a respondent to this proceeding for the purposes of modifying the Advocates Trust Fund, and the Process Office is directed to serve a copy of this decision on Pacific Bell.

3. The Executive Director, or his designated representative, shall meet with the Donor and the Trustee of the Advocates Trust Fund to obtain their consent to the modification to Paragraph 1.4 of the Advocates Trust Fund, and to ensure that all the necessary paperwork to complete the modification to the Advocates Trust Fund is carried out by May 29, 1992.

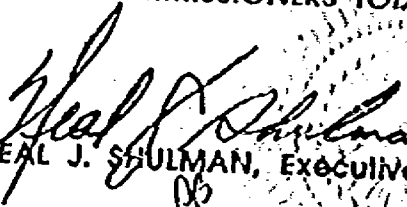
4. The Executive Director shall inform the assigned Administrative Law Judge, by letter, as to the status of the modification on or before June 1, 1992. Copies of the letter shall be served to all parties on the service list.

This order is effective today.

Dated March 31, 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, Executive Director