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ORIGINAL

Decision No. 88533 MAR 7 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CONSUMERS LOBBY AGAINST MONOPOLIES, DAVID L. WILNER, IN PRO PER,

Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, A CALIFORNIA CORPORATION,

Defendant.

Case No. 10066
(Filed March 9, 1976)

David L. Wilner, for Consumers Lobby Against Monopolies (CLAM), complainant.
Clay C. Burton, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.
Rod Pinto, Attorney at Law, for the Commission staff.

INTERIM OPINION

David L. Wilner, representative for Consumers Lobby Against Monopolies, alleges that The Pacific Telephone and Telegraph Company (Pacific) has frequently failed to collect tariff charges for removing its PBX equipment when replacing it with newer Pacific equipment. Complainant contends that as a result of the alleged practice, the costs of disconnection have been borne by the general ratepayer. Complainant seeks to compel Pacific to collect all outstanding charges of this kind. He also seeks to have Pacific ordered to collect all such charges in the future; he contends that the economic burden of the past undercharges should be shifted from the general consumer to the company, presumably by having any undercharges collected paid to, or used on behalf of, Pacific's general ratepayers. Complainant claims both attorney's and lay advocate's fees.

Pacific claims the Commission has no power to award either type of fees. Administrative Law Judge Gilman, assigned to this matter, took this question under submission for advance determination by the Commission, without protest from the parties. The question will be decided on the pleadings, assuming for purposes of decision that complainant will be able to prove all the matters alleged.

Complainant's claim is based on each of the nonstatutory grounds for awarding attorney's fees, i.e., the common fund theory, the substantial benefit theory, the private attorney general theory, and the vexatious and oppressive conduct theory. Since complainant has not alleged facts showing vexatious and oppressive conduct, that theory will not be discussed further.

Pacific claims that the general rule both in California and throughout the United States is that each litigant must pay his own attorney's fees, absent statutory authority or an agreement between the parties. It contends that the Public Utilities Commission has been given only the judicial powers specifically designated in the Public Utilities Code. It reasons, therefore, that the Commission has none of the inherent, nonstatutory powers of a court of equity and hence cannot proceed under any of the theories listed above, all of which are equitable in nature.

Pacific also contends that an award under the common fund theory would be inappropriate, since complainant's efforts were intended to create a new fund, not to preserve an existing one.

Pacific notes that the Commission has previously held that it has no jurisdiction to award attorney's fees. It relies on a recent rate case (Application of Pacific Gas and Electric Company, Decision No. 84902, Application No. 54729) in which the Commission rejected a demand by public interest firms that the Commission award them a sum for anticipated attorney's fees and other costs. The California Supreme Court refused to review that decision, S.F. No. 233957.

That decision is therefore binding precedent since a denial of review by the Supreme Court is a ruling on the merits (People v Western Airlines (1954) 42 Cal 2d 621). The Commission explained its ruling in PG&E as follows:

> "Attorney's Fees and Other Costs
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> "At the prehearing conference, held on November 12, 1973, counsel for Public Advocates, Inc. (Public Advocates) moved that one-tenth of one percent of the proposed rate increase, a sum of $233,000, 'be allocated by the Examiner to the public for it to secure expert witnesses and capable counsel'. This motion was denied from the bench by the examiner.
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> "At oral argument held on May 12, 1975, TURN requested that it be awarded $100,000 to be paid by PG&E for the purpose of specifically compensating it for its time and efforts. EDF, at the oral argument, also requested an award of costs, but in an unspecified amount. TURN and the EDF were allowed until May 27 to file memoranda of points and authorities supporting their positions and PG&E and the staff until June 10 to respond.
>
> "All the parties generally agree that there is a general rule of American law which normally disfavors the allowance of attorney's fees and costs in the absence of statutory or contractual authorization. This rule has been adopted in California in statutory form as Section 1021 of the Code of Civil Procedure (CCP).
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> "Neither of the claimants cited any specific statutory provision of California law under which this Commission could award fees, although EDF claims that the Commission, like courts of law and equity, has the inherent authority to award attorney's and expert witness' fees, citing Section 701 et seq. of the Public Utilities Code as authority. TURN cites Section 701 of the Public Utilities Code as sufficient basis. Both TURN and EDF relied on court cases for authority. None of the parties pointed to any case in which a regulatory agency such as this Commission had awarded costs, and we have been unable to find such a precedent.

"The participation of consumer and public interest groups, such as TURN and EDF, is not a new phenomenon. Over the years many groups and dedicated individuals have appeared and participated in our proceedings. Such participation is to be commended, and even encouraged. We have reservations, however, about encouraging such participation by means of financial incentives. Pursuant to Sections 307 and 309 of the Public Utilities Code we have assembled a legal and technical staff to assist us in the performance of our duties and exercise of our powers. As the staff points out in its memorandum, the awarding costs would require the people of California to pay for representation twice; once as taxpayers and again as ratepayers."

* * *

"There is also the question of how such an award would affect future proceedings. Hearings in a case such as this one under consideration are lengthy affairs, and in the subject case the dedication and sincerity of the public participants cannot be questioned. In the court litigation where the rules as to recovery of costs developed and are presently exclusively applied, there are specific identifiable plaintiffs seeking to rectify some injustice. Under the liberal rules that we, as a regulatory agency, conduct our legislative proceedings, such as a rate case, there are no such readily identifiable plaintiffs. A precedent of awarding costs would undoubtedly attract additional intervenors, most likely more than the processes of the Commission would accommodate. We would then be faced with the necessity of deciding who would be sincere and effective participants and picking and choosing those to accept as appearances. Such a procedure could not avoid causing feelings of discrimination among those rejected. At the conclusion of the case we would be faced with the necessity of measuring the contribution of each intervenor and the appropriate compensation. (Another opportunity for allegations of discrimination.)

"Considering the breadth of interest in a rate proceeding before the Commission, it would impose an impossibly heavy additional burden upon the Commission to have to weigh the worth of each contribution by the numerous pro bono intervenors who would be attracted were there a financial inducement added.

"As a practical matter we consider our past decisions to refuse the awarding of costs to have been wise ones, and this opinion has not been changed by the circumstances we have before us. We also conclude that the court cases cited by the claimants are not sufficient authority for this Commission, an administrative agency, to award costs to participants in a general rate case, a legislative, not a judicial proceeding.

"To open so wide a door, and to impose an additional surcharge upon any rate award so as to satisfy the costs incurred by volunteer pro bono groups, however well intentioned, must be the province of the Legislature. The constitutional and legislative mandate to this Commission is not that broad. Accordingly, we have not, in our adopted results of operations, included as an operating cost, any attorney's fees or similar costs for volunteer groups, and the request of TURN and EDF for such fees and costs will be denied."

The holding in PG&E, supra, which follows the holdings in all prior Commission matters in regard to attorneys' fees is applicable here. This Commission does not have jurisdiction to award attorneys' fees absent statutory authority.[1]

It is agreed by all parties that there is no statutory authority in the Public Utilities Code which expressly authorizes the Commission to grant attorneys' fees in a case such as the one at bar. Complainant asserts that we have certain inherent equitable powers which authorize the grant of attorneys' fees in a limited number of situations, especially those situations set forth in Serrano v Priest (1977) 20 C 3d 25 as a private attorney general, or under the common fund theory, or under the substantial benefit theory, or under the oppressive conduct theory.

The Commission is, without question, vested with equitable powers and may invoke remedies developed by courts of equity. Certainly, we fashion remedies to meet specific situations coming within our jurisdiction. But even here we find a basis in statute, e.g., cease and desist orders (Public Utilities Code Sections 1006, 1034, 1054, and 1071). But to say that we have some powers of a court is not to say we have all powers. The Commission has consistently dismissed actions where the complainant has prayed for damages for tortious conduct (Townsley v PT&T (1972) 74 CPUC 341), damages for breach of contract (Mak v PT&T (1971) 72 CPUC 735), and consequential damages (Horwitz v PT&T (1971) 72 CPUC 505). The Commission has no jurisdiction to adjudicate alleged violations of trademarks (Air Astro Inc. (1969) 69 CPUC 258); nor creditors' rights (Hempy v PUC (1961) 56 C 2d 214); nor to restrain nonutilities (Santa Cruz v La Porte (1966) 66 CPUC 523); see generally Cal. P.U. Digest, Commission, Sec. 17-109 et seq.

1/ This holding does not include attorneys' which may be awarded pursuant to discovery motions. We expressly leave the question open for attorneys' fees in that situation. (See Public Utilities Code Section 1794, "The Commission...may...cause the deposition of witnesses...to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts....")

Section 5 of Article 12 of the Constitution of the state of California provides that "the Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, ..." The Legislature has never granted the Commission authority to impose attorneys' fees.

Section 1021 of the Code of Civil Procedure states:

> "Except as attorneys' fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, expressed or implied, of the parties...."

In 1977 the Legislature added Section 1021.5 to the Code of Civil Procedure, which provides as follows:

> "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of their recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

This section on its face applies only to courts.

Of principal significance to our analysis of this problem is the recent amendment of the Public Utilities Code Section 453(b) which states:

> "No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or changes in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees." (1976, Chapter 1174.)

In Section 453(b) the Legislature was faced with the problem of awarding attorneys' fees in actions brought before the Commission. The Legislature specifically did not provide for attorneys' fees in such actions but provided that after "a person who has exhausted all administrative remedies" is successful in litigation, "the prevailing party shall be awarded attorney's fees." The Legislature could have provided that the Commission award attorneys' fees but it did not; it provided that after administrative remedies were exhausted a party, if successful in court, should obtain attorneys' fees from the court.

Based on our own precedents which have denied claims for attorneys' fees, based on the lack of statutory authority in the Public Utilities Code to award attorneys' fees, based on the lack of statutory authority in the Code of Civil Procedure or other codes to permit the Commission to award attorneys' fees, and based on recent amendments to the Public Utilities Code which specifically authorize courts to award attorneys' fees but not this Commission, we hold that we have no jurisdiction to award attorneys' fees.

The attorneys' fee issue in Serrano v Priest, supra, arose in the Superior Court and was decided under principles applicable to traditional courts and not administrative hearings. We are not persuaded that we should extend Serrano to administrative hearings. Because of the views we take of this matter, it is not necessary for us to decide whether complainant has stated a cause of action, nor whether complainant, as a nonattorney, may claim attorney's fees. For the reasons stated above, we also conclude that we have no authority to award "lay advocate's" fees.

O R D E R

IT IS ORDERED that complainant's petition for attorney's fees and lay advocate's fees is denied. This matter is referred to the presiding Commissioner for further proceedings.

The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 7th day of MARCH, 1978.

Robert Batinovich
President
William Symons Jr.
Vivian E. Sturgeon
Richard D. Gravelle
Commissioners

I concur: Richard D. Gravelle

I will file a dissent
Claire T. Dedrick

Concurring Opinion:

These proceedings present once again for the Commission's determination the question of our ability to award attorneys' fees for presentation and representation of public interest issues by private parties or entities in our proceedings.

Today's decisions discuss the applicable court decisions in great detail, and I believe, correctly apply the law to the factual situations presented. The basic issue however, is broader than the limited question of our jurisdiction to award attorneys' fees. It is more properly directed at the ability of consumers, and their representatives, to participate in Commission proceedings on a professional basis and to adequately present the particular views of the class they represent. As noted the Commission's staff has an obligation to protect the public and to utilize its expertise in such a fashion that the Commission is provided with a record that will enable the Commission to make decisions in the overall public interest. But "public" and "public interest" represent many varied segments which make it impractical, if not impossible, for any one party to claim status as representing all the "public" in defining what is the "public interest." The problem exists not only for our staff but also for any person or entity that might claim the role of consumer advocate, public advocate, or something similar. What we require as a Commission, in order to make ultimate decisions, not as an advocate, but as the trier of fact, determiner of policy, and concluder of law, is a professional record reflecting the broad spectrum of views that constitute the various segments that collectively make up the "public" and impact the "public interest." To create that professional record the various segments must not only have adequate counsel, i.e. attorneys' fees, they must also have adequate expertise, i.e. witness fees. Together then, what is needed is funding--adequate funding--for the result desired.

The problem is properly stated: How do the various segments of the public which wish to have their views considered by the Commission in formal proceedings make those views known to the Commission in a professionally competent manner? The answer to the question is one which has troubled us, the legislature, and those who purport to represent the consumer, for some time. Based upon today's decisions, if supported by the California Supreme Court, the answer must come from the legislature.

Should the California Supreme Court disagree with today's decisions and extend its recent actions involving court ordered reimbursement to successful litigants to proceedings conducted by administrative bodies such as the Commission, then an entire set of new, but not unsolvable, problems will confront us. I would not shirk the responsibility to face these problems if I believed we had the authority to do so, but in the absence of Supreme Court direction, I would not embark upon such a venture and would look, as previously indicated, to the legislature for solution.

I would respectfully suggest that the legislature might establish a procedure whereby the California Department of Consumer Affairs would certify, pursuant to guidelines established by the legislature, a list of consumer organizations that would be identified on the bills sent to consumers by their utility company and would provide the consumer the opportunity to pledge and pay, with his utility bill payment, whatever sum he wished to voluntarily contribute to the certified consumer organization of his choice. The Commission could have the responsibility of seeing that the utility company properly accounted for and disbursed the funds collected to the proper consumer organization. In this way, without additional taxes, or requiring additional staff personnel or a duplicative bureaucracy, the consumer--the public--could voluntarily choose the organization he believes would most nearly reflect and present his views.

There are existing consumer organizations doing a good job under severe

financial handicap that I am sure would qualify under any guidelines created by the legislature. If they did not satisfy the consumers' expectations I am sure his financial support would terminate. If consumers chose not to contribute enough to any organization to allow it to function professionally, a result I would not expect to occur, then all concerned would have been given the public's message--that the current practice is all that is required and legislature, Commission, consumer organizations et al, should direct their concerns to other areas.

The foregoing is not the only solution to the problem but it is, I believe, better than any other I have seen to date. If it has merit it should be implemented immediately. Time will then tell the magnitude of the problem and the efficacy of the solution.

This proceeding has not been submitted on the merits by the assigned Commissioner for decision by the Commission. Therefore, without making any comment on the merits of the complainant's showing I will say that if the contentions of the complainant are borne out by the evidence Mr. Wilner will have performed a valuable public service in filing the pursuing Case No. 10066. The Commission should appreciate the efforts of individuals who bring incidents of illegal utility activity to its attention. This regulatory body exists to hear the merits of such complaints and to render decisions ordering collective action or other appropriate relief if the evidence so justifies. Our staff, I recognize, cannot always be currently abreast of all utility conduct. In view of that reality it is apparent that Mr. Wilner's concern and willingness to pursue what he perceives as utility wrongdoing deserves consideration. This decision today will not, I trust, be taken as a rebuke by Mr. Wilner. My observation of Mr. Wilner's efforts and participation before this Commission

in the past is that he whole heartedly pursues positions he believes to be in the public interest. If the legislature enacts a program for funding consumer representatives as outlined above in this concurrence I would envision that Mr. Wilner's organization (Consumer's Lobby against Monopolies) might very well qualify as a group eligible for inclusion on the checklist to receive voluntary funding through ratepayers.

Richard D. Gravelle

Richard D. Gravelle
Commissioner

March 7, 1978

C.10066 - D.88533

COMMISSIONER CLAIRE T. DEDRICK, DISSENTING:

My dissent from this decision is based on my belief that the decision refuses an award of advocacy fees in the narrow case presented here out of concern that broad and unrestricted intervention in Commission proceedings by numerous consumer advocates and interested members of the public may ensue, rather than on the merits of this specific case. The decision incorrectly assumes that an award of fees in this case will "open the floodgates" to claims for compensation, and therefore rejects a claimant presenting a truly equitable claim for fees and one which, on its factual basis, would have set no precedent for a flood of "me too's" from the general public.

How is this a "narrow" case? The claimant in this case, on his own, presented certain issues for the Commission's attention, the resolution of which, if the claimant's allegations are ultimately found to be meritorious, would produce a financial benefit for the ratepayer. The crucial point, however, is that Mr. Wilner brought his complaint to the Commission and pursued it for some period of time without assistance of the Commission staff. That is, because of unavoidable staffing pressures and priorities, Mr. Wilner had to pursue the matters he presented on his own, necessarily incurring expenses of his own.

The principal point is this: the Commission's staff is the proper representative of the public interest in proceedings before the Commission. Therefore, in cases in which the staff participates, it would be unfair to assess additional costs against the taxpayers for additional public representation offered by intervenors and other interested parties appearing before the Commission. This simple point serves to differentiate this case from the majority of cases in which the public plays a role. It is a rare case in which the public is not represented or assisted by our staff in Commission proceedings. Further, staff participation would preclude awards of fees to public advocates in quasi-legislative proceedings, in which the staff is required to perform

the Commission's evidence-testing function and to test the issues on the basis of its own expertise.

I believe that we can and should consider an award of advocacy fees in cases in which the following factors coalesce:

1. The staff is incapable or unwilling to represent the complaining party or parties; and

2. the principal issues adduced do not require the Commission to resolve competing claims concerning the "public interest", but require the Commission to respond quasi-judicially, applying the law to past conduct or occurrences; and

3. the named complainant, if representing a class of persons, has no conflict of interest with the class and is as a practical matter, capable of bearing a fiduciary relationship with the absent members of the class; and

4. the efforts of the complainant(s) result in either the protection or preservation of a constitutional right or rights of the public, or such efforts create a common fund or other tangible benefit inuring to the public.

These four factors, all of which are present in the Wilner case, are sufficient to tailor claims for advocacy fees so as to prevent any "floodgate" effect. Further, inherent in these factors and in the Wilner case, is the principle that lay advocacy such as that found here fills a void created by the absence of staff participation. That is, but for outside participation, nothing may have been done in the instant case. For this service, the public advocate deserves compensation.

A final point: one of the Commission's two primary functions is the resolution of complaints brought by members of the public that a practice of a utility or carrier is unlawful. It appears to me that the Legislature intended such complaints to be tried either before this Commission or in the courts. While the courts have elaborate and complex rules governing fee awards, in a case such as this a claimant would have at least

a litegable claim for compensation. I can perceive no reason to believe that the Legislature intended to impose any special disabilities on those having a claim against utility practices simply because they brought their case before this Commission. Unfortunately however, this is the practical effect of the majority's decision today.

CLAIRE T. DEDRICK
Commissioner

San Francisco, California
March 7, 1978