

Application No. 91486 APR 2 1980

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of)
MARTIN E. WHELAN, JR., INC. and)
MARTIN E. WHELAN, JR. for Modifi-)
cation of RESOLUTION NO. G-2256;)
and for Award of Attorneys Fees.)

Application No. 58513
(Filed December 7, 1978)

O P I N I O N

On November 28, 1978 by Resolution No. G-2256 the Commission authorized Southern California Gas Company (SoCal) "to provide a one-time credit of approximately \$238,000 plus 7 percent interest to its G-45 customers and to include such funds in its PGA balancing account as unrecovered cost of gas." On December 7, 1978 the above-captioned application was filed, wherein applicant requests attorney fees of one-third of the principal and interest to be recovered by the affected G-45 customers other than Tehachapi-Cummings County Water District (Tehachapi-Cummings).

Tehachapi-Cummings was the complainant in Case No. 10472, Tehachapi-Cummings County Water District vs. Southern California Gas Company. The law firm of Whelan and Markham through Martin E. Whelan, Jr. appeared for Tehachapi-Cummings. The public hearing was held before Administrative Law Judge Main on March 20, 1978 and the case was submitted upon the filing of reply briefs on May 19, 1978. The relief requested by Tehachapi-Cummings was a refund of \$6,834.35 plus interest. The amount of the refund sought was determined by applying 1-cent-per-therm to Tehachapi-Cummings gas usage during the July 19, 1977 to November 1, 1977 delivery period.

CORRECTION

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THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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During that period the rates for gas engine service (Schedule G-45) were 1-cent-per-therm higher than intended because of an error in Decision No. 87587 dated July 12, 1977 in Application No. 57196. In that decision, Schedule G-45 was assigned inadvertently the same commodity rate as rate schedules having Priority 3, 4, and 5 customers. Any lower rate for Schedule G-45 customers would have required, however, an increase in rates for other classes to fully recover the increased costs because the assigned rate had been designed to offset the cost increases incurred by SoCal.

The error was discovered and corrected on November 1, 1977. Decision No. 88080 issued on that date required SoCal to reduce the commodity charge under Schedule G-45 by 1-cent-per-therm applicable to all service rendered on and after November 1, 1977.

Because of the limited scope of relief sought by the Tehachapi-Cummings formal complaint, the Commission on its own initiative undertook, within the framework of Application No. 57196, supra, and the statutory provisions prohibiting discrimination between similarly situated customers, to re-examine the matter to see if there was a viable way in which to compensate all the gas engine customers to the extent the rate was higher than intended and yet permit SoCal to recoup the resultant revenue shortfall. An outcome of this re-examination was a proposed decision, listed on the Commission President's Public Agenda No. 2523 for the conference held October 31, 1978, (of which we take official notice) as follows:

- "12. A.57196 - SoCal Gas Co to incr rev to offset higher gas costs resulting from natural gas purchased from Transwestern Pipeline Co, et al;
C 10472 - Tehachapi-Cummings County Wtr Dist vs SoCal Gas Co. SoCal Gas Co ordered to revise Schedule No. G-45 (Gas Engine Customers) to incl lmt'd & temporary 1 cent per therm redctn in

commdc rate. The redctn will be available to each eligible Gas Engine Customer until quantity of therms delivered reaches customer's usage in July 19, 1977 to Nov 1, 1977 period or until Dec 31, 1979, whichever occurs first. C 10472 is dismissed.
(Com Gravelle - ALJ Main)"

The proposed decision was held several weeks. During that time, on November 16, 1978, SoCal filed its Advice Letter No. 1158 requesting the authority ultimately granted by Resolution No. G-2256, supra. The proposed decision, referred to above, was accordingly moot and withdrawn from the President's Public Agenda.

Shortly before the refunds required pursuant to Resolution No. G-2256 were to be made, applicant filed the instant Application No. 58513 requesting an award of attorney fees. We then issued Decision No. 89726 in this proceeding, dated December 12, 1978, which stayed the implementation of Resolution No. G-2256 (the effect of which was to stay the refunds). We stated in Decision No. 89726:

"By Resolution No. G-2256, approved November 28, 1978, certain refunds are to be made to Southern California Gas Company's G-45 customers (industrial gas engine use).

"On December 7, 1978 the above-captioned petition was filed, wherein the attorney who originally represented one of the affected G-45 customers, Tehachapi-Cummings County Water District, requests attorney fees of one-third of the principal and interest recovered by the affected G-45 customers (other than Tehachapi-Cummings).

"In order not to prejudice the petitioner's claim, the implementation of the refunds approved by Resolution No. G-2256 should be stayed until further order of the Commission.

"Because refunds as authorized by Resolution No. G-2256 will otherwise be made in the near future, and because the Petition for Award of Attorneys Fees was just filed on December 7, 1978, this order should issue immediately."

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It is fairly evident that what prompted SoCal's filing Advice Letter No. 1158 was the proposed decision that was under consideration by the Commission. Under these circumstances it should also be evident that applicant's role in this matter was limited to serving the interests of its client, Tehachapi-Cummings, for which applicant was presumably paid; applicant is not entitled to more. ✓

As indicated, the Commission considered its proposed decision, which was ultimately mooted by SoCal's advice letter filing, in compliance with the statutory provisions prohibiting discrimination between similarly situated customers (Sections 453, 454, 532, and 734 of the Public Utilities Code). In a broader sense that statutory scheme, by making available the results of any Commission decision and the relief it provided available to all customers similarly situated, makes the traditional class action unnecessary. Mr. Whelan's efforts arguably may have benefited Tehachapi-Cummings, but it was the initiative of the Commission and SoCal that directly benefited those similarly situated pursuant to the regulatory scheme provided by the Legislature. Logically, therefore, other Schedule G-45 customers owe the applicant nothing. If attorney fees were awarded as proposed by applicant, he would reap a windfall for an action the Commission was obligated to adopt in any event given the statutes referred to above; the result would be inequitable to say the least.

The California Supreme Court has determined that the Commission may award attorney fees to public interest participants in quasi-judicial reparation proceedings under the common fund doctrine in meritorious cases; CLAM v PUC, SF 23863, opinion issued December 6, 1979. In the circumstances under discussion herein we conclude that applicant, through his involvement in Case No. 10472, was not directly or substantially instrumental in securing the refund for the G-45 customers as a class, and that, as such, applicant's claim is not meritorious.

A public hearing is not necessary because this matter may be resolved based on the pleadings and items or events of which we take official notice; including the record in

Case No. 10472 and SoCal's Advice Letter No. 1158. A public hearing would serve no useful purpose with respect to developing further facts on which a decision in this application for attorney fees could be based.

Findings of Fact

1. An inadvertent error in Decision No. 87587 resulted in an improper rate being assessed Schedule G-45 customers.
2. The Commission, on its own volition, undertook to equitably rectify the situation as it affected all Schedule G-45 customers referred to in the above finding; however, before action was taken on the proposed Commission decision, SoCal filed its Advice Letter No. 1158 which provided for refunds to all Schedule G-45 customers.
3. As a result of the Commission's approval of Advice Letter No. 1158, by Resolution No. G-2256, the same equitable result occurred and the pending proposed Commission decision was thereby moot and withdrawn from the President's Public Agenda.
4. Securing the refunds for all affected Schedule G-45 customers was the direct result of the initiative of the Commission and/or SoCal, and not the result of the applicant through his participation in proceedings before the Commission.

Conclusions of Law

1. The relief requested in the application should be denied because the applicant was not instrumental in advocating or procuring a refund for all affected Schedule G-45 customers.
2. The stay of Resolution No. G-2256, imposed by Decision No. 89726, should be lifted.
3. A public hearing is not necessary.

O R D E R

IT IS ORDERED that:

1. Application No. 58513 is denied and the stay imposed on Resolution No. G-2256 by Decision No. 87926 is lifted.

2. The Executive Director is hereby directed to serve a copy of this order on the Southern California Gas Company.

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

Dated APR 2 1980, at San Francisco, California.

John E. Conroy
President

Wesley L. ...

Harold D. ...

Lawrence J. ...
Commissioners

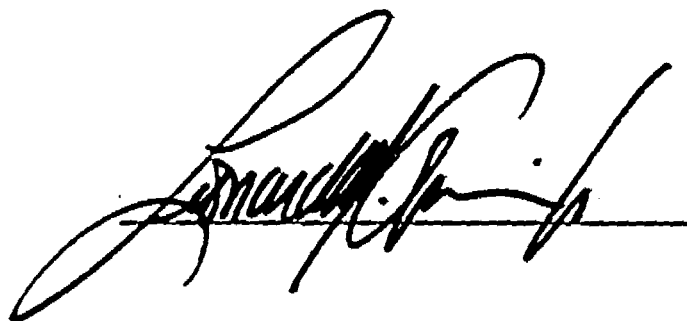
See attached ...

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

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A.58513

LEONARD M. GRIMES JR., Concurring

I concur with the majority vote in denying this specific request for attorney's fees. However, that is not to say that I have lost my interest in awarding attorney's fees and other means of financial support for intervening parties who substantially contribute to any proceeding before this Commission. I shall continue to seek a comprehensive procedure to accomplish such an objective.

A handwritten signature in cursive script, appearing to read "Leonard M. Grimes Jr.", written over a horizontal line.