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Decision No. 91848 JUN 3 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for authority to revise its gas service tariff to offset the effect of increases in the price of gas from Pacific Gas Transmission Company. (Gas)	Application No. 57481 (Filed July 28, 1977)
In the Matter of Advice Letter No. 1092 of SOUTHERN CALIFORNIA GAS COMPANY to increase revenues to offset changed gas costs under its approved PGA procedures resulting from adjustments in the price of natural gas purchased from TRANSWESTERN PIPELINE COMPANY, EL PASO NATURAL GAS COMPANY, and PACIFIC INTERSTATE TRANSMISSION COMPANY.	Application No. 57573 (Filed September 13, 1977)

Brobeck, Phleger & Harrison, by William H. Booth, Attorney at Law, for California Manufacturers Association, Kerr-McGee Chemical Corporation, Amstar Corporation, California Portland Cement Company, Kaiser Cement and Gypsum Company, Southwestern Portland Cement Company, and Monolith Portland Cement Company, petitioners.
Walter H. Kessenick, Attorney at Law, for the Public Utilities Commission, respondent.

O P I N I O N

In Decision No. 88261, in Application No. 57481, the Commission applied rebates received by Pacific Gas and Electric Company (PG&E) to the company's gas balancing account thus deferring a prospective rate increase requested by the utility. In

Decision No. 88751, as modified by Decision No. 89049, in Application No. 57573, a similar treatment was accorded to rebates received by Southern California Gas Company (SoCal). The California Manufacturers Association (CMA) and others filed a petition for writ of review in the California Supreme Court in S.F. No. 23823 with respect to Decision No. 88261 and a similar petition in S.F. No. 23881 with respect to Decisions Nos. 88751 and 89049. In a single opinion dated August 15, 1979, the court disposed of both proceedings, annulling the decisions insofar as they disposed of rebates other than as rate refunds to be distributed pursuant to Public Utilities Code Section 453.5. In remanding the proceedings to the Commission the court stated:

> "Petitioners shall recover their costs from the Commission; real parties shall bear their own costs. (See Rule 26(a), Cal. Rules of Court.)." CMA v PUC 24 Cal 3d 836,849.)

Pursuant to the Court's order on the subject of costs, CMA and the other petitioners in S.F. No. 23823 and S.F. No. 23881 (petitioners) on October 17, 1979, filed a pleading with the Commission entitled Petitioners' Cost Bill. The petitioners seek an award of costs from the Commission for expenses incurred by the petitioners totalling $6,882.85. However, the cost bill seeks not only an award with respect to S.F. No. 23823 and S.F. No. 23881, the proceedings in which the petitioners prevailed, but also an award of costs in S.F. No. 23691 and S.F. No. 23751, petitions for Writ of Mandamus and for Writ of Supersedeas, in which the petitioners did not prevail.

On October 26, 1979, the Commission staff filed a pleading entitled Notice of Motion to Strike Cost Bill or in the Alternative to Retax Costs. On October 31, 1979, the staff filed a pleading entitled Supplement to Notice of Motion to Strike Cost Bill, or in the Alternative to Retax Costs.

Pursuant to the notice of motion filed by the staff, a hearing was held on November 16, 1979, before Administrative Law Judge Robert T. Baer in San Francisco where the issues raised by the cost bill were argued by the parties and the proceeding was submitted for decision.

Issues

1. Does the Commission have jurisdiction to determine what costs are either appropriate or reasonable or have in fact been incurred?

2. If the Commission has jurisdiction to make the determinations regarding the cost bill, what costs should appropriately be awarded to the petitioners?

Jurisdiction

Although the awarding of costs on review of a Commission decision was a novel result, CMA v PUC (supra) includes no discussion of the Court's intentions or of the mechanism by which costs are to be determined. In ruling that petitioners shall "recover their costs" from the Commission, the Supreme Court left uncertain whether the Commission, the Court itself, or a lower court would be responsible for calculating the amount of such costs. The assignment of this responsibility would appear to depend upon whether the Commission possesses or can properly exercise jurisdiction to determine costs in such a case.

The staff argues that the Commission lacks jurisdiction to entertain the cost bill. The staff contends that no statute or constitutional provision confers upon the Commission the jurisdiction to approve or disapprove a bill for costs on appeal and that, therefore, the Commission cannot act on the cost bill submitted by petitioners.

Although the staff did not mention Section 701,[1/] that section is arguably applicable to the issue of costs on appeal.[2/] We first

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1/ "The commission may supervise and regulate every public utility in this State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

2/ We will later address the question whether "costs on appeal" correctly characterize the issue before us.

note that Section 701 is permissive, rather than mandatory.[3] Thus, if a certain order appears to us to be "necessary and convenient" in the regulation and supervision of public utilities we may issue that order, with the sole qualification being that such an order must be cognate and germane to the regulation of public utilities. Thus, even if we were to find that a certain order was necessary and convenient, that finding would not compel the issuance of an order, since the statute is couched in permissive terms. We do not, however, reach that point, for we expressly find that the taxing of costs on appeal by the Commission is neither necessary nor convenient.

For many years (at least in the memory of those Commissioners and staff members now with the agency) costs have never been awarded by the California Supreme Court in proceedings to review the orders and decisions of the Commission. Of course, we can only speculate upon the reasons for the existence of such a consistent and long-standing policy. Among possible reasons, the following come to mind:

1. Rule 58 of the Rules of Court, the only rule which specifically deals with review of the Commission's orders, does not address the subject of costs incurred in such review proceedings.

2. Chapter II, Rules on Original Proceedings in Reviewing Courts, of Division I of Title I of the Rules of Court does not address the subject of costs incurred in such review proceedings.

3. The costs incurred by a prevailing party would usually be minimal because: first, it is rare for parties to cause their pleadings to be commercially printed;[4] second, the Commission

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3/ "'Shall' is mandatory and 'may' is permissive." (Section 14.)

4/ In this case $5,143.95 of the total of $6,882.85 claimed is attributable to commercial printing of the petitioner's briefs in S.F. No. 23691.

submits its original record to the court rather than incurring copying costs; third, incremental xeroxing costs for parties with their own equipment are minimal and copying costs of commercial establishments are reasonably low; and fourth, the filing fee is only $50.00.

4. When the court assesses costs against the Commission, it creates a conflict of interest if the court expects the Commission both to adjudicate the question of costs and to pay over to the other party litigant the costs it has adjudicated. 5/

5. A uniform policy of awarding costs to all prevailing parties could tempt affluent parties to incur high commercial printing costs in order to discourage consumers or consumer groups from challenging Commission decisions.

In addition to the above, certain anomalous results could occur, as demonstrated by the following cases:

1. A uniform policy of awarding costs to all prevailing parties could result in the unequal application of the policy when one party, alleging poverty, seeks to be excused from paying costs. (See correspondence in S.F. Nos. 23863 and 23868, CLAM & TURN v Public Util. Comm. (1979) 25 C 3d 891.)

2. The cost to the Commission and to the litigants of adjudicating contested cost issues would frequently exceed the reasonable costs incurred, as is manifestly the case in this proceeding.

5/ The staff contends: "For the Commission to adjudicate a matter in which it has an interest also violates the very essence of due process." (Johnson v Mississippi (1971) 403 US 212, 216; La Strange v City of Berkeley (1962) 210 CA 2d 313, 325.)

For all of the reasons enumerated above, we conclude that it is neither necessary nor convenient in its regulation and supervision of public utilities for the Commission to involve itself in the adjudication of costs on appeal. Rather, such exercises are completely tangential to our primary function, consume scarce resources, and do not foster the public interest in the regulation of public utilities in any significant way. Accordingly, the adjudication of costs on appeal is not cognate and germane to the regulation of public utilities and is thus not one of the "things" which Section 701 authorizes us to do. It follows that we lack jurisdiction to adjudicate such costs under Section 701.

In filing their cost bill petitioners apparently rely on Code of Civil Procedure Section 1034. This section is for several reasons inapplicable to the Commission. First, by its terms it deals only with courts within the judicial system and not with the Commission. Secondly, it deals with costs on appeal, as opposed to costs in proceedings which invoke the Supreme Court's original jurisdiction. It is important to note again that costs are provided for in the Rules on Appeal but not in the Rules on Original Proceedings. Third, Section 1034 provides for an impartial forum to adjudicate costs on appeal, whereas, if the section is strained to apply to the Commission, the Commission would be forced to litigate a matter in which it has an obvious interest. Fourth, although the Commission does act as a court in quasi-judicial matters, it did not do so in the underlying

proceedings out of which petitioners' claim arises. Rather, those proceedings were quasi-legislative in nature, involving applications for rate increases by PG&E and Southern California Gas Company. Fifth, there is no necessity for the Commission to deal with petitioners' cost bill. The California Supreme Court should adjudicate costs in an original proceeding, absent statutory authority for the Commission to do so.

It follows from the above discussion that the Commission lacks jurisdiction under any statutory or constitutional provision to entertain petitioners' cost bill. Therefore, we cannot conclude that the Supreme Court intended for us to do so.6/

In the interest of avoiding further litigation - should the Supreme Court disagree with our conclusion as to jurisdiction - we now, by way of dicta only, address the second issue.

6/ We respectfully suggest that the court may wish to reconsider its recent policy of assessing costs and revert to its former policy that all parties should bear their own costs. The former policy has not discouraged consumers and consumer groups, some in propria persona, from challenging the Commission's decisions. The former policy does not risk placing greater financial burdens upon consumers and consumer groups, who in the great majority of cases are not the prevailing parties. Finally, the former policy does not place either the court or the Commission in an anomalous position.

Cost Award

The following costs claimed by petitioners are called into question by the staff's pleadings:

1.	S.F. No. 23691, filing fee, October 7, 1977.....	$ 50.00
2.	S.F. No. 23691, printing and binding cost associated with the original and 30 copies of the Petition for a Writ of Mandamus, with accompanying Memorandum of Points and Authorities in Support of Petition for Writ of Mandamus.....	$5,143.95
3.	S.F. No. 23751, filing fee, December 21, 1977.....	$ 50.00
4.	S.F. No. 23751, duplicating and binding cost associated with the original and twenty-two (22) copies of the Petition for Writ of Supersedeas in Aid of This Court's Appellate Jurisdiction, or in the Alternative, for Writ of Mandamus and Injunctive Relief With Supporting Memorandum of Points and Authorities	
	a. Copying 4,246 pages at $0.10 per page.....	$ 424.60
	b. Binding, 23 copies at $1.50 per copy.....	$ 34.50
	Grand Total	$5,703.05

The staff argues that the above items are not legally chargeable as costs because they were not incurred by the petitioners in connection with S.F. No. 23823 and S.F. No. 23881, the two petitions for writs of review which were granted and which led to the order in CMA v PUC 24 CA 3d 836. They were incurred in connection with two other petitions, to wit, S.F. No. 23691 and S.F. No. 23751, both of which, although admittedly related to the

other Supreme Court proceedings, were nevertheless denied without opinion by the Supreme Court. Not having prevailed in those proceedings, the staff contends, the petitioners are not entitled to an award of costs under Rule 26(a) of the California Rules of Court.

The Commission concurs with the arguments of the staff in this respect. The petitioners are not entitled to costs totalling $5,703.05, which costs were incurred in connection with S.F. No. 23691 and S.F. No. 23751, in which the petitioners did not prevail.

Petitioners have claimed costs of $1,179.80 in connection with S.F. No. 23823 and S.F. No. 23881, the cases in which the petitioners prevailed. The staff does not dispute the amount.

Finding of Fact

It is neither necessary nor convenient in regulating and supervising public utilities for the Commission to adjudicate costs in original proceedings, for the reasons enumerated more fully in the discussion of Section 701.

Conclusions of Law

1. Section 701 does not confer jurisdiction upon the Commission to adjudicate or to award costs in original proceedings.

2. Section 1034 of the Code of Civil Procedure is applicable to courts in the judicial system and not to the Commission. Section 1034 applies to costs on appeal and not to costs in proceedings within the original jurisdiction of the California Supreme Court.

3. Proceedings to review decisions and orders of the Commission are proceedings within the original jurisdiction of the California Supreme Court and are not appeals.

4. Rule 26 of the Rules of Court applies to appeals but is inapplicable to proceedings within the original jurisdiction of the California Supreme Court.

5. There is no rule in Chapter II (Rules on Original Proceedings in Reviewing Courts) of Division I of Title I of the Rules of Court addressing the subject of costs incurred in such review proceedings.

6. The Commission lacks jurisdiction to adjudicate and to award costs in original proceedings of the California Supreme Court.

7. The cost bill should be stricken for lack of jurisdiction.

O R D E R

IT IS ORDERED that the petitioners' cost bill is stricken.

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

Dated JUN 3 1980, at San Francisco, California.

John E. Bryson
President

Commissioners

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