

ORIGINAL

92236 SEP 16 1980

Decision No. \_\_\_\_\_

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for authority, among other things, to increase its rates and charges for electric service.

Application No. 58545  
(Filed December 26, 1978)

(Electric)

Application of Pacific Gas and Electric Company for authority, among other things, to increase its rates and charges for gas service.

Application No. 58546  
(Filed December 26, 1978)

(Gas)

ORDER DENYING PETITION FOR AWARD OF ATTORNEY FEES AND PARTICIPATION COSTS

Toward Utility Rate Normalization's (TURN) petition, initially filed June 15, 1979 and amended January 17 and July 29, 1980, seeks an award of attorney fees and participation costs in the amount of \$44,422.44 pursuant to the federal statutory requirements set forth in Section 122 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

TURN was an active participant in these consolidated Pacific Gas and Electric Company (PG&E) gas and electric general rate proceedings, in which the Commission ultimately issued Decision No. 91107, dated December 19, 1979. TURN alleges that its participation in the electric rate phase of these proceedings made a "substantial contribution" to the Commission's implementation of PURPA as reflected in Decision No. 91107. In doing so, TURN

contends it incurred financial hardship as a representative for PG&E's residential electric customers and other consumer interests, and, accordingly, now petitions the Commission for the aforementioned award of fees and participation costs.

On June 29, 1979, TURN was advised that several of the issues contained in its petition concerning the implementation of PURPA were actively before the Commission in Order Instituting Investigation No. 39 (OII No. 39). In addition, resolution of other related matters was also before the California Supreme Court in Consumers Lobby Against Monopolies et al. v PUC, S.F. No. 23863 and TURN v PUC, S.F. No. 23868. Pending resolution of these matters the Commission's determination relative to TURN's petition for an award of attorney fees and participation costs in Application No. 58545 was held in abeyance.

On December 6, 1979 the California Supreme Court reached its decision in Consumers Lobby Against Monopolies et al. v PUC and TURN v PUC (25 Cal 3d 891). The Court held that ratemaking proceedings are quasi-legislative and that this Commission lacks general authority to award fees and costs in such proceedings. The Court did, however, note that such authority could be conferred on the Commission by legislation and cited PURPA by way of example (25 Cal 3d, supra, at 912 fn 9).

Section 122(a)(2) of PURPA provides, in part, that:

"A consumer entitled to fees and costs...may collect such fees and costs from an electric utility by bringing a civil action in any State court...unless the State regulatory authority...has adopted a reasonable procedure pursuant to which such authority...determines the amount of such fees and costs, and...includes an award of such fees and costs in its order in the proceeding." (Emphasis added.)

On December 1979, in Decision No. 91107, the Commission again addressed TURN's petition, stating in part:

"The proceedings in OII 39 are designed to develop a comprehensive policy with respect to Section 122 of PURPA. Following issuance of a decision in OII [39] we will evaluate TURN's participation in this rate proceeding in light of the criteria developed in OII [39]."

That decision directed TURN to file an itemization of its costs of participation in the proceeding, and denied TURN's petition for reimbursement without prejudice to a subsequent similar filing. The decision did not, however, guarantee any reimbursement to TURN. TURN filed both the itemization and, on July 28, 1980, a "Supplemental Petition for Award of Compensation." PG&E has filed responses opposing all of TURN's requests.

In Decision No. 91909 issued June 17, 1980 in OII No. 39, the Commission responded to the federal delegation of authority recognized by the California Supreme Court and established a comprehensive set of rules for the implementation of PURPA Section 122(a)(2). These rules became effective forty days after the July 28, 1980, effective date of the Commission's decision in OII No. 39.

Although the Commission arguably has had jurisdiction to award intervenor fees under PURPA since its enactment, the Commission had no procedure for doing so prior to the issuance of Decision No. 91909. That decision established such a procedure which, by implication, was to operate prospectively.

In their most recent filings, TURN and PG&E take opposite positions on the issue of retroactivity. TURN argues in favor

of retroactive operation of our procedures; PG&E argues for prospective application. We have carefully considered the arguments raised, and remain of the opinion that our rules implementing Section 122(a)(2) of PURPA should apply prospectively only.

Prospective application ensures that all potential intervenors have full and equal notice of the opportunity to seek reimbursement in appropriate proceedings. It also gives electric utilities under our jurisdiction notice that, in future rate proceedings, they may very likely be assessed at least a portion of intervenors' costs. Moreover, all intervenors who choose to seek reimbursement will begin on the same footing and will be subject to the same standards for compensation.

We are convinced that PURPA intended this result. Section 122(a)(2) establishes an alternative remedy in civil court, absent an established procedure adopted by the appropriate regulatory agency. We interpret this language to mean the remedy in civil court applies until a state regulatory agency has adopted a procedure: after a procedure is effective, the remedy is with the agency. PURPA contains no other guidance on the question of whether the adopted state procedure should be made retroactive; we consider the language of Section 122(a)(2) to be a strong indication that PURPA contemplates prospective operation of a state's program.

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For the reasons expressed above, and because the civil remedy clearly preserves any right to reimbursement for compensable participation in an electric rate proceeding ending before a state enacts rules implementing PURPA, it is reasonable and equitable for our PURPA procedures to operate prospectively only.

We now come to TURN's petition. The proceeding for which TURN seeks reimbursement ended six months before Decision No. 91909 was issued. We have considered TURN's petition in light of the principles set forth in that decision, as more fully explicated herein. We conclude that because the procedures adopted in that decision are intended to operate prospectively only, TURN cannot seek reimbursement under them for participation in a proceeding terminating prior to their adoption. TURN should therefore pursue its claim for intervenor fees in civil court under the alternative procedure provided in Section 122(a)(2).

We recognize that TURN may suffer some inconvenience by having to pursue its claim in superior court. But on balance, fairness to all prospective parties demands this result. Under the circumstances, TURN's petition, as amended, should be denied.

IT IS ORDERED that Toward Utility Rate Normalization's petition, as amended, requesting an order granting it an award of fees and costs for its participation in Application No. 58545 is denied.

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

Dated SEP 16 1980, at San Francisco, California.

John E. Bryan  
President

Vernon L. Sturgeon

Richard W. Howell

Paul J. DeLuca

Edward W. Pines  
Commissioners

I concur in part and dissent from any idea of paying intervenors with rate payer funds

Vernon L. Sturgeon