

Decision No. 92752 MAR 3 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
 own motion into the regulation of
 employment practices of PACIFIC
 TELEPHONE AND TELEGRAPH COMPANY,
 PACIFIC GAS AND ELECTRIC COMPANY,
 GENERAL TELEPHONE COMPANY,
 SOUTHERN CALIFORNIA GAS COMPANY,
 SAN DIEGO GAS & ELECTRIC COMPANY,
 CALIFORNIA WATER SERVICE COMPANY,
 SOUTHERN CALIFORNIA WATER COMPANY,
 SIERRA PACIFIC POWER COMPANY, CP
 NATIONAL CORPORATION, SOUTHWEST
 GAS CORPORATION, CITIZENS UTILITIES
 COMPANY OF CALIFORNIA, and
 CONTINENTAL TELEPHONE COMPANY OF
 CALIFORNIA,

Case No. 10308
(Filed April 12, 1977)

Respondents.

ORDER DENYING PETITION FOR A FINDING
OF ELIGIBILITY FOR ATTORNEY'S FEES

Preliminary Statement

On December 9, 1980 Public Advocates, Inc. (Public Advocates) filed a Request For A Finding Of Eligibility For Compensation pursuant to the Public Utilities Regulatory Policies Act of 1978 (PURPA), Decision No. 91909 dated June 17, 1980, and the Commission's Rules of Practice and Procedure, Article 18.5, Rule 76. The request states that the compensation sought relates to Pacific Gas and Electric Company (PG&E), pursuant to PG&E's Notice of Intent (NOI 33) to seek an electric rate increase.

The Commission staff, PG&E, and Southern California Edison Company (Edison) have filed responses opposing the award of attorney's fees.

Public Advocates filed a response on January 8, 1981 stating "no nonprofit organization, be it legal or otherwise, can effectively participate in proceedings without advance notice as to its eligibility for compensation." The response goes on to request the Commission, if it has any doubt about the sufficiency of the request for a finding of eligibility for compensation, should clearly and specifically set forth what is required in this case to be eligible and permit a formal application to be filed prior to completion of the participation.

Positions of Parties

Public Advocates argues that it represents fifteen organizations which in turn represent low-income and moderate-income utility customers. It alleges that none of these organizations has any other counsel available or affordable and that no other client or attorney groups are presenting the issues and positions represented by Public Advocates. It goes on to state that most of these organizations have sought Public Advocates' representation in other cases and will be seeking such in future PUC cases relating to rate proceedings and electric utility services, and that Public Advocates can only continue to provide legal services to low-income customers of electricity through the receipt of attorney or equivalent fees.

Public Advocates represents that it has been and will be addressing the following PURPA positions and standards in these hearings:

1. The efficiency of services provided by PG&E, including the impact of inefficient and discriminatory hiring and promotion policies on quality and costs of electric services, as well as prejudicial services that have an adverse impact on the full availability of electric services to certain classes of low- and moderate-income classes of electricity customers; and

2. The creation of more competition in contracts and subcontracts through mechanisms designed to increase the number of minority and women contractors and services. It alleges that the result of such competition will be to lower the cost of electricity to all customers and insure greater availability of electric services to low- and moderate-income customers.

PG&E argues that attorney's fees should not be awarded on the grounds that:

1. The Commission has already ruled, in Decision No. 92114 dated August 19, 1980, that Article 18.5 of the Commission's Rules for Implementation of PURPA Section 122(a)(2) is not applicable since this proceeding is not a ratemaking proceeding;

2. Even if this were a ratemaking proceeding, Article 18.5 would not apply to it because this proceeding does not relate to one or more PURPA ratemaking standards; and

3. Even if this were a ratemaking proceeding which related to one or more PURPA ratemaking standards, the request does not comply with Rule 76.03(b) which requires that the party requesting eligibility must file a statement of the PURPA issues which it intends to raise, together with a statement of the party's position on each such issue.

Edison argues that the statutory basis for awarding attorney's fees under PURPA is not applicable to this proceeding, discussing in detail the legislative history of PURPA as it relates to compensation to consumers for costs of participation in rate-making proceedings and also relying on our holding in Decision No. 92114.

Edison further argues that there is no other basis under law (other than PURPA) or equity upon which the Commission has the

power to award attorney's fees in this proceeding. It cites California Code of Civil Procedure, Section 1021, which provides in part:

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

and notes that there is no statutory basis other than PURPA and there is no agreement, express or implied, for payment of attorney's fees to Public Advocates. In support of its argument that the Commission lacks equity powers to award attorney fees in this proceeding, it cites Consumers Lobby Against Monopolies v Public Utilities Commission (1979) Cal 3d 891, 905-906, in which the California Supreme Court held that the Commission had equitable power to award attorney's fees in quasi-judicial reparation actions but that this power did not extend to quasi-legislative duties. The court defined a quasi-legislative proceeding as one in which the Commission conducts investigations and adopts rules (25 Cal 3d 891, 909).^{1/}

The staff argues that Public Advocates' statement of the PURPA issues it intends to raise and its position thereon is inadequate. Accordingly, staff contends that there is no means of ascertaining whether Public Advocates' contribution to the case will be compensable or not. Staff also cites Decision No. 92114 arguing that in this request, as in the previous one, there was no showing that compensable PURPA electric rate issues would be raised by the party seeking fees. Staff recommends that the present request for a finding of eligibility be denied, but adds that if it later becomes clear that Public Advocates is making a substantial compensable contribution to Case No. 10308, a finding of eligibility to receive fees may then be made.

Discussion

Section 121 of PURPA authorizes any electric consumer (among others) to intervene and participate as a matter of right in any

^{1/} The Court specifically found that Code of Civil Procedure Section 1021.5 did not apply to administrative agencies in any of their functions and that the Commission was without authority under Section 1021.5 to award attorney fees in quasi-legislative proceedings. (25 Cal 3d 891, 910.)

ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a state regulatory authority. Section 122 of PURPA establishes the electric utilities' liability to compensate such consumer intervenors for certain fees and costs incurred to prepare and advocate their positions and provides further that a consumer may collect such fees and costs in a civil action unless the state regulatory authority has adopted a reasonable procedure for determining the amount of, and for including an award of, such fees and costs in its order in the proceeding. Decision No. 91909 dated June 17, 1980, in Order Instituting Investigation No. 39 adopted Rules of Practice and Procedure for awarding intervenor fees under PURPA.

As we indicated in Decision No. 92114, "This investigation is simply not a ratemaking proceeding by any stretch of the imagination--no request for rate relief has been made by any utility in this proceeding, nor is the reasonableness of expense levels or the rate of return of any utility an issue in this proceeding" (mimeo. p. 3). The question now is whether this is an "other appropriate regulatory proceeding relating to rates or rate design" as set forth in PURPA and as included in Decision No. 91909. We think it is not. Most of our proceedings relate ultimately to rates in one way or another; however, some, like the generic ECAC proceeding (OII No. 56), obviously relate to rates in a more immediately specific manner than do others, such as a certification proceeding. Still others such as this one are particularly difficult to classify as one relating to rates under PURPA when the PURPA standards themselves are examined.

There are eleven PURPA standards. The six set forth under Section 111(d) pertain directly to the utility's rate structure; the five set forth under Section 113 do not relate directly to the

rate structure, but rather relate to other practices of electric utilities regarding terms and conditions of electric service that may indirectly affect the rate structure of the utility. In order to be considered for a finding of eligibility, a consumer's participation must promote one of three PURPA purposes and relate to one or more of the eleven PURPA standards.

We have already determined in Decision No. 92114 that this proceeding is not itself a rate proceeding; therefore, the PURPA ratemaking standards, which include cost of service (defined in PURPA Section 115(a)), declining block rates, time-of-day rates, seasonal rates, interruptible rates, and load management techniques, do not apply to it.

The five PURPA standards which relate to other practices of the electric utility regarding terms and conditions of service include master metering, automatic adjustment clauses, information to consumers, procedures for termination of electric service, and advertising.

For a proceeding to be considered as an other regulatory proceeding relating to rates under PURPA, the subject matter would have to fall within one of these five standards before a consumer could be found to be eligible for compensation for participation in the proceeding. Public Advocates' petition makes no showing that the questions it intends to address promote one of these five PURPA standards, nor, in our opinion can such a showing be made by amendment to the petition.

Public Advocates' contention that the findings and determinations derived from hearings in this proceeding will be part of the record in future rate proceedings is insufficient for us to find that this proceeding relates to rates under PURPA. There is no provision under PURPA or under Decision No. 91909 for a finding of eligibility for compensation for work done in a proceeding which is not itself a rate proceeding or a regulatory proceeding which relates to rates or rate design, but which may be used at some future date in an electric utility rate proceeding. Accordingly, we must deny the petition for a finding of eligibility for compensation in Case No. 10308.

Petitioner requests that if we have any doubt about the sufficiency of the request for a finding of eligibility for compensation, we clearly and specifically set forth what is required in this case to be eligible. Because of our finding that Case No. 10308 is not a rate proceeding, or a proceeding relating to rates or rate design under PURPA, and therefore, by its very nature not subject to PURPA rules for compensation, we do not believe that the petition can be amended or refiled with additional material which would enable us to make a finding of eligibility in this case. Should petitioner desire to file a petition for a finding of eligibility for compensation in an electric utility rate proceeding, the requirements for the content of such a petition are clearly set forth in the Rules of Practice and Procedure adopted in Decision No. 91909, specifically, Rule No. 76.03.

Findings of Fact

1. Section 121 of PURPA authorizes any electric consumer (among others) to intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design and Section 122 establishes the electric utilities' liability to compensate such consumer intervenors in these proceedings.
2. The Commission has adopted Rules of Practice and Procedure, Article 18.5, for implementation of PURPA Section 122 in its Decision No. 91909.
3. Case No. 10308 is not a rate proceeding nor is it a proceeding relating to rates or rate design under PURPA.
4. Since Case No. 10308 is neither a rate proceeding nor a proceeding which relates to rates or rate design under PURPA, neither PURPA Section 122 nor Decision No. 91909 relating to compensation are applicable to it.

Conclusion of Law

The petition for a finding of eligibility for compensation for participation in Case No. 10308 should be denied.

IT IS ORDERED that the petition of Public Advocates, Inc. for a finding of eligibility for compensation in Case No. 10308 is denied.

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

Dated MAR 3 1981, at San Francisco, California.

John E. Burns
President
Michael W. Dore
Leonard M. ...
Walter ...

Commissioners