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Decision 93032

ORIGINAL

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)

ORDER GRANTING A STAY OF DECISION NO. 92914

An application for a stay and rehearing of Decision No. 92914 has been filed by Pacific Telephone and Telegraph Company (Pacific). We shall respond to Pacific's request for rehearing on its merits in a subsequent order. In order to preserve the status quo while we analyze the application, however, we will grant the requested stay until May 19, 1981. Therefore

IT IS ORDERED that,

Decision No. 92914 is hereby stayed until May 19, 1981.

The effective date of this order is the date hereof.

Dated MAY 5 1981, 1981 at San Francisco, California.

John E Bryson
President

Victor Calvo

Priscilla C. Grew
Commissioners

We dissent.

Leonard M. Grimes, Jr.

Richard D. Gravelle

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Decision No. 92914 April 21, 1981

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 Consumer Lobby Against Monopolies, complainant.
Margaret deB. Brown and Clay Burton, Attorneys at Law, for The Pacific Telephone and Telegraph Company, defendant.
Edward D. Santillanes, for The California Association for the Deaf, Incorporated, interested party.
Robert Cagen and Radovan Z. Pinto, Attorneys at Law, and Ermet Macario, for the Commission staff.

INTERIM OPINION

Introduction

David L. Wilner (complainant or Wilner) filed this complaint on March 9, 1976, on behalf of Consumers Lobby Against Monopolies (CLAM), alleging that The Pacific Telephone and Telegraph Company (Pacific) had regularly failed to collect its full termination charges, as provided in its tariff, when installing new Centrex or switchboard (PBX) systems as replacements for its own utility-owned switchboards.

Following investigation and negotiation, Wilner and Pacific agreed on a settlement of the complaint on July 12, 1977. On May 8, 1978, this settlement was reduced to an "Agreement of Compromise and Release" between Wilner and Pacific. The chief item in the settlement was Pacific's agreement to pay $400,000 for a beneficial public purpose, as approved by the California Public Utilities Commission(Commission).

The major question remaining after Wilner's settlement with Pacific was Wilner's request for attorney fees. In Decision No. 88533, on March 7, 1978, the Commission denied Wilner's request for fees. Decision No. 88296, dated May 31, 1978, denied rehearing of Decision No. 88533. However, in Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal. 3d 891, the California Supreme Court, inter alia, held that the Commission has an equitable power, similar to that held by courts, to award attorney fees in quasi-judicial reparation cases which result in the creation of a common fund. The Court further held that we have discretion in such cases to award fees and costs to non-attorneys such as Wilner, appearing in a representative capacity. In this decision, we decide numerous issues related to Wilner's eligibility to receive attorney fees.

Summary of Decision

We find that Wilner is entitled to $29,550 for his efforts before the Commission in creating the settlement fund of $400,000. We stress that only because this is the first case of its kind before the Commission are we willing to look beyond Wilner's lack of adequate records documenting his work. We shall not again entertain such a poorly documented claim.

We discuss, but ultimately defer ruling on, the question of whether Wilner is entitiled to fees for his efforts before the Commission and the California Supreme Court in establishing the principle that the Commission has discretion in quasi-judicial matters to award attorney fees. This question, however, is addressed in the attached proposed report of Commissioner Gravelle.

We find that the agreement between Wilner, Pacific and the Commission staff for use of the settlement fund (after payment of attorney fees to Wilner)to provide telecommunication devices for the deaf (TDD's) is a matter requiring further study and comment. In the proposed report of Commissioner Gravelle, it is suggested that the settlement fund should be allocated to the creation of an advocates trust fund, to pay attorney and expert witness fees in quasi-judicial matters where private parties have made exceptional presentations to the Commission. We have no comment regarding this proposal at this time. We expect that comments of interested parties

and observers will assist us in determining whether this is an appropriate use of the settlement fund or whether some more appropriate use might be found.

Finally, we hold that Pacific Telephone is not liable for payment of interest on the $400,000 settlement. We find that Pacific stood ready for this Commission to direct it where it should pay or allocate the $400,000 fund. Any delay in this matter cannot legally or equitably be attributed to Pacific. Accordingly, no interest is assessed, despite the long period of time in which Pacific has held this fund. However, Pacific is directed as of the date of this decision, after payment of certain monies to Wilner, either to place the remainder in a separate commercial money market fund or to segregate the remainder in a separate, interest-bearing "holding fund" account, in order that the settlement fund may now begin to accumulate interest at the commercial paper rate pending our ultimate conclusion as to the best disposition of the fund.

Questions Presented

The questions presented are:

1. How should the $400,000 settlement fund be allocated?

2. How much money should Wilner be paid for lay advocate fees and attorney fees as a result of his participation in Case No. 10066?

   a. Has Wilner improperly sought compensation for his 1975 and 1976 efforts in quasi-legislative Commission proceedings?

   b. Does an order of the Administrative Law Judge preclude Wilner from receiving attorney fees for his efforts after March 31, 1977?

   c. What hourly rate should be applied to Wilner's and his attorney's services?

   d. Does Wilner's destruction of records bar him from receiving attorney fees and, if not, for what number of hours should Wilner be compensated?

3. May the Commission award Wilner attorney fees for his efforts before the Commission and the California Supreme Court in establishing that the Commission has the authority to award attorney fees in quasi-judicial cases?

4. Should the settlement fund be augmented by interest?
5. Is Wilner entitled to interest on his attorney fees?
6. Is Wilner entitled to costs on appeal?

Further Hearing

The California Supreme Court's opinion in the CLAM case annulled Decision No. 88533 and remanded the matter to the Commission. A hearing was held in San Francisco on January 10, and on March 14 and 17, 1980. Briefs were filed May 16, 1980. The evidentiary hearings considered both the disposition of the fund and Wilner's fee claims.

Use of the Settlement Fund

On May 8, 1978, Wilner and Pacific signed a stipulation to the dismissal of Wilner's complaint. Their agreement provided, in part: "In consideration of this release, The Pacific Telephone and Telegraph Company agrees that, after dismissal of the above-mentioned PUC Case No. 10066, it will allocate the sum of $400,000 from the earned surplus of the Company in accordance with a plan which the Company will file with the CPUC for their concurrence."

After this case was remanded by the California Supreme Court, Pacific submitted several proposals for disposition of the fund. The appearances in this proceeding came to a tacit agreement that it was appropriate for the settlement fund to be spent on projects which would provide the hearing-impaired better access to the telephone network. There was no signed or binding agreement to that effect, but no party objected to this proposal. Two of Pacific's other proposals for use of the settlement fund, a program for distribution of so-called "residence catalogs" and a program for remodeling public telephone booths to accommodate the handicapped, appear not to have been acceptable to the parties. Staff pointed out, for example, that the residence catalog program was already one of Pacific's basic obligations and that existing law required remodeling of telephone booths. We note Pacific's revenues and rates have already been set by the Commission at levels adequate for the accomplishment of these purposes.

The parties first responded to Pacific's proposals regarding use of the $400,000 settlement fund in 1978. However, in 1979, the Legislature passed Senate Bill 597 (Stats. 1979, Ch. 1142), which added Section 2831 to the California Public Utilities Code. This bill required the Commission to design and implement the program adopted in OII-70.

In Decision No. 92603, issued January 21, 1981, in OII 70, Telecommunication Devices for the Hearing-Impaired, we directed the establishment of an industry-administrative committee to administer a trust funded from telephone subscriber surcharges of $.15 per month. According to staff calculations in Appendix A to Decision No. 92603, this monthly surcharge is expected to yield revenues sufficient to fund a $72 million program for providing special telephone devices to the hearing impaired. The parties in 1978 obviously had no idea that in 1981 the Commission would adopt such a well-funded program for the hearing-impaired.

In view of what we perceive as a material change in circumstances, we believe that allocating the settlement fund to the TDD Fund is a matter requiring further study and comment. We would like the parties to consider and comment on the proposed report of Commissioner Gravelle before we decide how to allocate the fund. The parties should feel free to propose alternative purposes which could be served by the fund. We will not, however, entertain alternatives that will either benefit Pacific's shareholders or relieve Pacific of existing duties paid for out of existing rates. For the reasons stated in Commissioner Gravelle's proposed report, we are inclined to believe that the $400,000 settlement fund is not a sum which must or should be treated as a refund. However, we reserve final judgment on that question pending our review of the comments of the parties and interested observers.

Wilner's Fee for Work Creating the Fund

We need not recite here the reasons given by the Court in the CLAM case why it is appropriate to assess attorney fees against the settlement fund which Wilner's efforts created.

The Court's exposition of common fund theory speaks for itself. Our task now is simply to determine what Wilner's compensation should be.

Wilner claims he should be awarded fees for 337 hours of work at $60 per hour for work prior to the Examiner's Ruling of March 31, 1977 (discussed below) and 53 hours of work at $60 per hour for work creating the fund after that date. He also seeks fees for the attorneys who advised him. He claims they provided 123 hours of advice related to the creation of the fund, for which they should be paid $50 per hour. We conclude that each of these claims should be allowed, for the reasons stated below.

Has Wilner Made a Claim for Hours Spent in Quasi-Legislative Proceedings?

Initially, we must settle a controversy which stems from the fact that Wilner first became interested in the issue of Pacific's under-collections as a result of his participation in a quasi-legislative proceeding in 1975 and 1976.

Pacific argues:

> "Wilner claims $10,920 in advocates' fees and $2,350 in attorneys' fees for work done in 1975 and January and February 1976 .... (B)ecause of the lack of primary documents ... we cannot tell how much of this work allegedly done in 1975 and early 1976 on this case was actually done in connection with Application 55276, the 770 case. It is important that Wilner not be compensated for any work done in connection with that application or with Pacific's contemporary rate case, Application 55492. These cases are quasi-legislative cases, setting future rates; the Supreme Court, in the case, held that the Commission did not have power to award fees in quasi-legislative cases. If an intervenor in a rate case or other quasi-legislative proceeding is permitted to file a later complaint based on work he (and others) did in the rate case and collect fees for that work, the distinction drawn by the Supreme Court will be meaningless. In order to prevent this sort of abuse Wilner must prove that he is not claiming any fees in this case for work done in other cases. This he has not done, in fact he himself submitted 'this whole complaint, of course, is an outgrowth from that case ...' ... In view of the overlap of issues ... in the proximity and time more proof is required."

Pacific's argument must be rejected, as it relies upon a mischaracterization of Wilner's testimony. Wilner did concede that the complaint was an "outgrowth" of the quasi-legislative case, but in the same breath he went on to say that "all the investigation work that I did, as indicated on page 4 (of Exhibit 3, Wilner's detail exhibit of fees claimed) is work that I did in connection with this (complaint) case".

We have no factual basis for disbelieving this testimony. As we discuss below, Wilner's records leave a great deal to be desired. However, it is apparent that Wilner was aware of the limitation in the CLAM decision on the Commission's power to award fees for work done in quasi-legislative proceedings. His answer upon cross-examination was, as quoted above, that he limited his claim to hours properly compensable by the Commission. Accordingly, we will not disallow hours as Pacific claims we should. In any case, the fee award is to be made against the $400,000 fund which Pacific has already agreed to pay. Our resolution of this issue does not increase Pacific's liability.

The March 31, 1977, Cut-Off Issue

An Examiner's Ruling dated March 31, 1977, states that subsequent to that date, staff counsel will represent Pacific's customers, and Wilner can no longer make claims for advocate fees. Despite this ruling, Wilner makes an advocate fee's claim of $3,180 for work performed after March 31, 1977, on the merits of the case.

Notwithstanding the Examiner's Ruling, we have decided to exercise our discretion in favor of awarding the claimed $3,180. The evidence demonstrates that the work performed by Wilner after March 31, 1977, was crucial to the successful result reached in this case. After that date, Wilner gathered much evidence relating to the amoung of Pacific's undercharges. He provided valuable assistance to staff counsel in drafting a data request designed to calculate undercharges. Perhaps most important, Wilner's efforts after March 31, 1977, resulted in a settlement of $400,000 rather

than the $200,000 which the record reflects that staff counsel may have originally believed an appropriate settlement.

Accordingly, because Wilner's efforts after the Examiner's Ruling were instrumental in achieving the $400,000 settlement, we have decided to compensate Wilner for those efforts despite the ruling. In this instance, it would be inequitable for the fund's beneficiaries to enjoy the benefit of this extra effort without paying for it. We are also influenced by the relatively small amount of fees at issue (a total of $3,180) compared to the relatively large benefit to the fund (in excess of $200,000). In addition, because this is a case of first impression, Wilner will not be held to the same strict standards as will future claimants.

Future fee claimants should not take this opinion as a license to disregard orders or rulings which limit a party's claim to receive fees. We intend that future claimants will be bound by such restrictions. Our decision to create an exception here is due to the unique circumstances of this case.

What Hourly Rate Should be Allowed for Wilner's Services?

Staff argues that:

> "... the issue of rate of compensation arises. Wilner seeks a rate of $60 per hour, his normal consulting fee. The staff does ... not dispute that Wilner normally earns at least $60 an hour and that this rate is reasonable ... Wilner obtained the services of two attorneys to work on this case at $50 per hour ... Wilner should also be compensated for advocate fees at the rate of $50 per hour. It would be unfair to the recipients of the common fund that Wilner be compensated at a higher hourly rate than his attorneys receive for work done on the same case."

If there were any evidence to support a finding that $50 per hour was the going rate for attorneys' services, there might be some basis for the staff's argument. However, staff failed to establish that $50 per hour is the going hourly rate for these

particular attorneys. In fact, the record suggests that this may have been a discounted rate offered to Wilner either out of friendship or on a pro bono publico basis.

The staff has also failed to consider that we are dealing with a type of contingency fee. Courts regularly allow higher than normal hourly rates to attorneys who fight the odds against success in a long-shot proceeding, thereby incurring a substantial investment of effort and ingenuity in a risky undertaking.

In order to establish a reasonable contingency rate, we would have to look at this case without the benefit of hindsight. Any prudent attorney asked to take such a proceeding on a contingency basis would have foreseen formidable problems in proving the amount of the class claim. He would also have foreseen difficulty in establishing that undercharges can, as a matter of law, support a claim for reparations, and that the Commission has the authority to award fees. Thus, anyone calculating the odds against a consumer victory in this case would necessarily have considered this case as not merely a long-shot but a three-way parlay.

Consequently, there is every reason to believe that the normal lawyer's contingency fee for taking full responsibility for such a case would have been much higher than $50 per hour. We can take judicial notice that the normal contingency fee in an uncomplicated personal injury case can be as high as 40 percent of the recovery, if an appeal is involved. The record provides no means to convert this to an hourly figure fee; even so, we have more than enough information to make us skeptical that $50 is a normal contingency hourly rate for any type of advocacy.

Consequently, we believe that Wilner should be complimented rather than penalized for having obtained legal services for the fund at what appears to be a favorable rate,[1] and that his normal

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[1] We note that the staff's theory could, in the long run, injure consumers by encouraging class attorneys or advocates to hire high-priced consultants, thus making their own fee claims seem more reasonable.

hourly rate should be found reasonable.

What Amount Should Wilner's Attorneys Be Paid?

Wilner, during the course of these proceedings, received legal advice from two attorneys. He agreed that they should be paid $50 per hour contingent upon the Commission's allowing compensation for their services.

Staff argued that the fund should not be required to pay anything for these attorneys' services, primarily because much of the time was assertedly spent on Wilner's claim for fees rather than on benefiting the fund. Wilner has conceded that 30 out of the 153 attorney hours claimed are attributable to his work establishing the principle that the Commission can award fees.

The staff points out that by contract, Wilner would not be liable for the remaining 123 hours of fees should the Commission disallow his claim against the fund. Since he would not be injured by a disallowance, the staff argues that it is not inequitable to disallow the claim completely. However, this argument overlooks the inequity to the attorneys of disallowing the claim.

The staff has also argued as follows: "We also note that Murray, one of the attorneys, did not testify before the Commission to verify the work hours attributed to him by Wilner. Blake, the other attorney, was deceased at the time of the fee hearing(;) ... the Commission should not award fees by proxy to attorneys who have not appeared before the Commission to testify on the work they did to deserve them. With respect to the claims for services rendered by Blake, his estate should have provided a knowledgeable person to testify as to the services given by Blake before his death. It is inconceivable that a common fund should be diminished in favor of attorneys (or their estates) who have never uttered one word to the Commission to explain their bases for receiving fees."

While staff's view has merit, we have decided to award fees to the attorneys for 123 hours of legal services at the claimed rate of $50 per hour. We do so on the same basis that we award fees to

Wilner - namely that this is a case of first impression and no Commission guidelines have existed previously. We are further influenced by our belief that Wilner's excellent advocacy throughout this proceeding surely was partly due to substantial advice and efforts rendered by his attorneys. Any future claimant, however, will be required to present much more adequately documented evidence on his own behalf, as explained more fully in the following section.

Hours Claimed and
Records Related Thereto

Wilner seeks compensation based on the total hours sp on this proceeding, multiplied by his hourly rate. It is impor that the Commission be able to verify the accuracy of Wilner's claimed hours. A claimant's submission of original time records the usual means of verifying the accuracy of claimed hours. Cour which address fee petition issues have stressed that it is importa for the claimant to present written time records in support of his application. For example, in Lockheed Min. Sol. Coalition v. Lockheed M.&S. Co., 406 F. Supp. 828 (N.D. Cal. 1976), the court reasoned as follows:

> "The first step in evaluating a claim for attorneys' fees is the determination of the number of hours spent on the case by the claimants. This essential determination has been complicated in the instant case by the inability of claimants to provide the Court with easily analyzable evidence of the time that they claim to have expended. This constitutes a serious failing because, as the Court of Appeals for the Fifth Circuit has stated in Johnson v. Georgia Highway Express, Inc., supra, 488 F.2d at 720, 'it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorney's fees just as he would bear the burden of proving a claim for any other money judgment'." 406 F. Supp. at 831.

We now adopt the requirement that future fee claimants present adequate original time records to support their petitions. By original time records, we mean documents prepared by claimant

or at his direction at or about the time the work is being performed. Such records must accurately apprise this Commission of the type of work performed and the time spent in performing it.

If we were to hold Wilner to the above-mentioned requirement, his claim for fees would have to be completely denied. The records submitted in support of his position are inadequate. Wilner's original time records, to the extent that he had any, were discarded at the end of 1978 as part of his "record disposal" policy. The only written time estimate presented at the fee hearing by Wilner was Exhibit 3, which was prepared immediately prior to the fee hearing and long after any original time records had been destroyed. In fact, there is good reason to doubt that he ever kept original time records meeting even the lowest possible standards.

Because this is the first proceeding in which we have awarded fees, Wilner has had no Commission guidelines to follow with respect to time records. This is the primary reason why we will award fees here despite the inadequacy of Wilner's records. In addition, circumstances exist here which corroborate the accuracy of Wilner's time estimates despite the absence of written records. Here, the excellent result reached in settlement clearly would have been impossible without Wilner diligently working for many hours to establish liability and damages. The result, and thus the work which preceded the result, are even more striking when Pacific's initial resistance to settlement is considered. Wilner devoted much time and effort to changing Pacific's unwillingness to settle the case. Finally, the record reflects that Wilner participated in many meetings and hearings, and prepared data requests, motions, and other documents. This participation reflects many hours of work and tends to buttress Wilner's fee claim.

Again, we must caution future fee claimants not to rely on this decision as precedent for Commission fee awards without strict documentary proof. This proceeding is an exceptional one, and we will apply exacting standards to our scrutiny of future fee petitions.

Accordingly, we shall award a fee of $29,550, calculated as follows:

337 hours (pre 3/31/77)	x	$60	=	$20,220
53 hours (post 3/31/77)	x	$60	=	3,180
123 hours (attorney fees)	x	$50	=	6,150
		Total		$29,550

This sum is immediately due and payable to Wilner, who has had to wait over a year for our resolution of his claims against the common fund. Pacific is ordered to pay this amount to Wilner and, as discussed below, to place the remainder of the settlement fund ($370,450) in a holding fund pending our ultimate disposition of that sum.

Should the Commission Compensate Wilner for his Efforts before the Commission and the California Supreme Court to Establish that he was Entitled to Attorney Fees?

A difficult matter to resolve is Wilner's claim that the Commission should award him attorney fees for his efforts before the Commission and the California Supreme Court in establishing that the Commission could grant him attorney fees in the first place.

The problem stems from the fact that the Court located the Commission's equitable power to award Wilner fees for his efforts against Pacific in the matrix of common fund theory. That is, the Court said it was only fair to charge the fund, and its beneficiaries, for the efforts which led to its creation. However, when Wilner sought fees for himself, he was no longer acting on behalf of the fund. At this point, he was essentially representing his own interests, as distinguished from those of the public. Mandel v. Lackner (1979) 92 Cal. App. 3d 747, 760 (Mandel II), and the common fund cases on which it relies, are squarely on point in this situation. They hold that the common fund may not be taxed for efforts undertaken by the attorney on his own behalf.

Wilner, however, seeks to distinguish his case from Mandel II, claiming that the precedent established in the CLAM case was a substantial benefit to all utility customers. In Woodland Hills Residents' Association v. City Countil, supra, 23 Cal. 3d 917, plaintiffs' attorneys advanced a similar theory. They had conducted litigation which ultimately compelled the City Council to make specific findings when approving any deviation from Los Angeles' master plan. They argued that this requirement created a substantial benefit for the City's residents as a whole. The court observed that the City's residents had become, in a sense, involuntary clients of those attorneys. They noted that not all City residents might place an equal value on such a precedent. The court went on to hold:

> "In the instant case, plaintiffs suggest that the present action has conferred upon the general public, and in particular upon the residents of Los Angeles, a number of such benefits, benefits which, while nonpecuniary in nature, are nevertheless sufficiently 'concrete and actual' to justify an attorney fee award under the substantial benefit doctrine as elaborated in Serrano III. Initially, plaintiffs contend that all of the residents of Los Angeles have received the benefit of the important principle of law resolved in Woodland Hills I,[3] namely, that before approving a subdivision map local authorities must make specific findings that a subdivision is consistent with the applicable general plan. Plaintiffs emphasize that this principle of law will be applied not only to the instant proposed subdivision but to all future subdivisions and thus that residents of all parts of the city will receive the benefits of plaintiffs' counsel's labor. Plaintiffs urge that, under such circumstances, all of the city's populace may appropriately be required to pay the attorneys fees incurred in securing the Woodland Hills I ruling.
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> "Although 'it is a built-in consequence of (the Anglo-American principle of) stare decisis that "a legal doctrine established in a case involving a single litigant characteristically benefits all other similarly situated"', the doctrine of stare decisis has never been viewed as sufficient justification for permitting an attorney to obtain fees from all those who may, in future cases, utilize a precedent he has

[3] Woodland Hills, etc., Assn. v. City Council (1975) 44 Cal App. 3d 825.

> helped to secure. As the Second Circuit Court of Appeals stated in rejecting a plea for attorney fees based on a comparable theory: 'It is a novel assertion that attorneys who are victorious in one case may, like the holder of a copyright, claim fees from all subsequent litigants who might rely on or use it in one or another.'" (23 Cal. 3d at p. 946.)

We strongly feel that Wilner has indeed conferred, as a matter of fact, an extremely significant benefit on the public as a whole, first by establishing the Commission's power to award fees in quasi-judicial cases and second by thereby insuring more public participation in Commission proceedings. However, under the Woodland Hills rule, we cannot consider these benefits a "substantial benefit" within the matrix of substantial benefit theory. We are bound by Woodland Hills. (See also, Save El Toro Association v. Days (1979) 98 Cal. App. 3d 544, 551.)

Wilner further contends that he should be awarded attorney fees for his work before the Court under the private attorney general theory. We note that Code of Civil Procedure Section 1021.5[4] represents the statutory enactment of this theory. We note further, however, that "(t)hat section ... only authorizes 'a court' to award attorney fees 'in any action' .... (I)f the Legislature had intended section 1021.5 to apply to administrative agencies in any of their functions, it would have plainly said so." (Consumers Lobby Against Monopolies v. Public Utilities Com., supra, 25 Cal. 3d at p. 910.)

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[4] Section 1021.5 provides:

"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 non-pecuniary, 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 the 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 discussion appears to bar the Commission from awarding attorney fees under Section 1021.5 of the Civil Procedure Code.

However, closer scrutiny of the Court's discussion reveals that the Court took great pains to state only that the statute did not authorize the Commission to award fees "in ratemaking (e.g., quasi-legislative) proceedings". (Ibid.) The question of whether the Commission could award fees under Section 1021.5 in quasi-judicial cases simply was not before the Court. The Court declined three times in one paragraph to say whether the Commission could apply the statute in a quasi-judicial proceeding. Therefore we must conclude that it is at least still an open question whether the Commission may apply Section 1021.5 in such cases.

There is also the possibility that the Commission has discretion, under the non-statutory private attorney general theory, to award fees in quasi-judicial cases. This is a possibility which is more fully explored in the proposed report of Commissioner Gravelle.

At this time we believe it is best to defer resolution of this question until after we receive comment on the proposed report of Commissioner Gravelle. We do note that there is an alternative open to Wilner, namely, applying directly to the California Supreme Court under Section 1021.5 for attorney fees. We also note that, short of our accepting the proposed report of Commissioner Gravelle, we lack a fund for payment of attorney fees to Wilner for his work in establishing the CLAM precedent. This practical problem looms at least as large as, if not larger than, the question of whether we have jurisdiction to award fees for that work.

Should the Settlement Fund be Augmented by Interest

Wilner claims that the sum agreed upon should be augmented by interest dating from the date Wilner filed his first complaint against Pacific. He also contends the Commission should apply the higher rate of interest established in Decision No. 91337.

We decline to impose interest. Not only did the settlement document not provide for the payment of interest, but also Pacific was essentially in the position of waiting for the Commission to direct it as to where the $400,000 fund should be allocated. No

delay in this regard may fairly or legally be attributed to Pacific. We find, under the circumstances, that we lack justification for such an award.

Is Wilner Entitled to Interest on his Claim Against the Fund?

Wilner has not sought interest on his own claims against the fund. Accordingly, no such award is made.

Should Wilner be Compensated for his Costs on Appeal?

The staff argues as follows:

> "Mr. Wilner claims the modest sum of $163.67 for expenses. These expenses are for photocopying matters relating to fees and for filing fees before the Supreme Court.
>
> "Staff recommends that the expenses be denied, because they relate to the issue of fees. We also suggest that the burden of such expenses is small, and will deprive nobody of his day in court."

The staff argument misconstrues the nature of Wilner's claim. First of all, this is not a claim against the fund. Rather, it is a claim against the Commission in its capacity as respondent in the CLAM proceeding. Secondly, the staff has assumed that the Commission has discretion to disallow Wilner's claim; however, the Supreme Court's remittitur in CLAM/TURN expressly provides that "the proceeding is remanded to the Commission for a determination of the fees and costs to be awarded Wilner and CLAM in accordance with the views expressed in the opinion of the Court. Wilner shall recover his costs in San Francisco, No. 23863". (Emphasis supplied.)

Thus, there can be no longer any question concerning Wilner's right to receive compensation for these costs. The Court's remittitur has already decided that issue.

All of the $163.67 claimed is thus allowable.

Interim Disposition of the Settlement Fund

Ever since agreement was reached between Pacific and Wilner to settle Wilner's complaint, Pacific has held the $400,000 settlement fund. This is in fact consistent with the literal terms of their stipulation, which provides that Pacific will disburse $400,000 after the complaint is dismissed in Case No. 10066. The complaint has not been dismissed in Case No. 10066. The complaint has not been dismissed previously, nor is it dismissed as a result of this Interim Opinion.

However, we feel as a practical matter that the settlement fund should be and is available for payment of Wilner's claims against the fund for his efforts in creating it. It may ultimately be the case that, as noted as a possibility in the Proposed Report of Commissioner Gravelle, Pacific will choose to resume hearings in Case No. 10066 rather than accept modification of the proposed settlement agreement on terms suggested by the Commission. However, as a practical matter, it is quite unlikely that Pacific's liability at the conclusion of the renewed hearings would be less than $400,000 for its failure to collect tariffed termination charges. Pacific's stipulation represents, in effect, its minimum liability in this matter. Whether its liability would be greater, after renewed hearings, is impossible to know at this point.

Pacific argues strenuously, and, as noted above, we think correctly, that no interest may be assessed against it from the time of the agreement to settle the complaint to the date of this decision. In theory, this sum of money has been a contingent liability on Pacific's books, yet it has been available to accrue interest ever since 1978. We think our resolution of this issue is the only fair conclusion.

Yet by the same token we think it is only proper that, since, as a practical matter the $400,000 sum represents Pacific's minimum liability in Case No. 10066, it should henceforth be segregated as a separate fund in order that it can begin to accrue interest. We emphasize that we say this as a practical matter, in an attempt to protect the fund's interests while recognizing that Pacific is not at fault for any delay up to this point. To the degree that Pacific would choose to interpret its settlement agreement so literally as

to foreclose both payment of Wilner's claims and future accruals of interest by the fund, we would have to find the settlement unacceptable and to order, reluctantly, the staff to resume prosecution of Case No. 10066.

Accordingly, as of the date of this decision, Pacific is directed (1) to pay from the settlement fund the sum of $29,550 to Wilner and (2) to place the balance of the $400,000 either in a separate commercial money market fund or in a separate, interest-bearing "holding fund" account on Pacific's books. In either case the fund must accrue interest at the current commercial paper rate. Pacific's choice among these alternatives shall be identified to the Commission in a compliance filing. Pacific is put on notice that the settlement fund shall be deemed to be accruing interest as of and from the date of this decision. Following receipt of comments, we shall direct the ultimate disposition of the fund.

Findings of Fact

1. Wilner worked 390 hours in creating the settlement fund of $400,000.

2. All 390 hours were spent in work related to the quasi-judicial complaint proceeding.

3. Wilner's usual hourly rate is $60 per hour.

4. Under the circumstances of this case, $60 per hour is a reasonable fee to charge the settlement fund for Wilner's services.

5. Wilner hired two attorneys to assist him in creation of the settlement fund.

6. The two attorneys worked a total of 123 hours in the creation of the settlement fund.

7. Under the circumstances of this case, $50 per hour is a reasonable fee to charge the settlement fund for the services of Wilner's attorneys.

8. The total compensation to be paid from the settlement fund to Wilner for his and his attorneys' services is $29,550.

9. Pacific presently holds the settlement fund, which is available for immediate satisfaction of Wilner's claims against the fund.

10. No delay in the distribution of the $400,000 settlement fund may be attributed to Pacific.

11. Wilner has not sought interest on his own claims against the fund.

12. Wilner's costs on appeal to the California Supreme Court in S.F. No. 23863 are $163.67.

13. The California Supreme Court's remittitur in S.F. No. 23863 mandates that Wilner shall recover his costs in that proceeding.

14. The parties to Case No. 10066 reached tacit agreement that the settlement fund should be used to provide telecommunication devices to the deaf (TDDs).

15. With the creation of a TDD fund in Decision No. 92603, it may not be necessary or appropriate to expend the settlement fund on the provision of TDDs; further comment is needed on the question of disposition of the settlement fund.

Conclusions of Law

1. Wilner is entitled under the common fund theory to compensation from the settlement fund for his and his attorneys' services in the creation of that fund.

2. It would be unjust and unreasonable to assess interest against Pacific on the settlement fund.

3. Wilner is not entitled to interest on his own claims against the settlement fund.

4. Wilner is entitled to payment of costs in S.F. No. 23863.

5. It is appropriate in this proceeding to ask the parties and persons interested or normally involved in Commission proceedings to comment on the proposed report of Commissioner Gravelle, and/or to propose alternative uses of the settlement fund, before we make a final disposition of the settlement fund.

6. The following order should issue.

I N T E R I M O R D E R

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company shall within five (5) days of the date hereof pay out of the $400,000 settlement fund to David L. Wilner the sum of $29,550.

2. The balance of the settlement fund shall be placed either in a commercial money market fund or in a separate, interest-bearing "holding fund" account on Pacific's books. In either case, the fund shall accrue interest as of and from the date of this decision at the commercial paper rate. Pacific shall notify the Commission of its choice among these alternatives by compliance filing, and its choice of a commercial money market fund, if it so elects, shall be subject to the approval of the Commission. The Commission shall direct the ultimate disposition of the settlement fund in a later decision. An original and twelve (12) copies of the compliance filing shall be filed with the Docket office, with a certificate of service showing that each party has been served.

3. The Executive Director shall pay David L. Wilner the sum of $163.67 in satisfaction of his costs in S.F. No. 23863.

4. The parties shall file their comments in response to the proposed report of Commissioner Gravelle, and/or comments suggesting alternative uses of the settlement fund, within thirty (30) days of the date hereof. Rules 79, 80 and 81 of the Commission's Rules of Practice and Procedure shall not apply to this modified comment

procedure. Interested persons may file comments as set forth on the cover sheet of the proposed report of Commissioner Gravelle, provided, however, that no person not a party and no person not otherwise entitled to seek rehearing shall thereby be given the right to apply for rehearing under Public Utilities Code Section 1731.

The effective date of this decision is the date hereof.

Dated April 21, 1981, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners