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ORIGINAL

Decision No. 93251 JUN 30 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Consumers Lobby Against Monopolies<br>David L. Wilner, in pro per.,<br>Complainant,<br><br>vs.<br><br>THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation,<br>Defendant. | Case No. 10066<br>(Filed March 9, 1976) |

David L. Wilner, for Consumer Lobby Against Monopolies, complainant.
Margaret deB.Brown and Clay Burton, Attorneys at Law, 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.

FINAL OPINION

Introduction

In Decision (D.) 92914, this Commission awarded David L. Wilner (Wilner) of the Consumers Lobby Against Monopolies (CLAM) the sum of $29,550 as compensation for his and his attorneys' services in Case (C.) 10066. In C. 10066, Wilner successfully negotiated a settlement of a complaint he had filed on behalf of CLAM against the Pacific Telephone and Telegraph Company (Pacific) for its alleged failure to collect full termination charges provided in its tariff. The settlement provided for Pacific to pay $400,000 for a beneficial public purpose, as approved by the Commission. This Commission's ability to award attorney fees from the common fund was decided in Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal. 3d 891 (hereinafter, the CLAM case).

In the Proposed Report of Commissioner Richard D. Gravelle, issued simultaneously with D. 92914, it was proposed that the balance of the $400,000 fund, after payment of Wilner's fee, be allocated to the creation of an "advocates trust fund." This fund would be used to support awards of attorney or advocate fees, and/or expert witness fees, in quasi-judicial proceedings before the Commission.

It was also proposed that, upon establishment of the advocates trust fund, Wilner be paid the sum of $17,220 from the fund for his work before the Commission and the California Supreme Court in establishing the principle decided in the CLAM case, that the Commission has an equitable power to award attorney fees in quasi-judicial cases. The Proposed Report was issued under a modified comment procedure asking for responses to the report.

In the wake of D. 92914, Pacific initially filed a petition for rehearing and a stay. It refused to pay Wilner the $29,550 award until the complaint in C. 10066 was dismissed. The Commission granted a stay in D. 93032 in order to allow Pacific and other interested observers of Commission proceedings the opportunity to suggest alternative allocations of the $400,000 settlement fund. In a petition for modification of D. 92914, Wilner requested immediate payment of both the $29,550 and the $17,220 awards. Decision 93097 continued the stay until further order of the Commission in C. 10066. We will respond to Pacific's and Wilner's petitions in a separate order.

We have now received responses to the Proposed Report from the following: Pacific, Commission Staff, the "Low-Income Coalition for Effective Representation (SER), Herman Mulman on behalf of Seniors for Political Action (SPA), Toward Utility Rate Normalization (TURN), Environmental Defense Fund (EDF), Natural Resources Defense Council (NRDC), Pacific Gas and Electric Company (PG&E), General Telephone Company (General), and Southern California Edison Company (Edison). We commend those filing comments for their thoughtful and careful responses to the Proposed Report. A number of issues raised by those responses are discussed below.

Summary of Decision

This decision adopts the plan for use of the settlement fund developed by Pacific. We commend Pacific for its constructive approach to the desire of this Commission to stimulate increased public participation in our proceedings.

Pacific proposes that two separate funds be established. The first fund would be administered by Pacific. It would disburse money to private nonprofit crisis intervention agencies which provide free emergency service via the telephone on a nondiscriminatory basis to all users. Examples of such agencies are suicide hot lines, poison hot lines, child abuse hot lines, battered spouse hot lines, rape hot lines, mental health hot lines, drug abuse hot lines and the like. The second fund would be established by Pacific but administered by an independent trustee. This fund would be the advocates trust fund. The trustee would disburse money only upon direction of the Commission. The sum of $200,000 would be allocated to the hot line fund administered by Pacific. The balance of the settlement fund, following payment to Wilner of the sums awarded to him, would be allocated to the advocates trust fund. The Commission approves this proposed settlement of C. 10066 and dismisses the complaint therein.

Discussion

We shall not here repeat all of the discussion which appears in D. 92914 and the Proposed Report of Commissioner Gravelle. The decision and report are incorporated herein by reference.

We note that the following parties supported the Proposed Report: Pacific (through its counter-proposal), SER, Staff, TURN EDF and NRDC. The advocates trust fund was opposed by SPA, PG&E, General and Edison, in large part on the ground that the existence of the advocates trust fund would lead to spurious litigation which would cost the public, the utilities and the Commission undue time and money. In response to that concern, we reaffirm the discussion in the Proposed Report that only in the most meritorious cases will a fee award be proper.

PG&E, General and Edison also generally expressed doubts regarding the Commission's legal authority to establish an advocates trust fund. PG&E in particular questioned the Commission's jurisdiction to award fees to Wilner under the non-statutory "private attorney general" theory for his work before the California Supreme Court and the Commission in establishing the principle that the Commission may award attorney fees in quasi-judicial cases. In response to such comments, we reaffirm the discussion in the Proposed Report.

We have adopted Pacific's proposed allocation of the settlement fund because we believe it most closely approximates the spirit in which Pacific and Wilner decided to settle C. 10066. Pacific saw such a settlement as an opportunity not only to buy peace, so to speak, from a persistent complainant but also as an opportunity to perform a public service for its customers. We think that Pacific's proposal to allocate $200,000 to various crisis hot line agencies is an excellent service to the public.

Pacific proposes to allocate grants to pay for telephone expenses not in excess of $10,000 per agency per year to agencies which: operate and answer calls 24 hours per day, 365 days per year, on an attended (live) basis; have been in operation for a minimum of twelve months and provide reasonable assurance they will continue to provide the same service for the next 12 months; operate with sound financial principles and qualified professional staff and adequately supervised and trained volunteers, and have telephone expenses as a significant portion of their budgets. These guidelines for distribution of grants to hot line assistance agencies are reasonable.

Pacific agrees to submit to the Commission a statement of disbursements made from the fund during the previous year on or before March 31 of each year. It is conceivable the fund could be exhausted in one year, depending on the manner in which Pacific chooses to administer it. We adopt staff's suggestion that Pacific should take deliberate steps to announce the creation of the fund,

the date on which applications will be accepted, and the criteria by which applications will be reviewed. We believe that the fund should be in existence certainly no later than October 1, 1981, and hopefully much sooner.

We accept Pacific's reservation that reasonable costs of maintaining and disbursing the fund shall be borne by the fund. Any interest earned by the fund, assuming that Pacific chooses to invest it separately, shall be retained by the fund. If the fund is not segregated from Pacific's general fund, interest should be imputed to the hot line fund at the commercial paper rate. The interest on $200,000 invested in a commercial money market fund could be as much as or more than $30,000 per year, which would help assure the continued availability of funds for hot line agencies. We leave to Pacific how this fund should be administered, but encourage Pacific to consider the wisdom of administering the fund to assure its permanence, as staff suggests. We decline staff's suggestion that we should so order.

After disbursement from the common fund of $200,000 for the hot line fund, the balance shall be charged $29,550 for Wilner's efforts in creating the common fund. The remaining $170,450 shall be allocated to the advocates trust fund. We have decided, for reasons stated below, to reduce, from 262 to 135, the number of hours of work for which Wilner should be compensated for his efforts in establishing the principle that the Commission has discretion to award attorney fees in quasi-judicial cases. We also reduce the rate of compensation from $60 to $30 per hour for reasons stated below. Accordingly, Wilner's compensation totals $5,550, which includes $1,500 for his attorneys. The $170,450 in the advocates trust fund shall be charged this $5,550. To avoid further delay to Wilner, Pacific should immediately pay Wilner the sum of $35,100. The sum of $164,900 shall be placed in the advocates trust fund.

This sum ($164,900) shall be paid by Pacific to a trustee to be named by the Executive Director. The trustee shall hold and disburse the fund as the Commission directs only for the payment of attorney fees in cases meeting the following criteria as suggested by Pacific in reliance on the Proposed Report.

Attorney and/or expert witness fee awards shall be available from the advocates trust fund in quasi-judicial complaint cases where the Commission has jurisdiction to make attorney fee awards, as provided in the CLAM case.[1/]

Attorney fees may be awarded to private parties in quasi-judicial cases only where it is clearly and convincingly demonstrated (as Wilner did in C. 10066) that the private party has made a direct, primary and substantial contribution to the result of the case (e.g., has not simply adopted staff's or another party's presentation as its own). The fees will be awarded from the advocates trust fund where complainants have generated a common fund but that fund is inadequate to meet reasonable attorney or expert witness fees, where a substantial benefit has been conferred upon a party or

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1/ Although EDF understands the Proposed Report to provide that in the future attorney fee awards shall be available only from the advocates trust fund and from no other source (e.g., a defendant properly chargeable with attorney fees), this belief is mistaken. Where, for example, in the future a complainant succeeds in generating a common fund, that fund, if large enough for the purpose, shall be charged with the attorney costs of its generation. Or where there is a means for properly charging attorney fees against a defendant or a party upon whom a substantial benefit has been conferred, that means will be employed rather than using the modest resources of the advocates trust fund.

EDF claims that the CLAM case does not bar the Commission from awarding attorney fees in ratemaking (quasi-legislative) cases where the award is to be made from an advocates trust fund (as opposed to being charged against the defendant utility and/or the ratepayers). EDF is partially correct, in that the CLAM case does not literally reach this question. (See 25 Cal. 3d at 911-912). But the considerations advanced by the Court in 25 Cal. 3d at pages 909-910 appear to be dispositive to us. For those reasons, we decline to adopt EDF's suggestion that we make the advocates trust fund available for awards in quasi-legislative cases.

members of an ascertainable class of persons but no convenient means are available for charging those benefitted with the cost of obtaining the benefit, or where complainants have acted as a private attorney general in vindicating an important principle of statutory or constitutional law,[2] but no means or fund is available for award of fees.

An award will be based upon consideration of three factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the complainant, and (3) the number of people standing to benefit from the decision. No award will be made without a specific finding by the Commission of what would be a reasonable amount for advocates', attorneys' or expert witness fees, in view of the time spent, expenses proved, level of skill shown, and comparable fees paid to others practicing public utility law. NRDC suggests that no award should be made where a party's own economic interest is sufficient to motivate participation. This test would exclude substantial customers of utility services or parties seeking to preserve or obtain some competitive position. We agree with and adopt this suggestion.

We agree with Pacific's proposal that the trustee should be able to commingle the funds with those of any common trust fund, invest the funds in secure commercial or governmental obligations, be entitled to reasonable compensation for the expense

2/ NRDC suggests that vindication of important principles of public policy should suffice to merit an award. NRDC argues that Wilner vindicated such a principle, but not one of statutory or constitutional law. We disagree. In vindicating the inherent judicial powers of the Commission, Wilner vindicated a principle of California statutory law, as explained in the Proposed Report. Accordingly we continue to believe that vindication of statutory or constitutional principles is an appropriate limitation, consistent with private attorney general theory.

of managing the assets of the trust and have the power to disburse funds as directed to do so by the Commission. The trustee shall submit an annual statement of the assets of the fund. As provided in the Proposed Report, Pacific shall be permitted to charge the advocates trust fund with the reasonable legal and administrative costs of its creation. Pacific shall apply by advice letter to the Executive Director for an order by the Commission allowing it to be compensated for such costs. We adopt a limit of $2,000 for such expenses.

NRDC proposes that the advocates trust fund should be maintained as a perpetual fund, beginning with the present fund and augmenting it, ideally, with legislative appropriations. NRDC proposes a complex mechanism which would pay claims against the fund on a competitive (not first-come, first-served) basis, with all or part of such claims paid from accumulated interest. We are sensitive to the desire to prolong the existence of the fund. However, we feel it is still premature to decide exactly how quickly or slowly its assets will be consumed.

The Proposed Report of Commissioner Gravelle provided for an award of $17,220 to Wilner, based on Wilner's claim that he worked 262 hours, at $60 per hour, before the Commission and the California Supreme Court to establish the principle that the Commission had discretion to award attorney fees. Upon close examination of this claim, we believe that Wilner's lack of adequate records demonstrating that he worked 262 hours precludes us from honoring all of his claim. Ordinarily this lack of records would preclude us from honoring any part of his claim. We are certain, however, that Wilner did expend a considerable number of hours before the Commission and the Court in preparing his briefs and preparing for oral argument. We believe that 135 hours, the equivalent of three full 45-hour weeks, is the number of hours a diligent, thorough and efficient attorney would spend before the Commission and the Court on a case presenting issues similar to those which Wilner litigated. A non-attorney with Wilner's proven

ability, assisted as he was by two attorneys for 30 hours, would not ordinarily require more than this number of hours. In the absence of documentation, we can award fees for no greater number of hours. We again emphasize in the strongest terms, as we did in D. 92914, that any future claimant will be required to present accurate and thorough original time records to qualify for an award. No award will be made without clear and convincing documentation.

We also reduce, from $60 to $30 per hour, the rate of compensation in computing Wilner's award. While working to establish the common fund, Wilner was performing work which, because of its close similarity to Wilner's normal consulting work, justified a rate of compensation equal to his normal consulting fee. In arguing for his fees, however, Wilner was essentially acting as a paralegal. His compensation therefore should approximate the rate which the marketplace would pay a non-attorney to do legal research and argument. We find $30 per hour to be a reasonable approximation of such rate.

Findings of Fact

1. Findings of Fact 1 through 14 of D. 92914 are incorporated herein by reference.

2. Findings of Fact 1, 2 and 6 through 8 of the Proposed Report of Commissioner Richard D. Gravelle are incorporated herein by reference.

3. Wilner worked 135 hours as a private attorney general before the Commission and the California Supreme Court in establishing the Commission's power to award attorney fees for his efforts in creating the settlement fund.

4. Thirty Dollars ($30) per hour is a reasonable rate of compensation for Wilner's services as a non-attorney acting in a private attorney general capacity in this case.

5. The total compensation to be paid to Wilner for his and his attorneys' services in establishing the Commission's power to award such fees is $5,550.

6. The most appropriate and reasonable use of the balance of the settlement fund after payment to Wilner of his attorney fee awards is to allocate $200,000 to the Fund for Nonprofit Agencies' Telephone Expenses (Pacific's proposed Hot Line Fund) and to allocate the remainder ($164,900) to the Advocates Trust Fund, as those funds are described in the body of this opinion.

Conclusions of Law

1. Conclusions of Law 1 through 4 of D. 92914 are incorporated herein by reference.

2. Conclusions of Law 1, 2 and 4 of the Proposed Report are incorporated herein by reference.

3. The Commission has an equitable power to, and should, accept the proposed settlement of C. 10066 as modified by Pacific's "Additional Plan for the Use of the Fund" filed May 15, 1981.

4. The Commission has an equitable power under Public Utilities Code Section 701 to order the establishment of an Advocates Trust Fund with a portion of the settlement fund, as proposed by Pacific, subject to the limitation that the fund not be used in quasi-legislative proceedings for attorney fee awards.

5. Conclusions of Law 7 through 10 of the Proposed Report are incorporated herein by reference.

O R D E R

IT IS ORDERED that:

1. Within five days of the effective date of this decision Pacific shall pay David L. Wilner the sum of $35,100.

2. On or before October 1, 1981, Pacific shall establish and administer a $200,000 Fund for Nonprofit Agencies' Telephone Expenses as described in the body of this opinion.

3. On or before October 1, 1981, Pacific shall establish at a financial institution to be named by the Executive Director a charitable trust fund known as the "Advocates Trust Fund of California Public Utilities Commission" consistent with this opinion and with the description of that fund in Appendix A of the Proposed Report of Commissioner Gravelle. Pacific shall prepare a deed of trust and applications for tax-exempt status under state and federal law, and shall submit its proposed deed of trust to the Commission for its approval before funding the trust. Pacific shall be entitled to reasonable fees, up to a limit of $2,000, to be paid from the trust as compensation for its legal and administrative costs in establishing the trust.

4. Pending the establishment of the Advocates Trust Fund the sum of $164,900 shall be held by Pacific as the balance of the settlement fund. This balance shall accrue interest at the commercial paper rate.

5. C. 10066 is dismissed, with prejudice.

6. A copy of D. 92914 and of the Proposed Report of Commissioner Richard D. Gravelle shall be attached hereto for reference.

The effective date of this decision shall be the date hereof.

Dated June 30, 1981, at San Francisco, California.

John E. Bryson
President
Richard D. Gravelle
Leonard M. Grimes, Jr.
Victor Calvo
Priscilla C. Grew
Commissioners

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Decision No. 92914 April 21, 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Consumers Lobby Against Monopolies<br>David L. Wilner, in pro per.,<br>Complainant,<br><br>vs.<br><br>THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation,<br>Defendant. | Case No. 10066<br>(Filed March 9, 1976) |

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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

[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.

Milner, 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.
>
> "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 is: (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.

# INTERIM ORDER

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

Certified as a True Copy of the Original

Sandra Simpson

ASST. EXECUTIVE DIRECTOR, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

State Building
350 McAllister Street
San Francisco, CA 94102

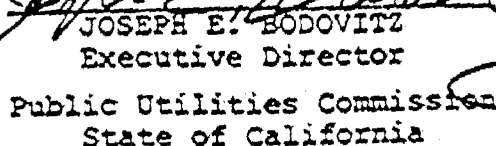
April 21, 1981

Attached is a copy of the Proposed Report of Commissioner Richard D. Gravelle in Case No. 10066.

COMMENTS: A modified comment procedure shall apply to this Proposed Report. The provisions of Rules 79 through 81 of the Commission's Rules of Practice and Procedure shall not apply to this modified comment procedure.

Any party of the record in the above proceeding, as well as any interested person, may file with the Docket Office of the Commission, not later than May 20, 1981, an original and 12 copies of comments on the Proposed Report, sending a copy to each party and filing with the Commission a certificate of service that each party has been served. No other service requirement shall apply. Copies of all comments received by the Commission shall be available for inspection in Room 5159. Responses and Replies to Comments shall not be accepted for filing with the Commission.

Comments shall be specific and shall be stated and numbered separately. Comments may, but need not, suggest other appropriate allocations for the settlement fund generated in Case No. 10066.



JOSEPH E. BODOVITZ
Executive Director
Public Utilities Commission
State of California

RDG/mw

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
PUBLIC UTILITIES COMMISSION
APR 21 1981
SAN FRANCISCO OFFICE

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
(F̶i̶l̶e̶d̶ ̶M̶a̶r̶c̶h̶ ̶9̶,̶ ̶1̶9̶7̶6̶)

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.

PROPOSED REPORT OF
COMMISSIONER RICHARD D. GRAVELLE

In Decision No. (H-3b),*/ dated April 21, 1981, the Commission awarded complainant in the above-entitled matter, David L. Wilner, the sum of $29,550 from a settlement fund of $400,000 created through Wilner's prosecution of a complaint against Pacific Telephone for failure to collect tariffed termination charges. In that decision, the Commission left open the question of how best to allocate the balance of the settlement fund. The Commission indicated that it was uncertain the money should be allocated to a fund to provide telecommunication devices for the deaf (TDDs)

*/ The final copy of this Proposed Report will indicate the actual decision number placed on H-3b if that alternate is adopted.

despite the apparent agreement of the parties on that purpose.

Summary of Proposal

The purpose of this report is to set forth a proposal for use of the balance of the settlement fund.

I propose that the settlement fund should be allocated to the creation of an "advocates trust fund". (A brief description of this trust fund appears in the appendix.) This fund would be used to support awards of attorney or advocate fees, and/or expert witness fees, in quasi-judicial proceedings before the Commission. The fund would make such awards possible in three types of cases: first, where a common fund is generated by the complainant's claims, but where the fund is inadequate to meet reasonable attorney or expert witness fees; second, where a substantial benefit is conferred upon the members of an ascertainable class of persons, but where no convenient means are available for charging those benefited with the cost of obtaining the benefit; and third, where the complainant acts as a private attorney general in vindicating an important principle of statutory or constitutional dimension, but where, again, no fund is available for award of fees. The parties to this proceeding, as well as interested observers of Commission proceedings (major utilities, EDF, TURN, Public Advocates, CURT, NRDC, etc.) are invited to address this proposal in written comments submitted no later than 30 days from the date of Decision No. (H-3b). Rules 79 through 81 of the Commission's Rules

of Practice and Procedure shall not apply to this modified comment procedure.

I further propose that the first award from the "advocates trust fund" should be made to Wilner for his efforts before the Commission and the California Supreme Court in establishing that, under Sections 701 and 734 of the California Public Utilities Code, the Commission has an equitable power to award attorney fees in quasi-judicial cases. I propose that the Commission hold that it has jurisdiction to make this award under the non-statutory private attorney general theory (as opposed to the private attorney general statute, Section 1021.5 of the Code of Civil Procedure). I propose that the sum of the award for these services be $17,220, as more fully set forth below.

Genesis of the Proposal

Several factors entered into the formulation of this proposal.

First, as explained in Decision No. (H-3b), it no longer appears necessary to allocate the balance of the settlement fund to the TDD fund. As a result of the Commission's decision in OII 70, the TDD fund will have a minimum of $70 million for provision of TDD equipment to the hearing-impaired. (See Appendix to Decision No. 92603.) I view this as a material change in the circumstances which led Pacific, in 1978, to propose allocation of the fund for the benefit of the hearing-impaired.

Second, it is important that the settlement fund not be allocated to a use which has the effect, whether intended or not, either of enriching Pacific's stockholders or of relieving Pacific of obligations which it must meet under rates already established. Pacific's three original proposals for allocation of the fund, to supply "residence catalogs", to equip phone booths for the handicapped, and now (after enactment of SB 597) to provide TDDs for the hearing-impaired, all have a common theme: they would use the settlement fund to meet obligations which Pacific has under existing law. Indeed, it is difficult to conceive of any use for the settlement fund which significantly benefits the public but does not relieve Pacific of existing obligations or otherwise benefit its stockholders. For example, an allocation of the fund to a traditional charitable purpose yields Pacific the good will inherent in such an allocation. This good will may offset entirely the loss occasioned by the payment of funds. An allocation of the fund to a particular type of research could benefit Pacific's shareholders, perhaps through future applications of the research or simply through avoidance of costs that otherwise would have been incurred. The appeal of allocating the settlement fund to an advocates trust fund is that it offers the hope of truly benefitting the public in a significant manner, as explained below, without relieving Pacific of its obligations or enriching its stockholders.

Third, and equally importantly, I did not want to overlook the unique circumstances which led to the creation of the settlement fund. Those circumstances included the persistence of an independent advocate in prosecuting an investigation which our own staff refused to undertake. When informed by the Administrative Law Judge that staff would take over the investigation from him, Wilner doggedly pursued the matter further and doubled the size of the settlement fund. Had the matter been left to staff, it is uncertain this result would have come about. Such public participation is, in the long run, the public's best guarantee of fair and just rates and service from the major utilities. Creation of an advocates trust fund would help to ensure that such public participation will occur in the future. A small expenditure from the fund for attorney fees could go a long way, as this case well demonstrates, in producing future savings through elimination of a pernicious utility practice at or near its inception. The public would be directly benefitted if, as a result of our creating the advocates fund, a potential complainant was encouraged to file a meritorious complaint on a matter that otherwise would not have been brought to the Commission's attention.[1]

[1] I stress that I am fully aware of the possibility that non-meritorious complaints may be filed as a result of creation of the advocates trust fund. This possibility, though real, presents no reason not to proceed with this proposal, as only in the "most meritorious cases" will a fee award be proper. (See Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal. 3d 891, 908.) We can quickly weed out complaints without merit.

Fourth, it is easy to foresee the situation of a complainant prevailing in a quasi-judicial proceeding, without generating a common fund but nevertheless ensuring great future savings to ratepayers. In this type of case, where the common fund was small or non-existent, or where the case most properly was classified as a "substantial benefit" case (see generally, Serrano v. Priest (1977) 20 Cal. 3d 25, 35-39; Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 943-947), the successful complainant on equitable grounds would be fully entitled to attorney fees. But without a fund to pay such fees, and without a convenient means for shifting the cost of obtaining the benefit to those benefitted (id., at p. 944), the Commission would be unable to make an award, even though the complainant had expended many hours of work or hired expensive expert witnesses. Alternatively, a complainant acting as a private attorney general (see id., at pp. 933-934), who vindicated policies or rights of statutory or constitutional dimension, would also be entitled to attorney fees. In such a case, an advocates trust fund would provide a convenient means for the Commission to recognize the litigant's contribution to the public welfare.

Finally, if the settlement fund was refunded just to Pacific's residential customers, the refund would be infinitesimal, no more than six cents per customer. This inability to make meaningful refunds is itself a strong reason not to attempt to

treat the fund as a refund. But more importantly, when the matter is properly analyzed, it can be seen that the $400,000 is not a refund. It is not the result of an overcharge by Pacific. No customer can complain he will be deprived of a refund of money he paid previously. The $400,000 does not correspond to any real figure. It is simply the result of Pacific's willingness to settle, without admitting fault, a claim regarding its alleged failure to collect termination charges. At most, the failure to collect charges may have resulted, years ago, in a past Commission's finding that Pacific's actual revenues were too low and that rates had to be set marginally higher. But this is entirely speculative. The presence or absence of $400,000 of revenue,[2/] with a company of Pacific's size, simply would not affect determination of the level at which rates should be set. In recalling the circumstances which obtained for Pacific in the early 1970's, I would think it more likely that a failure to collect termination charges was visited upon Pacific's shareholders through reduced net revenues available for dividends.

The Commission's Power to
Create an Advocates Trust Fund

The Commission's power to create an "advocates trust fund" is inherent in our quasi-judicial power to hear and decide reparations and similar complaints. As the Court noted in the CLAM case,

2/ A crucial fact, of course, is that the Commission still does not know how much Pacific failed to collect in termination charges. I shall assume, without deciding, that there was an under-collection and that it was approximately $400,000. If the under-collection was on the order of several tens of millions of dollars, then it is possible that this did result in the Commission's setting rates for Pacific's customers at a level higher than otherwise would have obtained. However, this is entirely speculative.

the Commission has broad equitable powers under California Public Utilities Code Section 701 to do all that it finds necessary and convenient in regulating utilities, subject only to the requirement that its orders be cognate and germane to such regulation. (See 25 Cal. 3d at pp. 905-908.) Among those powers is the power "to direct that a trust fund be created to preserve potential refunds .... (People v. Superior Court (1965) 62 Cal. 2d 515, 516.)" (Id., at 907.) In this case, as noted above, we are not dealing with refunds. But we do have a fund that is analogous to refunds. We have an equitable power to distribute that fund. We apply that power to the unique circumstances before us. Those unique circumstances are as follows: we have a complainant in a reparations matter who is not asking the Commission to order a refund to him, which is relief we could unquestionably order in any reparations matter where it was appropriate. Rather, he is asking, and the defendant essentially has agreed, that the proceeds of this atypical reparations matter be applied to a public purpose. On the basis set out below, I propose only that the Commission decide what that purpose shall be. I see no statutory limitation on the Commission's power to direct the disposition of the fund. (Cf. California Public Utilities Code Section 2100; see also, id., Section 734.) I see no decisional law barring us from deciding that public purpose, so long as it is cognate to public utility

regulation. I believe creation of an advocates fund to compensate prevailing parties in quasi-judicial proceedings is cognate and germane to the responsibilities which the Court told us we have in the CLAM decision. Unless the comments in response to this proposal convince me otherwise, I would conclude it is within our jurisdiction to order the creation of the advocates trust fund.

Factors Affecting the Commission's Authority to Direct Disposition of the Settlement Fund

In Decision No. (H-3b), the Commission noted that, in an attempt to resolve Case No. 10066, Pacific and Wilner on May 8, 1978, signed a stipulation to the dismissal of the complaint. As Pacific concedes in its Brief to the Commission filed May 16, 1980, the complaint has not been dismissed and the Commission still has not approved the proposed settlement. The complaint having been filed and the Commission's jurisdiction having been properly invoked, only a formal order of the Commission can effect a dismissal of the complaint. Until such time as the complaint is dismissed, the Commission may order Wilner, if he chooses, and/or the Commission staff, to investigate and prosecute the complaint with renewed vigor.

The most critical provision of the stipulation stated: "In consideration of this release, The Pacific Telephone and Telegraph Company agrees that, after dismissal of the above-mentioned CPUC 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."

This provision of the stipulation suggests that only Pacific, and not the Commission, may direct the disposition of the $400,000 fund. It suggests that although the Commission could reject Pacific's proposals, it could not provide for what those proposals should contain. To the degree that Pacific wishes to strictly adhere to such suggestions, I find the stipulation unacceptable. It is simply inconsistent with the Commission's judicial role, as described in the California Supreme Court's CLAM opinion (see 25 Cal. 3d at pp. 905-908) for Pacific to expect that it alone may suggest what, in effect, its penalty will be in a reparations matter where the Commission's jurisdiction has been properly invoked by a complainant.

If Pacific wishes, as it theoretically is free to do, to reject a proposed modification from this Commission regarding disposition of the settlement fund, then I would reject the proposed settlement and calendar the case for further hearing. At such further hearing, Wilner and the Commission staff would likely want to fully develop the possible anti-competitive motivations which may have led Pacific, as Wilner alleges, to fail to collect certain termination charges when replacing company-owned switchboard equipment. Wilner and staff, if not also Pacific's shareholders, would

likely want to continue to document all undercharges for the years 1971-1976 in order that Pacific's true liability for failing to collect charges in its tariffs might be established. I suspect that the costs to Pacific from continued hearings were what led it to wish to compromise this case in 1977.

Fortunately, however, Pacific has already indicated in its May 16, 1980, Brief to the Commission, that the Commission has jurisdiction under Section 701 of the California Public Utilities Code to approve the settlement on terms acceptable to the Commission. Pacific stated: "As stated during the recent hearings, Pacific is willing to discuss minor modifications of the settlement agreement, such as a use of the $400,000 fund which would be different from the three proposals Pacific made to the Commission on June 6, 1978." (See Decision No. (H-3b) for discussion of Pacific's original proposals for use of the fund.) Pacific also stated: "Pacific submits that the Commission can either accept the settlement agreement as written or suggest that the parties modify it. If the Commission feels it should be modified, Mr. Wilner, Pacific, and the Commission staff, on behalf of Pacific's ratepayers, can decide what modifications would be acceptable to them. Pacific has already indicated its willingness to discuss possible uses of the fund other than those it originally proposed."

I propose to take Pacific at its word regarding its willingness to discuss modifications of the settlement agreement.

I see no reason why a contest of wills should result. The Commission must employ its broad power under Section 701 to arrive at a just settlement of a reparations complaint. Our responsibility as commissioners requires that we optimize the use to which the settlement fund is put and that we avoid allowing the settlement to benefit Pacific and its stockholders. Theoretically, Pacific may refuse to accept any modification, or the modification which I propose, and elect to go to further hearing. I leave to Pacific the question whether such an election would be in its ultimate best interest. But I do think the practicalities of Pacific's situation, and the potential liability it faces, speak loudly for themselves. It would be absurd to pretend such factors do not exist, and I will not do so here. On this basis, I conclude that the Commission has a practical and actual power to direct disposition of the settlement fund. I believe this is consistent with, and not an abuse of, our responsibilities as commissioners.

Limitations on the use of the Advocates Trust Fund

I have considered, and rejected, one possible limitation on the use of the advocates trust fund. It could be argued that the fund should only be available for attorney fee awards in cases involving The Pacific Telephone and Telegraph Company or cases benefitting Pacific's ratepayers. The source of such an argument

would be the fact that the $400,000 came from Pacific. I think the argument must be rejected. It overlooks the fact that this case is not the typical reparations case. The money which Pacific has agreed to pay is not the result of an overcharge of any customer. It is not a refund. Only through speculation can it be established that Pacific's ratepayers paid higher rates because of Pacific's failure to collect certain charges in its tariff. The settlement fund is something Pacific agreed to pay out of its retained earnings as a means of buying peace, so to speak, from a tireless complainant who persisted even in the face of our staff's refusal to investigate. In view of the fact that the fund comes from Pacific's retained earnings, I see no reason why the advocates trust fund should be limited to paying attorney fees in cases involving Pacific. Such a limitation could have the unintended result of making Pacific an isolated target of complainants seeking only attorney fees and not to confer a true benefit upon the public.

There is, however, one limitation which must be scrupulously observed. The CLAM decision held, of course, that the Commission has the power to award attorney fees in quasi-judicial cases. However, the CLAM decision also held that the Commission lacks jurisdiction to award attorney fees in quasi-legislative cases, such as general rate cases. (25 Cal. 3d at pp. 909-910.) In view

of the Court's express delimitation of our powers, the advocates trust fund would not be available for fee awards in quasi-legislative cases. Further, I would propose that we not allow litigants to raise in complaint cases, in the hope of obtaining attorney fees, matters which more properly belong in general rate cases. Allowing such a practice would result in abuse of our resources and abuse of the forum we provide for resolution of legitimate complaints against utilities.

Jurisdiction to Award Attorney Fees
Under the Non-Statutory Private
Attorney General Concept

Wilner seeks compensation for the work that he did before the Commission and the California Supreme Court in establishing the principle that the Commission may award attorney fees in quasi-judicial cases. I need not repeat here the discussion which appears in Decision No. (H-3b) on the question of whether the Commission has jurisdiction to award such fees. Mandel v. Lackner (1979) 92 Cal. App. 3d 747, 760 (Mandel II) bars such an award under the matrix of common fund theory. Woodland Hills Residents' Association v. City Council of Los Angeles, supra, 23 Cal. 3d 917, 946, bars such an award under the matrix of substantial benefit theory. It is an open question whether the Commission could award such fees under the provisions of Code of Civil Procedure Section 1021.5.

I submit that there is a means available for awarding Wilner attorney fees for his work establishing the Commission's power to award such fees in quasi-judicial cases. The means I propose may appear contrived, in that it requires recognition of a change in the nature of the settlement fund once it is transformed into the advocates trust fund. However, I propose that the advocates trust fund be utilized in a manner which takes cognizance of its origins. I find it altogether fitting and proper that the first award from the advocates trust fund should go to the person responsible for its creation.

The means open to the Commission is to look to the origins of the Code of Civil Procedure Section 1021.5. Even before Section 1021.5 was enacted, courts in California and elsewhere had developed a private attorney general theory. In Serrano III, the California Supreme Court relied on this theory to find eligible for fee awards attorneys who had vindicated principles of constitutional origin. (20 Cal. 3d at pp. 46-47.) Whether Wilner vindicated a principle of constitutional origin in establishing the Commission's equitable power to award fees in common fund cases is unclear. However, in Serrano III and in Woodland Hills, the Court expressly left open the question of whether the non-statutory private attorney general concept empowers a court to award attorney fees for vindication of a principle of statutory origin. (23 Cal. 3d at p. 930 The Court did so in Woodland Hills because of the then recent

enactment of Section 1021.5 of the Code of Civil Procedure. Had it been forced to decide the question, I think the Court would have overcome the reservations expressed in Serrano III (20 Cal. 3d at pp. 43-46) and concluded that it did have the power, under the non-statutory private attorney general theory, to award fees for vindication of principles of statutory dimension.

I would conclude, in any event, that under the CLAM opinion, we have such a power in quasi-judicial cases. If the Commission is sufficiently similar to a court to have the power to award attorney fees under the common fund theory, it is also sufficiently similar to a court to have the power to award fees under the non-statutory private attorney general theory for vindication of principles of statutory origin. In this case, it is clear that this is exactly what Wilner did. He established, under Section 701 and Section 734 of the California Public Utilities Code, that the Commission had the power to award attorney fees in quasi-judicial cases. I believe this is a tremendous benefit to the Commission. Wilner essentially vindicated the equitable power given to the Commission by, and latent in, the California Public Utilities Code. For this reason I find use of non-statutory private attorney general concept appropriate.

This does not entirely settle the question of whether the Commission should award Wilner fees for all of his efforts to win attorney fees. Some of those efforts were before the

California Supreme Court, an entirely different tribunal. Under the Code of Civil Procedure Section 1021.5, Wilner could apply directly to that tribunal for an award of attorney fees. (See Mack v. Younger (1980) 27 Cal. 3d 687, 689.) This is an avenue of relief which Wilner should actively consider if he wishes to avoid further delay. However, there may be practical difficulties in attempting to collect a judgment against the State of California. (See, e.g., the litigation involved in Mandel v. Myers (1980) 106 Cal. App. 3d 384), S.F. No. 24217, hrg. gtd., Sept. 25, 1980.) Accordingly, I do not find it appropriate to tell Wilner his only avenue of relief is before that tribunal.

Does Wilner Qualify for an Award of Attorney Fees under the Non-Statutory Private Attorney General Theory?

Before making such an award, we must determine whether Wilner qualifies for an award of attorney fees under the non-statutory private attorney general theory. Under Serrano III, "there are three basic factors to be considered in awarding fees on this theory ...: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and (3) the number of people standing to benefit from the decision." (20 Cal. 3d at p. 45; see also, Woodland Hills, supra, 23 Cal. 3d at pp. 933-934.) Applying these factors to this

case, I would hold that Wilner qualifies for an award of fees.

As stated above, I believe the principle which Wilner's action established, namely, that the Commission has an equitable power in quasi-judicial cases to award attorney fees, to have immense significance for future Commission proceedings. I recognize that some, and perhaps many, participants in Commission proceedings believe that public involvement is a nuisance and an expensive waste of time. I do not share that hostility to increased input from the public. Our work is to serve the public and, as in the present case, to learn from the public. Increased communication between the Commission and the public is vital for the Commission to be able to accomplish its work in the future. Such communication must go two ways, not just from the Commission to the public. We do not have jurisdiction to award fees in general rate cases, although three justices of the California Supreme Court would have so held. But we do now have jurisdiction to award fees in complaint cases. This power is likely to lead to increased public interest in and knowledge of our functions. The increased public participation is also likely to confer significant benefits on all California ratepayers in the future.

The necessity for private enforcement is obvious in this case on two levels. First, despite staff reluctance to examine the problem, Wilner persevered and established that Pacific was violating the provisions of its tariff in not collecting

certain termination charges. Second, despite the Commission's conclusion, in Decision No. 88533, that it lacked power to award attorney fees, Wilner again persevered and obtained a definitive opinion from the Court to the contrary. Without such private intervention, the Commission might never have realized either that Pacific was not collecting the termination charges or that it had greater equitable powers than it believed. On either level, the burden on Wilner was great because of the staff's active opposition to his goals.

Finally, I believe a great number of people will benefit from Wilner's efforts before the Commission and in going to the Court. Those benefiting include not only future litigants in quasi-judicial Commission proceedings but also future ratepayers who reap the benefits of meritorious litigation such as that undertaken by Wilner against Pacific in Case No. 10066.

Accordingly, I submit that an award from the advocates trust fund, when established, will be appropriate under the non-statutory private attorney general theory.

How Much Money Should Wilner be Paid for Work Related to Attorney Fees?

Wilner claims that he worked a total of 262 hours before the Commission and the California Supreme Court on the attorney fees issue. He also claims that he paid his attorneys for 30 hours of advice in this regard. He seeks compensation at $60 per hour for himself and $50 per hour for his attorneys. These

are the rates accepted in Decision No. (H-3b).

Despite the lack of adequate documentation, for the reasons stated in Decision No. (H-3b) I propose that the Commission should accept Wilner's claims. Upon establishment of the advocates trust fund, Wilner should be awarded $17,220 for his work related to attorney fees issues.

Proposed Findings of Fact

1. Following payment of $29,550 to complainant for his efforts in creating the settlement fund, a balance of $370,450 will remain in the settlement fund.

2. The settlement fund is not the product of overcharges collected by Pacific.

3. The most appropriate use of the settlement fund would be to allocate it to the creation of an advocates trust fund, for payment of attorney (advocate) fees, and/or expert witness fees, in quasi-judicial cases before the Commission.

4. Wilner worked a total of 262 hours as a private attorney general before the Commission and the California Supreme Court in establishing his right to, and the Commission's power to award, attorney fees for his efforts in creating the settlement fund.

5. $60 per hour is a reasonable fee for Wilner's services in seeking his attorney fee.

6. Wilner hired two attorneys to assist him in seeking his attorney fee.

7. The two attorneys worked 30 hours on the issue of Wilner's right to an attorney fee.

8. $50 per hour is a reasonable fee for the services of those attorneys.

9. The total compensation to be paid to Wilner for his and his attorneys' services in seeking his attorney fee is $17,220.

Proposed Conclusions of Law

1. No refund of the settlement fund is required.

2. The Commission has an equitable power under California Public Utilities Code Section 701 to reject the proposed settlement of the complaint in Case No. 10066 if the terms of the stipulation between complainant and defendant are not in the public interest.

3. The present stipulation between Pacific and Wilner is not in the public interest insofar as only Pacific can control allocation of the settlement fund.

4. Modification of the proposed settlement of Case No. 10066 to provide for use of the settlement fund to create an advocates trust fund would be in the public interest.

5. Unless and until such a modification occurs, or unless and until the parties propose an acceptable modification of their proposed settlement of the complaint, Case No. 10066 should not be dismissed.

6. The Commission has an equitable power under California Public Utilities Code Section 701 to create an advocates trust fund, subject to the limitation that the fund not be used in quasi-legislative proceedings for attorney fee awards.

7. The Commission has an equitable power under California Public Utilities Code Section 701 to award fees under the non-statutory private attorney general concept for vindication of rights and policies of constitutional and statutory dimension.

8. Wilner is entitled under the non-statutory private attorney general concept to compensation for his attorneys' services in establishing that the Commission has an equitable power in quasi-judicial proceedings to award attorney fees.

9. Such compensation should be paid from the advocates trust fund.

10. The following order should issue.

PROPOSED ORDER

IT IS ORDERED THAT:

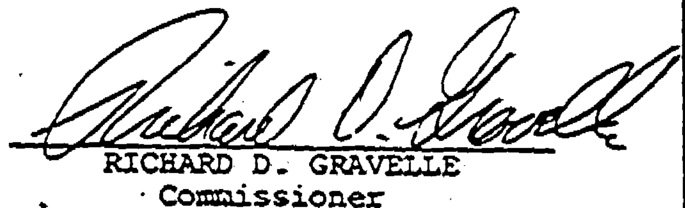
1. Within ninety days of the effective date of this decision, Pacific shall establish an Advocates Trust Fund consistent with the description of that fund in the Appendix.

2. Following establishment of the Advocates Trust Fund, the Executive Director shall direct the Trustee of the fund to pay David L. Wilner the sum of $17,220.

3. Upon establishment of the Advocates Trust Fund, the complaint in Case No. 10066 should be dismissed.

The effective date of this decision shall be the date hereof.

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



RICHARD D. GRAVELLE
Commissioner

# APPENDIX

The Commission proposes that the advocates trust fund be created and administered in the following manner. With the Commission's approval, Pacific shall select a financial institution to establish a charitable trust fund known as the "Advocates Trust Fund of the California Public Utilities Commission". The charitable trust shall be established so as to qualify for tax-exempt status under both state and federal law. This trust shall be irrevocable and Pacific shall have no power over the principal and income after funding the trust with the amount remaining in the settlement fund, plus interest from the date of April 7, 1981, after payment of the sum of $29,550 to David Wilner. The financial institution shall be the sole trustee. Its charge will be to invest the fund so as to maximize yield (income) while preserving the liquidity of the assets of the trust. The trustee shall disburse funds only in accordance with the directions of the Commission upon its formal decision that an award of attorney fees, and/or expert witness fees, is proper. An award shall be proper where the Commission determines that an intervenor or an interested party has conferred a benefit upon the ratepaying public as a result of their intervention in Commission proceedings. Such fees shall first be paid out of income, if any, of the trust and then from principal. There shall be no restrictions upon the amount which may be distributed from the principal of the trust in any one year or at any one time. Pacific shall prepare a deed of trust and applications for tax-exempt status under state and federal law, and shall submit its proposed deed of trust to the Commission for its approval before funding the trust. Pacific shall be entitled to reasonable attorney fees to be paid from the trust as compensation for its legal work in establishing the trust.