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Decision 93724 NOV 13 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY and PACIFIC GAS AND ELECTRIC COMPANY for a Certificate that present and future public convenience and necessity require or will require the participation by Applicants and others in the construction and operation of six new coal fired steam electric generating units, to be known as Units 1, 2, 3 and 4, at a site in Nevada known as the Harry Allen Generating Station, and as Units 1 and 2 at a site in Utah known as the Warner Valley Generating Station, together with other appurtenances to be used in connection with said generating stations.	Application 59308 (Filed November 30, 1979; amended January 7, 1980, February 6, 1980, and May 17, 1980)

(See Decisions 91968 and 92654 for appearances.)

INTERIM OPINION

In this decision we address the application by Environmental Defense Fund (EDF) for compensation for its participation in the Harry Allen/Warner Valley Energy System (Allen/Warner) certification proceeding. EDF's application raises two issues:

(1). Whether the Commission has authority to compensate public participants in our proceedings for their attorney and witness fees, and other reasonable expenses (participant fees), and

(2). Whether EDF is eligible for compensation in this proceeding.

First, we find that we do have the general authority to compensate public participants in all proceedings before the Commission. The California Supreme Court had previously limited our authority, in the Consumers Lobby Against Monopolies v Public Utilities Commission decision (1979) 25 C 3d 891 (CLAM). CLAM found authority to compensate participants in quasi-judicial reparations cases, while denying such authority in quasi-legislative ratemaking, based on what appears after close analysis to be a two-part test. The legal portion was based on certain intrinsic differences between the two proceedings. The policy portion found administration of compensation procedures to be infeasible in rate cases, but practical in reparations cases.

We conclude that CLAM no longer limits our authority, although we do find that certification proceedings are predominately quasi-legislative. We reach this conclusion because we believe we have resolved CLAM's policy concern. Commission Rules of Practice and Procedure Article 18.5, and proposed Article 18.6, presented

today in Order Instituting Investigation (OII) 100, contain procedures which ensure our ability to administer compensation awards.

Since CLAM, the Commission has created procedures for awarding participant fees in electric utility cases involving the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Commission Decision (D.) 91909, as amended by D.92602, created Article 18.5 of the Commission Rules of Practice and Procedure. Article 18.5 provides a procedure by which we evaluate the policy contribution and financial hardship to participants in PURPA-related cases, and determine when and whom to compensate for participation costs.

In this Decision, and in OII 100, we apply our experience with PURPA standards to other proceedings before this Commission. As described below, Article 18.6 will ultimately provide a set of procedures for considering participant fee awards in all Commission proceedings.

Articles 18.5 and 18.6 require that a participant's position be "adopted, in whole or in part" before compensation is to be available. This adoption test is critical to our procedures, because it ensures that ratepayer money will be expended only when a participant has significantly contributed to an actual Commission decision or order. We will not award compensation merely for creative or meritorious efforts.

The Allen/Warner application, however, was withdrawn by the utilities exceptionally late in the proceeding, after all evidence had been taken. In the interest of equity, EDF and all parties and appearances may file briefs discussing whether the special circumstances in A.59308 justify a narrow exception to our strict adoption requirement. EDF carries a substantial burden to demonstrate that the special circumstances of this case should allow for recovery.

Background

The Allen/Warner project called for mining coal at the Alton coal field in southern Utah, on the rim of Bryce Canyon National Park. Some of the coal would have been transported by slurry pipeline to the site of the 500 megawatt (MW) Warner Valley power plant 13 miles southeast of St. George, Utah. The rest of the coal was to be slurried to the site of the 2000 MW Harry Allen facility 25 miles northeast of Las Vegas. The proponents of this multi-billion dollar project were Pacific Gas and Electric (PG&E), Southern California Edison (SCE), the Nevada Power Company, and the City of St. George. PG&E and SCE would each have held a 40% and a 25% interest in Harry Allen and Warner Valley, respectively. PG&E and SCE sought from the Commission a certificate that public

convenience and necessity required the construction of this extensive energy system in A.59308 (as required by PU Code Section 1001).

Apart from the Sierra Club and Toward Utility Rate Normalization (TURN), which made only brief appearances, EDF was the only party to oppose Allen/Warner in the Commission's certification proceeding. Hearings lasted 105 days; over 10,000 pages of transcript were filled and close to 300 exhibits were submitted. EDF participated in almost all proceedings, conducting thorough cross-examination of applicants' and staff's witnesses. EDF developed and presented through its technical witness the "ELFIN" computer model, which permitted sophisticated manipulation of various supply and demand hypotheses in testing the need for and financial impacts of the Allen/Warner project. The essence of the EDF position was that alternative electric energy supplies were available to the utilities at far lower cost and that consequently, Allen/Warner was not necessary. The Commission staff also relied upon the ELFIN model in its analysis of the operational and financial impacts of Allen/Warner, compared with potential alternatives.

PG&E and SCE ultimately sought dismissal of A.59308. They requested that the Commission not reach a decision on the necessity for Allen/Warner. On March 3, 1981 we issued D.92757, which dismissed A.59308 without prejudice and without discussion of the merits.

Ordering Paragraph 3 of D.92757 provided that:

> On or before March 23, 1981 Environmental Defense Fund may file a memorandum of points and authorities concerning its request for attorney fees and expert witness fees. All other parties may respond to the memorandum of points and authorities on or before April 7, 1981.

In response to this invitation, the question of the Commission's power to award participant fees in A.59308 was briefed by EDF, PG&E and SCE jointly, the California Energy Resources Conservation and Development Commission (Energy Commission), and this Commission's staff.

Positions of the Parties

EDF contends that certification proceedings are quasi-judicial within the meaning of CLAM. EDF relies first on Ligon Specialized Hauler, Inc. v Interstate Commerce Commission (6th Cir. 1978) 587 F 2d 304, 315-316, where the Court of Appeals states: "It has long been held that an application of a motor

carrier for a certificate of public convenience is such an adjudication and therefore covered by those requirements [e.g., the adjudicatory provisions of the Administrative Procedure Act]." EDF states the ICC applies general principles of public convenience and necessity to specific proposed conduct of a specific applicant and determines whether the conduct shall be allowed. EDF contends that power plant certification proceedings before this Commission are "exactly the same" and therefore quasi-judicial.

EDF also cites numerous California cases to demonstrate that adoption of a general plan (e.g., a zoning plan, district boundary lines, general professional standards) has been deemed quasi-legislative activity, but that ruling on specific departures from general criteria or measuring specific conduct against general standards is a quasi-judicial function (e.g., issuing zoning variances or landfill permits, or conducting professional disciplinary proceedings).

EDF points to the Commission's decision in D.91968 (July 2, 1980) to adopt the Energy Commission's supply and demand forecasts as binding in A.59308 proceedings as an instance of quasi-legislative activity. EDF then argues that the Commission's determination whether a specific proposed project fits into the Energy Commission's forecasts is quasi-judicial activity.

EDF claims that the language used by the Commission in D.91968 demonstrates this. There the Commission stated that "all the remaining issues...including need...must be adjudicated by this Commission under the authority set forth in Public Utilities Code Section 1001 ...." (Mimeo at 3; emphasis supplied by EDF).

EDF also asserts that the chief policy reason in CLAM against authorizing attorney fee awards, the difficulty of isolating contributions in a sprawling rate case, does not stand as an obstacle to an award here. EDF argues that its position, contribution, and success are all clearly identifiable in this case.

The balance of EDF's argument is directed toward demonstrating that it is entitled to attorney fees under the substantial benefit, common fund, private attorney general, and vexatious litigant theories. EDF also details the areas where it believes it detected major errors in applicants' and our staff's presentations.

The Energy Commission did not submit legal analysis. However, it supports EDF's request for compensation, praising EDF's ELFIN computer model as a "pioneering work" for comparing conventional coal plants with other alternatives. The Energy

Commission notes that EDF alone actively fought against Allen/Warner, stating that "EDF's professional defense of its position contributed to the CEC staff's final conclusion that preferable alternatives" to Allen/Warner do exist.

Applicants devote the great bulk of their brief to an effort aimed at demonstrating that EDF's presentation was irrelevant, methodologically invalid and based on false assumptions. SCE and PG&E argue that EDF has misconstrued testimony and the importance of certain errors and that, in any case, EDF did not prevail because applicants abandoned Allen/Warner for reasons unrelated to EDF's presentation. Applicants argue that the issuance of a certificate of public convenience and necessity is a quasi-legislative decision, emphasizing this Commission's decision in In re Barrett Garages, Inc. (1954) 53 CPUC 351, 352: "It is elementary that the granting or withholding of a certificate of public convenience and necessity is a legislative act which rests in the discretion of this Commission". Applicants argue that CLAM makes it clear that certificate proceedings are altogether dissimilar to reparations proceedings: there is no plaintiff or defendant; no responsive pleading to an application is required; no vested rights are at stake; there is no "winning" or "losing" party; and the certification proceeding is prospective in its focus, just as a rate case is and just as reparations cases are not.

The Commission's staff also argues that certification proceedings are quasi-legislative, pointing to the same factors as applicants. Staff also disputes whether any theory, whether substantial benefits, common fund, private attorney general, or vexatious litigant, is truly applicable as a basis for an attorney fee award in this case.

Discussion

I. THE CLAM DECISION

It is appropriate to set forth in detail our consideration of CLAM. Our interpretation and application of that important Supreme Court decision have strengthened our resolve to develop effective procedures for administering participant fee awards in PURPA cases (Article 18.5) and now in all Commission proceedings (proposed Article 18.6). We find that these procedures meet the requirement set forth in CLAM for Commission exercise of authority to award participant fees, so that CLAM does not prohibit our decisions today.

CLAM contains the most recent statement by the California Supreme Court concerning the Commission's authority to award fees to public participants. CLAM dealt only with two types of Commission proceedings, which the decision characterizes as "quasi-judicial reparations proceedings" and "quasi-legislative ratemaking

proceedings." The CLAM decision finds that the Commission's authority differs in these two types of proceedings. The legal portion of the CLAM distinction was based on the differences between proceedings in which the Commission primarily performs legislative functions - "quasi-legislative" proceedings - and those in which the Commission acts primarily as a court - "quasi-judicial" proceedings. The second basis was a policy concern for the problems then anticipated by the Commission in administering programs to award participant fees.

We first consider the quasi-judicial/quasi-legislative distinction. At their most extreme, the two functions can be differentiated readily. Justice Holmes of the United States Supreme Court drew the distinction:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial....
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> Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226 (1908).

In CLAM, the seven justices agreed after consideration of each type of proceeding that ratemaking proceedings are predominantly quasi-legislative in nature, while reparations proceedings are predominantly quasi-judicial. The court split sharply, however, over the authority available to the Commission in those two types of proceedings. Justice Mosk's prevailing opinion held the Commission had authority to award participant fees in quasi-judicial reparations cases but not in quasi-legislative ratemaking cases. Three justices (Richardson, J., joined by Clark and Manuel, JJ.) would have held the Commission lacked authority to award fees in quasi-judicial as well as quasi-legislative cases. Three other justices (Newman, J., joined by Bird, C.J., and Tobriner, J.) would have given the Commission power to award fees

in quasi-legislative as well as quasi-judicial cases.[1/] No justice agreed with all of Justice Mosk's analysis.

The Commission recognizes the complexity of the quasi-judicial/quasi-legislative distinction, and the difficulty the court encountered when applying it to evaluate the Commission's authority. We therefore have scrutinized the language of CLAM seeking guidance for today's decision.

1/ Justice Newman's partial dissent disputes the distinction between the two categories. He emphasized that "quasi-legislative" ratemaking is actually quite similar to complex civil litigation. 25 C 3d at 918-19. His comments concerning the court-like procedural requirements of a fair hearing in federal administrative actions apply as well to proceedings of this Commission. Chapter 9 of Part 1 of the California Public Utilities Code (Sections 1701-1795) sets forth requirements for the Commission's "Hearings and Judicial Review" which include hearings (Article 1), rehearings (Article 2), judicial review (Article 3), and witnesses (Article 4). The Commission has issued Rules of Practice and Procedure, codified in Title 20 of the Administrative Code, which provide for implementation of these legislative mandates.

On the other hand, there are ways in which all PUC proceedings are "quasi-legislative." Most importantly, the Commission may include revisions in its broad policy directives within an order in a proceeding which must otherwise meet existing directives. In such cases, the Commission "legislates" a new framework, then "adjudicates" rights and responsibilities under that framework, disregarding the framework in place when the proceeding began.

We note first that Justice Mosk's decision appears on its face to be a narrow one. He consistently refers only to reparations and ratemaking proceedings, and not to quasi-judicial or quasi-legislative proceedings generally. A strict reading of CLAM therefore renders it irrelevant to the certification proceeding underlying this decision and today's OII. However, to ensure that our decision addresses the Court's concerns, we considered the quasi-legislative/quasi-judicial distinction in this case.

Justice Mosk's opinion contrasts reparations and ratemaking proceedings. He identifies six characteristics as partial justification for the different treatment by the court. In Part II of his opinion he discusses reparations cases:

> [1] there are identifiable parties plaintiff and defendant; [2] the Commission acts as a trier of fact, [3] applies rules of law to those facts, and [4] renders a decision adjudicating vested interests [5] in which there are clear prevailing and losing parties. Moreover, [6] successful reparation actions before the commission may result in the creation of a common fund that is available for satisfying an award of attorney fees.
> 25 C 3d at 908.

A comparable listing is made in Part III for "quasi-legislative ratemaking proceedings" identifying six characteristics contrasting with those just described. (25 C 3d 909-10) First,

there are no identifiable parties plaintiff or defendant. Second, the Commission does not try facts in the sense of being required to select among conflicting assertions, but finds facts which may help form a compromise among these assertions, which is used to define the best approach to be taken in order to protect the composite "public interest." Third, ratemaking does not adjudicate presently vested interests by applying facts to legal frameworks, created through legislative or quasi-legislative processes, but instead changes (or at least may change) the existing framework of interests and expectations. Fourth, determination of these interests is purely prospective in application. Fifth, the composite nature of findings means that "[i]solating the contribution of each of numerous interveners is likely to be impossible...." Finally, no fund is created which can readily be drawn upon for fee awards.

The Supreme Court might have relied on these contrasting sets of characteristics, standing by themselves, to justify differing treatment by the Commission. However, Justice Mosk does not base his conclusion solely on these legalistic distinctions. Before limiting the Commission's authority in quasi-legislative

ratemaking proceedings, he also addresses what are cast as sharply contrasting administrative burdens. This policy discussion is critical to our interpretation of CLAM's application.

Justice Mosk discusses two policy arguments against awarding participant fees. First, he rejects Commission claims that public interests were adequately represented by staff. The underlying Commission decisions[2/] had quoted with approval an earlier Commission decision:

> The participation of consumer and public interest groups, such as TURN and EDF, is not a new phenomenon. Over the years many groups and dedicated individuals have appeared and participated in our proceedings. Such participation is to be commended, and even encouraged. We have reservations, however, about encouraging such participation by means of financial incentives. Pursuant to Sections 307 and 309 of the Public Utilities Code we have assembled a legal and technical staff to assist us in the performance of our duties and exercise of our powers. As the staff points out in its memorandum, the awarding of

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2/ Appl. of Pac. Tel. & Tel. Co., D.88532, 83 CPUC 471 (March 7, 1978)(TURN) and D.88533, 83 CPUC 484 (March 7, 1978)(CLAM).

> costs would require the people of California to pay for representation twice; once as taxpayers and again as ratepayers.
> Appl. of PG&E, D.84902 (Sept. 16, 1975), 78 CPUC 638 at 749.

Justice Mosk flatly rejected this argument, noting that "the commission staff cannot fully and adequately represent all facets of the public interest, and in some instances...it may fail to discern the ratepayers' rights. Public interest interveners therefore fill a gap in the ratemaking process." (25 C 3d at 911.) "Moreover, the staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing or judicial review of commission decisions" (Id. at 908.)

Justice Mosk then considerd the administrative feasibility of making awards in these two types of cases. We refer to this as the policy test in CLAM. The Commission had argued that administering participant fees would pose severe difficulties. Justice Mosk rejected this argument with respect to reparations cases:

> Nor are we persuaded that permitting attorney fees in quasi-judicial reparation cases will cause a plethora of administrative problems by opening the "floodgate of public participation." Administrative problems are not novel

> in the commission's adjudicatory proceedings, and we are confident that it can solve these problems effectively under its rule-making power .... [T]he decision to award attorney fees will, of course, lie in the sound discretion of the commission, reviewable only if a clear abuse of that discretion is shown.
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> 25 C 3d at 908.

Justice Mosk did lend credence to this fear in the context of rate cases, however.

> For the reasons stated [above], the result [of awarding intervener fees] might well be an administrative quagmire, and the consequences...would go far beyond the circumstances presented in this case. The decision to include such 'public participation costs' in ratemaking proceedings is more appropriately within the province of the Legislature.
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> 25 C 3d 911-12 (footnote omitted).

Summarizing our reading of CLAM, it appears that Justice Mosk differentiated reparations and ratemaking on two general grounds. First, he used the six legal criteria described above to find reparations to be a quasi-judicial activity, and rate-making to be quasi-legislative. Second, in partial agreement with fears then expressed by this Commission, he found that a potential "administrative quagmire" justified denial of the Commission's authority to award participant fees in quasi-legislative ratemaking cases.

II. APPLICATION OF CLAM.

As discussed above, we read CLAM to have relied on both legal and policy analyses to differentiate the Commission's authority in reparations and ratemaking proceedings. Because the Commission has adopted procedures to administer participant fee claims, any proceeding will now meet at least the policy test for manageability of participant fee awards. CLAM did not address situations in which it might be feasible to administer fees in a quasi-legislative proceeding, whether certification, OII or ratemaking.

In view of our action in D.91909, the Commission believes that it is now appropriate to consider participant fee awards in all Commission proceedings. The need for full and effective public participation exists regardless of their characterization as quasi-judicial or quasi-legislative. Furthermore, application of the complex legal portion of the CLAM test will often produce an ambiguous characterization of the proceeding under evaluation.

To demonstrate the problems in applying the quasi-judicial/quasi-legislative test, we will set forth our attempt to apply it to certification proceedings. We repeat our belief that this half of the two-part CLAM test does not control.

A. The Legal Test

1. Certification Proceedings have identifiable parties plaintiff and defendant and may have other participants not classifiable as plaintiffs or defendants.

Certification proceedings may contain the equivalent of identifiable parties plaintiff and defendant. A utility seeking a certificate may be analogized to a party plaintiff in a civil action for declaratory judgment or a quiet title action, in that it proposes a project, has a definite plan, and stands ready to act if the requested legal ruling or authority is granted. It is also true that where there are parties which flatly oppose the granting of a certificate, such parties stand in the role of defendants, much as EDF did in this case.

However, not all parties participate on this basis. In this case our own staff was also involved, just as it is involved in ratemaking cases, in an attempt to help the Commission determine where the public interest truly lay. The staff cannot be categorized as a plaintiff or defendant. In addition, unlike

reparations cases, which involve only a customer and the utility, certification proceedings by their very nature invite the participation of many parties which cannot be categorized as proponents (plaintiffs) or opponents (defendants) of the project. For example, an environmental group may not completely oppose a project like Allen/Warner; it may seek only to mitigate certain environmental impacts. A local citizens' group may seek only to have transmission lines rerouted. Such interveners cannot be called plaintiffs or defendants.

2. The Commission acts as a quasi-legislative gatherer of facts.

CLAM distinguishes between the Commission acting as a quasi-judicial "trier of fact," and acting as a quasi-legislative fact gatherer free to draw its own factual conclusions. The quasi-legislative role predominates in certification proceedings.

In certification proceedings applicants, staff and public participants each present their interpretation of the facts. However, the Commission remains free to base its decision on a single interpretation, or on an independent combination of any or all interpretations. This is broader discretion than that granted to most courts.

3. The Commission makes both quasi-judicial application of facts to law and broader quasi-legislative factual determinations.

Although the Commission finds facts in certification cases in a quasi-legislative manner, they are applied both quasi-judicially and quasi-legislatively. The Commission reaches its conclusions by applying the facts found concerning the proposed project, such as the amount and cost of supplies to be made available, to the existing legal framework of official state demand projections. This is a quasi-judicial decision. The Commission more broadly applies facts to decide such questions as the cost and environmental impact of the proposed project. These are quasi-legislative decisions.

We start with the knowledge that power plant certification proceedings conducted by the Energy Commission are labelled "adjudicatory hearings" by statute. (Pub. Res. Code, Section 25513.) Within California's regulatory scheme, the Energy Commission is charged with promulgating state electricity demand forecasts for use in facility planning (Id., Sections 25300-25305). This closely resembles the quasi-legislative act of developing and adopting a land use master plan. With these forecasts in place, and after certain other quasi-legislative hearings have established general siting criteria, the Energy Commission then holds an "adjudicatory hearing" to determine whether a certificate authorizing construction should be issued.

In the Allen/Warner certification proceeding, this Commission followed a similar procedure. The PUC determined in D.91968 to accept the Energy Commission's demand forecasts as binding in Allen/Warner proceedings. We stated that "all the remaining issues including need... must be adjudicated...under this standard." EDF contends that a certification process is a classic example of the judicial prcess of applying facts to pre-existing law.

We find instructive the analogies to be found in the California land use cases cited by EDF. The California Supreme Court has held that "[t]he adoption of a general plan is a legislative act." (Selby Realty Co. v City of San Buenaventura (1973) 10 C 3d 110, 118. In City of Rancho Palos Verdes Estates v City Council of Rolling Hills Estates (1976), 59 CA 3d 869, 882-85, the Court of Appeals addressed the problem of administrative action which has both legislative and adjudicatory aspects. The court stated: "[T]he presently applicable test of adjudicatory or legislative character of local government action...is the dominant concern of the action taken.... [Where] the dominant concern of the action... is narrow and private rather than broad and public, the action must be viewed as adjudicatory in nature.." (Id. at 885)

We also note EDF's reliance on Ligon Specialized Hauler, Inc., supra. The United States Supreme Court held that in hearings before the Interstate Commerce Commission for a motor carrier certificate of public convenience and necessity under Section 207, subdivision (a), of the Interstate Commerce Act (former 49 U.S.C. Section 307, subd. (a), repealed in 1978 by P.L. 95-473, Section 4(b)) were subject to the adjudicatory hearing requirements of the federal Administrative Procedure Act (APA). (Riss & Co. v. United States (1951) 341 U.S. 907) However, proceedings involving the issuance of a motor carrier certificate determine narrow factual issues, such as the adequacy of existing service for a particular commodity on a specific route, particular shippers' needs, the effect of new competition on existing carriers, and, most importantly, the "fitness" of an applicant and the inherent advantages of his proposed service. The framework and standards for decision are relatively fixed by the narrow factual issues. This is a quasi-judicial process.

Our decision making process in certification proceedings involves more than a narrow application of facts to law in the classical judicial mode. Once we have made the benchmark quasi-judicial decision that a proposed project conforms to the officially adopted forecast, there remain many facts that are considered

on a quasi-legislative basis. These include the cost of the project, its likely impact on rates, operating and reliability factors, safety, and environmental impacts. The range for exercise of our discretion is very broad. There is no fixed framework of narrow factual issues which governs the decision-making process. Our process is quasi-legislative on these questions.

4. Certification proceedings have prospective application, in a manner found quasi-legislative in CLAM.

Justice Mosk contrasts "adjudicating vested interests" with making ratemaking decisions with prospective application only. On this ground, certification resembles ratemaking, and so would be quasi-legislative under the CLAM test.

It can be argued that the "vested interests" of all EDF's members and supporters in clean air and a healthful environment, or utility shareholders' "vested interests" in securing and selling power, or even utility customers' "vested interests" in buying power, are "adjudicated" when a project such as Allen/Warner is reviewed. However, all these interests are prospective and contingent, rather than presently vested. These contrast with reparations cases, in which the utilities are claimed to have present wrongful possession of money or goods belonging to complaining parties. The CLAM decision found this distinction between present and prospective rights to be critical.

5. The frequent attachment of conditions to certificates prevents identification of clear prevailing and losing parties.

Unlike ratemaking, certification proceedings may produce one of two clearly distinguishable results; a certificate of public convenience and necessity may or may not be issued. In this regard, the applicant utilities either prevail or fail. When public participants have argued against a certificate, their positions can easily be seen to have been vindicated or rejected at the end of the proceeding. Surely EDF would consider itself to have scored a "clear-cut victory" had the Commission denied the certificate, thereby preventing the utilities from building Allen/Warner. Such a certification decision might therefore be quasi-judicial under this element of CLAM.

Typically, however, certificates are granted subject to conditions. These conditions are applied after a quasi-legislative evaluation of the record by the Commission. Elements of participants' positions may appear as conditions. In these circumstances, attachment of a condition may constitute the adoption, in whole or in part, of participants' positions sufficient to justify compensation under Articles 18.5 or 18.6.

Although a participant may have "prevailed" on the individual point covered by a condition, it is unlikely that every one of a participants' proposed facts or conditions will be adopted in a certification decision. Absent such complete victory, certification proceedings will produce composite results of the type found quasi-legislative in CLAM.

6. No identifiable fund of money was created.

As in rate cases, no identifiable fund of money is extracted from the utilities which can readily be tapped to pay participant fees. On this ground, CLAM would label certification proceeding quasi-legislative.

7. Summary

Our application of the six elements of CLAM's legal test to certification proceedings leads us to conclude, on balance, that such proceedings, are quasi-legislative in nature. We reach this conclusion despite the fact that we can envision situations where the certification process would appear to be entirely quasi-judicial, except for the prospective application of the decision and the lack of the creation of an identifiable fund of money. For example, where our staff and other parties did not intervene, a certification matter could very closely resemble a quasi-judicial case.

This does not end our analysis, however. The close attention paid to underlying policy considerations was an important element in Justice Mosk's prevailing opinion. The CLAM case must be viewed against the Commission's then strident opposition to authorization for attorney fee awards because of administrative difficulties. We believe that we have now resolved those difficulties, as outlined below.

B. The Policy Test

Within his complex CLAM opinion Justic Mosk made a clear, firm statement about the California Public Utilities Commission:

> The commission is a state agency of constitutional origin with far-reaching duties, functions and powers. (Cal. Const., art. XII, Sections 1-6.) The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (Id., Sections 2, 4, 6.) The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: 'The Legislature has plenary power, unlimited by other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission....' (Cal. Const., art. XII, Section 5.)

> Pursuant to this grant of power the Legislature enacted Public Utilities Code section 701, conferring on the commission expansive authority to 'do all things, whether specifically designated in [the Public Utilities Act] or addition thereto, which are necessary and convenient' in the supervision and regulation of every public utility in California. The commission's authority has been liberally construed. [citations omitted] Additional powers and jurisdiction that the commission exercises, however, 'must be cognate and germane to the regulation of public utilities...' [citations omitted]
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> 25 C 3d at 905-906
> [emphasis in opinion]

After setting forth this basic assumption in favor of the Commission's authority and discretion, Justice Mosk restated the general principle that the Commission's judicial powers include "equitable jurisdiction as an incident to its express duties and authority." (Id. at 907). Discussing the reparations case before the court he found "persuasive reasons for holding that the commission likewise has equitable power to award attorney fees from a common fund in such circumstances." (Id.) However, the Court ultimately rejected the Commission's authority to grant fees in ratemaking cases.

We believe the result in CLAM must be viewed in light of its history if these apparent discrepancies are to be resolved. As discussed above, the Commission pleaded with the Court not to

bestow on us the power to award participant fees. In the Commission decisions appealed to the Court in CLAM, we had especially stressed the administrative difficulties we expected to face in using such power. At the time we asserted that those difficulties would be insurmountable.

Justice Mosk's opinion focuses not so much on any jurisdictional bar to participant fee awards but rather on the difficulty of applying court-developed attorney compensation theories to the administrative setting. As set forth in Part I, above, Justice Mosk uses strong language to contrast the complexity of rate cases with the relative simplicity of reparation proceedings. As we have shown in our application of the legal test to certification proceedings, the quasi-judicial/quasi-legislative dichotomy reveals more about administrative difficulties than it does about intrinsic differences in the two types of cases. This suggests that, once those administrative difficulties are solved, the dichotomy's usefulness disappears.

Our thoughts in this regard are bolstered by two portions of Part IV of Justice Mosk's opinion. First, he uses the "administrative quagmire" language cited above in rejecting TURN's arguments that the Commission was empowered to include "public participation costs" in expenses charged to ratepayers. We see

this as clearly the language of a court wishing to proceed on a step-by-step basis to let an administrative agency that asks not to be given certain powers avoid the problems which precipitous imposition of responsibility could entail.

In addition, Justice Mosk's opinion contrasts the position of the Office of Legal Counsel of the United States Department of Justice with the Commission's position in CLAM. After a federal circuit court opinion held that the Federal Power Commission lacked authority to award compensation to interveners, the Office of Legal Counsel apparently determined that an agency might examine its organic statutes and permit compensation from its own budget. Justice Mosk's opinion states: "Here, by contrast, the commission has determined that its own organic statutes do not authorize it to award 'public participation costs' in ratemaking proceedings. Even under the federal authorities, negative determination by the agency disposes of the issue." (Id. at 912; footnote omitted, emphasis added.) We read this language not as embodying a jurisdictional bar but, again, as deference to our assessment of the difficulties we would face. Positive determination by the Commission might well have disposed of the issue the other way.

If we are to continue to receive expert public input in our proceedings, we must be prepared to compensate those who would otherwise be unable to participate. Furthermore, we simply no longer believe that awarding participant fees in ratemaking cases is an impossible task. We believe it is incumbent on us to explain these procedures to the Court, since they constitute the principal reasons for today's decision.

III. COMMISSION PROCEDURES WILL GUIDE OUR COMPENSATION OF PUBLIC PARTICIPANTS

A. The PURPA Rules

On June 17, 1980, the Commission issued D.91909, to implement Sections 121 and 122 of the federal Public Utilities Regulatory Policies Act of 1978 (PURPA). Section 121 authorizes intervention by any electric consumer in a state ratemaking proceeding related to rates or rate design of electric utilities. Section 122 establishes the electric utility's liability under certain conditions to compensate such participants either in a civil action or through a procedure to be established by the state regulatory body. D.91909, as modified by D.92602, culminates the proceeding begun by Order Instituting Investigation (OII) 39, issued March 13, 1979. The decision establishes a procedure whereby participants may seek from this Commission an award of attorney fees

and related costs in quasi-legislative ratemaking cases containing PURPA issues. That procedure is formally embodied in Article 18.5 of our Rules of Practice and Procedure (Rules 76.01 through 76.11), attached as Appendix A.

In brief outline, the procedure requires a participant seeking compensation to file a Request for Finding of Eligibility for Compensation within thirty days of the first prehearing conference in a proceeding. The request must indicate the financial hardship the participant faces, the PURPA issues the participant will raise, the participant's position on such issues, persons with the same interests represented by a common legal representative, an estimate of the compensation to which the participant believes itself entitled, and a description of the organization, if any, which the participant represents. (Rule 76.03.) Other parties may respond to this Request for a Finding of Eligibility. (Rule 76.04.) At its first regularly scheduled conference thereafter, the Commission must issue a ruling on the Request. (Rule 76.05.) Rule 76.05(c) permits the Commission to determine, among other things, whether compensation will be necessary to ensure that an interest essential to a fair determination in the proceeding is adequately represented. If the Commission finds that the issues participants want to raise will be adequately represented by staff or other

parties, it may issue a negative ruling on eligibility. This ruling forecloses neither the participation nor the possibility of compensation, but does alert the participant early in the case that it cannot expect to be compensated.

After the Commission has issued an order or decision in the proceeding, a participant may file a Request for Compensation. (Rule 76.06.) This request must include a detailed description of services and expenses and the manner in which the participant "has substantially contributed to the adoption, in whole or in part, of a PURPA position" advocated by the participant. Rule 76.11 addresses the situation where a proceeding was pending at the time the rules were adopted.

D. 91909 was never challenged in the California Supreme Court by the utilities.[3/] As a result, our rules for awarding compensation are in effect. We recently awarded TURN compensation for its presentation in a Pacific Power & Light general rate case, and have found TURN eligible to apply for compensation in several other proceedings.

We now have in place a mechanism which allows us to manage the difficulties which we previously thought were insuperable. Particularly useful is our procedure for determining eligibility for compensation very early in a given proceeding.

3/ In his dissent to D.91909, former PUC Commissioner Sturgeon argued that the California Supreme Court in CLAM had denied the Commission the authority to award compensation in ratemaking cases. He argued that PURPA neither required nor authorized the Commission to adopt the procedure outlined above. His views on each point were not addressed by the majority.

There are several legitimate reasons the utilities may have chosen not to challenge D.91909. For example, if CLAM had been found to present a bar to the rules adopted, then consumer participants would have been able under PURPA to sue the utilities for compensation in civil actions in state court. The utilities might then have found themselves engaged in a multiplicity of lawsuits, all involving considerable expense and even greater potential liability than if the Commission awarded compensation and then included such compensation as a permissible expense in the utility's next general rate case.

By requiring the participant to state its positions on the issues it will raise and to specify the compensation it will seek, we are in a position to know whether the participant will simply duplicate positions taken by the staff or other parties. Further, we will be in a position at the end of the proceeding, assuming eligibility has been positively determined, to isolate the contribution, if any, which the participant has made to our final decision. The Commission, assisted by the administrative law judge presiding over the case, can identify the value of the contribution by any given participant in the case proceeding. Finally, if we think that the participant's presentation is likely to be duplicative, unnecessary, or unintelligible, we can issue a negative eligibility ruling to alert the participant not to expect compensation. This exercise of discretion is subject to review by the California Supreme Court.

B. Article 18.6 will apply comparable procedures to other proceedings.

Today's OII, issued separately, begins the process of creating general procedures for considering awards of participant fees in all Commission proceedings. Article 18.6 will apply the concepts presented in our PURPA rules (Article 18.5) to other types of cases, where issues other than PURPA purposes and PURPA standards are litigated or where utilities other than electric utilities are involved.

The proposed Article 18.6 closely parallels the PURPA rules. To guide interested parties in their preparation of comments on these proposed rules, we here set forth our critical policy concerns.

Foremost among these critical concerns is that the procedures can be administered in an even-handed way to award compensation only when our basic guidelines are met. The requirement of "significant contribution to the adoption, in whole or in part" of a participant's position is meant to be a stringent one, which will exclude from compensation many interesting and creative proposals.

The Commission staff will remain our primary resource in evaluating applications by utilities, and balancing the needs of ratepayers and utility shareholders. The staff's national reputation for technical excellence and innovative reasoning is richly deserved. However, no body of individuals can adequately address all facets of the public interest. Participation by consumers and their representatives is necessary both as supplemental sources of ideas, and as external checks on the Commission's practices and presumptions. We have no desire to insulate ourselves from those we serve.

A second critical concern is that compensatory participant fee awards be limited to those situations in which significant financial hardship would otherwise prevent effective participation. The level of participation we already receive from groups such as EDF suggests that existing financial hardships may not be crippling.

Finally, out of a sense of fairness to all interested parties in our proceedings, we seek to promulgate procedures which fairly indicate when compensation can be expected. All parties suffer under resource constraints, and will be best served by a fair knowledge of the scope of their antagonists' views. Would-be participants should especially benefit from preliminary determination of their eligibility for compensation. We must remember, however, that any finding of eligibility in no way ensures compensation, nor does a negative finding necessarily preclude compensation. In the Allen/Warner case itself, no one would have predicted that last-minute withdrawal of the application would jeopadize EDF's ability to apply for compensation. This surprise in the Allen/Warner proceeding leads us to consider departure from our "adoption" requirement at the very instant we reaffirm it. These circumstances are unique, and bring us to contemplate a unique result, in our desire to treat all parties equitably.

After a final set of rules in Article 18.6 are adopted, and following exhaustion of administrative and judicial remedies in conjunction with this decision, we will be prepared to consider requests prospectively in other proceedings. Until then we will hold without action any new requests for participant compensation beyond that considered herein, other than PURPA-related activity covered by Article 18.5, in applications or investigatory proceedings before us.

IV. CONCLUSIONS

In CLAM we feared the administrative difficulties of awarding attorney fees in sprawling rate cases would be unmanageable. In D.91909 we created procedures whereby those difficulties could be managed.[4/] In this decision we simply say that we think CLAM's dichotomy between quasi-legislative and quasi-judicial cases does not control in light of the existence of rules which resolve the concerns contained in the policy portion of the CLAM test.

4/ Ironically, the Court was aware in CLAM of Sections 121 and 122 of PURPA. (25 C 3d at 912, fn. 9.) Had CLAM been delayed but six months, the Court would have been informed of the rules adopted in D.91909 for implementing PURPA.

We reach our conclusion today with no intention to defy the California Supreme Court. We realize full well that CLAM states "...we are not persuaded that sections 701 and 728 require, or even permit, the Commission to shift TURN's 'public participation costs' to the ratepayers." (25 C 3d at 911.) We realize CLAM also states such a decision "is more appropriately within the province of the Legislature." (Id. at 912, fn. omitted.) We further realize that this decision could serve as the occasion for a court opinion excoriating us for departing from a governing court ruling. But we think that by far the most productive course for us now, in the context of our constant dialogue with the Court, is to accept responsibility for the full implications of D.91909. If CLAM is to be read literally, D.91909 may be found illegal. In view of PURPA, this would merely shift the burden of first determining compensation from this Commission to the courts.

Now that our experience with the PURPA rules demonstrates that compensation rules can be administered, we will apply them beyond the PURPA context. The OII proceeding commenced today will produce Article 18.6 of our Rules, applicable to all non-PURPA issues. By establishing rigid guidelines for eligibility, we will avoid the "administrative quagmire" once feared by both this Commission and the California Supreme Court. We will also ensure

that compensation is available as a reward only to those whose position is adopted, in whole or in part, in a Commission decision. This excludes compensation for participants whose position is viewed sympathetically, but not adopted.

This requirement of "adoption, in whole or in part" would appear to foreclose EDF's application for fees in this proceeding. However, because of the unique circumstances of the utilities' withdrawal of the Allen/Warner application on the eve of decision, we decided in D.92757 to allow an application for fees. We reaffirm that decision today, in the interests of equity. EDF can only prevail if it shows significant contribution to the Commission, sufficient under the unique circumstances of this proceeding to justify even a narrow departure from our general standards.

As Commissioners we have many opportunities to direct and reorient future actions to be taken by California utilities. Often our decisions have far-reaching consequences. We think today's decision is one of the most important we can make, because it fundamentally affects the degree of public input into our decisions. The best insurance against producing untoward results for California with our decisions is to invite public participation

in and understanding of our processes. Our decision today aims at securing that participation where it is most needed now and where we are sure it will be most needed in the future.

Conclusions of Law

1. CLAM creates a two-part test for determining when the Commission may award participant fees. A six element legal test distinguishes between quasi-judicial and quasi-legislative proceedings. A policy test relies upon expectations of differing burdens of administering awards of participant fees in quasi-judicial reparations cases and quasi-legislative ratemaking cases.

2. CLAM finds that a potential "administrative quagmire" in administering participant fee procedures in quasi-legislative ratemaking proceedings before the Commission bars such fee awards, but does not prevent such awards in quasi-judicial reparations proceedings.

3. The proceeding in A.59308, related to the request for a certificate of public convenience and necessity for the Harry Allen/ Warner Valley Energy System, is predominantly quasi-legislative under the CLAM distinction.

4. D.91909 (as modified by D.92602) adopted procedures for awarding participant fees in quasi-legislative electricity ratemaking cases containing PURPA issues. These procedures are codified as Article 18.5 of the Commission Rules of Practice and Procedure.

5. The procedures in Article 18.5 provide a structure for the Commission to exercise its discretion over participant fee claims, resolving underlying policy concerns in CLAM.

6. The Commission should issue an Order Instituting Investigation, to create an Article 18.6 to the Rules of Practice and Procedure, to provide for participant fee compensation in Commission proceedings. The rules in Article 18.6 will also meet the CLAM policy requirements by providing reasonable, administrable standards.

7. Because there was no Commission decision on the merits in A.59308, the Commission did not "adopt, in whole or in part, "an EDF position, as that phrase is used in Article 18.5 and proposed Article 18.6.

8. The unique circumstances of last minute withdrawal of A.59308 will produce inequitable results if EDF is denied the opportunity to show that it made a significant contribution in A.59308.

9. EDF may apply for compensation in A.59308, but will prevail only if it demonstrates significant contribution to the Commission, within the context of the unique procedural history of A.59308, sufficient to justify a narrow exception to our adoption test.

INTERIM ORDER

1. Environmental Defense Fund may file before the Commission a brief explaining why special circumstances in A.59308 may justify an award of compensation for attorney and witness fees, and other reasonable related costs. EDF may file in one of two ways:

(a). If EDF intends to file for an ad hoc determination of its eligibility for compensation, it must notifiy the Commission and all parties and appearances, within 15 days of the effective date of this order. EDF, and all parties and appearances who choose to respond, shall then file concurrent briefs 15 days thereafter.

(b). In the alternative, EDF may wait until the Rules in Article 18.6 are finalized. EDF, and all parties and appearances who choose to respond, shall then file concurrent briefs 30 days after the effective date of Article 18.6.

This order becomes effective 30 days from today.
Dated NOV 13 1991, at San Francisco, California.

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

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

I concur.
VICTOR CALVO, Commissioner

APPENDIX 1:

COMMISSION RULES, ARTICLE 18.5

72. (Rule 72) Commission Records.
If any matter contained in a document on file as a public record with the Commission is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically identified and are competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

73. (Rule 73) Official Notice of Facts.
Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California.

74. (Rule 74) Additional Evidence.
At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, he may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission reserving exhibit numbers therefor.

Article 18. Briefs and Oral Arguments

75. (Rule 75) Briefs.
The presiding officer may fix the time for the filing of briefs. Concurrent briefs are preferable. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the Commission in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. Ordinarily, when a matter has been submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the Commission. The original of each brief shall contain a certification that copies have been served upon or mailed to each party or his attorney.

Article 18.5. Rules for Implementation of PURPA Section 122(a)(2)

76.01. (Rule 76.01) Purpose.
The purpose of this article is to establish procedures for awarding reasonable fees and costs to consumers of electric utilities pursuant to PURPA Section 122(a)(2).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:
1. New Article 18.5 (Sections 76.01-76.10) filed 8-13-80, designated effective 7-27-80 by Public Utilities Commission Decision No. 91909, see Section 11445, Government Code (Register 80, No. 33).

76.02. (Rule 76.02) Definitions.
When used in this article:
(a) "PURPA" means Public Utility Regulatory Policies Act of 1978.
(b) "Compensation" means reasonable attorneys' fees, expert witness fees, and other reasonable costs.

(c) "PURPA position" means a factual contention, legal contention, or specific recommendation promoting one of the following PURPA purposes and relating to one or more of the following PURPA subtitle B standards:
(1) PURPA purposes:
(A) Conservation of energy supplied by electric utilities
(B) Optimization of the efficiency of use of facilities
(C) Equitable rates to electric consumers
(2) PURPA Ratemaking Standards:
(A) Cost of Service--S 111(d)(1)
(B) Declining Block Rates--S 111(d)(2)
(C) Time-of-Day Rates--S 111(d)(3)
(D) Seasonal Rates--S 111(d)(4)
(E) Interruptible Rates--S 111(d)(5)
(F) Load Management Techniques--S 111(d)(6)
(3) Other PURPA Standards:
(A) Master Metering--S 113(b)(1)
(B) Automatic Adjustment Clauses--S 113(b)(2)
(C) Information to Consumers--S 113(b)(3)
(D) Procedures for Termination of Electric Service--S 113(d)(4)
(E) Advertising--S 113(d)(5)
(d) "Consumer" means any retail electric consumer of an electric utility, any authorized representative of such a consumer, or any representative of a group or organization authorized, pursuant to articles of incorporation or by-laws, to represent the interests of consumers.
(e) "Expert witness fees" means recorded or billed costs incurred by a consumer for an expert witness with respect to a PURPA issue.
(f) "Other reasonable costs" means reasonable out-of-pocket expenses incurred by a consumer with respect to a PURPA issue not exceeding twenty-five percent (25%) of the total of reasonable attorneys' fees and expert witness fees awarded.
(g) "Party" shall mean any interested party, respondent, utility, or Commission staff of record in a proceeding.
(h) "Proceeding" shall mean any application, case, investigation, or other procedure of the Commission related to or involving electric rates or rate design which is initiated after the date the rules herein become effective and in which a PURPA position is considered.
(i) "Reasonable fees" shall be computed at prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:
1. Amendment of subsection (h) filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

76.03. (Rule 76.03) Consumer's Request.

Within thirty days of the first prehearing conference in a proceeding the consumer shall file with the Commission's Docket Office and serve on the parties known or contemplated at that time a Request for Finding of Eligibility for Compensation, in compliance with Rules 2, 3, 4, 6, and 7, and with an attached certificate of service by mail on appearances. In cases where no prehearing conference is scheduled or where the ALJ anticipates the proceeding will take less than 30 days, the ALJ shall determine the procedure to be used for filing petitions for reimbursement. In all cases, the petition for reimbursement must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such consumer. Such showing shall include a specific budget for the representation and a summary description of the finances of the consumer which distinguishes between grant funds committed to specific projects and discretionary funds.

(b) A statement of the PURPA issues which the consumer intends to raise in the proceeding, together with a statement of the consumer's position on each such issue.

(c) A showing addressing representation of persons with the same or similar interests by a common legal representative.

(d) An estimate of the compensation to which the consumer believes it may be entitled to at any stage of the proceeding and the basis for such estimate, including a budget.

(e) For a consumer who claims to represent the interests of other consumers, a showing which includes the articles of incorporation, by-laws, membership structure, composition of Board of Directors, and newsletter circulation, if any, along with a summary description of the previous work of the consumer.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11343, Government Code (Register 81, No. 7).

76.04. (Rule 76.04) Showing of Other Parties.

Except as provided by the ALJ in accordance with Rule 76.03, the Commission staff shall file with the Commission's Docket Office a statement within ten days after the consumer's filing or 30 days after the commencement of the proceeding, whichever occurs later, declaring whether it intends to take a position different from the consumer. Any other party may file comments on a consumer's request within ten days after the request is filed. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7, and be accompanied by a certificate of service on appearances by mail.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11343, Government Code (Register 81, No. 7).

76.05. (Rule 76.05) Commission Ruling.

At the first regularly scheduled conference after the statement of the Commission staff has been filed, the Commission shall issue a ruling as to the following items:

(a) Whether or not the consumer has met its burden of showing "significant financial hardship" pursuant to Rule 76.05(e).

(b) A designation, if appropriate, of the "common legal representative" to represent persons with the same or similar interests as provided for in PURPA Section 122(a)(2), which designation shall be binding for the remainder of the proceeding.

(c) Whether or not "Significant financial hardship" has been shown by consumers:

(1) who have, or represent, an interest

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(C) who are, or represent an interest which is, unable to effectively participate or intervene in the proceeding because such persons cannot afford to pay reasonable attorneys' fees, expert witness fees, and other reasonable costs of preparing for, and participating or intervening in, such proceeding (including fees and costs of obtaining judicial review of such proceeding).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

(2) who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.05(e)1(C).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.06. (Rule 76.06) Compensation Filings of Consumer.

Following issuance of a Commission order or decision during a proceeding pursuant to Rule 76.05 a consumer may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7, and shall have a certificate of service by mail on appearances attached. Such request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. To the extent possible, this breakdown of services and expenses should be related to specific PURPA issues. The request shall also describe how the consumer has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of a PURPA position advocated by the consumer related to a PURPA standard. "Substantial contribution" shall be that contribution which, in the judgment of the Commission, substantially assists the Commission to promote a PURPA purpose in a manner relating to a PURPA standard by the adoption, at least in part, of the consumer's position. A showing of substantial contribution shall include, but not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the consumer.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11343, Government Code (Register 81, No. 7).

76.07. (Rule 76.07) Staff Audit of Consumer's Records.

At the direction of the Commission, the Commission staff may audit the records and books of the consumer to the extent necessary to verify that compensation sought is reasonable. Within twenty days after completion of the audit, if any, an audit report shall be filed with the Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.05. (Rule 76.05) Commission Decision.

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit report, if any, the Commission shall issue a decision describing the contribution found to have been made and the compensation awarded.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.09. (Rule 76.09) Payment of Compensation.

The electric utility shall pay any award of compensation to the consumer within 30 days after the Commission's decision is issued, unless a timely application for rehearing with respect to the issue of compensation is filed, in which case no payment will be required until an order denying rehearing or an order after rehearing is issued.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.10. (Rule 76.10) Consumer Request After Hearings Commence.

(a) A consumer who has not requested a finding of eligibility for compensation pursuant to Rule 76.03 may make such a request after hearings have begun. Such request shall not be granted unless all the requirements of Rule 76.03 are met and the consumer can demonstrate that absent participation by the consumer, an important issue relating to a PURPA standard has not or will be adequately considered in the proceeding. In no event may such a request be filed after Day 110 in an electric rate case subject to the Regulatory Lag Plan as adopted by Resolution No. M-4705 (adopted June 3, 1979).

(b) A request pursuant to this Rule shall be filed within five days of the date of the appearance by the consumer in the proceeding. Any comment by the staff or any party, in the nature of that described in Rule 76.04, shall be filed within five working days of the consumer's request. A ruling in the nature of that described in Rule 76.05 shall at the first regularly scheduled conference after the filing of the consumer's request. All filings pursuant to this Rule shall comply with Rules 2, 3, 4, 6, and 7 and shall have a certificate of service on appearances by mail attached.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.11. Provisions for Reimbursement.

For cases which were pending on the date these rules became effective, where the rules concerning time for filing requests for eligibility and reimbursement, the time for filing responses thereto, and time for a Commission decision thereon cannot be met, parties may file requests for reimbursement in compliance with all of the remaining rules. Such requests must be filed within 60 days of the date the order adopting this rule is made effective. The Commission will consider all such requests on an individual basis. The exception established by this rule is not applicable to cases in which a decision on the relevant PURPA issue or issues was issued prior to July 28, 1980.

NOTE: Authority and reference cited: Section 1701, Public Utilities Code; Stats 1947, Ch 1425.

HISTORY:

1. New section filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11345, Government Code (Register 81, No. 7).

COMMISSIONER VICTOR CALVO, CONCURRING:

The Commission today finds the Environmental Defense Fund (EDF) eligible to apply for an award of attorney fees for its participation in the Harry Allen/Warner Valley Energy System certification proceeding. The decision finds that a certification proceeding, on balance, is more like a ratemaking than a reparations proceeding, and hence is a quasi-legislative proceeding under Consumers Lobby Against Monopolies (1979) 25 C 3d 891 (CLAM). It then concludes that the policy justification in CLAM barring an award of attorney fees in quasi-legislative proceedings is no longer viable in light of the Commission's ability to manage fee awards in such proceedings.

While I strongly concur with the policy to award attorney fees in all meritorious cases, I am not totally comfortable with this policy in light of the CLAM decision. Specifically, our decision reasons that while CLAM barred the Commission from awarding attorney fees in quasi-legislative cases, CLAM did so primarily in response to insuperable administrative burdens feared by the Commission. Prior to the CLAM decision, the Commission perceived an administrative quagmire in isolating the contribution of numerous intervenors in complex rate cases in determining whether to award a party attorney fees. With the creation of rules to award fees in electric rate proceedings involving the Public Utility Regulatory Policies Act

of 1978 (PURPA) our decision reasons that the administrative burdens are, in fact, manageable. The feasibility of awarding fees is no longer problematical in rate proceedings; hence, the need to distinguish legally the type of proceeding in order to award fees disappears.

This reasoning causes me some concern. While I fully support the policy reasons justifying an award of attorney fees in any case where eligibility is clearly established, I am not completely convinced that the Commission has the power to make such an award absent federal or state legislative authority. My concern stems from certain statements in the CLAM decision. Justice Mosk specifically indicated that "the decision to include 'public participation costs' in ratemaking proceedings is more appropriately within the province of the Legislature." (25 C 3d 891 at 911-12) The footnotes which follow this statement cited PURPA and the Colorado legislative scheme as examples of federal and state legislative authority which expressly allow a state public utility commission to award attorney fees in certain rate-making matters. Justice Mosk then distinguished the California legislative scheme and stated that "the decision to establish a system for compensating public interest organizations for participation in the commission's quasi-legislative proceedings is a prerogative of the Legislature." (25 C 3d 891 at 912-13, footnote 10). He concluded that the Commission correctly determined that it was without authority to award attorney fees and costs in quasi-legislative ratemaking proceedings.

By my concurrence I do not mean to say that I support the legalistic distinction between quasi-legislative and quasi-judicial proceedings, but that I accept the distinction as the governing law. I do strongly agree with my fellow Commissioners that informed and sophisticated public participation in our proceedings is highly desirable, and even necessary to ensure that our decisions reflect reasonable results.

VICTOR CALVO, COMMISSIONER