

Decision 98-12-064 December 17, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

ORIGINAL
Rulemaking 94-04-031
(Filed April 20, 1994)

Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.

Investigation 94-04-032
(Filed April 20, 1994)

**DECISION REGARDING PUBLIC MEDIA CENTER'S
MOTION AND NOTICE OF INTENT
TO CLAIM COMPENSATION**

Summary

On September 3, 1997, Public Media Center (PMC) filed its "Motion For Determination Of Procedure For Accepting Notice Of Intent To Claim Compensation" (motion). PMC's motion requests that the assigned Administrative Law Judge (ALJ) issue an order determining the procedure for accepting new notices of intent to claim compensation in this proceeding. Concurrent with the filing of PMC's motion, PMC submitted for filing its "Notice Of Intent To Claim Compensation" (notice of intent).¹ This decision denies PMC's motion because PMC failed to timely identify the issues that it

¹ In addition, PMC filed its "Petition for Rehearing Of Decision 97-08-064" on the same day. PMC's petition was renamed by the Docket Office as an application for rehearing of that decision.

participated in and failed to timely file its motion requesting what procedure PMC should follow for filing its notice of intent. PMC is therefore ineligible for intervenor compensation for issues that arose out of, and which were addressed in, Decision (D.) 97-03-069, D.97-05-040, and D.97-08-064.

Background

In order to resolve PMC's motion and its notice of intent, it is necessary to briefly recite the history of some of the electric restructuring decisions that have been issued, and to provide some background about the pleadings and letters which PMC submitted and the other pleadings which have been filed.

The first mention of a customer education effort appeared in D.95-12-063, as modified by D.96-01-009. The Commission stated that it expected that efforts would be conducted to inform consumers about the changes occurring in the electric industry. The decision also stated that an independent education trust would be established to educate small business and residential customers about the changes in the electric industry. (D.95-12-063, as modified by D.96-01-009 [64 CPUC2d 1, 84, 98].) In D.96-03-022, the Commission reiterated its role of providing information to consumers and that an independent education trust would be an integral part of this effort. Subsequently, in Assembly Bill (AB) 1890 (Stats. 1996, ch. 854), the Legislature codified the development and implementation of a program to educate customers about the changes to the electric industry. AB 1890 took effect on September 23, 1996.

D.97-03-069 authorized the three largest electric investor-owned utilities (IOUs) in California to conduct a joint, statewide Customer Education Program (CEP) to inform the public about the changes taking place in the electric industry. That decision also established the Electric Restructuring Education Group (EREG), and authorized it to organize, develop, and implement the CEP on behalf of the IOUs. In addition, the decision established the Consumer Education

Advisory Panel (CEAP) to assist the Commission in the evaluation of the joint CEP and to provide input into the development of the Commission's own outreach plan. The decision directed the IOUs, in conjunction with the EREG, to develop the proposed CEP work scope and budget, and to file and serve a motion requesting that the CEP proposal (CEP motion) be adopted. That CEP motion was filed on June 2, 1997.

Prior to the filing of the CEP motion, the Commission issued D.97-05-040. That decision addressed some of the policy and threshold issues regarding direct access. The decision ordered that direct access be made available to all California electricity consumers on January 1, 1998.

Comments to the June 2, 1997 CEP motion of the IOUs were to be filed within 10 days from the date of service of the CEP motion. PMC's motion states that it "submitted initial comments on the CEP on June 12, 1997."² However, a review of the records of the Docket Office reveals that PMC's June 12 response was not filed with the Commission. This ruling takes official notice of that fact. Perhaps in recognition that PMC did not submit its June 12 response to the Docket Office for filing, PMC attached its June 12 response as an exhibit to its "Reply Comments Of Public Media Center To Motion Of Investor-Owned Utilities, On Behalf Of The Electric Restructuring Education Group, For Approval Of A Consumer Education Program" (reply comments). PMC's reply comments were filed with the Docket Office on July 2, 1997. PMC also attached another exhibit, a nine page letter dated July 1, 1997 addressed to Commissioner

² PMC's comments of June 12, 1997 is entitled "Response Of Public Media Center To Motion Of Investor-Owned Utilities, On Behalf Of The Electric Restructuring Education Group, For Approval Of A Consumer Education Plan" (June 12 response).

P. Gregory Conlon from Joseph Therrien, to its reply comments.³ Therrien is a Communications Consultant and Chairman of the Board of PMC.⁴ His letter of July 1, 1997 replies to the June 23, 1997 response that the IOUs filed in response to the comments to the June 2, 1997 motion of the IOUs for approval of the CEP. Therrien's letter was incorporated by reference into PMC's reply comments. (Reply Comments, p. 14.)

D.97-08-064 was approved by the Commission on August 1, 1997. That decision authorized a statewide CEP with a budget of \$89.3 million and adopted

³ PMC's notice of intent states that it has already incurred 146 hours of Therrien's time, in addition to time spent by others.

⁴ Therrien also mailed a letter dated June 12, 1997 to Commissioner Conlon. That letter contained comments to the CEP motion filed by the IOUs on behalf of the EREG. Although Therrien's introduction to his letter states: "I am filing comments on the motion filed June 2, 1997 by the Investor Owned Utilities on behalf of the Electric Restructuring Education Group..." the Docket Office records reveal that this letter was not filed with the Commission. Therrien's June 12, 1997 letter was not served on the service list, and appears to have been copied only to the other Commissioners, the EREG Board members, two ALJs, the Speaker of the California Assembly, the President of the California Senate, and to six other community/consumer organizations.

Therrien also mailed a letter dated July 23, 1997 to Commissioner Jessie J. Knight, Jr. That letter responded to the assigned Commissioners' ruling (ACR) of June 24, 1997 requesting comments on the points raised by the four organizations which offered opinions on the CEP. In the introductory paragraph of Therrien's letter, he states that he only recently became aware of the ACR, and that he is responding to the ACR now "because I believe you and your fellow Commissioners should have the benefit of all possible relevant opinion, regardless of time deadlines, before concluding your decision-making process." This letter was not filed with the Docket Office.

In addition, Therrien mailed a letter dated July 28, 1997 to Commissioner Conlon. That letter alleged that the focus group research that the EREG and DDB Needham were undertaking was being conducted inappropriately. Therrien requested that a review of the research process be undertaken by the staff. Copies of these two letters appear to have been sent only to a select group of individuals similar to the recipients of the June 12, 1997 letter.

various steps and procedures for the design and implementation of the CEP. In addition, the IOUs were directed to take over the direct management of the advertising efforts from the EREG.

On September 3, 1997, PMC filed its application for rehearing of D.98-08-064. PMC also filed the motion at issue in this ruling, along with its notice of intent.

PMC's motion contends that D.97-05-040 "effectively accelerated the restructuring process to breakneck speed by demanding direct access for all consumer groups by January 1, 1998." Due to the accelerated time schedule, and the authorization of the CEP in D.97-03-069, PMC filed its motion because:

"These two decisions raised new and controversial issues in the Electrical Restructuring process, prompting the need for PMC to formally participate in this preceding [sic] in order to protect consumer interests which had not yet been considered by the parties. PMC submitted initial comments on the CEP on June 2, 1997. PMC filed additional comments on July 2, 1997 addressing EREG's response to PMC's initial comments and comments on the CEP filed by other parties to the restructuring proceeding. On July 25, 1997, the Commission issued a draft Opinion Regarding the Budget of the Joint Consumer Education Program and Modification of D.97-03-69 and D.97-04-40, [sic] wherein the commission proposed to approve the CEP, with few modifications On August 1, 1997, the Commission approved the CEP, as modified, retaining the power to review and approve numerous aspects of the CEP (Decision 97-08-064)." (Motion, pp. 2-3; emphasis added.)

On September 10, 1997, the Office of Ratepayer Advocates (ORA) filed a response to PMC's motion. This was followed by the October 3, 1997 filing of Southern California Edison Company's (Edison) response to PMC's notice of intent to claim compensation. PMC requested and was granted an opportunity to reply to the responses of ORA and Edison. PMC's reply was filed on October 20, 1997.

Discussion

Public Utilities Code § 1804(a)(1) sets forth the procedure for the filing of a notice of intent to claim compensation.⁵ Usually, a customer who seeks intervenor compensation must file and serve its notice of intent within 30 days after the Prehearing Conference (PHC) is held, or where no PHC is scheduled or if the proceeding will take less than 30 days, the Commission may determine the procedure to be used. This subdivision also provides:

"In cases where the schedule would not reasonably allow parties to identify issues within the timeframe set forth above, or where new issues emerge subsequent to the time set for filing, the commission may determine an appropriate procedure for accepting new or revised notices of intent."

Since the Commission may specify the procedure for accepting new notices of intent, the filing of PMC's notice of intent on September 3, 1997 is not dispositive of the procedure that PMC should be required to follow with regard to its notice of intent to claim compensation. Instead, PMC's motion is the appropriate procedural vehicle for determining the procedure for accepting a new notice of intent. That motion must be resolved before the notice of intent to claim compensation is addressed.

In ruling on PMC's motion, we must decide whether PMC should have submitted its motion or its notice of intent earlier in this proceeding in accordance with § 1804(a)(1). Although the Commission discussed a customer education effort and an education trust as early as December of 1995, no specifics about the CEP were provided until AB 1890 was enacted and D.97-03-069 was issued. D.97-03-069 contained the first description of the type of CEP the

⁵ Unless otherwise noted, all section references are to the Public Utilities Code.

Commission had in mind. That decision laid out the process for how the EREG was to develop the CEP for the Commission's consideration. April and May of 1997 were important months for the EREG because the proposed work scope and budget for the CEP were being developed. This culminated in the filing of the CEP motion by the IOUs to adopt the proposed CEP and budget, comments to the CEP, comments to the draft decision regarding the proposed adoption of the CEP, and the issuance of D.97-08-064. As evidenced by PMC's letters to the Commissioners in June and July of 1997, and its reply comments of July 2, 1997, it was during this time that PMC appears to have developed an interest in the customer education effort and the meetings of the EREG and the CEAP.

Despite PMC's participation in the EREG and CEAP meetings in the Spring of 1997, its awareness that D.97-05-040 mandated that direct access would begin on January 1, 1998, and its July 2, 1997 filing of its reply comments, PMC did not file its motion for the Commission to determine the procedure to claim compensation until September 3, 1997. This lag time is troublesome because PMC's notice of intent states that:

"PMC has already made a substantial contribution to the electrical restructuring rulemaking by submitting two sets of detailed comments on the Electric Restructuring Education Group's ... proposed consumer education program ... and by participating in meetings of the Consumer Education Advisory Group ... in order to assist CEAP in its review of the proposed CEP. Specifically, PMC's written comments provided a detailed analysis of the proposed CEP, raising serious concerns regarding its budget, lack of detail and flawed approach to consumer education. Many of PMC's recommendations were incorporated by the Commission into the approved CEP. For example, in accordance with PMC's comments, the Commission called for the disbandment of the EREG and implementation of the CEP by the IOUs with direct oversight by the Commission. In addition, the Commission redirected the media campaign away from mass media and towards citizen-based organizations.

"PMC anticipates that it will continue to participate in the CEP process by submitting additional comments, attending meetings and writing letters necessary to ensure that the Commission acts in accordance with the requirements of A.B. 1890 and its obligation to protect the public from unfair and abusive marketing practices. Most immediately, PMC is filing concurrently herewith a motion for rehearing of the Commission's August 1 decision to urge the Commission to direct the IOUs to prepare a revised CEP that meets the standards of A.B. 1890 and those previously set by the Commission for other consumer education programs." (Notice of Intent, p. 3.)

Although PMC's notice of intent acknowledges that the notice is "brought subject to" its motion to determine the procedure for accepting a new notice of intent, PMC is in essence seeking to be declared eligible for an award of compensation for work that it has already performed in connection with D.97-08-064.

In determining whether PMC's motion should have been filed earlier, we must turn to § 1804(a)(1) and the phrase "where the schedule would not reasonably allow parties to identify issues within the timeframe set forth above, or where new issues emerge subsequent to the time set for filing." It is our belief that this phrase contemplates that a party seeking eligibility for intervenor compensation must do so in a timely manner. This is supported by the Legislature's intent that:

"(b) The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process."

"(f) This article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding." (§ 1801.3, emphasis added.)

D.97-03-069 was decided on March 31, 1997. That decision authorized the three largest electrical corporations in California to devise and implement a joint CEP in conjunction with the Commission. The decision also authorized the formation of the EREG and the CEAP, and the schedule to be followed for implementing the CEP. With the issuance of D.97-03-069, the Commission provided notice to all interested parties of the schedule and the procedures that would be followed to establish the CEP. In addition, with the June 2, 1997 filing of the IOUs' CEP motion, interested parties had an additional opportunity to identify the issues regarding the CEP.

Based on PMC's own submissions, PMC was aware of D.97-03-069 and the CEAP and EREG as early as April of 1997, participated in at least some of the CEAP and EREG meetings, was made aware of D.97-05-040, submitted various letters and pleadings in connection with the CEP in June and July, and formally filed reply comments in July 1997. In PMC's June 12 response, which as noted earlier was one of the exhibits to PMC's July 2, 1997 reply comments, one of its concerns was "that the Commission has chosen to proceed with deregulation of the electricity market on an unreasonably short time frame that simply does not allow adequate time to provide consumers with the information they need to deal with significant changes in the way electricity is provided." (June 12 response, p. 2.) This concern was reiterated in PMC's July 2, 1997 reply comments at pages 4 and 5. In addition, PMC's September 3, 1997 motion acknowledged the formation of the EREG and the CEAP, and that D.97-05-040 "effectively accelerated the restructuring process to breakneck speed by demanding direct access for all consumer groups by January 1, 1998." (Motion, pp. 2-3.) Therrien's June 12, 1997 letter and PMC's notice of intent to claim

compensation also noted that PMC participated in some of the meetings of both the EREG and the CEAP.⁴

PMC was aware of the CEP issues that were going to be decided by the Commission. Instead of filing its motion when PMC was made aware of the various CEP issues, PMC waited an unreasonable period of time before it filed its motion seeking guidance on how it could submit its notice of intent. The filing of PMC's motion came well after the time it performed any work on the issues which led up to the issuance of D.97-08-064.

The intervenor compensation statutes should not be interpreted in a manner that permits a party to participate in a proceeding first, and then file a notice of intent explaining why it should be eligible for intervenor compensation for work that it has already performed. To the contrary, the intervenor compensation rules are to be administered in a manner which encourages effective and efficient participation, and avoids unproductive or unnecessary participation. PMC should have filed its motion when it first became aware of the issues, rather than participating first and seeking to be compensated once the decision deciding the underlying issues that it participated in had issued.

Had PMC's motion been filed earlier, the Commission would have been made aware of the nature and extent of PMC's participation in advance and could have informed PMC whether its efforts would be eligible for compensation. Instead, PMC chose to engage in certain activities and waited

⁴ In Therrien's June 12, 1997 letter, he stated: "I represented Public Media Center at the April 18 public meeting which initiated EREG's search for an agency and I assisted Public Media Center in the preparation of its response to EREG's Request for Qualifications." In PMC's notice of intent at page 3, PMC states that it participated in meetings of the CEAP in order to assist the CEAP in its review of the proposed CEP.

until a decision was issued to seek whether it would be eligible for intervenor compensation.

We also note that some of the issues that PMC and Therrien raised in their informal letters and response to the CEP motion, and in formal reply comments, were issues that should have been raised earlier. For example, in PMC's response to the CEP motion, PMC raised concerns about the short time frame in which the CEP was to be prepared, and the composition and qualifications of the BREG members. Those concerns were reiterated in Therrien's letter of July 1, 1997. That letter also questioned the manner in which the consultant was hired to implement the CEP. As the Commission noted in D.97-08-064 at page 23, those kinds of issues should have been litigated earlier:

"Some of the parties commented that the pace at which the restructuring of the electricity market is occurring should be slowed down to accommodate the CEP. In addition, some have questioned why the BREG structure was put into place, the board composition of the BREG, and the method in which the advertising agency was selected to devise and implement the CEP on behalf of the IOUs. Those types of issues should have been raised when the Commission set forth those mechanisms in its decisions authorizing the IOUs to devise and implement a joint CEP, and authorizing direct access. We point out that parties have had numerous opportunities to file comments on the draft decisions which resulted in D.97-03-069 and D.97-05-040. In addition, parties had the opportunity to raise legal challenges to these mechanisms by filing for rehearing of the two decisions. No one has done so. We decline in this decision to address issues that should have been raised beforehand."

The Commission has subsequently recognized that a customer should not be awarded compensation for those kinds of issues that are irrelevant or outside the scope of the proceeding." (D.98-04-059, p. 31.)

Based on the above discussion, we conclude that PMC had notice of the schedule and process for developing the CEP as early as April of 1997, but failed to pursue an application for rehearing of D.97-03-069 or D.97-05-040. PMC also

failed to timely identify the CEP issues and to seek a timely determination on how it could file its notice of intent regarding its planned participation on issues that arose out of and which were decided in D.97-03-069, D.97-05-040, and D.97-08-064. Since PMC did not timely identify the issues and because it did not seek a timely determination on the applicable procedure for filing its notice of intent, PMC is not eligible for an award of compensation in connection with the issues it raised.

Finally, we find that PMC is not eligible for compensation in this case because its advocacy was in pursuit of its own self-interest as a self described non-profit social marketing firm" and not as a representative of ratepayers. Public Media Center began its participation in this proceeding as a potential vendor for the CEP. It was only after the selection of a vendor other than PMC, that PMC began its advocacy in this proceeding, and it was not until after the issuance of D.97-08-064 that PMC claimed to be representing consumers, and that it would seek compensation for its involvement in this proceeding. It is clear that PMC's interest was not to represent ratepayers, but rather its own pecuniary interests. PMC should not be permitted to shroud its action in a mantle of consumer representation.

During the period before the issuance of D.97-08-064, and before PMC submitted its motion, PMC made no assertion in either its June 12 response or its reply comments that it was representing the interests of ratepayers. During this time period, the Commission was unaware that PMC was a representative of ratepayers. Rather, PMC held itself out as a San Francisco-based non-profit social marketing firm with 25 years experience in the area of consumer education and social marketing with substantial experience working with government agencies, including the California Public Utilities Commission, the Federal Trade

Commission, and the State of California, to design and implement both government and private public information programs.

PMC sought to have the Commission "disapprove the CEP submitted by the IOUs and the EREG and direct its [the Commission's] staff to oversee the development of a thorough and effective CEP for electric industry restructuring". (June 12 Response, p. 15.) During this time, PMC continued to raise issues about the vendor selection process in its various filings and letters for which it is seeking compensation. Clearly PMC sought to have the CEP program, where it lost out as a possible vendor, tossed out and a new one created. It is clear that PMC sought to gain from a reopening of the consumer education process and the possible selection of a new vendor. It was only after the issuance of D.98-08-064, when it became apparent that the CEP would not be terminated as PMC had sought and that the CEP would go forward with the previously selected vendors, that PMC articulated that it was representing the interests of ratepayers.

Simply arguing a position that benefits ratepayers is insufficient grounds to be awarded intervenor compensation. Instead, one must act in the capacity as a representative of customers, rather than as a disgruntled candidate in the vendor selection process.

Findings of Fact

1. The customer education effort and the independent education trust were first mentioned in D.95-12-063, as modified by D.96-01-009.
2. AB 1890 codified the development and implementation of a program to educate customers about the changes to the electric industry.
3. D.97-03-069 authorized the three largest electric IOUs in California to conduct the CBP, established the EREG and the CEAP, and set forth a schedule for the development of the CBP.

4. D.97-05-040 ordered that direct access be made available to all California electricity consumers on January 1, 1998.
5. PMC filed reply comments to the CEP motion and PMC's Chairman submitted four different letters to the Commissioners regarding the CEP.
6. D.97-08-064 was approved by the Commission on August 1, 1997.
7. PMC filed its motion, notice of intent, and application for rehearing of D.97-08-064 on September 3, 1997.
8. PMC's motion states that D.97-03-069 and D.97-05-040 raised new and controversial issues.
9. PMC's notice of intent seeks a declaration of eligibility for an award of compensation for work that it has already performed.
10. The issuance of D.97-03-069 provided notice to all interested parties of the schedule and the procedures that would be followed to establish the CEP.
11. With the filing of the CEP motion, interested parties had an additional opportunity to identify the issues regarding the CEP.
12. PMC was aware of D.97-03-069 and the CEAP, and BREG as early as April 1997.
13. PMC was aware of D.97-05-040 as early as June 1997.
14. Some of the issues that PMC and Therrien raised should have been litigated earlier.
15. PMC's participation in the EREG and CEP process was as a possible vendor for the education program.
16. PMC had a pecuniary interest in the outcome of the case.
17. PMC was rejected in its bid to be a vendor to the CEP.
18. PMC continued to raise issues about the vendor selection process in its filing for which it is seeking compensation.

19. PMC never stated before the issuance of D.97-08-064 that it was acting as a representative of consumers.

Conclusions of Law

1. Official notice should be taken of the fact that PMC's June 12 response was not filed with the Commission.

2. Section 1804(a)(1) provides that the Commission may determine the appropriate procedure for accepting a new notice of intent in situations where the schedule would not reasonably allow parties to identify issues within the timeframe set forth in § 1804(a)(1), or where new issues emerge subsequent to the time set for filing the notice of intent.

3. Since the Commission may specify the procedure for accepting new notices of intent, PMC's motion must be resolved before the notice of intent to claim compensation is addressed.

4. Section 1804(a)(1) contemplates that a party seeking eligibility for intervenor compensation must do so in a timely manner.

5. PMC waited an unreasonable period of time before it filed its motion seeking guidance on how it could submit its notice of intent.

6. The filing of PMC's motion came well after the time it performed any work on the issues which led up to the issuance of D.97-08-064.

7. The intervenor compensation statutes should not be interpreted in a manner that allows a party to file a notice of intent after it has already participated in the proceeding.

8. PMC failed to timely identify the CEP issues and to seek a timely determination on how it could file its notice of intent.

9. PMC should not be eligible for an award of compensation in connection with the issues it raised.

10. PMC's pecuniary interests, as a possible vendor, in the outcome of the proceeding makes PMC ineligible for intervenor compensation.

O R D E R

IT IS ORDERED that:

1. Official notice is taken of the fact that Public Media Center's (PMC) initial comments of June 12, 1997 were not timely filed with the Commission.

2. Since PMC did not timely identify for the Commission the issues that it planned to participate in, and because PMC's participation involved its own pecuniary interests, PMC's September 3, 1997 Motion For Determination Of Procedure For Accepting Notice Of Intent to Claim Compensation is denied, and PMC is ineligible for compensation for the issues that arose out of and which were addressed in Decision (D.) 97-03-069, D. 97-05-040, and D. 97-08-064.

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners