

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Application of James L. and Marianne S. Orvis to sell, and Aspen Forest Investment Co., LLC, To Buy, Five Thousand (5,000) Shares of the Common Stock of the water system known as Lake Alpine Water Company, Inc. (U148WTD) Located in Alpine County, California.

A.11-04-013

**COMMENTS OF THE RATEPAYERS
OF LAKE ALPINE WATER COMPANY (“RLAWC”)
ON PROPOSED DECISION REVISING INTERVENOR COMPENSATION AWARDED
TO THE RATEPAYERS OF LAKE ALPINE WATER COMPANY**

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Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, the Ratepayers of Lake Alpine Water Company (“RLAWC”) hereby file Comments on the Proposed Decision (“PD”) revising intervenor compensation granted to them in D.14-11-016. The PD is issued pursuant to D.15-06-036, which concluded that the D.14-11-016 erred in two respects with regard to RLAWC’s intervenor compensation award and granted a rehearing on the amount of compensation that should have been awarded to RLAWC. First, D.15-06-036 determined that RLAWC made a substantial contribution on an issue for which D.14-11-016 determined there was no substantial contribution, and it determined that RLAWC was entitled to additional costs.

While RLAWC appreciates the adjustments in the PD that increases the fee award, the PD errs legally by failing to apply correctly the stated methodology for increasing the fees and costs. Specifically, the percentage states that RLAWC’s award will be based on the percentage of issues on which RLAWC contributed substantially in the proceeding.¹ However, the PD fails to increase the percentage for the number of issues on which RLAWC’s award was based despite the finding in D.15-06-036 that RLAWC contributed substantially to an additional issue that was not reflected in the award calculation in D.14-11-016. Further, the PD erroneously reduces the cost award even though the percentage of issues on which RLAWC was found to have contributed substantially increased.

Further, after the PD was issued, the Commission approved a new rule 17.5, which requires applicants for new certificates of convenience and necessity (“CPCNs”) and transfers of control of existing certified utilities to post a bond to cover the cost of intervenor compensation awards. Although Rule 17.5 was issued after the PD, the new rule codifies precedent that pre-

¹ PD, at p. 3 (“The calculation of RLAWC’s revised intervenor compensation award is based on . . . taking the adopted issues divided by total issues requested, results in a percentage of 47.06. This represents the percent of hours claimed by RLAWC that were adopted by the Commission in D.14-11-016, as modified by D.15-06-036.”)

dates D.14-11-016 and should have been applied to the intervenor compensation award in this proceeding. RLAWC respectfully requests that the PD be modified as set forth in Appendix A to correct these errors.

I. The PD Errs By Failing to Base the Fee Award on the Correct Percentage of Issues on Which RLAWC Was Found To Have Made a Substantial Contribution

D.14-11-016 found that RLAWC contributed or prevailed on 10 issues,² while concluding that RLAWC did not contribute or did not prevail on 9 issues.³ D.15-06-036 held that RLAWC made a substantial contribution on an additional argument (Issue 9) – that the sale of 50 percent of Lake Alpine Water Company’s to Aspen Forest Investment Company created a 50/50 ownership arrangement constituted a change of control. D.15-06-036, at p. 10. RLAWC argued that the 50/50 ownership split between two blocks of shareholders required a vote as a block created a stalemate since each shareholder group could block one another’s votes.⁴

Taking into account the holding in D.15-06-036 that RLAWC made a substantial contribution on the stalemate issue, RLAWC made a substantial contribution or prevailed on 11 out of 19 issues. Thus, RLAWC made a substantial contribution on 57.89% of the issues, and the fee award should have been calculated using that percentage. The PD, however, awards only 47.06% of RLAWC’s fee claim. PD, at p. 4.⁵

² Issues 2, 3, 4, 5, 6, 10, 11, 12, 18 and 19. Issue 2 does not have a “yes” or “no” indicator, but the text acknowledges that RLAWC member Gloria Dralla influenced the staff to look into Aspen’s unauthorized purchase of a controlling interest in LAWC.

³ Issues 1, 7, 8, 9, 13, 14, 15, 16 and 17. Issue 1 does not have a “yes” or “no” indicator, but the text could be interpreted to be a “no,” therefore RLAWC is not asserting that D.14-11-016 found that it prevailed on this Issue.

⁴ RLAWC Opening Brief, at p.19-24 (“Aspen ... can vote its fifty percent shares to block the proposals and wishes of the Orvis shareholders.”); RLAWC Reply Brief, at p.19; RLAWC Opening Comments on Proposed Decision, at p. 3,4, 9 (*e.g.* “Aspen’s unauthorized purchase of half of LAWC has created a harmful stalemate.”). Comments on Decision, at p. 4.

⁵ “When 47.06 percent is applied to the hours claimed in each year, the revised award for hours claimed is \$72,712.43.”

The PD errs by calculating the fee award based on a percentage that is inconsistent with the stated methodology (*i.e.* taking the adopted issues divided by total issues requested). RLAWC respectfully requests that the fee award be based on 57.89 percent rather than 47.06 percent. When calculated using the correct percentage, the total fee award should be \$93,556.93.

II. The PD Erroneously Cuts RLAWC’s Cost Award Despite Holding That RLAWC Contributed Substantially on an Additional Issue

D.15-06-036 held that the award given for RLAWC’s costs in D.14-11-016 was error because it excluded approximately 50 percent of the claimed costs on the basis that “many of these charges are those that would normally be absorbed in overhead; however we reduce them by half and compensate the reduced expenses.” D.14-11-016, at p.22. D.15-06-036 concluded that the 50 percent reduction of costs in D.14-11-016 was an error because there was “no record evidence that these expenses would normally be absorbed in overheads” and because the Intervenor Compensation Guide indicates these types of out-of-pocket costs are compensable. D.15-06-036, at p. 8.

RLAWC sought reimbursement for four categories of expenses: copying, postage, deposition transcript and online legal research. D.14-11-016, at p. 19. Compensation for these exact types of costs have routinely been awarded by the Commission over many years and generally at 100% of the amount sought.⁶ For example, in D.16-07-011, the Commission awarded TURN \$1,324.05 in costs for copies, Federal Express deliveries, phone and Lexis

⁶ See *e.g.* D.16-07-011 (\$1,324.05 in costs awarded for copies, Federal Express deliveries, phone and Lexis online research); D.16-06-024 (\$248 in costs awarded for copies, Lexis, phone, postage); D.16-05-045 (\$866.83 awarded for travel, copies and express mail – the amount was slightly reduced from the claim of \$986.83); D.15-05-044 (costs awarded for travel, copies and express mail); D.16-05-015 (costs awarded for copies, postage, and phone); D.16-04-031 (costs awarded for postage, phones, copies and Lexis); D.02-05-027 (\$2,277.99 awarded for trail exhibits, postage, fax and phone; copies and transcripts).

online research. In D.14-08-053, the Commission reimbursed exactly the same categories of expenses (photocopying, legal research) at 100% of the requested amount.⁷ Similarly, in D.09-09-06-047, the CPUC fully reimbursed expenses for copies, telephone fees, and postage.⁸ In D.02-05-027, the Commission awarded the intervenors \$2,277.99 for trial exhibits, postage, fax and phone, copies, and transcript costs.

Cal. Pub. Util. Code Section 1803 mandates that “[t]he commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding in which the intervenor made a substantial contribution “to the adoption in whole or in part, of the Commission’s order or decision.” Cal. Pub. Util. Code Section 1803 (a). Thus the statute makes clear that expenses incurred both for preparation for and actual participation in a proceeding shall be reimbursed. So long as the costs are reasonable, the costs are to be reimbursed even if the intervenor made a substantial contribution to only a portion of the Commission’s order or decision. While the statute allows for a reduction if costs are determined to be unreasonable, it does not allow for a reduction of the costs based on which the percentage of issues the intervenor was found to have made a substantial contribution. This is especially true for expenses like a deposition transcript, which RLAWC asserts contributed to its entire presentation of its case. There is no evidence in the record that the deposition transcript cost was only partially attributable to the issues for which RLAWC was found to have made a substantial contribution.

Even if a percentage based approach were appropriate, the PD fails to award RLAWC the same percentage of costs as the number of issues on which it made a substantial contribution.

⁷ D.14-08-053, at pp. 26, 29. TURN also requested and was granted full reimbursement for phone calls and attorney travel. RLAWC did not request reimbursement for either of these categories.

⁸ D. 09-06-047, P. 19.

Indeed, the PD actually decreases the amount of costs awarded to RLAWC from \$1,547.07 (*see* D.14-11-016, at p. 20) to \$1,447.03 (PD, at p.7 Conclusion of Law 3) even though D.15-06-036 concluded that RLAWC made a substantial contribution on one additional issue than the award was based on in D.14-11-016. D.15-06-036, at p. 5 (Finding of Fact #5); PD, at p. 2. With the correction that RLAWC prevailed on 10 out of 19 issues in the proceeding, the PD determines that RLAWC prevailed on 52.6% of the issues, however, it awards RLAWC only 47.06% of its costs. D.14-11-016 awarded RLAWC 50.3% of the costs for which it sought reimbursement.

The PD errs by not awarding RLAWC the full amount of costs sought, \$3,074.93. Neither D.14-11-016 nor D.15-06-036 determined that the costs claimed by RLAWC were unreasonable and neither identified specific costs excluded on the basis that they related to issues on which RLAWC did not make a substantial contribution. Thus, there is no reasonable basis in the record to reduce the amount of costs sought. The PD simply does a mathematical exercise and decreases the award for costs. At the worst, the PD should have awarded costs in the same percentage as the percentage of issues on which RLAWC prevailed – 52.6%. The PD should be corrected to award RLAWC 52.6% of its costs, or \$1,617.41.

RLAWC noted in its comments on the Proposed Decision⁹ that was eventually issued as D.14-11-016 and in its Application for Rehearing of D.14-11-016 that it requested only the bare minimum of costs – copying, postage, legal research and transcripts. RLAWC noted that the vast majority of law firms charge for telephone calls, faxes (incoming and outgoing), ground transportation and parking, meals, and paralegal time. RLAWC's counsel chose not to include such charges and instead requested reimbursement for the bare minimum of expense categories.

III. The PD Erroneously Orders LAWC to Pay the Intervenor Compensation Award and To File an Advice Letter To Recover The Award

A. The PD Errs By Failing to Require the Applicant to Pay the Award

In D.16-08-025, the Commission issued Rule 17.5, which requires “every applicant seeking a Certificate of Public Convenience and Necessity (CPCN) through an initial application or a transfer of an existing CPCN shall post a bond or equivalent security instrument in a form and amount determined by the presiding Administrative Law Judge to be sufficient to guarantee payment of intervenor compensation awarded to any intervenors who make substantial contributions to the proceeding.”¹⁰ The Rule codifies the Commission’s existing authority and practice since 2011 requiring non-utility applicants to pay intervenor compensation claims.

Pursuant to Rule 17.5 and Commission precedent, the PD should have required the applicant in this proceeding (Aspen Forest Investment Company) to post a bond and draw against it to pay the intervenor compensation award as modified. It is undisputed that Aspen, not LAWC, bore the sole responsibility for obtaining approval of its acquisition of control pursuant to Section 854. Therefore the need for intervenor compensation arises directly from Aspen’s violation of Section 854 by failing to obtain the required approvals at the time it acquired a controlling interest in LAWC. It is further undisputed that LAWC was not the applicant and was not even a party to this proceeding until January 2012 – ten months after Aspen filed its application. LAWC was made a party by the Administrative Law Judge not because any party requested it, but because two of LAWC’s shareholders and directors sought to disqualify Aspen’s attorney who began acting as counsel to LAWC, even though the two directors asserted that the attorney had a conflict of interest and he did not obtain the required waiver to represent

¹⁰ D.16-08-025, at p. 10, Appendix A (setting forth text of Rule 17.5).

both the acquirer (Aspen) and LAWC (the acquired utility). RLAWC cannot emphasize enough that it has consistently opposed requiring LAWC to pay intervenor compensation since LAWC played no role in the illegal transaction when Aspen purchased shares from two LAWC shareholders. LAWC has, and likely will, pass along the intervenor compensation award to its ratepayers, an outcome that is directly contrary to the legislative intent of intervenor compensation.

As Rule 17.5 and prior Commission precedent makes clear, the Commission has ample jurisdiction to require Aspen to pay the intervenor compensation award rather than LAWC. In D.11-07-036, the Commission required the Nevada Hydro Corporation, a non-utility applicant, to post a bond to cover the costs of intervenor compensation for eligible protesting parties. Ultimately, the Nevada Hydro application was dismissed, but the Commission awarded intervenor compensation, and directed Nevada Hydro to pay the claims. Similarly, in D.13-11-018, the Commission required Sacramento Natural Gas Storage (“SNGS”), a non-utility applicant for a CPCN to operate a natural gas storage facility in California, to pay Avondale Glen Elder Neighborhood Association more than \$1.4 million for making a substantial contribution in the proceeding.

An application for transfer of control pursuant to Section 854 raises exactly the same issues as a CPCN applicant – the non-utility party invokes the Commission’s processes and causes costs for interested parties that wish to intervene to challenge or support the application. In such acquisition applications, the utility being acquired is not the subject of the proceeding. Rather, the applicant’s fitness to acquire an existing utility and ensuring the public interest will be served by the acquisition is the subject of the proceeding.

Section 854, under which Aspen applied to the Commission for belated authority to acquire a controlling interest in LAWC, imposes the obligation to obtain approval for acquisition of an existing utility on the acquirer, not the utility. Section 854(a) mandates that, “[n]o person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission.” For almost 100 years, California law has required any entity that wishes to acquire or otherwise control a public utility to obtain prior Commission approval “to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition to the transfer, as the public interest may require.”¹¹ Thus, the examination in a Section 854 application for transfer of control is the qualifications of the acquiring entity, not any aspect of the utility’s operations.

Any non-utility applying to acquire an existing CPCN or utility would stand in the position of holding company of a utility and is therefore clearly subject to the Commission’s jurisdiction. The Commission has well-established precedent of exercising jurisdiction over non-utility holding companies, including imposing financial obligations on them.¹² The definition of the word “utility” has been interpreted to include entities other than utilities in the context of other statutory sections. In *PG&E Corp.*, the Court held that despite the legislative mandate in

¹¹ D.10-03-008, *Application of NobelTel, LLC (U6739C) and Nobel Holding, Inc. for Approval of an Indirect Transfer of Control of NobelTel, LLC* at p.4 (March 11, 2010) (citing D.09-08-017 at 7 and D.05-12-007 at 6). See also *San Jose Water Co.* (1916) 10 CRC 56; see also, *In re E. B. Hicks Water Company* (1990) 37 CPUC2d 13).

¹² See e.g., D. 95-12-018, *In the Matter of the Application of San Diego Gas & Electric Company (U 902-M) for Authorization to Implement a Plan of Reorganization Which Will Result in a Holding Company Structure*, at Ordering Paragraph 4 (Dec. 6, 1995) (the Commission required a newly formed holding company for SDG&E’s utility operations to pay for a detailed audit to verify SDG&E’s compliance with its affiliate transaction policies and guidelines after allowing the creation of the holding company); *PG&E Corp. v. Public Utilities Com.*, at 1201. (Commission jurisdiction over a holding company is cognate and germane to its regulation of a public utility)

Cal. Pub. Util. Code Section 701 authorizing the Commission to “supervise and regulate every public utility,” Section 701 does not limit the Commission’s authority only to utilities. The Court held, “[a]lthough the statute initially refers to the PUC's power to the PUC's authority to do all things “necessary and convenient” in the exercise of that power is not expressly limited to actions against public utilities.”¹³

A California appeals court recently clarified that the Commission has broad authority to make intervenor compensation awards that support the public policy purposes of the statute.¹⁴ The Court reviewed a Commission order requiring non-utility applicants to pay intervenor compensation is its interpretation of a recent court decision regarding intervenor compensation arising from the failed AT&T/T-Mobile merger. Because AT&T withdrew its merger request prior to a “final” decision on the merits, AT&T contended that it should not be required to pay intervenor compensation. The Court held that the Commission was within its jurisdiction to require AT&T to pay intervenor compensation:

The Legislature not only agreed with the CPUC's view that intervenor compensation may be awarded on a discretionary basis in cases that resolve short of a decision on the merits, but more than that, delegated to the CPUC the authority to “fill in gaps” in Article 5 in the course of administering it based on express policy guidance in the statute. In enacting Article 5 in 1984, the Legislature confirmed the CPUC's power to address intervenor compensation on its own, and then, in 1992, gave the CPUC explicit policy criteria in section 1801.3, subdivision (b) to guide Article 5's administration. In light of this history, we conclude that the Legislature has expressly conferred power on the CPUC to “fill up the details” of the statutory scheme.¹⁵

The Court continued, “we find abundant evidence in the history and prehistory of Article 5 showing that this particular statutory scheme has been built, in effect, on a shared enterprise

¹³ *PG&E Corp. v. Public Utilities Com.*, at 1198.

¹⁴ *New Cingular Wireless PCS, LLC v. Public Utilities Commission*, 246 Cal. App. 4th 784, 817 (April 19, 2016).

¹⁵ *Id.* at 816-817.

between the Legislature and the CPUC, with the CPUC having delegated authority under section 1801.3, subdivision (b), to flesh out lacunae in the statutory language, incrementally, when called upon to do so in the course of implementing the overall statutory scheme.”¹⁶

The Court, however, was dissatisfied with the reasoning the Commission used in its order, and on that basis vacated the intervenor compensation award without prejudice so that the Commission could re-determine the awards based on reasoning set forth in the Court’s order.¹⁷

Based on the Commission’s precedent, and Rule 17.5, the PD should be modified to require Aspen, the Applicant in this proceeding, rather than LAWC to pay the total modified intervenor compensation award. Aspen is now in the position of a holding company to LAWC since it is a corporation that holds a controlling interest in LAWC and actively participates in the day to day operations of the company through Aspen’s managing partner, who is both the President and Chairman of the LAWC Board of Directors. Even if the Commission declines to require Aspen to pay the intervenor compensation award, it is legal error to order LAWC to file an advice letter seeking reimbursement of the intervenor compensation award through a rate adjustment.

B. The PD Erroneously Orders LAWC to File an Advice Letter To Recover the Award

The PD appears to order LAWC to file an advice letter to recover the additional intervenor compensation award. The PD states, “Lake Alpine Water Company *shall* file an advice letter to adjust its rates in order to recover \$33,967.39, the difference between intervenor compensation of \$42,517.07 awarded in Decision 14-11-016 and the revised amount of

¹⁶ *Id.* at 821.

¹⁷ *Id.*

\$76,484.46, adopted herein.” PD, at p. 8, Ordering Paragraph 3 (emphasis added). To the extent that the PD intends to order LAWC to file an advice letter to adjust its rates to recover the additional intervenor compensation award, it is legal error for two reasons.

First, the text in the ordering paragraph contradicts the analysis and discussion in the PD. At page 4, the PD states that “LAWC *may* file an advice letter requesting authority to adjust rates in order to recover the difference between intervenor compensation . . . awarded in D.14-11-016 and the revised total award . . . adopted herein.”

Second, ordering a utility to file an advice letter to recover intervenor compensation costs is unprecedented in the history of intervenor compensation. RLAWC was unable to find a single order in which the Commission ordered a utility to recover intervenor compensation.

Third, the Commission has no statutory authority to order a utility to seek to recover an intervenor compensation award from its customers. The statute that authorizes recover of intervenor compensation awards is permissive, not mandatory. Section 1807 states that for a public utility that pays an intervenor compensation award, the Commission must allow it as an expense “by way of a dollar-for-dollar adjustment to rates imposed by the Commission . . . so that the award shall be fully recovered within one year from the date of the award.”¹⁸ Thus, Section 1807 only authorizes the Commission to require a public utility to pay intervenor compensation awards and to allow a recovery by a utility if the utility requests such adjustment. Section 1807 does not authorize the Commission to require the utility to seek recovery of an intervenor compensation award through a rate adjustment.

¹⁸ California Public Utilities Code Section 1807.

IV. Conclusion

RLAWC demonstrated above that the PD errs legally, factually and technically by failing to apply the Commission's rules and precedent requiring applicants for CPCNs or transfers of CPCNs to pay for intervenor compensation, and by failing to apply correctly the stated methodology for adjusting the fees and costs to be awarded to RLAWC. Specifically, the PD states that RLAWC's award will be based on the percentage of issues on which RLAWC contributed substantially in the proceeding. However, the PD fails to increase the percentage for the number of issues on which RLAWC's award was based despite the finding in D.15-06-036 that RLAWC contributed substantially to an additional issue that was not reflected in the award calculation in D.14-11-016. Further, the PD erroneously reduces the cost award even though the percentage of issues on which RLAWC was found to have contributed substantially increased. Finally, the PD should state that Aspen alone be held responsible for paying the intervenor compensation award.

RLAWC respectfully requests that the corrections set forth in Appendix A be adopted to correct the factual and legal errors in the PD.

Signed and dated in Walnut Creek, CA on August 24, 2016.

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