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Decision 16-08-025 August 18, 2016

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Award of Intervenor Compensation.	Rulemaking 14-08-020 (Filed August 28, 2014)

DECISION ADOPTING NEW RULE 17.5

Summary

We adopt a new Rule 17.5 requiring applicants for a Certificate of Public Convenience and Necessity - or other Commission action - who are not regulated public utilities subject to the jurisdiction of the Commission, to post a bond or equivalent security instrument in a form and amount deemed by the Presiding Officer to be sufficient to pay the anticipated costs of any related intervenor compensation awards. Existing holders of Certificates of Public Convenience and Necessity are exempt from the requirement to post a bond or equivalent security instrument unless an intervenor can show, by clear and convincing evidence, that there is a significant risk of non-payment in the absence of a bond or equivalent security instrument.

This proceeding is closed.

1. Background

On November 6, 2013, the California Public Utilities Commission (Commission) granted the petition of The Nevada Hydro Company to issue an Order Instituting Rulemaking (OIR) to consider changes to the Commission's program of compensating intervenors in ratesetting proceedings who make substantial contributions to the proceedings. The Commission issued this OIR in

response to several ratesetting cases in which intervenors had made substantial contributions to the resolutions of the cases but had not been compensated for their efforts because there was no party to the proceeding that was a public utility (as defined by Public Utilities (Pub. Util.) Code Section 216) against whom intervenor compensation awards could be assessed, nor was the proceeding classified as quasi-legislative so that an award could be made from the Commission's intervenor compensation fund (Fund). Respondents to the OIR included the Center for Biological Diversity (CBD), the Consumer Federation of California (CFC), The Nevada Hydro Company (NHC), Southern California Edison Company (SCE), and The Utility Reform Network (TURN).

Respondents were asked to consider three alternative potential resolutions to the problems presented when neither a public utility, nor the Fund, is available to pay intervenors who make substantial contributions:

> **Alternative 1**: Make the Fund available to otherwise uncompensated intervenors in ratemaking proceedings. Under this alternative, an intervenor that is unable to collect an award from a public utility subject to our jurisdiction, such as an unsuccessful applicant for a Certificate of Public Convenience and Necessity (CPCN), could be compensated from the Intervenor Compensation Fund (Fund).
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> **Alternative 2**: Require any applicant for a CPCN to agree to pay related intervenor compensation awards as a condition of accepting the application. To provide security for the agreement to pay, require every applicant for a CPCN to post a bond in an amount set by the presiding Administrative Law Judge (ALJ) or as otherwise determined in this rulemaking.
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> **Alternative 3**: Pay all intervenor compensation awards, whether in ratemaking or quasi-legislative proceedings, from the Fund. This alternative would require increasing the monthly fees paid by customers of regulated energy, telecommunications and water utilities within the state. The process of determining whether an intervenor has made a

substantial contribution to a proceeding would remain unchanged.

Briefs and reply briefs addressing the alternatives were received from CBD, CFC, SCE and TURN. CBD, CFC and TURN all endorsed Alternative 2 (the bonding requirement) while SCE argued that no changes to the current intervenor compensation regime are required. However, SCE added that among the alternatives proposed for consideration, Alternative 2 was the least objectionable.

On March 13, 2015, the assigned Commissioner issued a ruling proposing to amend Rule 17 of the Commission's Rules of Practice and Procedure (Rules). California Code of Regulation Title 20, Div. 1, Chapter 1, Art. 3 § 17 by adding thereto a new Rule 17.5, requiring any applicant for a CPCN (other than a financially solvent applicant that already holds a CPCN from the Commission) to agree as part of the application process that it will: (1) pay any intervenor compensation awards made by the Commission in connection with the application; and (2) post a bond to guarantee its payment obligation, in an amount to be determined by the presiding Administrative Law Judge (ALJ). The text of the proposed new rule is set out in Appendix A to this decision.

Notice of the proposed amendments, and comments on them, are governed by California Government Code §§ 11346.4 and 11351, and California Code of Regulations, Title 1, §§ 1-120. Accordingly, the March 13, 2015 Assigned Commissioner's Ruling directed the assigned ALJ to take the appropriate steps necessary to provide for notice of these proposed amendments to be published in the California Regulatory Notice Register and to serve the March 13, 2015 ruling on all persons on the service list used by the Commission to notify persons when the Commission is proposing changes to its Rules. Publication of the notice in the California Regulatory Notice Register on January 1, 2016, started the 45-day notice

and comment period. Timely comments were received from NHC, Ratepayers of Lake Alpine Water Company (RLAWC) and CBD.

On March 17, 2016, the assigned Commissioner issued a Ruling Proposing and Soliciting Comments on Modifications to Text of Originally Proposed New Rule 17.5. On April 12, 2016, the assigned Commissioner re-issued the ruling to establish the deadline for comments in the modified Proposed New Rule 17.5. The rulings were mailed to all parties on the service list of the proceeding and the Commission's Rules Change Service List. As discussed in Section 3 below, Comments were received from Goodin, McBride, Squeri and Day, LLP and the California Water Association.

2. Discussion

In considering possible modifications of our Rules, we first determine whether a proposed change can be accomplished by a rule change alone or whether implementing legislation would also be required.

Intervenor compensation obligations imposed on individual public utilities are based on Pub. Util. Code §§ 1801 *et seq.* and specifically on Pub. Util. Code § 1807, which provides in relevant part:

> Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding. . .

Decision (D.) 00-01-020 broadly interpreted the phrase "public utility" to include groups of public utilities that comprise an industry and all of whom would be similarly impacted by changes in Commission policy adopted in quasi-legislative proceedings. We based this interpretation on the power to impose fees on all public utilities conferred on us by Pub. Util. Code § 401:

> … The Legislatures further finds and declares that funding the commission by means of a reasonable fee imposed on each common carrier and business related thereto, [and] **each**

> **public utility** that the commission regulates . . . is in the public interest. (Emphasis supplied.)

Following the reasoning of D.00-01-020, disbursements from the Fund are limited to compensating intervenors for substantial contributions to proceedings that affect all public utilities in an industry group or all public utilities within the state rather than any public utility in particular. Ratesetting proceedings, by their nature, are specific to individual utilities. Paying intervenor compensation from the Fund in such proceedings amounts to taxing non-participating utilities for the benefit of participating utilities. While the language of Section 401 is broad, we do not think it is broad enough to encompass that arrangement. Accordingly, we conclude that adopting Alternative 1 would have required us to seek confirming legislation before we could implement that change. We reach the same conclusion with regard to Alternative 3, which would make the Fund even more broadly available than Alternative 1 and also conflicts with the express language of Section 1807.

Alternative 2, by contrast, can be adopted without additional legislation. We routinely require proof of financial ability from applicants for CPCNs to ensure that they possess enough money to meet their anticipation obligations. In the case of contested applications to which intervenors make substantial contributions, we are breaking no new ground if we require proof (in the form of a bond) that the applicant possesses sufficient financial resources to meet that obligation. But not every applicant for a CPCN will require bonding. In particular, applicants who are already subject to our jurisdiction will not be required to post a bond in the absence of exceptional circumstances indicating a need for greater financial security.

Three of the intervenors in this proceeding, CBD, CFC and TURN filed Notices of Intent to Claim Compensation. If intervenor compensation is to be

awarded to any of these intervenors, it will have to come from the Fund. Although our practice of limiting Fund awards to participants in quasi-legislative proceedings is well established, we conclude that this proceeding, though it is classified a "rulemaking," results in a new Rule potentially affecting every public utility in this State and that, accordingly, intervenor compensation may be paid from the Fund to any intervenor that made a substantial contribution.

3. Comments on Proposed New Rule 17.5

RLAWC suggests a clarification to the proposed Rule that we accept. The clarification consists of spelling out that it applies both to applicants seeking a new CPCN and to applicants seeking to acquire an existing CPCN. CBD suggests adding language to the proposed Rule that would: (a) exempt existing CPCN holders from the bonding requirement; and (b) restrict the type of bond that an applicant could post to satisfy the bonding requirement. We reject the suggested removal of the exemption for existing CPCN holders. The proposed Rule already contains an exception to the exemption for existing CPCN holders that permits the assigned ALJ to impose a bonding requirement on them if circumstances warrant. We accept the suggestion to modify the proposed Rule to clarify that the form of the bond must be such as to satisfy the ALJ that it can, in fact, be drawn on to pay all anticipated intervenor compensation claims. We further modify the Rule to provide that the bonding requirement may be satisfied by a bond so-called or by an equivalent form of security such as, by way of example, an irrevocable letter of credit drawn on a solvent bank. NHC argues that the proposed Rule is deficient in that it countenances the situation where an out-of-state applicant for a CPCN must pay intervenor compensation awards from its stockholder equity while a California company may pass that cost on to

its ratepayers. While we agree that this is the case, we regard the payment of intervenor compensation by an out-of-state company to be a cost of entering the California market that is appropriately allocated to its shareholders.

On April 22, 2016, Goodin, McBride, Squeri and Day, LLP filed comments on proposed new Rule 17.5 arguing that under existing law the Commission may not require an entity that is not a public utility and does not seek to become a public utility to pay intervenor compensation. We concur.

Consistent with Section 1807 of the Public Utilities Code, the proposed new Rule imposes the bonding requirement on the utility that is the subject of the transaction. In the case of a proposed acquisition of a utility by a non-utility — for example, if a holding company headquartered in another state seeks to acquire a California utility — the bonding requirement will be imposed on the utility being acquired. Although sub-paragraph (b) of the proposed new Rule exempts entities that already hold CPCNs from the bonding requirement, it contains an exception for cases in which there is "clear and convincing evidence" that the existing CPCN holder should post the bond. A situation such as the one envisioned by the comments, where the acquiring entity cannot be made to post a bond, is one such case.

On April 22, 2016, the California Water Association posted comments arguing that the bonding requirement should never apply to transfers of existing CPCNs because existing holders are necessary parties to a transfer and are automatically subject to the intervenor compensation regime. We disagree. As explained above, the proposed Rule exempts existing holders of CPCNs from the bonding requirement except in extraordinary circumstances where imposition of the requirement on an existing holder may be justified.

4. Comments on Proposed Decision

The proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments on the proposed decision were received on June 29, 2016 from the CBD, and on July 5, 2016 from Goodin, MacBride,Squeri & Day, LLP and the Ratepayers of Lake Alpine Water Company. Reply comments were received on July 11, 2016 from Goodin, Macbride, Squeri & Day, LLP, RLAWC and SCE. The comments of the Center for Biological Diversity and SCE broadly supported the proposed decision. Goodin, Macbride, Squeri & Day, LLP and RLAWC reiterated comments made and considered earlier in this proceeding and their latest comments and reply comments were given no additional weight.

5. Assignment of Proceeding

Commissioner Michel Peter Florio is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ.

Findings of Fact

1. Intervenors who make substantial contributions to ratesetting proceedings in which there is no public utility subject to our jurisdiction risk not getting compensated.
2. It is the public policy of this State to compensate intervenors who make substantial contributions to Commission proceedings.

Conclusions of Law

1. Intervenors who make substantial contributions to ratesetting proceedings may not be compensated from the Fund.

2. Intervenors who make substantial contributions to rulemaking proceedings that affect all public utilities in the state may be compensated from the Fund.

3. The Commission may by Rule require applicants for CPCNs to post bonds or equivalent security instruments sufficient to cover the estimated cost of intervenor compensation awards.

4. The Commission's Rules should be modified in conformity with this decision.

O R D E R

IT IS ORDERED that:

1. The Commission hereby adopts a new Rule 17.5 in the form of the Rule contained in Appendix A to this decision.

2. Intervenors who made substantial contributions to this decision shall be paid from the Intervenor Compensation Fund.

3. Rulemaking 14-08-020 is closed.

This order is effective today.

Dated August 18, 2016, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE M. RANDOLPH
Commissioners

APPENDIX A

Rule 17.5

(a) Except as set out in sub-paragraph (b) below, 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.

(b) Existing holders of Certificates of Public Convenience and Necessity are exempt from the requirement to post a bond or equivalent security instrument unless an intervenor can show, by clear and convincing evidence, that there is a significant risk of non-payment in the absence of a bond or equivalent security instrument.

(c) Upon the motion of a party with good cause shown, the presiding Administrative Law Judge may modify the amount of the bond requirement.

(**END OF APPENDIX A)**