

Decision 04-10-012

October 7, 2004

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

Application of Southern California Gas Company for authority to update its gas revenue requirement and base rates. (U 904 G)	Application 02-12-027 (Filed December 20, 2002)
Application of San Diego Gas & Electric Company for authority to update its gas and electric revenue requirement and base rates. (U 902 M)	Application 02-12-028 (Filed December 20, 2002)
Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Service and Facilities of Southern California Gas Company and San Diego Gas & Electric Company.	Investigation 03-03-016 (Filed March 13, 2003)

**DECISION DENYING REHEARING OF DECISION 03-12-058****I. SUMMARY**

D.03-12-058 made a preliminary determination of eligibility as requested in the Notice of Intent (Notice) filed by Local 483 Utility Workers Union of America (Local 483) on March 29, 2003 and the Amended Notice filed on May 20, 2003 pursuant to Pub. Util. Code § 1804(b)(1).

Southern California Edison (SCE) made a timely Application for Rehearing, raising issues of statutory interpretation of Article 5 of Chapter 9 of the Public Utilities Act. (Pub. Util. Code section 1801 through 1812 inclusive, hereafter Intervenor Compensation Statute.) The Intervenor Compensation Statute establishes a program for encouraging the participation of all groups that have a

stake in the regulatory process.<sup>1</sup> SCE argues that Local 483, as a labor organization, is not eligible for intervenor compensation as a matter of law, and that the Commission's eligibility determination is therefore contrary to law and beyond its authority.

SCE's legal arguments are not well taken and we deny rehearing. SCE has failed to apply traditional rules of statutory interpretation, instead making sweeping policy arguments better addressed to the Legislature. Adopting the narrow, restrictive approach to initial eligibility determinations advocated by SCE would subvert the Legislature's policy, enacted in the Intervenor Compensation Statute, to facilitate participation by all groups affected by CPUC regulatory processes.

Local 483 is eligible to request compensation in this proceeding because it meets the statutory definition of "customer," Pub. Util. Code § 1802(b), and demonstrates a significant financial hardship, Pub. Util. Code § 1802(g). The preliminary determination of eligibility does not assure that an award of compensation will be forthcoming at the conclusion of the proceeding. Pub. Util. Code § 1804(b)(2). The Intervenor Compensation Statute requires the Commission to award reasonable compensation for costs of participation to a "customer" (1) who makes a substantial contribution and (2) whose participation without an award of compensation would impose a significant financial hardship. Pub. Util. Code § 1803. Both elements are required for an award of compensation.

The Intervenor Compensation Statute does not anticipate extensive litigation about preliminary matters such as eligibility. Section 1804(b)(1) contemplates the filing of a Notice of Intent to Claim Compensation (NOI) and an advisory ruling by the ALJ on the scope of issues, 1804(b)(2). It also anticipates

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<sup>1</sup> Pub. Util. Code section 1801 provides: "The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission." (emphasis added) This negates any inference that compensation eligibility is limited to customers who formally intervene in CPUC Proceedings.

that participants may adjust their participation with the flow of the case, without affecting their eligibility.

1804. ...

(b) (1)

(2) The administrative law judge may, in any event, issue a ruling addressing issues raised by the notice of intent to claim compensation. The ruling may point out similar positions, areas of potential duplication in showings, unrealistic expectation for compensation, and any other matter that may affect the customer's ultimate claim for compensation. Failure of the ruling to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation. Similarly, the failure of the customer to identify a specific issue in the notice of intent or to precisely estimate potential compensation shall not preclude an award of reasonable compensation if a substantial contribution is made. (emphasis added)

The eligibility element is not a “hurdle” to participation. The focus of Commission proceedings is on the merits and policies proposed by utilities in their applications. It is fruitless to create hurdles to participation at an early stage of the proceeding, when the participation may prove to be valuable because it makes the required substantial contribution. The statute does not permit it.

In the Matter of the Commission's Intervenor Compensation Program, (1998), 79 CPUC 2d 628 (D.98-04-059 hereafter Intervenor Compensation Order)<sup>2</sup> we suggested that questions about a participant's eligibility should be addressed at the "Notice of Intent Stage" of the proceeding in which compensation would be sought, which typically occurs around the time of the Prehearing Conference. (79 CPUC 2d 628, 649.) We followed that timetable here, although due to the importance of the issue of labor union eligibility we issued a Commission

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<sup>2</sup> D.98-04-059 was issued in a combination rulemaking/investigation, R.97-01-009/I.97-01-010, commenced to consider generic issues in the Commission's implementation of the Legislature's intervenor compensation legislation in light of its view of changing regulatory practices and in light of the "Alkon Report," described as a study of the compensation program. 79 CPUC 2d 628, 636-37

decision, as distinguished from the preliminary ruling by the Administrative Law Judge contemplated by section 1804(b). Local 483 has participated in the proceeding and may avail itself of any procedure contemplated by the statute. Because D.03-12-058 was a decision issued at a preliminary stage of the proceeding, it set out a number of paths for establishing eligibility that Local 483 might utilize as the proceeding continued. The failure to definitively establish any one of them at the preliminary NOI stage did not, and could not consistent with the statute, preclude compensation for participation that resulted in a substantial contribution. We affirm the discussion of the various paths to eligibility under Pub. Util. Code section 1802(b).

### **Edison's Arguments – Overview and Introduction**

SCE correctly asserts that the Commission's Intervenor Compensation Program is purely a matter of statute and that an eligibility determination for Local 483 must be consistent with the Intervenor Compensation Statute. However, SCE then proceeds to ignore the established canons of statutory interpretation, instead making ill-aimed policy arguments that have no basis in the statutory text or the legislative context surrounding the enactment of SB 4 in 1984 and AB 1975 in 1992, which bear on interpretation of the text under established rules of statutory construction. SCE is afraid that virtually any public interest organization could be eligible for intervenor compensation. In fact the Legislature has provided for this – has provided that if the participation of a public interest organization that meets the statutory definition results in a substantial contribution and entails in a financial hardship for the participating organization, all as provided for in the statute, that customer shall be compensated. However, SCE's operatic wail that this would "render Article 5 meaningless" misses the mark, since compensation under Article 5 involves three elements, of which eligibility is only one. If SCE wishes to constrain the eligibility element of Article 5, it should complain to the Legislature.

Before addressing the technical legal arguments about how to read the Intervenor Compensation Statute's definition of "customer", it is important to address certain of SCE's general "policy-based" arguments. SCE argues that Local 483 is not a "customer" because, in SCE's view, the term "customer" can apply only to individuals and entities that are narrowly focused on economic concerns as reflected in rates charged by the utility. The Commission rejected this reasoning in In the Matter of Joint Application of GTE and Bell Atlantic (Greenlining Institute), D. 03-03-031 as having no basis in the statute. The Commission said:

“...In enacting intervenor compensation legislation in 1984, the Legislature eliminated pre-1984 limitations on intervenor compensation after January 1, 1984 derived from older CPUC programs, and established a purely legislative program. Stats. 1984, Ch. 297 (SB 4 (Montoya)). Section 1 of that statute provides: “It is the intent of the Legislature in enacting this act ...to require that for proceedings commenced on and after January 1, 1984, awards to customers shall be made pursuant to this act.” This renders nugatory and of no effect statements such as “The requirement that contribution assist the Commission in promoting a public purpose was very in keeping with the common fund theory at the root of our program. It compensates the participation of intervenors when other, nonparticipants, derive a benefit from that participation” 79CPUC2d 628 at 638. The fiction of a perpetuation of the Commission's old “common fund” theory underlies the notion that a participating customer must confer some monetary benefit on non-participants as the “consideration” for an award of compensation. 79 CPUC 628, 650.” D.03-03-031, Typescript page.

We affirm this statement in both respects – the Intervenor Compensation Statute is the sole basis for the program at the Commission and that statute cut off the older notions that tie compensation to conferring a specific financial benefit on ratepayers.

SCE also argues that D.03-12-058 misapplies the Intervenor Compensation Order, supra, as though that Order could supersede the terms of the Intervenor Compensation Statute. In D.03-03-031 we expressed strong

disapproval of that Order, and specifically over-ruled certain aspects of the Order, while not addressing others. We said:

...Pub. Util. Code section 1803 requires that the Commission award compensation to “any customer” who makes a substantial contribution to the outcome of a proceeding and whose participation [footnote omitted] imposes a significant financial hardship. Section 1801.3 contains an authoritative expression of the Legislature’s intent in enacting the intervenor compensation program. During the era of deregulation the Commissioners interpreted this section, and particularly subdivision 1801.3(f), as imposing restrictions on intervenor compensation that the text of the statute does not support. Most notably in its decision *Commission’s Intervenor Compensation Program*, D.98-04-059, 79 CPUC 2d 628 (April 23, 1998) the Commission attempted to decisively narrow customer participation at the Commission by selectively elevating section 1801.3(f) to a “standard” for compensation that would limit or preclude many types of customer participation at the CPUC, while ignoring other and more prominent subdivisions of that section such as 1801.3(b). 79 CPUC2d 628, 649-50.

The ideological basis for this narrowing was made apparent in the decision. The Commissioners opined that:

[A]s the telecommunications and energy industries become increasingly competitive, the participation of customers, separate and apart from their representation through ORA or CSD, may not be necessary. We must begin to more critically assess, at the outset of a proceeding, whether the participation of these ‘third-party’ customers, separate and apart from their representation through ORA or CSD, is necessary, both in terms of non-duplication and in terms of a fair determination of the proceeding. 79 CPUC2d 628 at 649. (emphasis added)

This statement envisions a peetering out of 3<sup>rd</sup> party consumer advocacy as regulation “withers away” and is replaced with competition. It is at odds with reality and the experience of California over the past several years. And its cavalier dismissal of active customer participation in Commission proceedings cannot be reconciled with other substantive and intent provisions of the statute, particularly with Pub. Util. Code section 1801.3(b), which provides:

1801.3.

...

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. (emphasis added)

D.03-03-031, Typescript at 9-11

We affirm this statement, and to the extent that the Order is inconsistent with the Intervenor Compensation Statute it will not control our decisions generally, or this case specifically. Specifically, we do not intend to create new underground rules relating to customer status that will subvert the Legislature's intent to broaden customer participation at the CPUC.

Finally, SCE imputes a narrow purpose to the Legislature: that the sole purpose of the intervenor compensation program is to provide representation for under-represented residential ratepayers. Nothing could be further from the truth. As the Court of Appeals concisely noted:

[In enacting] the provisions [of the Intervenor Compensation statute], the Legislature sought to encourage customers to participate in PUC proceedings and contribute to PUC decisions. Southern Cal. Edison v. CPUC, 117 Cal. App. 4<sup>th</sup> 1039, 1049 (2004). (emphasis added)

In 1992 the Legislature substantially amended the intervenor compensation statutes and substantially broadened the legislative authorization for compensation for customer participation or intervention in commission proceedings. Stats. 1992, Ch. 942 (AB 1975 (Moore)). AB 1975 added three new sections to the statute -- Pub. Util. Code sections 1801.3, 1802.5 and 1812; repealed a section -- Pub. Util. Code section 1805; and made a number of amendments to the remaining Public Utilities Code sections. Significantly, AB 1975 made no change to the definition of "customer."<sup>3</sup>

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<sup>3</sup> Stats. 2003 ch. 300 (SB 521 Bowen) expanded the definition of eligible customer to include representatives of small commercial customers, and reorganized section 1802(b) in non-substantive ways. It was not effective at any time during 2003 and is therefore of no significance to this case.

The most important amendment was to Public Util. Code section 1803. Prior to AB 1975, the section provided:

The commission may award reasonable advocate's fees, reasonable expert witness fees and other reasonable costs of participation or intervention in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate to any customer who complies with section 1804 and satisfies all of the following requirements:

- (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
- (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship.

AB 1975 rewrote the section as follows:

1803. The 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 to any customer who complies with section 1804 and satisfies both of the following requirements (emphasis added):

- (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
- (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship.

By making the award mandatory for any customer who makes a substantial contribution and meets the financial hardship requirement, the Legislature eliminated any other obstacles to participation, and to compensation for the costs of participation. There is no qualification of a complying customer's right to be compensated on the face of this statute, or in any other substantive provision of the statutes governing participant compensation.

## **Discussion of Customer Status**

### **1) Standards for Statutory Interpretation**



The primary goal of statutory interpretation is to determine the Legislature's intent in order to effectuate the statute's purpose.<sup>4</sup> Therefore, the Commission's objective in applying the statute to determine whether Local 483 is meets the eligibility test as a "customer" under Article 5 is to ascertain and effectuate legislative intent. In determining legislative intent, the Commission must look to the statutory language itself.<sup>5</sup> "If the language is clear and unambiguous there is no need for construction, and it is not necessary to resort to indicia of the intent of the Legislature . . . ." It is only necessary to resort to statutory construction when the language of the statute remains unclear or ambiguous after its words are given a common sense meaning.<sup>6</sup>

In the case of the Intervenor Compensation Statute, the Legislature was explicit in stating its intent. Pub. Util Code 1801.3. Specifically, 1801.3(b) provides:

1801.3....

(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. (emphasis added)

Arguments making inferences from statutory design must take account of this express statement of intent, which is phrased in much broader terms – all groups – than the phrase "residential ratepayers" would suggest.

When construing a statute, "the various parts of a statutory enactment must be harmonized by considering the particular clause or section of that statute in the context of the statutory framework as a whole" and by keeping in mind the statutory purpose.<sup>7</sup> "Thus, every statute should be construed with reference to the

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<sup>4</sup> *People v. Murphy* (2001) 25 Cal. 4<sup>th</sup> 136, 142; *People v. Cruz* (1996) 13 Cal. 4<sup>th</sup> 764, 774-775.

<sup>5</sup> *De Anza Santa Cruz Mobile Estates Homeowners Assoc. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal. App. 4<sup>th</sup> 890, 909.

<sup>6</sup> *See Wilcox v. Birtwhistle* (1999) 21 Cal. 4<sup>th</sup> 973, 977.

<sup>7</sup> *Palos Verde Faculty Assoc. v. Palos Verde Peninsula Unified School District* (1978) 21 Cal. 3d 650, 659 (citations omitted).

whole system of law of which it is a party, so that all may be harmonized and have effect.’’<sup>8</sup>

## 2) Application of Standards

D. 03-12-058 interprets the statutory term “customer.” “Customer” is defined in Pub. Util. Code § 1802(b):

1802. ...

b) " Customer" means any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the commission; any representative who has been authorized by a customer; or any representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers, but does not include any state, federal, or local government agency, any publicly owned public utility, or any entity that, in the commission's opinion, was established or formed by a local government entity for the purpose of participating in a commission proceeding.

In reading this definitional language, the command of 1801.3(b) must be kept in mind -- encourage the participation of all groups that have a stake. There are three distinct concepts within this definition:

- (i) a participant representing consumers, or
- (ii) a representative specifically authorized by a customer, or
- (iii) a representative of a group or organization that is authorized by its bylaws or articles of incorporation to represent the interests of residential ratepayers.

The Commission requires a participant to identify specifically in its Notice of Intent (NOI) how it meets the definition of customer and, if it is a group or an organization, provide a copy of its articles or bylaws, noting where in the document the authorization to represent residential ratepayers can be found. *Intervenor Compensation Order* at 649. A rebuttable presumption of eligibility

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<sup>8</sup> *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal. App. 4th 47, 54 (quoting *Moore v. Panish* (1982) 32 Cal. 3d 535, 541).)

did not exist for Local 483 because Local 483 had not previously filed for eligibility for intervenor compensation. Pub. Util. Code § 1804(b)(1). In D. 03-12-058 the Commission determined that Local 483 may be eligible under all three approaches. Local 483 is definitely eligible pursuant to Category 3, and we so held.<sup>9</sup>

Under Category 3 – an organization generally authorized to represent the interests of residential ratepayers -- the Commission has for many years adopted an expansive approach to customer status determinations, utilizing various presumptions and assumptions in favor of associations and organizations that advance the public interest directly but represent narrowly defined “ratepayer” or “residential ratepayer” interests only indirectly. Environmental groups, including groups without voting members, have been found eligible because of an "understanding" that they "represent customers who have a concern for the environment." The Intervenor Compensation Order expresses this clearly:

...With respect to environmental groups, we have concluded they were eligible in the past with the understanding that they represent customers whose environmental interests include the concern that, e.g., regulatory policies encourage the adoption of all cost-effective conservations measures and discourage unnecessary new generating resources that are expensive and environmentally damaging. They represent customers who have a concern for the environment which distinguishes their interests from the interests represented by Commission staff, for example. 79 CPUC 2d at 688, fn. 14. (emphasis added)

C.f., *Natural Resources Defense Council*, (1988), 28 CPUC 2d 101 (D.88-04-066).

A very recent example of this practice is found in Administrative Law Judge’s Ruling regarding Notices of Intent to Claim Compensation in A.02-11-017, Application of PG&E dated April 9, 2003, which approves NRDC for eligibility on the basis of corporate by-laws providing for “individual” memberships and a general purpose to “...preserve, protect and defend natural

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<sup>9</sup> Because we have found Local 483 eligible pursuant to Category 3, we may presume that the significant financial hardship element has been met because of the disproportion between the costs of participation and the interest of any of the individual members of the organization as residential ratepayers.

resource, wildlife and environment....” In that case ALJ Cooke has no trouble correctly finding these generalized references sufficient to infer authorization to represent the interests of residential ratepayers, because of the established “understanding” or – more legally precise – “presumption” in favor of eligibility that has been an established element of commission practice. In this regard the Constitution of the UWUA, of which Local 483 is a subordinate body,<sup>10</sup> compares favorably with the generalized language of the NRDC Articles of Incorporation, because it refers specifically to promoting the interests of “workers and their families” (as compared with “Individual Members”) and “participat[ing] in our democratic society” and “work[ing] for social and economic justice” (as compared with “conduct[ing] research and collect[ing] and publishing[ing] facts and information...”) The UWUA Constitution is certainly sufficient to invoke the presumption in favor of “Category 3” customer status for Local 483, as a broad authorization to represent the interests of residential ratepayers.

Similarly, the Commission has consistently awarded compensation to Cal/Neva, "an association of community action agencies and community based organizations representing low income interests," *Intervenor Compensation Order* at 688, fn. 14 , even though the participation of government agencies might have disqualified it under other circumstances. Compare, *Intervenor Compensation Order* at 645-46. Indeed, Pub. Util. Code 1802(e) affirmatively prohibits local government agencies from eligibility, both directly and indirectly by excluding from the definition of customer “...any entity ... established or formed by a local government for the purpose of participating in a commission proceeding.” Pub. Util. Code 1802(b).

These decisions, stretching back over many years, represent a recognition that the interests of “customers” are broad enough to encompass

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<sup>10</sup> Although SCE does not make the argument, it is important to note that the structure of the UWUA and its subordinate bodies make the Constitution the controlling document for the organization. The phrase “authorized by its articles of incorporation or by-laws” applies fully to Local 483 and its superior body the UWUA. It is erroneous to characterize UWUA as an “umbrella” organization whose organic documents do not control its subordinate bodies and their relationship with the members of UWUA.

related issues of public health and welfare, environmental quality, and distributive justice. This expansive approach is fully consistent with the intent of AB 1975 (Moore) (Ch. 942 Stats. 1992) which added § 1801.3(b) to the intervenor compensation article of the Public Utilities Code:

1801.3. It is the intent of the Legislature 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.

Indeed, the fact that the Legislature has amended the Intervenor Compensation State repeatedly without making any change to the definition of customer, or the presumption favoring an expansive approach to customer status for public interest organizations requires an inference of legislative acquiescence to this longstanding approach. Richfield Oil Co. v. CPUC, 54 C.2d 419, 430-31 (1961).

The canons of statutory interpretation require the Commission to read the Intervenor Compensation Statute in light of the Public Utilities Act of which it is a part. The Commission's public interest charge pursuant to Pub. Util. Code § 451 includes a requirement affirmatively to promote the well-being of utility employees and the public through the provision of adequate service and facilities:

451....

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

...

The Legislature in enacting the Public Utilities Act recognized that in the area of adequacy of service and facilities consumers and employees share

common interests. Employees and their union representatives have access to information and points of view that may be invisible to customers, but which are crucial both to customers' well-being and to this Commission's ability to discharge its statutory responsibility to assure adequate service and facilities. Unions representing utility employees therefore "customers" if they are the proponents of positions and issues that affect adequacy or quality of service, under the established precedents of the Commission, even if they do not advance narrow consumerist positions regarding control of cost and rate levels. Of course, where they do advance rate and cost-related issues on behalf of their members as consumers or consumers generally, they are eligible as "customers" without more justification. C.f., Pub. Util. Code §§ 761 and 762.

Although the foregoing discussion of Category 3 status would be sufficient, D. 03-12-058, also described the manner in which Local 483 might establish customer status under either Category 1 or Category 2. We affirm that discussion. We note that the Commission's procedural decision to issue a formal decision at a preliminary point in the proceedings did not, and could not consistent with Pub. Util. Code 1804(b), preclude Local 483 from presenting to the

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Commission facts that would establish eligibility consistent with the discussion contained in D. 03-12-058 at a subsequent point in the proceeding as the scope of its participation changed.

Therefore **IT IS ORDERED** that:

Rehearing of D.03-12-058 is hereby denied.

The order is effective today.

Dated October 7, 2004, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
CARL W. WOOD  
LORETTA M. LYNCH  
SUSAN KENNEDY  
Commissioners

I reserve the right to file a dissent.

/s/ GEOFFREY F. BROWN  
Commissioner