ADMINISTRATIVE PROCEEDING
FILE NO. 3-617

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

PENNZOIL COMPANY
UNITED GAS CORPORATION
PENNZOIL UNITED, INC.

(File Nos. 54-239; 59-112)

(Public Utility Holding Company Act of 1935)

INITIAL DECISION

September 7, 1971
Washington, D.C.

Sidney Ullman
Hearing Examiner

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Public Utility Holding Company Act of 1935	:	

APPEARANCES: Aaron Levy, Frank Field and Arthur J. Buswell, for the Division of Corporate Regulation.

Baine P. Kerr and E.J. Freiberg for Pennzoil United, Inc.; Moulton Goodrum, Jr. for Baker, Botts, Shepherd & Coates; Morton E. Yohalem, pro se; Norwood P. Beveridge, Jr. of Kramer, Marx, Greenlee & Backus, for Morton M. Adler; John T. Miller, pro se and for certain representatives of Mississippi and Louisiana Municipalities; Marc A. White, of Pittman Lovett Ford Hennessey & White, for John T. Miller; Fred Benton, Jr. and Fred Benton, Sr., of Benton & Moseley, pro se and for certain representatives of Mississippi and Louisiana Municipalities; Simmons J. Barry, pro se; H. Zinder & Associates, pro se; Alfred H. Ebert, Jr., for Andrews, Kurth, Campbell & Jones; Carl H. Conley for Stone & Webster Management Consultants, Inc.; Robert M. McHale, pro se; Van Scoyoc & Wiskup, pro se; Hedberg & Gordon, Inc., pro se; Arthur Andersen & Co., pro se.

BEFORE: Sidney Ullman, Hearing Examiner

Nature of the Proceedings

By Notice and Order dated June 12, 1969,[1/] (hereafter "Order") the Commission ordered that a public hearing be held with respect to fees and expenses paid or to be paid by Pennzoil United, Inc. ("Pennzoil United") to a number of attorneys, accountants, consultants and expert witnesses for services rendered in connection with Commission proceedings under circumstances described below. The Commission had reserved jurisdiction over the allowance of such fees and expenses in an earlier order dated February 21, 1968, in which it had modified and approved a final amended plan pursuant to which Pennzoil Co. ("Pennzoil"), then a registered holding company, and its then subsidiary gas utility company, United Gas Corporation ("United") were consolidated to form Pennzoil United.[2/]

The plan was filed initially on April 29, 1966 by Pennzoil and United jointly under Section 11(e) of the Public Utility Holding Company Act of 1935 (the "Act") and was amended on May 10, 1966. It was commonly known as the "May plan." It had provided generally for the disposition by United of its retail gas distribution properties to a non-affiliated purchaser, and thereafter for the consolidation of Pennzoil and United. The filing followed Pennzoil's acquisition of 5,152,598 shares of United in December 1965, pursuant to a tender offer. This acquisition, together with 275,000 shares previously purchased in the open market, had given Pennzoil 42.013% of United outstanding stock. Pennzoil thereupon, on December 21, 1965 had registered with the

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1/ Pennzoil Company, et al., Holding Company Act Release No. 16401.

2/ Pennzoil Company, et al., Holding Company Act Release No. 15980. The order was issued under Section 11 of the Public Utility Holding Company Act of 1935, the aim of which "is to restrict each holding company to a single integrated electric or gas utility system having a simple capital structure, with provision for the retention of additional utility systems and related incidental businesses under specific standards." 1 Loss, Securities Regulation, 135 (1961).

Commission pursuant to Section 4 of the Act, and the filing of the joint application by the parent and subsidiary followed.[3/]

The plan as amended provided in part as follows:

> "Fees and expenses in connection with the Plan as originally filed May 10, 1966 [4/] and as subsequently amended, and any proceedings in connection therewith, including, without limitation, the proceedings with respect to the proposed sale of United's gas distribution facilities pursuant to Part I of the Plan of May 10, 1966, will be borne by the Consolidated Company, and the Consolidated Company shall pay such fees and expenses to such persons and in such amounts as the Commission may by order determine, subject only to the right of Pennzoil, United or the Consolidated Company to seek review of the Commission's determination in any Court of competent jurisdiction."

In the Order the Commission required that a list of all persons who had received or who were to receive fees and expenses or other compensation in connection with the consolidated Section 11 proceedings which eventuated, as described below, be submitted by Pennzoil, together with a description of the nature of the services and a justification for the payment thereof. Pennzoil United thereafter submitted a list of fees and expenses requested or paid or agreed to be paid, in amounts totalling $1,207,360 for fees and $88,302 for expenses.[5/]

(In response to a letter request from the Secretary of the Commission to the fee applicants, application for approval of amounts requested, agreed to or paid by Pennzoil United also were filed. As discussed

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3/ In January 1966, United's board was enlarged to include as a majority, persons who were directors or otherwise associated with Pennzoil.

4/ As stated above, the plan was filed on April 29, 1966. It was amended by the plan of May 10, 1966, and was subsequently amended as indicated in the text, infra.

5/ These amounts do not include fees and expenses for services in connection with a subsequent proposal by Pennzoil United to dispose of the retail gas facilities. See, Pennzoil United, Inc., Holding Company Act Release No. 16481 (September 23, 1969) and No. 16747, (June 2, 1970).

below, some of the claimants do not concede the jurisdiction of the Commission to pass upon their fees and expenses).

The Order provided that at the hearing to be held with respect to the fees and expenses, consideration be given to the following questions, among others to be properly presented:

> "1. Whether the services and disbursements for which remuneration is requested, was paid or will be paid are for, and associated with, compensable services rendered in connection with any of the various aspects of the consolidated proceedings, and whether it is lawful to grant allowances for such fees and expenses.
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> 2. Whether the amounts of such fees and expenses are reasonable and, if not, what amounts should be allowed as reasonable.
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> 3. Whether there are any other factors apart from the nature, necessity and value of the services rendered and the capacity in which rendered that would make the payment of compensation and reimbursement improper."

Following a pre-hearing conference, hearings were held in July and August 1970, during which testimony and exhibits were received delineating the services performed by the respective applicants in connection with the various hearings and the several aspects of the Section 11 proceedings. After the hearings in the instant proceedings, proposed findings, briefs, and requests for approval of the claimed fees and expenses were filed, and in response the Division of Corporate Regulation ("Division") filed a memorandum setting forth its views with respect to the applications. Inasmuch as the Division's memorandum, as well as that filed on behalf of Pennzoil United, took the position that with a single exception (Morton M. Adler) all of the fees and expenses claimed were proper and should be approved, only one reply brief was filed, and this, of course, was on behalf of Mr. Adler.

The plan ultimately approved by the Commission and the bases for the rejection and the required modification of the amended plan proposed and filed by the companies are discussed fully in the Commission's order of approval of February 21, 1968, supra, fn. 2. The earlier plans are described in other Commission orders cited herein in the margin. Accordingly, only to the extent deemed necessary for understanding and evaluating the services rendered are the plans and the prior proceedings themselves discussed herein. Similarly, only brief description need be made of the two companies involved in these extended and complex proceedings which, in one or another form, frequently came before the Commission and involved the work of members of the staff during a period of approximately two years.

United

United was a Delaware corporation engaged in the retail distribution of natural gas in Texas, Louisiana, Mississippi and Florida. Its Distribution Division included 11,071 miles of underground mains and 6,671 miles of distribution service lines. It had a gas transmission subsidiary and five non-utility subsidiaries engaged in mining, manufacture and other activities. As of September 30, 1966, United's gross plant, property and equipment totalled $1,163,999,000, of which $153,350,000 represented gross book value of the (natural gas) Distribution Division. For the year then ended, United's total operating revenues amounted to $458,852,000.

Pennzoil

Pennzoil, a Pennsylvania corporation, was primarily engaged directly and through subsidiaries in the production, transportation

and refining of crude oil and the marketing of motor fuels, lubricants and related products. As of September 30, 1966 the company and its subsidiaries had consolidated assets of $341,897,000, of which approximately 67% was stated to represent Pennzoil's investment in the common stock of United. The company's gross plant and equipment then amounted to $216,273,000, and for the year then ended its total operating revenues were $92,093,000. It had over four million shares of common stock outstanding, as well as stock options and debentures convertible into additional shares.

The Proceedings Before the Commission

As indicated above, some discussion is necessary of the more significant aspects of the proceedings so that the area in which the services and expenses under consideration may be understood and the services evaluated. The proceedings were before the Commission in various forms and stages for extended periods between the initial filing of the application by Pennzoil and United on April 29, 1966 and the ultimate approval of the final amended plan on February 21, 1968.

As stated above, the plan was divided into two parts: Part I provided for the sale by United of its retail natural gas distribution systems, franchises and related properties, referred to as the Distribution Division: Part II provided for the consolidation of United and Pennzoil into a single company. As amended on May 10, 1966, the plan stated:

> "In order to expedite the consummation of the plan, Part I may be severed for notice, hearing and disposition and the Commission's order with respect thereto may be entered prior to disposition of Part II of the Plan."

The Commission gave notice of this filing by order dated May 16, 1966,[6] in which it invited requests for a hearing on the proposed sale of the Distribution Division. No hearing was requested and none was ordered by the Commission, and by order of June 27, 1966 the Commission approved Part I, subject to certain conditions, including the maintenance of competitive conditions and the reservation of jurisdiction over the price.[7]

Several municipalities in Mississippi and Louisiana within the gas service area of United then petitioned to intervene in the proceedings in opposition to the proposed sale of the gas distribution properties, requesting Commission reconsideration of its order of June 27, 1966 on Part I of the plan. A substantial number of the fee applicants are involved in the instant proceedings because of this intervention and their representation of the Mississippi and Louisiana municipalities in various capacities in opposition to the plan. The reasons for and basis of the intervention and the nature of the representation are treated, infra, in the discussion of the fee applications.

Following the Commission's order of June 27, 1966 authorizing the sale of the retail gas properties, two bids were submitted in response to Pennzoil's invitation. Both were rejected on August 8, 1966. Thereafter, United accepted a proposal made by System Distribution, Inc., a newly-organized Texas corporation, for the purchase of the Distribution Division (with the exception of some small facilities in Florida and Louisiana which the proposed purchaser would operate on behalf of United).

6/ Pennzoil Company, et al., Holding Company Act Release No. 15475.

7/ Pennzoil Company, et al., Holding Company Act Release No. 15518.

The Commission, in response to the petition for intervention by the municipalities and an application by the company for approval of the proposed sale to System Distribution, Inc., issued on August 25, 1966 an order [8/] for a hearing on September 19, 1966 with respect to Part I of the plan as then modified, raising as issues therein the necessity for Commission approval of the plan in order to effectuate the provisions of Section 11(b) of the Act; the question of the maintenance of competitive conditions for the sale of the gas distribution properties; and the broad issues of the public interest and the protection of the interests of consumers as well as of investors.

Extensive activity engendered by representatives of the Mississippi and Louisiana municipalities in support of the intervention followed in the hearing. On October 17, 1966, near the end of the hearing and during a period of recess granted by the hearing examiner to afford the municipalities an opportunity to prepare rebuttal, Part I of the plan was withdrawn, and on November 3, 1966 an amended plan permitting the consolidation of Pennzoil and United was filed jointly by the two companies under Section 11(e). (Prior to this time, settlement negotiations had begun between counsel for Pennzoil and United and representatives of the municipalities, and ultimately in January 1967, after other proceedings outside of the authority of the Commission had been instituted on behalf of the municipalities, settlement agreements were entered into between Pennzoil, United, and the representatives of the municipalities).

8/ Pennzoil Company, et al., Holding Company Act Release No. 15547.

The plan as now amended and filed on November 3, 1966 was summarized in a Commission order dated December 8, 1966 [9/] which recited generally the proposed terms for reimbursing the stockholders of Pennzoil and of United for the surrender of their respective holdings. After reciting the basis and need for a hearing, it stated that intervention in the Section 11(e) proceedings had been granted to the Louisiana Public Service Commission, to 14 named Louisiana municipalities and 6 named Mississippi municipalities, and it made them parties to the Section 11(e) proceedings, which it consolidated with proceedings it then instituted under Section 11(b)(1) and (2). The portion of the order quoted in the margin is enlightening with respect to the basis for and nature of the consolidated proceedings. [10/] This chapter of the proceedings before the Commission and the negotiation and consummation of the settlement agreements which eventuated constitute an area of work done and expenses incurred by a substantial number of the fee applicants, and it has particular significance here for the reason that under these settlement agreements Pennzoil United paid to the municipalities $275,000 for the fees and expenses of these persons who served the municipalities in opposing the plan. The distribution or allocation of the $275,000 to the attorneys, accountants, consultants, experts and others is discussed below in connection with the fee applications.

9/ Pennzoil Company, et al., Holding Company Act Release No. 15618.

10/ The Order provided in part:

> "It being the duty of the Commission, pursuant to Section 11(b)(1) of the Act, to require by order, after notice and opportunity for hearing that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part

(Continued)

As stated in the Division's brief submitted in the instant proceeding, the principal issues with respect to the plan related to the terms of the exchange proposed for the securities of the consolidated company. Under the plan, the consolidated company would issue common stock and two classes of preference common stock, all $2.50 par value per share. One class of preference common stock would bear an annual dividend rate of $4.75 per share and the other $4.00 per share. The preference common stock would be entitled, before the common stock, to cumulative cash dividends payable at their respective annual dividend

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10/ Continued from page 8:

> to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operation of such integrated public-utility systems; and
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> It being the duty of the Commission, pursuant to Section 11(b)(2) of the Act, to require by order, after notice and opportunity for hearing, that each registered holding company take such steps as the Commission shall find necessary to ensure that the corporate structure of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system; and
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> The Commission being required by the provisions of Section 11(e) of the Act, before approving any plan filed thereunder, to find, after notice and opportunity for hearing, that such plan, as submitted or as modified, is necessary to effectuate the provisions of Section 11(b) and is fair and equitable to the persons affected thereby; and
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> The Commission deeming it appropriate that notice be given and a hearing held for the purpose of determining what action should be ordered under Sections 11(b)(1) and 11(b)(2) in respect of Pennzoil and its subsidiary companies and for the purpose of ascertaining whether the Plan should be approved; and
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> It appearing that common issues of fact and law arise in connection with the Section 11(e) Plan and in connection with the issues involved under Sections 11(b)(1) and 11(b)(2), making it appropriate that the two proceedings be consolidated and that Pennzoil and United be made parties to the consolidated proceeding. . . ."

rates. The preference common stock and the common stock would be entitled to one vote per share, with cumulative voting for the election of directors of the consolidated company.[11/]

The plan contemplated that Pennzoil stockholders would receive one share of Pennzoil United for each share of Pennzoil. The public stockholders of United would receive for each share of United one-half (½) share of $4 dividend preference common stock of Pennzoil, convertible at the rate of 0.588 of a share for each share of United in the first six years and at a lower rate in the next succeeding six years, and an option to exchange, within 30 days of the effective date of the plan, each share of United common stock (provided he exchanged all shares) for two-thirds (2/3) of a share of Pennzoil United common stock.

Hearings in the consolidated proceedings began on January 24, 1967 and continued on March 7-10, 13-15 and April 3-7. An initial decision by the hearing examiner and other post-hearing procedures were waived by all parties participating in the hearing, and in accordance with another waiver the Division assisted the Commission in the preparation of the Commission decision.

The Commission, in its extensive and comprehensive findings and opinion,[12/] concluded that the then-current corporate structure of Pennzoil gave rise to an inequitable distribution of voting power "because the entire Pennzoil system, including United's system, is controlled

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11/ A full description of other provisions of the plan, such as those relating to the right of conversion of the preference common stock of the consolidated company into its common stock may not be essential here to a fair understanding and evaluation of the proposals. Some of these provisions, however, are stated in Holding Company Act Release No. 15618, supra, fn. 9.

12/ Pennzoil Company, et al., Holding Company Act Release No. 15963 (February 7, 1968).

by the common stock of Pennzoil which represents a disproportionately small investment in the system," and that the standards of Section 11 and of relevant decisions required the elimination of this inequitable distribution of voting power as to Pennzoil and the elimination of the publicly-held common stock of United. It found, despite the contention by Pennzoil and United to the contrary, that the consolidation would not eliminate Pennzoil as a holding company, and, accordingly, that the retention of the retail gas utility properties by the consolidated company would contravene the provisions of Section 11(b)(1) of the Act. 13/ The Commission concluded that the proposals, as made, were unfair to the public stockholders of United; that among other modifications the conversion ratio of their stock should be 0.72 rather than 0.588, and that the 30-day option should be eliminated.

The Commission used, as a point of departure in determining a fair conversion rate, the actual, estimated and projected per share contributions of the public United shareholders, on the one hand, and of the Pennzoil shareholders, on the other, to the earnings of the consolidated

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13/ The opinion states at 11-12:

> "When Pennzoil acquired control of United, it was clear that the holding company thus created did not meet the standards of Section 11(b)(1), and shortly thereafter Pennzoil filed a plan, Part I of which, since withdrawn, proposed the sale of the gas distribution properties of United in order to comply with the requirements of Section 11(b)(1). These requirements cannot be side-stepped by the mere act of consolidating into a single corporate ownership both the retainable and non-retainable properties within the present system. The interpretation of Section 11(b)(1), as proposed by Pennzoil and United, would permit the creation and perpetuation of the very conditions that Section 11(b)(1) was designed to correct."

Thereafter, at 13, the opinion continues:

(Continued on p. 12)

company. The computation was made on the basis of full conversion into Pennzoil common stock of its outstanding stock options (67,678 shares) and its outstanding debentures (488,154 shares). Conversely, consideration was also given to such other factors as the preference features attaching to the shares to be issued to the United stockholders. The opinion stated, at 39, that the proposals "if amended in accordance with the findings herein, will comply with the requirements of Section 10 of the Act" and with other applicable provisions of the Act. The concluding sentence stated:

> "If within 30 days . . . the Plan is so amended, we shall enter an order approving it, subject to the reservations of jurisdiction noted above." 14/

The plan was amended in conformity with the opinion and was approved by Commission order of February 21, 1968.[15/] The amended plan also provided that following the consolidation Pennzoil United would dispose of the retail gas distribution properties, and as to this the Commission reserved jurisdiction.

In an order issued on March 12, 1968,[16/] pursuant to Section 5(c) of the Act and the application of Pennzoil and United thereunder,

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13/ (Continued)

> "Pennzoil and United have stated that if Section 11(b)(1) must be complied with, their choice would be to retain the vastly larger non-utility businesses in the Pennzoil holding-company system rather than the retail gas distribution properties of United. This is an appropriate election which would satisfy the requirements of Section 11(b)(1)."

14/ One of the reservations pertained to "all fees and expenses with respect to the entire Section 11 proceeding, including the proceeding relating to the proposal in Part I to sell the gas distribution facilities of United."

15/ Pennzoil Company, et al., Holding Company Act Release No. 15980.

16/ Pennzoil Company, Holding Company Act Release No. 16014.

the Commission declared that on the effective date of the consolidation of the companies the registration of Pennzoil as a holding company would terminate, subject to reservation of jurisdiction over specified matters, including the allowance of the fees and expenses and the divestiture of the gas utility assets.

On application of the Commission, its order approving the Section 11(e) plan was approved and enforced by order of the Federal District Court.[17/] In accordance with a provision of the court order the "effective date of the consolidation" was April 1, 1968, and as of that date Pennzoil's registration under the Act ceased to be effective except for matters as to which jurisdiction had been reserved.

Jurisdiction of the Commission

In his brief in support of proposed findings of fact and conclusions of law, John T. Miller, Jr. challenges the jurisdiction of the Commission over the fees and expenses, totalling $275,000, paid over by Pennzoil United for allocation among the many persons who performed services on behalf of the Louisiana and Mississippi municipalities. (Mr. Miller's document assumes, arguendo, however, that the Commission has jurisdiction, and as indicated below he urges persuasively that the fees and expenses he received as counsel for the municipalities were reasonable and should be approved).

The basis for the argument against Commission jurisdiction is Section 2(c) of the Act,[18/] which provides in part:

> "No provision in this title shall apply to, or be deemed to include *** any political subdivision of a State *** or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

17/ In re Pennzoil Co., D.C. Del., No. 3485 (March 22, 1968).
18/ 15 U.S.C.A. §79b(c).

Mr. Miller urges that "The counsel, engineers and consultants of the municipalities served as their agents or employees within the meaning of this statute. They were acting within the course of their official duties as representatives of and aides to the municipalities in opposing the Pennzoil take-over of United Gas. . . The activities for which they received compensation come within Subsection 2(c) of the Act."

Conversely, as the Division's brief points out, although Section 2(c) would preclude Commission review of fees paid by municipalities to its representatives in proceedings under the Act, it does not divorce the Commission from its responsibilities under Section 11(e) to assure that a plan under consideration is "fair and equitable to the persons affected by such plan." See In re Electric Bond and Share Co., 80 F. Supp. 795, 798 (S.D.N.Y. 1948), where the court said that the Commission's "jurisdiction over fees is an inseparable part of the determination of whether a plan is fair and equitable"; and Standard Gas & Electric Co. v. S.E.C., 212 F.2d 407, 410 (8th Cir., 1954), cert. denied 348 U.S. 831 (1954), where the Court said: "Obviously payment of fees and expenses may affect the fairness and equitabilness of the plan."

I believe that the scope of Section 2(c) urged by Mr. Miller would have a result which is illogical and not intended by

Congress. It would oust the Commission of jurisdiction where the holding company makes an agreement with a political subdivision, regardless of the effect thereof on consumers, on investors, or on the public interest. Such agreement, under the construction urged, would preclude the Commission from performing its statutory function.

In Public Utility District v. United States Securities and Exchange Commission, 195 F.2d 727 (9th Cir., 1952), it was urged that Section 2(c) barred the Commission from ordering a hearing to inquire into a proposed sale by a public utility holding company of the common stock of a subsidiary company to certain public utility districts which were concededly governmental agencies within the scope of Section 2(c). The court sustained the jurisdiction of the Commission, stating at 731:

> "We think that §2(c) cannot be made to carry so much weight. True, the language is that 'no provision in this title shall apply' to the Public Utility Districts. But the districts are only one party to the proposed transaction. The other party is [the holding company] and the provisions of the Act most assuredly do apply to it. . . . Of course, the Commission cannot regulate what the district may buy, but the Act contains adequate authority to the Commission to regulate what and how [the public utility] may sell."

Again, at 733 the court said:

> "In the light of this factual situation, we cannot believe that §2(c) was intended to tie the hands of the Commission whenever, as here, the company subject to an 11(b) divestiture order, chooses to deal with a public agency. §(2), in providing that 'no provision in this title shall apply to' any state or Federal public agency, did not say that no provision of the title 'shall apply to any registered holding company in respect of a transaction otherwise subject to the Act whenever the other

> party to the transaction is some public agency, state or federal.' The Act is replete with mandates to the Commission that in respect to such divestiture as is now ordered to be accomplished by [the public utility] it shall issue such orders as it deems necessary or appropriate 'in the public interest or for the protection of investors or consumers. . . .'"

Accordingly, it appears that both logic and authority lead to the conclusion that the Commission has jurisdiction over the fees and expenses paid by Pennzoil United to the municipalities for allocation to their representatives for services performed and expenses incurred in the proceedings described above. The contention to the contrary is rejected.[19/]

The $275,000 Payment and Its Allocation

The objection to the Commission's jurisdiction and my determination thereon pertain to all fee and expense payments -- not just to those compensating and reimbursing Mr. Miller. The principal burden of negotiations on behalf of the municipalities was borne by Fred G. Benton, Sr., of the firm of Benton & Moseley, and Mr. Benton directed the allocation of the $275,000 which was made as indicated in the Order. The recipients, either for themselves or through other recipients, have filed documents and in some instances have testified with regard to the asserted fairness and reasonableness of the respective payments.

All parties recognize that the obligation to pay the fees and expenses incurred in connection with the plan as filed and amended and in all proceedings in connection therewith properly falls on Pennzoil United. The plan, as amended and approved by the Commission, provided

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19/ At a pre-hearing conference held before me on June 23, 1970 Mr. Miller had moved for an order to the effect that Commission jurisdiction did not encompass the fees and expenses paid to representatives of the municipalities. That motion was denied.

that the fees and expenses would be borne by the consolidated company. 20/ Pennzoil United paid these fees and expenses of all counsel, accountants, and consultants retained by or on behalf of the municipalities in February 1967; it has paid or agreed to pay all fees and expenses of its counsel and of its other representatives; it has agreed to pay all of the expenses but only a portion of the fees requested by Morton M. Adler, a stockholder of United, who appeared and performed services in the proceedings as discussed, infra.

The payment to the municipalities was made to settle the several aspects of the litigation, pending and prospective, which were holding up the program of Pennzoil before the Commission. The $275,000 figure was reached after many extended arms-length negotiations between counsel for the company and counsel for the municipalities. Company counsel recognized the delay inhering in the several objections of the municipalities to the proposed sale for approximately $140,000,000 of the retail gas properties to a Texas company newly-formed by Pennzoil and United, and the opposition asserted initially to approval of Part I and after its withdrawal to any program which would frustrate or discourage acquisition of the properties by the municipalities. If company counsel did not fully credit the merits of the opposition and its aims, discussed below, nevertheless they recognized the effectiveness of the intervention in the proceedings, and at least to some extent the agreements were entered into because of the practicalities involved in

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20/ The pertinent provision is quoted at page 2, supra.

continued delay of the program, even after withdrawal of Part I.

Baine P. Kerr, formerly of Baker, Botts, Shepherd & Coates, who were counsel for Pennzoil United throughout the Section 11 proceedings,[21/] testified with respect to the necessity for effecting the settlement with the municipalities, in part as follows:

> "Nevertheless, there was a very compelling motivation to satisfy the requirements of the Act and obtain a release from the requirements of the Act [as soon as possible].
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> * * * *
>
> Secondly, had these municipalities stayed in, there would not only have been a delay but it would have increased tremendously the amount of expenses ultimately payable by the company.
>
> I am confident that the municipalities and their representatives would have put in a claim for the compensation in this matter, I am confident that they very likely would have a lot of compensation and a very substantial amount.
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> * * * *
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> I see allowances in some of these large cases and I know that they can run into extremely large amounts. But at the same time, the fees and expenses of the company's own representatives would have been increased in a commensurate way because they would have been there opposing the position of the municipalities."

As pointed out in Mr. Miller's brief, the opposition of the municipalities to the sale of the gas distribution properties had persuaded the Commission to expand the scope of the hearing to include not only the issue of the price at which the properties were proposed to be sold but also, as indicated in the order of the Commission of

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21/ At the time of the hearing in the instant proceedings Mr. Kerr was in the employ of Pennzoil United as its General Counsel.

August 25, 1966,[22] the merits of the proposed divestment. There seems little question but that, as suggested in the Miller brief, some of the vulnerability of the plan was exposed during the testimony of witnesses supporting Part I, and that the vulnerability, as well as the potential for delay, contributed to the decision to abandon the sale to the Texas corporation. Mr. Miller urges, with reason and authority, that the services performed on behalf of the municipalities, although rendered for intervenors, contributed "to the defeat of a proposed plan, to the development of the proceeding, and to the plan ultimately approved" citing Arkansas Fuel and Oil Corporation, 41 SEC 773, 782 (1964); Engineers Public Service Co., 116 F. Supp. 930 (D. Del. 1953), aff'd 221 F.2d 708 (2d Cir., 1966). It is clear that the services were essential to the eventual outcome of the proceedings, were not duplicative of services rendered by any other party, and that the settlement was neither questionable nor improper.[23]

The petition for intervention had urged that the proposed sale to the Texas company was detrimental to the interests

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22/ Pennzoil Company, et al., Holding Company Act Release No. 15547.

23/ Any thought of impropriety arising from the inclusion in the settlement agreements of provisions precluding the ultimate recipients of fees from continuing or renewing opposition to the proposals of Pennzoil and United would be unfounded. The companies had to be assured that opposition from persons participating in the intervention would not be renewed in a different form or in another forum following the settlement.

Mr. Kerr testified that it is customary, if not required by law, that municipalities in Louisiana and Mississippi be reimbursed for expenses in public utility proceedings by the companies involved. In any event, the settlement was a practical solution of undoubted benefit to all concerned parties. The agreement of Division counsel with this thesis is discussed, infra.

of local consumers. Counsel sought to obtain for the cities the opportunity to consider the purchase or the expropriation of their local distribution systems by some plan which would not contravene state laws prohibiting the acquisition by a municipality of facilities not within its city limits or adjacent area. There was concern, as well, that the proposed method of financing the purchase by the new company and of evaluating the acquisition cost would increase rates to consumers, and also would make expropriation more expensive; further, that United's management and local employees might not be retained. These arguments were recognized, and accommodation therefor was reached in the agreements executed in January 1967 (Louisiana) and February 1967 (Mississippi).[24/]

The arms-length agreements between company counsel representing the municipalities for payment of $275,000 should be given some weight. The situation is comparable to, but of course not controlled by cases in which great weight is given to agreements between the company in reorganization and its counsel. Cf. Standard Gas & Electric System v. SEC, 212 F.2d 407, 413 (8th Cir., 1954), cert. denied 348 U.S. 831 (1954); International Hydro-Electric Systems, 183 F. Supp. 689 (D. Mass. 1960). I find nothing in the factual circumstances suggesting that the payment of $275,000 should not be approved, or that the determination with respect to allocations thereof to the persons performing the services for the municipalities, as reflected below, was unfair or inappropriate. I conclude that the payment and the allocations as discussed below should be approved.

24/ The agreements were similar, except where necessary to adjust for local law. They restricted any future owner of the gas properties with respect to rates; they detailed conditions for expropriation under state laws; assured continued employment of local personnel with protection against rejection of employee benefits by any future owner of the properties; and provided for reimbursement by Pennzoil and United of all costs of the municipalities incurred in connection with their opposition.

Concurrence of Division in the $275,000 Payment

Counsel on the staff of the Division who were deeply involved in all of the proceedings under consideration agree, for reasons set forth in the Division's brief,that the payment to the municipalities was proper and should be approved. The brief states, at 38, that intervention by any interested municipality in any proceeding under the Act is recognized by Section 19, and that although

> "so far as we know this is the first case in which their representatives have sought compensation for services rendered in the proceeding . . . compensable services have been rendered in these proceedings, and under Section 11(e) the Commission may approve, as part of an overall and broader settlement, a total of $275,000 which the companies and the representatives of the Municipalities have negotiated as compensation and in reimbursement of expenses."

The brief points out that although Section 12(d) of the Act does not require competitive bidding but only the maintenance of competitive conditions in the sale of properties of a utility subsidiary, nevertheless the initial proposal was to sell the distribution properties at competitive bidding; that after the rejection of two bids the proposed sale to a newly-organized distribution company would not be an arms-length transaction,

> "and thus fairness of the price and the proposed capitalization of the new distribution company became highly critical issues. Indeed in the days of hearing that followed, Commission counsel extensively cross-examined company expert witnesses in order to ascertain whether earnings of the [Texas] company would provide adequate coverage for $100 million of long-term debt it was to issue and whether net income would be sufficient to support an expected net price of $40 million for the common stock to be sold to the public. The Municipalities, by their intervention, further sharpened the issues and broadened the inquiry in terms of the interest of consumers."

Following the Commission order requiring divestiture of the retail gas properties under the standards of Section 11(b)(1), they were transferred with related assets and liabilities in late 1969, as stated by the Division,

> "at book amounts to a newly-organized company - United Gas, Inc. - in exchange for which Pennzoil received a total of $70 million in bonds and debentures and 4,056,714 shares of common stock representing a book equity of $36.5 million, all of which Pennzoil-United would dispose of to comply with the Commission's order of Section 11(b)(1) */ . . . . The transfer of the distribution properties in this transaction involved no excess acquisition costs, and the sale of the securities delivered to Pennzoil-United in exchange, if sold at prices other than book amounts, will result only in capital gains or losses to Pennzoil-United. Of course, the Municipalities had no part in these proceedings, but in determining the weight given to the defeat of the earlier plan it is pertinent to consider how and upon what terms the eventual and mandatory sale or transfer was accomplished."

*/ See Pennzoil-United, Inc., Holding Company Act Release No. 16481 (September 23, 1969).

The Division's brief thereafter describes the provisions in the settlement agreements for expropriations (of potential value and available to all municipalities in Louisiana and Mississippi) and points out that six cities have exercised their rights of expropriation; it refers to the concessions made by the companies in connection with the complaint of the municipalities lodged with the Federal Power Commission, in the hope that the Federal Power Commission "will find it unnecessary to intervene" in the Section 11(e) proceedings; and it refers to the recognition given by the Commission in Standard Gas & Electric Company, 36 SEC 247, 270 (1955) to the benefits from a settlement in arms-length bargaining which obviates the need for lengthly and costly proceedings.

Division counsel make it clear that in recommending approval of the $275,000 payment they do not imply that this is "the precise value of the services rendered on behalf of the Municipalities" and they point out that the Commission stated in Standard Gas, at 270:

> "We know of no precise formula to determine the reasonableness of a settlement price since no single amount percentagewise or otherwise, is the only reasonable figure for settlement; rather a wide range exists within which any settlement can be found to be reasonable, especially when it is arrived at as the result of arms'-length bargaining."

Counsel state that they "do not perceive any need to review the distribution [of the $275,000] among the attorneys and the other representatives of the Municipalities", citing New England Power Association, 28 SEC 916, 931 (1948), where the Commission noted:

> ". . . it is difficult enough for us to value the services of committee counsel without undertaking the further task of dividing the fee between two sets of attorneys. In future cases involving multiple representation, we shall scrutinize most carefully the claims for allowances so as to insure that the aggregate amount of the allowances will not exceed the amount which we would otherwise allow to a single firm, barring some unusual showing of necessity for such representation."

Thus, the Division's brief asks:

> "If the task of dividing a fee between two sets of attorneys adds complexities to the overall valuation of services, what shall we say of the present case? The representation of the 20 Municipalities involved over 20 attorneys and others, including two coordinators, one for Louisiana and another for Mississippi, a principal attorney to coordinate with the coordinators and their 20 Municipal clients, and a Washington attorney -- all flanked or supported by utility and other experts."

The Division concludes that a useful and meaningful inquiry into the allocation of the $275,000 would be impracticable without, to a

substantial degree, trying in the instant proceeding the rebuttal case for the municipalities which the settlement negotiations succeeded in avoiding. (As noted above, the settlement agreements were reached following a recess granted by the hearing examiner to permit preparation of rebuttal by the municipalities).

For the reasons stated above, including the excellently-expressed views of the Division, I do not believe that efforts need or should be made to support or justify the allocation of the $275,000 down to the last dollar. Some discussion, however, of the larger payments made to counsel and experts appears appropriate, and such discussion follows.

The Allocation of the $275,000

On February 10, 1967, Pennzoil issued checks totalling $275,000 to four attorneys as follows:

John T. Miller, Jr.	$118,331.10
Benton & Moseley	95,668.85
Boyce Holleman	33,500.05
Robert M. McHale	27,500.00
Total	$275,000.00

As stated above, the allocation of the above amounts was directed by Fred G. Benton, Sr., and the sub-allocations or breakdowns thereof are indicated in the Order. Thus, Mr. Miller, pursuant to Mr. Benton's instructions, disbursed from the amount of $118,331.10 the sum of $12,853 as fees and $134.94 for expenses to Van Scoyoc & Wiskup, Inc., public utility consultants of Washington, D.C., for services rendered in connection with the intervention; the sum of $15,000 and $3,329.15 for engineering consultant fees and expenses of Simmons J. Barry & Associates ("Barry Associates") of Baton Rouge; and the sum of $19,001.95

for fees and expenses to James H. Blackburn, formerly an investment banker of Pass Christian, Mississippi, (including a fee to Abroms & Co.), for their services in the proceedings. Sub-allocations were made by the other above-named recipients as indicated, infra.

A. John T. Miller, Jr.

Mr. Miller is a highly respected attorney practicing in Washington, D.C., with an expertise in public utility matters and extensive experience in the natural gas industry, including practice before the Federal Power Commission and in the courts. His testimony indicates a broad background and valuable experience in administrative proceedings over a period of years. He has taught and written extensively in legal fields.

The net amount received as compensation for Mr. Miller's services is $65,000, with expenses of $3,012.06. He kept no records of time expended, perhaps because his compensation, as originally arranged, was not expected to come from a payment by a public utility holding company under the Commission's jurisdiction, but rather, from the municipalities on a contingent basis, as noted below. His estimated time for services to the municipalities is "at least" 751 hours, and on this basis the hourly compensation is approximately $69. He was deeply involved in all aspects of the intervention in the proceedings, having been retained soon after the Commission's order of June 27, 1966 authorizing the sale of the gas distribution properties, and his services continued through negotiation and consummation of the settlement agreements. Mr. Miller's testimony at the hearing indicates a thorough knowledge of the issues and a competence in the preparation

and development of the municipalities' positions in the Commission proceedings.[25/]

I believe that it was largely as a result of Mr. Miller's initiative, persistence, and ability that Part I of the plan was withdrawn and that the settlement agreements eventuated. The advantages running to the municipalities from the agreements are recited in his extensive post-hearing documents. Also emphasized therein is the fact that his fee, as agreed upon originally with the municipalities, was entirely contingent upon the authorization and issuance by any municipality of bonds to purchase from United the local gas system, and that a reasonable contingent fee would be $160,656 if all municipalities obtained and exercised rights of expropriation. I concur in the view of the Division that judged in light of what has been accomplished in the proceedings,under the circumstances described above, the fee requested and paid by Pennzoil for Mr. Miller's services to the municipalities is far and reasonable and should be approved.

B. Benton & Moseley, Baton Rouge, Louisiana

This firm specializes as bond counsel to public utilities and municipalities for the financing of public improvements, and its qualifications as experts in this area are well-documented in the record. Fred G. Benton, Sr., the principal attorney, has done this work for over 30 years.

25/ A relatively small amount of Mr. Miller's time was devoted to an unsuccessful contest against the refinancing of Pennzoil bank loans, and a small amount in matters which are related to the instant proceedings but which took place before the Federal Power Commission and before the Louisiana and Mississippi Public Utility Commissions. He estimates, however, that 72% of the 751 hours was spent directly in the proceedings before the Commission and that 20% was spent in connection with negotiating the settlement of such proceedings.

The firm kept no time records for work in the Commission proceedings (again, perhaps with no expectation that its fees would be paid by a public utility holding company under Commission jurisdiction: the record shows that all work done by Benton & Moseley as Bond Counsel in Louisiana is done on a contingent fee basis and is paid from the proceeds of bonds if and when they are authorized and sold in connection with the acquisition of utility systems).[26/]

However, it is estimated that a minimum of 660 hours were expended by members of the firm from June 1966 through January 1967 in connection with these proceedings, and an affidavit of Mr. Benton indicates that this is "a substantially accurate estimate of the time required." Of the total received from Pennzoil the firm retained $48,250.85 as compensation and $4,526.64 as expenses. As indicated in the Order, $32,691.36 was paid to Barry Associates, and relatively small sums were paid to approximately 20 persons for assistance rendered in connection with the proceedings and the settlement negotiations.

Benton & Moseley served as principal counsel for the municipalities. Mr. Benton states that at least 10% of the firm's services were spent directly on the Commission proceedings at the Washington level; 5% on collaboration with Mr. Boyce Holleman, James H. Blackburn, and Barry Associates, in relation to the Mississippi interests; 45% in collaboration with Barry Associates, Robert H. McHale and other city attorneys and officials relative to the filing and conduct of the

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26/ Baine Kerr testified that the retainer agreements provided for contingent fees dependent on the acquisition of properties, but that in negotiating the amount of the settlement "we were not trying to make them whole for any contingent fee they might have . . . . that the fees had to be related to the time and nature of the services performed."

Commission proceedings; and the balance of 40% to collaboration with Mr. Miller and his Washington associates, and Barry Associates, Mr. McHale and city attorneys and officials in "working out the final Louisiana Settlement Agreement of January 12, 1967." On the basis of the background and experience of the members of the firm, I conclude that the fee of approximately $73 per hour should be approved. The affidavits, memoranda and briefs filed in the instant proceeding as well as the testimony at the hearing support this view.

C. Boyce Holleman.

Mr. Holleman was senior member of the law firm Hulbert & Necaise, of Gulfport, Mississippi. He served as coordinator of the particpating Mississippi cities, having been engaged in that capacity by James H. Blackburn. A summary of his work is detailed in his affidavit of July 12, 1969 and in an affidavit by Fred G. Benton, Sr., dated January 14, 1969, but inasmuch as Mr. Holleman was seriously ill at the time of the hearings in the instant proceedings he did not testify therein. However, testimony at the hearing by Fred G. Benton, Jr. and other witnesses described his services for the Mississippi municipalities, including his active engagement in the work related to the settlement agreements.

Mr. Holleman kept no time records but estimated his time at 500 hours. He received from Pennzoil, as indicated above, the sum of $33,500.05 and an additional amount of $550.00 from Benton & Moseley, for a total of $34,050.05. He retained as fees the sum of $20,000 and $2,500 for expenses, and disbursed a total of $6,000 to six city

attorneys [27] and $5,550.05 to James H. Blackburn for expenses. On the basis of the estimated time of 500 hours Mr. Holleman's fee of $20,000 amounts to $40 per hour.

D. Robert McHale - Lake Charles, Louisiana

Mr. McHale had a part-time position as City Attorney of Lake Charles, under a retainer of $7,500 per year. Compensation for non-routine services in connection with bond issues, for example, was on a contingency basis. Not being an expert in utility matters, he called upon Benton & Moseley in April 1966 when concern developed as the result of newspaper stories regarding the proposed sale of United's local gas properties. He was kept informed by Mr. Miller of subsequent developments in the Commission proceedings, and he estimates that for approximately seven months thereafter more than 75% of his professional time was devoted to this matter, including meetings with officials and citizens of many Louisiana cities, some of whom favored and some of whom opposed municipal acquisition of the gas properties. Mr. McHale served as Louisiana coordinator [28] with the cities. He testified that the settlement agreement was used subsequently in negotiating a new franchise with Pennzoil United for the City of Lake Charles, and that it has been effective in controlling gas rates.

27/ Mr. Kerr testified that he was satisfied that attorneys representing the municipalities were not being paid or reimbursed under employment agreements for the work done or expenses incurred in connection with the intervention.

28/ Another description, he testified, would be treasurer for the funds advanced by the municipalities.

Mr. McHale was paid $27,500 by Pennzoil, and when he expressed displeasure with this payment he received an additional $1,500 from the fee of Benton & Moseley. He kept no time records but estimates time expended at 720 hours. On an hourly basis his fee is approximately $40 per hour.

E. Barry Associates, Baton Rouge

This is a firm of consulting engineers specializing in the design, construction and operation of public utility properties on a nation-wide basis. Mr. Barry is licensed as a civil engineer in 23 states. The firm also provides supervisory and service functions for publicly-owned utilities by providing service and office personnel.

Mr. Barry's interest in the subject matter of these proceedings began in November 1965 when Pennzoil made its tender offer to purchase United's common stock. He testified that based on his experience he believed the gas distribution properties of United would have to be disposed of in accordance with the standards of the Act, and he met with Mr. Blackburn and Mr. Abroms as well as with officials of municipalities throughout Mississippi in which United distributed gas in order "to determine their feelings towards what might occur." Thereafter, numerous meetings with city officials throughout Louisiana and Mississippi were held to advise the city governing bodies of developments and after thorough study to submit to them alternative proposals for action they might wish to take. Eventually, Mr. Barry retained Mr. Miller on behalf of the municipalities. He attended conferences in Mr. Miller's office and assisted in the preparation of material for the hearing and for the

cross-examination of company witnesses. He attended most of the hearings at the Commission, and prepared testimony and data which was to be submitted on behalf of the municipalities. He also joined Mr. Blackburn and Mr. Abroms in meetings with "investment people" in New York and Washington regarding the feasibility of bond sales by the cities if gas distribution properties were to be purchased.

Mr. Barry took part in the drafting of the settlement agreements in Baton Rouge and in Houston. His efforts on this matter included the drafting of an operating contract for use in the event of acquisitions by Louisiana cities and a leasing arrangement for the Mississippi municipalities.

The Barry firm kept no records and Mr. Barry estimates his time and that of his associates not in hours but in months, with total time for him and his two associates, from November 1965 through January 1967 estimated at about 20 months, one-half of these by Mr. Barry. The firm received $1500 as compensation and $3,329.15 for expenses from Mr. Miller and $25,000 as compensation and $5,866.36 for expenses from Mr. Benton, Sr., plus $1,825 identified as reimbursement of legal expenses. The record indicates a basis for approval of these fees and expenses.

F. Van Scoyoc & Wiskup, Inc., Washington, D.C.

This firm is the last of the recipients of a sufficiently large amount of the settlement payment to justify discussion of the services it performed.

Van Scoyoc & Wiskup are well-known consultants with extensive experience in public utility matters, including proceedings before the

Louisiana Public Service Commission involving United Gas affiliates, expropriation proceedings in Louisiana, and numerous proceedings before the Federal Power Commission.

The firm was retained by Mr. Miller for its expertise in important considerations involved in public utility proceedings, including rate-making, among others, and it performed services primarily in two areas: in developing material for use by the municipalities in the Commission proceedings, the need for which was obviated by the withdrawal of the proposed sale to the Texas subsidiary (the material was therefore not introduced in the proceedings); and in participation in negotiations for the settlement agreement, particularly with regard to the provisions and terms for the acquisition of gas properties by the municipalities.

The firm received $12,853 in fees and $134.94 for expenses, including a bonus of $5,000 paid by Mr. Miller under direction from Fred. G. Benton, Sr. [29/]

An invoice from the firm to Mr. Miller reflects fees for services of Mr. Van Scoyoc at the rate of $25 per hour, and for two associates at

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29/ The evidence shows that Mr. Van Scoyoc had to be persuaded by an added payment of $5,000 (called a "settlement obligation fee") to agree not to participate in future activity designed to frustrate the consolidation. This points up the question of the extent to which from a practical standpoint, the $275,000 payment included consideration for agreements or understandings of this nature as part of the withdrawal of the municipalities and their representatives from the Commission proceedings. The $5,000 payment arrangement with Mr. Van Scoyoc was more direct, more express, and more clearly evidenced than was any consideration included in payments to other representatives of the municipalities, but I find no clear difference in principle and no practical basis for departure from the thesis or concept previously stated regarding the $275,000 payment and its allocation on behalf of the municipalities as a practical solution of the problem facing Pennzoil and United as well as the municipalities.

rates of $17.50 and $20 per hour respectively. (The invoice included charges for stenographic and clerical help amounting to $168, at $4 per hour). The added payment of $5,000, by a roughly proportional increase would raise Mr. Van Scoyoc's fees to approximately $42 per hour and charges for his associates to approximately $29 to $32 per hour. Under the circumstances I do not believe that Commission approval should be withheld.

Fees of Company Counsel

Counsel representing Pennzoil and United in these proceedings have requested fees totalling $615,000 and expenses of $32,866.96. The firm of Baker, Botts, Shepherd & Coates, of Houston, Texas, ("Baker, Botts") served as principal counsel prior to and throughout the proceedings; Morton E. Yohalem, of Washington, D.C., was retained by them as special counsel in the proceedings; and the firm of Andrews, Kurth, Campbell & Jones, of Houston ("Andrews, Kurth") was special counsel with respect to Part I of the May plan.

A. Baker, Botts

Baine P. Kerr was the partner principally involved in the Section 11 proceedings. He testified extensively, with obvious and great familiarity concerning the many aspects of the plans, the intervention and the settlement with the municipalities. His total time expended was approximately 2,200 hours, encompassing all phases of the proceedings and related matters. The time of ten other partners amounted to 4,057 hours; that of 28 associates of the firm to 7,283 hours, making a total of 11,340 hours expended by partners and associates during the period March 1966 to April 1968, when the consolidation became effective.

The firm had primary responsibility for all aspects of the proceedings and for supervision of all legal matters. It has requested a fee of $440,000 and reimbursement of expenses of $24,506.91. No breakdown has been made for services of partners as against services of associates, but on an overall hourly basis the charges amount to approximately $39 per hour. Inasmuch as partners' time amounts to between 35 and 40% of the total, and Mr. Kerr's time is over 50% of partner time, it is apparent, particularly in light of Mr. Kerr's capability, that the charges are reasonable. Computed by another method, i.e., the arbitrary assumption that the fees for a partner's services would be twice those for an associate, the time of partners would be charged at approximately $58 per hour and the time of asoociates at approximately $29. Here again, especially in recognition of Mr. Kerr's extensive expenditure of time on the matters under review and his capability, the charges are reasonable.

The firm has received payments totalling $225,000 on account,[30/] and its expenses have been reimbursed. Approval of the fees and expenses as requested is appropriate.

B. Morton E. Yohalem, Washington, D.C.

Mr. Yohalem had extensive experience with the Act during the years he was an employee of the Commission and thereafter in private practice. This experience was one of the bases for his retention as special counsel in order that Pennzoil might be "released" from the provisions of the Act to which it had become subject on its acquisition

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30/ As pointed out in the Division's brief, payment on account to company counsel subject to approval of the Commission is permissible. The United Corporation, 39 S.E.C. 575, 577 (1959).

of control of United. Apart from such expertise and his experience generally in corporate and public utility matters and litigation, Mr. Yohalem's familiarity with United, one of his clients, and his location in Washington, D.C., were important considerations in his being retained in these proceedings.

He had been under an annual retainer by United for a period of 14 years, with compensation at the rate of $8,000 for the normal or routine legal work required by the client. His location in Washington, D.C., permitted direct and immediate conference with the staff of the Division, and the record indicates that frequent conferences were necessary in connection with the Section 11 proceedings. In allocating his working time he gave priority to matters related to these proceedings as against other matters in his office. He was, during the proceedings, a single practitioner with no legal associates or assistants.

The record shows that Mr. Yohalem participated in the formulation and drafting of the original Section 11(e) plan filed on April 29, 1966 providing for the sale of the gas distribution properties and the consolidation of Pennzoil and United, and served as special counsel in connection with the several plans. He worked in close collaboration with the partners and associates of Baker, Botts "with respect to substantially all actions and decisions taken by or in behalf of Pennzoil and United in connection with the proceedings." Following the issuance of the Commission's order approving generally the May plan for the sale of the retail gas distribution properties, Mr. Yohalem became deeply

involved in the proceedings which resulted from the intervention by the municipalities. With the Commission order of August 25, 1966 fixing the date of the hearing for September 19, 1966, [31/] Mr. Yohalem participated in numerous conferences with officials of Pennzoil and United and with legal and accounting representatives regarding the nature of the supporting documents and other exhibits which would be required at the hearing. He attended the hearing at which William R. Choate of the Baker, Botts firm served as principal trial counsel. During the recess of the hearing he conferred frequently with officials of the companies and other counsel regarding the elimination of Part I from the plan, the preparation of a proposed agreement of consolidation of the two companies, and the preparation of essential documents to accomplish the consolidation. As indicated in his affidavit of January 15, 1969, he was intimately involved ". . . in the initial drafting, revision or review of substantially all documents filed with the Commission or used in connection with the proceedings," except to the extent they involved matters of state law, contractual obligations of the companies, or tax matters. [32/]

Mr. Yohalem's affidavit indicates that he devoted approximately 1,250 hours of recorded time to these matters. He requested and has been paid a fee of $150,000, plus expenses of approximately $5,800. He states that the 1,250 hours of recorded time is an approximation, inasmuch

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31/ Pennzoil Company, et al., Holding Company Act Release No. 15547.

32/ During the years 1966 - 1969 Mr. Yohalem received from United $60,000 in fees, including the annual retainer of $8,000, for services unrelated to these Section 11 proceedings.

as he

> ". . . also rendered services to the companies in connection with other matters before the Commission, and the diary entries do not always permit precise allocation as between such matters and services related to the Section 11 proceedings." 33/

He also states that his recorded time does not reflect

> "large amounts of time . . . in extended long distance telephone conferences from his home, or otherwise spent at home after office hours or on week-ends nor, generally speaking, does the recorded time include time spent in travel. Affiant spent 45 days away from his office at Shreveport, Houston and New York, as well as 2 days in transit to and from and at Wilmington, Delaware, in connection with the Court enforcement of the plan."

Computed on the basis of 1,250 hours of recorded time, the fee is approximately $120 per hour and because of the vagueness and lack of precision in the above-quoted statement it is not possible to determine how much less than this hourly amount is the actual fee. At the least, Mr. Yohalem should have made an effort to estimate the time expended in telephone conferences from his home, in work done at home, and in travel to the named cities. (It would seem that an estimate of the amount of such travel time as is not recorded would be particularly susceptible to reasonably accurate calculation).

But on the basis of Mr. Yohalem's representations it would follow that he has requested less - perhaps substantially less than $120 per hour, and no objection has been raised to approval or payment thereof.

33/ Mr. Yohalem's affidavit refers to the affidavit of December 13, 1968 of John T. McCullough, managing partner of Baker, Botts, for a chronological statement of the principal events in the course of the proceedings because "no useful purpose would be served by reiteration." That affidavit records precisely the number of days spent by Baker, Botts lawyers away from Houston, and the hours of time, totalling 11,340.6, devoted to the proceedings by each partner and associate. It does not, of course, include such figures for Mr. Yohalem, and none are available.

As pointed out in the several briefs filed in support of the approval of fees, and as reiterated in the Division's brief specifically with respect to the Yohalem fee, great weight is given in reorganization proceedings to the agreement for compensation made by a client and its attorney.[34/] I do not believe the cases intend that the Commission's exercise of its authority and statutory duty to approve only fees and expenses that are fair and reasonable should be a perilous journey which it should undertake reluctantly. But giving due recognition to the lawyer-client agreement, particularly in light of the familiarity of the company with the quality of the services of its counsel, does not contravene such authority and duty. I believe also that the opinions of counsel who participated actively in these extended proceedings should be accorded respect, and, as suggested in the Division's brief at 12, ". . . nothwithstanding that the exit permit [from the Act] was not as advantageous to the stockholders of Pennzoil as management had hoped or expected", it is apparent that company counsel view the accomplishment of the exit as having been expeditiously achieved under difficult circumstances. To impose upon an attorney the burden of sustaining the position of management at the risk of suffering a reduction in compensation is neither appropriate nor in accord with authority. See Standard Gas & Electric Co. v. SEC, supra, at 412. It would appear, also, that the Division counsel who participated both in the preparation of the Division's brief in the instant proceedings and who engaged in the Section 11 proceedings are in accord with the

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34/ See the cases cited supra, at 20. Cf. In re United Corporation, 249 F.2d 168, 175 (3rd Cir., 1957).

view that the quality of Mr. Yohalem's representation in those proceedings merits the compensation requested.

Under all of the circumstances, I believe there is substantial evidence in the record for approval of the fee and expenses requested and paid by Pennzoil.

C. Andrews, Kurth Campbell & Jones, Houston, Texas

This firm was retained as special counsel to Systems Distribution, Inc., the Texas corporation which was newly-formed to purchase the retail gas distribution properties of United under Part I of the amended plan. The proposal contemplated that the purchaser would make a public offering of debt and equity securities to finance the purchase, and numerous conferences were held by representatives of the firm with officials of Arthur Andersen & Co. and Stone & Webster, as well as with officers of Systems Distribution, Pennzoil and United. The firm reviewed a large number of documents pertaining to the proposed purchase and performed legal research with respect thereto; assisted in the preparation of testimony of witnesses and supporting documents to be offered at the hearings on Part I and participated in the hearings which commenced on September 19, 1966 and continued, periodically, for eight days through October 17, 1966. With the withdrawal of Part I the services of the firm were no longer required.

Numerous trips were made by representatives of the firm to New York City, Shreveport and Washington, D.C., in connection with the preparation for and the participation in the hearings. From mid-August 1966 through November 1966, partners and associates spent 485 hours in connection with services of the firm, and of this total approximately

252 hours represented time spent by partners and 233 hours represented time spent by associates. The firm's arrangement for compensation was for a fair and reasonable fee and for reimbursement for its expenses. It received the sum of $25,000 as its fee and was reimbursed its expenses of $2,503.19. On an hourly basis the fee represents a charge of approximately $50 per hour for the services of representatives of the firm: by allocation between partners and associates the fee represents a charge of $60 per hour for partners and $30 per hour for associates. The compensation appears to be reasonable, the services were appropriate and necessary, and approval of the fee and expenses is warranted.

Company Accountants and Experts

Following is a list of fees and expenses requested and paid by Pennzoil for other services in the proceedings.

	Fees	Expenses
Arthur Andersen & Co.	$ 82,331.00	$ 10,504.00
Stone & Webster Management Consultants, Inc.	56,480.00	6,053.90
H. Zinder & Associates, Inc.	78,994.00	12,854.24
Robert D. Hedberg	101,581.40	4,281.81

A. Arthur Andersen & Co.

This is a national accounting firm with one of its many offices in Houston, Texas, which rendered substantial professional services to Pennzoil and United in connection with the Section 11 proceedings. The firm performed services from May 12, 1966 to May 15, 1968 involving 2,280 hours of professional time. Of this total, 955 hours involved the professional services of partners, 684 hours involved the services of managers, 289 hours of seniors and 351 hours of semi-seniors and assistants. The total fees for the 2,280 hours were $82,331, and according to the

testimony of Randal B. McDonald, one of the partners, the charges were made "at regular per diem rates . . . no different than we charge all our clients." The charges amount to approximately $36 per accountant hour.

The services involved the development of studies, the resolution of accounting problems, and the preparation of financial statements and other documents, in connection with the proposed consolidation of the two companies. Mr. McDonald, devoted 917.5 hours to the proposed consolidation, with much of his time spent in the preparation of testimony and documents used at the hearings and the resolution of complex problems resulting from the differing methods of accounting used by Pennzoil and by United. He testified with respect to the numerous conferences with the staff of the Commission in Washington, D.C., and with representatives of the companies at Houston. He attended hearings in the Section 11 proceedings and not only testified extensively therein with respect to the accounting problems but also was available at all times for consultation with counsel and other representatives of the companies. Subsequent to the hearings he conferred frequently with members of the Commission staff and supplied information on the accounting and financial matters of the companies. The fees and the firm's expenses which amounted to $10,504 are fair and reasonable and payment thereof was appropriate.

B. Stone & Webster Management Consultants, Inc.

The services of this firm related to sale of the retail gas distribution properties under Part I of the plan. The work commenced in April 1966 under a "job order" from Pennzoil seeking advice with respect

to the sale of the properties. Thereafter, a second "job order" was given in July 1966, which required the firm's services in evaluating the gas distribution properities. Stone & Webster, by agreement with Pennzoil and United, became the point of contact for bidders interested in purchasing the properties. The services of the firm continued, as detailed in testimony in the instant proceedings, until November 1966, when Part I of the plan was abandoned.

The work involved, among other areas, the development of various methods of valuation of the properties and of financial and earnings forecasts based on the assumption of public ownership. The firm rendered assistance to counsel at the hearings on Part I with respect to the proposed sale, it made analyses of the effect of the sale of individual properties to the respective municipalities, and a Stone & Webster representative was available at hearings at all times as technical adviser.

Stone & Webster has performed services for a number of other companies involved in proceedings before the Commission and has acquired a national reputation as experts in the area of assistance to utility companies. A total of 2,473 hours of time was expended in connection with the problems involved in the proceedings, and the firm received a fee of $56,480 for its services. The testimony indicates that the fee and expenses were based on "our regular per diem rates plus out-of-pocket expenses." It appears that the work was necessary and appropriate to the problem areas in the proceedings and that the fees and expenses were necessarily incurred and are fair and reasonable.

C. Robert D. Hedberg, Paoli, Pennzylvania

Prior to the commencement of services by Hedberg & Gordon, Inc., Mr. Hedberg agreed with Pennzoil and United on his firm's reimbursement on the basis of an hourly rate of $90 for Mr. Hedberg, $60 for Mr. Gordon and $20 for assistants. On this basis the fee totalled $101,581.40. It was paid, together with expenses of $4,281.81. 35/

Mr. Hedberg was retained at the suggestion of Baine P. Kerr to make an economic analysis of the amended plan of consolidation and to testify concerning its fairness. In June 1966 he began his study of the companies and of a plan which was ultimately submitted to the Commission in November. Early in this period he advised company counsel that he believed he could testify to the fairness of the plan to the shareholders of both Pennzoil and United.

Mr. Hedberg's testimony on the plan was extensive on direct and in cross-examination. It indicated deep analyses of the respective companies, their assets, earnings, and potentials, on individual and pro forma bases, and large numbers of exhibits prepared by him or under his direction were introduced by counsel for the companies in support of his conclusion that the plan was fair and equitable.

Although the Commission did not agree with that conclusion and required substantial modification of the proposals, there is no basis for requiring a modification of the fee arrangement made by Mr. Hedberg with the companies. His reputation as a competent investment counsel and utility consultant with substantial experience in the field in which he was engaged is unquestioned. He has testified frequently as an

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35/ Total time expended was 1,451.46 hours, of which 1,012.46 hours were Mr. Hedberg's time.

expert witnesses and financial consultant, and he has received from the Commission, for services as an expert in prior proceedings, hourly compensation comparable to that agreed upon here. The Division's brief points out that an arrangement for compensation made by a company with its financial consultant in a situation as we have before us is comparable to the attorney-client agreement on fees, in that great weight should be accorded both arrangements. The court, in In re United Corporation, 249 F.2d 168 (3rd Cir., 1957), after discussing the weight to be given the agreement between the company and counsel and declaring that the compensability for such work is "as a practical matter, generally conceded unless the circumstances indicate that counsel operated in a manner not contemplated by [the Act]", stated further, at 75: "What has been said above is equally applicable to the suppliers of financial advisory services."

That the arrangement for compensation was made before the services were begun, in my view, affords some further justification, however slight, for approval at this time of the payment previously made by Pennzoil in satisfaction of the claim.

Morton M. Adler, Rye, New York: Opposing Shareholder

The only applicant whose request for compensation has not been accepted by Pennzoil is Mr. Adler, who, as stated above, participated actively throughout the Section 11 proceedings as a United stockholder, representing himself, members of his family and the Adler Foundation as holders of 2081 shares of United common stock.

Mr. Adler's initial request for compensation, as submitted to the Commission, is stated in his affidavit of December 5, 1968 in the following language:

> "2. He petitions for reimbursement of expenses of $1,214.86, compensation of $18,500 for thirty-seven days and such fees as the S.E.C. may determine to be reasonable for the unique services rendered and the results achieved in the proceedings, as hereafter set forth . . . ."

Pennzoil, prior to and at the hearing and the consolidated company in its proposed findings, has agreed to pay to Mr. Adler $18,500 and the expenses requested. However, in a supplemental affidavit of June 22, 1970, Mr. Adler, believing that a more specific (and a more substantial) compensation request was appropriate in response to the requirement in the Order that Pennzoil United submit the names of all persons to whom compensation was payable, requested a fee of $75,000 "or such other fee as may be fair and reasonable under the circumstances."[36/] This amount, (or perhaps any sum substantially over the $18,500) Pennzoil United objects to paying.[37/]

Mr. Adler's affidavit states that the total time spent by him is 37 days, including ten days in preparing for cross-examination of company witnesses, 12 days in participation at the hearing between March 6

36/ The Order, either inadvertently or in an attempt at precision or perhaps in the interest of brevity, had listed the Adler fee request as $18,500, but had not included the additional language of the request quoted above. Accordingly, Mr. Adler's supplemental affidavit pointed this out, restated the original request, and added: "I had intended to apply for a fee considerably in excess of $18,500, and I believe this is the only correct interpretation of the language quoted above."

37/ At the hearing in the instant proceedings, Mr. Kerr stated that any increase over the $18,500 would be a matter for the Board of Directors, and he thought any increase in excess of 10 percent would not be favorably received.

and April 4, 1967,[38] three days in review of a meeting and in conferences, and ten days in preparation of his brief following the Section 11 hearings.[39] The hourly rate for the requested compensation of $75,000 is approximately $214; the hourly rate for the $18,500 acceptable to Pennzoil United is approximately $53.

The record indicates that Mr. Adler has been "an investor" for 25 years. He has extensive experience in securities analysis, investments, corporate finance and in reorganizations under the Act, and has participated as a shareholder in several public utility proceedings before the Commission. Never before has he requested compensation for his participation -- but never before has he been the sole shareholder representing a position in a reorganization type proceeding in opposition to a proposed plan. He testified that at the opening of the hearing he had not intended to ask for a fee, but he apparently changed his mind after realizing, as he referred to Pennzoil's control, "that the United Gas Board of Directors and the United Gas attorneys were under the control of the Pennzoil Company" and after recognizing that no opposition to the plan of consolidation was forthcoming from other United shareholders or counsel representing them. Therefore, he found himself in the unique position (in his experience) that demonstration of his point of view required his active personal cooperation with the staff of the

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38/ March 6, 1967 is listed by Mr. Adler as a day of hearing. No hearing was held on March 6, but it seems probable that on that day he was in conference at the Commission offices, inasmuch as he lists expenses for the period March 6-11, 1967: "Hotel and Meals - $329.58". Additionally, Mr. Adler testified: "If I put down the sixth, I was in Washington, D.C. that day." I credit his testimony.

39/ The total of these figures is 35 days, but it is possible that unrecorded or unallocated time of two days is included in Mr. Adler's total. In any event his estimate in hours (350) is more precise and has more significance in determining compensation for his time, to the extent that time is a factor to be considered.

Division and his active participation in the hearings. This he gave. That his motive was personal -- to protect his financial interest and that of his family -- is relevant but not controlling on the measure of his compensation. It is one of the several "other factors" enumerated by the Commission in opinions such as International Hydro-Electric System, 36 S.E.C. 152 (1955), where it was stated:

> "Compensation may be paid for services which have contributed to a plan ultimately approved or to the defeat of a proposed plan found to be unsatisfactory or which have otherwise directly and materially contributed to the development of the proceedings with respect to the plan.
>
> In determining the amount of compensation to be allowed, the primary factor is the amount of benefit conferred on the estate or its security holders by the services rendered. Among other factors to be considered are the necessity of the services, duplication of efforts, the intricacy and magnitude of the problems involved, the time necessarily required to be expended, the experience and ability of the applicant, the size of the estate and its ability to pay, conflicts of interest, the extent to which the applicant's efforts were directed to or motivated by personal or special interests or the applicant effected purchases or sales of the securities involved, and the extent to which the applicant's efforts unreasonably delayed or were detrimental to the proceedings.
>
> Fee allowances necessarily must be based on an evaluation of these factors which cannot be reduced to a fixed formula or expressed with mathematical precision. In applying these criteria we seek to attain the objective of conserving the estate for the benefit of the security holders while at the same time recognizing that inadequate allowances would discourage vigorous and effective participation by representatives of security interests."

Cf. Matter of Standard Gas & Electric Co., 36 S.E.C. 247 (1955); Arkansas Fuel Oil Corporation, 41 S.E.C. 773, 782 (1964).

Under the criteria of the above quotation, and with due recognition to the difficulty of fixing compensation for services in a Section 11

proceeding,[40] it would seem that once the determination has been made that Mr. Adler contributed to the plan ultimately approved or to the defeat of the plan proposed by the companies, or otherwise directly and materially contributed to the development of the proceedings with respect to the plan, the "primary factor" in determining the amount of his compensation is "the amount of benefit conferred on the estate or its security holders by the services rendered." This is the one significant area that requires resolution, for the record shows that Mr. Adler contributed to the defeat of the proposed plan, and his entitlement to compensation is conceded by Pennzoil United and by the Division, apparently in recognition of this fact. No problem exists because of the "pro se" status of Mr. Adler as a shareholder.[41] But the extent of his contribution for the benefit of United shareholders is an area in which the stated views and arguments of Pennzoil United and the Division differ from those of Mr. Adler.

40/ See for example, Commission recognition of the imprecise measures available to it in determining fees in such cases, in its language in Electric Power & Light Corporation, et al., 33 SEC 348 (1952) at 355:

> "In this 'most thankless and delicate task in all of the problems of judicial reorganizations' we seek to apply these criteria so as to conserve the estate for the benefit of security holders while at the same time recognizing that inadequate allowances would discourage vigorous , and effective participation by representative security interests. We base our conclusions upon experience acquired from extensive familiarity with all aspects of Section 11 proceedings as well as the work of this Commission in advising the courts with respect to fees in proceedings under Chapter X of the Bankruptcy Act."

41/ As stated in Arkansas Fuel Oil Corporation, 47 SEC 773 (1964), with respect to the amount of the fee of an expert (Hedberg) representing an individual security holder, ". . . the criterion is the benefit accorded all security holders in the same position as the individual client." Thus, it is clear that whether the fee under consideration is that of an expert retained by a security holder or that of the security holder himself, as stated by the Division in its brief at 21, "Obviously the same criteria apply . . . ."

Pennzoil United's brief states that the $75,000 claim, amounting to about $215 per hour for Mr. Adler's time, "is disproportionate to his specific contribution and that his original claim for $18,500 which represents approximately $51 an hour, furnishes a touchstone close to the mark." The argument is made that his complaint regarding the plan's undervaluation of the United shares vis a vis Pennzoil shares is based in part on the "black gold in the ground" approach, and that this is contrary to the standards applicable in a Section 11 proceeding. In accordance with this approach Mr. Adler had stated in a letter of June 6, 1966, 42/ to the then Chairman of the Commission, that "The present worth of the mineral assets [of United] is not made known [in the proposed plan], nor are the quantitative reserves of oil, gas, copper, potash, or sulphur disclosed." He requested that the Commission ". . . order an appraisal of all the natural resources of the United Gas Corp. before the Commission passes on the fairness of the Plan submitted for its consideration."

It does not seem that valuation of the mineral reserves of United would be irrelevant to valuation of its securities and to the exchange ratio proposed. That such valuation was not adopted by the Commission as the primary measure or even as a significant factor does not indicate its lack of relevance: it might indicate merely that such valuation would not have increased the ratio of exchange beyond the increase determined by the Commission as appropriate under the method ultimately relied upon. In Arkansas Fuel Oil Corporation, 40 SEC 26

42/ This letter was sent by Mr. Adler on receipt of notice of the plan, long prior to the December 8, 1966 Commission order for the Section 11 proceedings.

(1960),[43] (a Section 11 proceeding brought to eliminate the publicly held common stock interest in Arkansas Fuel, then a subsidiary of Cities Service Company), the Commission discussed at length the valuation of estimates of the companies' reserves of oil and gas and the use made thereof (or, critically, not made thereof) by expert witnesses.[44] Moreover, in the instant case the Division brief is less severe on this matter of valuation, for it states, at 22:

> ". . . Mr. Adler did not introduce any independent evidence on this subject, and the Commission, in its Findings and Opinion noted the reserves of two subsidiaries of United (Holding Company Act Release No. 15963, p. 6, fn. 12) and the source of possible though speculative, value of another (p. 34, fn. 75), but resolved the question of fairness primarily on the basis of earnings." (Underscoring supplied).

With respect to the above-mentioned "speculative value" of reserves (the copper reserves of a United subsidiary) and a contract relating thereto the Commission said, in footnote 75:

> "The earnings of United which we have considered do not reflect the possible benefits which may flow from development of the Sierrita Properties. While projections of operating results of the Sierrita Properties have been made, the inherent risks in the venture are such as to reduce the significance of the venture as a factor bearing on the fairness of the Plan."

The Commission also considered, at 35,

> "that United also has various favorable prospects, including the expected profitable operations from the Duval Sierrita mineral properties. . . ."

but further minimized their significance because "a cash flow benefit will not be realized for perhaps a minimum of 8 years after production commences, "and also because Pennzoil and its shares would participate

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43/ This was the "predecessor" to the Arkansas fee case discussed in the text, supra. (Mr. Adler participated in the proceeding pro se as a stockholder of Arkansas Fuel Oil Corporation).

44/ For example, see pp. 81-86 of the Commission opinion.

in any benefit through the 42% stock interest in United."

In any event, the testimony and exhibits and the Commission opinion indicate that certain estimates or computations of gas and mineral reserves were furnished by Pennzoil, were the subject of extensive testimony, and were considered by the Commission as relevant.[45/] Mr. Adler, at the least, appears in this regard to have initiated the request for an inquiry into an area of sufficient relevance to have "materially contributed to the development of the proceedings with respect to the plan." It would seem that for the Commission to have totally disregarded consideration of the nature and extent of the reserves would not have permitted assurance or confidence in the fairness of the ratio of exchange ultimately decreed.[46/]

The Division states that Mr. Adler, in his brief filed after the hearing in the Section 11 proceedings, suggested that the Commission's valuation of United common stock should reflect the substantial rise which had taken place in the market price of Pennzoil's common stock,[47/] but that he ignored the rise in the market price of United stock. This criticism is correct, but it ignores Mr. Adler's cross-examination of Mr. Hedberg regarding the importance which that witness gave to Pennzoil's market price as a basis for valuation and to

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45/ Note also, that at 30, fn. 65, the Commission, in rejecting a multiple of earnings for Pennzoil used by Mr. Hedberg and based in part on comparisons with companies in a Domestic Oil Index, stated:

". . . and Hedberg conceded that he had made no analysis of the marketing ability or the reserves of the companies included in the Domestic Oil Index."

46/ Of course, it does not follow that consideration would not have been given to the natural resource reserves absent the intervention of Mr. Adler. Whether the valuation of reserves and attribution of significance to the result might have increased the ratio of exchange originally proposed is not ascertainable from the record.

47/ Mr. Adler attributed this rise to the several "windfalls" which would result from approval of the proposed plan.

the multiple (of 26) he gave to Pennzoil's annual earnings. As stated by the Division, "in any case, in its Findings and Opinion the Commission indicated that little, if any weight should be given to market values in Section 11 reorganizations, and especially market values following the public announcement of Pennzoil's tender offer and thereafter (pp. 38-29)." 48/

The Division brief recognizes Mr. Adler's argument concerning the substantial debt incurred by Pennzoil in acquiring 42% of the stock of United and its effect on the interest of the United public shareholders in the consolidation. The brief continues, with respect to this debt, at 23:

> "His recognition of its importance on the fairness of the plan to United public stockholders is well taken, particularly since Mr. Hedberg, in his analytical approach, had practically ignored the matter. There is no need at this juncture for us to comment on the calculations set forth in his brief. It is sufficient to note that the Commission's treatment of Pennzoil's high debt as it relates to the plan is quite different (pp. 31-32, 35-37)."

We may minimize the effect of Mr. Adler's argument because he did not evaluate the issue as it was ultimately evaluated by the Commission, 49/

48/ See the opinion at 28: "It appears from his testimony [that of Mr. Liedtke, president of Pennzoil and chief executive officer of both companies] that the over riding consideration was the respective market values . . . ." And at 29: "As noted previously, Haslanger's conclusion [he was executive vice president of United and also became executive vice president of Pennzoil] that the Plan was fair was also primarily based upon a market value approach . . . ." And again at 30: "There is no demonstrable support for the 26 multiplier which [Mr. Hedberg] said should be applied to the 5-year weighted average earnings of the Pennzoil common stock, and it would appear that the selection was designed to achieve a value close to the November 19, 1965 market price . . . ."

49/ The Commission pointed out at 31-32 that Pennzoil witnesses had failed to consider the effect of the outstanding debt, but had valued Pennzoil as it had been before the debt was incurred, and that this would "have a most critical relevance to the Pennzoil common stock. . . ."

but that he pressed the argument must be accorded some significance.

The dollar benefit which was conferred on the United public shareholders is considerable. However, all interested parties agree that Mr. Adler's fee cannot and should not be measured as a percentage of that benefit.[50/] Accordingly, the significance of the disagreement in the Pennzoil United brief and in Mr. Adler's briefs on the amount of the benefit diminishes. And more specifically, it is not possible to determine how many United shareholders would have exercised the option in the proposed plan to exchange each (and all) of their shares, within 30 days, for 2/3 share of the consolidated company (the rate now urged by Pennzoil United as appropriate for measurement against the 0.72 rate of exchange determined by the Commission), or, conversely, how many would have accepted 0.588 share in the consolidated company for each United share (the comparative rate urged in the Adler briefs). The measurement must be as imprecise as the measurement of Mr. Adler's contribution to the thinking of the Commission in reaching its decision.

I recognize that Division counsel and others on the staff conferred frequently and at length with Mr. Adler prior to and during the hearing, and I respect the evaluation in the Division brief that his "participation in these proceedings has been helpful, though limited", and that the $18,500 "is reasonable for his limited contribution to the proceedings". I do not mean to suggest that the Division's evaluation of the extent of Mr. Adler's contribution to the proceedings is far off the mark. At the same time, I know the limitations which human nature

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50/ Standard Gas & Electric Co., et al., 36 S.E.C. 247, 269 (1955).

imposes on our ability to give full recognition to a contribution made by another to our thinking or plan of action. And I cannot diminish the significance, as stated in Mr. Adler's reply brief, of the "indirect benefit of motivation provided the Division staff through active participation in these proceedings by an investor directly affected by the outcome." I recognize the moral support which Mr. Adler's arguments and his urgent adherance to them must have given to the Division staff which was opposing or exploring opposition to the arguments of company management and to the studied position of a host of experts and of a battery of company counsel, all cooperating in an effort to establish the proposals as fair and equitable. I also accept, partially and to the limited extent it has any value, the argument in the reply brief that

> "Mr. Adler is the only fee applicant who did not sit down and negotiate his fee with representatives of Pennzoil United, Inc. This fact should not redound to his detriment. Apparently, if Mr. Adler and representatives of Pennzoil United, Inc. had agreed to a fee of $25,000 or $35,000, the Division would have agreed to that fee also."

Using the few meaningful measures and guides available, under the criteria set forth by the Commission and with due recognition of the importance of the Commission policy to encourage appropriate, effective and vigorous participation by public investors in Section 11 reorganizations, I have determined that the compensation of Mr. Adler should be set at $25,000.

In making this determination I have, of course, considered the ability of Pennzoil to make this payment and I have noted the amounts paid or agreed to be paid by it, and approved by me herein, to its experts, advisors and counsel. I have recognized, as requested by Mr. Adler's

counsel, that such persons supported an exchange ratio found to be too low for shareholders of United. I appreciate, also, that some of them espoused theories with which the Commission disagreed. I have also given full consideration to the nature and extent of Mr. Adler's contribution, as I evaluate it, to the defeat of the proposed plan, to the plan ultimately approved, and to the development of the proceedings with respect to the plan.

Conclusion

After consideration of the specific matters set forth in the Order, with particular attention directed thereto, it is concluded that:

1. The services and disbursements for which remuneration was paid or agreed upon by Pennzoil United are for and associated with compensable services rendered in connection with the various aspects of the consolidated proceedings, and it is lawful to grant allowances for such fees and expenses.

2. The amounts of such fees and expenses as paid or as agreed upon by Pennzoil United, and as found above and ordered hereafter are reasonable.

3. There are no other factors apart from the nature, necessity and value of the services and the capacity in which rendered that would make payment of compensation and reimbursement improper. 51/

51/ To the extent that the proposed findings and conclusions submitted by the parties are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected. Certain proposed findings and conclusions have been rejected as not relevant or as not necessary to a proper determination of the issues presented.

Order

Accordingly, IT IS ORDERED as follows:

The fees and expenses as paid and as agreed upon between Pennzoil and the applicants are hereby approved. In addition, the company shall pay to Mr. Adler the sum of $25,000, together with his expenses in the amount of $1,214.86.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not within fifteen (15) days after service of this initial decision upon him filed a petition for its review pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Sidney Ullman
Hearing Examiner

Washington, D.C.
September 7, 1971