

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of a Power Purchase Agreement with Mariposa Energy, LLC. (U39E).

Application 09-04-001
(Filed April 1, 2009)

**ORDER DENYING REHEARING
OF DECISION (D.)10-05-046**

I. INTRODUCTION

This decision disposes of the application for rehearing of Decision (D.) 10-05-046, filed by CALifornians for Renewable Energy (“CARE”). D.10-05-046 involves the award of intervenor compensation to CARE for its substantial contributions in D.09-10-017. In its compensation request, CARE had requested \$19,431. The Commission reduced CARE’s request for compensation to \$9,320.75 due to duplicative billings, i.e., CARE fails to explain and justify the work of each CARE participant performing the same task in the proceeding.¹ (See D.10-05-046 at pp. 5 - 6.) The Commission also denied CARE’s claim for “submission” of it Notice of Intent to claim intervenor compensation and lowered the hourly rates for CARE’s counsel, Mr. Martin Homec, and its expert, Mr. Sarvey. (See D.10-05-046 at pp. 4 - 5.)

¹ At page 4 of D.10-05-046, the Commission reminds CARE that “CARE’s records should identify specific issues for which it requested compensation, the actual time spent by each employee or consultant, the applicable hourly rates, fees paid to consultants, and any other costs for which compensation was claimed. The records pertaining to an award of compensation shall be retained for at least three years from the date of the final decision making the award.” This same warning was made to CARE in two earlier decisions: D.09-09-023 and D.09-08-021. (See *Decision Granting Intervenor Compensation to Californians for Renewable Energy for Substantial Contributions to Decision 08-05-028* [D.09-09-023] (2009) ___ Cal.P.U.C.3d ___, at p. 19 (slip op.), *Decision Granting Intervenor Compensation to Californians for Renewable Energy for Substantial Contribution to Decisions to Decisions (D.) 06-07-029, D.07-06-022, D.07-12-052, AND D.08-11-008* [D.09-08-021] (2009) ___ Cal.P.U.C.3d ___, at p. 19 (slip op.).)

The intervenor compensation program, set forth in Public Utilities Code sections 1801-1812,² requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if that party makes a substantial contribution to the Commission's proceedings. The Commission determined in D.10-05-046 that CARE's participation in the settlement agreement resulted in Pacific Gas & Electric Company ("PG&E") requiring reimbursement from Mariposa Energy, LLC ("Mariposa"), regarding the reasonableness of amendments to the Mariposa Power Purchase Agreement with regard to capacity, the fixed operations and maintenance rate, and the variable operations and maintenance rate. (D.10-05-046 at pp. 2 – 3.) Further, CARE brought the issue of viability of the amendments to the agreement into the spotlight and as a result, if Mariposa comes back for modification, the ratepayers will be saved a significant amount of money by passing these costs to Mariposa. (*Ibid.*) For these reasons, the Commission determined that CARE made a substantial contribution to the proceeding.

However, having found substantial contribution, the Commission is further required to inquire into the reasonableness of the requested compensation pursuant to sections 1804(a), 1804(d) and 1806. This review resulted in the Commission finding that CARE's requested number of hours exceeded those reasonably necessary for CARE's substantial contribution. The Commission reduced the total number of compensable hours for CARE because of unexplained duplication of efforts. (D.10-05-046 at pp. 5 - 6.) CARE fails to present reasonable justification for its claims that several of its participants should be paid for performing the same task. (*Ibid.*) The Commission also reduced the hourly rate requested for its attorney.

CARE timely filed an application for rehearing of D.10-05-046. In its rehearing application, CARE challenges the Commission's disallowance of duplicate hours and alleges the Commission erred in determining the hourly rate of its counsel, Mr. Homec. CARE also claims a violation of 42 U.S.C. § 1981 (equal rights under the law) and 18 U.S.C. § 242 (deprivation of rights under color of law). Finally, CARE

² All subsequent section references are to the Public Utilities Code, unless otherwise indicated.

requests oral argument under Rule 16.3 of the Commission's Rules of Practice and Procedure.

We have carefully considered the arguments presented by CARE and are of the opinion that no grounds for rehearing have been demonstrated. Therefore, we deny CARE's application for rehearing.

II. DISCUSSION

A. The Commission Correctly Set The Hourly Rate For CARE's Counsel, Mr. Homec.

CARE contends, *inter alia*, that its counsel was paid an hourly rate of \$185 determined reasonable here and in D.09-05-012³ rather than the requested \$551 "because CARE is representing people of color in this proceeding." (App. for Rehg. at p. 2.) We disagree that Mr. Homec's rate was unreasonable given his education and experience and find CARE's argument without merit.

The Commission is required to take into consideration the market rates paid to persons of comparable training and experience who offer similar services in determining a proper amount of compensation. (Pub. Util. Code, § 1806.) In determining the hourly rate for CARE's attorney, Mr. Homec, the Commission applied the same rationale for the hourly rates approved for Mr. Homec in D.09-05-012. In that decision, the Commission considered his past education and experience with the Commission, and stated the following:

CARE requests hourly rates of \$200 in 2008 for Homec's work as an expert witness and \$540 in 2008 for Homec's work as an attorney. Homec has an undergraduate degree in Physics from the University of California (1970) and a law degree from the University of San Francisco (1975). He was employed as a regulatory analyst at the California Public Utilities Commission from June 1983 to October 2007. He also worked as a volunteer lawyer for the Bar Association from 1987 to 2000, representing appellants before the

³ In D.09-05-012, CARE requested an hourly rate of \$540 for Mr. Homec's services. (D.09-05-012, *supra*, at p. 12 (slip op.).)

Immigration Appeals Board and plaintiffs in employment law at the U.S. District Court. The Commission has not previously set hourly rates for Homec [but]...[w]e...decline to grant CARE's requested hourly rate of \$540 in 2008 for Homec's work as an attorney. The requested rate exceeds what the Commission has deemed reasonable for the most experienced attorneys practicing before the Commission.⁴ Homec has no experience in practicing law before the Commission. His experience as an attorney is limited to part-time volunteer work in the fields of immigration and employment law, which ended in 2000. In light of Homec's lack of recent and relevant legal experience, we will set his 2008 hourly rate as an attorney at \$175, which [is] mid-range for attorneys with 0 - 2 years of experience.⁵

....

As required by § 1806, the hourly rate for Homec cannot exceed the market rates paid by the Commission or public utilities to persons of comparable training and experience who offer similar services. Homec's training and experience consists of 24 years at the Commission, most recently as a PURA III. Thus, the comparable market rate paid by the Commission is the salary and benefits paid to PURA IIIs, unless CARE can show that public utilities pay a higher rate. CARE made no effort to show that utilities pay a higher rate.

(D.95-05-012, *supra*, at pp. 16 - 18 (slip op.).)

Consequently, because CARE makes no showing that Commission's grounds for determining that an hourly rate of \$185 in 2009 is not appropriate for an attorney of Mr. Homec's experience, we find no basis to overturn that determination.

B. The Commission's Disallowance Of Hours Spent By Mr. Homec Was Reasonable.

CARE contends that certain hours spent by its counsel, Mr. Homec, were "incorrectly disallowed." (App. for Rehg. at p. 2.) Mr. Homec claimed 16.5 hours and

⁴ In D.08-04-010, we set an hourly rate of \$535 for the most experienced attorneys practicing before the Commission. (*Final Opinion Setting Hourly Intervenor Rates for 2008 and Addressing Related Matters* [D.08-04-010] (2008) ___ Cal.P.U.C. ___, at p. 5 (slip op.).)

⁵ *Id.* at p. 5 (slip op.).

was awarded 15.75 hours. (*Ibid.*) Mr. Homec claimed an additional 6 hours for preparing CARE's intervenor compensation claim and was awarded 3.5 hours. (*Ibid.*)

CARE argues that both its counsel and experts had to read the documents in order to familiarize themselves with the parties' positions. (App. for Rehg. at p. 3.) However, the duplication of efforts does not result simply from reading the documents in the proceeding. Rather, Mr. Homec, claimed two hours to attend a settlement conference on August 28, 2009, while CARE's expert, Mr. Sarvey, claimed 1.25 hours for the same meeting. The Commission cannot determine that Mr. Homec's claim for an additional .75 hours is reasonable without an explanation and none was provided.

As for the preparation of the Notice of Intent ("NOI") to claim intervenor compensation, Mr. Homec claims 2.5 hours and Mr. Boyd claims 2 hours. "In contrast, the only other intervenor in this proceeding logged .5 hours to prepare its NOI." (D.10-05-046 at p. 6.) Without CARE's explanation and justification for these hours claimed, the Commission reasonably determined that "CARE's time spent on this task is excessive" especially when the "'submission' of an NOI is clearly a clerical task and is not compensable." (*Ibid.*)

The Commission is required to compensate for *reasonable* advocate's fees, *reasonable* expert witness fees, and other *reasonable* costs of preparation and participation. (Pub. Util. Code, §§ 1802, subd. (a) & 1803.) Based on the Commission's review of the hours submitted by CARE's counsel and its determination that some of the hours claimed were excessive and duplicative, the Commission reasonably concluded that some hours had to be disallowed as being unreasonable. Consequently, under the law, the Commission correctly disallowed hours that were unreasonably accrued.

C. The Commission's Disallowance of Hours Spent by Mr. Boyd and Mr. Sarvey was reasonable.

CARE contends that certain hours spent by its experts, Mr. Boyd and Mr. Sarvey, were "incorrectly disallowed."⁶ (App. for Rehg. at p. 2.) Mr. Boyd claimed

⁶ We note that the hourly rates for Mr. Sarvey and Mr. Boyd were awarded by the Commission as requested by CARE. (D.10-05-046, Appendix at p. 8 [unnumbered].)

16.25 hours and was awarded 6.25 hours. (D.10-05-046 at p. 4.) Mr. Boyd claimed an additional 3 hours for preparation of CARE's intervenor compensation claim and was awarded 1.5 hours. (*Ibid.*) Mr. Sarvey claimed 39.65 hours and was awarded 33.15 hours. (*Ibid.*)

In D.10-05-046, the Commission found that CARE failed to explain and justify hours of work performed on the same task by multiple CARE participants. This failure to explain appears to be a continuing behavior from CARE. In fact, CARE has been "admonished" in two previous decisions for failing to provide sufficient justification. (See D.09-08-021, *supra*, pp. 14-16 (slip op.) and D.09-09-023, *supra*, at pp. 12-13 (slip op.).)

Further, as we noted in our decision in this proceeding:

[W]hen multiple participants are utilized to perform the same task, that [CARE] must provide the Commission with sufficient information to ensure that this work is not duplicative. While CARE may find it necessary to have several individuals involved in the same work efforts, without a clear explanation and justification of how these efforts differ from one another, we see no reason why ratepayers should pay for duplicative efforts.

(D.10-05-046, p. 5.)

Consequently, because of CARE's lack of sufficient justification for each individual's work hours, the Commission reasonably disallowed the discrepancies in work hours.

D. CARE's Claims of Discrimination

CARE contends that its mere allegations of discrimination will support a finding that the Commission "preclude[s] participation by people of color in Commission proceedings." Further, CARE contends that these unsupported allegations can themselves demonstrate a "pattern and practice" of the Commission to wrongfully deny compensation to CARE's attorneys in violation of equal rights under law pursuant to 42 U.S.C. §1981 et seq., as well as a deprivation of rights under color of law pursuant to

42 U.S.C. §242. (App. for Rehg. at p. 6.) CARE’s contention has no merit, in the absence of any factual basis.

Furthermore, CARE is not the only representative of “minority and low-income” ratepayers. For example, Greenlining Institute received intervenor compensation for representation of “the perspectives, experiences, and interests of minority, low-income, inner city, and other vulnerable and underserved communities.” (*Order Instituting Rulemaking Regarding Policies, Procedures and Rules for the Low Income Energy Efficiency Programs of California’s Energy Utilities Southern California Edison Company’s Application for Approval of SCE’s “Change A Light, Change The World,” Compact Fluorescent Lamp Program* [D.09-03-042] (2009) ___ Cal.P.U.C.3d ___) “Greenlining describes itself as a public policy research and advocacy group representing the interests of Latino, Asian-American, African-American, and low-income communities.” (*Order Instituting Rulemaking on the Commission’s Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities* [D.06-11-009] (2006) ___ Cal.P.U.C.3d ___.) Another example of a group is the Latino Issues Forum. (*Order Instituting Rulemaking to Address the Needs of Telecommunications Customers Who Have Limited English proficiency* [D.08-12-057] (2008) ___ Cal.P.U.C.3d ___).

1. CARE’s claim of criminal discrimination under 18 U.S.C. § 242 for conspiracy against civil rights lacks merit.

We note that 18 U.S.C. § 242 is a criminal statute enforceable by the United States Attorney requiring proof of a specific intent to deprive an individual of a right secured by federal or state law. (See *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1742.) Because of the criminal nature of a section 242 claim, courts have stated that violation of this statute does not give rise to civil liability. (See *Figueroa v. Clark* (E.D. Pa. 1992) 810 F.Supp. 613, 615.) Intervenor compensation is a civil matter, not a criminal one. Thus, as a private party, CARE lacks standing to assert criminal charges

against the Commission. Therefore, CARE cannot assert a claim under 18 U.S.C. § 242 before the Commission.

2. CARE’s 42 U.S.C. § 1981 claims for violations of its equal rights under the law to “make and enforce contracts” and freedom from impairment of those equal rights, are unfounded.

CARE has failed to allege any evidence to support its claim that the Commission had “an intent to discriminate on the basis of race” and that “the discrimination concerned one or more of the activities enumerated in the statute” (i.e., make and enforce contracts, sue and be sued, give evidence, etc.). (See *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.* (2d Cir. 1993) 7 F.3d 1085, 1087.) Mr. Homec, CARE’s counsel, does not assert that reduction of his requested hourly rate was based on race. Similarly, Mr. Brown has not demonstrated that the Commission’s determination of an appropriate hourly rate for Mr. Homec was based on any racial animus towards Mr. Brown. CARE alleges that D.10-05-046 “provides that Martin Homec will be paid the lowest rate possible.” (App. for Rehg. At p. 7.) These allegations have no merit.

As discussed above, the Commission provided reasonable compensation commensurate with Mr. Homec’s years of legal experience and practice. (See D.10-05-046, p. 4; see also, D.95-05-012, *supra*, at pp. 16 – 18 (slip op.)) CARE’s allegation that Mr. Homec’s hourly rate demonstrates that the Commission “does not want to listen to the positions of poor people of color” is wholly unsupported by facts. Likewise, CARE’s claim that “it has reason to believe” that the Commission’s disallowances for intervenor compensation evidences “retaliatory discrimination” is equally unsupported.⁷

⁷ We note that CARE refers to a Superior Court action for age discrimination brought against the Commission without any reference to its bearing on this proceeding. No other facts are presented in the Application for Rehearing to support any claim for age discrimination as it concerns Mr. Homec, Mr. Brown, or any other CARE participant. Thus, CARE fails to meet the requirements of section 1732, which require that an application for rehearing must set forth specific grounds of why a Commission order is unlawful. (Pub. Util. Code, §1732.)¶

Mr. Brown suggests in his Affidavit⁸ that he can afford only recent law school graduates to represent him while other parties can afford more experienced attorneys. (See also, CARE App. for Rehg, at p. 6.) Mr. Brown claims that this lack of legal representation has resulted in denial of representation in Commission proceedings because of “special rules, applicable only to people of color and their chosen attorneys.” (*Ibid.*) However, what those “special rules” are and how they affect Mr. Brown’s rights of contract are not presented in CARE’s application for rehearing. CARE fails to demonstrate when or where it has ever been denied the opportunity to participate in Commission proceedings.⁹ “It is well established that mere conclusory allegations are insufficient to establish a cause of action for a violation of civil rights.” (*Mazurek v. Wolcott Board of Educ*, (D.Conn. 1993) 815 F.Supp. 71, 77; see also: *Koch v. Yunich* (2nd Cir. 1976) 533 F.2d 80, 85.)

3. CARE’s claim that the Commission used compensation criteria “never before used for any other person claiming compensation” has no merit.

CARE contends that the hourly compensation criteria used in D.10-05-046 contained reasoning “never before used for any other person claiming compensation in a Commission proceeding,” and did so “to deprive people of color” representation in Commission proceedings. (App. for Rehg, at p. 7.) CARE further contends that the Commission denies compensation to CARE’s attorneys “so that people of color will not be permitted to participate as parties in Commission proceedings.” (*Ibid.*) As previously mentioned, CARE fails to demonstrate when or where it has ever been denied the opportunity to participate in Commission proceedings.

The criteria used to determine hourly compensation rates in D.10-05-046 are identical to those in the compensation proceedings previously brought by CARE. These criteria used by the Commission to determine intervenor compensation are used for

⁸ Mr. Brown’s Affidavit is attached to CARE’s Application for Rehearing.

⁹ Individual ratepayers and interested parties may participate in Commission proceedings without representation by counsel. (Cal. Code of Regs., tit. 20, §1.4.)

all intervenors, not just CARE. (See generally, *Final Opinion Setting Hourly Intervenor Rates for 2008 and Addressing Related Matters* [D.08-04-010, *supra.*]) Furthermore, they are consistent with the statutory requirements in sections 1801 et seq. CARE fails to establish how these compensation awards are the product of discrimination and retaliation. Accordingly, CARE's claim is without merit.

E. CARE's request for oral argument under Rule 16.3 of the Commission Rules of Practice and Procedure should be denied.

In its rehearing application, CARE requested oral argument pursuant to Rule 16.3 of the Commission Rules of Practice and Procedure. (App. for Rehg. at p. 8.) It argues oral argument is warranted because the application for rehearing raises the issue of whether the Commission knowingly deprives people of color participation in Commission proceedings, whether D.10-05-046 demonstrates an intent to deprive people of color protected rights, and alleges that the Commission "always discriminates against attorneys representing CARE, an organization specifically representing poor people of color." (*Ibid.*)

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, § 16.3, subd. (a).) Rule 16.3 states:

- (a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first

impression that are likely to have significant precedential impact.

(Rule 16.3 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, §16.3.)

CARE, however, did not meet the requirements listed above. CARE's request is merely a statement of issues and a claim that D.10-05-046 demonstrates racial discrimination. CARE gives no explanation as to how oral argument will materially assist the Commission in resolving its rehearing application. Thus, CARE has failed to meet the basic requirements of Rule 16.3. (See generally, Code of Regs., tit. 20, §16.3, subd. (a)(1) – (a)(4).) Accordingly, CARE's request for oral argument should be denied.

III. CONCLUSION

CARE's allegations of racial discrimination and retaliation lack any factual support. Rather, the Commission's intervenor compensation awards in this proceeding are consistent with prior Commission decisions, Commission rules, and relevant statutory provisions for intervenor compensation. CARE has failed to provide sufficient grounds for granting rehearing of D.10-05-046. Therefore, the application for rehearing is denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.10-05-046 is hereby denied.
2. Application (A.) 09-04-001 is closed.

The order is effective today.

Dated August 12, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners