

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Carole Dominguez,

Complainant,

vs.

Pacific Gas and Electric Company (U39E),

Respondent.

Case 07-03-006
(Filed March 8, 2007)

**ORDER MODIFYING DECISION 09-05-011,
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. INTRODUCTION

On June 12, 2009, CALifornians for Renewable Energy (“CARE”) filed an application for rehearing of Decision (D.) 09-05-011 (“Decision”).¹ In the Decision, we awarded CARE \$33,363.84 in intervenor compensation for its substantial contributions to D.08-02-001. The underlying proceeding concerned the categorization of Pacific Gas & Electric Co.’s (“PG&E’s”) gas pipeline after the City of Tracy developed a playing field above it. The parties entered into a settlement, which the Commission adopted in D.08-02-001. CARE assisted in development of the settlement. In its application for rehearing, CARE contends that the hourly rate we awarded its attorney, Stephan Volker, for his participation is too low.

¹ All Commission decision citations refer to the official Commission pdf versions of the decisions, which can be found on the Commission’s website.

We have carefully considered the arguments in the application for rehearing, and are of the opinion that rehearing of the Decision is not warranted. However, we will modify the Decision to correct a clerical error in the Appendix, as described below. Accordingly, in today's order, we deny CARE's application for rehearing of D.09-05-011, as modified.

II. DISCUSSION

A. Reliance on \$250 per Hour as a Baseline Rate

CARE first contends that we erred in relying on the \$250 per hour rate that we awarded for Volker's work in 2003. According to CARE, the \$250 per hour rate did not represent Volker's market rate, and, "the freezing of Volker's rate at a non-market rate violates Public Utilities Code section 1806..."² (CARE App. Rehg., at p. 6.) CARE's argument is mistaken.

According to CARE, \$250 per hour was not Volker's "market rate," contrary to our conclusion. Rather, CARE argues that this earlier hourly rate was an amount the Sierra Club sought in its Notice of Intent ("NOI"), which was filed before Volker had become a lawyer in the case. Thus, according to CARE, the Sierra Club's request did not reflect Volker's actual hourly rate, which had "already exceeded \$300" in 2002.

CARE first raised this argument in its challenge to D.06-06-025, and it is misplaced for a number of reasons. First, that the \$250 amount was a reasonable representation of Volker's market rate at the time is a factual conclusion that we reached in the *2005 Hourly Rate Decision*, D.05-11-031, as well as in *Volker's Hourly Rate in Valencia Water Company Decision*, D.03-01-058. As we explained in response to CARE's earlier challenge, because we adopted this factual finding in the 2005 decision and earlier, it has become final and cannot be challenged. "In all collateral actions or

² Unless otherwise specified, section references are to the Public Utilities Code.

proceedings, the orders and decisions of the commission which have become final shall be conclusive.” (§ 1709.)

CARE has contended that Volker only requested \$250 in the 2003 award because that is what Sierra Club requested in its NOI. However, as we have repeatedly informed CARE and Volker, the NOI amount was in no way binding, and Volker could have requested a higher hourly rate when CARE actually requested intervenor compensation. (See D.08-04-060 (“*Order Denying Rehearing of D.07-12-007*”), at pp. 4-5.) The fact that Volker failed to do so illustrates his lack of experience as an intervenor in Commission proceedings. An intervenor is not bound by the NOI, and there is generally no incentive for an intervenor to request a below market rate, since it does not benefit the client.

Moreover, we have rejected CARE’s interpretation of the 2003 award repeatedly. As we previously explained, in awarding Mr. Volker \$250, we considered his experience and market rates, and concluded, “based on Volker’s experience, the requested hourly rate of \$250 for services provided in 2000 and 2001 is reasonable.” (*Volker’s Hourly Rate in Valencia Water Company Decision*, D.03-01-058, at p. 7; see also D.08-04-060, rejecting CARE’s assertion that the 2003 award was not representative of market rates.) Thus, despite CARE’s protests, we conclusively found that the requested rate was reasonable, and therefore the award of this rate was not accidental, as CARE implies. In addition to the fact that these holdings are final and conclusive, it was reasonable for the *2005 Hourly Rate Decision*, to consider the 2003 award within the range of rates that we have awarded.

Furthermore, CARE misstates the conclusions in the *2005 Hourly Rate Decision*. There was no “freezing” of a rate. Rather, although the last authorized rate was a starting point for a subsequent award, intervenors could make showings that they had additional experience, or that their rate was otherwise too low. Moreover, although Volker had received \$250, the range for attorneys with 13 plus years experience was bumped to \$270- \$490 to avoid the anomalous result of more experienced attorneys having a lower low end of the range of market rates than less-experienced attorneys.

Although CARE mentions this “anomalous result,” it neglects to mention that it was never adopted, and that the lowest rate for experienced attorneys was \$270. Thus, CARE’s contention that Volker’s rates were frozen at the artificially low \$250 hourly rate is not accurate.

Ultimately, whether the \$250 hourly rate should have been included in the range of market rates is a factual question that was decided in the *2005 Hourly Rate Decision*. As mentioned, the Commission’s factual determinations are not subject to collateral attack. (§ 1709.) Even if that conclusion had not become final, it could not be challenged as long as it was based on substantial evidence in light of the whole record, regardless of whether there was contrary evidence. (See § 1757 (a)(4).) Since we based our conclusion on evidence in the record, i.e. the amount was in fact requested and awarded in the relevant market, there would be no basis for CARE’s challenge in any event.

Thus, it was reasonable for us to have concluded that amounts requested and awarded to intervenors in Commission proceedings are representative of the market rates for intervenors. Moreover, these conclusions were reached in the *2005 Hourly Rate Decision*, a decision which has long been final. Furthermore, there is opportunity for these rates to be adjusted, as they were in part here. Therefore, there was no rate freeze, and there was no error on our part in relying upon the earlier hourly rate awards.

B. Market Rates

CARE argues that the Decision errs, because the \$290 and \$330 hourly rates it awards are not market rates. According to CARE, the Decision therefore violates section 1806, which requires the Commission to consider market rates in awarding intervenor compensation. As the Commission has repeatedly explained to CARE, this argument is wrong.

Section 1806 requires us to “take into consideration the market rates paid to persons of comparable training and experience who offer similar services.” We did this in part by conducting a market rate survey, summarized in Resolution (“Res.”) ALJ-184 and the *2005 Hourly Rate Decision*. In those proceedings, we recorded the range of rates

awarded to participants in our proceedings, and divided them into separate ranges for years of experience. In the *2005 Hourly Rate Decision*, we officially take note of the market rates for similar services.

Moreover, as we have explained, section 1806 specifically requires us to consider the market rates of those offering “similar services.” Appearing in administrative proceedings at the Commission is different from work in courts. Although CARE argues that it presented uncontested evidence that Volker’s market rate was at least \$500, the only evidence CARE presents concerns the market rate for his court work. As the *Decision* explains:

Section 1806 does not direct us to accept as a given an individual attorney’s hourly rate based on what he or she makes outside the Commission. ... Section 1806 directs us to set intervenor rates relative to rates paid to attorneys that practice before this Commission.

(Decision, at p. 13.)

CARE did not present evidence that Volker’s market rate for practice before the Commission, or similar agencies, was higher. As the *2005 Hourly Rate Decision* conclusively found, the appropriate range of rates for attorneys who had more than twelve years of experience was from \$270 to \$490 per hour. Moreover, Volker’s actual awarded rates for work before the Commission were within this range. Volker had previously earned \$280 per hour for work performed in 2006. (D.07-12-007.) Therefore, the Commission awarded Volker \$290 per hour for 2007, and \$330 per hour for 2008 after allowable step increases plus cost of living adjustments. Thus, the only evidence concerning practice before the Commission supports the Decision’s conclusion regarding the appropriate hourly wage.

C. Due Process

CARE next contends that our reliance on Res. ALJ-184 and the *2005 Hourly Rate Decision* violates the Due Process clauses of the California and United States Constitutions. CARE argues that although those proceedings “fixed” Volker’s

hourly rates, we did not provide CARE with notice and an opportunity to be heard on those issues. This argument also lacks merit.

First, CARE cannot challenge the *2005 Hourly Rate Decision* because it is a final and unappealable Commission decision. CARE never filed an application for rehearing of that decision, and therefore, CARE is not able to challenge it years later. (See § 1731 (b).) Even if the *2005 Hourly Rate Decision* could be challenged, CARE has already attempted to file a belated court challenge, which was denied. (See *CARE v. PUC*, California Court of Appeal, First Appellate District, Division One, Case No. A115703.) Therefore, if CARE's challenge to the earlier decision was not barred for finality, it would be barred by *res judicata*.

In any event, the *2005 Hourly Rate Decision* did not implicate CARE's or Volker's due process rights. That decision simply ratified the survey conducted in Res. ALJ-184, and developed a methodology for considering the market for similar services when awarding hourly rates. Although the starting point for an hourly rate award is the rate that was previously adopted, that rate is subject to modification, and contrary to CARE's assertions, is not fixed. In fact, the *2005 Hourly Rate Decision* lists broad grounds that we will consider to determine whether higher rates are appropriate in a given request. Specifically, we provided:

1. For any given year, all intervenor proposed rates shall be within the same range of utility rates from the year immediately preceding that year in which the work was performed, for individuals with similar training and experience. For example, intervenor rates for work performed in 2006 shall be within the range of utility rates for 2005, ***subject to possible escalation (below)***.
2. Escalation, if any, to previously authorized rates shall be based on the increases in utility costs of representation, as shown in the utility data sets for the two preceding years.
3. Where additional experience since the last authorized rate would move a representative to a higher level of qualification (e.g., from intermediate to senior level),

an increase beyond the inflation rate is reasonable to bring the representative's hourly rate within the range of the representative's peers at the higher level.

4. An increase beyond the escalation rate may be reasonable on the basis of a specific showing that a representative has historically sought rates that appear to be at the low end of the range of rates for their peers. This increase is intended to narrow but not necessarily eliminate perceived disparities.

(*2005 Hourly Rate Decision*, at p. 19-20, emphasis added.) In light of this procedure, CARE and other intervenors are given ample opportunity to be heard regarding the appropriate hourly rate each time they submit compensation requests.

D. Evidence of Market Rate

CARE's final argument is that in setting Volker's hourly rate, we ignored CARE's uncontroverted evidence concerning his market rate. CARE's argument is incorrect, and ignores our previous advice and holdings.

CARE presented evidence that courts have awarded Volker a higher hourly wage, and that the prevailing hourly wage for experienced court attorneys was higher. However, section 1806 provides that the Commission shall, "take into consideration the market rates paid to persons of comparable training and experience who offer similar services." Moreover, the statute further provides:

The compensation awarded may not, in any case, exceed the comparable market rate for services paid by the commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.

(§ 1806.)

Thus, the requirement in the statute is that the market rate be considered, and not exceeded. There is no requirement that any market rate must be met. Despite CARE's reliance on court cases implementing state court compensation schemes, the standard in section 1806 is not the same or analogous to the standards CARE cites.

Notably, we have repeatedly advised CARE that outside court work is a different type of work than practice before the Commission. As we explained to CARE pertaining to an earlier challenge:

Ultimately, CARE's assertions concerning the appropriate market rate serve best to illustrate the fundamental misunderstanding that pervades its challenge. Specifically, CARE fails to distinguish between the market rate, the hourly rate a practitioner earns in a particular market, and the hourly rate afforded a practitioner for work performed at the Commission.

(D.08-04-060, at p. 5; see also Decision, at p. 13.)

CARE maintains that it made the showing required by the ALJ-184 standard cited in the Decision. Pursuant to that standard:

[A]n intervenor may request an adjustment to an adopted hourly rate, but must show good cause for doing so. For example, if a court of regulatory agency awarded the advocate a higher hourly rate for work in the same calendar year, the intervenor may ask us to use the higher rate. The burden is on the intervenor to justify the higher rate, and in the example just given, we would expect the intervenor to address, among the other things, the standard used by the court or agency in setting the higher rate and the comparability of the work performed at the Commission to the work performed at the court or agency.

Although CARE lists multiple proceedings that Volker worked on in its Request for Intervenor Compensation, there is little discussion of the standards used in Volker's other fee awards. (See CARE April 11, 2008, Req. for Compensation.) Nor is there much discussion of the comparability of Volker's other work to the work at issue. Moreover, much of CARE's discussion is conclusionary, as is further discussed below. Instead of making the required showing, CARE largely reiterated its position that reliance on the \$250 per hour figure was mistaken, and that we were required to adopt the rate courts have awarded to Volker outside of Commission proceedings; positions that we had previously and repeatedly rejected.

CARE attempted to make the requisite showing in its Comments on the Proposed Decision. However, pursuant to the Commission Rules (Code of Regs., tit. 18, (“Commission Rules”), Rule 14.3 (c)), Comments are limited to claim of error in the Proposed Decision. As the Commission Rules provide:

Comments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law.

(Commission Rules, Rule 14.3 (c).) Thus Comments must cite to the existing record. They are not the appropriate vehicle to present new evidentiary support.

In any event, CARE’s Comment discussion reveals that neither of the cited court attorney awards applied standards similar to the Commission’s intervenor compensation standard. In its Comments, CARE refers to Code of Civil Procedure section 1021.5 (“private attorney general statute”). Despite CARE’s argument that the standard “is the same” as the Commission’s intervenor compensation statute, in fact there are two different standards. As CARE explains the private attorney general standard, courts must award the “reasonable market rate” to eligible attorneys. In contrast, as discussed, the intervenor compensation standard only requires that the Commission consider market rates for similar services, and not exceed them. CARE’s attempt to argue these are the same standards is not convincing.

Furthermore, regarding the comparability of the work, again CARE’s argument is not convincing. CARE contends that the discussions in the underlying case “required the expertise of a seasoned negotiator,” and therefore made use of Volker’s experience in “high-stakes settlement discussions.” (CARE April 1, 2009 Comments, at p. 7.) However, CARE’s representations are not supported. The underlying complaint concerned a specific controversy and a focused issue, and is among the less complex cases that we handle. Moreover, since it was resolved via settlement there is little support for CARE’s contention that Volker’s skill and experience at a high level were essential for a successful resolution of the case. Although CARE asserts its showing is uncontroverted, in an intervenor compensation request, the decision maker also reviews

the actual work of the attorney in the proceeding, in order to judge the expertise demonstrated. The burden is on CARE to support its request for a higher rate for Volker (see Res. ALJ-184), and it did not meet that burden.

E. Error in Appendix

CARE correctly points out that there is a clerical error in the Appendix to the Decision. Although the Decision awards CARE \$290 per hour for Volker's 2007 work, and \$330 per hour for 2008, the Appendix does not reflect these rates. We will correct this error in today's decision.

F. CARE's Request for Oral Argument

In its rehearing application, CARE requests oral argument pursuant to Rule 16.3 of the Commission Rules. (CARE App. Rhg, at p. 15.) CARE claims that its application for rehearing "presents legal issues of exceptional public importance." Specifically CARE argues:

The Commission's current rate setting mechanism unconstitutionally limits recovery by CARE and other similarly-situated intervenors. This imbalance creates an uneven playing field for participants in Commission proceedings and discourages, rather than encourages public participation in the Commission's important decision making processes.

(Rehrg. Application, p.15-6.) CARE copied this assertion verbatim from its earlier challenges to Volker's hourly wage award. (See D.08-04-06, at p. 9.)

Commission Rule 16.3 gives us complete discretion to determine the appropriateness of oral argument in any particular matter. In addition, Rule 16.3 directs applicants requesting oral argument to 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.

As we previously explained, the merits of the Commission's current rate setting mechanism was not the subject of the Decision, but rather that mechanism was adopted in the *2005 Hourly Rate Decision* and Res.ALJ-184, and updated in subsequent Commission decisions (e.g., D.07-01-009). Oral argument on issues not in the decision being challenged is inappropriate. Accordingly, CARE's request for oral argument is denied.

Therefore **IT IS ORDERED** that:

1. In the Advocate Information chart in the Appendix to D.09-05-011, the "Hourly Fee Adopted" for Volker is changed to \$290 for 2007 and \$330 for 2008.
2. CARE's request for oral argument is denied.
3. Rehearing of D.09-05-011, as modified herein, is denied.
4. Complaint 07-03-006 is closed.

This order is effective today.

Dated March 8, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners