

Decision 05-06-054 June 30, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Revise
Commission General Order Numbers 95 and 128.

Rulemaking 01-10-001
(Filed October 2, 2001)

**OPINION GRANTING INTERVENOR COMPENSATION
TO CN UTILITY CONSULTING, LLC FOR
CONTRIBUTIONS TO DECISION 05-01-030**

This decision awards \$40,710.51 to CN Utility Consulting, LLC (CNUC) in compensation for its contribution to Decision (D.) 05-01-030. This represents a decrease of \$37,012.50 from the amount requested.

I. Background

The Commission issued Order Instituting Rulemaking (R.) 01-10-001 to revise General Order (GO) 95 and GO 128, which govern, respectively, the construction of overhead and underground supply and communications systems. Commission staff, industry representatives, labor organizations, and the public participated in 16 months of twice-monthly two- and three-day public workshops throughout California. A total of 63 proposed revisions to existing rules were considered. Of these, 40 revisions were supported by consensus of the workshop participants; 15 were withdrawn, and eight were in dispute. In D.05-01-030, the Commission adopted the consensus changes, noted the withdrawn proposals, resolved seven of the eight disputed change proposals, and deferred consideration of one disputed proposal to a later proceeding (R.05-02-023).

CNUC is a small business concern with two partners, Stephen R. Cieslewicz and Robert R. Novembri, who are arborists with many years of experience in utility vegetation management. CNUC currently serves in a consultant role with the Joint U.S./Canada Power System Outage Task Force. Cieslewicz is past president of the Utility Arborist Association and was awarded the 2003 Utility Arborist Award of the International Society of Arboriculture. CNUC limited its participation in this proceeding to analyses of Rule 35 of GO 95. Specifically, CNUC made recommendations for keeping trees and vegetation away from power lines in a cost-effective manner. The firm's partners participated only in workshops dealing with Rule 35. CNUC requests \$77,723.01 for its contributions to D.05-01-030.

II. Requirements for Awards of Compensation

The intervenor compensation program, enacted in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings.¹ The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers. In this case, the rulemaking proceeding affected a broad array of utilities and others. As such, we find it appropriate to authorize payment of the compensation award from the intervenor compensation program fund, as described in D.00-01-020.

¹ Subsequent statutory references are to the Public Utilities Code unless otherwise indicated.

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements, including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(b)(1).)
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(h), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

For discussion here, the procedural issues in Items 1-4 above are combined, followed by separate discussions on Items 5-6.

III. Procedural Issues

No PHC was held in this proceeding, nor was any time specified for filing NOIs. CNUC filed its NOI on June 28, 2003, which we deem timely under these

circumstances. The NOI was rejected by Administrative Law Judge (ALJ) Brown, however, on grounds that it failed to show that CNUC meets the definition of a “customer” and failed to meet the financial hardship test. CNUC was given 30 days to supplement its NOI to correct the deficiencies and to explain what significant contribution it intended to provide that was not duplicative of presentations by other participants. CNUC filed a supplemental pleading, and by subsequent ruling it was deemed to be a “participant representing consumers,” and thus a Category 1 customer under § 1802(b) for purposes of this proceeding. It became eligible to file for an award of intervenor compensation, subject to a showing of significant financial hardship in its request for compensation. CNUC filed its request for compensation on March 8, 2005, within 60 days of D.05-01-030 being issued. No party has opposed this request for compensation. CNUC asserted financial hardship in documents filed under seal with its request for compensation.

An intervenor seeking compensation must show that, without undue hardship, it cannot pay the reasonable costs of effective participation in the proceeding. A participant representing consumers (Category 1) must disclose its gross and net monthly income, monthly expenses, cash and assets, including equity in real estate, to make this showing. CNUC has submitted under seal statements showing its partners’ income, net worth and expenses. The finances of the two partners of CNUC, as revealed in the sealed documents, meet the standard for showing financial hardship.

CNUC has satisfied all of the procedural requirements necessary to make the request for compensation.

IV. Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding, we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See § 1802(h).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (See §§ 1802(h) and 1802.5.) As described in § 1802(h), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.²

Should the Commission not adopt any of the customer's recommendations, compensation may be awarded if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order. For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could

² D.98-04-059, 79 CPUC2d 628, at 653.

find that the customer made a substantial contribution.³ With this guidance in mind, we turn to the claimed contributions CNUC made to the proceeding.

³ See D.03-12-019, discussing D.89-03-063 (31 CPUC2d 402) (awarding San Luis Obispo Mothers for Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, although ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

CNUC asserts that its substantial contribution to D.05-01-030 was in successfully blocking proposed changes to the Rule 35 “tree-trimming” rules in GO 95. These efforts, however, overlapped to some extent the work of several utilities and of the Commission’s Consumer Protection and Safety Division (CPSD). In all of the Rule 35 changes proposed by William Adams, for example, those opposing the changes included eight utilities, one labor organization, two private organizations and CPSD, in addition to CNUC.

CNUC was cautioned at the time of its NOI that no compensation would be awarded for duplicative work, and it was asked to explain in subsequent filings how its efforts differed from those of other parties. In its supplemental NOI, CNUC sought to distinguish its efforts, stating:

CNUC provided the entire workshop group a formal presentation that covered the current state of [Utility Vegetation Management]-related laws in the U.S. and how changes in them can result in significant impacts on cost and the environment. This example of a non-duplicative effort will be supplemented in greater detail in our final Request for Compensation. (Supplemental Notice, at 3.)

In its request for compensation, CNUC states that it participated in all workshop sessions involving proposed changes to Rule 35. Because of their unique backgrounds as experienced arborists, CNUC’s partners state their belief that they provided insights into vegetation management that helped persuade CPSD to withdraw some of the Rule 35 changes it had originally supported. Additionally, CNUC provided substantial assistance in helping craft definitions related to Rule 35, including the contested definitions of vegetation strain and abrasion. Other workshop participants, including CPSD, agree that CNUC provided facts and statistical calculations that helped shape consensus on Rule 35 and, ultimately, led to the Commission’s adoption of the consensus position in this area.

We conclude that CNUC made a substantial contribution to the workshop product and the Commission decision, although we also conclude that a significant portion of CNUC's claimed contribution was merely cumulative and did not materially supplement, complement, or contribute to the presentation of other parties. We will adjust the amount awarded to CNUC accordingly. This adjustment is most easily effected by careful analysis of CNUC's claimed hours, which we examine in the next section.

V. Reasonableness of Requested Compensation

CNUC requests \$77,723.01 for its participation in this proceeding, as follows:

Advocates' Fees	Year	Hours	Rate	Amount
Stephen Cieslewicz	2002	152.50	\$175.00	\$26,687.50
	2003	159.00	\$175.00	\$27,825.00
Cieslewicz (Travel)	2002	20.75	\$ 87.50 ⁴	\$ 1,815.63
	2003	21.00	\$ 87.50	\$ 1,837.50
Robert Novembri	2002	67.50	\$175.00	\$11,812.50
	2003	24.00	\$175.00	\$ 4,200.00
Novembri (Travel)	2002	11.00	\$ 87.50	\$ 962.50
Subtotal				\$75,140.63

Other Expenses

Travel, Transportation & Lodging	\$2,451.16
Photocopy and Postage	\$ 131.22
Subtotal	\$2,582.38

TOTAL = \$77,723.01

⁴ Travel and time spent preparing the request for compensation are eligible for award at half the professional rate. CNUC here seeks no compensation for time spent preparing the request for compensation.

The components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation. As noted earlier and further discussed below, we find that some of CNUC's claimed time is not clearly associated with its substantial contribution.

CNUC states that the proposed changes to Rule 35 could have added tens of millions of dollars annually to utilities' costs of vegetation management and could have resulted in the removal of thousands of trees that are no risk to electric service reliability on public safety. CNUC states that the only issues it addressed were the various proposals to amend Rule 35.

The timesheets submitted by CNUC are generalized in nature, with most of the entries showing a cryptic "emails" or "emails and attachments." Nevertheless, we are able to segregate claimed time for preparation and presentation of the formal report that CNUC delivered, along with time participating in and contributing to Rule 35 analysis in subsequent workshops. These efforts total 191.5 hours, as opposed to the 403 hours claimed. Based on our review of the record, we find that the electric utilities uniformly opposed changes in Rule 35 for essentially the same reasons offered by CNUC. CNUC responded to e-mail inquiries from the utilities, and its expert analysis was helpful to those utilities in preparing their positions. Arguably, however, consultation with the utilities should be billed to the utilities, rather than to ratepayers.

Thus, we disallow 211.5 hours which we find have not been adequately distinguished from the work performed by the utilities and other parties. Based

on our review of the record, CNUC's request for compensation and CNUC timesheets, we will narrow our award of compensation to recognize 191.5 hours of compensable time, the firm's travel costs in attending the workshops and being available as experienced arborists to answer participant questions, and the partners' miscellaneous out-of-pocket costs of participating in this proceeding.

We acknowledge that this award falls substantially short of the amount requested. Nevertheless, our duty to ratepayers requires that awards ultimately paid by ratepayers are based on fees and costs demonstrated to be reasonable. Unlike most litigants, ratepayers generally have no direct control over the intervenors who purport to represent ratepayer interests, and unlike most advocates, intervenors need not submit their litigation budgets for prior approval. Here, we find the requested amount to be excessive in relation to the relatively informal workshop process and work product involved in this rulemaking.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. CNUC requests Commission approval of an hourly rate of \$175 for professional work performed during 2002 and 2003 and half that amount (\$87.50) for travel time. CNUC states that these are market rates for vegetation management experts, and it attaches a Federal Energy Regulatory Commission (FERC) document (FERC-03AL-30574) establishing those rates for FERC proceedings requiring analysis of vegetation management practices. We will approve the claimed rates as reasonable.

The itemized direct expenses submitted by CNUC include costs for travel, photocopying and postage and total \$2,582.38. We find these costs reasonable.

VI. Award

As set forth in the table below, we award CNUC \$40,710.51:

Advocates' Fees	Year	Hours	Rate	Amount
Stephen Cieslewicz	2002	75.50	\$175.00	\$13,212.50
	2003	72.00	\$175.00	\$12,600.00
Cieslewicz (Travel)	2002	20.75	\$ 87.50	\$ 1,815.63
	2003	21.00	\$ 87.50	\$ 1,837.50
Robert Novembri	2002	38.00	\$175.00	\$ 6,650.00
	2003	6.00	\$175.00	\$ 1,050.00
Novembri (Travel)	2002	11.00	\$ 87.50	\$ 962.50
Subtotal				\$38,128.13

Other Expenses

Travel, Transportation & Lodging	\$2,451.16
Photocopy and Postage	\$ 131.22
Subtotal	\$2,582.38

TOTAL = \$40,710.51

Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing the 75th day after CNUC filed its compensation request (or, May 23, 2005) and continuing until full payment of the award is made.

This rulemaking proceeding affected a broad array of utilities and others in the telecommunications and electrical fields. As such, payment of the compensation award will be made from the Commission's intervenor compensation program fund, as described in D.00-01-020.

We remind all intervenors that Commission staff may audit their records related to this award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. The records should identify specific issues for which compensation was requested, the actual time spent by each employee or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

VII. Comments on Draft Decision

Pursuant to Pub. Util. Code § 311(g)(1) and Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

VIII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Glen Walker is the assigned ALJ in this proceeding.

Findings of Fact

1. CNUC has satisfied all the procedural requirements necessary to make the request for compensation.
2. CNUC made a substantial contribution to D.05-01-030 in its preparation and presentation of a formal arborist report and in its Rule 35 analyses in subsequent workshops that helped shape a final consensus rule adopted by the Commission.
3. CNUC has not shown that work during claimed additional hours was necessary for its substantial contribution.
4. Requested hourly rates for CNUC are reasonable in that they are comparable to the market rates for persons with similar training and experience.
5. The total of the reasonable compensation is \$40,710.51.

Conclusion of Law

1. CNUC has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation, as adjusted herein, incurred in making a substantial contribution to D.05-01-030.

2. The comment period should be waived, and today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. CN Utility Consulting, LLC (CNUC) is awarded \$40,710.51 as compensation for its substantial contributions to Decision (D.) 05-01-030.

2. Within 30 days of the effective date of this decision, the award to CNUC shall be paid from the intervenor compensation program fund, as described in D.00-01-020. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning May 23, 2005, the 75th day after the filing date of this request for compensation, and continuing until full payment is made.

3. Comment period for today's order is waived.
4. This proceeding is closed.

This order is effective today.

Dated June 30, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

Commissioner John A. Bohn, being necessarily absent,
did not participate.

Compensation Decision Summary Information

Compensation Decision:	D0506054
Contribution Decision(s):	D0501030
Proceeding(s):	R0110001
Author:	ALJ Walker
Payer(s):	Commission

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
CN Utility Consulting, LLC	3/8/05	\$77,723.01	\$40,710.51	No	Failure to make substantial contribution

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Stephen	Cieslewicz	Expert	CN Utility Consulting, LLC	\$175	2002	\$175
Stephen	Cieslewicz	Expert	CN Utility Consulting, LLC	\$175	2003	\$175
Robert	Novembri	Expert	CN Utility Consulting, LLC	\$175	2002	\$175