

Decision 08-04-060

April 24, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Policies, Procedures and Rules for the California Solar Initiative, the Self-Generation Incentive Program and Other Distributed Generation Issues.

Rulemaking 06-03-004
(Filed March 2, 2006)

ORDER DENYING REHEARING OF DECISION (D.) 07-12-007

I. BACKGROUND

In Decision (D.) 07-12-007, we awarded Californians for Renewable Energy (“CARE”) compensation for its substantial contributions to D.06-08-028. In particular, D.07-12-007 awarded CARE \$39,810.98 in compensation. This award was \$25,942.90 less than the \$65,753.88 requested due to reductions to the hours claimed by CARE and adjustments to the requested hourly rates for CARE attorneys. D.07-12-007 awarded CARE’s lead attorney, Mr. Volker, an hourly rate of \$280 per hour rather than the \$500 per hour requested for his year 2006 work.¹

On December 20, 2007, CARE filed an application for rehearing of D.07-12-007. In its rehearing application CARE requests a limited review of D.07-12-007 in that it only seeks to have this Commission “increase the hourly rates assigned to their lead counsel, Stephan C. Volker, to reflect his market rates.” (Rehrg. Application, p.1.) In its rehearing application, CARE also requested oral argument on this issue pursuant to Rule 16.3(a)(iii).

¹ CARE sought a rate of \$235 per hour and was awarded a rate of \$195 per hour for work done in 2006 by attorney Harris.

II. DISCUSSION

A. D.07-12-007 comports with section 1806.

CARE argues that D.07-12-007 fails to conform to Public Utilities Code section 1806.² CARE alleges that D.07-12-007 did not consider the market rates in determining Mr. Volker's hourly rates. CARE argues that section 1806 requires not only that this Commission "consider the market rates paid to persons of comparable training and experience who offer similar services," but that we must base each practitioner's hourly rate on the rate the practitioner commands outside the Commission. Specifically, CARE asserts:

As previously documented by CARE and Mr. Volker, market rates for Mr. Volker, an environmental lawyer for more over 33 years, was at least \$450 in 2006. (Rehrg. Application, p.3.)

Contrary to the CARE's assertion, Public Utilities Code section 1801, et seq., does not require this Commission to determine and award the hourly rate an individual attorney receives based on their practice outside the Commission. To the extent that it asserts that its evidence, uncontroverted or otherwise, is controlling, CARE incorrectly state this Commission's section 1806 obligation.

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. Rather, the statute directs that we "take into consideration the market rates paid to persons of comparable training and experience who offer similar services." (Pub. Util. Code, §1806.) The Commission therefore has discretion in determining the hourly rate. Indeed, when taking into consideration the market rates paid to persons of comparable training and experience who offer similar services, section 1806 directs us to set intervenor rates relative to the rates paid attorneys that practice before this Commission. Specifically, section 1806 directs that:

² All statutory references are to the Public Utilities Code, unless otherwise noted.

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. (Pub. Util. Code, §1806.)

This Commission has properly interpreted and implemented section 1806 through its decisions, including the ones adopting an annual process (see D.05-11-031 and Resolution ALJ-184),³ those setting Mr. Volker's hourly rates (see D.06-04-018, D.06-06-025), and the decision now being challenged.⁴ (See discussion, *infra*.) The rate established for Mr. Volker in D.07-12-007, of \$280 per hour, was the result of escalating the \$270 per hour rate established for Mr. Volker in D.06-04-018. In D.06-04-018 we considered the factors set forth in section 1806, including whether the claimed intervenor fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (See *Opinion Denying Petition for Modification by Californians for Renewable Energy of Decision 06-04-018* [D.06-06-025] *supra*, at p. 1 (slip op.), citing *Opinion Granting Intervenor Compensation* [D.06-04-018], *supra*, at pp. 37, 58-59, & 63 (slip op).)⁵

Further, D.06-04-018 and D.06-06-025 are consistent with D.05-11-031 wherein this Commission adopted rates for advocates based on their specific training and

³ *Rulemaking to Set Hourly Rates for Purposes of Calculating Intervenor Compensation Awards, Pursuant to Public Utilities Code Section 1801 and Following, for Work Performed in Calendar Year 2005* ("2005 Hourly Rate Decision") [D.05-11-031] (2005) ___ Cal.P.U.C.3d ___; Resolution ALJ-184, issued August 25, 2004 [adopting annual process for setting hourly rates to use in calculating compensation awards to intervenors].

⁴ See *Opinion Granting Intervenor Compensation to 280 Corridor Concerned Citizens, Californians for Renewable Energy, and Women's Energy Matters for Substantial Contributions to Decision 04-08-046* ("Opinion Granting Intervenor Compensation") [D.06-04-018] (2006) ___ Cal.P.U.C.3d ____.

⁵ In D. 06-10-023, the Commission denied a request for rehearing of D.06-06-025, which argued among other things that Volker's 2004 rate should be \$400 per hour. (*Order Denying Rehearing of D.06-06-025* [D.06-10-023] (2006) ___ Cal.P.U.C.3d ___.) On January 31, 2007, the California Court of Appeal summarily denied a writ petition, challenging the lawfulness of D.06-06-025 and D.06-10-023 in *Californians for Renewal Energy v. Public Utilities Commission of the State of California*, First Appellate District, Division 1, Case No. A115703. The California Supreme Court denied a petition for review on March 2, 2007.

experience, taking into consideration the compensation of persons with comparable training and experience.⁶ As noted in D.05-11-031:

Here we examine the authorized hourly rates paid to intervenors in 2003 and 2004 in light of the data from utilities on their expenses for representation in our proceedings (new intervenor rates proposed for 2005 are examined in Sections 6 and 7 of this decision). Regarding the hourly rates we currently authorize for intervenors, we find these rates are within the ranges of hourly rates that utilities pay their representatives overall. This is true both for attorneys and experts, at all levels of experience. (*2005 Hourly Rate Decision* [D.05-11-031], *supra*, at pp. 9, 12, 28.)

Based on the data received, D.05-11-031 found that for 2003 and 2004, “all currently authorized intervenor attorney rates fall within the range of utility outside attorney rates” and established rates authorized for work by intervenor attorneys in 2005. (*Id.* at pp. 12 & 15- 16 (slip op.)) In addition to establishing a range of experience based rates and providing for annual increases to attorney hourly rates, D.05-11-031 increased the rates established prior to 2004 to bring them within the current experience based rate range.

The initial hourly rate for CARE’s attorney, Mr. Volker, was established in D.03-01-058.⁷ Consistent with our section 1806 obligation, in D.03-01-058 we considered Mr. Volker’s prior experience in non-Commission proceedings, including his having commanded \$300 per hour in other venues. As noted in *Re: Valencia Water Company – Opinion on Request for Intervenor Compensation* (“*Volker’s Hourly Rate in Valencia Water Company Decision*”) [D.03-01-058] (2003) ___ Cal.P.U.C.3d ___:

Attorney Volker states that he has over 27 years experience as a practicing environmental lawyer in California and has been

⁶ Also, D.06-04-018 is consistent with Resolution ALJ-184, issued August 25, 2004 [adopting an annual process for setting and updating hourly rates for use by intervenors in seeking compensation].

⁷ CARE wrongly claims that Mr. Volker’s prior \$250 per hour rate resulted from an estimate of legal costs contained in a notice of intent to claim compensation submitted by his client prior to D.03-01-058. (Rehrg. Application, p. 1.) However, there is nothing in the record or the Commission rules showing that Mr. Volker or his client were prohibited from requesting a higher rate in that proceeding, so long as the rate was justified.

awarded attorney's fees at the hourly rate of \$300 based on his extensive experience in the field of environmental litigation. We conclude that based on Volker's experience, the requested hourly rate of \$250 for services provided in 2000 and 2001 is reasonable. (*Id.* at p. 7 (slip op.))

The Commission also set hourly rates for Mr. Volker in D.06-04-018 and D.06-06-025, as affirmed by D.06-10-023. After the upward adjustments to Mr. Volker's rate provided for in D.06-06-025, D.07-12-007 provided for a \$280 per hour rate, which falls within the range of rates that have been found to be appropriate for attorneys with a comparable number of years of practice.⁸

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. Consistent with section 1806, this Commission considered market information to determine the appropriate range of hourly rates for individuals with a comparable number of years of experience to Mr. Volker, examined Mr. Volker's evidence of his experience at the Commission and in other venues, and thereby set an hourly rate for Mr. Volker's work at the Commission.⁹

B. CARE's rehearing application constitutes an improper collateral attack on decisions that are now final.

CARE asserts that "[n]either Resolution ALJ-184 nor D.05-11-031 however afforded Mr. Volker any notice, and neither actually considered any evidence of his market rate." (Rehrg. Application, p.8.) Specifically, CARE alleges a due process

⁸ Mr. Volker received an hourly rate of \$270 for 2004.

⁹ That this Commission may weigh general versus Commission specific legal experience differently is consistent with Resolution ALJ-184. As set forth therein, "we expect that advocates with experience before the Commission have a certain level of knowledge about our Rules of Practice and Procedure and filing requirements." (Resolution ALJ-184, issued August 25, 2004, p. 4.)

violation on claims that “the attorney rate setting mechanism established in Resolution ALJ-184 and D.05-11-031 cannot be applied constitutionally to Mr. Volker or to any other parties who were not afforded notice of these proceedings.” (Rehrg. Application, p.10.) CARE’s due process claim is no more than an improper collateral attack on Resolution ALJ-184 and D.05-11-031, two Commission orders that are now final.¹⁰

CARE’s claim’s is also factually inaccurate. As an initial matter CARE’s claim ignores the fact that individual attorneys can get their rate changed in any appropriate proceeding. Moreover, contrary to CARE’s claims, like D.03-01-058, D.07-12-007 considered the evidence presented on Mr. Volker’s hourly rates. (See *Volker’s Hourly Rate in Valencia Water Company Decision* [D.03-01-058], *supra*, at p.7 (slip op.), and D.07-12-007, p.28.) After acknowledging Mr. Volker’s years of experience at this Commission and before other regulatory bodies, D.07-12-007 declined to increase his hourly rate and stated:

[C]ompensation at \$280/hour is within the range for other attorneys of his experience. We will not grant Volker an increase for his work on this particular case because it primarily involved meeting with or editing the work of the other attorneys. (D.07-12-007, p. 28.)

Thus, rather than ignore the evidence presented as CARE claims, we considered it but in the context of the work actually performed in the instant proceeding, were not persuaded by it.

C. The Commission routinely adjusts the established market rates and allows intervenors the opportunity to change their individual hourly rate.

Resolution ALJ-184, D.05-11-031, and subsequent decisions (e.g. D.07-01-009), are part of this Commission’s “annual process for updating hourly rates based

¹⁰ See Pub. Util. Code, §1709, which provides: “In all collateral actions or proceedings, the orders and decisions of the [C]ommission which have become final shall be conclusive.”

on new compensation data and proposed rates from intervenors.” (See Res ALJ-184, issued August 25, 2004, p. 1; *2005 Hourly Rate Decision* [D.05-11-031], *supra*, at p. 3 (slip op.); and *Order Instituting Rulemaking to Set Hourly Rates for Purposes of Calculating Intervenor Compensation Awards Pursuant to Public Utilities Code Section 1801 and Following, for Work Performed in Calendar Year 2006* (“*2007 Hourly Rate Decision*”) [D.07-01-009] p. 2 (slip op.)) (2007) ___ Cal.P.U.C.3d ___) Through this “process” interested parties are afforded the opportunity to introduce evidence going to, but not limited to, the appropriate market rates, practice categories, and cost of living increases. Consistent with this objective, among other things, D.05-11-031 established pay ranges for attorneys and expert witnesses based on years of experience, and found a 3% cost of living increase to be appropriate in some circumstances. (*2005 Hourly Rate Decision* [D.05-11-031], *supra*, at p. 28 (slip op.))

In addition to considering evidence regarding the market rates established for attorney practice groups, this Commission has consistently afforded intervenors the opportunity to modify their individual hourly rate. For example, in addition to adopting an annual process for setting and updating hourly rates for intervenors seeking compensation, Resolution ALJ-184 provides that:

[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 or 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 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. (*Id.* at pp. 2-4, emphasis added.)

Resolution ALJ-184 is thus clear that, in addition to showing good cause for an hourly rate increase, such as a being awarded a higher hourly rate by a court or other regulatory agency, the intervenor requesting the higher rate bears the additional burden of justifying the higher rate requested.

While CARE presented evidence of Mr. Volker's having received a higher award in other venues, it failed to address the standard used to set that rate, and made no attempt to show how the work performed at that hourly rate was comparable to the work done at the Commission for which the hourly rate increase was being sought. Indeed, in addition to noting that Mr. Volker's "work on this particular case primarily involved meeting with or editing the work of other attorneys" D.07-12-007 specifically notes that "CARE's request for compensation fails to mention prior awards to Volker... ." (D.07-12-007, p. 26.) Accordingly, CARE's request for an increase from \$280 to \$500 per hour was properly denied.

D. The request for oral argument is denied.

CARE requested oral argument in its application for rehearing. Rule 16.3(a) of our Rules of Practice and Procedure provides, in relevant part:

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.

These criteria are not exclusive. The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter.

(Code of Regs., tit. 20, §16.3, subd. (a).)

The rehearing applicants seek oral argument on claims that their application for rehearing “presents legal issues of exceptional public importance.” Specifically, CARE asserts that:

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, pp.11-12.)

The merits of the Commission’s current rate setting mechanism was not the subject of D.07-12-007, that mechanism was adopted in D.05-11-031 and Resolution ALJ-184, and updated in subsequent Commission decisions (e.g. D.07-01-009). Oral argument on issues not in the decision being challenge is inappropriate. We will therefore deny CARE’s request for oral argument.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.07-12-007 is hereby denied.
2. The request for oral argument is hereby denied.
3. This proceeding, Rulemaking 06-03-004, is closed.

This order is effective today.

Dated April 24, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners