

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Starving Students, Inc. (Cal T-116, 476), and Ethan Margalith.

Investigation 02-02-005
(Filed February 7, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO STRIKE AND
DENYING ADMISSION OF SUPPLEMENTAL
INVESTIGATION OF KEVIN S. NAKAMURA**

This ruling denies the Motion of Starving Students, Inc. and Ethan Margalith (Starving Students) to Strike Portions of Reply Brief of the Consumer Services Division (CSD). This ruling also denies admission of Kevin S. Nakamura's Supplemental Investigation of Starving Students, Inc., 2001 Gross Operating Revenue into evidence in Phase II of this proceeding.

Starving Students moves to strike the reference in CSD's Phase I reply brief to a September 2000 settlement agreement between Starving Students and the Washington Utilities and Transportation Commission (WUTC settlement agreement), because it was never received into evidence, it is inadmissible under Evidence Code § 1152(a), and evidence of prior conduct cannot be admitted into evidence or used in a subsequent criminal or enforcement proceeding to show bad character or propensity to violate the law. CSD notes in its response to the

motion that CSD also referred to the WUTC settlement agreement in its opening brief, the WUTC settlement agreement was filed as part of this order instituting investigation (OII) and is mentioned in the OII, CSD referenced the settlement agreement to demonstrate that Margalith's health problems did not cause Starving Students' problems, and the evidentiary objections do not apply in this instance. A review of the briefs filed by the parties demonstrates that Starving Students also replied to CSD's reference in its reply brief and noted there that the WUTC settlement agreement was attached to the Investigative Report of Richard Chan and was not entered into evidence in Phase II.

The Commission's objective under Rule 64 of the Commission's Rules of Practice and Procedure is to preserve the substantial rights of the parties.¹ Striking the single reference to the WUTC settlement agreement in CSD's reply brief would not accomplish Starving Students' objectives, since the parties have referred to that agreement several times in their briefs. In addition, striking that reference would not preserve the parties' rights. That objective instead can be accomplished by permitting the additional argument on the WUTC settlement agreement, where both parties have briefed their positions on intended and permissible uses of that agreement, to be considered supplemental briefing. Since this phase of the proceeding was submitted on the receipt of reply briefs on June 6, 2002, by accepting supplemental briefing on the WUTC settlement agreement, Phase I will be deemed submitted on June 28, 2002.

Starving Students also moves to strike portions of CSD's reply brief that cite a settlement agreement between Starving Students and the Commission, that

¹ Rule 64 provides: "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved."

allegedly misrepresent Starving Students' witness Purzycki's testimony and her reliance on an Excel spreadsheet, and that misstate the Commission's Maximum Rate Tariff 4. CSD denies that it misrepresented Purzycki's testimony or misstated Maximum Rate Tariff 4.

The settlement agreement between Starving Students and the Commission is attached as an appendix to Decision 93-07-020, the decision resulting from the 1992 investigation into Starving Students' operations and practices. Reliance on matters contained in Commission decisions is proper. CSD's discussion of Purzycki's testimony is argument and is properly included in briefs. Any discussion of Maximum Rate Tariff 4 is superseded by the tariff, which speaks for itself. Starving Student's motion to strike these portions of CSD's reply brief is denied.

On June 24, 2002, CSD served its supplemental Phase II testimony. Included in the testimony was Kevin S. Nakamura's Supplemental Investigation of Starving Students, Inc.'s 2001 Gross Operating Revenue. The OII includes an allegation, based on CSD's investigation of regulatory fees for 1998, 1999, and 2000, that Starving Students had made false statements of gross operating revenues. The OII designated this issue for Phase I. The scoping memo confirmed that Phase I would address underpayment of regulatory fees, and that Phase II would address consumer services violations. Nakamura's supplemental investigation is outside the scope of Phase II and cannot be admitted into evidence in Phase II.

IT IS RULED that:

1. Starving Students, Inc.'s and Ethan Margalith's Motion to Strike Portions of Reply Brief of the Consumer Services Division (CSD) is denied.

2. The motion to strike and CSD's response will be deemed supplemental briefing.

3. Phase I of this proceeding will be deemed submitted on June 28, 2002.

4. Nakamura's supplemental investigation will not be admitted in Phase II.

Dated July 24, 2002, at San Francisco, California.

/s/ JANICE L. GRAU

Janice L. Grau
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge’s Ruling Denying Motion to Strike and Denying Admission of Supplemental Investigation of Kevin S. Nakamura on all parties of record in this proceeding or their attorneys of record.

Dated July 24, 2002, at San Francisco, California.

/s/ JEANNIE CHANG
Jeannie Chang

N O T I C E

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