

Decision 00-06-082

June 22, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Intervenor Compensation Program.	Rulemaking 97-01-009 (Filed January 13, 1997)
Order Instituting Investigation on the Commission's Intervenor Compensation Program.	Investigation 97-01-010 (Filed January 13, 1997)

**OPINION DENYING REHEARING
OF DECISION 00-02-044**

Decision (D.) 00-02-044 awarded intervenor fees to various parties for their participation in the Commission's rulemaking/investigation (R.97-01-009, I.97-01-010) to consider possible reforms and revisions to the Commission's intervenor compensation program. One of the intervenors, Sun Yung Kim (Kim), was awarded \$15,200 in fees out of a total request for \$64,474. She has filed an application for rehearing of this decision. Other participating intervenors included California Alliance for Utility Safety and Education (CAUSE); Consumers for the Public Interest, Inc. (CPI); The Utility Reform Network (TURN); Spanish Speaking Citizens Foundation, National Council of La Raza, and Oakland Chinese Community Council (collectively referred to as SSCF); George M. Sawaya (Sawaya); and James Weil (Weil).

Kim participated in the rulemaking proceeding as an individual utility customer in response to our effort to have interested persons and organizations discuss changes to the then existing intervenor compensation

program. An Intervenor Compensation Reform Consensus Group (the Consensus Group) was established. It included utility representatives and intervenors. Kim participated in this Group's activities along with CAUSE, TURN and Sawaya. After it proposed several principles for reformation of the intervenor compensation program, the formal rulemaking proceeding was commenced. Although no hearings were held, three rounds of comments and replies were received. Comments and replies to comments on the draft decision were also filed. Then we issued D.98-04-059, which adopted revisions to the compensation program. Further modifications were made on rehearing by D.99-02-039.

In D.00-02-044 (the Decision) we considered the intervenors requests for fees. Each intervenor complied with the procedural requirements set forth in Public Utilities Code Secs. 1801-1812.¹ The amount of fees claimed by each intervenor party and the amount awarded in the Decision are set out below:

<u>Customer</u>	<u>Request</u>	<u>Award</u>
CAUSE	20,543.44	10,498
CPI	29,987.73	5,180
Kim	64,474.01	15,200
SSCF	30,500.34	22,172
Sawaya	8,536	8,289
TURN	51,724	51,724
Weil	15,979.22	15,226
Total	221,745.44	128,289

(D.00-02-044, page 60)

Kim filed an application for rehearing on March 17, 2000. The application fails to allege any specific legal error, but asserts that her request has

¹ All statutory references are to the Public Utilities Code.

been judged too harshly, and that the large disallowance involved in her fee award discourages public participation in Commission proceedings and renders the statutes "obsolete".

First, Kim disputes the hourly rate of \$100 allowed compared to her request for \$110 per hour. She maintains that the request for \$110 is reasonable in light of the fact that she was awarded \$100 per hour in an earlier proceeding relating to electromagnetic fields (D.96-07-010).

Second, she also contends that her opposition set forth in her comments to the utilities proposal for an annual funding cap constituted a substantial contribution to the Decision, since it rejected the proposal. She also refers to her oral comments that compensation awards should come from the largest utility companies. She maintains that this position was adopted in D.00-01-020; and that consequently the substantial contribution requirement set out in P.U. Code Sec. 1802 (h) has been met for this issue with the result that she should be awarded additional fees.

Third, Kim disagrees with the number of hours allowed for compensation by the Decision. Kim claimed 233 hours for work on Consensus Group activities and 312 hours for work during the actual rulemaking proceeding. After agreeing that 28 hours should be deleted in the time devoted to the formal proceeding, the application states that the allowance of fees for 20 hours for her participation in the formal proceeding is not fair and does not constitute a "level playing field" when compared to the awards granted to other intervenors.

We have reviewed all of the allegations in the application for rehearing and are of the opinion that insufficient grounds for granting rehearing have been shown. We further discuss this conclusion below.

The intervenor fee program is established by P.U. Code Secs. 1801-1812. Section 1803 directs the Commission to award reasonable fees and costs to any

customer who makes a substantial contribution to the Commission's decision and whose participation without fees would impose a significant financial hardship. Once an intervenor has established eligibility for an award of fees, the Commission may award all or part of reasonable advocate or expert witness fees (Section 1802(a)). Before an intervenor may receive fees, the Commission must determine that the intervenor's presentation and participation constituted a "substantial contribution" to the proceeding. (Section 1801.3(d)) This term is defined in Section 1802(h) to mean that the presentation substantially assisted the Commission in making its decision because the decision adopted in whole or in part one or more the factual, or legal, or policy contentions advanced by the intervenor. However, the Legislature has further provided that the Commission is to avoid awarding fees for unproductive, unnecessary or duplicative presentations of interests that are adequately represented. (Section 1801.3(f)) On the other hand, fees may be awarded for participation that "materially supplements or complements" the presentation of another party, or the Commission staff's presentation, if the intervenor's participation makes a substantial contribution to the decision. (Section 1802.5)

In evaluating the merits of Kim's three allegations that the Decision's fee award to her is unreasonable, it must be recognized that these statutes invest the Commission with substantial discretion in determining what level of fees are reasonable. This is a judgement decision based on the evaluation of the facts surrounding the particular intervenor's participation.

Kim was one of eight intervenors in this proceeding. The proceeding involved two phases: the first consisted of discussions and activities of the Consensus Group, and the second, the actual rulemaking/investigation. No hearings were held. Participation consisted of attending meetings and filing comments.

Of the eight fee requests filed, Kim's was the largest - \$64,474. Her award of \$15,200 was the fourth largest, just \$26 less than the third largest

(\$15,226 to Weil). The largest fee awards went to two customer representative organizations, TURN and SSCF. With this background, Kim's three allegations will be considered in order.

Hourly Rate

Kim requested an hourly rate of \$110. She objects to the award of \$100 per hour on the ground that since she was awarded \$100 per hour in the electromagnetic fields proceeding resolved in 1996, her request for \$110 is reasonable. She also refers to paragraph 2 of her April, 1998 comments. This paragraph recommends legislation to establish public funding for interim funding for intervenors. It does not specifically discuss hourly rates for intervenors, or provide any basis supporting a \$110 rate.

We conclude that this contention lacks merit. The Decision notes that the rate of compensation must take into consideration the market rates paid to persons of comparable training and experience who offer similar services (Section 1806; Decision p. 36-38). It applies the \$100 rate to work provided by non-attorneys representing CAUSE, and to CPI witnesses Knecht and Czahar, each of whom had been awarded higher hourly rates in earlier proceedings. Finally, the Decision points out that the rate applied to Kim's hours worked in the Electrical Magnetic Fields proceeding was comparable to others with similar technical training. This is also true in this proceeding, given the same rate is applied to the CAUSE and CPI witnesses, as well as to Kim.

There is no showing of any undue preference to other intervenor witnesses. Kim does not provide any reasons why her rate should be increased by \$10 per hour. In our opinion, the application of the \$100 rate, which was applied generally to non-experts, falls well within the zone of reasonableness.

Significant Contribution

Applicant objects to the Decision's conclusion that she made a substantial contribution in only three aspects of the final decision in the proceeding: participation in the Consensus Group which contributed to the adoption of some of the reform principles that the group proposed; participation as an interviewee for preparation of the Alkon Report (which evolved out of the Consensus Group); and her comments on the usefulness of up-front and interim funding proposals for individual customer intervenors.

Kim maintains that her objection in comments to the utilities' proposal for an intervenor funding cap constituted substantial contribution to the result, since the proposal was rejected; and that she recommended in comments that the largest utilities should be the source of compensation awards for intervenors.

Because Kim asserted that the biggest utilities should pay intervenor fees, she claims that she made a substantial contribution to D.00-01-020 (Interim Opinion on Payment of Intervenor Compensation Awards), dated January 6, 2000. Although this decision expressly refers to comments filed by TURN and the California Association of Competitive Telecommunications Companies, it does not discuss any statements or participation by Kim. The decision modified D.98-04-059, to require in quasi-legislative rulemaking proceedings affecting an entire utility industry that all utilities in the affected industry pay any compensation awards. It also announces our intent to establish an intervenor compensation program fund annually for such rulemakings out of utility user fees. We do not find any contribution to this decision by Kim's assertion in 1997 that only the biggest utilities should pay such fees.

Furthermore, the Decision points out, that Kim's comments addressed issues that did not involve a clear, identifiable contribution by her.

Mere objection in comments without persuasive analysis, reasons, and discussion cannot reasonably be transmuted to constitute a substantial contribution to the final determination. If mere statement of objection or position to a proposal constitutes a substantial contribution to a Commission's decision rejecting the proposal, the door would be opened to almost unlimited awards of compensation.

Hours Allowed

Out of a total claim of 539.5 hours for her activities (233.15 for the Consensus Group and 312.38 for the formal proceeding) Kim was granted fees for 112 hours for work on the Consensus Group and 20 hours for the proceeding. She did not allocate her time by issue because she considered the issues in the proceeding to overlap each other. Her request also failed to explain how the work categories "issues addressed" and "number of issues" differ from each other. The Decision notes that Kim assigned only 30 minutes for her Alkon Report interview. It finds that after completion of a review of her detailed time records, her total hours requested "are excessive, unproductive and inefficient"; and it describes specific excessive time claims applicable to efforts related to both the Consensus Group and the formal proceeding. (Decision, p. 46-8) On the other hand, the Decision grants an increase from 60 to 120 in hours, allowed from the number initially approved in the draft decision because Kim made a convincing argument in comments to the draft decision regarding her Consensus Group participation. Similarly, it doubled her allowed miscellaneous costs from \$1000 to \$2000 after she submitted cost records. It also allowed some extra time in recognition that English is not her primary language.

A review of Kim's comments, her application for rehearing, and the Decision leads to the conclusion that the hours awarded are reasonable, if not perhaps generous. The award of 112 hours for participation in the Consensus Group is only 11 hours less than the 123 allowed TURN, whose participation the Decision concludes was more active and productive than Kim's. (Decision p. 47)

The application for rehearing fails to present any explanation or reasons why her time submittal should be deemed reasonable. It only asserts, without any supporting facts, that other intervenors received preferential treatment. It also concedes that some calculation errors were made in her initial submittal of total hours. This further undermines the creditability of her claim of unreasonable or unfair treatment.

Likewise, the 20 hours allowed Kim for the formal proceeding also appear to be reasonable. There were no hearings, and therefore no presentation of witnesses or cross-examination. The comments submitted by Kim are short. They mostly consist of statements of position. Several of the proposals recommended by Kim, such as upfront funding for intervenors, institution of a short service list for proceedings, and changing the statutory requirement of substantial contribution to "good faith participation", were not adopted. Although her application for rehearing recognizes that this award is largely in the presiding officer's discretion, she asserts, without presenting any supporting explanation, that such a small number of hours may violate due process. No information, reasons or argument is presented which supports a conclusion that the Decision is so out of line with the level of participation made by her that the fees awarded are unconscionably or outrageously low. Therefore, we conclude that the Decision falls within the zone of reasonableness.

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Accordingly, we conclude that the application for rehearing must be denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.00-02-044 is denied.
2. This proceeding is closed.

This order is effective today.

Dated June 22, 2000, at San Francisco, California.

HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners

President Loretta M. Lynch
being necessarily absent,
did not participate.