Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for Approval of a Power Purchase Agreement under PUHCA Section 32(k) Between the Utility and a Wholly-owned Subsidiary and for Authority to Recover the Costs of Such Power Purchase Agreement in Rates.	Application 03-07-032 (Filed July 21, 2003)

OPINION GRANTING INTERVENOR COMPENSATION TO THE UTILITY REFORM NETWORK FOR SUBSTANTIAL CONTRIBUTIONS TO DECISION 03-12-059

This decision awards The Utility Reform Network (TURN) $ 84,824.72 in compensation for its contribution to Decision (D.) 03-12-059.

Background

In an expedited proceeding commencing on July 21, 2003, Southern California Edison Company (Edison) requested the Commission's permission to acquire Mountainview Power Company, LLC, as a wholly -owned subsidiary of Edison. At the time, this company was a subsidiary of Sequoia Generating Company, LLC. Mountainview Power Company had rights to build a combined-cycle gas turbine generating station in Redlands, California. Under an option agreement expiring on February 29, 2004, Edison sought to acquire Mountainview Power Company as a wholly owned utility subsidiary and to enter into a power purchase agreement (PPA) for the electricity from the new power plant. The PPA was proposed as a cost-based contract providing for recovery of investment, fixed and variable costs, and a regulated rate of return

over the 30-year term of the contract to be reviewed and approved by the Federal Energy Regulatory Commission (FERC), rather than this Commission.

Because of the short period to acquire Mountainview, Edison did not seek a certificate of public convenience and necessity (CPCN) from the Commission and did not issue a request for proposal seeking alternative bids for electricity anticipated from the new plant.

Eight entities protested Edison's application. The assigned Commissioner issued a Scoping Memo on September 16, 2003; evidentiary hearings were held October 14-24, 2003. On December 18, 2003, in D.03-12-059, the Commission authorized Edison to execute the PPA for the electricity output of the Mountainview Power Plant so long as the agreement was also approved by FERC without rate-changing modifications. The Commission also authorized Edison to acquire Mountainview Power Company as a wholly-owned subsidiary and to acquire the Mountainview Power Plant as a utility-owned generation facility. With the issuance of this decision, the Commission closed the proceeding.

TURN participated in prehearing proceedings and the briefing of selected issues, in the evidentiary hearing, and in post-hearing briefing. TURN's primary role in the proceeding was to propose limitations and modifications of the PPA. In D.03-12-059, the Commission adopted almost all of TURN's recommendations.

Requirements for Awards of Compensation

The intervenor compensation program, enacted by the Legislature 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. The statute provides

that the utility may adjust its rates to collect the amount awarded from its ratepayers.

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 (PHC) (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.)

Because no preliminary ruling was issued on eligibility, we discuss each of these items in the following.

Procedural Requirements

The PHC in this matter was held on August 13, 2003. TURN did not file a timely NOI, but the organization did file a motion for acceptance of a late-filed NOI on October 10, 2003, which the Commission granted in D.03-12-059. Neither

the administrative law judge (ALJ) nor the Commission issued a preliminary ruling at the time on TURN's eligibility for compensation. In its NOI, TURN addressed its anticipated scope of participation, estimated cost of participation, customer status, and significant financial hardship.

Customer Status

TURN states that it is a "customer" within the meaning of the intervenor compensation statute, and the organization has previously submitted the relevant portion of its articles of incorporation (which have not changed) to the Commission in proceedings Application (A.) 98-02-017 and A.99-12-024. TURN indicates that it has approximately 30,000 dues-paying members; and, although it does not survey its members, TURN believes that the vast majority are residential utility customers. Thus, TURN argues that, while other organizations participated in this proceeding, it is the sole representative of the residential customer class. TURN is a Category 3 customer.

Timeliness of Request for Compensation

TURN formally filed its actual request for compensation on February 23, 2004, within the required 60 days of D.03-12-059 being issued (the decision was mailed on December 31, 2003).

Significant Financial Hardship

In its NOI, TURN asserted that its participation in this proceeding would pose significant financial hardship. An intervenor seeking compensation must show that, without undue hardship, it cannot pay the reasonable costs of effective participation in the proceeding. In the case of groups or organizations, significant financial hardship is demonstrated by showing that the economic interest of individual members is small compared to the overall costs of effective participation. (Pub. Util. Code § 1802(g).) Such a finding is normally made in

the ALJ's preliminary ruling as to whether the customer will be eligible for compensation (§ 1804(b)).

A determination of significant financial hardship was made by ALJ Bemesderfer in A.02-07-050 on March 25, 2003. Since this current proceeding commenced within one year of the date of that determination, TURN is entitled to a rebuttable presumption of significant financial hardship in this proceeding. No objection has been made to TURN's NOI or claim for compensation, so the presumption of significant financial hardship remains.

Summary of Procedural Issues

TURN has satisfied all the procedural requirements necessary to make its request for compensation. We now examine whether the organization made a substantial contribution to the proceeding.

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) & 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.[1]

Even where the Commission does 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.[2] With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding.

TURN participated in prehearing procedures, the evidentiary hearing, and post-hearing briefing. TURN indicates that its goal in participating in this proceeding was to help the Commission critically evaluate Edison's application and to offer recommendations so that the proposed project could be improved to the benefit of ratepayers. After participating in the evidential hearing, TURN offered a series of 14 major recommendations in its opening brief. As TURN documents in its compensation request, the Commission ultimately adopted 13 of these recommendations (12 explicitly and one implicitly). These adopted recommendations are set forth in the following table.

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[1] D.98-04-059, 79 CPUC 2d, 628 at 653.

[2] *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).

Recommendation	Commission Action
1- Any changes made by FERC to the PPA should be subject to subsequent CPUC review and approval prior to Edison accepting any modifications that have potential rate impacts.	Adopted in D.03-12-059 at Ordering Paragraph 2.
2- Direct Edison to modify the PPA to eliminate the explicit *Mobile-Sierra* waiver contained in Section 16.01 of the PPA and thereby remove the potential for Mountainview Power Company to seek unilateral rate changes at FERC under a lenient standard of review.	Edison amended the PPA to remove this waiver. *Id.* at 25.
3- In order to protect bundled ratepayers from the risk of stranded resource commitments resulting from the combination of potential new direct access and a restart of the Mohave plant, determine that all costs associated with Mountainview should become the financial responsibility of all customers currently ineligible for direct access for at least the first ten years.	Adopted. *Id.* at 35.
4- Due to the significant share of total costs associated with the acquisition and construction of Mountainview that are fixed, reduce the supplemental contingency by 50% in order to limit incentives for overspending.	Also concerned about potential cost over-runs, the Commission set a 5% cost over-run contingency rather than the more strict limit urged by TURN. *Id.* at 49.
5- Amend the PPA to require Commission pre-approval, on a relatively expedited timeline, in the event that Mountainview Power Company seeks to make any capital expenditure references in section 8.09 of the PPA in excess of $10 million unless emergency conditions require immediate action.	Adopted. *Id.* at 52.
6- Direct Edison to compile a summary of all cost categories and forecasted amounts that would be recoverable from ratepayers for Mountainview and entered both into the record of the proceeding and appended to the PPA as part of Edison's FERC filing.	Adopted and set forth as Appendix B to D.03-12-059
7- Increase the availability targets in the PPA (tied to incentive payments) by 2% for both summer and winter months in order to reflect terms in comparable PPAs and to comport with the Mountainview Power Company's own expectations regarding the performance of Mountainview.	Adopted. *Id.* at 51.
8- Clarify the heat rate targets in Section 12.01 of the PPA and establish a relationship between future heat rate targets and betterments.	Adopted. *Id.* at 24.

Recommendation	Commission Action
9- Deny Edison's request for rate recovery of its option payments to Sequoia if the acquisition is not approved or consummated.	Adopted. *Id.* at 55.
10- Accept Edison's late filed proposals for modifying PPA Section 6.03(a) (Environmental Penalties) and Section 7.02 (Fuel Purchases by Mountainview Power Company).	Adopted. *Id.* at 24.
11- Codify Edison's proposed treatment of cash working capital in order to limit disputes in the next general rate case.	Adopted. *Id.* at 55.
12- Conclude that the Affiliate Transaction Rules apply to the relationship between Edison and Mountainview Power Company but agree to a one-time waiver for the application of those rules.	Granted a one-time waiver after finding that it is in the public interest. *Id.* at 29.
13- Request that the Commission declare that the ownership arrangement proposed by Edison represents a one-time deal and will not be considered in any future proceeding.	Did not explicitly adopt this statement but indicated that "we find ourselves in the same place as TURN: We prefer a straight utility-owned generation project, and argue that there are 'vexing weaknesses' with the PPA." *Id.* at 22.
14- Levelize recovery of Mountainview's fixed costs over the first ten years of operation in order to minimize the early-year rate impacts associated with traditional straight-line depreciation.	Shared concerns about cost to ratepayers but determined that early-year impacts would not be significant. *Id.* at 49.

The Commission has awarded full compensation even where the intervenor's positions were not adopted in full, especially in proceedings with a broad scope. *See, e.g.*, D.98-04-028, 79 CPUC 2d 570, 573-574. Here, however, TURN achieved a high level of success on the issues it raised. In the only area where we did not explicitly adopt TURN's position in whole or in part, we benefited from TURN's participation.

As described above, TURN made a substantial contribution to this proceeding. We now determine whether TURN's compensation request is reasonable.

Reasonableness of Requested Compensation

TURN requests $84,824.72 for its participation in this proceeding, itemized as follows:

Attorneys Fees:			$53,153.13
Matthew Freedman	155.25 hours @ $250	$38,812.50	
	6.75 hours @ $125	843.75	
Michel P. Florio	22.50 hours @ $435	9,787.50	
Daniel Edington	14.00 hours @ $190	2,660.00	
Robert Finklestein	1.25 hours @ $365	456.25	
	3.25 hours @ $182.50	593.13	
Expert Witness Costs:			29,893.75
JBS Energy, Inc.			
William Marcus	27.91 hours @ $185	5,163.35	
Expenses		58.80	
Woodruff Expert Services			
Kevin Woodruff	122.5 hours @ $200	24,500.00	
Expenses		171.60	
Other Costs:			1,777.84
Photocopying expense		1,503.25	
Postage		133.67	
Facsimile/Phone/FedEx		32.92	
Legal Research (LEXIS)		108.00	
TOTAL CLAIM			$84,824.72

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.

Also, D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of a customer's participation should bear a reasonable relationship to the benefits realized through their participation. This showing assists us in determining the overall reasonableness of the request.

TURN documented its claimed hours by presenting a daily breakdown of the hours of its attorneys, accompanied by a brief description of each activity.

The hourly breakdown reasonably supports the claim for total hours.[3] Given the scope of TURN's participation and the work products prepared, the number of claimed hours is reasonable. Since we find that TURN's efforts made a substantial contribution to the decision, we need not exclude from TURN's award any compensation for specific issues. We note, however, that TURN did generally document its work by issue (*i.e.*, cost-effectiveness, jurisdictional and affiliate transaction issues, and specific terms of the PPA). Had we needed to eliminate certain issues from this award, TURN's breakdown would have facilitated the process.

Although we adopted almost all of TURN's recommendations, it is difficult to attribute specific quantifiable benefits to TURN's participation. Over the life of the project, however, net financial savings in many areas recommended by TURN will most likely exceed the intervenor compensation claim, *e.g.*, reduced capital cost contingency, higher operating availability benchmark, clarification of heat rate incentive to prevent unnecessary ratepayer costs, measure to reduce future cost escalation, provision to prevent the pass-through to ratepayers of option payments in the event the transaction was not consummated, and a provision to protect bundled service customers from the risk of stranded costs. Thus, we find that TURN's efforts have been productive.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. In this proceeding, TURN used four attorneys and two expert witnesses. Of the

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[3] TURN separated the hours associated with the preparation of this compensation request and (consistent with Commission practice) requests compensation at half the usual hourly rate for this time.

attorneys, three of the four persons have had their hourly rates recently approved by the Commission, and TURN asks that these rates be applied to the work they conducted in this proceeding. TURN requests an hourly rate of $435 for Michel Florio, which is the rate approved by the Commission for his 2003 work in D.04-02-017, and $365 for Robert Finkelstein, which is the rate approved by the Commission for his 2003 work in D.03-08-041. Both these rates remain reasonable.

In D.04-02-017, the Commission approved an hourly rate of $225 for Matthew Freedman for legal work in 2003. Due to his extensive and skillful work in this proceeding, also concluded in 2003, TURN takes the unusual step of requesting an increase in Freedman's hourly rate to $250. TURN justifies this request by documenting Freedman's role as the TURN lead attorney in this proceeding, the proportion of time (80%) he spent on the case as compared to the other TURN lawyers, his substantive work prior to joining TURN in 2000 (Senior Energy Policy Analyst for Public Citizen's Critical Mass Energy Project, Policy Analyst for Massachusetts Public Interest Group), and his increasing responsibilities in representing TURN in Commission proceedings. Additionally, TURN offers the *Of Counsel* Annual Survey of the Nation's 700 Largest Law Firms 2002/2003. For San Francisco Bay and Southern California law firms that responded to the survey, the average associate's time was billed at $253 per hour. Since this proceeding was filed in the last half of 2003 and most of the legal work was performed during the last quarter, we believe it is appropriate to make an end-of-year 2003 adjustment to Freedman's hourly rate. We find that the hourly rate of $250 is reasonable. Since this sizeable increase is determined for work preformed late in 2003, we expect that if any 2004 hourly rate increase is requested it will be modest by comparison.

The Commission has not previously approved an hourly rate for Daniel Edington, who is a recent law school graduate (2002) and joined TURN in 2003. TURN requests an hourly rate of $190. Using the same *Of Counsel* survey, TURN argues that the average billing rate at major California law firms for recent graduates was $176 for 2002/2003. This is generally consistent with our prior decisions for new attorneys awarding compensation at between $165-$175 per hour (*see, e.g.,* D.02-05-05, D.03-01-075). TURN asks that this amount be increased by 7.5% to justify a $190 hourly rate since the *Of Counsel* survey was based on January 2002 data. While also noting that we previously adopted hourly rates of $180 (2000; D.02-09-005) to $190 (2001; D.02-10-056) for Freedman shortly after he completed law school, we conclude that $190 per hour is reasonable compensation for Edington based on market information.

TURN also claims compensation for two expert witnesses: William Marcus of JBS Energy and Kevin Woodruff of Woodruff Expert Services. We have recently awarded compensation at $185 per hour for Marcus' services in D.03-10-011. This rate is reasonable in this proceeding.

We have not previously awarded compensation for Kevin Woodruff. In evaluating the proper hourly rate, we look to the experience of a particular expert, relevant market rate data, and the rates awarded to peers practicing before the Commission. TURN seeks $200 per hour. Woodruff graduated from the University of California, Berkeley, with a degree in economics in 1976. He obtained a MBA from California State University, Sacramento, in 1990. He has worked on the economic analysis of energy policy, and his expertise is in power market analysis. He worked for 15 years for Henwood Energy Services, a national firm in power market analysis. He started his own firm in 2002. TURN justifies its hourly rate claim by arguing that this is the rate that Woodruff

charges other clients and that the proposed rate falls within the approved hourly rate range for other experts such as William Marcus ($185; TURN argues that this rate is below market) and James Weil ($220, beginning in 2000). For comparison purposes, we note that we awarded an hourly rate of $190 (2000) to a policy expert with more education, some experience with the Commission, and less involvement in the pertinent proceeding than Woodruff had here (*see* D.02-11-024) (Boothe).

Woodruff's role in the development of TURN's presentation is demonstrated by his billing records. From September 17 to December 15, 2003, Woodruff performed some work almost every day on this proceeding. He helped the attorneys prepare for the examination of witnesses and advised on the briefs. He testified at the evidentiary hearing. Woodruff undoubtedly shares much of the credit for TURN's constructive role in this proceeding. However, Woodruff lacks the experience of appearing before the Commission shared by Marcus and Weil, and TURN does not indicate whether he has been an expert witness in other court or contested administrative proceedings. Given Woodruff's role in this proceeding, his education and experience, and the rates awarded to experts of similar experience, we find his circumstance most similar to Boothe. Since we awarded Boothe $190 for work done in 2000, conservative escalation results in an hourly rate of $200 for Woodruff's work in 2003. Thus, we award that rate.

The incidental costs for TURN's participation in this proceeding, including reproduction, facsimile, and other office costs, are modest, well-documented, and reasonable.

Award

As set forth in the table below, we award TURN $84,824.72.

Attorneys Fees:			$53,153.13
Matthew Freedman	155.25 hours @ $250	$38,812.50	
	6.75 hours @ $125	843.75	
Michel P. Florio	22.50 hours @ $435	9,787.50	
Daniel Edington	14.00 hours @ $190	2,660.00	
Robert Finklestein	1.25 hours @ $365	456.25	
	3.25 hours @ $182.50	593.13	
Expert Witness Costs:			29,893.75
JBS Energy, Inc.			
William Marcus	27.91 hours @ $185	5,163.35	
Expenses		58.80	
Woodruff Expert Services			
Kevin Woodruff	122.5 hours @ $195	24,500.00	
Expenses		171.60	
Other Costs:			1,777.84
Photocopying expense		1,503.25	
Postage		133.67	
Facsimile/Phone/FedEx		32.92	
Legal Research (LEXIS)		108.00	
TOTAL CLAIM			$84,824.72

Consistent with previous Commission decisions, we will 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 TURN filed its compensation request and continuing until full payment of the award is made.

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. TURN's records should identify specific issues for which it requested compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of our Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner. Carol A. Brown is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN represents consumers, customers, or subscribers of Edison, a utility regulated by the Commission.

2. TURN filed a motion for acceptance of a late-filed Notice of Intent to claim compensation on October 10, 2003. The Commission approved the filing of the notice in D.03-12-059 (December 18, 2003), but neither the ALJ nor the Commission ruled at that time on TURN's eligibility to claim intervenor compensation.

3. In his ruling dated March 25, 2003, in proceeding A.02-07-050, ALJ Bemesderfer determined that participation in that proceeding would pose a significant financial hardship to TURN.

4. TURN has previously provided the Commission with all other information necessary to be eligible to claim intervenor compensation.

5. TURN filed its request for compensation on February 23, 2003.

6. No objection has been made to TURN's NOI or claim.

7. TURN made a substantial contribution to D.03-12-059.

8. TURN's requested hourly rates for attorneys and experts are reasonable when compared to the market rates for persons with similar training and experience.

9. The total of these reasonable fees is $84,824.72.

Conclusions of Law

1. Since this proceeding commenced within one year of ALJ Bemesderfer's determination that participation in a Commission proceeding would pose a significant financial hardship to the organization, TURN's participation in this proceeding is also presumed to pose a significant financial hardship to the organization.

2. TURN 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 fees and expenses incurred in making substantial contributions to D.03-12-059.

3. Today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded $84,824.72 as compensation for its substantial contributions to Decision 03-12-059.

2. Within 30 days of the effective date of this decision, Southern California Edison Company (Edison) shall pay this award to TURN.

3. Edison shall also pay interest on the award beginning May 8, 2004, at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, and continuing until full payment is made.

4. The comment period for today's decision is waived.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision:	
Contribution Decision(s):	D0312059
Proceeding(s):	A0307032
Author:	ALJ Brown
Payer(s):	Southern California Edison Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
The Utility Reform Network (TURN)	2/23/04	$84,824.72	$84,824.72	No	

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Matthew	Freedman	Attorney	The Utility Reform Network	$250	2003	$250
Michel P.	Florio	Attorney	The Utility Reform Network	$435	2003	$435
Daniel	Edington	Attorney	The Utility Reform Network	$190	2003	$190
Robert	Finklestein	Attorney	The Utility Reform Network	$365	2003	$365
William	Marcus	Economist	The Utility Reform Network	$185	2003	$185
Kevin	Woodruff	Economist	The Utility Reform Network	$200	2003	$200