

Decision 03-05-029 May 8, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
to Revise its Electrical Marginal Costs, Revenue
Allocation and Rates at the End of the Rate
Freeze.

Application 99-03-014
(Filed March 5, 1999)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision awards The Utility Reform Network (TURN) \$83,780.68 for its contribution to Decision (D.) 03-01-012.

1. Background

Pacific Gas and Electric Company (PG&E) filed this application in March 1999 to address issues relating to rate design and the allocation of costs to various customer classes. The application reached the point where intervenors, including TURN, had submitted testimony. Subsequently, the wholesale electricity market became unstable as wholesale prices skyrocketed and system reliability faltered. In response, the Commission suspended the proceeding in order to turn its full attention to the energy crisis. It ultimately found that the proposals submitted in the proceeding were out of date and accordingly dismissed the application in D.03-01-012.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812. (Unless otherwise noted, all statutory citations are to the Public

Utilities Code.) Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference (PHC) or by a date established by the Commission. The NOI must present information regarding the nature and extent of the customer's¹ planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility. TURN filed a timely NOI on May 25, 1999. An Administrative Law Judge's (ALJ) ruling dated June 9, 1999, found TURN eligible in this proceeding.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. TURN timely filed its request for an award of compensation on March 18, 2003. No party protested the request.

Under § 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding."

Section 1802(h) states that "substantial contribution" means that,

"in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention

¹ To be eligible for compensation, an intervenor must be a customer as defined by § 1802(b). In D.98-04-059 (footnote 14) we affirmed that compensation be proffered only to customers whose participation arises directly from their interests as customers. (*See* D.88-12-034, D.92-04-051, and D.96-09-040.)

or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.”

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

3. Substantial Contribution to Resolution of Issues

As provided in § 1802(h), a party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision, or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted. A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.²

² The Commission has provided compensation even when the position advanced by the intervenor is rejected. *See* D.89-03-063 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved). (*See also*, D.89-09-103, order modifying D.89-03-063.) (In certain exceptional circumstances, the Commission may find that a party has made a substantial contribution in the absence of the adoption of any of its recommendations. Such a liberalized standard should be utilized only in cases where a strong public policy exists to encourage intervenor participation because of factors not present in the usual Commission proceeding. These factors must include 1) an extraordinarily complex proceeding, and 2) a case of unusual importance. Additionally, the Commission may consider the presence of a proposed settlement.)

D.03-01-012 dismissed PG&E's application without prejudice after finding that intervening circumstances had made much of the proceeding obsolete. TURN had recommended the dismissal of the application.

Notwithstanding this simple procedural contribution, TURN submits that we should also consider its request more broadly:

“Where, as here, an intervenor eligible for compensation acted reasonably throughout its participation in a Commission proceeding, and the unusual outcome of that proceeding was determined by extenuating circumstances having nothing to do with the proceeding, the Commission should award the intervenor compensation for its reasonable advocate's fees, reasonable expert witness fees, and other reasonable cost of participation.”

D.03-01-012 does not discuss or resolve the substantive issues that TURN addressed in the proceeding. Thus, TURN's work on substantive issues did not assist the Commission in making its procedural decision. TURN acknowledges this, but observes that the Commission has broad discretion under § 1802(h) to determine whether an intervenor has substantially assisted the Commission in making its order or decision. TURN also points to the legislative intent, expressed in § 1801.3(b), that the Commission should administer the intervenor compensation program so as to encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process. TURN believes that the Commission should exercise this discretion and fulfill the legislative intent by finding that a substantial contribution has been made.

In lieu of the typical review, TURN suggests that we weigh several factors in considering whether a substantial contribution has been made:

- The circumstances that led to the proceeding's conclusion;
- The appropriateness of the intervenors' participation in the underlying proceeding;

- The reasonableness of the intervenor's participation in the underlying proceeding; and
- Where available, the intervenor's past record of demonstrating a substantial contribution to Commission decisions on similar subjects.

TURN points out that the Commission adopted this test in substantially similar circumstances when it granted TURN compensation in D.02-08-061. That decision found that TURN should receive compensation for work in a proceeding addressing Southern California Edison Company's rate design. There, as here, we dismissed the proceeding without considering matters of substance in recognition of California's electricity crisis. There, as here, those circumstances could not have been foreseen or affected by TURN or any other party at the time that TURN commenced its participation. There, as here, TURN acted responsibly in assuming the application would not be dismissed and submitted testimony accordingly. TURN committed significant resources with a reasonable expectation that successful participation would eventually entitle it to receive an award of compensation.

Consistent with our findings in D.02-08-061, we will not deny TURN compensation in this proceeding where circumstances beyond its control led to dismissal of the application. We caution that the intervenor compensation program is not structured to ensure an intervenor will receive reimbursement for its costs of participation. Each time an intervenor such as TURN decides to participate in a given proceeding, it assumes the risk that its costs of participation therein will not be fully reimbursed. That risk is a part of the intervenor compensation program and is appropriate to ensure that the intervenor's conduct is calculated to assist the Commission in carrying out its public duties. However, we see no reason to increase the intervenor's risk by

denying any compensation in a proceeding that is prematurely terminated for reasons that are not reasonably foreseen and are beyond its control. Based on the fact that TURN's procedural recommendation to dismiss this application was adopted, and taking into account the circumstances that led to the dismissal, we find that TURN made a substantial contribution to D.03-01-012.

4. The Reasonableness of Requested Compensation

TURN requested \$83,780.68 as follows:

Attorney Fees

Robert Finkelstein	34.25 hours @ \$280/hour	= \$9,590.00
	9.5 hours @ \$265/hour	= \$5,035.00
	1.75 hours @ \$250/hour	= \$437.50
	9.75 hours @ \$170/hour	= \$1,657.50
Michel P. Florio	5.0 hours @ \$300/hour	= \$1,500.00
Marcel Hawiger	33.3 hours @ \$185/hour	= \$6,160.50
	Subtotal	= \$24,380.50

Expert Witness Costs—JBS Energy, Inc.

Phase 2

William Marcus	113.24 hours @ \$160/hour	= \$18,118.40
	36.17 hours @ \$150/hour	= \$5,425.50
Gayatri Schilberg	2.57 hours @ \$115/hour	= \$295.55
	4.42 hours @ \$110/hour	= \$486.20
Jeff Nahigian	105.25 hours @ \$100/hour	= \$10,525.00
	81.25 hours @ \$95/hour	= \$7,718.75
Greg Ruszovan	90.2 hours @ \$100/hour	= \$9,020.00
	24.4 hours @ \$95/hour	= \$2,318.00
Ron Faubion	4.5 hours @ \$45/hour	= \$202.50
Expenses		= \$119.50
	Phase 2 JBS Subtotal	= \$54,229.40

Phase 1

William Marcus	8.25 hours @ \$150/hour	= \$1,237.50
Gayatri Schilberg	13.82 hours @ \$110/hour	= \$1,520.20
Greg Ruszovan	9 hours @ \$95/hour	= \$855.00
	Phase 1 JBS Subtotal	= \$3,612.70
	Grand JBS Subtotal	= \$57,842.10

Other Reasonable Costs

Photocopying expense		= \$1,366.07
Postage costs		= \$175.25
Facsimile/Phone		= \$16.76
	Subtotal	= \$1,558.08
	TOTAL	= \$83,780.68

A. Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was “productive,” as that term is used in § 1801.3, where the Legislature gave the Commission guidance on program administration. In that decision, we discuss the requirement that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

TURN prepared for participation in the proceeding anticipating that its work would be productive. Because we dismissed this application, TURN observes that it is not possible to demonstrate productivity by assigning a dollar value to the benefits of participation as there was no Commission decision on the underlying merits of the application, or addressing any matter of dispute. Therefore, TURN submits that we should find that the productivity requirement does not apply in this instance.

We agree with TURN that dismissal of this application resulted in no issues or benefits upon which to apply the productivity standard and therefore, in this instance, we will not apply the productivity requirement to TURN’s compensation request. As we discussed relative to TURN’s substantial contribution to resolution of issues, TURN reasonably expected to participate in revenue allocation and rate design issues, and to engage consultants and commit resources in its participation. Therefore, we provide an award in order to be consistent with the purpose of the intervenor compensation statutes, to avoid discouraging potential intervenors, and in order not to create an inappropriate

incentive for intervenors to prolong proceedings. Our finding here is consistent with D.02-08-061.

B. Hours Claimed

TURN documented its claimed hours through precise daily records of the time spent by attorneys and its expert witness consultants. The records indicate both the hours and the activities associated with the hours in this shortened proceeding. The expenditure of hours is consistent with TURN's expected participation in the proceeding. We have reviewed the hours and activity records submitted by TURN and conclude that the records reasonably support the claimed hours.

C. Hourly Rates

TURN requests hourly rates for its attorneys and consultants that are consistent with those the Commission has already found reasonable for each period in question. We will adopt these rates for this compensation award.

D. Other Costs

TURN requests \$1,558.08 for other costs including photocopying and postage, and travel expenses. Based on the scope of TURN's work, the documents needed, the activities of its consultants, and the size of the service list, these costs appear reasonable.

5. Award

We award TURN \$83,780.68. Our calculation is based on the hourly rates described above plus the other costs.

Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after TURN filed its compensation request and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission Staff may audit TURN's records related to this award. Thus, TURN 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 requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

Waiver of Comment Period

Pursuant to 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 being waived.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Burton W. Mattson is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.03-01-012.
2. TURN has made a showing of significant financial hardship by demonstrating the economic interests of its individual members would be extremely small compared to the costs of participating in this proceeding.
3. TURN has requested hourly rates for attorneys, as modified above, and experts that are no greater than the market rates for individuals with comparable training and experience.
4. The other costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of §§ 1801-1812 which govern awards of intervenor compensation.
2. TURN should be awarded \$83,780.68 for its contribution to D.03-01-012.
3. Per Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.
4. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$83,780.68 in compensation for its substantial contribution to Decision 03-01-012.
2. Pacific Gas and Electric Company (PG&E) shall pay TURN \$83,780.68 within 30 days of the effective date of this order. PG&E shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, with interest, beginning May 2, 2003, and continuing until full payment is made.
3. The comment period for today's decision is waived.
4. This proceeding is closed.

This order is effective today.

Dated May 8, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN

SUSAN P. KENNEDY
Commissioners

Compensation Decision Summary Information

Compensation Decision(s):	D0305029
Contribution Decision(s):	D0301012
Proceeding(s):	A9903014
Author:	ALJ Mattson
Payer(s):	Pacific Gas and Electric Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network	3/18/2003	\$83,780.68	\$83,780.68	

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Robert	Finkelstein	Attorney	The Utility Reform Network	\$340	2002	\$340
Robert	Finkelstein	Attorney	The Utility Reform Network	\$280	2000	\$280
Robert	Finkelstein	Attorney	The Utility Reform Network	\$265	1999	\$265
Robert	Finkelstein	Attorney	The Utility Reform Network	\$250	1998	\$250
Michel	Florio	Attorney	The Utility Reform Network	\$300	1998-1999	\$300
Marcel	Hawiger	Attorney	The Utility Reform Network	\$185	2000	\$185
William	Marcus	Economist	The Utility Reform Network	\$160	2000	\$160
William	Marcus	Economist	The Utility Reform Network	\$150	1999	\$150
Gayatri	Schilberg	Economist	The Utility Reform Network	\$115	2000-2001	\$115
Gayatri	Schilberg	Economist	The Utility Reform Network	\$110	1999-2000	\$110
Jeff	Nahigian	Economist	The Utility Reform Network	\$100	2000	\$100
Jeff	Nahigian	Economist	The Utility Reform Network	\$95	1998-1999	\$95
Greg	Ruszovan	Computer Modeling	The Utility Reform Network	\$100	2000	\$100
Greg	Ruszovan	Computer Modeling	The Utility Reform Network	\$95	1998-1999	\$95
Ron	Faubion	Analyst	The Utility Reform Network	\$45	1998-2000	\$45