Decision 04-03-031 March 16, 2004

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 Authority to Value its Hydroelectric Generation Assets and for Authority to Retain Its Hydroelectric Generation Asserts in a Regulated Utility Corporation.	Application 99-12-024 (Filed December 15, 1999)

OPINION GRANTING INTERVENOR COMPENSATION TO THE UTILITY REFORM NETWORK

Summary

This decision awards The Utility Reform Network (TURN) $49,539.99 in compensation for its work on the above-noted application. As explained below, even though the application was rendered moot by legislation before the issuance of a decision on the merits, we consider it appropriate (as we have in other cases) to award compensation to TURN for its work on the application. No party has opposed TURN's compensation request.

Background

The application in this matter was filed by Southern California Edison Company (Edison or SCE) in late 1999, before the advent of the California energy crisis. The application grew out of provisions in Assembly Bill (AB) 1890,[1] the principal piece of electric restructuring legislation, that required the valuation of any non-nuclear generating assets that the state's major electric utilities proposed

[1] Stats. 1996, Chapter 854, effective September 24, 1996.

to keep. Specifically, at the time the application was filed, § 377 of the Pub. Util. Code provided:

> "The commission shall continue to regulate the nonnuclear generation assets owned by any public utility prior to January 1, 1997, that are subject to commission regulation until those assets have been subject to market valuation in accordance with procedures established by the commission. If, after market valuation, the public utility wishes to retain ownership of nonnuclear generation assets in the same corporation as the distribution utility, the public utility shall demonstrate to the satisfaction of the commission, through a public hearing, that it would be consistent with the public interest and would not confer undue competitive advantage on the public utility to retain that ownership in the same corporation as the distribution utility."

In its November 30, 2001 petition to withdraw the application on account of mootness, Edison gave the following summary of the proposal in its original application:

> "A.99-12-024 proposed to value SCE hydroelectric assets at about $993 million and sought authority to retain those assets within the regulated utility . . . A.99-12-024 proposed that SCE would sell electricity generated by the hydroelectric assets into the now dissolved California Power Exchange or other wholesale electric markets. Revenues from the sale of electricity would be applied first to allow SCE to recover its expenses under a type of performance based ratemaking mechanism. A 90/10 revenue sharing arrangement was proposed to operate if actual receipts from market sales exceeded or fell short of the authorized revenue requirement." (Petition to Withdraw, pp. 2-3.)

As part of the application, Edison also filed a Memorandum of Understanding (MOU) signed by many interested parties -- including TURN --

that set forth how Edison proposed to operate the hydro system after the Commission had established its value.

The Commission held prehearing conferences (PHCs) on February 22 and September 6, 2000, and subsequently held evidentiary hearings on four days between September 11 and 15, 2000. The Commission had intended to hold a second set of hearings after its environmental review of Edison's application was complete. However, before any environmental report was issued, the Legislature enacted ABx1 6, which was signed into law on January 18, 2001. ABx1 6 amended § 377 to require Commission approval prior to a utility's sale of a generation facility, and also prohibited any such sale prior to January 1, 2006.

Owing to the enactment of ABx1 6, Edison no longer needed a Commission finding that the retention of SCE's hydro facilities was in the public interest, nor was it necessary for the Commission to set a market value for these facilities. Accordingly, Edison filed a petition to withdraw the application on November 15, 2001, arguing that the new legislation and other developments had rendered the application moot. No party opposed the petition to withdraw, but TURN and Aglet Consumer Alliance (Aglet) both filed responses dealing with intervenor compensation issues. In its comments, TURN specifically noted that the Commission had recognized in other proceedings that an award of compensation to intervenors might be appropriate even where intervening events had rendered an issue (or an entire docket) moot.

In Decision (D.) 03-08-040, we granted Edison's petition to withdraw, but noted that despite the mootness of the application, requests for intervenor compensation would still be considered. We also found that the Notices of Intent to Claim Compensation (NOIs) filed by TURN and Aglet met the necessary

statutory requirements,[2] so that both of them would be eligible to seek an award of compensation.[3] We said:

> "We agree with SCE that the issues for resolution in the instant application have been addressed by legislation since the application was filed. The issues are therefore moot and it is appropriate to grant SCE's petition to withdraw the application and close the proceeding. We also recognize, however, that intervenors may have a reasonable argument for receiving intervenor compensation. Accordingly, we find that the intervenors may still file requests for compensation even though the Commission will not be resolving the original issues presented in this application." (*Mimeo.* at 4.)

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[2] Under §§ 1802 and 1804 of the Pub. Util. Code, an NOI is considered sufficient if it (1) demonstrates that the intervenor is a utility customer or a representative of such customers (§ 1802(b)), (2) is filed within 30 days after the PHC (or, in special circumstances, other appropriate times that we specify) (§ 1804(a)), (3) sets forth a description of the intervenor's expected contributions to the proceeding, as well as an itemized estimate of the intervenor's expected costs (§ 1804 (a)(2)(A)(i) & (ii)), and (4) demonstrates that the intervenor's participation in the proceeding would constitute a significant financial hardship (§ 1804(b)(1)). Some of these showings can also be made in the actual request for compensation.

[3] Although we found both TURN and Aglet eligible to seek compensation, we concluded that the NOI filed by the California Hydropower Reform Coalition (CHRC) did not meet the statutory requirements, because CHRC had not yet demonstrated that participation in the proceeding would constitute a significant financial hardship for all of its members. Although a finding of significant financial hardship had been made in a prior application with respect to three of the nonprofit membership corporations included in CHRC, we said that "CHRC must make such a showing on behalf of its entire membership, and cannot rely on a finding that applied to only three of its many constituent groups." (*Mimeo.*, at 5.) We also pointed out that under § 1804(a)(2)(B) of the Pub. Util. Code, CHRC was free to make this showing in any request for compensation that it eventually filed. (*Id.* at 5-6.)

Summary of TURN's Argument for Compensation

TURN filed its request for compensation in this proceeding on October 21, 2003, within 60 days after the mailing of D.03-08-040. In its request, TURN acknowledges that owing to the lack of a decision on the merits of Edison's hydro valuation application, the substantiality of TURN's contribution to this proceeding cannot be evaluated in the usual way. Instead, TURN urges us to follow the lead of decisions such as D.02-08-061 that have awarded compensation to TURN for participation in other proceedings that were rendered moot by legislation or other developments connected with the California energy crisis. In particular, TURN urges us to evaluate its work here in accordance with four criteria that were applied in D.02-08-061:

- The circumstances that led to the proceeding's conclusion. TURN argues that it satisfies this criterion because the circumstances that caused the application to become moot – principally the amendment of Pub. Util. Code § 377 – were not within the control or influence of TURN or any other party to the proceeding.

- The appropriateness of the intervenor's participation in the underlying proceeding. TURN argues that this is a minor issue here because the valuation issues were clearly important and, as noted above, the proceeding did not "stall out" until after four days of hearings had been held.

- The reasonableness of the intervenor's participation in the underlying proceeding. TURN argues that it satisfies this criterion because, in view of its participation in electric restructuring proceedings generally and the Competitive Transition Charge/ Stranded Cost proceeding (A.96-08-001, et al.) in particular, it would have been odd if TURN had not participated in this valuation proceeding.

- Where it is available, the intervenor's past record of demonstrating a substantial contribution to Commission

> decisions on similar subjects. TURN argues that although it has not participated in many valuation proceedings, it should be deemed to satisfy this criterion because many of the issues in the application, such as developing forecasts of future operating costs, are similar to cost-of-service issues that TURN has addressed for many years in general rate cases (GRCs). TURN points out that it has been awarded compensation (and even multipliers) for its work in these GRCs. (TURN Compensation Request, pp. 7-8.)

TURN also points out that it is seeking compensation here not only for its work in this application, but also for the work it did in Application (A.) 98-05-014, a proceeding initiated by Edison in response to a Commission directive in D.97-11-074 requiring the state's major electric utilities to submit applications for the purpose of developing principles that would be used to appraise the utilities' retained generation assets. TURN describes the relation between its work in A.98-05-014 and its work here as follows:

> "In early 1999, TURN (along with a number of other parties) served testimony [in A.98-05-014] addressing appraisal issues. TURN's testimony addressed in particular the problems associated with employing traditional appraisal methods to the hydroelectric generation facilities of Edison (and PG&E), and presented an alternative approach. Instead of attempting a 'snapshot' valuation, TURN proposed to first develop an interim valuation based solely on the future energy value of the assets, with ongoing adjustments based on differences between the negotiated value and actual energy revenues realized over time.
>
> "No decision addressing appraisal matters issued in A.98-05-014. However, during the course of that proceeding[,] TURN and Edison entered into discussions to develop an appraisal process that would serve to attain a reasonable market valuation for the utility's hydroelectric generation assets, allow the utility to retain those assets, and protect the utility's ratepayers and shareholders from unintended

> consequences should it turn out that the assumptions underlying the market valuation prove to be erroneous. The result of that effort was the Memorandum of Understanding that was the basis for the instant application. The ratemaking proposed in the MOU was substantially similar to the ratemaking TURN proposed in our market valuation testimony in A.98-05-014; the general structure (an interim valuation, subject to ongoing 'true-ups') was identical." (*Id.* at 3-4.)

TURN's request indicates that $6,740.57 of the $48,714.98 it is seeking here is attributable to the above-described work in A.98-05-014. (*Id.* at 12.)[4]

Should TURN Be Eligible for Intervenor Compensation Even Though Subsequent Events Have Rendered the Original Application Moot?

Our many decisions over the years dealing with intervenor compensation issues establish that under the program enacted by the Legislature in Pub. Util. Code §§ 1801-1812, an intervenor must use the following procedures and satisfy the following criteria to obtain a compensation award:

1. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
2. The intervenor must satisfy certain procedural requirements including the filing of a sufficient NOI to claim compensation within 30 days of the PHC (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
3. The intervenor must 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).)

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[4] As explained in our discussion of the reasonableness of TURN's request, one of the subtotals shown by TURN is $825.01 too low. Per our usual practice, we award TURN the correct (and higher) amount.

4. The intervenor must demonstrate significant financial hardship. (§ 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. (§ 1803(a).)
6. The claimed fees and costs must be no greater than the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

As indicated by the background discussion above, TURN has already satisfied the first four of these criteria. Thus, the only issues we need to consider here are whether TURN should be deemed to have made a substantial contribution to this proceeding,[5] and whether the fees and costs that it seeks do not exceed the market rates paid to experts and advocates having comparable training and experience to TURN's own attorneys and witnesses.

As TURN acknowledges, the most difficult issue in this case is how a finding of "substantial contribution" can be justified in view of the fact that

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[5] Pub. Util. Code § 1802(h) gives the following definition of a "substantial contribution":

> "'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 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."

events occurring after the September 2000 hearings rendered SCE's application moot. Sound guidance on this issue can be found in D.02-08-061, where we faced a similar mootness question. In D.02-08-061, we had to decide whether TURN should be awarded intervenor compensation for its work in A.00-01-009, a proceeding that was dismissed without prejudice in D.02-01-031. In D.02-08-061, we gave the following description of the circumstances that led to the dismissal without prejudice of that application:

> "In this decision, the Commission dismissed without prejudice the application of [Edison] seeking approval of various revenue allocation and rate design proposals that would have become effective with the end of the statutory rate freeze. Following the time that Edison filed its application in January 2000, significant energy events occurred that changed the appropriate rates for the post rate-freeze period. These events included substantial increases in wholesale energy costs, procurement of energy by the California Department of Water Resources (DWR), and eventual implementation of conservation-oriented electric rate design principles in D.01-05-064." (*Mimeo.*, at 1.)

Later, we stated that "D.02-01-031 does not discuss or resolve the substantive issues that TURN addressed in the proceeding," and concluded that "it cannot be asserted that TURN's work on substantive issues substantially assisted the Commission in making its procedural decision" to dismiss the application without prejudice. (*Id.* at 6.) Nevertheless, we agreed with TURN that if one applied the four factors that TURN urges us to apply here, TURN should receive compensation:

> "TURN's [four] suggested review criteria have not been given a full airing, and we hesitate to adopt them as appropriate tests of substantial contribution in all proceedings before us. Nevertheless, we find it appropriate to apply them here. The circumstances that led to our dismissing Edison's application

> are largely associated with the California electricity crisis that began in 2000. Those circumstances could not have been foreseen or affected by TURN or any other party at the time that TURN commenced its participation in this proceeding. Until it was reasonably certain that processing of Edison's application would be discontinued, it was reasonable and appropriate for an intervenor such as TURN, having a long-established track record of effective participation in revenue allocation and rate design proceedings such as this, to commit resources and engage consultants to review the application, participate in the prehearing conference, conduct discovery, and begin preparation of testimony, all with a reasonable expectation that successful participation would eventually entitle it to receive an award of compensation.
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> "Denying TURN any compensation in this proceeding simply because circumstances beyond its control led to dismissal of the application would be both unfair and inconsistent with the intent of the intervenor compensation statutes. Moreover, doing so could potentially discourage it from participating in future proceedings . . . Finally, if we were to deny compensation here because there was no decision or order addressing the merits of TURN's substantive participation, we could create an inappropriate incentive for intervenors to argue for the continued processing of cases even where discontinuation of the proceeding is the better outcome." (*Id.* at 6-7.)

The reasoning in D.02-08-061 supports an award of intervenor compensation here. TURN is correct that when this application was filed and the parties were preparing their testimony in the first half of 2000, it would have been speculation to assume that Pub. Util. Code § 377 would be amended so as to preclude any sale of Edison's hydro assets until at least 2006. Similarly, based on its participation in electric restructuring proceedings including A.96-08-001, it was quite appropriate for TURN to participate in this proceeding, which involved important issues about whether hydro asset valuations should be

conducted in a traditional, "snapshot" manner, or in novel way that focused on the value of the energy the assets would be providing. Indeed, the MOU that constituted part of Edison's application reflected TURN's valuation proposal in A.98-05-014.

We also agree that denying compensation here would be inconsistent with the intent expressed in Pub. Util. Code § 1801.3(b) that the intervenor compensation statutes should "be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process." As we stated in D.02-08-061, "we see no reason to increase the intervenor's [financial] risk [of participation] by denying compensation in a proceeding that is prematurely terminated for reasons that are not reasonably foreseen and are beyond [the intervenor's] control." (*Mimeo.*, at 8.)

Support for our ruling here can also be found in other decisions that have awarded compensation in proceedings that were rendered moot by legislation or other developments in the California energy crisis. *See, e.g.*, D.03-06-065, *mimeo.*, at 6-8 (awarding TURN compensation in reliance on D.02-08-061 in proceedings on revenue cycle services and direct access service fees, despite dismissal of proceedings without prejudice); D.03-05-029, *mimeo.*, at 4-6 (awarding TURN compensation in reliance on D.02-08-061 after dismissal of a PG&E rate design and cost allocation proceeding rendered obsolete by the energy crisis); D.02-03-034, *mimeo.*, at 5-7 (awarding TURN compensation for its contribution to a draft decision even though the application was withdrawn after the amendment of Pub. Util. Code § 377).

Reasonableness of Requested Compensation

As noted above, TURN requests compensation in the amount of $49,539.99. This sum is comprised of $41,974.41 for its work in this proceeding, plus $6,740.57 for the work it did in A.98-05-014, the valuation principles proceeding that led to the valuation proposal reflected in the MOU.[6] In Appendix A to its compensation request, TURN has provided a detailed breakdown of the hours and expenses claimed for its attorneys and expert in these two proceedings.

The components of TURN's compensation request for its work in this proceeding, A.99-12-024, are as follows:

Attorney Fees		
Robert Finkelstein	29.0 hours @ $280/hour	$8,120.00
	36.25 hours @ $265/hour	$9,606.25
	1.5 hours @ $250/hour	$375.00
	7.75 hours @ $182.50/hour	$1,414.37
	3.5 hours @ $140/hour	$490.00
Michel P. Florio	1.5 hours @ $300/hour	$450.00
	48.75 hours @ $310/hour	$15,112.50
	Subtotal:	$35,568.13[7]
Expert Witness Costs-JBS Energy, Inc.		
William Marcus	43.68 hours @ $150/hour	$6,552.00
Expenses		$112.50
	Subtotal:	$6,664.50

[6] TURN points out that in the Amended NOI it filed in this proceeding on March 29, 2000, TURN stated its intention to seek compensation for its "pre-filing" work; *i.e.*, the work it did in A.98-05-014 that led to the MOU. *See*, March 29, 2000 Amended NOI at 4; TURN Compensation Request at 3, n. 3.

[7] TURN's compensation request shows this subtotal (at p. 11) as $34,743.12. The difference of $825.01 between TURN's subtotal and ours accounts for the increased amount of compensation we are awarding TURN over what it requested.

Other Reasonable Costs		
Photocopying expense		$474.40
Postage costs		$75.27
Facsimile/Phone		$17.12
	Subtotal:	$566.79
	Total:	$42,799.42

The components of TURN's compensation request for its work in the valuation principles proceeding, A.98-05-014, are as follows:

Attorney Fees		
Robert Finkelstein	3.25 hours @ $250/hour	$812.50
Michel P. Florio	18.75 hours @ $310/hour	$5,812.50
	Subtotal:	$6,625.00
Other Reasonable Costs		
Photocopying expense		$95.00
Postage costs		$20.57
	Subtotal:	$115.57
	Total:	$6,740.57

We believe the components of these two requests constitute reasonable fees and costs when compared to market rates for similar professional services and costs. The claimed hourly rates for attorneys Finkelstein and Florio are the hourly rates we have previously approved for these attorneys. *See, e.g.*, D.99-02-005, *mimeo.* at 8 ($250 hourly rate for Finkelstein in 1998); D.00-02-038, *mimeo.* at 15-16 ($265 hourly rate for Finkelstein in 1999); D.00-11-002, *mimeo.* at 6-7 ($280 hourly rate for Finkelstein in 2000); D.03-08-041, *mimeo.* at 7 ($365 hourly rate for Finkelstein in 2003); D.99-11-049, *mimeo.* at 7-8 ($300 hourly rate for Florio in fiscal year 1998-99); D.00-02-008, *mimeo.* at 12 ($310 hourly rate

for Florio in fiscal year 1999-2000.)[8] We have also approved in prior proceedings the same hourly rate sought here for TURN's expert witness, William Marcus of JBS Energy, Inc. *See, e.g.*, D.00-05-006, *mimeo.*, at 13-14 ($150 hourly rate for Marcus in 1999-2000).

The other claimed expenses (such as photocopying and postage) are appropriate for a proceeding of this scope. We will therefore grant them in full.

Award

We award TURN $49,539.99. Our calculation is based upon the hourly rates described above plus the other costs.

Consistent with previous Commission decisions, we will order that, after January 4, 2004 (the 75th day after TURN filed its compensation request), interest shall be paid on the amount awarded to TURN above at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15. Interest will continue on the award until Edison has made full payment to TURN.

We remind TURN that Commission staff may audit its records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all of its claims for intervenor compensation.

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.

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[8] The rates of $182.50 per hour and $140 per hour shown for attorney Finkelstein represent his work on compensation requests, which TURN appropriately bills at half the usual rate for the attorney who prepares the request. *See*, TURN Compensation Request at 13, n. 10.

Assignment of Proceeding

Carl Wood is the Assigned Commissioner and A. Kirk McKenzie is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In D.03-08-040, TURN was found eligible to seek intervenor compensation for its work in this proceeding.

2. On October 21, 2003, TURN timely filed its request for compensation for its contributions to this proceeding.

3. TURN participated continuously and extensively in this proceeding until the proceeding was rendered moot by the amendment of Pub. Util. Code § 377.

4. The Commission has awarded intervenor compensation to TURN for its work in other proceedings that were rendered moot by legislation connected with the California energy crisis.

5. TURN has requested hourly rates for attorneys and experts that are no greater than the market rates for persons with comparable training and experience. TURN's other proceeding-related expenses are reasonable.

6. The total of the reasonable fees and expenses sought by TURN is $49,539.99.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation.

2. TURN should be awarded $49,539.99 for its substantial contribution to A.99-12-024 and D.03-08-040.

3. In accordance with 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 promptly.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded $49,539.99 as compensation for its substantial contributions in Application 99-12-024 and Decision 03-08-040.

2. Within 30 days after the effective date of this decision, Southern California Edison Company (Edison) shall pay TURN the amount of compensation awarded in this order.

3. Edison shall also pay interest on the award beginning on January 5, 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.

5. This proceeding is closed.

This order is effective today.

Dated March 16, 2004, 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:	D0403031
Contribution Decision(s):	D0308040
Proceeding(s):	A9912024
Author:	ALJ McKenzie
Payer(s):	Southern California Edison Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network (TURN)	10/21/2003	$48,714.98	$49,539.99	Arithmetic Error

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	$250	1998	$250
Robert	Finkelstein	Attorney	The Utility Reform Network	$265	1999	$265
Robert	Finkelstein	Attorney	The Utility Reform Network	$280	2000	$280
Robert	Finkelstein	Attorney	The Utility Reform Network	$365	2003	$365
Michel	Florio	Attorney	The Utility Reform Network	$300	FY 1998-99	$300
Michel	Florio	Attorney	The Utility Reform Network	$310	FY 1999-2000	$310
William	Marcus	Economist	The Utility Reform Network	$150	1999-2000	$150