

Decision 04-12-002 December 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company to Consolidate the Review of Pacific Gas and Electric Company's Expenditures in 1997 And 1998 to Enhance Transmission and Distribution System Safety and Reliability Pursuant to Section 368(e) of the California Public Utilities Code. (U 39 E)

Application 99-03-039
(Filed March 19, 1999)

**OPINION GRANTING INTERVENOR COMPENSATION
TO THE UTILITY REFORM NETWORK FOR SUBSTANTIAL
CONTRIBUTIONS TO DECISION 04-09-020**

This decision awards The Utility Reform Network (TURN) \$48,255.21 in compensation for its substantial contribution to Decision (D.) 04-09-020.

1. Background

Pub. Util. Code § 368(e)¹ required PG&E to propose plans to recover increased system safety and reliability costs associated with the transition to a deregulated environment and, if the plans met certain criteria, directed the Commission to authorize the plans. In D.96-12-077, the Commission authorized incremental base revenue for PG&E of \$164.231 million for 1997, and \$241.614 million for 1998, for system safety and reliability enhancements above those already authorized in base revenues. In 1997, PG&E overspent the

¹ Unless otherwise noted, all statutory references are to the Public Utilities Code.

authorized amount by \$19.012 million, and in 1998 it underspent the authorized amount by \$2.875 million. In D.04-09-020 the Commission found that PG&E was entitled to reimbursement of most costs incurred pursuant to § 368(e) other than \$29.1 million in flood and storm-related costs that were deferred to a separate Catastrophic Events Memorandum Account (CEMA) application.

Through no fault of TURN, or directly by any of the other parties, the Commission, as a result of the press of significant financial crises in the electric industry, set this proceeding aside until it recently adopted D.04-09-020. A final decision in Application (A.) 99-03-039 was delayed for a span of 5-and-a-half years.

2. Requirements for Awards of Compensation

The intervenor compensation program was enacted by the Legislature in Pub. Util. Code §§ 1801-1812, and 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 (Notice) to claim compensation within 30 days of the prehearing conference (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(i), 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.)

For discussion here, the procedural issues in Items 1-4 above are combined, followed by separate discussions on Items 5-6.

3. Procedural Issues

The prehearing conference in this matter was held on May 17, 1999. TURN filed its timely Notice on May 25, 1999. On July 6, 1999, Administrative Law Judge (ALJ) Hale issued a ruling that found TURN to be a customer under the Public Utilities Code. TURN filed its request for compensation on October 15, 2004 within the required 60 days of D.04-09-020 being issued.² In its Notice, TURN asserted financial hardship. On July 6, 1999, ALJ Hale ruled that TURN met the significant financial hardship condition.

TURN has satisfied all the procedural requirements necessary to make its request for compensation.

² No party opposes the request.

4. Substantial Contribution

In evaluating whether TURN 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 TURN? (*See* § 1802(i).) 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(i) and 1802.5.) As described in § 1802(i), 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.³

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. For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the customer made a substantial contribution. With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding.

³ D.98-04-059, 79 CPUC2d, 628 at 653.

TURN asserts that it made a substantial contribution in the proceeding that directly contributed to the recommendations proposed in the ALJ's proposed decision, the Brown Alternate, and the final decision, D.04-09-020. TURN's substantial contribution can be seen in the final decision's disallowance of automatic meter reading costs. The Commission agreed with TURN's argument that any benefit that this spending produced for system safety and reliability was too remote and insignificant to qualify as a reasonable use of § 368(e) funds.⁴ The Commission adopted TURN's recommendation to disallow recovery of costs incurred to purchase vehicles for metering purposes.⁵ The Commission also agreed with TURN's arguments in opposition to the utility's request to recover over \$2 million in costs related to electric industry restructuring here, rather than in the Section 376 proceeding.⁶ The Commission kept the proceeding open and the (System Safety and Reliability Balancing Account) for the sole purpose of recovering and crediting to ratepayers any reimbursements for joint pole test and treat work.⁷

TURN's substantial contribution to the proceeding is apparent in the ALJ's proposed decision that recommended adopting many of TURN's other recommendations in this proceeding. The Commission has repeatedly held that an intervenor's contribution to a final decision may be supported by

⁴ See D.04-09-020, p. 16 and Conclusion of Law 11; and TURN Opening Brief, pp. 10-11.

⁵ *Id.* at pp. 26-27 and Conclusion of Law 15, and TURN Opening Brief, pp. 21-22.

⁶ *Id.* at pp. 21-22, and TURN Reply Brief, pp. 12-13.

⁷ *Id.* at pp. 25-26, and TURN Opening Brief, pp. 11-12.

contributions to a proposed decision, even where the Commission's final decision does not adopt the proposed decision's position on a particular issue.⁸

PG&E's rebuttal testimony responded in detail to TURN's testimony. The utility reduced its request for cost recovery by \$362,249 in automatic meter reading costs and \$348,823 for metering projects, for a total of \$711,072 attributable to TURN's testimony identifying errors.

TURN's comments on the Brown Alternate resulted in a significant change to the discussion on burden of proof. TURN and PG&E were the only parties to submit comments on the Brown Alternate, and only TURN criticized this aspect of the Alternate as a departure from past Commission.⁹ PG&E's Opening Comments were silent on this issue, and its Reply Comments argued that TURN's argument on this point was incorrect. The Brown Alternate was revised for the final decision to reflect TURN's position on the burden of proof issue in the general discussion of the applicable standards.

TURN's involvement was extensive and included participation in hearings and preparation of comments, expert testimony, and briefs, and therefore TURN made a significant contribution to final decision. Although, TURN was not successful on every argument presented, the two draft decisions and the final decision reflect the significant impacts of TURN's advocacy.

TURN was one of only two parties (the Office of Ratepayer Advocates was the other) to test PG&E's assertions on the reasonableness of § 368(e) costs and its efforts gave the Commission important information regarding PG&E's actions.

⁸ D.92-08-030, *mimeo.* at 4; D.96-08-023, *mimeo.* at 4; D.96-09-024, *mimeo.* at 19; D.99-11-006, *mimeo.* pp. 9-10; D.01-06-063, pp. 6-7.

⁹ TURN's August 12, 2004 Comments on the Brown Alternate, pp. 1-3.

Every issue raised by TURN was relevant and within the scope of the proceeding, therefore there is no need to consider any adjustment to the time TURN spent on the proceeding.

The Commission has previously awarded full compensation where the intervenor’s positions were not adopted in full, especially in proceedings with a broad scope. (*See D.98-04-028, 79 CPUC2d 570, 573-574.*) Here, TURN achieved a less than total level of success in the final decision on the issues it raised. In the areas where we did not adopt TURN’s position in whole or in part, we nevertheless benefited from TURN’s analysis and discussion of the issues.

5. Reasonableness of Requested Compensation

TURN requests \$48,255.21 for its participation in this proceeding, as follows:

Attorney Fees

Robert Finkelstein	70.0	hours @ \$265 (1999)	\$ 18,550.00
	0.5	hours @ \$132.50(comp.)	\$ 66.25
	0.75	hours @ \$280 (2000)	\$ 210.00
	43.75	hours @ \$395 (2004)	\$ 17,281.25
	8.5	hours @ 197.50 (comp.)	\$ 1,678.75
		Subtotal	\$ 37,786.25

Expert Witness Costs – JBS Energy, Inc.

William Marcus	18.0	hours @ \$150	\$ 2,700.00
Jeff Nahigian	53.5	hours @ \$95	\$ 5,082.50
Gayatri Schilberg	15.38	hours @ \$110	\$ 1,691.80
JBS Expenses			\$ 10.50
		Subtotal	\$ 9,484.80

Other Reasonable Costs

Photocopying expense			\$ 586.80
Postage/FedEx costs			\$ 53.22
LEXIS Research costs			\$ 344.14
		Subtotal	\$ 984.16

TOTAL **\$ 48,255.21**

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.

To assist us in determining the reasonableness of the requested compensation, 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.

In this proceeding TURN's work activities all addressed a single overriding issue, whether the disputed expenditures met the standards for recovery under Section 368(e). TURN provided the following quantification:

“This proceeding is of the type for which it is possible to specifically quantify the results of TURN's participation. While the exact amount of benefits will depend on the outcome of the pole test and treat cost reimbursement and the amount of cost recovery achieved in the CEMA application called for in the decision, the reduction in the authorized cost recovery directly attributable to TURN's efforts is at least approximately \$4.2 million.¹⁰ The total amount requested for intervenor compensation at this time is less than 2% of this figure. TURN submits that the Commission should have no hesitation finding our participation “productive” given that

¹⁰ As footnoted by TURN: “This figure includes \$499,295 for automatic meter reading costs, \$929,000 for vehicles used for metering, \$2.06 million for electric industry restructuring costs (all from the decision) and \$711,000 (from PG&E's rebuttal testimony).”

the benefits are more than 50 times the amount spent to achieve those benefits.” (TURN Request: p. 6.)

Thus, we may find that TURN’s efforts have been productive.

Next, we assess whether the hours claimed for the customer’s efforts that resulted in substantial contributions to Commission decisions are reasonable.

TURN documented its claimed hours by presenting a daily breakdown of the hours of its attorney and consultants, accompanied by a brief description of each activity.¹¹ The hourly breakdown reasonably supports the claim for total hours. Since we found that TURN’s efforts made a substantial contribution to the final decision as well as the ALJ proposed decision and Brown alternate decision, we need not exclude anything from TURN’s award compensation.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons.

TURN separated the hours associated with preparation of this compensation request and requests compensation at half the usual hourly rate for this time. TURN requests an hourly rate of \$265 for work performed by Finkelstein in 1999, \$280 for work performed in 2000, and \$395 for work performed in 2004. For the 1999 and 2000 hour rates, each figure is the hourly rate that the Commission has previously approved for work in that year.¹² For the hours that Finkelstein devoted to this proceeding in 2004, TURN proposes to increase the approved 2003 rate of \$365 by 8%, consistent with

¹¹ Appendices to the Request.

¹² See, D.00-02-038 (in A.98-05-004), p. 16 for the 1999 rate, and D.00-11-002 (in A.99-01-016), pp. 6-7 for the 2000 rate.

Resolution ALJ-184, issued at the Commission's August 19, 2004 meeting.¹³ We find these rates reasonable.

TURN requests hourly rates of \$150, \$110, and \$95 for the work performed by JBS Energy firm members Marcus, Schilberg, and Nahigian, respectively, during 1999. The Commission has previously approved these rates for these firm members for their work in other Commission proceedings during 1999.¹⁴

The itemized direct expenses submitted by TURN include costs for photocopying, postage, and research and total \$984.16. The cost breakdown included with the request shows the miscellaneous expenses to be commensurate with the work performed. We find these costs reasonable.

6. Award

As set forth in the table above, we award TURN the full amount of its request, \$48,255.21.

Consistent with previous Commission decisions, we 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

¹³ The Commission approved an hourly rate of \$365 for Finkelstein's 2003 work in D.03-08-041 (in R.92-03-050), p. 7. An 8% increase to Finkelstein's 2003 hourly rate of \$365 yields an hourly rate of \$394.20. TURN rounded that figure to the nearest \$5 increment.

¹⁴ The Commission approved an hourly rate of \$150 for Marcus D.00-02-008 (in A.97-06-0121 – Edison OOR sharing mechanism) and D.00-05-006 (in A.99-03-020 – Edison mid-term PBR review). Schilberg's and Nahigian's 1999 rates were also approved in D.00-05-006. TURN is also using the 1999 rate for the small amount of time JBS employees devoted to this proceeding in 2000 or 2004.

payment of the award is made. The award is to be paid by PG&E as the regulated entity in this proceeding.

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 or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

7. 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.

8. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner. Douglas M. Long is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN made a substantial contribution to determining the reasonableness of PG&E's incremental costs for safety and system reliability incurred pursuant to § 368(e), as described herein.
2. TURN requested hourly rates for attorneys and experts that are reasonable when compared to the market rates for persons with similar training and experience.
3. The total of the reasonable compensation is \$48,255.21.

Conclusions of Law

1. 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 compensation incurred in making substantial contributions to determining the reasonableness of PG&E's incremental costs for safety and system reliability.

2. TURN should be awarded \$48,255.21 for its substantial contribution to D.04-09-020.

3. Pursuant to Rule 77.7(f)(6), the comment period for this compensation decision may be waived.

4. This order should be effective today so that TURN may be compensated without further delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$48,255.21 as compensation for its substantial contributions to Decision 04-09-020.
2. Within 30 days of the effective date of this decision, Pacific Gas & Electric Company shall pay TURN the total award.
3. The comment period for today's decision is waived.
4. This proceeding is closed.

This order is effective today.

Dated December 2, 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:	D0412002
Contribution Decision(s):	D0409020
Proceeding(s):	A9903039
Author:	ALJ Long
Payer(s):	Pacific Gas & Electric Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier ?	Reason Change/Disallowance
The Utility Reform Network (TURN)	10/15/04	\$48,255.21	\$48,255.21	No	

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	\$265	1999	\$265
Robert	Finkelstein	Attorney	The Utility Reform Network	\$280	2000	\$280
Robert	Finkelstein	Attorney	The Utility Reform Network	\$395	2004	\$395
William	Marcus	Economist	The Utility Reform Network	\$150	1999	\$150
Jeff	Nahigian	Economist	The Utility Reform Network	\$95	1999	\$95
Gayatri	Schilberg	Economist	The Utility Reform Network	\$110	1999	\$110