ALJ/JSW/hkr **Mailed 9/9/2005**

Decision 05-09-011 September 8, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902-E) for an Order Implementing Assembly Bill 265.	Application 00-10-045 (Filed October 24, 2000)
Application of San Diego Gas & Electric Company (U 902-E) for Authority to Implement an Electric Rate Surcharge to Manage the Balance in the Energy Rate Ceiling Revenue Shortfall Account.	Application 01-01-044 (Filed January 24, 2001)

OPINION GRANTING INTERVENOR COMPENSATION TO THE UTILITY CONSUMERS ACTION NETWORK FOR SUBSTANTIAL CONTRIBUTIONS TO DECISION (D.) 02-12-064 AND D.03-08-072

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OPINION GRANTING INTERVENOR COMPENSATION TO THE UTILITY CONSUMERS ACTION NETWORK FOR SUBSTANTIAL CONTRIBUTIONS TO DECISION (D.) 02-12-064 AND D.03-08-072

I. Summary

This decision awards the Utility Consumers Action Network (UCAN) $78,191.31 in compensation for its contributions to Decision (D.) 02-12-064, D.03-08-072,[1] and for its participation in the subsequent judicial review in the California Court of Appeal (Court of Appeal). In D.02-12-064, the Commission adopted the June 14, 2002 settlement agreement between the Commission and San Diego Gas & Electric Company (SDG&E), which resolved a federal court proceeding concerning certain intermediate term power purchase contracts entered into by SDG&E in late 1996 and early 1997. D.03-08-072 addressed the applications for rehearing of D.02-12-064.

II. Background

Application (A.) 00-10-045 was filed by SDG&E to seek approval of various proposals to implement Assembly Bill (AB) 265 (Stats. 2000, Ch. 328). AB 265 was part of the legislative effort during the height of the energy crisis to stabilize electricity rates. SDG&E filed A.01-01-044 seeking authority to assess a surcharge on electric bills of residential, small commercial, and street lighting customers. This surcharge was intended to amortize the balancing account undercollection resulting from high wholesale electric prices and the establishment of the 6.5 cent rate ceiling in AB 265. The two proceedings were

[1] A citation error in D.03-08-072 was corrected in D.03-08-082.

consolidated, and became the procedural vehicle for resolving several issues affecting SDG&E's electric rates.

Following the adoption of D.02-12-064, UCAN, Aglet Consumer Alliance (Aglet), and The Utility Reform Network (TURN) filed a joint request for compensation on February 27, 2003.[2] In D.03-05-013, we awarded UCAN $36,063.30 for its substantial contribution to D.02-12-064.

On January 29, 2003, UCAN, the City of San Diego, and the Commission's Office of Ratepayer Advocates (ORA) applied for rehearing of D.02-12-064. We denied rehearing in D.03-08-072. UCAN sought judicial review of D.03-08-072 and D.02-12-064 by petitioning the Court of Appeal for a writ of review. The petition was granted and oral argument was held. In UCAN v. Public Utilities Commission of the State of California (2004) 120 Cal.App.4th 644,[3] the Court of Appeal concluded that the Commission "properly accepted SDG&E's settlement offer and did not act contrary to section 332.1 or violate the state Constitution," and affirmed D.02-12-064 and D.03-08-072. (120 Cal.App.4th at 648-649.) UCAN

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[2] UCAN, Aglet, and TURN filed an earlier request for compensation in the above-captioned proceedings on March 25, 2002. A significant portion of that request sought compensation for their work related to the Commission's earlier rejection of SDG&E's proposed settlement of claims in the Court of Appeal regarding the intermediate term power purchase contracts. In D.02-10-051, the Commission denied, without prejudice, the compensation that UCAN and Aglet were seeking as premature. (See D.02-10-051, pp. 6, 15; D.03-05-013, pp. 10-14.) In D.03-05-013, which addressed the February 27, 2003 request for compensation, the Commission recognized the request "represents, in effect, the amount of the First Compensation Request that was denied without prejudice (i.e., deferred) by D.02-10-051, plus certain adjustments." (D.03-05-013, p. 11.)

[3] Cited herein as UCAN v. PUC.

filed a subsequent petition for review with the California Supreme Court, which was denied on November 10, 2004.[4]

On January 7, 2005, UCAN filed the subject request for compensation in connection with the rehearing of D.02-12-064 and appeal of D.03-08-072.

SDG&E filed an opposition to UCAN's request for compensation on February 7, 2005. UCAN filed a response on February 23, 2005. Both filings are further discussed herein.

III. Requirements for an Award of Compensation

The intervenor compensation program, the provisions of which are found in Pub. Util. Code §§ 1801-1812,[5] requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission proceeding. 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).)

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[4] UCAN is not seeking compensation for its work related to the appeal to the Supreme Court.

[5] All code section references are to the Public Utilities Code.

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 must be reasonable and comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§§ 1803, 1806.)

For discussion purposes, the procedural issues in Items 1-4 above are combined and discussed below, followed by separate discussions of Items 5 and 6.

IV. Procedural Issues

UCAN filed its NOI on October 5, 2001. The first PHC was held on February 16, 2001, and the time for filing NOIs would have expired on March 18, 2001. However, § 1804(a)(1) states that "where new issues emerge subsequent to the time set for filing, the commission may determine an appropriate procedure for accepting new or revised notices of intent."

Separate rulings by the Assigned Commissioner and assigned Administrative Law Judge (ALJ), on April 30, 2001 and October 30, 2001, respectively, identified new and emerging issues and established procedures for filing subsequent NOIs. The ALJ ruling determined that UCAN timely filed its

NOI, and was a customer pursuant to § 1802(b). UCAN made a showing of financial hardship in its initial request for compensation. In D.03-05-013, we found that UCAN met all the procedural requirements in order to request compensation.

Section 1804(c) requires an eligible customer to file a request for compensation within 60 days of the issuance of a final order or decision by the Commission. Section 1802(a) defines the term "compensation," as used in the intervenor compensation statutes, to include "the fees and costs … of obtaining judicial review, if any." Since judicial review of a Commission decision usually occurs well after 60 days from the issuance of the Commission decision, we find that the Supreme Court's denial of UCAN's petition for review on November 10, 2004 triggered the 60 day period, and thus find that UCAN's January 7, 2005 request for compensation was timely filed.

Considering the above, we find that UCAN in its subject request has satisfied all the procedural requirements necessary to claim compensation.

V. Substantial Contribution

A. Background

In D.03-05-013, we awarded UCAN approximately $36,000 for its substantial contribution to D.02-12-064. UCAN's contribution related to its joint participation in the development of the value of the intermediate term contracts, the Joint Proposal of the intervenors and the resulting Memorandum of Understanding (MOU). As discussed in D.03-05-013, the intervenors and SDG&E agreed, and we concurred, the MOU resulted in a value to ratepayers of at least $24 million.

B. UCAN

Not all of UCAN's proposals were adopted in D.02-12-064, and as a result it filed an application for rehearing. UCAN asserts it made a substantial contribution to D.03-08-072, which addressed the application for rehearing. Though rehearing was denied, UCAN contends that D.03-08-072 resulted in many changes to the findings of fact and conclusions of law in D.02-12-064 as a result of issues it raised, and that these modifications constitute a substantial contribution to D.03-08-072.

UCAN further asserts it made a substantial contribution to the Court of Appeal decision, UCAN v. PUC, which resulted from UCAN obtaining judicial review of D.02-12-064 and D.03-08-072. According to UCAN, the Court of Appeal criticized the Commission's interpretation of § 332.1, and established legal precedent pertaining to the interpretation of that code section. UCAN v. PUC also addressed the broad power of the Commission to settle pending cases, which according to UCAN, is "likely to be used by this Commission to defend its settlements from challenge in the future." (UCAN Request, p. 11.) UCAN argues it should be compensated for using the appellate courts to pursue an outcome of a Commission proceeding favorable to the customers it represents, even when UCAN is unsuccessful in its appellate efforts.

UCAN's February 27, 2003 compensation request did not include the cost of UCAN's participation in the June 2002 evidentiary hearings and its comments on the June 14, 2002 settlement agreement. Although UCAN's January 7, 2005 compensation request is not seeking compensation for this work, UCAN

contends that these efforts resulted in a substantial contribution to the ALJ's proposed decision and to D.02-12-064.[6]

C. SDG&E

SDG&E contends that UCAN should not be awarded any compensation for its work related to the petition for writ of review before the Court of Appeal.[7] SDG&E asserts that the Court of Appeal decided against UCAN on every issue in UCAN v. PUC. Although the court disagreed with the Commission's interpretation of the phrase "utility-owned or managed generation assets" in § 332.1(c), the court "reached the same conclusion as the Commission that the utility-owned or managed generation assets did not have to be the 'exclusive source to offset the AB 265 shortfall.'" (SDG&E Response, pp. 4-5; 120 Cal.App.4th at 658.) Thus, according to SDG&E, the Court of Appeal did not adopt UCAN's interpretation of the statute.

SDG&E also contends that Southern California Edison Company v. Public Utilities Commission of the State of California (2004) 117 Cal.App.4th 1039,[8] does not automatically entitle an intervenor for the costs and fees of obtaining judicial review under all scenarios. SDG&E points out that in SCE v. PUC, the intervenor was awarded compensation for its work in successfully defending the judicial review of a Commission decision. SDG&E asserts that the intervenor compensation legislation requires that intervenors only be compensated when

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[6] UCAN's request only seeks compensation for the work associated with the application for rehearing and the Court of Appeal.

[7] SDG&E does not oppose UCAN's request for compensation related to UCAN's application for rehearing of D.02-12-064, which amounts to $8,525.

[8] This decision is cited herein as SCE v. PUC.

their "presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision." (§ 1803(a).) Since UCAN was unsuccessful in its effort to have the Court of Appeal overturn D.02-12-064 and D.03-08-072, SDG&E contends that UCAN's associated fees and costs of obtaining judicial review are not compensable.

SDG&E further argues that the outcome in UCAN v. PUC does not amount to a substantial contribution of a Commission decision or order. SDG&E contends that nothing in UCAN v. PUC affected any existing Commission decision. SDG&E asserts in footnote 22 of its response that the only substantial contribution that UCAN is trying to establish is that the Court of Appeal agreed with UCAN's contention that the Commission wrongly interpreted § 332.1. Although the Court of Appeal disagreed with the Commission's interpretation of the phrase "utility-owned or managed generation assets," SDG&E asserts that this was insignificant because the Court of Appeal was not persuaded to adopt UCAN's interpretation of § 332.1(c). SDG&E also argues that the two precedents that UCAN claims were created in UCAN v. PUC are "simply restatements of existing law, of which the Commission is already well aware." (SDG&E Response, p. 8.)

Lastly, SDG&E argues that UCAN failed to justify the use of outside counsel Ed Silverman in UCAN's appellate efforts, as that work was led by another outside counsel, Alan Mansfield, and by UCAN's Michael Shames.

D. Discussion

We previously addressed UCAN's February 27, 2003 request for compensation in D.03-05-013. In that decision, we found that UCAN, Aglet, and TURN made substantial contributions to D.02-12-064 through "their earlier analysis of the [June 18, 2001 memorandum of understanding] MOU and their

leadership roles in developing and presenting the Joint Proposal." (D.03-05-013, p. 10.) As a result, "Joint Intervenors substantially contributed to an ultimate outcome in D.02-12-064 that is more favorable to ratepayers than the earlier MOU alternative." (*Ibid.*)[9]

UCAN's January 7, 2005 request for compensation states that it seeks an award for work omitted from its February 27, 2003 request, and the subsequent work relating to its application for rehearing of D.02-12-064 and the appellate review of D.02-12-064 and D.03-08-072. Since UCAN's February 27, 2003 request for compensation did not include the other work that UCAN engaged in which led up to the issuance of D.02-12-064, and because the compensation related to judicial review must have a connection between the issues that are appealed and the substantial contributions the intervenor made to the Commission decisions, it is appropriate to address whether UCAN made any other substantial contributions to D.02-12-064.[10]

UCAN asserts:

> "Here, UCAN clearly made a substantial contribution to the proposed decision of ALJ Wong, which did adopt UCAN's fundamental contention that the intermediate term contracts were utility 'owned or managed' assets, and revenue from the contracts

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[9] The MOU's history is described more fully in D.01-12-015, D.02-12-064, and D.03-05-013.

[10] Although footnote 5 of D.03-05-013 acknowledged that UCAN had reserved the right to request compensation for its work related to the June 2002 evidentiary hearings, UCAN elected not to do so in this request. However, since the issues that UCAN raised during the evidentiary hearings are related to the issues raised at the Court of Appeal, we address whether UCAN's evidentiary hearing efforts resulted in other substantial contributions to D.02-12-064.

> should be used to offset the AB 265 balancing account. (Proposed Decision of ALJ Wong (PD), Mailed 9/24/02, at p. 61-62). The [proposed] decision discusses at length evidence reviewed in UCAN's brief about statements Sempra [SDG&E's parent company] made undermining the company's claims about the purpose of the intermediate term contracts, as well as UCAN's suggestions for other sources of revenue to offset the balancing account. (PD at 38-43) The PD adopts language addressing UCAN's recommendation that money from DWR [Department of Water Resources] rate adjustments potentially be allocated to offset the balancing account. ([PD] at 62)" (Request for Compensation, p. 7.)

UCAN made a substantial contribution to D.02-12-064 by arguing that revenues from the intermediate term contracts should have been used to offset the AB 265 balancing account. As noted in the Summary at page 2 of D.02-12-064, a "central issue in this proceeding are the [intermediate term] power purchase contracts that SDG&E entered into with three entities in late 1996 and early 1997." Although UCAN's argument ultimately was not adopted by the Commission, the issue that UCAN raised about the intermediate term contracts was a central focus of D.02-12-064 and extensively discussed at pages 44 to 50 of that decision. We also stated in D.02-12-064 that the evidence regarding the intermediate term contracts that UCAN and other parties presented "on this key point directly bears on, and contributes to the rationale for, our decision herein." (D.02-12-064, p. 60.) UCAN's argument regarding the intermediate term contracts also formed the basis of its appeal to the Court of Appeal. Thus, we find that UCAN's work regarding the intermediate term contracts made a substantial contribution to D.02-12-064.

UCAN also asserts that it made a substantial contribution to D.03-08-072, which substantially amended D.02-12-064. SDG&E does not oppose UCAN's request in this regard.

D.03-08-072 was issued as a result of the applications for rehearing of D.02-12-064. Although D.03-08-072 did not overturn D.02-12-064, as UCAN had advocated on rehearing, we clarified D.02-12-064 by addressing two of the issues that UCAN had raised in its application. First, the discussion in D.02-12-064 regarding AB 265 was clarified as a result of "the issues raised by Applicants [for rehearing]." (D.03-08-072, p. 10.) The Commission modified D.02-12-064 by adding additional language in Ordering Paragraph 1.a. of D.03-08-072.

UCAN's second argument on rehearing was that certain customers should be excluded from the AB 265 surcharge. D.02-12-064 at page 56 states that "surcharge-related issues are moot and do not require further discussion." We addressed this issue and clarified this passage in Ordering Paragraph 1.d. of D.03-08-072.

Since we addressed the two issues that UCAN raised on rehearing in D.03-08-072 by modifying D.02-12-064 with additional text, we find that UCAN made a substantial contribution to D.03-08-072. As a result of the clarifying changes in Ordering Paragraphs 1.a. and 1.d. of D.03-08-072, which modified portions of D.02-12-064, we likewise find that UCAN made a substantial contribution to D.02-12-064 as a result of its rehearing efforts.

UCAN also asserts it made a substantial contribution to UCAN v. PUC. UCAN contends that the Court of Appeal "agreed with UCAN's contention that the Commission wrongly interpreted . . . Public Utilities Code [§] 332.1, and that the statute was not vague and did not make a distinction between ratepayer and shareholder assets, as the Commission claimed." (January 7, 2005, Request for Compensation, p. 3.)

According to records in UCAN's compensation request, the major portion of its time was spent in the appellate work before the Court of Appeal. UCAN

contends that § 1802(a) and court precedent compel the Commission to award UCAN compensation for the work related to the judicial review of D.02-12-064 and to D.03-08-072. SDG&E essentially argues that UCAN's appellate work is not compensable unless the intervenor successfully defends the Commission's decision from attack, or successfully overturns the Commission's decision.

In addressing whether UCAN made a substantial contribution by virtue of the appeal that led to UCAN v. PUC, we must follow § 1802(a), which defines "compensation" to include "the fees and costs … of obtaining judicial review, if any." Thus, the work related to appellate review before the Court of Appeal can be compensated as long as there is a sufficient nexus between that work and the substantial contribution made in the Commission decision for which compensation is sought. Specifically, under governing Commission and judicial precedents, the work in the reviewing court must be related to or necessary for the substantial contribution. We discuss these precedents below.

The Commission addressed the issue of awarding intervenor compensation for "obtaining judicial review" in D.02-06-070, where TURN was awarded compensation for federal court litigation work that the utilities initiated. The Commission found the work was related to or necessary for TURN's substantial contribution to Commission decisions in proceedings that prompted the utilities' federal court litigation. Subsequently, the Commission denied compensation for court work where the work did not meet the "related to or necessary for substantial contribution" test. In D.05-01-059, for example, the Commission denied compensation to another intervenor for judicial review work because the work was not related to the intervenor's substantial contribution to the earlier Commission decision. Similarly, in D.05-04-049, the Commission denied compensation to TURN for judicial litigation costs of challenging a

settlement between the Commission and a utility because TURN did not substantially contribute to either the settlement or any further action by the Commission on remand.

The common thread among these decisions is that in order for the judicial forum work to be compensable, the work must be "related to or necessary for" the intervenor's substantial contribution for which compensation is sought. (See D.03-04-034, p. 5; D.05-01-059, pp. 9-10; D.05-04-049, pp. 9-11; 117 Cal.App.4th, pp. 1052-1053.)

In the situation before us, we previously found in D.03-05-013 that UCAN made a substantial contribution to D.02-12-064. As discussed earlier, we also find that UCAN made other substantial contributions to both D.02-12-064 and D.03-08-072. The appellate work that UCAN performed at the Court of Appeal relates directly to the substantial contributions that UCAN made to D.02-12-064 and D.03-08-072. In UCAN v. PUC, UCAN argued that the Commission misconstrued § 332.1 and, by approving the settlement with SDG&E, exceeded its authority by contravening § 332.1(c) and violating two provisions of the California Constitution. (UCAN v. PUC, 120 Cal.App.4th at 648.) In particular, UCAN argued on appeal that D.02-12-064 failed to determine whether the intermediate term contracts were subject to the offset accounting procedure in § 332.1(c) as a "utility-owned or managed generation assets."

The Court of Appeal concluded that the Commission did not change or modify § 332.1(c). However, the court stated "we disagree in part with the PUC's interpretation of the statute, but our disagreement has no bearing on the legality of the settlement agreement." (UCAN v. PUC, 120 Cal.App.4th at 656.) The Court of Appeal then clarified the phrase "utility-owned or managed generation assets" in § 332.1(c) by stating:

> "the phrase 'utility-owned or managed generation assets' does not refer to generation assets owned or managed by the utility for the benefit of ratepayers. Nothing in the language of the statute makes a distinction between a generation asset that serves shareholder interests and a generation asset that is used by the utility for the benefit of its utility customers. As the administrative law judge correctly pointed out, 'utility-owned or managed,' which modifies 'generation assets,' are the operative words. Put another way, the statute applies to generation assets that are owned or managed by the utility. Had the Legislature wanted to make a distinction between *shareholder* generation assets and *ratepayer* generation assets, it could have done so. It has not. " (UCAN v. PUC, 120 Cal.App.4th at 658.)

Although the Court of Appeal concluded that the Commission inappropriately found a distinction between shareholder assets and ratepayer assets in § 332.1(c), the court went on to find that the adoption of the settlement in D.02-12-064 did not contravene § 332.1(c). (UCAN v. PUC, 120 Cal.App.4th at pp. 658-659.)

We view with substantial reluctance the notion that "obtaining judicial review" [§ 1802(a)] of a "substantial contribution" [§ 1801.3(d)] to an underlying decision should justify the award of intervenor compensation where judicial review is largely unsuccessful.[11] The general, if largely unarticulated, rule regarding judicial review where an intervenor sues the Commission is that, for the intervenor to receive an award of compensation for the costs of its suit, the intervenor must prevail. Here, UCAN's effort to overturn our settlement failed, but its contention that we misinterpreted the statute prevailed.

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[11] See D.05-04-049 "An intervenor's work in obtaining judicial review of a Commission order or decision to which the intervenor had not substantially contributed may be compensated only to the extent that the intervenor, through judicial review, is successful in requiring further Commission consideration of the challenged order or decision. (*Mimeo.* at 12.)

In this specific instance, the judicial review sought, and achieved, by UCAN was "related to or necessary for" the underlying substantial contribution. UCAN acted in a manner consonant with its substantial contribution to the underlying decision and was successful in urging its interpretation of Pub. Util. Code § 332.1(c) on the Court of Appeal, adding substantially to the interpretation of that statute and correcting an error of interpretation on our part. While the applicant's interpretation did not compel reversal of our settlement of this case, largely because our settlement (in the Court of Appeal's words) "sidestepped"[12] the substantive issue of how § 332.1(c) should be interpreted, the judicial review sought by UCAN and the resulting definitive statutory interpretation materially contributed to the decisional law involving an important statute arising out of the 2000-2002 energy crisis legislation.

We do not countenance recompense for the unsuccessfully litigious. This was no technical vindication of a trifling dispute; nor was it a pyrrhic victory. The Court of Appeal's decision was a substantial and material interpretation of a relevant and essential statute in which our appraisal of a key provision of law was deemed to have erred. Under these peculiar (and not easily replicable) circumstances, we find that the reasonable cost of obtaining judicial review is "related to or necessary for" the substantial contribution made in the underlying Commission decision, and is therefore compensable under the intervenor compensation statutes (§§ 1801-1812).

In summary, we find that applicant UCAN's efforts in this proceeding relating to the application for rehearing resulted in a substantial contribution to

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[12] 120 Cal. App. 4th 644, at 655.

D.02-12-064 and D.03-08-072. Additionally, we find that the reasonable cost of "obtaining judicial review" [§ 1802(a)] of those Commission decisions is compensable because the decisional law of this state has been clarified to be consonant with the specific "legal contentions" [§ 1802(i)] of applicant UCAN's substantial contribution in the decisions at issue.

VI. Reasonableness of Requested Compensation

UCAN requests $86,073.81 for its described participation in this proceeding, as summarized below:

Description	Year	Rate	Hours Billed	Total Fees
M. Shames	2003-2004	$250	67.6	$16,900
L. Biddle	2003-2004	$185	33	$ 6,105
A. Mansfield	2003	$430	80.25	$34,507.50
A. Mansfield	2004	$450	46.25	$20,812.50
E. Silverman	2003-2004	$375	17[13]	$ 6,375
UCAN miscellaneous costs				$ 394.00
Mansfield miscellaneous costs				$ 979.81
Total Request				**$86,073.81**

UCAN submitted logs showing the time and work performed by its attorneys and outside counsel, and for related expenses. UCAN allocated the costs and fees by issues and tasks. All of the time and costs relate to the application for rehearing and pursuing judicial review in the Court of Appeal.

The components of the 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. In ascertaining what is reasonable

[13] The request shows Silverman billing 40 hours. However, UCAN is only seeking compensation for 17 hours of work associated with the Court of Appeal work.

compensation for an intervenor, the Commission may reduce an award by taking many variables into consideration, such as the number of hours expended and the hourly rate requested.

A. Reasonableness of Time Spent

In reviewing UCAN's records, we find it was careful to request compensation only for hours spent by its two attorneys, Shames and Lee Biddle, on activities directly related to the rehearing application and subsequent judicial review in the Court of Appeal. We find the time spent by Shames and Biddle to be reasonable.

SDG&E contends that UCAN failed to justify why it used two outside counsel to handle UCAN's appellate work. SDG&E believes that Silverman's fees are unreasonable. UCAN contends that Silverman's "familiarity with court procedure and practice enabled UCAN to narrow the scope of its appeal and to fashion the appeal so that the court could, as it did, address the core issues of the dispute." (UCAN Response, p. 6.)

We reviewed the qualifications and time records of both outside counsel. As a Certified Specialist in appellate law, Silverman has a more specialized knowledge of appellate practices and procedures, including the types of issues that the Court of Appeal is more likely to address. In light of the time spent by Silverman, and the coordination of his effort with UCAN and Mansfield, we find that Silverman's time was reasonable. Accordingly, we find that the hourly billings reasonably support the claim for the total hours spent by UCAN and its outside attorneys regarding the application for rehearing of D.02-12-064 and pursuing judicial review of the two Commission decisions.

B. Market Rates

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

UCAN's request for compensation includes time billed by its own attorneys, Shames and Biddle. UCAN seeks an hourly rate for work performed in 2003 and 2004 of $250 for Shames and $185 for Biddle. These rates were previously approved in D.04-09-024 and D.04-12-054 and we adopt them here.

UCAN engaged Silverman and Mansfield to obtain judicial review of the described Commission decisions. Mansfield was UCAN's lead counsel, and his work included much of the drafting of UCAN's appellate briefs and arguing before the Court of Appeal. Silverman served in a consulting capacity to Mansfield and UCAN during the judicial review process.

Mansfield is a partner in the firm Rosner, Law & Mansfield, in San Diego. He received his law degree in 1986 and has practiced law for 18 years. His primary practice is consumer litigation, including national consumer class actions and public interest litigation. According to the request for compensation, Mansfield "has been involved in a number of major utility cases, including the PG&E bankruptcy proceeding, and has successfully represented plaintiffs including UCAN in cases involving Verizon, Sprint, Cingular, SBC and the Tenderland Power Company." (January 7, 2005, Request for Compensation, p. 16.)

UCAN is seeking an hourly rate for Mansfield of $430 in 2003 and $450 in 2004,[14] with 80.25 hours claimed in 2003, and 46.25 hours in 2004.[15]

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[14] The text of UCAN's request for compensation at page 15 and Attachment E reflect that UCAN is requesting these hourly rates for Mansfield. However, in paragraph 3 of

Footnote continued on next page

Mansfield's declaration states that he has been paid the hourly rate of $430 "for performing consulting services by various clients," and that it "is also the rate I have been paid and that judges have approved as reasonable in numerous cases in California, including through litigated fee motions." (UCAN Request, Att. C.) UCAN points out that in the "Of Counsel" survey, which was discussed in D.04-02-017 at page 14, the average partner billing rate in 2003 was $420.

In D.03-01-070, we approved an hourly rate for Mansfield of $300 for work performed in 2002. In that order, we stated the $300 rate was "said to be substantially lower than [his] $400/hour standard rate," and that the "$300/hour for 2002 is in the range of rates we have awarded to others of comparable background." (D.03-01-070, p. 9.) In this proceeding, UCAN seeks a market rate of $430 for 2003, and a market rate of $450 for 2004.

The issue that we must now address is whether Mansfield's hourly rate should be increased by $130 and $150 for 2003 and 2004, respectively, as compared to the approved 2002 hourly rate of $300. In deciding whether UCAN's request is justified, we must consider the dollar amount of the increases, the amount that Mansfield requests in his declaration, the 2002 hourly rate that

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Mansfield's declaration to Attachment C, Mansfield states: "I am requesting approval of an hourly billing rate of $395, which is approximately 10% less than my standard billing rate." Although UCAN does not directly address this inconsistency, the request for compensation does state that: "Here, UCAN is seeking an appropriate market rate for Mr. Mansfield, as permitted under the compensation statutes." (January 7, 2005, Request for Compensation, p. 15.) Section 1806 states in part that the "computation of compensation awarded pursuant to Section 1804 shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services."

[15] As mentioned earlier, UCAN is not requesting compensation for time spent appealing UCAN v. PUC to the Supreme Court.

we approved for Mansfield, and the escalation factor of 8% for 2004 rates as discussed in Resolution ALJ-184.

As demonstrated by Attachment C of the request for compensation, and our approval of Mansfield's prior work in D.03-01-070, Mansfield has lengthy experience in the representation of consumers, as well as experience in utility issues. However, UCAN's request would result in a 43% and 50% increase in Mansfield's hourly rate as compared to the approved 2002 hourly rate of $300. The percentage increases that UCAN requests are quite significant as compared to the 8% escalation factor that we approved in Resolution ALJ-184 for 2004 rates. Furthermore, Mansfield's hourly rate exceeds the hourly rate for Silverman, who has been practicing law longer than Mansfield. We also note that Mansfield's declaration requests approval of an hourly rate of $395 for his appellate work.

UCAN has not justified its request for an hourly rate of $430 and $450 for Mansfield for 2003 and 2004. Instead, we will adopt as reasonable an hourly rate of $375, as his approved hourly rate for 2003 and 2004.

Since we have adopted a lower hourly rate for Mansfield, this reduces UCAN's total compensation request by $7,882.50.

UCAN is requesting an hourly rate of $375 for Silverman, for work performed in 2003 and 2004. UCAN's request for compensation and Attachment D of the request note that Silverman has been a Certified Specialist in appellate law since 1999. According to UCAN and the time records of Silverman, Silverman assisted Mansfield in the appellate review of the Commission decisions. Silverman has been practicing law in California since 1977, and has been of counsel with the firm of Sandler, Lasry, Laube, Beyer and Valdez in San Diego since 2003. According to UCAN, Silverman's work focuses "almost exclusively on appellate work for a wide variety of clients including the City of San Diego."

UCAN states the requested hourly rate for Silverman "is substantially below the rate the Commission has recently awarded to attorneys with similar amounts of legal experience." (UCAN Request, p. 17.) UCAN points out that in D.04-12-054, the hourly rate of attorneys with similar lengths of experience was $435. Although UCAN acknowledges that Silverman has less experience in Commission proceedings than those who received an hourly rate of $435 in D.04-12-054, Silverman's work focused exclusively on assisting UCAN with the appellate review of the Commission decisions, an area in which he is a Certified Specialist. Given Silverman's expertise and the recent awards of other attorneys, UCAN asserts that the billing rate of $375 is easily justified.

Silverman's certification in appellate law is of unique value to UCAN's appeal of the Commission decisions to the Court of Appeal. His area of specialty, his length of experience, and the hourly rates we have approved for attorneys with comparable training and experience merit compensation at the hourly rate that UCAN is seeking. We find the hourly rate of $375 for Silverman's work in 2003 and 2004 to be reasonable.

C. Productivity

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.

As noted in D.02-12-064 at page 51, D.03-05-013 at pages 10 and 11, D.03-08-072 at pages 9 and 18, and in UCAN v. PUC, *supra*, 120 Cal.App.4th at 653, 660, the quantifiable benefits of UCAN's position were over $130 million.

Although UCAN's position ultimately was not adopted by the Commission, we find that UCAN's participation was productive, and bears a reasonable relationship to the benefits that ratepayers would have realized as compared to the amount of compensation that UCAN is seeking in this proceeding. As discussed earlier, it is also important to recognize that UCAN's actions resulted in the Court of Appeal's interpretation of a phrase in § 332.1(c). This contribution is significant in that the meaning or interpretation of the Public Utilities Code governs what this Commission does.

D. Direct Expenses

UCAN is seeking reimbursement of its related direct expenses that include photocopying, postage, and telephone charges, and total $394. The direct expenses incurred by UCAN's outside counsel total $979.81, for filing fees, photocopying, and delivery charges. UCAN is not requesting expenses associated with the appeal to the California Supreme Court.

These miscellaneous costs are commensurate with the work performed and we find these costs to be reasonable.

VII. Award

We award UCAN $78,191.31.

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 on March 23, 2005, the 75th day after UCAN filed its compensation request and continuing until full payment of the award is made. The award shall be paid by SDG&E as the regulated entity in this proceeding.

We remind UCAN, as in all intervenor compensation awards, that Commission staff may audit its records related to this award and that UCAN

must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. UCAN's records should identify specific issues for which it requested compensation, the actual time spent by each employee, the applicable hourly rate, and any other costs for which compensation was claimed.

Since there are no other matters pending, these two proceedings should be closed.

VIII. 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 (Rules), we waive the otherwise applicable 30-day comment period for this decision.

IX. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner, and John S. Wong is the assigned ALJ in the subject proceedings.

Findings of Fact

1. On October 30, 2001, UCAN was ruled eligible to file for an award of compensation in this proceeding by the assigned ALJ.

2. The applications for rehearing of D.02-12-064 were denied in D.03-08-072.

3. UCAN's writ of review of D.02-12-064 and D.03-08-072 was granted by the Court of Appeal, which led to the decision in UCAN v. PUC.

4. The Supreme Court denied UCAN's petition for review of UCAN v. PUC on November 10, 2004.

5. UCAN's January 7, 2005 request for compensation was filed within the 60 days as required by § 1804(c).

6. UCAN made a substantial contribution to D.02-12-064 and D.03-08-072, and the cost of obtaining judicial review in the Court of Appeal is compensable

because that decision clarified the decisional law in a manner consonant with UCAN's substantial contribution.

7. As discussed and modifications adopted herein, UCAN's hourly rates and related expenses for its attorneys for work performed in 2003 and 2004 are reasonable.

8. The total of the reasonable compensation is $78,191.31.

9. The Appendix to the opinion summarizes today's award.

Conclusions of Law

1. UCAN has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation incurred in making substantial contributions to D.02-12-064 and D.03-08-072.

2. UCAN should be awarded $78,191.31 for its contribution to D.02-12-064 and D.03-08-072 including the subsequent application for rehearing and judicial review of these decisions.

3. The award should be paid by SDG&E.

4. Per Rule 77.7(f)(6), the comment period for this compensation decision should be waived.

5. This order should be effective today so that UCAN may be compensated without further delay.

O R D E R

IT IS ORDERED that:

1. The Utility Consumers Action Network (UCAN) is awarded $78,191.31 as compensation for its substantial contributions to Decision (D.) 02-12-064,

D.03-08-072, and the subsequent judicial review in the California Court of Appeal.

2. Within 30 days of the effective date of this decision, San Diego Gas & Electric Company shall pay UCAN the amount of $78,191.31.

3. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning March 23, 2005, the 75th day after the filing date of UCAN's request for compensation, and continuing until full payment is made.

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

5. Application (A.) 00-10-045 and A.01-01-044 are closed.

This order is effective today.

Dated September 8, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners

Compensation Decision Summary Information

Compensation Decision:	D0509011	**Modifies Decision? No**
Contribution Decision(s):	D0212064 and D0308072	
Proceeding(s):	A0010045 and A0101044	
Author:	ALJ Wong	
Payer(s):	San Diego Gas & Electric Company	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
Utility Consumers Action Network	01/07/05	$86,073.81	$78,191.31	No	Hourly rate reduced.

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Michael	Shames	Attorney	Utility Consumers Action Network	$250	2003/2004	$250
Lee	Biddle	Attorney	Utility Consumers Action Network	$185	2003/2004	$185
Alan	Mansfield	Attorney	Utility Consumers Action Network	$430	2003	$375
Alan	Mansfield	Attorney	Utility Consumers Action Network	$450	2004	$375
Edward	Silverman	Attorney	Utility Consumers Action Network	$375	2003/2004	$375