

Decision 06-11-031 November 30, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) Relating to Confidentiality of Information.

Rulemaking 05-06-040
(Filed June 30, 2005)

**OPINION GRANTING INTERVENOR COMPENSATION
TO THE UTILITY REFORM NETWORK
AND THE GREEN POWER INSTITUTE FOR
SUBSTANTIAL CONTRIBUTIONS TO DECISION 06-06-066**

This decision awards The Utility Reform Network (TURN) and the Green Power Institute (Green Power) \$44,344.70 and \$39,670, respectively, in compensation for their substantial contributions to Decision (D.) 06-06-066. TURN's award is slightly less than the amount requested (\$44,587.82) because we award a slightly lower hourly rate to its attorneys for work in 2006 than it requests.

Today's award will be paid from the Commission's intervenor compensation program fund. This proceeding remains open for Phase II.

I. Background

The Commission opened this proceeding to develop rules related to confidentiality of information used and submitted in Commission proceedings and more informal settings. In D.06-06-066, the Commission decided Phase I of the proceeding, and adopted rules applicable in the electric procurement, resource adequacy, renewable energy and related contexts. TURN and Green Power participated actively in Phase I, participating in hearings, and

submitting detailed briefs, and preparing comments on the proposed decision leading up to D.06-06-066.

II. Requirements for Awards of Compensation

The intervenor compensation program, enacted in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers. (Subsequent statutory references are to the Public Utilities Code unless otherwise indicated.)

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (PHC), or in special circumstances at other appropriate times that we specify. (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)

5. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a).)
6. The claimed fees and costs are reasonable (§ 1801), necessary for and related to the substantial contribution (D.98-04-059), comparable to the market rates paid to others with comparable training and experience (§ 1806), and productive (D.98-04-059).

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

III. Procedural Issues

The PHC in this matter was held on September 21, 2005. TURN filed a timely NOI on October 21, 2005. TURN claimed financial hardship in its NOI. On November 22, 2005, the assigned Administrative Law Judge (ALJ) ruled that TURN is a customer pursuant to § 1802(b)(1)(C), and meets the financial hardship condition through a rebuttable presumption of eligibility, pursuant to § 1804(b)(1), because TURN met this requirement in another proceeding within one year of the commencement of this proceeding (ALJ Ruling dated July 27, 2004, in R.04-04-003). TURN is therefore eligible to claim compensation in this proceeding.

Green Power filed a timely NOI on October 17, 2005. Green Power claimed financial hardship in its NOI. In her November 22, 2005 ruling on the NOI, ALJ Thomas required Green Power to supplement its NOI to show how it meets the "customer" requirement of § 1802(b)(1). In response, on November 28, 2005, during evidentiary hearings on this case (held November 28-December 2,

2005), Green Power submitted to the ALJ for consideration decisions issued in other cases relating to the "customer status" requirement.

The first decision, D.03-12-058, states that “[t]he Commission has for many years adopted an expansive approach to customer status determinations.... Environmental groups, including groups without voting members, have been found eligible because of an 'understanding' that they 'represent customers who have a concern for the environment.’” (Citations omitted.) The second decision, D.05-10-030, grants intervenor compensation to Green Power in Rulemaking (R.) 04-04-025. It states, *mimeo.* at 5, that “[Green Power is a customer], pursuant to § 1802(b)(1)(c). . . .” The third decision, D.04-01-046, issued in R.01-10-024, also awards Green Power intervenor compensation and finds that “Green Power is a Category 3 customer for the purposes of determining eligibility for receiving intervenor compensation.”

Based on the foregoing supplementation, we find that Green Power has established that it is a customer pursuant to § 1802(b)(1)(C), and meets the financial hardship condition through a rebuttable presumption of eligibility, pursuant to § 1804(b)(1), because Green Power, like TURN, met this requirement in another proceeding within one year of the commencement of this proceeding (ALJ Ruling dated July 27, 2004, in R.04-04-003). Therefore, we find Green Power is eligible to claim intervenor compensation in this proceeding.

The Commission issued D.06-06-066 on July 5, 2006. TURN filed its request for compensation on September 5, 2006, and Green Power filed its request on August 30, 2006. Both requests were timely filed.

In view of the above, we find that TURN and Green Power have satisfied all the procedural requirements necessary to make their request for compensation in this proceeding.

IV. Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (*See* §1802(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* §§ 1801.3(f) 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.¹

Should the Commission 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

¹ D.98-04-059, 79 CPUC2d 628, 653 (1998).

mind, we turn to the claimed contributions TURN and Green Power made to the proceeding.

A. TURN

TURN claims it made a substantial contribution to D.06-06-066 by prevailing on each of its key objectives, as follows:

- TURN supported the distinction the Commission drew under § 454.5(g) between market participants and non-market participants in terms of their access to confidential procurement information.
- TURN advocated a “window of confidentiality” approach that would treat procurement information as “market sensitive” for approximately one year backward and three to five years forward, depending upon the specific nature of the information.
- TURN supported proposals to make more renewable resource procurement information public, in light of the strong public interest in such matters; and
- TURN recommended that Energy Service Providers (ESP) compliance filings regarding Renewables Portfolio Standard (RPS) and Resource Adequacy (RA) requirements be made available to non-market participants, subject to a protective order approved by the Commission.

TURN also assisted the Commission in resolving a number of other contested issues. For example, D.06-06-066 agreed with TURN that while Senate Bill (SB) 1488 requires the Commission to examine its practices with respect to the handling of confidential data, it did not repeal any of the existing protections for confidential information contained in existing law. Similarly, the Commission agreed with TURN that the burden of proof regarding the confidentiality of data is on the party claiming confidentiality. Likewise, the

Commission agreed with TURN's position in that the term "market sensitive information" is not the same as "trade secrets."

TURN's opening and reply comments on the proposed decision were also meritorious. For example, the Commission agreed with TURN that parties should have 60 rather than 30 days to meet and confer on the terms of a model protective order. Similarly, the Commission accepted TURN's proposed modification to the language of the "materiality" standard, and agreed with TURN that closed hearings should not be absolutely precluded. Finally, the Commission adopted TURN's position that contracts between utilities and their affiliates should be made public.

Thus, we find TURN made a substantial contribution to D.06-06-066.

B. Green Power

Green Power states it made substantial contributions to D.06-06-066 in the areas of:

- legal and policy issues;
- public access to RPS information;
- principles for determining confidential designation;
- burden of proof; and
- demonstration of market sensitivity.

Green Power notes that it filed comments on the Order Instituting Rulemaking (OIR), testimony, post-hearing briefs, and comments on the proposed decision in this case, and also participated actively throughout the evidentiary hearings. It accurately lists several contentions on which it prevailed in D.06-06-066:

- That SB 1488, the statute giving rise to this proceeding, requires more openness for data used in Commission proceedings;
- That RPS information should be open to the maximum extent possible because of the strong public interest in increasing the amount of renewable energy used in California;
- That § 583 prescribes a process for claiming confidentiality, but does not contain any substantive rules on what is and is not confidential;
- That aggregation of data should always be considered before deeming it confidential in its entirety;
- That to be considered “market sensitive information,” data must have the potential to affect the price of electricity.

Where Green Power did not prevail – in its contention that cost information is more sensitive than quantity data – it nonetheless provided input that enhanced the Commission's deliberations. Thus, we find Green Power made a substantial contribution to D.06-06-066.

V. Reasonableness of Requested Compensation

A. TURN

TURN requests \$44,587.82 for its participation leading up to D.06-06-066, as follows:

Attorney Fees:

Michel P. Florio	35.75 hours	X	\$470 (2005)	=	\$ 16,802.50
	45.75 hours	X	\$490 (2006)	=	\$ 22,417.50
	4.75 hours	X	\$245 (2006 comp) ²	=	\$ 1,163.75
Matthew Freedman	12.75 hours	X	\$270 (2005)	=	\$ 3,442.50
	0.50 hours	X	\$135 (2005 comp)	=	\$ 67.50
Robert Finkelstein	0.75 hours	X	\$395 (2005)	=	\$ 296.25
	0.50 hours	X	\$410 (2006)	=	<u>\$ 205.00</u>
			Subtotal	=	\$ 44,395.00

Other Reasonable Costs:

Photocopying expense	=	\$ 167.40
Postage costs	=	\$ 11.92
Attorney Expenses	=	<u>\$ 13.50</u>
		Subtotal
		\$ 192.82
		TOTAL
		= \$ 44,587.82

B. Green Power

Green Power requests \$39,670 for its participation leading up to D.06-06-066, as follows:

Staff Time 2005 - (Gregg Morris 90 hours x \$210)	\$18,900
Staff Time 2006 - (Gregg Morris 86 hours x \$220)	\$18,920
Comp Request Prep Time - (Gregg Morris 14 hours x \$110)	\$ 1,540
Document Filing and Serving Costs	<u>\$ 310</u>
Total Compensation Request	\$39,670

² Preparation of the compensation request at one-half the normal hourly rate.

In general, 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. The issues we consider to determine reasonableness are discussed below.

VI. Hours and Costs Related to and Necessary for Substantial Contribution

We first assess whether the hours claimed for the customer's efforts that resulted in substantial contributions to Commission decisions are reasonable by determining to what degree the hours and costs are related to the work performed and necessary for the substantial contribution.

Both TURN and Green Power documented their claimed hours by presenting a daily breakdown of hours, accompanied by a brief description of each activity. The hourly breakdowns reasonably support the claim for total hours. Since we find that TURN's and Green Power's efforts made a substantial contribution to D.06-06-066, even where we did not wholly adopt their recommendations, we need not exclude from their awards compensation for certain issues.

VII. Market Rate Standard

We next take into consideration whether 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.

A. TURN

TURN seeks hourly rates for 2005 (\$470 for Michel Florio, \$270 for Matthew Freedman, and \$395 for Robert Finkelstein) that we previously approved in D.06-10-018 (Finkelstein) and D.06-04-012 (Florio and Freedman). We adopt these rates here.

For 2006, TURN seeks a 4% increase in its hourly rates. We rejected a 4% increase, and opted instead for a 3% increase, in D.06-10-018. We do the same here. Thus, we award Florio \$485 for 2006 and Finkelstein \$405 for 2006, each a 3% increase over their 2005 rates (rounded to the nearest \$5).

B. Green Power

Green Power seeks rates for its work in 2005 and 2006 that we have already approved in D.06-08-013 (\$210/hour for Gregg Morris for 2005, and \$220/hour for 2006). Thus, these rates are reasonable and adopted here.

VIII. Productivity

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.

A. TURN

TURN notes that it is difficult to "monetize" its contribution, which relates to confidentiality of data, and not to rates. Under the circumstances, it is impossible to assign a dollar value to TURN's work. By the same token, TURN accurately points out that the "successful adoption of consistent rules governing the use of confidential information will help to expedite Commission proceedings, to the benefit of ratepayers, the general public, and the regulated entities alike." (TURN Request at 4.) We agree and find TURN's work was productive.

B. Green Power

Green Power also finds it difficult to assign a dollar value to its work. However, it notes that the RPS program should reduce the risk of price spikes,

and that “publicly accessible information ... is conducive to the growth of renewable energy in California...” (Green Power Request at 10.) For this reason, and the reasons TURN sets forth, we find Green Power's work was productive.

IX. Direct Expenses

A. TURN

The itemized direct expenses submitted by TURN include costs for photocopying and postage and total \$192.82. The cost breakdown included with the request shows the miscellaneous expenses to be commensurate with the work performed. We find these costs reasonable.

B. Green Power

The itemized direct expenses submitted by Green Power include costs for photocopying, courier, overnight delivery and postage and total \$310.00. The cost breakdown included with the request shows the miscellaneous expenses to be commensurate with the work performed. We find these costs reasonable.

X. Awards

A. TURN

We award TURN most of its request, with the exception of a small discount in the 2006 requested hourly rates for Florio and Finkelstein (Freedman recorded no time in 2006).

Attorney Fees:

Michel P. Florio	35.75 hours	X	\$470 (2005)	=	\$ 16,802.50
	45.75 hours	X	\$490 (2006)	=	\$ 22,417.50
	4.75 hours	X	\$245 (2006 comp)	=	\$ 1,163.75
Matthew Freedman	12.75 hours	X	\$270 (2005)	=	\$ 3,442.50
	0.50 hours	X	\$135 (2005 comp)	=	\$ 67.50
Robert Finkelstein	0.75 hours	X	\$395 (2005)	=	\$ 296.25
	0.50 hours	X	\$410 (2006)	=	<u>\$ 205.00</u>

Less reduction in Florio/Finkelstein 2006 hourly rates

Michel P. Florio	45.75 hours	X	\$ 5	=	\$ (228.75)
	4.75 hours	X	\$ 2.50	=	\$ (11.87)
Robert Finkelstein	.50 hours	X	\$ 5	=	\$ (2.50)
Total reduction					\$ (243.12)
Subtotal			\$ 44,395.00 - \$243.12	=	\$ 44,151.88

Other Reasonable Costs:

Photocopying expense		=	\$ 167.40
Postage costs		=	\$ 11.92
Attorney Expenses		=	<u>\$ 13.50</u>
Subtotal			\$ 192.82

TOTAL = \$ 44,587.82 - \$243.12 = \$ 44,344.70

B. Green Power

Staff Time 2005 – (Gregg Morris 90 hours x \$210)	\$18,900
Staff Time 2006 – (Gregg Morris 86 hours x \$220)	\$18,920
Comp Request Prep Time – (Gregg Morris 14 hours x \$110)	\$ 1,540
Document Filing and Serving Costs	<u>\$ 310</u>
Total Compensation Request	\$39,670

This rulemaking proceeding affected a broad array of utilities, Electric Service Providers (ESPs) and other load serving entities (LSEs). As such, we find it appropriate to authorize payment of today’s awards from the Commission’s intervenor compensation program fund, as described in D.00-01-020.

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

- November 19, 2006, the 75th day after TURN filed its compensation request, and continuing until full payment of the award is made, and on
- November 13, 2006, the 75th day after Green Power filed its compensation request, and continuing until full payment of the award is made.

We remind all intervenors that Commission staff may audit their records related to the award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN’s and Green Power’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.

XI. Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 14.6(c)(6) of the Commission’s Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

XII. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner, and Sarah R. Thomas is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN and Green Power have satisfied all the procedural requirements necessary to claim compensation in this proceeding.
2. TURN and Green Power each made a substantial contribution to D.06-06-066, as described herein.
3. TURN and Green Power requested hourly rates that are reasonable, as adjusted herein, when compared to the market rates for persons with similar training and experience.
4. The total of the reasonable compensation for TURN is \$44,344.70.
5. The total of the reasonable compensation for Green Power is \$39,670.
6. This proceeding affected a broad array of utilities, ESPs and other LSEs.
7. The appendix to this opinion summarizes today’s award.

Conclusions of Law

1. TURN and Green Power have fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and are entitled to intervenor compensation for their claimed compensation incurred in making substantial contributions to D.06-06-066.

2. TURN should be awarded \$44,344.70 for its contribution to D.06-06-066.
3. Green Power should be awarded \$39,670 for its contribution to D.06-06-066.
4. Per Rule 14.6(c)(6), the comment period for this compensation decision may be waived.
5. Today's award should be paid from the Commission's intervenor compensation program fund, as described in D.00-01-020.
6. This order should be effective today so that TURN and Green Power may be compensated without further delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$44,344.70 for its contribution to Decision (D.) 06-06-066.
2. The Green Power Institute (Green Power) is awarded \$39,670 for its contribution to D.06-06-066.
3. Within 30 days of the effective date of this decision, both awards shall be paid from the Commission's intervenor compensation program fund, as described in D.00-01-020. 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, commencing as follows:
 - November 19, 2006, the 75th day after TURN filed its compensation request, and continuing until full payment of the award is made, and on
 - November 13, 2006, the 75th day after Green Power filed its compensation request, and continuing until full payment of the award is made.

4. The comment period for today's decision shall be waived.

This order is effective today.

Dated November 30, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

APPENDIX

Compensation Decision Summary Information

Compensation Decision:	D0611031	Modifies Decision? No
Contribution Decision(s):	D0606066	
Proceeding(s):	R0506040	
Author:	ALJ Thomas	
Payer(s):	Intervenor Compensation Program Fund	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/ Disallowance
The Utility Reform Network	September 5, 2006	\$44,587.82	\$44,344.70	No	Hourly rate for 2006 lower than requested
The Green Power Institute	August 30, 2006	\$39,670	\$39,670	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	\$395	2005	\$395
Robert	Finkelstein	Attorney	The Utility Reform Network	\$410	2006	\$405
Michel	Florio	Attorney	The Utility Reform Network	\$470	2005	\$470
Michel	Florio	Attorney	The Utility Reform Network	\$490	2006	\$485
Matthew	Freedman	Attorney	The Utility Reform Network	\$270	2005	\$270
Gregg	Morris	Policy Expert	The Green Power Institute	\$210	2005	\$210
Gregg	Morris	Policy Expert	The Green Power Institute	\$220	2006	\$220

(END OF APPENDIX)