

Decision 07-01-009 January 11, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Set Hourly Rates for Purposes of Calculating Intervenor Compensation Awards Pursuant to Public Utilities Code Section 1801 and Following, for Work Performed in Calendar Year 2006.

Rulemaking 06-08-019
(Filed August 24, 2006)

INTERIM OPINION ON UPDATING HOURLY RATES

I. Summary

In today's interim decision we adopt the following measures relating to the hourly rates paid to intervenor representatives:

- A 3% cost-of-living adjustment (COLA) for work performed in calendar year 2006, as proposed in our order instituting this rulemaking.
- An additional 3% COLA for work performed in 2007.
- Beginning with 2007 work, establish three rate ranges for experts based on levels of experience, similar to the five levels already established for attorneys.
- Beginning with 2007 work, allow individual intervenor representatives up to two annual 5% "step increases" within each experience level; the step increases may not result in a rate that exceeds the maximum rate for that level.
- Beginning with 2007 work, an intervenor representative with a rate last authorized at least four years prior to the pending request may seek a new rate as if that individual were new to Commission proceedings.

This proceeding remains open to address other issues discussed in the rulemaking.

II. Procedural Background

Our order instituting rulemaking (OIR) describes the evolution of our hourly ratesetting process; we will not repeat that description here. Before the OIR, we held two informal meetings, open to all interested persons and well attended by intervenors and utilities. We also solicited and received letters from Union of Concerned Scientists (UCS) and The Utility Reform Network (TURN) fleshing out some of the ideas they brought up at the meetings. This preliminary work greatly helped to focus the OIR, and we express appreciation for the participants continuing efforts.

The record of our hourly rate updates consists of utility compensation data sets and party comments. The due date for the data sets is annually on April 30, when the annual compensation reports under General Order 77-M must be filed.¹ The OIR provided for two rounds of comments (opening and reply) to be filed concurrently, with certain additional compensation data to be supplied by the utilities with their opening comments.

Two intervenors, The Greenlining Institute (Greenlining) and Public Advocates, submitted “preliminary” comments (seeking to broaden the rulemaking) before the due date for opening comments. Greenlining also participated fully in the scheduled comment cycle.

¹ In other words, the utilities generate and distribute the basic compensation data without having to wait for the OIR to issue.

The following parties (besides Greenlining) filed opening comments: Aglet Consumer Alliance (Aglet); AT&T California; Pacific Gas and Electric Company (PG&E); San Diego Gas & Electric Company and Southern California Gas Company (SDG&E/SoCalGas, filing jointly); Southern California Edison Company (SCE); Verizon California Inc.; and the Joint Intervenors (consisting of TURN, UCS, Disability Rights Advocates, Green Power Institute, Utility Consumers' Action Network, and Consumer Federation of California). Although Aglet did not formally participate in the Joint Intervenors' opening comments, Aglet joined in the latter's reply comments. With the exception of Aglet and SDG&E/SoCalGas, the parties filing opening comments also filed replies.

III. COLA Adjustments for 2006

We solicited comments on whether to adopt a general COLA for work performed in 2006. We suggested that a 3% increase was appropriate above rates previously authorized for 2005. As mentioned in the OIR, this increase was calculated based on federal and other cost-of-living data generally available to the public.

In comments, the utilities generally agree a 3% COLA is reasonable. Intervenors argue a 4-6% COLA is more appropriate, noting that no general increases were authorized for work performed in 2005. In D.05-11-031, we discussed the reasons no general hourly rate increases were adopted for 2005, and we will not revisit the issue here.

After reviewing the available data relating to COLA's, and the comments from the parties, we find the 3% increase for 2006 suggested in the OIR is appropriate, and adopt it here.

IV. COLA Adjustments for 2007

As noted by the intervenors, the process for adopting hourly rates has proved to be time-consuming. Rates for 2005 (D.05-11-031), and with this decision for 2006, were adopted at or near the end of each year, leaving intervenors uncertain as to the approved level of rates for almost the entire year. To avoid similar delay and uncertainty, we adopt here another 3% COLA for work performed in 2007 above rates for 2006. This increase is based primarily on the Social Security Administration COLA of 3.3% for 2007, released on October 18, 2006.

V. Experience Levels for Experts

The most troublesome current issue has been refining our determination of hourly rates for experts. The range of rates adopted for experts in D.05-11-031 was \$110-\$360/hour, with no differentiation for levels of experience. In light of comments, we have tempered the “peer group” proposal in the OIR; we deem that proposal unduly complex. Instead, effective with 2007 work, we adopt three experience levels for experts, conceptually similar to the experience levels and rate ranges we previously adopted for attorneys. The three levels for experts are: 0-6 years; 7-12 years; and 13-plus years.

We chose levels for experts on the basis of clusters we observed among representatives appearing in our proceedings; however, we note that experts with 13-plus years clearly predominate (i.e., 24 of the 35 experts identified in Attachment B of the OIR, or almost 70%, have 13-plus years experience). There is substantial overlap in the rate ranges we approve. The low end of the 13-plus year range (\$150 for 2007) is equal to the low end for the 7-12 year level (similar to the situation for attorneys), and is lower than the high end of the range for experts with 0-6 years (\$180). Thus, an expert with relatively few years of

experience may still argue on the basis of, e.g., advanced degrees, honoraria, significant responsibility within the firm or in the proceeding, or other factors, for a rate commensurate with experts who may have more years of experience. In other words, qualifications besides experience will still be important.

The utilities generally do not oppose experts' rates based on years of experience. SCE further recommends that if experience-based rates are adopted, intervenors should be required to disclose the full credentials of their representatives to allow for a meaningful analysis of the nature of the work performed. The Joint Intervenors comment that experience levels should be adopted with a floor-ceiling structure for each range, and that a continuing analysis/comparison of utility data sets should be made.

We find that basing expert rates on levels of experience, similar to the levels established for attorneys, will better ensure that an expert's given rate is within the market rates paid to persons of comparable training and experience. However, in no event should the rate requested by an intervenor exceed the rate billed to that intervenor by any outside consultant it hires, even if the consultant's billed rate is below the floor for a given experience level. We also agree with SCE that intervenors must disclose the credentials of their representatives in order to justify the requested rates. The adopted rate ranges for experts are shown in the table in a later section of today's decision.

VI. Step Increases

Aglet proposed, in addition to a COLA, that we include "step increases" within each rate range, based on the experience level of the representative. As an example, Aglet described the step increase process now applicable to State employees, where salary scales allow for annual increases, or steps, up to the maximum within a given range. The State step increase process generally

includes up to five steps of 5% each, with those entering at a mid-level step limited to one or two increases before reaching the maximum. Aglet suggests we consider a step increase element be included here, with at least two steps within each range. We agree with Aglet. A step increase will allow representatives within a given level of experience, otherwise who might be limited to a COLA, to seek rates more in line with others having similar training and experience.

Beginning with work performed in 2007, we will allow intervenor representatives to request annually a step increase of 5% above their adopted rates from the previous year. The step increase is in addition to any authorized COLA. Step increases are subject to the following conditions:

- Representatives will be limited to two step increases within any given level of experience. For example, an attorney with nine years experience in 2006 (in the 8-12 year experience level) may request a 5% step increase for 2007 work, and another 5% step increase for 2008 work, but no more. That same attorney would be eligible for additional step increases upon reaching the 13-plus year experience level.
- Step increases may not result in rates above the highest rate for any given range, for a given year. An attorney with nine years experience, for example, and with a previously adopted rate at the high end of the 8-12 year level, would not be eligible for a step increase. Similarly, that same attorney with a previously adopted rate 5% less than the maximum would be eligible for only one step increase while in the 8-12 year level.

VII. Representatives With No Recently Authorized Rates

In D.05-11-031, we did not authorize any general hourly rate increases for work performed in 2005 above rates adopted for 2004. We did, however, set forth in that decision three circumstances where a 2005 rate increase for an individual representative might be justified. One of those circumstances was for

representatives whose hourly rate was last authorized prior to 2004, and in that case we found an increase of 3% per year for each year up to 2005 as reasonable.

We solicited comments in this OIR on whether we should allow an individual without a recently authorized rate to seek a new rate as if that individual were new to Commission proceedings, thereby not necessarily tying the individual's older (e.g., more than four years) rate to the current request.

In their comments, the utilities and Aglet agree or did not oppose allowing an individual with no recent rate to justify a new rate as if that individual were new to Commission proceedings.

The Joint Intervenors commented that the issue could also be one of how to treat, for example, two individuals who had similar approved rates in the past, but now may be on significantly different rate levels because one of them had not appeared before the Commission for some time, while the other had rates adopted annually. The Joint Intervenors suggest we allow an individual with no recent rate to renew the linkage that existed in the past, and thereby create a rebuttable presumption for compensation at the same level as the individual whose rate was updated more recently. We will entertain a request to renew a linkage where the Commission had expressly linked the rates of two individuals in the past; however, we will not accord a rebuttable presumption to the validity of such a request. The individual who had not appeared before the Commission for some time may have retired or may have worked in unrelated areas. Thus, the intervenor proposing we renew a linkage should demonstrate that the nature of the individual's work since we approved the linkage continues to support the linkage.

In sum, we are allowing an individual with no recently authorized rate to justify a new rate as if the representative were new to Commission proceedings.

Comparison to approved rates for other representatives is always part of this justification; where the representative formerly had an approved rate expressly linked by us to another representative, the intervenor may seek to restore the linkage, provided the intervenor shows that the original basis for the linkage remains valid.

VIII. Adopted Hourly Rate Ranges: 2006 - 2007

The following table shows the adopted ranges for work performed by intervenor representatives in 2006 and 2007. Rate ranges for attorneys and experts are based on levels of applicable experience. Step increases should be addressed on a case-by-case basis, and are not reflected in the table.

Hourly Intervenor Rate Ranges for 2006 and 2007

(For 2006, rates adopted in D.05-11-031 x 3%, rounded to nearest \$5)

(For 2007, rates adopted for 2006 x 3%, rounded to nearest \$5)

Years of Experience	2006 Range	2007 Range
Attorneys:		
0 - 2	\$140 - \$195	\$145 - \$200
3 - 4	\$190 - \$225	\$195 - \$230
5 - 7	\$260 - \$280	\$270 - \$290
8 - 12	\$280 - \$335	\$290 - \$345
13+	\$280 - \$505	\$290 - \$520
Experts:		
All	\$115 - \$370	
0 - 6		\$120 - \$180
7 - 12		\$150 - \$260

13+		\$150 - \$380
-----	--	---------------

Note: The rates intervenors request for the use of outside consultants may not exceed the rates billed to the intervenors by the consultants, even if the consultants' rates are below the floor for any given experience level.

IX. Annual Updating

We currently update hourly rates annually on a calendar year basis. We solicited comments in this proceeding on whether to change to a fiscal year basis since the affected utilities annually report compensation data (pursuant to General Order 77-M) at the end of April. Considering we have most recently used Social Security Administration COLA data which is annually released at the end of the calendar year, and in view of comments, we will continue to update hourly rates on a calendar year basis.

X. Comments on Proposed Decision

The proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Comments were filed by Aglet, Greenlining and Disability Rights Advocates. Reply comments were filed by SCE and TURN.² We first summarize these comments and then respond.

Aglet requested we confirm that the step increases discussed herein apply to intervenor representatives in the 13-plus year experience level. Aglet also commented that we should continue adjusting hourly rates on a calendar year, as opposed to a fiscal year, basis.

² Because of the New Year's Day holiday, and the declared national day of mourning on January 2, 2007 with no postal service, we accepted comments filed on or before January 3, 2007, as timely. Due date for replies was January 8, 2007.

Greenlining commented that the hourly rate ranges generally should be higher, and more in line with what utilities pay their outside representatives. Greenlining also recommended a 3% COLA be established for the next three years, with a general re-examination of rates thereafter. Disability Rights Advocates commented on the hourly rates, stating that sole reliance on a COLA and the proposed step increases do not provide adequate opportunities for representatives to move up through a given range.

In its reply, SCE states that Greenlining and Disability Rights Advocates ignore the difference between the rates utilities pay in-house and outside representatives. SCE explains that current hourly rates and those proposed in this order are based on a blended rate of both in-house and outside rates. Lastly, SCE states a mechanism is already in place for gathering hourly rate data, and recommends we adopt the proposed rate ranges with no modifications.

In its reply, TURN supported the comments of Disability Rights Advocates and Aglet regarding the inadequacy of proposed COLA and step increases. TURN also supported Aglet regarding rate increases being effective on a calendar year basis. TURN also had concerns over inclusion of 2007 rates should be included in this proceeding, and the source of those rates.

Responding first to Aglet, we confirm that our step increase proposal would apply to all intervenor representatives at every experience level, including 13-plus years, subject to the maximum rate for the experience level. Responding to Greenlining and Disability Rights Advocates (as well as to TURN's reply comments), we note that we have used a blended rate, as described by SCE, to set hourly rates. We agree with SCE that the arguments from Greenlining and Disability Rights Advocates are not persuasive and do not support a change of the use of blended rates in this interim decision. However, we will further

address the rate-setting methodology in the next phase of this rulemaking, and encourage all parties to participate in the process.

We next address annual hourly rate adjustments. No party supported, and Aglet and TURN opposed, our proposal for adjusting hourly rates on a fiscal year basis. Our proposal was prompted by the timing of utility compensation reports, which are filed annually in April. Because we have relied today on the Social Security Administration's COLA, which is released annually in late fall, it appears that such reliance would be consistent with a calendar year adjustment of hourly rates. Calendar year adjustment has been our long-standing practice, and we will retain it. If further adjustments must be made on the basis of the utility reports, which are filed in the spring, those adjustments can be addressed on a mid-year basis.

Lastly, we respond to TURN's reply comments regarding 2007 rates. The reasons for establishing rate levels for 2007 (avoiding delay and uncertainty), and the source for those rates (Social Security Administration COLA for calendar year 2007), were addressed earlier in today's decision (see Section IV - COLA Adjustments for 2007).

In sum, we find no reason to modify the Commissioner's proposed order in this matter, except to continue annual hourly rate adjustments on a calendar year basis.

XI. Assignment of Proceeding

This proceeding is assigned to Commissioner Michael R. Peevey, and Administrative Law Judges Steven Kotz and Kenneth Koss.

Findings of Fact

1. The purpose of this rulemaking is to refine the process for determining the hourly rates to be used in calculating intervenor compensation awards for work performed in 2006.

2. It is also necessary to refine the process for determining hourly rates for intervenors for 2007.

3. The computation of compensation and hourly rates paid to intervenors takes into account the market rates paid to representatives of comparable training and experience offering similar services.

4. Cost-of-living data readily available to the public from several federal agencies shows the general rate of inflation for 2006 to be approximately 3%, and also 3% for 2007.

5. The Social Security Administration annually releases COLA data in the late fall, with any increases effective on a calendar year basis.

6. For work performed in 2006, a 3% COLA above rates adopted for 2005 is reasonable.

7. For work performed in 2007, a 3% COLA above rates adopted for 2006 is reasonable.

8. Establishing three rate range levels for experts, and the corresponding rates, effective with work performed in 2007, based on years of applicable experience, is reasonable, and similar to the five levels already established for attorneys.

9. Beginning with 2007 work, establishing for individual intervenor representatives two annual "step increases" of 5% within each experience level, and capped at the maximum of that level, is reasonable.

10. Beginning with 2007 work, allowing intervenor representatives with a rate last authorized at least four years prior to the pending request to seek a new rate as if that individual was new to Commission proceedings is reasonable. In such cases, allowing intervenors to restore a linkage of a requested rate with previously approved rate is also reasonable if the Commission expressly linked the two rates in the past, and the intervenor shows that the original basis for the linkage remains valid.

11. It is reasonable that intervenors disclose the credentials of their representatives in order to justify the requested rates.

12. The compensation data we use from the utilities to determine hourly rates becomes available (and is reported to us pursuant to General Order 77-M) each year in the spring.

Conclusions of Law

1. For work performed in 2006, intervenors should be authorized an hourly rate COLA of 3% above rates adopted for 2005.

2. For work performed in 2007, intervenors should be authorized an hourly rate COLA of 3% above rates adopted for 2006.

3. Beginning with work performed in 2007, the authorized rates for experts should be categorized into the following three levels, or rate ranges, based on years of applicable experience: 0-6 years; 7-12 years; and 13-plus years. The corresponding rates included in the table, herein, should be adopted for these experience levels.

4. Beginning with 2007 work, individual intervenor representatives should be allowed to request annual "step increases" to their hourly rate of no more than 5%, limited to two step increases within each identified experience level, and capped at the highest rate for any given experience level.

5. Beginning with 2007 work, intervenor representatives with a rate last authorized at least four years prior to the pending request should be able to seek a new rate as if that individual were new to Commission proceedings. In such cases, intervenors may restore a linkage of a requested rate with previously approved rate if the Commission expressly linked the two rates in the past, and the intervenor shows that the original basis for the linkage remains valid.

6. The rate requested by an intervenor for its outside consultant may not exceed the rate billed to the intervenor by the consultant, even if the consultant's rate is below the floor for the corresponding experience level.

7. Intervenors should disclose the credentials of their representatives in order to justify requested rates.

8. We should continue to adjust the hourly rates of intervenors on a calendar year basis.

9. Today's order should be effective immediately.

INTERIM ORDER

IT IS ORDERED that:

1. For work performed in 2006, intervenors are authorized an hourly rate Cost-of-Living-Adjustment (COLA) of 3% above rates adopted for 2005.

2. For work performed in 2007, intervenors are authorized an hourly rate COLA of 3% above rates adopted for 2006.

3. Beginning with work performed in 2007, the authorized rates for experts shall be categorized into the following three levels, or rate ranges, based on years of applicable experience: 0-6 years; 7-12 years; and 13-plus years. The corresponding rates included in the table, herein, are adopted for these experience levels.

4. Beginning with work performed in 2007, individual intervenor representatives are authorized to request annual “step increases” to their hourly rate of no more than 5%. Step increases shall be limited to two per individual within each identified experience level, and in no event result in rates above the highest rate for any given experience level.

5. Beginning with work performed in 2007, intervenor representatives with a rate last authorized at least four years prior to the pending request may seek a new rate as if that individual were new to Commission proceedings. In such cases, intervenors may restore a linkage of a requested rate with previously approved rate if the Commission expressly linked the two rates in the past, and the intervenor shows that the original basis for the linkage remains valid.

6. The rate requested by an intervenor for its outside consultant may not exceed the rate billed to the intervenor by that consultant, even if the consultant’s rate is below the floor for the corresponding experience level.

7. Intervenors shall fully disclose in their requests for compensation the credentials of their representatives in order to justify requested rates.

8. Annual hourly rate adjustments shall continue on a calendar year basis.

9. This rulemaking shall remain open to address further issues.

This order is effective today.

Dated January 11, 2007, at San Francisco, California.

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