

Decision 08-04-010` April 10, 2008

**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)

**FINAL OPINION SETTING HOURLY INTERVENOR RATES FOR 2008 AND  
ADDRESSING RELATED MATTERS**

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## **FINAL OPINION SETTING HOURLY INTERVENOR RATES FOR 2008 AND ADDRESSING RELATED MATTERS**

### **1. Summary**

In today's final decision, we adopt a 3% cost-of-living adjustment (COLA) for work performed by intervenor representatives in calendar year 2008, discontinue the requirement that utilities submit annual data reports, address other related matters, and close this proceeding.

### **2. Background**

This rulemaking initially was scoped to set hourly rates for intervenor representatives for work performed in 2006. Interim Decision (D.) 07-01-009 in this proceeding expanded the scope of the rulemaking and authorized the following: a 3% COLA increase for work performed in 2006; an additional 3% COLA for work performed in 2007; ranges of rates for experts based on levels of experience, similar to the existing experience levels for attorneys; and up to two annual 5% "step increases" in hourly rates within each experience level for all intervenor representatives. The interim decision also established guidelines for setting hourly rates for intervenor representatives with no recently authorized rates in place, determined that we would continue to update intervenor hourly rates on a calendar year basis, and directed that the proceeding remain open to resolve other issues.

### **3. Procedural History and Revised Scoping Memo**

We held two informal workshops after the issuance of interim D.07-01-009, on March 15 and June 29, 2007, to discuss and possibly refine the remaining issues from the rulemaking. The workshops were open to all interested persons and well-attended by intervenors and utilities. Issues discussed at the workshops included: future COLA increases, particularly for 2008 work;

determining whether a “market analysis” of hourly rates for the purposes of setting future intervenor rates (2009 and beyond) should be conducted; the need to clarify how individual intervenor rates are determined in certain circumstances; the need to continue, in light of COLA increases, the requirement that utilities submit “Annual Data Reports” each spring with information on hourly rates paid to utility representatives, as directed in D.05-11-031 (our decision addressing 2005 intervenor rates, in Rulemaking 04-10-010); and, in closing this rulemaking, a linkage with future proceedings regarding the setting of hourly rates.

In light of the issues already addressed in the interim decision, and further discussion of these and related issues at the workshops, President Peevey, the assigned Commissioner in this proceeding, issued a revised Scoping Memo and Ruling (Scoping Memo) on September 18, 2007. No objections were filed to the revised Scoping Memo, which accomplished the following:

- 1) Expanded the scope of the rulemaking to include setting intervenor rates for work performed in 2008.
- 2) Expanded the scope to include establishing a COLA for 2008 work.
- 3) Determined that a study analyzing market rates for the purposes of setting future rates (2009 and beyond) should not be conducted now.
- 4) Directed that the rulemaking address:
  - (a) the showing or level of justification necessary for an individual representative to request an hourly rate increase greater than that generally adopted (e.g., a COLA) for representatives in any given level of experience;
  - (b) how the allowable step increases discussed in D.07-01-009 would apply in 2008, and beyond;
  - (c) whether, in light of the use of COLAs, the utilities’ Annual Data Reports directed in D.05-11-031 should continue; and

- (d) a procedural linkage to this rulemaking regarding the succession and frequency of future proceedings for the purposes of setting intervenor rates for 2009 and beyond.

We did not solicit comments on the revised Scoping Memo as these same topics were discussed at the June 29 workshop. Today's decision affirms the revised Scoping Memo and incorporates and discusses the comments from that workshop.

#### **4. Discussion**

The issues contained in the revised Scoping Memo are addressed below, along with related matters we find necessary to close this proceeding.

##### **4.1. COLA Adjustments for 2008**

We find it reasonable to adopt another 3% COLA for intervenor rates for work performed in 2008. This increase primarily is based on various federal inflation indexes, such as the Social Security Administration (SSA) COLA and Bureau of Labor Statistics (BLS) data for consumer prices and wages.

Appendix A to this decision contains tables showing current and recent (2002-2008) SSA COLAs and other price and wage indexes.<sup>1</sup>

In reviewing available data, we found no index that specifically targets rates for services by regulatory professionals (attorneys, engineers, economists, scientists, etc.). Though we considered many indexes, our findings are weighted heavily to SSA COLA and similar data. Monthly indexes with a rolling 12-month average are useful, but seem highly sensitive to short-term spikes

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<sup>1</sup> The SSA annual COLA for 2008 is 2.3% (issued in October 2007). The Bureau of Labor Statistics Consumer Price Indexes (CPI) average annual CPI for all months increased by approximately 3% from 2006 to 2007.

(e.g., in energy costs) that may show month-to-month fluctuations better than they show yearly trends. Here we are exercising our own informed judgment, based on review of various indexes measuring inflation in consumer prices or wages in the national economy.

After reviewing the available data relating to COLA's, we find a 3% increase for 2008 is appropriate, and adopt it here. The table below shows the adopted ranges for rates for work performed by intervenor representatives. The rates for 2006 and 2007 were adopted in D.07-01-009, and the rates for 2008 are adopted in today's decision.

**Hourly Intervenor Rate Ranges for 2006 - 2008**  
(2008 rates = 2007 rates x 3%, rounded to nearest \$5)

| Years of Experience | 2006 Range    | 2007 Range    | 2008 Range    |
|---------------------|---------------|---------------|---------------|
| Attorneys:          |               |               |               |
| 0 - 2               | \$140 - \$195 | \$145 - \$200 | \$150 - \$205 |
| 3 - 4               | \$190 - \$225 | \$195 - \$230 | \$200 - \$235 |
| 5 - 7               | \$260 - \$280 | \$270 - \$290 | \$280 - \$300 |
| 8 - 12              | \$280 - \$335 | \$290 - \$345 | \$300 - \$355 |
| 13+                 | \$280 - \$505 | \$290 - \$520 | \$300 - \$535 |
| Experts:            |               |               |               |
| All                 | \$115 - \$370 |               |               |
| 0 - 6               |               | \$120 - \$180 | \$125 - \$185 |
| 7 - 12              |               | \$150 - \$260 | \$155 - \$270 |
| 13+                 |               | \$150 - \$380 | \$155 - \$390 |

We continue the policy stated in D.07-01-009 that the rates intervenors request for the use of outside consultants (attorneys and experts) may not exceed

the actual rates billed to the intervenors by the consultants, even if the consultants' rates are below the floor for any given experience level, to better ensure that ratepayers only pay for the actual costs of such outside consultants.<sup>2</sup>

From discussion at the workshops, the parties consider COLAs as a simple and acceptable method for computing rate increases for the short-term. COLAs, however, are not specifically targeted to regulatory professionals, and we cannot be certain over the long-term if COLAs will provide intervenor rates that reflect the "market rate." (See § 1806.<sup>3</sup>) This issue is discussed in the next section of this opinion.

#### **4.2. Market Analysis of Hourly Rates**

This rulemaking requested comment on the need for the development of a methodology for setting future intervenor rates that would periodically validate the government inflation indexes. Unlike indexes, the validation would use an analysis of "market rates" actually paid to representatives in the legal and other professions whose services are engaged for regulatory proceedings. The revised Scoping Memo found that, in light of COLA increases, a study of market rates

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<sup>2</sup> We note that representatives' fees are compensable under statute only to the extent that the hours billed result in "substantial contribution" to a Commission order. Therefore, intervenors assume a risk that some of their costs for representation will not be compensated, and this risk gives intervenors an incentive to find qualified representatives who will work for a reasonable hourly fee, a fee that may be at or even below the low end of our adopted ranges. Our policy of not allowing intervenors to request hourly rates for an "outside" representative that exceeds the representative's actual billed rate reinforces the incentive for intervenors to "shop" carefully for representation, and thereby helps to keep to reasonable levels the awards ratepayers fund through the intervenor compensation program.

<sup>3</sup> All statutory references are to the Public Utilities Code.

should not be conducted now, but that such a study may be considered appropriate for 2009 or 2010 rates in a future proceeding. We affirm the Scoping Memo, and further discuss plans for a market rate study. (See Section 4.6.2 below).

### **4.3. Justifying Increases Beyond Those Generally Adopted**

Several intervenors asked that we clarify the showing or level of justification necessary for an individual representative to request an hourly rate increase greater than that generally adopted (e.g., by COLA).

Authorizing rates within a given range, instead of setting a single specific rate, allows a measure of flexibility in setting rates and recognizes that the training and experience of individuals within any given range will differ. The existing rate ranges have been in place for the last four years (2005-2008), with levels set by years of experience in each of the four years for attorneys, and in the last two years (2007-2008) for experts.

The primary purpose of this discussion is to address how intervenor representatives (attorneys and experts) with an hourly rate already in place may request an increase beyond any generally adopted increases. Before commencing that discussion, we first briefly reiterate the guidelines for establishing rates for first-time representatives, and for those with no recently authorized rate.

#### **4.3.1. Rates for New Representatives**

Intervenor representatives who previously have not appeared before the Commission must make a showing in the compensation request to justify their proposed hourly rate. The requested rate must be within the established range of rates for any given level of experience, and, consistent with the guidelines in D.05-11-031, must take into consideration the rates previously awarded other

representatives with comparable training and experience, and performing similar services. (*See* § 1806.)

#### **4.3.2. Rates for Representatives with No Recent Rate**

In D.07-01-009, we set forth guidelines for setting rates for representatives with a rate last authorized at least four years prior to a pending request for compensation. We will not repeat that full discussion here, but generally these guidelines state that an individual with no recently authorized rate (within the previous four years) may seek a new rate as if that individual were new to Commission proceedings.

#### **4.3.3. Rates for Representatives with a Recently Adopted Rate**

Intervenor representatives (attorneys and experts) with an hourly rate previously adopted by the Commission (an existing rate in place from a prior or recent year) normally would qualify for a rate increase under the following five circumstances:

- 1) Annual COLA: includes any other type of annual increase adopted by the Commission generally applicable to all representatives;
- 2) Step increases: limited to two annual increases of no more than 5% each year within any given level of experience for each individual;
- 3) Moving to a higher experience level: where additional experience since the last authorized rate moves a representative to a higher level of experience (e.g., an attorney with 12 years experience, in the 8-12 year experience level, would be eligible for an increase the following year, apart from any COLA or step increase, by virtue of moving up to the 13-plus year level); and
- 4) Rate below rate range: any rate below the range of rates for a given experience level in a given year may be increased to at least the bottom of the rate range (cannot exceed the rates intervenors actually pay their outside consultants).

- 5) Rate historically sought at low end of a given range: an intervenor representative who has historically sought rates at the low end of an applicable rate range may request an increase within that range if the representative can clearly demonstrate in the compensation request that the representative's previously adopted rate is significantly less than that of close peers (those with closely comparable training and experience and performing closely similar services). Such requests will be judged on a case-by-case basis, but at a minimum must show the previously adopted rate of the peer(s), and must include a detailed description of the work involved, to the degree that a comparison readily can be made.

#### **4.3.4. Increases Greater Than Those Generally Adopted**

During the workshops, intervenors pointed to a previous few instances, as examples, where the intervenor engaged outside counsel for handling highly technical or complex matters, such as bankruptcy proceedings, and the rates billed by the outside counsel were greater than the highest rate authorized by the Commission for a given level of experience. We recognize the desire by the intervenors to be able to make a showing on behalf of a particular representative, and agree with the intervenors that proceedings potentially involving such specialized outside counsel or representation are very rare. In these rare proceedings, beginning with work performed in 2008, we will consider approving an hourly rate in excess of the maximum rate for any given range, as discussed below.

The adopted hourly rate ranges are presumed reasonable. This presumption is conclusive, and an hourly rate request above the relevant adopted range is presumed excessive, except where the Commission finds all of the following:

- a. The subject matter of the proposed representation generally is foreign to utility regulatory proceedings (*e.g.*, bankruptcy; judicial review).
- b. Such representation almost always would be in another forum (*e.g.*, bankruptcy court; federal district or circuit court).
- c. The market rate for such representation, considering the training and experience reasonably required for the services requested, clearly is above the adopted range. A utility's use of a representative charging a rate above an adopted hourly rate range does not suffice alone to make the required showing.

An intervenor intending to request compensation at an hourly rate above the relevant adopted range must make the above showing in its original Notice of Intent (NOI)<sup>4</sup> or in a supplemental NOI filed as soon as possible after the intervenor determines that its costs of representation will be above the adopted hourly rate range.<sup>5</sup> The showing in the NOI must explain the reasons why specialized representation is necessary and why such representation reasonably would not be available except at the higher requested rate. The intervenor bears the burden of proof for all elements of the required showing.

The above procedure is narrow and is specific to the proceeding, subject matter, and representative for which the above findings are requested. Thus, by granting a higher rate under the procedure, we would not be changing the adopted hourly ranges generally applicable to compensation for participation in our proceedings.

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<sup>4</sup> As set forth in § 1804(a).

<sup>5</sup> Rule 17.1(f) of the Commission's Rules of Practice and Procedure requires intervenors to file a supplemental NOI in judicial review cases within 30 days after filing any judicial review pleading.

#### **4.4. Clarifying Step Increases for 2008 and Beyond**

Several intervenors requested that we clarify how step increases would apply in 2008, and future years. D.07-01-009 allows intervenor representatives to request an annual 5% “step increase” twice within each level of experience. Step

increases are separate from and not considered in the establishment of the rate ranges for each level of experience, but may not result in rates above the highest rate for any given range in a given year.

As an example for determining a step increase, an attorney with eight years experience in 2006 (then within 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 additional step increases while within the 8-12 year experience level. Since step increases are in addition to COLAs, this attorney could request a 3% COLA and a 5% step increase (8% total) for 2007 work, then request another COLA (3%) and another 5% step increase (8% total) for 2008 work. This attorney then would be limited only to COLAs (or other rates or methodologies directed by the Commission) and not eligible for step increases for the remaining time spent in the 8-12 year experience level. That same attorney would be eligible for two additional annual 5% step increases upon reaching the 13-plus year experience level.

As another example, an attorney with nine years' experience, and with a previously adopted rate already at the highest end of the rate range for the 8-12 year experience level, would be limited to COLAs only and not eligible for a step increase until reaching the 13-plus year experience level. Similarly, if this same attorney had a previously adopted rate that was within 5% of the maximum for the 8-12 year level, that attorney would be eligible for only one step increase (up to the maximum of the rate range) while in that level.

In order to accurately track individual step increases from year to year, we direct that any request for a step increase be clearly and separately explained in the compensation request, and include a statement on whether the requested step increase is the first or second such increase for that individual within a given

level of experience. For simplicity, we have rounded COLA computations for hourly rates to the nearest \$5, and follow that practice for step increases. In order to avoid compounding of rate increases or “double-rounding” (rounding to nearest \$5 twice in any rate calculation), representatives requesting a COLA and a step increase in the same year shall calculate both adjustments as a single computation, then round the final product to the nearest \$5. As an example, a representative with an authorized hourly rate of \$200 for 2006 would calculate a rate for 2007 as follows:

COLA only:  $\$200 \times 3\% = \$206$ ; with rounding, rate is **\$205**

Step Increase only:  $\$200 \times 5\% =$  rate of **\$210**

COLA plus Step Increase:  $\$200 \times 8\% = \$216$ ; with rounding, rate is **\$215**

#### **4.5. Discontinuance of the Utilities’ Annual Data Reports**

In D.05-11-031, our decision on intervenor rates for 2005, we directed the state’s six largest investor-owned utilities<sup>6</sup> to serve, beginning in April 2006, annual data sets on the parties to the proceeding regarding the hourly rates they paid to attorneys and expert representatives, both in-house and outside, for participation in our proceedings for the previous two-year period. The purpose of these data reports was to provide information that would assist the Commission, intervenors, and others in determining and calculating hourly

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<sup>6</sup> Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), Southern California Gas Company (SoCalGas), SBC California (now AT&T California), and Verizon California Inc. (Verizon).

rates.<sup>7</sup> The data sets also must be accompanied by an analysis of any escalation in rates over the two preceding years.

We have found little use of the first two utility data sets (filed in 2006 and 2007) in light of the COLAs adopted for each of the last three years (2006-2008). Moreover, despite our efforts to standardize the reporting, the data sets seem inconsistent and non-uniform in content. We further found that attempting to use the sets for any comparison to intervenor rates does not result in meaningful conclusions regarding annual escalation. Even if we were certain that the utilities all were reporting compensation data exactly as we directed, we doubt that the data sets would, by themselves, satisfy the “market rate” standard under § 1806. Although the reporting utilities are very large companies, we have found that for many types of expertise and/or experience levels, the sets contain very few data points, even if we were to aggregate all of the data from all of the utilities. Given these limitations, we do not think robust conclusions about market rates could be drawn solely from the data sets. Furthermore, in the absence of an established methodology, we do not see how the data sets can be used to validate the results from using COLAs to update hourly rates for intervenors.

We recognize that data input from the utilities will be one part of any meaningful analysis of market rates for the purposes of setting intervenor rates in the future. However, the data requested now may not be the type or contain

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<sup>7</sup> Section 1806 states that intervenor compensation awards shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services; and that such awards shall not exceed the comparable market rate for services paid by the Commission or the public utility, whichever is greater.

the necessary information that would be necessary to conduct such a meaningful analysis. We therefore find that the utilities should no longer be required to serve the annual data sets as directed in D.05-11-031. Any further directives regarding the utilities' hourly rate data will be addressed in a future proceeding.

#### **4.6. Procedural Linkage to Future Proceedings**

In D.05-11-031, we reviewed and analyzed (in-house) the rate levels of intervenor hourly rates in order to set rates for work performed in 2005, and earlier years. In D.07-01-009 and today's decision, we adopted annual COLAs for 2006-2008. In closing this proceeding, however, we recognize that a comprehensive compensation study will be necessary periodically (perhaps once every five years) in order to ensure compliance with the "market rate standard" described in § 1806, for the purposes of computing rates for intervenor representatives. Such a study has not yet been conducted due primarily to the time and expense involved, and also to unresolved issues regarding methodology and available data (types of data needed, applicability for comparison, etc.). Solving these issues may require the services of an expert outside consultant. (*See* Section 4.6.2 below.)

##### **4.6.1. COLAs for 2009 and Beyond**

We foresee adopting a COLA for at least calendar year 2009 before conducting a market rate study. In this regard, we direct the Chief Administrative Law Judge (ALJ), in consultation with the Commission President, to prepare a proposed resolution recommending a COLA for work performed in 2009, and in subsequent years in the absence of a market analysis study, that considers the same federal inflation indexes used to compute the 2008 COLA, to be effective on January 1 of each year. This proposed resolution should be

prepared, as feasible, in time for consideration by the Commission on or before its last business meeting of the year prior to the effective date of the COLA.

#### **4.6.2. Rates Based on a Comprehensive Compensation Market Analysis**

We began the process of setting hourly rates for all intervenor representatives in a single annual proceeding with the hope that this process would better ensure consistency in our intervenor compensation awards and reduce controversy. We have been partially successful, but controversy persists, and may be inevitable in such a program. Underlying the controversy is discomfort among intervenors over the rather improvised methodology we have applied to date. We also see weaknesses in the methodology.

At first, we hoped to update hourly rates based on a year-to-year escalation factor derived from analysis of utility compensation data sets filed each year in the spring. But analyzing these data sets was never easy, and we lacked confidence in the results of our analysis, for reasons described in Section 4.5 above.<sup>8</sup>

Because we considered the results of the utility reports to be inconclusive, we chose (with support from both utilities and intervenors) to escalate hourly

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<sup>8</sup> Also, with a small number of data points, year-over-year differences in compensation rates paid by a utility for a category of representative could swing wildly and for reasons peculiar to that utility. For example, for a given level of experience, a utility may have had many individuals at the upper end of that level in a given year; in the following years, if those individuals graduate to the next experience level, the utility will appear to be paying a lower compensation rate to individuals at both levels, based simply on the fact that the individuals at their respective levels are more junior than the previous year. In the example, all of the individuals involved actually may have received increases to their hourly rates, and yet the utility's report might show negative overall escalation.

rates based on COLAs derived from review of various respected indexes measuring general inflation in the national economy. We believe use of COLAs is reasonable in the short term.

Continually adjusting hourly rates on the basis of a COLA measuring general inflation seems questionable; however, we have found no index that specifically targets compensation paid to regulatory professionals, and experience has shown that this compensation may escalate at a rate higher, or lower, than general inflation. Because of these factors, there is some possibility that exclusive reliance on COLAs could, over time, result in hourly rates for intervenors' representatives that do not accurately track the "market rate" for regulatory professionals.

We have already indicated that the utility compensation data sets cannot presently serve either to derive rate escalation or to validate the COLAs. Furthermore, we do not believe the solution is to refine the reporting requirements imposed on the utilities. Careful reading of § 1806 shows that, although the compensation paid by the Commission or the utilities (whichever is higher) establishes the ceiling for hourly rates that we set for intervenors' representatives, the standard we must apply is the market rate for all professionals offering the kind of expertise pertinent to regulatory proceedings. The compensation paid by the Commission and the utilities is certainly relevant to a market rate study, but that market is much broader than those representatives who actually appear in Commission proceedings.

The question of how to perform a market rate study that yields robust results has been discussed from the very beginning of our efforts to comprehensively update hourly rates in an annual proceeding. In D.05-11-031, we considered and rejected, but only for the time being, a proposal to retain a

consulting firm specializing in employee recruitment and compensation to perform the study. As the decision states (pp. 4-5):

Finally, we note that Verizon presented an alternative proposal to the above data collection process. Verizon advocated retaining a private company, with expertise in personnel recruitment and compensation, to develop and analyze the “market rate” information. At Verizon’s invitation, two prominent human resources consulting firms with extensive utility experience submitted responses describing how they would approach the project. The responses addressed scope of work, timing, project team, and cost, among other things.

The sense of the second workshop was that the alternative proposal could not be implemented at this time. We agree. Given our desire to set hourly rates before we receive large numbers of award requests involving 2005 work, we prefer to revisit the alternative proposal, if Verizon wishes to renew it, in our hourly rate update for 2006. In the meantime, we encourage Verizon and any others who may be interested in the alternative proposal to give more thought to its implementation, including at least the following questions:

- 1) Will the hourly rate recommendations developed through the alternative proposal be credible and objective? How and when will the consultant’s process and methodology be open to public scrutiny?
- 2) Will the alternative proposal save time and effort for utilities, intervenors, and Commission staff? What other advantages might the alternative proposal have relative to the process that we rely on in today’s decision?
- 3) What is the process by which the consulting contract will be awarded, and how will it be funded?

The responses elicited by Verizon provide concrete examples that may be evaluated in terms of how well they address the issues posed in the first two questions. The third question is more

problematic, particularly if the Commission itself is expected to solicit bids and award, administer, and fund the consulting contract.

As discussed above, we have always seen advantages and difficulties with the proposal. We do not think a market rate study needs to be performed annually, and that fact alleviates the timing problem that we originally perceived. Moreover, the advantages of having an outside party with specific compensation expertise perform the study now appeal to us more strongly (given our experience over several update proceedings) than when the proposal was originally presented.

Accordingly, we direct the Chief ALJ to designate staff from the ALJ Division who will work in consultation with interested utilities and intervenors on a market rate study to be conducted and concluded within the next two to three years, as feasible. Although we still are not committed to the use of an outside consultant, the working group should strongly consider this possibility, among other alternatives. ALJ Division staff also should consult with other Commission staff, as appropriate, regarding the necessary steps to retain a consultant. To the extent that further Commission action is necessary in conducting the market rate study, the ALJ Division should prepare appropriate reports and make recommendations to the Commission President.

## **5. Categorization of Proceeding and Need for Hearing**

In authorizing the subject rulemaking, we initially categorized this proceeding as quasi-legislative, and determined that hearings would not be necessary. We affirm these findings here.

## **6. Comments on Proposed Decision**

The PD in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under

Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on March 26, 2008 by PG&E, SCE, SDG&E/SoCalGas (jointly), Verizon, and The Utility Reform Network (TURN). TURN, SCE and Verizon filed reply comments on April 1, 2008. All comments and replies were filed timely.

The PD initially did not allow for any circumstances where we would consider rate increases above the maximum of the generally adopted ranges. In their comments, the utilities generally support the PD and in particular encourage the Commission to eliminate the requirement of the annual service of data sets. TURN's comments focus on the need for a procedure to allow for rates above the maximum of a given range in limited circumstances. TURN also alleges in its comments that the outcome of the PD (no procedure for allowing rates above a given range) "represents legal error due to the inconsistency with the intervenor compensation statutes."

In reply comments, SCE states it does not oppose establishing a procedure for considering hourly rates above the adopted rate range, but disagrees that legal error would result, as TURN alleges, if such a procedure were not established. Verizon endorsed SCE's position.

In Section 4.3.4 of today's order, we describe a procedure and circumstances where we would consider proposals for hourly rates above the adopted rate ranges. However, we do not agree with TURN that the statute requires such a procedure.

The statute authorizes, with many limitations and conditions, compensation for "reasonable advocate's fees" and "reasonable expert witness fees." *See, e.g.,* Sections 1801, 1802(a), 1803. The statute does not require the Commission to distinguish more finely than between "advocates" and "expert witnesses." For the Commission to try to set fees for every type of specialized

knowledge and expertise that ever becomes pertinent to Commission proceedings would be wholly impractical, even if we desired to do so, and also would require us to divert energy and resources to the analysis of circumstances that TURN itself concedes arise very rarely. This misallocation of effort would be inconsistent with the legislative intent that the Commission administers the statute efficiently. *See, e.g.*, Section 1801.3(b).

Indeed, we remain skeptical that our approved hourly rate ranges are too low to allow an intervenor to obtain skilled representation, even in the realms of bankruptcy and federal appellate litigation. We emphasize that the “market rate” for representatives in a given subject matter area is not necessarily the hourly rate charged by the most famous or most senior representatives, or by those hired by the utility.

We also note that an intervenor remains free to retain any willing representative it chooses, at whatever rate the intervenor is able to pay or negotiate. As TURN points out, we award hourly rates for an intervenor’s in-house representatives that may be less (perhaps significantly less) than what the intervenor actually pays those representatives. The intervenor has the discretion to hire the outside representatives that it chooses, including representatives whose rates may be higher than our adopted ranges, higher indeed than what we find to be the “market rate” after consideration of a supplemental NOI under the procedure we adopt today. We find these results consistent with the “letter and spirit of the intervenor compensation statute.”

## **7. 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 initial purposes of this rulemaking were to refine the process for setting hourly rates for intervenor representatives and to determine the hourly rates to be used in calculating intervenor compensation awards for work performed in 2006.
2. Interim D.07-01-009 expanded the scope of this rulemaking to include intervenor rates for 2007.
3. The Assigned Commissioner's Scoping Memo on September 18, 2007, expanded the scope of this rulemaking again to include a determination of rates for intervenors for 2008, among other matters.
4. Cost-of-living data readily available to the public from several federal agencies show the general rate of inflation for 2007 to be approximately 3%.
5. For work performed in 2008, a 3% COLA above rates adopted for 2007 is reasonable.
6. In addition to COLAs, we find that continuing to allow individuals an annual "step increase" of 5%, twice within each experience level and capped at the maximum of that level, as authorized in D.07-01-009, is reasonable.
7. The existing intervenor rate ranges, based on levels of experience, have been in place for the last four years (2005-2008).
8. It is reasonable generally to restrict intervenor rates to the established range of rates for any given level of experience.
9. It is reasonable to continue our policy that in no event shall any generally applicable increase in intervenor rates result in rates above the highest rate adopted rate for any given level of experience, in a given year.

10. The rate levels established herein, and the limited procedure for considering rates above the established levels, are consistent with the intervenor compensation statutes (§§ 1801-1812).

11. Beginning in 2006, the state's largest utilities, pursuant to D.05-11-031, have been required to serve annual data sets regarding the hourly rates they paid to their attorneys and expert representatives, both in-house and outside, for participation in our proceedings for the previous two-year period, for the purpose of assisting the Commission, intervenors and others in determining and calculating hourly rates to be used in awards of intervenor compensation.

12. The results of the utility data reports have been inconclusive, and we have found little use for the first two data sets (2006 and 2007) in light of adopted COLAs.

13. The data sets contain very few data points for several experience levels, even when the data from all utilities are aggregated.

14. Comparing the data sets to intervenor rates does not support meaningful conclusions regarding the escalation of hourly rates in the market for representatives in regulatory proceedings.

15. The data sets do not validate the results from using COLAs to update hourly intervenor rates.

16. A comprehensive study of market rates will be necessary in order to ensure compliance with the "market rate standard" described in § 1806.

17. We previously rejected a proposal to retain an outside consultant to perform the market rate study.

18. It is reasonable to conduct a market rate study periodically, perhaps once every five years.

19. Based on our previous experiences, we now see advantages of having an outside consultant with specific compensation expertise perform the market rate study.

20. It is reasonable to authorize a COLA for work performed in 2009, by future Commission Resolution, and in subsequent years in the absence of a market rate study, to be effective on January 1 of each year.

### **Conclusions of Law**

1. For work performed in 2008, intervenors should be authorized an hourly rate COLA of 3% (rounded to nearest \$5) above rates adopted for 2007, as set forth in the table in Section 4.1 of the foregoing opinion.

2. The Assigned Commissioner's Scoping Memo of September 18, 2007, should be affirmed.

3. The 5% step increases authorized in D.07-01-009 should be continued.

4. We should develop a procedure to consider hourly rates, in specific limited circumstances, above the generally adopted rate ranges.

5. The requirement that the utilities submit annual data reports on hourly rates should be discontinued.

6. A comprehensive market rate study of hourly rates should be conducted in order to ensure compliance with the "market rate standard" described in § 1806.

7. We should conduct a market rate study periodically, perhaps once every five years.

8. We should direct the Chief ALJ to designate staff from the ALJ Division who will work in consultation with interested utilities and intervenors on a market rate study to be conducted and concluded within the next two to three years, if feasible.

9. The working group should consider the use of an outside consultant to conduct the study.

10. A COLA adjustment should be authorized, by future Commission Resolution, for work performed in 2009, and in subsequent years in the absence of a market rate study, to be effective on January 1 of each year.

11. The Chief ALJ, in consultation with the Commission President, should prepare a proposed resolution recommending the 2009 COLA, and subsequent years if necessary, using the same federal inflation indexes used to compute the 2008 COLA, with the resolution prepared, if feasible, in time for consideration by the Commission on or before its last business meeting of the year prior to the effective date of the COLA.

12. This proceeding should be closed, and today's order should be made effective immediately.

## FINAL ORDER

### IT IS ORDERED that:

1. For work performed in 2008, intervenors are authorized an hourly rate Cost-of-Living-Adjustment (COLA) of 3% (rounded to the nearest \$5) above rates adopted for 2007, as set forth in the table in Section 4.1 of the foregoing opinion.
2. The Assigned Commissioner's Scoping Memo and Ruling of September 18, 2007, is affirmed.
3. The requirement that the utilities submit annual data reports on hourly rates, as set forth in Decision (D.) 05-11-031, is discontinued.
4. Annual hourly rate adjustments shall continue on a calendar year basis.
5. The 5% step increases authorized in D.07-01-009 shall continue in 2008, and subsequent years. The step increases shall be administered, and are subject to the limitations, as set forth in Section 4.4 of the foregoing opinion and in Finding of Fact 6.
6. Beginning with work performed in 2008, a procedure is adopted, as described in the foregoing opinion, to consider requests for approval of hourly rates above the generally adopted rate ranges.
7. In order to ensure compliance with the "market rate standard" described in Pub. Util. Code § 1806, the Chief Administrative Law Judge (ALJ) shall designate staff from the ALJ Division who will work in consultation with interested utilities and intervenors on a market rate study to be conducted and concluded within the next two to three years, if feasible, and consider the use of an outside consultant to conduct the study.
8. A COLA adjustment shall be authorized, by future Commission Resolution, for work performed in 2009, and subsequent years in the absence of a decision based on a market rate study, to be effective on January 1 of each year.

9. The Chief ALJ, in consultation with the Commission President, shall prepare a proposed resolution recommending the 2009 COLA, and subsequent years if necessary, using the same federal inflation indexes used to compute the 2008 COLA, with the resolution prepared, if feasible, in time for consideration by the Commission on or before its last business meeting of the year prior to the effective date of the COLA.

10. Rulemaking 06-08-019 is closed.

This order is effective today.

Dated April 10, 2008, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

## APPENDIX A

**Comparison of Inflation Indexes  
(Percent Increase from previous year)**

**2002-2008**

| Year | SSA<br>COLA <sup>1</sup> | BLS<br>CPI <sup>2</sup> | BLS<br>Wages <sup>3</sup> | Intervenor<br>Rate <sup>4</sup> | Commission<br>Order <sup>5</sup> |
|------|--------------------------|-------------------------|---------------------------|---------------------------------|----------------------------------|
| 2002 | 2.6                      | 1.6                     | 0.8                       | N/A                             |                                  |
| 2003 | 1.4                      | 2.9                     | 5.0                       | N/A                             |                                  |
| 2004 | 2.1                      | 2.7                     | 3.4                       | 8%                              | Resolution ALJ-184               |
| 2005 | 2.7                      | 3.4                     | 5.7                       | 0%                              | D.05-11-031                      |
| 2006 | 4.1                      | 3.2                     | 5.4                       | 3%                              | D.07-01-009                      |
| 2007 | 3.3                      | 2.9                     | N/A                       | 3%                              | D.07-01-009                      |
| 2008 | 2.3                      | N/A                     | N/A                       | 3%                              | Today's order                    |

(END OF APPENDIX A)

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<sup>1</sup> SSA COLA issued in prior year (i.e., 2008 COLA issued in October 2007).

<sup>2</sup> BLS – average Consumer Price Index.

<sup>3</sup> BLS – average wage increase for legal profession in the Bay Area.

<sup>4</sup> Before 2004, the Commission increased rates for individual representatives based on a showing specific to the individual seeking an increase, and only in response to individual requests. Thus, the timing and amount of adopted increases were subject to wide variation among intervenors.

<sup>5</sup> Commission order authorizing the intervenor rate increase.

N/A = not available