

ALJ/BAR/bwg \*

Decision 98-04-059 April 23, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's  
Intervenor Compensation Program.

Rulemaking 97-01-009  
(Filed January 13, 1997)

Order Instituting Investigation on the Commission's  
Intervenor Compensation Program.

Investigation 97-01-010  
(Filed January 13, 1997)

**INTERIM OPINION REVISING THE INTERVENOR COMPENSATION PROGRAM  
AND INVITING LEGISLATIVE AMENDMENT PROPOSALS**

## **Summary**

The revisions to our intervenor compensation program we adopt today, and the Legislative amendments we invite parties to propose, are intended to ultimately broaden participation by customers in our proceedings, and to improve the effectiveness of that participation. We adopt revisions and invite legislative proposals after considering the comments of the parties.

We begin by discussing the changing regulatory and decision making environment that prompts this comprehensive review of our program. Next, we adopt principles that we then use as a guide for the changes to the program offered by the parties, and state that we will apply these principles as we consider future requests for compensation. We then address the specific recommendations parties offer to change the accountability and control mechanisms, modify funding mechanisms, and improve the program through administrative streamlining.

With respect to accountability and control mechanisms, we conclude that intervenors must state how they meet the statutory definition of customer, provide a copy of the articles or bylaws authorizing representation of residential ratepayers when appearing as a group or organization and we provide a model nondisclosure agreement that would govern the disclosure of an individual intervenor's financial information. In the area of funding, we determine to more broadly assess the costs of intervenor awards among the utilities participating in quasi-legislative proceedings and propose for comment an approach for assessing payment responsibility on utilities participating through associations. We establish an optional track an intervenor may elect for compensated intervention which, if authorized by statute, would provide periodic payments for participation on Commission-identified issues if the intervenor commits to a budget. We identify the various efforts now underway to make the program more "user friendly" in our discussion of administrative streamlining, and direct the Public Advisor to further evaluate a volunteer ombudsperson program.

We invite legislative proposals that will broaden the substantial contribution standard, allow local public education institutions to qualify as “customers,” and provide support for the optional track as a means for awarding periodic payments.

We do not adopt the proposal to “sunset” the program, concluding instead that when customers no longer make a substantial contribution to our decision making, the program, by its own governing statutes, will no longer provide customers compensation. We also do not adopt the “good faith” standard of substantial contribution for to do so would so reduce the accountability and control value of the standard that it becomes meaningless.

Finally, we identify the process for pursuing the legislative changes we regard appropriate.

### **Background**

We initiated this rulemaking and investigation by inviting comment on our intervenor compensation program. We stated that we would consider changing the rules, regulations, and policies which govern the program. We acknowledged that some changes to the program would need to be considered by the Legislature since for the change to take effect would require changes in the governing statutes, Public Utilities (PU) Code §§ 1801-1812.<sup>1</sup> We included as an attachment to our rulemaking and investigation a study of the compensation program prepared by Ms. Margaret Alkon (the Alkon Report), which included recommendations for program change.

On March 6, 1997, assigned Commissioner Jessie J. Knight, Jr., preliminarily determined that these proceedings should be included in our sample of proceedings to which we are applying our experimental rules for implementing the reforms embodied in Senate Bill 960 (Leonard, ch.96-0856).<sup>2</sup> Comments on the substance of the rulemaking and the preliminary determination were received March 31, 1997, a prehearing

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<sup>1</sup> Future section references are to the Public Utilities Code unless otherwise stated.

<sup>2</sup> The experimental rules may be found in Resolution ALJ-170, adopted January 13, 1997, and have been posted on the Commission’s webpage (cpuc.ca.gov).

conference was held April 18, and reply comments were filed May 7.<sup>3</sup> On July 2, 1997, Commissioner Knight issued a ruling which affirmed the preliminary determination and established the timetable and issues to be considered.

Commissioner Knight identified three broad categories of proposed modifications to be considered in this proceeding: accountability and control mechanisms, funding, and administrative streamlining. Commissioner Knight stated that he would prepare a decision, publish it for comment, and present it to the full Commission for consideration. The decision would modify the intervenor program, identify modifications that require statutory change to effect, and propose a process for developing specific statutory language that the Commission may support before the Legislature. This is that decision and it follows the outline Commissioner Knight established in his July 2 ruling.

A draft of this decision was published on November 14, 1997, for comment. There were no evidentiary hearings on this matter so PU Code § 311(d) did not require

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<sup>3</sup> Comments were filed by William P. Adams (Adams), Kenneth Bates, Jr., (Bates), California Alliance for Utility Safety and Education (CAUSE), California Association of Competitive Telecommunications Companies (CALTEL), California Department of Consumer Affairs (DCA), California/Nevada Community Action Association (Cal/Neva), Citizens Concerned About EMFs (CCA), Consumers for the Public Interest, Inc. (CPI), DMM Customer Services (DMM), Energy Consulting Group (ECG), Insulation Contractors Association (ICA), Sun Yung Kim (Kim), MCI Telecommunications Corporation (MCI), Natural Resources Defense Council (NRDC), Commission Office of Ratepayer Advocates and Consumer Services Division (ORA/CSD), Commission Public Advisor's Office (PAO), George M. Sawaya (Sawaya), School Project for Utility Rate Reduction and Regional Energy Management Coalition (SPURR/REMAC), Spanish Speaking Citizen's Foundation, National Council of La Raza and Oakland Chinese Community Council (SSCF, et. al.), Joan I. Tukey (Tukey), The Utility Reform Network (TURN), Utility Consumers' Action Network (UCAN), The Utility Members of the Intervenor Compensation Reform Consensus Group (Utility Members), which includes Southern California Edison Company, Southern California Gas Company, San Diego Gas & Electric Company, Pacific Gas and Electric Company (PG&E), Pacific Bell, and GTE California Incorporated. Reply comments were filed by Adams, AT&T Communications (AT&T), Bates, CAUSE, CCAE, CPI, United States Department of Defense (DOD), Lou Filipovich (Filipovich), Greenlining Institute and Latino Issues Forum (GI/LIF), ICA, MCI, PAO, Sawaya, SPURR/REMAC, John Sevier (Sevier), SSCF, et. al., TURN, TURN and UCAN, Utility Members, and James Weil (Weil).

the Administrative Law Judge (ALJ) to file and serve a proposed decision. However, Commissioner Knight and ALJ Hale wished to afford parties an opportunity to review and comment on the draft order. Timely initial comments were filed by December 4, and timely reply comments were filed by December 9.<sup>4</sup> Initial and reply comments were considered by the Commission. The November 14 draft decision was revised in light of the consideration of comments and published as a revised draft decision for another round of comments and reply comments. Timely comments on the revised draft decision were filed April 2, 1998, and timely reply comments were filed April 7, 1998.<sup>5</sup> In light of these comments, the revised draft decision was further modified.

### **Historical Context**

The inception of the Commission's intervenor compensation program dates back to the late 1970's when the authority of the Commission to compensate an intervenor for its participation in a proceeding was brought before the California Supreme Court in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, ((CLAM) 160 Cal. Rptr 124 (1980)). The Court stated the general rule that a party is entitled to an award of attorney fees only if there is specific authorization therefor by statute or private agreement, and recognized three equitable exceptions to the general rule. They are

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<sup>4</sup> Initial comments on the draft order were filed by AT&T/MCI, jointly, California Manufacturers Association (CMA), CPI, GI/LIF, ICA, ORA/CSD, SSCF, et. al., Kim, Utility Members, TURN/UCAN, jointly, and Weil. Reply comments on the draft order were filed by AT&T, CPI, SSCF, et. al., Utility Members, TURN, and Weil.

<sup>5</sup> Initial comments on the revised draft order were timely filed by AT&T, CAUSE, CALTEL, CMA, CPI, GI/LIF, ICA, Kim, MCI, ORA/CSD, Sawaya, SPURR/REMAC, SSCF, et al., TURN, Utility Members, and Weil. Comments of the Telecommunications Resellers Association were also served. However, since the Telecommunications Resellers Association never became a party to the proceeding, its comments were not filed as a pleading. Rather, its comments were considered and placed in the correspondence portion of the formal file. Timely replies were filed by CPI, GI/LIF, MCI, SSCF, et. al., TURN, Utility Members, and Weil.

known as the common fund, substantial benefit, and private attorney general theories. The Court majority held the Commission's general authority allowed it to award fees under the common fund theory in quasi-judicial reparation actions. Under the common fund theory, "one who expends attorney's fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." (Id. 133.) The Court also noted the existence of the statutory basis provided by federal law which, at that time, specifically allowed this Commission to award fees in certain electric utility proceedings.<sup>6</sup>

The Commission adopted procedures for administering the fee awards program authorized by PURPA in June, 1980 (see Decision (D.) 91909). Then in November, 1981, the Commission issued a decision which determined that it had jurisdiction to award fees to public participants in quasi-legislative and quasi-judicial proceedings (see D.93724 (7 CPUC2d 75)). At the same time, the Commission proposed procedures for awarding attorney, witness and related fees to public participants in all proceedings (see Order Instituting Investigation (OII) 100, November 13, 1981), building upon the experience gained in administering the PURPA fee awards program.

In April 1983, after comment on the November proposed rules, the Commission adopted its procedures for awarding reasonable fees and costs to participants in proceedings before the Commission (See D.83-04-017 (\_\_\_ CPUC2d \_\_\_), as modified by D.83-06-112 (\_\_\_ CPUC2d \_\_\_)). These rules required a finding of eligibility, based on a showing of significant financial hardship, and a finding of substantial contribution, concepts present in the PURPA statutes which remain fundamental criteria of today's intervenor compensation program.

Senator Montoya introduced a bill in December of 1982 (SB 4) which essentially codified the intervenor compensation program which the Commission had adopted by

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<sup>6</sup> PURPA, Public Law 95-617, 16 USC 2601 et seq. (especially 2632), 92 Stat. 3117. For legislative history and purpose, see 1978 US Code Cong. and Adm. News, p. 7659 (especially p. 7816-7817).

rule. This bill was chaptered, adding Article 5 to Chapter 9 Part 1 of Division 1 of the Public Utilities Code (Montoya, ch.84-297).

This codification of the Commission's program was intended "to confirm the authority of the Public Utilities Commission...to make awards to participants pursuant to existing rules and regulations of the commission." (Id., § 1.) It included requirements for eligibility, based on a showing of significant financial hardship, and substantial contribution. Unlike the Commission's rules, it limited awards to participation in electrical, gas, telephone, telegraph, or water proceedings where the purpose of participation is to modify or influence a rate. Though it substantially adopted the Commission's definition of "significant financial hardship," it omitted an important aspect of the Commission rules governing "substantial contribution."

The Commission's rules, at that time, provided that:

"'Substantial contribution' shall be that contribution which, in the judgment of the Commission, greatly assists the Commission *to promote a public purpose* in a matter relating to an issue by the adoption, at least in part, of the participant's position."

(Rule 76.26 of the Commission's Rules of Practice and Procedure, adopted November 13, 1981, (emphasis added) and subsequently repealed.)

Missing from the codification of the substantial contribution concept was, and is, an explicit public purpose component. The requirement that a contribution assist the Commission in promoting a public purpose was very in keeping with the common fund theory at the root of our program. It compensates the participation of intervenors when other, non-participants, derive a benefit from that participation.

Further amendment to the governing statutes occurred in 1992 (ch.92-942) and 1993 (ch.93-589). The effect of these amendments were to:

- apply the statutes to any proceeding involving electric, gas, water, and telephone utilities, rather than the more limited application to proceedings that modify or influence rates;
- make express the Legislative intent of the program;



- compensate intervenors for preparation as well as participation;
- lift the cap on “other reasonable costs”;
- define proceeding, making it explicit that alternative dispute resolution procedures in lieu of formal proceedings were potentially compensable proceedings;
- define “significant financial hardship” with more specificity;
- supplement the definition of “substantial contribution” to allow for full compensation when only a part of a customer’s contentions or recommendations are adopted;
- state that participation that supplements, complements, or contributes to the presentation of another party may be fully eligible for compensation;
- make mandatory rather than discretionary the determination to award fees when the substantial contribution and financial hardship criteria are met;
- modify the timing of the required filings;
- delete the section that provided for a common legal representative; and
- provide for a special evaluation of eligibility for a group that represents small and large agricultural customers.

### **Changing Regulatory Environment**

Comprehensive review of the intervenor compensation program is appropriate at this time because the regulatory environment for some of the industries to which the program applies has changed since the inception of the program, and even since the more recent legislative amendments to the governing statutes. In the telecommunications and energy industries, traditional rate of return regulation is being abandoned for the disciplines of competition and the less administratively burdensome economic oversight of performance-based regulation. In developing the policy which will guide these regulatory program changes, the Commission is increasing its reliance on legislative-style hearings and informal workshops, and lessening its reliance on the

traditional evidentiary hearings. Given these far reaching regulatory program and process changes, it is timely to review the appropriateness of the intervenor compensation program, and its current configuration.

The large scale industry restructuring efforts the Commission has undertaken have highlighted for us the importance of getting input from a socioeconomically diverse, culturally diverse, and geographically dispersed public. Participation in our formal policy development proceedings by a broad base of consumers has aided our efforts to, for example, continue to ensure Californians have access to safe, reliable, environmentally sensitive energy services at the lowest price possible, including support for low income households, as we allow new market entrants to provide energy services. As we progress from policy development to policy implementation in the telecommunications and energy industries, we continue to believe that a broad base of public input can assist us in perfecting the restructured marketplaces. Through the intervenor compensation program, we can reduce the barriers to participation that customers face, and award customers who make a substantial contribution to our decision making.

Where consumers have no choice in their carrier or service provider, the Commission serves as the consumer's trustee. The Commission is the sole source of protection for the consumers' rights. Thus, the Commission must make the best possible decisions because the consumers have no recourse. Broad based participation is a key ingredient to high quality decision making. At some future point, however, we expect that the presence of pervasive competition will be the ultimate protector of consumer interests in the marketplace. In the context of such a competitive marketplace, consumers will have the ultimate protection of being able to reject a carrier or service provider which does not meet their needs, for any reason or no reason, and will readily, perhaps eagerly, obtain service from another carrier or provider. Therefore, once competition is present, it may not be necessary for a fair determination of the proceeding to fund the participation of customers separate and apart from their participation through ORA. The ability to immediately and permanently cease to do

business with a carrier or provider may be a far more desirable outcome for consumers than additional Commission regulation of a carrier or provider, and broader issues of consumer interest may be adequately represented by ORA.

This is not to say the Commission should abandon all consumer participation where a more mature robust level of competition is in place, just that the enhanced level of consumer protection inherent in consumer-funded participation may not be warranted. We must begin to more critically assess, at the outset of a proceeding, whether the participation of a customer is necessary for a fair determination of the proceeding, consistent with the Legislative intent of § 1801.3(f). For example, in our Rulemaking to Establish a Simplified Registration Process for Non-Dominant Telecommunications Firms (our Streamlining Proceeding R.94-02-003/I.94-02-004) it may not be necessary to have consumer-funded participation of customers. This aspect of the telecommunications market is quite competitive, and consumers may choose a different carrier if unhappy with service quality or cost.

Just the same, we do not believe, as do some of the commenters, that the intervenor compensation program is no longer needed, or should be “sunset” or phased out, now that restructuring of the telecommunications and energy industries is well under way. On the contrary, we have continued to find the contributions of many customers to have substantially assisted us throughout the restructuring efforts, and, for telecommunications, in enforcing the policies of the restructured era. When customers no longer make a substantial contribution to the Commission’s decision making, the program, by its own governing statutes, will no longer provide customers compensation.

The dialogue we had with the parties around phasing out the intervenor compensation program focused primarily on the program’s application to energy and telecommunications proceedings. Parties failed to acknowledge that the program applies to water proceedings in addition to energy and telecommunications proceedings. The private water companies we regulate continue to face a traditional regulatory structure appropriate to their continuing monopoly characteristics. The

arguments for phasing out the intervenor compensation program in light of the competitiveness of the industries to which it applies is certainly not compelling given the regulatory environment present for water companies.

In light of the changing regulatory environment, AT&T/MCI recommend in their comments on the draft order that the Commission deny compensation to intervenors who take a position, directly or indirectly, that challenges a prior Commission determination that an industry, utility or market segment are subject to effective competition. They suggest that if the question directly at issue in the case is the competitiveness of an industry, utility or market segment, compensation should be allowed.

This recommendation is misplaced. If any party attempts to take a position in a proceeding that e.g., directly or indirectly challenges a prior Commission determination that an industry, utility or market segment are subject to effective competition, is outside the scope of the proceeding or irrelevant to the issues at hand or previously determined by the Commission and not to be revisited at that time, then the appropriate remedy for opposing parties is to move to strike the material. If such a position is allowed into the proceeding, then the question, in terms of compensation, comes down to the eligibility of the intervenor and whether a substantial contribution was made.

### **Decision Making Reforms**

As of January 1, 1998, new rules governing how the Commission processes a proceeding became effective as a result of SB 960. The statute is intended to enhance Commissioner involvement in decision making, and thereby improve the quality and timeliness of Commission decisions. The new rules require, among other things, the categorization of proceedings, early scoping of the issues to be addressed and the timetable for completion, the presence of Commissioners in hearings and oral arguments under certain circumstances, and new ex parte contact rules.

The reforms embodied in SB 960 will greatly aid the customer interested in participating in a Commission proceeding where hearings are held. It will be stated in approximately the first 40 to 50 days what issues will be resolved in the proceeding, and

when resolution is intended. SB 960 imposes a mandatory 12-month completion deadline in most complaints and enforcement cases, and states the intent that all other proceedings be completed in no more than 18 months.

As a result of these reforms, some of the uncertainties that have chronically saddled customers interested in participating in a Commission proceeding will be significantly reduced, though not eliminated. For example, proceedings will no longer continue over a number of years; a party will know early in a proceeding whether its issue will be resolved in that proceeding, or some other proceeding. We expect the scoping ruling to provide the Commission and parties a useful tool for evaluating the Notice of Intent filed by a customer. Issues identified by the customer in its notice should reflect the scope of issues laid out in the scoping memo. Once a Request for Compensation is filed, the scoping ruling will be used to evaluate the customer's showing on substantial contribution and reasonableness of costs. Costs associated with participation on, and claimed contributions to, issues the Commission did not identify as within the scope of the proceeding will not be found reasonable and will, therefore, not be compensated. In this manner, we expect the scoping ruling to exert a useful and consistent discipline upon the evaluation of intervenors' compensation requests. Unfortunately, none of the commenters recognized the impact of the SB 960 reforms on the intervenor compensation program, nor did any acknowledge its enactment.

A number of parties pointed out in their comments on the revised draft that strict adherence to this approach could conflict with the governing statutes. They state that a decision may resolve an issue not identified in the scoping memo ruling because an issue may come up late in a proceeding that was not anticipated but is nonetheless central to our ultimate decision. Under this scenario, a substantial contribution on such an issue, though not included in the scoping ruling, must be compensated under the statute.

While we do not disagree that a substantial contribution by an eligible intervenor must be compensated, we still believe the scoping ruling as a consistent discipline will work and be lawful. We expect that any late-arising issues, outside the scope of the

proceeding as articulated in the scoping ruling, will only be allowed to be addressed by parties after a modification to the scoping ruling (from the bench or in writing). When the Legislature adopted the scoping ruling requirement, it placed a new discipline on both the Commission and parties – addition of issues to be resolved in a proceeding can not occur willy-nilly. Rather, the addition of an unanticipated but central issue late in a proceeding should only occur through the well-thought-out discipline of a modification to the scoping memo ruling.

### **Discussion**

We undertook this rulemaking to examine and, where appropriate, to revise our intervenor compensation program because we believe that the program can be more effective in promoting consumer participation in today's regulatory processes. The revisions we adopt today are intended to ultimately broaden participation and improve its effectiveness within the boundaries of the existing governing statutes. We also clarify and compile our implementation practices to improve the consistency of our treatment of compensation requests and to generally advise the public of our practices. Finally, we also reflect on the program changes parties recommend that would require legislation to effect.

As we considered the proposals for change offered by parties, we bore in mind the purpose and intent of the program as codified by the Legislature:

1801. The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission.

1801.3. It is the intent of the Legislature that:

- (a) The provisions of this article shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities.
- (b) The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process.

- (c) The process for finding eligibility for intervenor compensation be streamlined, by simplifying the preliminary showing by an intervenor of issues, budget, and costs.
- (d) Intervenors be compensated for making a substantial contribution to proceedings of the commission, as determined by the commission in its orders and decisions.
- (e) Intervenor compensation be awarded to eligible intervenors in a timely manner, within a reasonable period after the intervenor has made the substantial contribution to a proceeding that is the basis for the compensation award.
- (f) This article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a Fair determination of the proceeding.

### ***Principles***

The Intervenor Compensation Reform Consensus Group, which included both utility and customer members, adopted principles to guide the reshaping of the intervenor compensation program. We included the principles in our rulemaking and asked parties to comment on them.

Those parties who commented on the principles generally supported them. Some of the principles spawned from or meshed with specific proposals in the Alkon Report and in comments to the rulemaking. We will recount them here and briefly discuss them as appropriate.

1. The timing of compensation should serve to facilitate participation.
2. The Commission should help parties conserve resources by making well-considered and timely decisions.
3. The *determination* of “substantial contribution” should leave intervenors indifferent as to whether they participate in alternative processes or litigation. (Emphasis added.)

We emphasize that while we agree with this principle, we do not believe that the definition of substantial contribution must change to act upon it.

4. The Commission's policies, including those affecting intervenor compensation, should strive to ensure that all parties participate efficiently and effectively; efficiencies should be expected and extraordinary efficiencies should be rewarded.

We not only support this principle, we have acted up on it. We have awarded intervenors efficiency adders for extraordinary efficiencies. See, for example, D.95-02-066. (\_\_\_ CPUC2d \_\_\_.)

5. The Commission should encourage the presentation of multiple points of view, even on the same issues, provided that the presentations are not redundant.
6. Cooperation among intervenors should be encouraged where feasible and appropriate.
7. An intervenor should not be required to enter into or join a settlement in order to receive compensation for participation in the settlement process.
8. The Commission should presume that a participant in an Alternative to Litigation process has made a substantial contribution. Other parties could challenge that presumption.

This proposed principle we reject in whole. We discuss our reasons more fully when we discuss proposed changes to the substantial contribution standard. In brief, we do not believe that participation (i.e., attendance at a workshop), in and of itself, is sufficient participation to bring value to ratepayers, warranting compensation.

9. Eligibility standards should encourage first-time and small-party intervenors.



We recognize that some of the commenters believe the current eligibility standards discourage first-time and small-party intervenors. While we agree that such participants should not be disadvantaged in requesting compensation, we do not agree that they should receive an advantage over other participants. We also believe that eligibility standards are an important part of the accountability and control mechanisms appropriate to the compensation program's administration. The effort undertaken by a first-time or small-party intervenor to comply with the eligibility requirements may discourage participation. Therefore, we modify principle 9 to read:

Eligibility standards should not unduly discourage first-time and small-party intervenors.

10. The Commission should make a timely offer of educational information, including all applicable laws and rules, standard sample filings and fill-in-the-blank forms and an orientation program for first-time parties.

Our current practice includes providing educational information to customers that may wish to participate in our proceedings. We offer informal orientation to individual participants, and when a larger group of participants needs assistance, we offer a more formal orientation. This effort is performed by the staff of our PAO and our Outreach Officers. At present, we do not offer fill-in-the-blank forms. We do not agree that pleadings filed in compliance with the intervenor compensation governing statutes lend themselves to fill-in-the-blank forms. We therefore modify principle 10 to state:

The Commission should make a timely offer of educational information, including all applicable laws and rules, and standard sample filings, and offer an orientation program for first-time parties.

11. If any party is required to disclose personal financial resources in a "Filing for Compensation," this information should be kept confidential by the Commission.

We generally agree with this principle, as discussed in more detail in the financial hardship section. However, there may be circumstances where it is appropriate for information to be public. We modify principle 11 to state:

The Commission may, upon the participant's request, keep confidential personal financial information provided by a participant in support of a Request for Compensation.

12. Each party of a coalition should be entitled to file for compensation for all expenses this party incurred by participating in the proceeding.

CPI addressed this principle in the comments. CPI argues that a party's recovery of expenses should be limited to only those expenses necessary for the coalition to effectively participate. We reject CPI's proposed limitation and decline to adopt this principle. The principle's import is unclear, and it appears to provide for recovery by non-parties that have not necessarily been found eligible. As long as the "party of a coalition" is a party to the proceeding and has been found eligible to request compensation, that party may file a Request for Compensation. If the "coalition" became a party to the proceeding under the coalition's name, and has been found eligible to request compensation, that coalition may request compensation. In this scenario, members of the coalition would work together to present one Request for Compensation that would, if granted, reimburse all coalition members for the costs of participation.

13. The contribution of an intervenor should be eligible for compensation regardless of the type of proceeding in which it was made.

We adopt this principle but with the understanding that by "type of proceeding," it is meant to include both litigated and non-litigated "formal proceedings of the Commission involving electric, gas, water and

telephone utilities.” (§ 1801.3(a).) Also, that “type of proceeding” would include complaints under those circumstances discussed in the section on compensation in complaint cases.

14. In at least some circumstances, it should be possible to receive compensation before a final decision is issued.

We agree, and we discuss interim decisions as decisions for which compensation may be sought when we address interim funding.

15. An award of intervenor compensation must be determined by the Commission and should not be negotiated independently by the parties.

16. In order to receive compensation, an intervenor must meet the Commission’s eligibility requirements.

17. The Commission should use its Outreach and Field Offices to encourage and assist intervenors and prospective intervenors in regions served by those offices.

As we reviewed the comments and considered changes to our intervenor compensation program, we bore these principles, as modified, in mind. We will also keep them in mind as we consider specific, future requests for compensation that may be filed in our dockets.

### ***Accountability and Control Mechanisms***

When it codified the intervenor compensation program, the Legislature struck a balance between competing goals: to encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process while avoiding unproductive or unnecessary participation that duplicates the participation of others. Three tools affect this balance: eligibility, based on financial hardship, and substantial contribution, which, when applied together, ensure that compensated intervention provides value to the ratepayers who fund it. These three tools come

together in the directive embodied in § 1803, and the key definitions which give § 1803 meaning.

1803. The commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or *proceeding* to any *customer* who complies with Section 1804 and satisfies both of the following requirements:

- (a) The customer's presentation makes a *substantial contribution* to the adoption, in whole or in part, of the commission's order or decision.
- (b) Participation or intervention without an award of fees or costs imposes a significant *financial hardship*.

1802. (b) "Customer" means any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the commission; any representative who has been authorized by a customer; or any representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers, but does not include any state, federal, or local government agency, any publicly owned public utility, or any entity that, in the commission's opinion, was established or formed by a local government entity for the purpose of participating in a commission proceeding.

1802. (f) "Proceeding" means an application, complaint, or investigation, rulemaking, alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the commission, or other formal proceeding before the commission.

1802. (g) "Significant financial hardship" means either that the customer cannot afford, without undue hardship, to pay the costs of effective participation, including advocate's fees, expert witness fees, and other reasonable costs of participation, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding.

1802. (h) "Substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural

recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation. (Emphasis added.)

Since their codification in 1984, and as amended in 1992, the Commission has interpreted and implemented these statutes. The statutes and the body of decisions interpreting and implementing them make up the accountability and control mechanisms the Commission applies to the intervenor compensation program. In comments on our rulemaking, parties have proposed changes to the statutes themselves and to the manner in which the Commission has interpreted them.

### **Eligibility**

The purpose of the eligibility phase of the compensation program is to provide customers with a sense of the likelihood compensation may be awarded. It essentially provides guidance to the participant who intends to request compensation and who would not otherwise participate in the proceeding or who would participate on a more limited scale after receiving a negative preliminary ruling on eligibility.

Under the statute, an intervenor is eligible for compensation when he is a customer, and his participation in a proceeding involving an electric, gas, water, or telephone utility presents a significant financial hardship. To determine eligibility, two questions must be addressed: Is the intervenor a "customer?" Will participation present a significant financial hardship?

We have in the past (since the 1992 amendments to the statute) denied eligibility to parties who are not customers pursuant to § 1802(b) (see, e.g., D.96-09-040 denying ICA eligibility, and ALJ Preliminary Ruling in C.93-10-023, June 15, 1995, denying Coachella Valley Communications, Inc. eligibility); when the financial hardship standard, defined in § 1802(g), has not been met (see, e.g. D.93-11-020 denying a coalition of renewable and energy service companies and environmental

organizations eligibility); or when the proceeding is a complaint and the party is not an intervenor, but is rather the complainant pursuing a purely personal claim not representative of any public interests and not for the benefit of a class of customers. (see, e.g., D.95-10-050, as affirmed on rehearing by D.96-11-063, denying complainant Grinstead's claim for compensation).

Most of the proposed modifications to eligibility recommended by parties address financial hardship, and so will be discussed under that heading. However, a few parties do propose modifications to eligibility on other grounds, specifically, in complaint cases, for government entities, and for regulatory professionals. We also provide further guidance on the program administration directives contained in § 1801.3(f).

### ***Compensation in Complaint Cases***

ICA recommends that the Commission develop guidelines on the use of intervenor funding for complaint actions. ICA asserts that the law authorizes intervenor funding in complaints, but it believes funding support for persons filing complaints should not be routine.

We agree with ICA that the law authorizes intervenor funding in complaint proceedings. The Commission's determination in *Milton Grinstead v. Pacific Gas and Electric Co.*, cited above, provides customers instruction on when they may be eligible for compensation in a complaint case. We regard this instruction as sufficient guidance on the eligibility for intervenor funding for complaint actions. It is useful to review the instruction *Grinstead* provides, both as a reminder to parties and to our staff.

The underlying case involves Grinstead's filing of a complaint for reparations of overcharges against PG&E. Grinstead claimed that PG&E overcharged him because he should have been informed that he qualified for PG&E's TOU (Time of Use) rate schedules, which would have allowed him substantial savings on his bills had he known of this alternative rate schedule. We ruled that PG&E indeed had a duty and did breach this duty in failing to inform Grinstead of the availability of

TOU rate schedules. Grinstead was thus entitled to the rate differential of what he actually paid and what he would have paid under the TOU rate schedules; the Commission awarded him \$3,518.00.

Subsequently, Grinstead filed a request for compensation, which gave rise to D.95-10-050, the pertinent decision at issue here. In D.95-10-050, we rejected Grinstead's request for compensation on several grounds. It is the third ground that is instructive to customers interested in seeking compensation in a complaint proceeding.

We reviewed the statute and Legislative intent and concluded that an individual cannot be an "intervenor" for the purpose of Article 5 of the Public Utilities Code "in a case which he has initiated and which is being prosecuted to vindicate a personal grievance or in quest of a personal remedy." (D.95-10-050 at p. 4 (footnote omitted).) The Commission came to the conclusion that a "complainant acting solely in an individual capacity and seeking a personal remedy is not entitled to claim compensation as an intervenor in a Commission proceeding as provided in Article 5 (§§ 1801-1808) of the Public Utilities Code." (Id., Conclusion of Law 4.)<sup>7</sup>

### **Government Entities**

SPURR/REMAC and the DCA each propose a modification to the eligibility criteria, one that would require legislation to effect. Specifically, SPURR/REMAC argue for a remedy narrowly fashioned to address what it characterizes as an inequity of excluding SPURR and REMAC from eligibility. In the past, SPURR/REMAC have been found ineligible on the basis that it is not a customer as defined in § 1802(b) (*supra*). The statute precludes compensation for any government agency, or any entity that was established by a government entity for the purpose of

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<sup>7</sup> The Commission's Guide for Intervenors, routinely provided to customers who inquire about intervenor compensation, briefly describes the instruction *Grinstead* provides.

participating in a commission proceeding. When considering a notice of intent to claim compensation from SPURR/REMAC, we stated that:

“[o]n its face, this exclusion bars SPURR/REMAC from claiming intervenor compensation. SPURR/REMAC is the agent for a group of entities that, on their own, would clearly be ineligible for compensation...SPURR/REMAC cannot get around this rule merely by pooling its resources under a joint powers agreement and subcontracting their participation to a separate entity.” (D.96-09-040, slip op., p. 4.)

SPURR/REMAC argue that it should be afforded specific relief in the same manner that the Legislature afforded representatives of agricultural consumers when it passed into law § 1812.<sup>8</sup> It argues that schools cannot and will not separately budget funds for participation in Commission proceedings. SPURR/REMAC ask the Commission to support a Legislative amendment. The amendment would carve out an exception to the § 1802(b) definition of customer so that government entities that are public education institutions would be deemed “customers” if they form joint powers agencies under Government Code § 6500 et. seq.

In comments, several parties support a legislative amendment that would allow local government public education institutions to qualify as “customers” for purposes of intervenor compensation. Only one party recommends the Commission reject this Legislative proposal. It is arguable that SPURR/REMAC fall into the government exclusion in § 1802(b). SPURR/REMAC state that each was formed as a Joint Powers Agency, under Government Code §§ 6500, et. seq., to assist member schools in achieving energy savings and provide services more extensive than

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<sup>8</sup> Section 1812 states: “A group or association that represents the interests of small agricultural customers in a proceeding and that would otherwise be eligible for an award of compensation pursuant to Section 1804 without the presence of large agricultural customers, as determined by the commission, shall not be deemed ineligible solely because that group or organization also has members who are large agricultural customers.”



representation before the Commission. Therefore, it is unclear whether SPURR/REMAC should necessarily be construed to be “an entity... established or formed... for the purpose of participating in a commission proceeding.”

We believe that local government public education institutions are to be encouraged to participate in Commission proceedings and thereby identify ways to lower the utility-related operating costs they face. According to SPURR/REMAC, its member institutions do not have discretion to allocate funds to the SPURR/REMAC consumer protection efforts, and the current SPURR/REMAC funding barely covers the costs of administering members’ natural gas aggregation programs.<sup>9</sup> We are convinced that local government public education institutions are a unique and important customer, whose views, absent the participation of SPURR/REMAC, are otherwise absent from our proceedings. We would support a Legislative amendment to make it clear that local public education Joint Powers agencies, like SPURR/REMAC, are customers able to avail themselves of our intervenor compensation program.

DCA similarly seeks amendment to the definition of customer, but in a manner in opposition to SPURR/REMAC. DCA argues that the § 1802(b) exclusion was intended to preclude government agencies, which are representing the interests of *government* as a utility customer, from being awarded compensation. DCA claims the statute has the unintended effect of disabling DCA in its role as a representative of *consumers*. It suggests amending § 1802(b) to allow a government agency that represents the interests of consumers to be eligible for compensation, and perhaps limit that compensation to out-of-pocket expenses such as travel and postage.

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<sup>9</sup> SPURR/REMAC explain in their comments on the revised draft that the current funding mechanisms for SPURR and REMAC are based on fees in association with SPURR’s and REMAC’s natural gas procurement activities. SPURR and REMAC do not receive any funding from the State’s general fund.

We do not support the special exception DCA seeks. We are empathetic to the budget constraints state government agencies face, and the internal choices each entity must make about allocating the resources the Legislature dedicates to their achieving their missions. The focus of the intervenor compensation program should remain on reducing the barriers to participation customers and their citizen-advocacy groups face.

### ***Regulatory Professionals***

ORA/CSD argue, and DOD agrees, that intervention by regulatory professionals, without clients, should be discouraged. ORA/CSD focuses on the motivation of the intervenor. It argues that the Legislature did not intend the intervenor compensation program to be a full employment act for private consultants. DOD states that regulatory professionals, with no discernible client base, seeking compensation through the intervenor compensation program presents the *potential* to lead to unreasonable ratepayer costs. We agree with both of these statements, but believe the compensation program's eligibility criteria, substantial contribution requirement and Commission oversight adequately protect against unreasonable ratepayer costs. The intervenor compensation program is intended to encourage the participation of all customers in Commission proceedings by helping them overcome the cost barriers to effective and efficient participation. ORA/CSD is correct that we must qualify this statement to reflect the intent of the statute that only those particular customer interests that would otherwise be underrepresented should be compensated. (See § 1801.3(f).) In this manner, the record is made more complete and the decision making process is improved.

These three parties advocate that the Commission adopt an "ordinary course of business" test to determine an intervenor's eligibility for compensation. ORA/CSD recommend that the Commission determine 1) if the type of work that an intervenor is doing as a participant in a proceeding is within the intervenor's normal line of business, and 2) if the intervenor is performing the same or similar role as it would in the ordinary course of its business for a private client. If the

answer to both questions is yes, ORA/CSD argue, and DOD agrees, that the Commission should establish a nonrebuttable presumption of no undue financial hardship. In this manner, ORA/CSD and DOD intend to exclude individual intervenors who are professional utility regulation consultants from being eligible for intervenor compensation.

The proposed ordinary course of business test, however, does not assist the Commission in determining whether the intervenor's participation is as a customer, as defined by 1802(b). Nor does it assist the Commission in assessing whether the nature and extent of the customer's planned participation raises issues, in the Commission's mind, about the customer's eligibility and/or likelihood of receiving compensation. The motivation of the intervenor, separate from the § 1802(b) requirement and the stated nature and extent of his participation, is not relevant. It is the ultimate contribution of the intervenor that controls, regardless of that intervenor's occupation.<sup>10</sup>

The ordinary course of business test may be argued as assisting the Commission in determining whether any financial hardship of participation is undue or without an overriding economic interest. Clientless participation by a regulatory consultant may be a means of building the experience and expertise necessary for a regulatory consultant to market services to future clients. In that way, clientless participation may be an investment that yields future earnings. Under these circumstances, it would be difficult for a clientless regulatory consultant to demonstrate a significant financial hardship. But the prospect of future earnings would be very difficult to evaluate. And again, the Commission cannot know whether the

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<sup>10</sup> *Webster's New World Dictionary*, Third Edition, defines motivate (*vt.*), motivation (*n.*) as "to provide with, or affect as, a motive or motives; incite or impel" and motive (*n.*) as "some inner drive, impulse, intention, etc., that causes a person to do something or act in a certain way." The motivation of the intervenor, the driving force behind its interest in participating, cannot be known. The motivation may be distinct from the intervenor's stated nature and extent of participation.

*Footnote continued on next page*

prospect of future earnings is motivating the participation of the intervenor. Future earnings are not an element of the significant financial hardship definition, and we are not inclined to attempt to evaluate future earnings in determining financial hardship.

The bottom line is that an intervenor's motivation for participating in a Commission proceeding cannot be determined with precision, and an intervenor's occupation, in and of itself, should not preclude that intervenor from requesting compensation. Neither are relevant to the eligibility determination.<sup>11</sup> The nature and extent of participation, however, are relevant to the eligibility determination. The nature and extent of participation, required elements of the Notice of Intent, provide the Commission with the means to evaluate whether a person who meets the definition of "customer" will be representing interests that would otherwise be underrepresented in the proceeding. (See § 1804(a)(2)(A)(i).)

Though we are not adopting the ordinary course of business test, the ORA/CSD comments on the draft decision have focused our attention on an aspect of the eligibility determination. Under § 1801.3(f), the Legislature states its intent that the intervenor program be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented. As we state above, we agree with ORA/CSD that the intent of the statute is that we compensate only those customer interests that would otherwise be underrepresented.<sup>12</sup>

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<sup>11</sup> However, remuneration associated with occupation is a factor in assessing a customer's ability to afford to participate and should come into consideration when evaluating an intervenor's financial hardship.

<sup>12</sup> We disagree with CPI's interpretation of the statute offered in reply comments. CPI asserts that a party advocating factual, legal and policy contentions and recommendations concerning what the public interest requires in a matter, assists the Commission. (CPI Reply p. 3.) CPI seems to be asserting that such advocacy necessarily constitutes a substantial contribution, implying that compensation would be required. The governing statute requires that the party represent customers, face a significant financial hardship, and make a substantial contribution, and that the Commission must administer the program in a manner that avoids participation

*Footnote continued on next page*

The information filed in the Notice of Intent, pursuant to § 1804(a)(2)(A)(i), should provide a basis for a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. While many preliminary rulings and decisions addressing eligibility have raised the issue of duplication of participation, the issue of underrepresented interests is not usually addressed of late. The nature and extent of the customer's planned participation, in combination with the scope of the proceeding as detailed in the scoping memo ruling, should enable the presiding officer to make a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. Such an assessment will occur in response to any Request for Compensation.

If the intervenor is a "customer" representing interests that would otherwise be underrepresented, who meets the significant financial hardship criteria, that customer may be eligible for an award of compensation. If the intervenor makes a substantial contribution to a Commission proceeding, the Commission should award reasonable compensation without reservations related to that intervenor's occupation or possible motivations.

### ***Representative Capacity***

As ORA/CSD notes in its comments on the draft decision, the definition of "customer" repeatedly casts customer in the representative capacity, whether or not that representation is through an individual or a group or organization. The code identifies three forms of "customer": participant representing consumers, representative authorized by a customer, and representative of a group or organization authorized in its articles of incorporation or bylaws to represent the interests of

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that duplicates the participation of similar interests otherwise adequately represented or that is not necessary. A party that states the nature and extent of its participation as broadly as "representing the public interest" would be unlikely to distinguish itself from other participants even if it were to represent customers and face a significant financial hardship.

residential customers.<sup>13</sup> A “participant representing consumers” is an actual customer who represents more than his own narrow self-interest; a self-appointed representative. A “representative authorized by a customer” connotes a more formal arrangement where a customer, or a group of customers, selects a presumably more skilled person to represent the customers’ views in a proceeding. A “representative of a group or organization” is a formally organized group (with articles of incorporation and/or bylaws) authorized to represent the views of residential customers. When filing its Notice of Intent, a participant should state how it meets the definition of customer: as a *participant representing consumers*, as a *representative* authorized by a customer, or as a representative of a *group or organization* that is authorized by its bylaws or articles of incorporation to represent the interests of residential customers.<sup>14</sup>

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<sup>13</sup> These three forms of customer were described and distinguished in D.86-05-007 (\_\_\_ CPUC \_\_\_).

<sup>14</sup> ICA argues, unconvincingly, that the intent stated in § 1801.3(b) that the program be administered in a manner that encourages the participation of all groups that have a stake in the process should be read together with the § 1802(b) definition of customer to allow, e.g., any representative of business customers to obtain compensation for its efforts to improve, through our regulatory process, its business prospects, under the auspices of representing customers. ICA objects to our limiting compensation to representation of customer interests. We affirm our previously articulated interpretation that compensation be proffered only to customers whose participation arises directly from their interests as customers. (See D.88-12-034, D.92-04-051, and D.96-09-040.) ICA argues that we have selectively applied our interpretation. ICA argues that Cal-Neva, Sierra Club, and NRDC are compensated participants whose participation does not arise directly from their interests as customers, but rather as non-profit contractors and environmentalists, respectively. With respect to Cal/Neva, we understand that it is an association comprised of community action agencies and community based organizations representing low income interests. If ICA believes that in future cases, Cal/Neva is actually representing business customers attempting to improve business prospects and not services to low income customers, ICA should file a response to Cal/Neva’s Notice of Intent so the Commission may consider ICA’s arguments in context. With respect to environmental groups, we have concluded they were eligible in the past with the understanding that they represent customers whose environmental interests include the concern that, e.g., regulatory policies encourage the adoption of all cost-effective conservation measures and discourage unnecessary new generating resources that are expensive and environmentally damaging. (D.88-04-066, mimeo. at 3.) They represent customers who have a concern for the environment which distinguishes their interests from the interests represented by Commission staff, for example.

CMA takes this representative capacity concept and advocates that, with respect to groups or organizations, the Commission have some assurance that the positions advocated by the customer fairly reflect the views of its purported constituents. CMA suggests that an intervenor who purports to represent a large group of consumers be required to demonstrate that through its organizational structure, opportunity is provided for its constituents to express their views on the issues and to participate in the group's decision making function. In the event the organizational structure delegates decision making to a board of directors, CMA argues that that group should be required to demonstrate that the constituents it represents have participated in the selection of the board of directors, or other decision making body.

While CMA's goal of providing the Commission with assurance that a group is fairly reflecting the views of its constituents is admirable, its proposed means of achieving that assurance is unworkable. The statute merely requires any group to be authorized in its articles of incorporation or bylaws to represent the interests of residential customers. While it presumes the group has a membership, it does not require the group to have a membership with voting rights. A voting membership is not a prerequisite to incorporation, and we are not inclined to advocate that it be made a requirement of the group form of "customer".

The statute does, however, require that a group or organization be authorized by its articles of incorporation or bylaws to represent the interests of residential ratepayers.<sup>15</sup> This is a requirement that should be evaluated at the Notice of Intent stage by the administrative law judge. Any group or organization seeking eligibility to claim compensation as a group should include in its Notice of

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<sup>15</sup> Absent that authorization, a representative could only qualify as a customer under the "representative authorized by a customer" definition of customer and may therefore have to provide the significant financial hardship showing applicable to non-groups, as discussed further below.

Intent a copy of its articles of incorporation or bylaws. It should point out where in the articles or bylaws it is authorized to represent the interests of residential ratepayers.<sup>16</sup>

Increasingly, we are seeing customer groups participating at the Commission who represent small business customers as well as residential ratepayers. Such groups should indicate in the Notice of Intent the percentage of their membership that are residential ratepayers. Similarly, a “representative authorized by a customer” should identify in his Notice of Intent the residential customer or customers that authorized him to represent that customer.

If as a result of the Notice of Intent, the administrative law judge issues a ruling, he should rule on whether the intervenor is a “customer” as defined in § 1802(b). He should identify whether the intervenor is a participant representing consumers, or a representative authorized by a customer, or as a representative of a group or organization that is authorized by its bylaws or articles of incorporation to represent the interests of residential customers.

***Productive, Necessary, and Needed Participation***

Section 1801.3 explains the intent of the Legislature in enacting the intervenor compensation program to provide compensation for public participation in Commission proceedings. Section 1801.3(f) provides the Commission program administration guidance. It says that the program

“shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding.”

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<sup>16</sup> If current articles or bylaws have already been filed, the group or organization need only make a specific reference to such filing.



Each of the three standards for program administration (productive, necessary, and needed for a fair determination) has independent meaning that customers, and ALJs preliminarily ruling on customer eligibility, should consider carefully.

The last of the three standards regarding compensability, namely, that the participation be “necessary for a fair determination of the proceeding,” means the Commission should not award compensation where the customer has argued issues that are, e.g., irrelevant, outside the scope of the proceeding, or beyond the Commission’s jurisdiction to resolve. The scoping memo requirement, established in SB 960, will provide parties an early statement from the Commission as to the scope of issues to be addressed. The extent of participation a customer presents in its Notice of Intent, and ultimately in its request for compensation, should reflect the scope established in the scoping memo ruling.

The statute itself explains the second standard (necessity) in terms of nonduplication of effort, i.e., that the participation for which compensation is sought should not duplicate “participation of similar interests otherwise adequately represented.” The Commission has recognized that administering this standard requires flexibility. In multiparty proceedings, parties’ positions likely will overlap. However, a party that is basically aligned with other parties may make its own suggestions, adopted by the Commission, that provide measurable and significant ratepayer benefits. Such participation, at least to that extent, seems compensable under this standard, especially in light of § 1802(h).

Nevertheless, as the telecommunications and energy industries become increasingly competitive, the participation of customers, separate and apart from their representation through ORA or CSD, may not be necessary. We must begin to more critically assess, at the outset of a proceeding, whether the participation of these “third-party” customers, separate and apart from their representation through ORA or CSD, is necessary, both in terms of nonduplication and in terms of a fair determination of the proceeding.

The information filed in the Notice of Intent, pursuant to § 1804(2)(i), should provide a basis for a more critical preliminary assessment of whether the participation of third-party customers is necessary. The nature and extent of the customer's planned participation, in combination with the scope of the proceeding as detailed in the scoping memo ruling, should enable the ALJ to make a preliminary assessment. Where, as the result of the Notice of Intent, the ALJ preliminarily determines that the participation of third-party customers is not necessary, the ALJ shall issue a ruling (otherwise discretionary under § 1804(b)(1)).

We expect that, as a matter of routine, we will conduct this more critical assessment for proceedings which cover those sectors of the telecommunications market that are clearly competitive. We will conduct a more critical assessment of the necessity for participation in proceedings which directly impact such competitors, when such a proceeding is initiated by the Commission, or filed by a party, after the effective date of this order.

Our points regarding duplication also relate to the statute's first and most difficult standard, productivity. Reading the governing statutes as a whole, we believe the productivity standard has at least three elements.

First, the participation must be efficiently and competently performed. Excessive fees or work time are not "reasonable costs" of participation within the meaning of the statute.

Second, the participation must be effective, as shown by the Commission's adoption, in whole or part, of one or more factual or legal contentions, or recommendations presented by the customer.

Third, the participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. To demonstrate productivity, a customer should try to assign a reasonable dollar value on the benefits of its participation. Even benefits sometimes thought of as intangible may be so "monetized" through appropriate proxies.

In comments on the revised draft, Kim argues that the Commission, and not the customer, should perform this assessment of the relationship between the costs of participation and the benefits realized. We disagree that the Commission alone should perform this assessment. Rather, the customer should present his views and the Commission should evaluate them, and judge whether the participation is productive. We agree with the several parties that raised concerns with the difficulty of monetizing intangible benefits. Just the same, an effort should be made. At a minimum, when the benefits are intangible, the customer should present information sufficient to justify a Commission finding that the overall benefits of a customer's participation will exceed a customer's costs.

### **Financial Hardship**

The concept of "significant financial hardship" is the second tool we apply to ensure that compensated intervention provides value to ratepayers. The § 1802(g) definition of significant financial hardship sets two standards, the "cannot afford, without undue hardship, to pay" standard and the "comparison test" standard. Most of the comments on and proposed modifications to the concept of financial hardship center on the dual standard. Other of the comments and proposed modifications address disclosure of financial information, and a lack of a clear understanding as to how much of a financial hardship is "undue."

### ***Dual Standard***

The standard that is applied depends on the form of customer. A participant representing customers and a representative authorized by one customer face the "cannot afford to pay" standard.<sup>17</sup> The group or organization

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<sup>17</sup> CPI and others are wrong when they argue that, under the governing statutes, an "individual intervenor" (a participant representing customers) can demonstrate significant financial hardship by showing that the cost of participation to the individual exceeds the individual's stake in the case when the collective benefits outweigh the compensation award.

authorized by its articles or bylaws to represent customers must meet the comparison test.

Quite a few of the interested parties argue that the definition of significant financial hardship should be the same for a participant as it is for a group or organization. Specifically, they advocate an amendment to the statute that would provide that significant financial hardship of a participant means that the economic interest of the customer is small in comparison to the costs of effective participation.

The statute provides that a participant faces a significant financial hardship when he cannot afford, without undue hardship, to pay the costs of effective participation. This can become an evaluation of the customer's personal financial circumstances regardless of what that individual may stand to lose or gain by participating in a specific case. For groups, the statute merely requires the group or organization to show that the economic interest of individual members is small in comparison to the costs of participation.<sup>18</sup> This dual standard establishes a harsher eligibility hurdle to the individual than to the group or organization.

Some parties have expressed the concern that the dual standard implies the participation of a group authorized to represent the interests of residential customers is inherently of more value to the Commission than the participation of a participant or representative. In the draft decision published for comment, a distinction the statute appears to make between groups and individuals was noted. As a result, a proposal to include a third standard was offered. The third standard would define significant financial hardship as applied to participants or a representative of a customer in terms of economic interest of the customer when that

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<sup>18</sup> In recent practice, the Commission has not typically required groups or organizations authorized in their bylaws or articles to represent residential customers to provide member-specific information when evaluating eligibility in order to assess the economic interest of individual members. One exception to this general practice has been the assessment of eligibility of agricultural groups who seek eligibility pursuant to §1812.

customer is participating for the purpose of promoting a public benefit. This addition was an effort to incorporate an explicit public purpose component to the statute which had been omitted when first codified. (See *Historical Context*.) It was also an effort to mimic the standard applicable to groups authorized in their articles or bylaws to represent residential customers. The comments of ORA/CSD have persuaded us to abandon the proposal to seek amendment of the statute to incorporate a third standard for significant financial hardship.

As ORA/CSD points out, participation that promotes a public purpose is not equivalent to participation that promotes the interest of customers who would not be represented in Commission proceedings absent intervenor compensation, as intended and required by the governing statutes. In addition, we agree with ORA/CSD's reading of the definition of customer which emphasizes the requirement that even individual consumers, customers, or subscribers must act in a representative capacity. We therefore conclude that modification of the existing standards, or the addition of a new standard of significant financial hardship, is not needed. We will continue to evaluate the hardship associated with participant's or representative's participation in light of the customer's financial circumstances and the specifics of the proceeding, assessing what constitutes "undue hardship" on a case-by-case basis.

For a participant, that means we expect the participant to provide financial information. For a representative authorized by a customer, we expect the representative to provide the financial information of the customer who authorized him to serve in a representative capacity. We carefully articulated how the "cannot afford to pay" standard should be demonstrated back in 1986, when the program was new. Since then, the "cannot afford to pay" standard has been modified to become "cannot afford, *without undue hardship*, to pay." Even with this new clause, we find the Commission's 1986 guidance still appropriate, and we review it here.

At that time, the Commission stated that the fact that the customer cannot afford to pay the costs of participation must be documented. It

reasoned that business customers, not-for-profit corporations, and other organizational customers have ready access to their annual income and expense statements and year-end balance sheets. The Commission concluded that these documents would provide a convenient summary of finances that should enable the Commission to determine whether the customer has the resources to pay for representation. It further concluded that individual, non-business customers – participants and the customer with authorized representation – should likewise be prepared to disclose their finances. The Commission drew an analogy with the financial disclosure requirements then in place in the State’s civil courts, where court filing fees are waived for individuals who attest to their inability to pay the fees. Though the Commission did not adopt the waiver application form used by the courts, it did observe that persons who seek to have the general body of taxpayers pay their court costs are routinely required to disclose their gross and net monthly income, monthly expenses, cash and assets, including equity in real estate. The Commission then concluded that persons seeking compensation from the Commission should provide similarly detailed documentation of their finances, distinguishing between discretionary and committed grant funds, if applicable. (See D.86-05-007, mimeo, pp. 10-11 (\_\_\_ CPUC \_\_\_).)

With this documentation in hand, the Commission will be in a position to assess the customer’s financial circumstances and determine whether the planned participation would constitute an undue hardship.

The appropriate financial hardship standard to be applied to a representative authorized by a *group* of customers, where the “authorized pursuant to its articles of incorporation or bylaws” requirement is not in place, is less clear.

Although § 1802(g) uses the phrase “group or organizations,” it does not explicitly qualify the phrase (as done in § 1802(b)) to be authorized pursuant to articles or bylaws. When we evaluated this question in 1986, we determined to apply the comparison test, admitting that this interpretation could lead to abuses of the compensation program. (Id., mimeo, p. 8-10.) For example, it does not appear appropriate to apply the comparison test to a representative authorized by a group of wealthy customers who

form an informal group to avoid the costs of participation. At this juncture, rather than applying the comparison test to such groups as a matter of routine, we will determine which standard should apply given the form of customer asserted and the customer's specific financial hardship showing.

### ***Disclosure***

In order to meaningfully evaluate whether a participant or representative face a significant financial hardship, the Commission has required the disclosure of personal financial information. In some cases, intervenors have provided summary financial information, while at other times the individual intervenor has provided copies of bank statements and tax forms. Some commenters have identified the public disclosure of financial information as a barrier to participation in Commission proceedings. Most argue for the elimination of the dual standard in assessing financial hardship, described above, but as an alternative, ask the Commission to allow such information to be filed under seal and disclosed only to those who sign a protective agreement.

Binding parties from publicly disclosing personal financial information filed in support of that intervenor's showing of financial hardship reduces a barrier to participation while preserving parties' rights to challenge an intervenor's proof of eligibility for compensation. There is nothing that presently prevents an individual concerned about disclosing his personal financial information from filing a motion requesting the Commission to accept the information under seal. However, for ease to the intervenor and to minimize the administrative burden on our staff, we will establish a procedure and model filing for individual intervenors to obtain a protective order for use in intervenor compensation proceedings.

Procedures for obtaining information and records in the possession of the Commission are described in General Order (GO) 66-C. Section 2 of GO 66-C describes some of the public records that are not open to public inspection. An intervenor seeking a protective order governing availability of personal financial

information will need to assert a ground for excluding such personal financial information from public inspection.

GO 66-C § 2.2 includes as a public record not open to public inspection “[r]ecords or information of a confidential nature furnished to, or obtained by the Commission.” The personal financial information of an individual intervenor is arguably information of a confidential nature. While it is important to make this information available to parties preparing to respond to an individual intervenor’s assertion of eligibility for compensation, it is difficult to imagine a situation where a public benefit warrants making the personal financial information of an individual intervenor generally available for public inspection. However, we do not rule out the possibility that such a situation may present itself. Therefore, we will consider GO 66-C requests from individual intervenors to exclude their personal financial information from public inspection on a case-by-case basis.

For administrative ease, we have attached as Appendix B a model request, which may be used by individual intervenors who want the Commission to exclude from public inspection their personal financial information. It should be filed with the intervenor’s Notice of Intent to Claim Compensation and ruled on by the ALJ when the ruling on the Notice is filed and served. If granted, and we expect most such requests will be granted, the intervenor’s personal financial information will only be disclosed to parties of record who sign a nondisclosure agreement. Attached as Appendix C is a model Nondisclosure Agreement Governing Disclosure of An Individual Intervenor’s Financial Information.

### **Substantial Contribution**

The requirement that an intervenor’s participation substantially assist the Commission in the making of its order or decision is the third tool the Commission applies in ensuring that compensated participation provides value to ratepayers. To meet the substantial contribution standard, the statute requires that a customer’s recommendation(s) be adopted in whole or in part. 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.

### ***Workshops and Settlements***

Section 1802(f) specifically identifies "alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the commission" as a "proceeding" for purposes of the statute. The Alkon Report notes the Commission's increased use of alternatives to litigation, such as workshops and settlements, and the difficulties these types of approaches create in determining a particular intervenor's contribution to a proceeding. In the "litigated" proceeding, whether ultimately handled with or without evidentiary hearings, parties file pleadings and/or serve testimony which creates a paper trail of their views and contributions. When workshops and settlements are used in lieu of or as a supplement to paper proceedings and/or evidentiary hearings, the paper trail may be minimal or non-existent. Alternatively, the paper trail may not consist of party-specific pleadings, but rather multi-party products.

To overcome the difficulties associated with determining substantial contribution when a decision relies on the joint efforts of parties participating in a Commission sponsored or endorsed workshop or settlement setting, the Alkon Report recommends the Commission seek legislation to alter the substantial contribution definition contained in § 1802(h). The Alkon Report recommends that for rulemakings, alternative to litigation approaches, and workshop situations, the Commission be allowed to apply a "good faith participation" standard to meet the significant contribution requirement.

The Alkon Report would have the Commission decide when to apply the good faith standard, and once announced, the customer would file a workplan. From the workplan, the Commission would determine the appropriate hourly rate, the proper level of expertise, and the likely number of hours necessary for

effective participation. Presumably, the Commission would also determine at that time whether the customer's participation would be of assistance. After conclusion of the proceeding, when the Commission is making the final evaluation of substantial contribution, there would be a rebuttable presumption of good faith participation if the work done by the customer is in conformance with the workplan.

We are concerned that modifying "substantial contribution" to include a "good faith participation" standard for certain, non-litigated proceedings will so reduce the accountability and control value of the standard as to make it meaningless. We agree that merely signing your name to an attendance sheet at a workshop, for example, is not enough of a contribution to demonstrate a substantial contribution, but neither is it enough to demonstrate a contribution under the good faith standard proposed in the Alkon Report and supported by some of the smaller intervenor groups, individual customers, and our Public Advisor's Office. Nowhere is the advocated good faith standard well defined, and we believe its implementation would prove very problematic. As ORA/CSD points out, it would have the Commission evaluating the intent of the customer, rather than the substance of that customer's contribution.

Those proponents who state a basis for their support of the good faith standard point to a positive impact it would have on the quality of participation because customers would not have to compromise their principles and agree with opponents in the non-litigated setting to assure an award at the conclusion of the proceeding. In practice, however, the Commission has awarded compensation to customers who met the substantial contribution standard when opposing the adoption of a settlement. As we recognized in D.94-10-029:

"[t]he matter of compensation in an alternative dispute resolution context cannot rest solely on whether the party requesting compensation supported a settlement ultimately approved by the Commission. To condition the award of intervenor fees on the intervenor subscribing to a settlement offered by a utility would put undue pressure on the

intervenor to settle on terms it felt were not genuinely in the public interest.”

(D.94-10-029, slip op., pp. 6-7.) We expect to continue to use our judgment and the discretion the Legislature has afforded us in the governing statutes to award compensation to parties who participated in settlements, whether or not the party requesting compensation supported a final agreement adopted by the Commission, when we find that party’s contribution to our order or decision was substantial.<sup>19</sup>

Although we sometimes find evaluating the contribution of a customer in a workshop or settlement setting difficult, we do not believe applying the “good faith participation” standard would overcome those difficulties in a manner that maintains our confidence that the customer’s contribution was of value to ratepayers.

In support of the “good faith participation” standard, a number of parties argue that customers who choose to intervene in Commission proceedings should face the same compensation risks and incentives that Commission and utility personnel face. They argue that the substantial contribution standard and its requirement that a party “win” puts them at too great a risk for ultimately receiving compensation. Any attempt to draw an analogy between customers who choose to participate in Commission proceedings and the government and utility personnel who participate in Commission proceedings as employees is misplaced. The intervenor compensation program was conceived from the common fund theory, where as a result of the participation of one, the public benefited. It offers customers the prospect of compensation to assist in overcoming the barriers to effective and efficient participation where that participation is on behalf of an otherwise underrepresented voice. Participation at the Commission by customers is not analogous to being employed by the Commission.

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<sup>19</sup> See, for example, D.95-08-024, D.95-07-035, D.89-03-063, and D.89-09-103.

### ***Winning – Is It Everything?***

Broader concerns about the substantial contribution standard were also raised, separate and apart from the concern that it is sometimes difficult to determine substantial contribution in the alternatives to litigation settings. There is concern that the requirement that an intervenor “win” means that an intervenor whose participation brought relevant, useful information to the Commission’s attention may not be compensated. Under the present statutory language, if the Commission adopts a customer’s contention or recommendation, it *shall* compensate the customer, assuming the financial hardship requirement is met and the customer has properly sought compensation. But this standard may discourage customers from presenting more novel, creative recommendations, which may have a lower likelihood of being adopted the first time they are presented to the Commission.

A broader standard, such as that used by the Department of Insurance (DOI), which affords the Commission greater discretion to make an award, while being tangibly defined so as to ensure value to ratepayers, may overcome the discouraging effect the present definition has on the presentation of novel and creative recommendations.<sup>20</sup> We find the DOI standard more appealing than 1802(h), in companion with 1803, in part because it affords us greater discretion to award fees for efficient and effective participation that we find useful, but that may fall short of “winning.” However, we recognize that a broader standard provides less clear, understandable, predictable guidance to intervenors for when the Commission would find a substantial contribution has been made. We found the comments and

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<sup>20</sup> The DOI standard reads “[s]ubstantial contribution means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor’s participation resulted in more relevant, credible and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated.” (California Code of Regulation, Title X, Chapter V, Subchapter 4.9, Article 13, Section 2661.1(j).)

*Footnote continued on next page*

recommended statutory language of our PAO, the two-track standard TURN/UCAN suggested, and to a lesser degree the recommendations of UCAN and Weil, particularly constructive on this subject.<sup>21</sup> The TURN/UCAN two-track standard, where the Commission “shall award” when a customer “wins” and where the Commission “may award” when a customer contributes but falls short of winning, has the best balance between Commission discretion and award predictability. It should also help the Commission overcome the present definition’s discouraging effect on the presentation of novel and creative ideas.<sup>22</sup> Parties should, in light of this decision, propose additions to 1802(h) and 1803 which permit, rather than require, the Commission to award compensation to a party who contributes but falls short of “winning.” Such additions should preserve the existing statutory approach and provide an approach that brings value to ratepayers and provides understandable guidance to intervenors where the party contributes but falls short of “winning.” Any amendments to create this additional track should be presented to the Commission for its consideration and possible support before the Legislature.

### ***Advisory Boards and Committees***

The Commission has recently increased its reliance on advisory boards and committees. Typically, these boards and committees are created by statute and/or decision, have limited, appointed membership, oversee and administer public purpose program funds, and have a specific purpose to oversee a Commission program or advise the Commission on the implementation of a program. These characteristics distinguish advisory boards and committees from the types of workshop

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<sup>21</sup> Our reservation with the UCAN proposal for modifying § 1802(h) centers on the rebuttable presumption it would create. With respect to Weil, our reservation centers on his focus on proposed decisions.

<sup>22</sup> This two-track approach may also reduce CMA’s concern, stated in its comments on the revised draft, that pursuing a broader contribution standard is the wrong direction in which to proceed.

and settlement activities referred to above and in the Alkon Report.<sup>23</sup> The Alkon Report did not address compensation for these entities, but some of the parties commented on whether advisory board activities are compensable through the intervenor compensation program.

The establishment of advisory boards and committees to assist the Commission in its oversight and implementation of regulatory programs is not new. Some of the boards in existence today were created 10 years ago. In the past, board members have been reimbursed for their reasonable expenses and received a per diem. More recently, when the Commission made appointments to the Independent and Governing Boards to oversee the administration of energy efficiency and low income programs, we adopted a per diem of \$300. (See D.97-04-044, slip op., p. 10-11, as modified by D.97-05-041.) Specifically, we stated:

“one of the most-discussed issues was the question of per diem for Board members. We were concerned that the per diem be high enough to ensure a broad spectrum of available candidates. On the other hand, Board membership should be considered a public service. Therefore, we will not set levels so high as to substitute for all comparable employment.” (Id.)

In so stating, the Commission continues its longstanding practice of providing per diem, and not intervenor compensation, for the participation of a customer on a limited-membership board.<sup>24</sup> We are not convinced by any party that this practice should change.

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<sup>23</sup> Though Commission-endorsed (and in the context of settlement conferences, required by our Rules), unlike the advisory boards, participation in the workshops and settlements is open to all parties.

<sup>24</sup> In Resolution F-621, November 9, 1988, the Commission adopted an Interim Advisory Committee Standard of Expense Reimbursement for Commission Established Advisory Committees. A copy of this resolution is attached as Appendix D.

***Allocation of Time and Costs by Issue***

The statute requires the customer, at the stage where the Notice of Intent is filed, to provide a statement of the nature and extent of the customer's planned participation. At this stage, the customer has therefore provided the Commission with the issue(s) it intends to address, as best as the customer can at that early stage of the proceeding. When the customer files its Request for Compensation, the statute says it must provide, at a minimum, a detailed description of the services it provided and the related expenditures, as well as a description of the customer's substantial contribution. At this stage, the customer has therefore provided the Commission with a statement of the issue(s) it actually addressed, the related costs, and its assertions of substantial contribution. If the Commission determines that a substantial contribution has been made, it must describe it, and determine the amount of compensation to be paid.

This is a fairly straightforward process when a customer is requesting compensation for one issue and participated on only that one issue. It becomes more complex when the customer has participated on a number of issues and is requesting compensation related to all those issues. It is most complex when the Commission finds that the customer made a substantial contribution, but only in part. The statute provides that, where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's recommendation or contention only in part, the Commission may award compensation to the customer for all reasonable costs for preparing or presenting that position.

CMA argues that the statute is unambiguous that the fees and costs associated with a customer's recommendation or contention which were not adopted by the Commission are not compensable. We agree, but we are not inclined to interpret § 1802(h), as a general matter, as narrowly as CMA appears to have done. CMA appears to interpret "contention or recommendation" at a very detailed level of issue or position. In practice, the issue a customer presents may be as broad as e.g., utility closure of branch offices resulted in unacceptable degradation of service. CMA

appears to argue that in such a case, the customer would be presenting multiple issues e.g., the impact of closures fell disproportionately on the poor, inadequate notice of closures occurred, the criteria for selecting offices for closure was flawed. Both of these interpretations of what constitutes a customer's contention or recommendation are in conformance with the statute, and have been applied by the Commission as appropriate when reviewing specific requests for compensation. We will not, as CMA advocates, routinely apply the more narrow interpretation of what constitutes a recommendation or contention.

We will consider the description of issue(s) as presented by the customer in the Notice of Intent and Request for Compensation, as well as the Commission's ultimate characterization of the issue(s) in the decision for which compensation is being requested. We will determine whether the customer's issue(s) was adopted and thereby a substantial contribution made. We will award reasonable compensation based on the claimed costs incurred in preparing or presenting the issue(s).

Regardless of whether we take a broad or narrow view in interpreting the statute, we will continue to require allocation of costs and time by task (e.g. initial preparation, testimony, briefs) and substantive issue. Perhaps our most careful description of what is required of customers can be found in D.85-08-012 (\_\_CPUC2d\_\_).

Customers participating in telecommunications proceedings should take special note of the "matrix requirement" adopted by the Commission in D.96-06-029 (\_\_CPUC2d\_\_). Applicable to certain telecommunications proceedings, this matrix of substantive issues addressed is designed to reveal potential duplicate compensation to customers active in these "telecommunications roadmap



proceedings.”<sup>25</sup> Although some commenters ask the Commission to abolish this requirement, we continue to find this careful delineation of costs and hours by issue, proceeding and compensation status an important tool for ensuring reasonable compensation.

To ease intervenors’ compliance with this requirement, we direct the PAO and the Telecommunications Division to work together to develop standard format(s) for compliance with the matrix requirement in Roadmap proceedings. The standard format(s) should be available for use by intervenors no later than 120 days from the effective date of this decision. The PAO shall promptly notice the availability of the standard format(s) to all third party intervenors in Roadmap proceedings. Upon issuance of the notice, all customers participating in Roadmap proceedings shall use the standard format(s) when seeking compensation in a Roadmap proceeding.

### **Consistency in Decisions on Requests for Compensation**

A number of parties ask the Commission to clarify its practices, largely in an effort to ensure consistency in its treatment among customers requesting compensation. We restate here our policy and practice with respect to six issues: the application of Rule 76.72, the awarding of interest, discounting requests due to duplication among parties, the awarding of an efficiency adder, compensation for time spent traveling, and compensation for time spent preparing the request for compensation.

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<sup>25</sup> The telecommunications roadmap proceedings are Universal Service, R.95-01-020/I.95-01-021; Local Exchange Competition, R.95-04-043/I.95-04-044; Open Access Network Architecture Development, R.93-04-003/I.93-04-002; its offshoot, Operations Support Systems, R.97-10-016/I.97-10-017; Equal Access (or Presubscription), I.87-11-033; and NRF Review proceedings.

**Rule 76.72**

In its comments, TURN raises a concern that the Commission may have an unduly narrow interpretation of what constitutes a final decision for purposes of compensation. The issuance of a “final order or decision” is used in § 1804 (c) as the event that is supposed to trigger the filing of a request for award, but it is not defined within the statute. The Commission’s Rule 76.72 defines final order or decision.

“For purposes of this article, ‘final order or decision’ means an order or decision that resolves an issue on which the customer believes it has made a substantial contribution *or* the order or decision closing the proceeding. If an application for rehearing challenges a decision on an issue on which the customer believes it made a substantial contribution, the ‘final order or decision’ on that issue means the order or decision denying rehearing on that issue, the order or decision that resolves that issue after rehearing, or the order or decision closing the proceeding.” (Emphasis added.)

We recently took up this issue in considering a specific Request for Compensation. In D.97-10-026, we re-interpreted Rule 76.72 and concluded that the pendency of an application for rehearing of a decision should not preclude a customer from requesting, and potentially receiving, compensation for its substantial contribution to that decision.

**Interest**

Sawaya recommends that the Commission’s policy of adding interest to delayed awards be codified, or by some other equally effective means, the Commission should assure that the policy is followed consistently and fairly. It is our practice to order the subject utility to pay interest on compensation awards at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest beginning on the 75<sup>th</sup> day after the customer filed its compensation request. Sawaya acknowledges that this practice is consistently applied, however, he is concerned that delays in what he characterizes as

“intermediate steps” are not factored into the awarding of interest. Sawaya notes that this practice is based solely on decisional authority.

Sawaya is correct that the Commission, through decisions, has adopted and applies a policy of awarding interest from the 75<sup>th</sup> day after the date of the filing of a complete compensation request. We believe these decisions clearly state our policy.<sup>26</sup> If a compensation request is not filed in compliance with the statute and any applicable additional requirements, like our matrix requirement for telecommunications roadmap proceedings, and an amendment is necessary to bring that request into compliance, then interest should accrue from the 75<sup>th</sup> day after the date the amendment to the request for compensation was filed.

### ***Duplication Discount***

The intervenor compensation governing statutes state an intent that the program be administered in a manner that avoids “unnecessary participation that duplicates the participation of similar interests.” (§ 1801.3(f).) It also provides that the participation of a customer that “supplements, complements, or contributes to the presentation of another party” may be compensated. The governing statutes envision that some participation that is duplicative may still make a substantial contribution. It also envisions that participation which is duplicative may be unnecessary and therefore not compensable at all.

In numerous decisions, we have applied this intent and statute in evaluating the contribution of parties. We have recognized duplication occurred and determined that full compensation is in order (see, for example, D.96-08-040). We have also recognized duplication occurred and accepted a proposed discount on the requested award of 26% (in D.88-12-085) and, in other cases, applied a 10% discount to the requested amount (see, for example, D.93-06-022). We will continue our practice of evaluating substantial contribution in light of potential duplication, and

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<sup>26</sup> See, for example, D.86-07-009, D.95-09-125, and D.96-01-027.

apply a discount, as appropriate. That discount may be as modest as 10% or, as CMA points out, may result in no compensation. The appropriate amount of the discount and the hours or costs to which it will be applied will be determined in each case.

### ***Efficiency Adder***

In the past, we have awarded an hourly adder when a customer's participation included responsibilities and duties beyond those normal for its role. We have awarded an efficiency adder to attorney hourly rates when that attorney developed and sponsored technical testimony. For example, in D.91-11-067, we awarded a \$25 per hour efficiency adder to the hours of a customer's attorney spent in the preparation of technical testimony. We have likewise awarded an efficiency adder to witness hourly rates when that witness performed as hearing room advocate and prepared briefs. For example, in D.95-02-066, we awarded a \$25 per hour efficiency adder to the hours a customer's representative spent during the hearing process performing as both a technical expert and advocate during evidentiary hearings and the preparation of briefs. Only those hours spent performing the additional responsibility were compensated at the higher hourly rate.

We will continue to apply an efficiency adder to compensable hours spent performing a responsibility beyond those normal to a customer's role when the customer has made a demonstration of that efficiency in its request for compensation.<sup>27</sup>

### ***Travel Time***

We have previously determined that travel time is compensable at one-half the normal hourly rate approved, unless the customer

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<sup>27</sup> In their joint comments, TURN and UCAN, and TURN separately in its comments, argue for greater efficiency adders. Customers are welcome to seek efficiency adders in their compensation requests, and present greater efficiency adders than those awarded in the past, for our consideration.

provides a detailed showing that the time was used to work on issues for which we grant compensation.<sup>28</sup> We will continue that practice.

### ***Preparing the Request for Compensation***

We have held in numerous prior decisions that compensation requests are essentially bills for services, and do not require a lawyer's skill to prepare. Accordingly, we have reduced by one half the attorney's rates applied to time spent preparing the compensation request, except in cases where the compensation claim involves technical and legal analysis deserving of compensation at higher rates.<sup>29</sup> We are not convinced by the various legal arguments presented in comments that our policy is ill-conceived or unlawful. In reducing by ½ the attorney's rate, as appropriate, we arrive at what is in our judgement a reasonable hourly fee for the service provided. We will continue that practice. We expect parties to file their requests in accordance with this practice, explicitly stating whether full attorney's rates were applied, and if so, arguing how the request meets the exception.

### ***Funding***

In this section, we will address the suggestions for reforming the manner in which the compensation awards are funded, and the certainty and timing of how those funds are dispersed. At present, awards to customers are made after a final order or decision. The award is paid by the utility which is the subject of the proceeding, and the utility is then allowed full recovery of the award from its ratepayers. When the proceeding is a rulemaking which affects many utilities, such as the Local Exchange Competition Rulemaking (R.95-04-043), we have limited responsibility for payment of any award to the former-monopoly utilities, such as Pacific Bell and GTE California

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<sup>28</sup> See, for example, D.86-09-046, D.92-04-042, and D.93-09-086.

<sup>29</sup> See, for example, D.96-08-023, D.97-02-047, and D.97-02-048.

Incorporated even though other regulated utilities, or their representatives, have participated.

Because awards are only made post-decision, intervenors must fund their own participation. In the past, some proceedings have been quite protracted, which means intervenors must wait to be awarded compensation over extended periods. Some repeat intervenors identified the post-decision award and length of time required to bring closure sufficient to allow a request for compensation to be made as very serious impediments to participation. They urge the Commission to address these impediments in this reform effort. The Alkon Report offers recommendations to improve the certainty and the timing of awards.

Our present approach to funding intervenor participation presents two issues for utility participants responsible for funding the awards. The issues arise from the Commission's efforts to foster competition in the provision of telecommunications and energy services. First, the former-monopoly utility participants want the Commission to broaden responsibility for paying awards to include new market entrants. Second, these utility participants assert that, in a competitive environment, shareholders, and not ratepayers, are funding a greater portion of intervenor awards. The Alkon Report presents some options for reforming the funding source for compensation awards.

### **Who Pays?**

The Alkon Report concludes that, given the relatively small amount of money at issue, the current approach to funding intervenor compensation is not problematic. However, it identifies two options for change. First, the obligation to pay could be limited to the biggest utilities involved in the proceeding. Second, the whole

program could be transferred to the Commission, and the funds collected through the user fee included in the rates paid by utilities.<sup>30</sup>

A number of parties presented options in addition to the options identified in the Alkon Report. The Utility Members support funding the intervenor program through the user fee, but also ask the Commission to support legislation to expand fee collection to include unregulated energy providers. ORA/CSD and DOD agree. CALTEL recommends transferring responsibility for payment of intervenor funding to the Commission budget as part of ORA's responsibilities. CAUSE and DCA would have intervenor awards drawn from the Commission's budget, but do not provide for increasing the user fee to account for the additional costs the Commission would incur. A few of the small intervenors suggest that the funds supporting ORA should be used to fund intervenor compensation and that ORA be eliminated.<sup>31</sup>

The present system works quite well for proceedings initiated by a utility or a complainant. It is clear under these circumstances who the "subject of the hearing, investigation, or proceeding" is for purposes of applying § 1807. It is also quite clear when the proceeding is an enforcement action initiated by the Commission.<sup>32</sup> However, when the Commission is establishing policy affecting an industry (i.e., electric restructuring), or all regulated industries (i.e., revision of our Rules of Practice

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<sup>30</sup> Pursuant to § 431, et. seq., the Commission has been authorized to collect fees from every "electrical, gas, telephone, telegraph, water, sewer system, heat corporation and every other public utility providing service directly to customers subject to the jurisdiction of the commission other than a railroad, except as otherwise provided in Article 2 (commencing with Section 421)." The total amount of the fees, together with the fees collected from regulated common carriers and related businesses, and other funds (e.g. federal funds), is to equal that amount established in the authorized Commission budget. In § 401, et. seq., the Legislature lays out how it intends the Commission spend the collected fees.

<sup>31</sup> These parties do not acknowledge that § 309.5 requires the Commission to have a division that represents the interests of public utility customers and subscribers in Commission proceedings.

<sup>32</sup> Generally, these circumstances will result in the proceeding being categorized as either "adjudicatory" or "ratesetting." (See Rule 5(b) and (c).)

and Procedure), as is generally performed in rulemaking proceedings, we have regarded the application of § 1807 administratively difficult and cumbersome.<sup>33</sup> Continuing with the current system in rulemakings, an approach advocated by some of the commenters, would unfairly assess the costs on some, but not all, of the subject utilities. Obligating only the biggest utilities to bear responsibility for funding an award would be an improvement, but would also be unfair.

Under § 1807, we have authority to order all subject utilities to contribute to any award of compensation. Because each share of that payment could be very small and therefore administratively burdensome on both the utility and on the intervenor who would ultimately collect a very small payment from a large number of utilities, we have been reluctant to order all subject utilities to contribute. As competition in the telecommunications and energy sectors takes hold, the current system becomes unduly unfair.

The lack of fairness in the current system of obligating only the biggest utilities to bear responsibility for funding an award in a rulemaking outweighs the claims of administrative burden on the utility and the intervenor. Therefore, when the proceeding is a rulemaking which affects an industry or industries, and not just a utility or class of utilities (that is, when it is categorized as “quasi-legislative”), responsibility for the payment of any awards of compensation should be more broadly shared among regulated industry participants. In the draft decision, parties were invited to present the Commission with a legislative proposal for its consideration. The proposal would amend §§ 401 and 431 to provide for the collection of intervenor compensation fees in the same manner that the Commission user fees are collected. The proposal would create a fund for compensating customers, when their participation was in a “quasi-legislative” proceeding where policy affecting an industry, or all

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<sup>33</sup> Generally, such rulemaking proceedings will be categorized as “quasi-legislative.” (See Rule 5(d).) To the extent specific utilities are named as respondents to such a rulemaking it may be clear who is the subject utility for purposes of applying § 1807.



regulated industries, was established, and that participation met the requirements of the intervenor compensation program. In the interim, the draft decision concluded we would assess responsibility on the largest utilities. However, largely based of the comments of AT&T/MCI and TURN, we reject this approach.

AT&T/MCI argues that the interim approach would allow smaller carriers to obtain a “free ride” in rulemakings by requiring larger carriers to absorb their burden of funding intervenor compensation. AT&T/MCI disagree that it is administratively burdensome, either for subject utilities or intervenors, to assess responsibility on all utilities.

TURN, in arguing in support of the interim proposal, actually convinces us that it is unfairly discriminatory and arbitrary to continue to limit responsibility for payment of compensation awards to a subset of affected utilities. TURN suggests the revenue and sales amounts used to determine who would pay under the interim proposal be used instead as an initial screen. After determining which participating utilities have revenues or sales above the amounts, TURN suggests the Commission then choose no more than five of those utilities to actually pay the award. It argues that since total annual awards are quite small, relative to the revenues generated by utilities, the risk of competitive harm is slight. TURN’s suggestion that we limit responsibility for payment of awards to no more than five of the largest participating utilities is arbitrary, and in considering it, we realize the interim proposal is not much less arbitrary. We had been persuaded that the administrative burdens on the utilities and intervenors of a more broadly shared responsibility for paying awards outweighed any unfairness. Having considered TURN’s suggestion, and AT&T/MCI’s disagreement that any administrative burden would be borne by them, however, we are persuaded that the interim proposal would be unduly unfair to the largest utilities.

AT&T/MCI propose an alternative to the interim proposal and the legislatively created user fee approach included in the draft decision. AT&T/MCI propose that once a request for intervenor compensation has been made in a rulemaking, all regulated companies affected by the proposed rulemaking submit their

California-jurisdictional revenues for the most recent calendar year, total those submissions, and apportion responsibility for intervenor funding based on each affected regulated company's percentage of the total. Whether a utility actually participates in the proceeding would be irrelevant; all affected regulated companies would bear responsibility for paying any award. MCI argues that such an approach would place competitors in a position to be facing comparable cost responsibility and avoid the "free-rider" benefits small carriers gain by not sharing in the costs of the program. TURN points out that for companies which have decided that participating in a Commission proceeding is worth the cost, intervenor compensation is a foreseeable expense of litigation.

In our revised draft decision, we agreed with TURN that it is appropriate that utilities participating in a proceeding pay the cost of compensation awards. We stated that we would exercise the authority we have under § 1807 to order all subject utilities, regardless of size or historic regulatory practices, to contribute to any award of compensation, with one exception. We would not require all utilities affected by a rulemaking to contribute. In rulemaking proceedings, we stated that we would regard "subject utilities" for purposes of § 1807, to be all utilities, appearing on their own or through a representative or association, participating in a proceeding. All such participating energy, water, and telecommunications utilities would be directed to pay the cost of any compensation awards in the proceeding. We would allocate responsibility for paying any compensation awards among these utilities on the basis of their California-jurisdictional revenues for the most recent calendar year. As AT&T/MCI suggested, we would total these revenues and apportion responsibility for intervenor funding based on each company's percentage of the total.

In comments on the revised draft, a number of parties object to the proposal that all participating utilities pay toward any intervenor compensation awards in quasi-legislative proceedings. They point out that the revised draft does not eliminate the "free-rider" problem and that it may chill utility participation in Commission proceedings as utilities opt out of participation to avoid the uncertain cost of intervenor

compensation. Payment from utilities participating through associations has administrative problems since during the course of a proceeding, association membership may change. In addition, some are concerned that the proposal fails to address the uneven cost responsibilities in quasi-legislative energy proceedings since the proposal would only have utilities, and not their energy competitors, like energy service providers, contribute toward any intervenor award. CALTEL and the Telecommunications Resellers Association argue that it is bad policy and unconstitutional for the Commission to compel utilities to fund intervenor participation in quasi-legislative proceedings because to do so requires them to fund the legislative advocacy of their adversaries in the Commission's administrative hearings. Most of these commenters advocate that the Commission adopt the proposal offered in the November draft decision to fund intervenor compensation in quasi-legislative, rulemaking proceedings through amendments to the user fee, while some advocate that the limitation of the revised draft's proposal to "participating" utilities be eliminated.

Others are concerned that expansion of the payment responsibility will create extremely burdensome collection responsibilities since it may require an intervenor to collect small amounts of money from dozens of different parties. These parties tend to advocate for little change in the current approach to funding intervention in rulemaking proceedings.

The proposal to fund intervention in quasi-legislative, rulemaking proceedings by amending the user fee statutes to include an allocation for compensating intervenors is disfavored by the Commission for four reasons. First, we believe it would constitute a hidden tax. Second, it may communicate a greater permanence to compensated intervention in quasi-legislative, rulemaking proceedings than the Commission is prepared to state, especially in light of our earlier discussion of the changing regulatory environment. We may wish to re-look at our compensation policies to update them as new markets emerge. Third, it effectively places a cap on the amount of compensation that will be awarded in a budget year since the annual fee is set based on the estimated, rather than realized, budget. As discussed later in this

decision, we reject the proposal to impose any cap. Alternatively, to the extent the Commission were to underestimate the amount of user fees that should be collected to fund intervenor compensation, and looked to its remaining user-fee collected funds, it would be placed in the untenable position of choosing between funding Commission staff and funding intervention by third parties. For all of these reasons, we will not seek a Legislative change to fund intervention in quasi-legislative, rulemaking proceedings through the Commission's user fee.

We will adopt the proposal from the revised draft to fund intervention in quasi-legislative, rulemaking proceedings by requiring all participating energy, water, and telecommunications utilities to pay the cost of any compensation awards unless a specific utility(ies) is named as a respondent. We find the constitutional argument off point. The Commission is not a Legislative body. Funding intervention in quasi-legislative Commission proceedings is not akin to funding lobbying activities of public interest groups at the Legislature. We also find unconvincing the argument that the costs associated with intervenor compensation will chill participation – especially since at present, the 6 energy and telecommunications utilities required to pay compensation awards from 1994 through 1996 paid, on average, between \$77,000 and \$512,000 each annually.<sup>34</sup> As a number of parties remarked, the costs likely to be born by participating subject utilities are foreseeable, reasonable, and miniscule relative to the revenue opportunities the California markets present and the compensation most subject utilities pay their managers. We agree that this new funding approach does not eliminate the free-rider problem associated with non-participating utilities benefiting from the participation of others, but the free-rider problem is present regardless of how we fund intervenors. The real problem identified here is that some utilities pay the costs of participation in Commission proceedings to protect their interests while a large body

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<sup>34</sup> These average figures are derived from Attachment 1 to Response of the Utility Members, filed March 31, 1997 in this rulemaking.

of utilities benefit from this advocacy without incurring the costs. The relatively small additional costs of funding intervenors is dwarfed by the more general problem, and this more general problem is not a subject of this proceeding. Finally, we believe it is appropriate to limit the responsibility for payment of compensation awards to utilities over which we have jurisdiction, and will not initiate an effort to amend the Public Utilities Code to expand our authority over non-utility market participants in Commission proceedings.

To implement this approach, we will require California-jurisdictional utilities that participate in our proceedings to have on file with our Public Advisor in San Francisco a letter reporting their California-jurisdictional revenues for the most recent calendar year.

One problem with implementing this approach was identified in comments. Specifically, when payment occurs through utilities represented by associations, changing association membership may make this approach administratively difficult. To address this concern we have modified the revised draft and propose the following approach for comment by the parties. We propose to determine responsibility for payment by members of associations by requiring the association to file a statement, at the time it seeks party status, in the proceeding identifying its participating California-jurisdictional utility members as of that date, and verifying that the necessary revenue report is on file with the Public Advisor. The association may defer filing its statement until after Notices of Intent are due. Since customers must estimate their cost of participation in their Notices, the total amount of compensation, if any, that an association's members may be responsible for paying will, at that point, be known.<sup>35</sup>

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<sup>35</sup> We recognize that although we will assess payment responsibility on participating utilities based on their California-jurisdictional revenues, members of associations may agree among themselves to meet the sum total of their individual shares based on a different allocation. We will accept such member-agreed-upon variations in payment responsibilities so long as the total payment under the member-agreed-upon variation equals the sum total of the payment

*Footnote continued on next page*

Any participating utility (whether individually or through an association) that fails to report its revenues may be deemed to have withdrawn from participation and will forfeit any rights it otherwise had associated with party status in the proceeding. Likewise, any association that fails to timely submit a statement identifying its utility members and verifying that the necessary revenue report is on file may be deemed to have withdrawn from participation and will forfeit any rights it otherwise had associated with party status.

The second issue the utility participants raise is the assertion that, in a competitive environment, shareholders, and not ratepayers, are funding a greater portion of intervenor awards. Utility Members claim that under AB 1890's rate freeze, no increase in electric rates is allowed for electric utilities. As a result, Utility Members continue, intervenor compensation awards crowd out competitive transition charge (CTC) recovery, leaving insufficient headroom for CTC collection at the end of the transition period. Telecommunications utilities claim they have been left in doubt about the recoverability of intervenor compensation costs under the New Regulatory Framework since rates are no longer regulated using a "cost-plus return" approach.

This issue, as it relates to telecommunications utilities, is before us in the context of an Application for Rehearing, so it would be inappropriate for us to speak determinatively of it here. However, we note generally that the presence of prospective competitors does not, in and of itself, reduce the value to the Commission's decision making process and to ratepayers of broad participation and input in Commission proceedings. To the extent a utility is the subject of a proceeding, it is appropriate that that utility's ratepayers fund intervenor compensation. That is what § 1807 provides. It states:

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responsibility calculated from California-jurisdictional revenues. If a member-agreed-upon allocation is to be used, the association should describe it in its statement so if awards are ordered, the Commission may appropriately assess payment responsibility.

Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding, as determined by the commission, within 30 days. Notwithstanding any other provision of law, any award paid by a public utility pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility by way of a dollar-for-dollar adjustment to rates imposed by the commission immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within one year from the date of the award.

To the extent a utility, in the face of competition, chooses not to pass the costs of intervenor compensation on to its ratepayers, then that is a choice of utility management that we respect. From the Utility Members' comments, Attachment 1, it appears that the amount of money, if any, that their shareholders may be paying toward intervenor compensation is, on average, between \$77,000 and \$512,000 annually per company.

A number of utility participants also argue that requiring non-rate regulated companies to pay intervenor compensation contravenes the above quoted § 1807. They state that where the Commission does not fix the rates of a utility it is impossible to meet the statutory requirement. We disagree, however, that our form of regulation of, for example, intrastate telecommunications providers does not allow any compensation award paid by such a utility as an expense for the purpose of establishing rates. Such utilities are authorized to include or not include certain expenses in rates, including intervenor compensation costs. While we agree that when it was adopted, a different regulatory scheme prevailed, we do not agree that the present, more permissive authorization to set and adjust rates characteristic of some of the utility industries we regulate today contravenes the statute. The Commission's more relaxed form of rate regulation still allows the costs of an award as an expense for the purpose of establishing rates. Again, if a utility chooses not to include the costs of an award in its

rates so that the amount shall be fully recovered by its ratepayers, then that is a choice of utility management that we respect.

### **Upfront Determination, Small Claims, and Interim Payments**

The Alkon Report seeks to address the intervenor's concerns with the certainty and timing of awards with three recommended modifications. It suggests that each would require legislative action before they would be implementable.

The first, an upfront determination of award, would increase the certainty an intervenor would have that its participation would be compensable. The Alkon Report recommends it be applied when a good faith standard for substantial contribution is applied. At the notice of intent stage, given the application of the good faith standard, the Commission would have a more authoritative position concerning the amount of the award an intervenor could expect. The Commission's ruling on the notice of intent would create a presumption that the award would be no higher than the amount stated in the notice of intent. The award would not be made until after the final order or decision.

The second, would create a fixed fund "small claims" process that would compensate eligible customers for out of pocket expenses, like service and travel costs, on a more regular basis, regardless of whether a substantial contribution was made. Disbursement of these funds would be final. Eligibility for such funding would follow the current eligibility requirements. Once eligibility was established, the decision on whether to award compensation would be delegated to the assigned ALJ. An annual cap on reimbursement through this fund per eligible customer (and presumably per proceeding) would be set at \$5,000, or, if the Commission wishes to also fund professional fees through this process, the Alkon Report recommends a \$10,000 annual cap on funds dispersed. The balance of the costs of participation for an eligible customer would be considered through the existing request and award process, subject to the substantial contribution criteria. If the customer is found to have not made a substantial contribution, it would not be required to return the funds awarded through the small



claims process, but it may not be eligible to seek reimbursement from the fund for participation in future proceedings.

The third recommendation the Alkon Report makes to lessen the impediments to intervenor participation caused by the timing of awards is to create an interim payment mechanism. This recommendation tracks an approach used by the DOI. Presumably, the current eligibility criteria would be applied. An eligible customer could apply for interim payments or awards through this mechanism if a proceeding continues beyond 180 days. The interim award would not be subject to the substantial contribution requirement. Only 80% of the request would be awarded, with 20% held back until the final order or decision of the Commission. Then the substantial contribution requirement would be applied and the remaining 20% awarded if a substantial contribution was made, or the 80% interim payment would be returned by the customer. Failure to return the interim payment would result in the customer being banned from future eligibility for awards.

As we consider the Alkon Report suggestions and the comments filed regarding the certainty and timing of awards, we must bear in mind a significant change we do not see reflected in the comments. Since the preparation of the Alkon Report, SB 960 became law, reforming the Commission's decision making process. The most relevant change for purposes of the intervenors' concerns regarding the timing of awards is that for adjudicatory proceedings, the Commission must resolve the proceeding within 12 months, and for all other proceedings, the Legislature stated its intent that the Commission resolve each proceeding within 18 months. These new time requirements took effect January 1, 1998. The resolution of proceedings within these SB 960 time constraints should mitigate the concern expressed by some intervenors that it is necessary to wait years before the Commission issues a decision or order on which an intervenor may base its request for compensation. Given the SB 960 time constraints, customers requesting compensation for substantial contribution to an adjudicatory proceeding should anticipate a decision on their request approximately 16 months (depending on whether there are any appeals or requests for review of the presiding

officer's decision) from the commencement of the proceeding. For ratesetting and quasi-legislative proceedings, customers requesting compensation should anticipate a decision on their request approximately 22 months from the commencement of the proceeding.

We recognize that we have not had a good track record in addressing requests for compensation expeditiously. We have, however, taken some management steps that should improve our ability to issue decisions on requests for compensation in a more timely manner. Though the new SB 960 requirements and our management steps should improve the timing of awards, we believe further consideration of the Alkon Report upfront determination of award, small claims process, and interim awards recommendations are warranted.

Little comment was received on the proposed upfront determination of award. Some commenters appeared to view it as a cap on the amount a customer would ultimately be allowed to request compensation for, and objected to the proposal on that ground. While an upfront determination may have provided some greater certainty of award, since it would not provide any entitlement to an award, it would still leave the customer at risk. Since we are not adopting the good faith standard for substantial contribution, there would be little benefit to customers in providing a process for determining, upfront, a more authoritative estimate of the amount of a possible award. Therefore, we will not adopt the proposed upfront determination of award.

Generally, the individual intervenors who commented on the small claims and interim payment approaches the Alkon Report discussed were supportive of early and frequent compensation, both for out-of-pocket costs, professional fees (which would include expert advice and attorney fees) and personal time. Many advocate funding such costs absent, or with a much-relaxed, standard of substantial contribution. Some of the individual intervenors would implement small claims and interim payment without, or with a much-relaxed, financial hardship standard.

We recognize that by reducing the accountability and control mechanisms, and providing early small claims and interim awards, we would be encouraging participation in a manner that would improve the number of participants in our proceedings. However, we would be failing to meet the intent of the statute that we administer the program in a manner that encourages *effective and efficient* participation, compensated when a substantial contribution is made. Participation for its own sake is not what the program is intended to foster. Therefore, as we look at modifying the manner in which we fund participation, we will consider modifications that have appropriate accountability and control mechanisms.

Few alternatives to the small claims and interim payment options proposed in the Alkon Report were offered. All parties who commented on the small claims proposal, with the exception of CALTEL and Weil, supported it, but they differed on whether only out-of-pocket costs (and not expert and attorney fees or compensation for time) should be compensable from the small claims fund. On one end of this spectrum was SSCF, et. al. It proposed that the small claims approach allow consumers to apply for funding of independent consumer experts in advance. SSCF, et. al., proposes that compensation for all reasonable expert's fees and expenses, when incurred on behalf of diverse segments of ratepayers, would be awarded on the basis that such participation, per se, makes a substantial contribution, independent of any party's actual contribution. On the opposite extreme was a proposal by Bates. Its idea was that individual intervenors willing to waive the right to compensation for their time would be guaranteed funding for their out-of-pocket expenses, regardless of whether they ultimately made a substantial contribution as defined by the statute.

We are reluctant to fund any costs of participation through the small claims process. That process guarantees funding regardless of a substantial contribution. Absent a substantial contribution, there is no assurance that ratepayers will benefit. We return to the principle that compensated intervention provide value to ratepayers. We will not adopt a program, like a small claims process, for awarding intervenors absent any substantial contribution determination.

Finally, we address the third Alkon Report recommendation for improving the certainty and timing of awards: interim payments. Before addressing specific comments, we should clear up a misconception held by some commenters. The Commission presently awards compensation for substantial contributions to interim decisions. The governing statutes and our Rules provide that compensation may be requested and ultimately awarded when the Commission issues a decision that resolves an issue on which the customer believes it made a substantial contribution, regardless of whether that decision closes the proceeding. This occurs most often in proceedings which result in multiple decisions issued in the same docket. We do not wait until a proceeding is closed to consider requests for compensation, unless the customer making the request chose to wait until the proceeding was closed before filing the request.

Among those parties who commented on the interim payment proposal described in the Alkon Report, it was generally viewed favorably. Weil objected to it on the grounds that it would not provide adequate benefit to ratepayers since it would be unreasonably difficult to get back the 80% interim payment in the event a customer was ultimately found to have made no substantial contribution. DMM claims the interim awards proposal will not effectively address cost as a barrier to participation since costs covered by an interim payment may ultimately need to be paid back. CALTEL opposes the proposal since it could increase the risk of abuse by intervenors more interested in compensation than contributing. Some of those supporting the concept regard interim payment of little improvement if such a program is not implemented with the good faith standard of substantial contribution.

As mentioned above, few alternatives to the interim payment option proposed in the Alkon Report were offered. Cal/Neva made a suggestion that would produce an interim payment without having to wait for the creation of an interim payment program like that administered by the DOI. Cal/Neva suggested the Commission could issue an interim decision on which to base an award as issues are advanced. For example, Cal/Neva suggests that the Commission could issue an interim order which confirms the status or impact on the ongoing decision-making process of a

workshop report, consensus proposal, or settlement. Without reaching the substantive issues the report, proposal, or settlement present, the interim decision could determine the relevance, applicability, or procedural impact of the parties' product to any further order. Following such an interim decision on procedure Cal/Neva continues, the Commission could consider requests for compensation from participating customers.

We find compelling the arguments made by CALTEL, DMM, and Weil, but not to the point of abandoning interim funding along the lines offered by the DOI. Instead, we would prefer a modified version of the DOI approach which would increase the likelihood that participation will result in a substantial contribution and provide ratepayers value while lessening the disadvantages these three parties identified.

Our modified approach to compensation creates an optional track an intervenor may elect for compensated participation. The optional track melds aspects of the upfront determination proposal and the interim payment proposals included in the Alkon Report and commented on by the parties. The optional track will be available on a proceeding-specific basis, at the discretion of the Assigned Commissioner. All decisions regarding implementation and oversight of the optional track will be delegated by the Commission to the Presiding Officer in consultation with the Assigned Commissioner. The optional track will only be available in formal proceedings. It may provide the party electing to use the approach periodic payments throughout the timeframe of participation, rather than only after a decision, under the condition that compensation will be capped at the amount of the proposed budget submitted in the Notice of Intent. It will help to ensure that all issues the assigned Commissioner wants addressed will be addressed, and at a cost he is comfortable matches the value of the information. This is how it would work:

Step 1. In a ratesetting or quasi-legislative proceeding, the assigned Commissioner identifies issues necessary for a complete resolution of the proceeding but that appear as though they will not be adequately addressed by parties to the proceeding.

Step 2. The assigned Commissioner assesses the value of getting that information. This would be a preliminary assessment which would take into account the potential benefit to ratepayers of resolving the issue and the relative importance of the issue to the overall resolution of the proceeding.

Step 3. In the scoping memo ruling, the assigned Commissioner announces the issues and the assessed value, and, pursuant to § 1804(a)(1), requests expanded Notices of Intent to be filed by intervenors electing the optional track. These expanded Notices of Intent would include the information required under § 1804(a)(2) (qualifications as “customer,” nature and extent of participation on the Commission-identified issues, related proposed budget, showing of financial hardship)<sup>36</sup> as well as statements of qualifications of the advocates and/or experts that an intervenor has preliminarily engaged for the Commission-identified issue. The intervenor would also have to provide model, typed timesheets that show how time/costs will be recorded by task and issue.

Step 4. Any party that may qualify for intervenor compensation – a customer for whom participation without an award imposes a significant financial hardship - that wishes to elect compensation through this optional track files an expanded Notice of Intent.

Step 5. The Presiding Officer then evaluates the expanded Notices, evaluating eligibility (is the intervenor a customer whose participation presents a significant financial hardship), assessing the quality of the planned participation on the Commission-identified issues and the budget (is it reasonable to expend the budgeted amount given the assessed value of getting the information). In this track, the budget would be the expected compensation award. The Presiding Officer, in consultation with the assigned Commissioner, chooses which, if any, eligible intervenors electing this

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<sup>36</sup> While the statute allows the customer to make his showing of significant financial hardship in his Request for Compensation, a customer electing the optional track would be required to include a showing of significant financial hardship in his Notice of Intent.

track will be assured periodic payments up to 80% of its expected compensation award during the course of the proceeding. Budgetary supplements may be requested and considered.

Step 6. Pursuant to § 1804(b), The Presiding Officer, in consultation with the assigned Commissioner, rules on which, if any, eligible intervenors electing this track were chosen. The periodic awards would be paid by the utility or utilities that are the subject of the proceeding, pursuant to § 1807.

Step 7. Pursuant to § 1804(c), after a Commission decision in the proceeding, the intervenor requests compensation. The final payment would be made only if the intervenor is found to have made a substantial contribution to the Commission decision(s) in the proceeding, as defined in § 1802(h) and as required in § 1803. The order on whether the intervenor made a substantial contribution, as described in § 1804(e), would not be delegated to the assigned Commissioner or Presiding Officer. The determination on substantial contribution would be made by the Commission in a decision, as provided in § 1804(e). If the intervenor is found to have not made a substantial contribution, all payments relating to that issue or issues would have to be returned in the time prescribed in the decision. Failure to return all payments would make the intervenor ineligible for any future intervenor compensation award.

This optional track would only be available in proceedings identified by the assigned Commissioner in the scoping memo ruling. Once a party elects to participate in it, and is chosen by the Commission, that party cannot, for that proceeding and the identified issues, also seek compensation under the existing, permanent compensation program. However, if not chosen or if participating on a number of issues not identified for optional track treatment by the Commission, requesting compensation under the existing program could be pursued (assuming the customer was found eligible.)

Many of the comments on the revised draft addressed the optional track, both in terms of whether it is workable and fair, and whether the Commission has authority to implement it under the existing statute. Concerns about its workability and

fairness centered on the concentration of power with the assigned Commissioner, its complexity, the condition that funding be capped at the amount in the proposed budget, and that it would constitute an interest-free loan from the subject utility to the utility's adversary. We regard the degree of delegation to the Presiding Officer, in consultation with the assigned Commissioner, included in the optional track to be comparable to the delegation the statute provides to the assigned Administrative Law Judge under the existing compensation program. Delegation from the Commission to the assigned Commissioner on decisions regarding the scope of issues in a proceeding is a feature of our existing case management (bolstered by the recent adoption of SB 960), so we do not see the delegation we propose in the initiation and administration of the optional track as a big departure from existing practice. The condition that funding be capped includes the ability to request budgetary supplements and so is not unduly onerous given the benefit to intervenors of periodic payments. Given the likely dollars at issue, the argument that periodic payments would constitute an interest-free loan and would therefore be unfair does not cause us to reconsider adoption of such an approach.

On balance, we believe that although it may involve additional, upfront work on the part of the assigned Commissioner and Presiding Officer, it may increase the participation of otherwise underrepresented interests. On that basis, we are prepared to pursue the optional track and test whether the drawbacks identified by commenters are outweighed by the benefits of improved decisionmaking it may foster.

At this juncture, the optional track would be an experimental or pilot program. If successful in providing broad based, effective and efficient participation by otherwise underrepresented customers, we may consider seeking Legislative support for the optional track as a replacement to our existing statutory intervenor compensation program.

TURN and the PAO each suggested the Commission consider modifying the bylaws of the Advocates Trust Fund (ATF) as a way to fund out-of-pocket or interim payments. TURN suggests this approach would provide the



Commission with the funds to conduct an experiment prior to seeking statutory amendments, assuming the Commission has legal authority to use the ATF funds in this manner.

We do not believe the governing statutes support periodic payments and do not wish to use ATF funds. We are convinced by the comments on the revised draft, especially those of the Utility Members, that we need legislative authority to implement this periodic payment experiment. Parties are invited to propose amendment to the governing statute to support periodic payments through the optional track.

Cal/Neva's suggestion that the Commission issue interim decisions on which to base awards as issues are advanced may also provide some assistance to customers within the framework of accountability and control mechanisms we find necessary.

Cal/Neva does not address how the Commission would award fees to the customer for its substantial contribution to advancing the issue procedurally while not compensating the customer for advancing the issue substantively. To the extent a report, proposal, or settlement specifically presents procedural recommendations, and the Commission then issues an interim decision on procedure, participating customers could request and may receive compensation for a substantial contribution to the procedural decision. In that context, any fees or costs incurred up to that decision point toward the substantive issues would need to be segmented out of the request for compensation. Fees and costs incurred on substantive issues would not be compensable until after a decision on the substance.

However, in the post-SB 960 culture, Cal/Neva's suggested approach may be of limited help to customers. Cal/Neva suggests its approach be applied in lengthy rulemakings. We do not expect any proceeding to take more than 18 months to resolve after SB 960 becomes effective. Under SB 960, the subjects of scope of issues and procedure (i.e., hearings necessary or not) are addressed in the first 30 to 60 days of a proceeding, and culminate in an Assigned Commissioner Ruling, not a

decision. In light of the SB 960 reforms, it is difficult to foresee a circumstance where a workshop report, consensus proposal, or settlement would warrant an interim decision on procedure prior to a decision on the substance of the proceeding in the 18-month timeframe.

Putting aside our skepticism about the usefulness of Cal/Neva's proposal in light of the SB 960 reforms, we agree that the substantial contribution of an eligible customer to an interim decision on procedure should be compensated. We invite parties to alert us, through a motion, of the need for a procedural decision confirming the status or impact on the ongoing process of, for example, a workshop report, consensus proposal, or a settlement. When a procedural decision is issued, requests for compensation for a substantial contribution to the procedural decision will be considered, and an interim award may be granted.

### **Other Funding Issues**

#### ***Annual Funding Cap***

As part of its integrated proposal, the Utility Members ask the Commission to support legislation that would limit intervenor compensation funding to \$3 million annually. It derives the \$3 million cap from the annual historical payouts for intervenor compensation made by the Utility Members for 1994-1996. Three million dollars represents the "high-water mark" outlay in 1996, according to the Utility Members. The Utility Members argue that other participants in Commission proceedings operate within budgets, and so should customers.

In response, most commenters object to the \$3 million annual cap as arbitrary, contrary to the governing statute which allows all reasonable costs to be compensated, and inequitable, since it does not match the spending of the Utility Members and ORA. Any cap, some argue, is contrary to the effort to encourage effective and efficient participation.

We are not prepared to endorse an annual funding cap. We have retained the accountability and control mechanisms we believe are necessary to ensure ratepayers receive value for compensated participation. We do not expect the

statutory safeguards against unnecessary, duplicative, obstructive participation to be modified in a manner that will reduce our ability to protect against such unproductive participation.

Although an annual cap such as that suggested by the Utility Members may be viewed as unreasonable or arbitrary, we note that compensation under the common fund theory has a case-specific cap. Where there is a common fund created as a result of the participation of a party, that party may be awarded a portion of the common fund. The amount of the common fund becomes the cap on the compensation that may be awarded.

Our intervenor compensation program has its roots in the common fund theory. Where there is a common fund created in an adjudicatory proceeding before us, or benefits which accrue generally to ratepayers, in a ratesetting or quasi-legislative proceeding, we believe any compensation awards in that proceeding may be a fraction of the common fund or benefits. Compensation for a customer's participation should be a fraction of the benefit ratepayers receive as a result of that participation.<sup>37</sup> We recognize that "monitizing" the benefits accruing to ratepayers as the result of a customer's substantial contribution may be difficult, but making such an assessment of whether the requested compensation is in proportion to

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<sup>37</sup> In response to this discussion, the Utility Members argue in their comments that it is not clear that the Commission currently retains the ability to award intervenor compensation under the common fund doctrine. They claim that the specifically enacted governing statutes detail the procedures to be used for awarding compensation, citing § 1801.3(a) legislative intent that the governing statutes apply to all formal proceedings. But we believe that the use of the word "all" was not to establish the statute as the exclusive means for funding compensation. Rather, it was to make clear that the statute was to apply to all types of proceedings, not just proceedings involving ratemaking. Before the 1992 amendments which codified the Legislature's intent, intervenor compensation was limited to participation that involved setting rates. We conclude that we continue to have the authority to award compensation under the common fund theory in adjudicatory proceedings, as described in *CLAM*.

the benefits achieved is a useful discipline for ensuring that (1) ratepayers receive value from compensated intervention and (2) only reasonable costs are compensated.

We agree with commenters who argue that the governing statutes provide for the compensation of all reasonable fees and costs. Payment to a customer in excess of the benefit ratepayers receive as a result of that customer's participation would not be reasonable. Practically speaking, how could ratepayers find value in funding a customer's participation where that participation costs more than ratepayers will save if the customer prevails?

The Utility Members' primary argument for the annual cap is to impose on customers the discipline to make the most important choices regarding what will and will not be funded. We expect the fact that intervention may not be compensated will discipline customers to budget their participation conservatively. Compensation in proportion to the benefits ratepayers receive will also discipline customers to budget their participation in the most effective and efficient manner.

DOD offers an alternative means of controlling expenditures. First, it would prohibit "client-less" consultants from compensation from the intervenor compensation program, discussed above. Second, it suggests the establishment of "line-item" funding limitations for reimbursable costs. DOD appears to envision the Commission would establish, in advance of the proceeding, the total per-hour reimbursement possible for each type of activity for which reimbursement would later be sought. DOD does not elaborate on what types of activities it means (i.e., hearings and communicating with other parties). We do not believe this approach would be administratively feasible or practical. We do not see participation at the Commission as an activity that is generic across proceedings, nor are participants homogeneous commodities whose hourly rate for a particular kind of service or activity would be equal.

***Application of the § 1806 Rate “Cap”***

ICA and Weil advocate that the Commission adopt written guidelines on reasonably comparable hourly rates of compensation for advocates and witnesses. Section 1806 states:

“The computation of compensation awarded pursuant to Section 1804 shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the comparable market rate for services paid by the commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.”

Both Weil and ICA argue that the rates paid by the Commission and the public utilities are not “comparable” to rates paid by customers. Customers, Weil emphasizes, effectively participate in Commission proceedings on a contingency basis since they must win if they are to get paid. In contrast, consultants and expert witnesses generally are not paid on a contingency basis. Weil suggests the Commission survey market rates and adopt a policy that 50% to 100% of market rates is a reasonable range for compensation rates, and adopt rates within the range based on the qualifications and experience of the customer. ICA emphasizes the differences in hourly compensation between salaried utility and Commission advocates and self-employed advocates, and calls for some adjustment that would increase an otherwise reasonably comparable rate (i.e., the utility employee rate of pay) to account for the non-billable activities of self-employed persons who appear as witnesses or advocates.

Through our database of intervenor compensation decisions, described below, a survey of the hourly rates paid witnesses and advocates participating at the Commission is readily available. As Weil points out, however, this survey only provides information on the rates actually awarded by the Commission. Unlike Weil, we do not believe this fact undermines the usefulness of this information as “market rate” information. The hourly rates awarded are generally the recorded or billed costs charged the customer by the expert, and it is reasonable to presume the

billed rate is the market rate, and that it includes whatever the market provides for the non-billable activities of concern to ICA.

Determining the appropriate hourly rate when the witness or advocate is appearing on behalf of him/herself (and therefore not rendering a bill) is more complex. However, the burden to demonstrate what the comparable market rate is that the Commission should take into account in considering a request for compensation is on the customer seeking compensation. Bearing this burden may be a barrier to participation, but it is an appropriate burden. Access to the database of hourly rates paid in the past, and to the underlying record of specific utility, staff, and intervenor witnesses' and advocates' experience, should assist customers in meeting that burden.<sup>38</sup> We will not conduct any additional survey of the hourly rates charged by witnesses or advocates.

### ***Administrative Streamlining***

A number of commenters suggested ways the Commission could reduce the administrative burdens on intervenors of meeting the requirements of the intervenor compensation program and of participating at the Commission in general. Some of these suggestions involve doing more of what we presently do in administering the compensation program, and some involve the Commission taking greater advantage of existing technologies to lower the costs of participation. Generally, we are inclined to implement those administrative suggestions which improve upon our program without increasing costs or shifting who bears the costs of the program.

### ***Timely Awards***

As noted earlier in this decision, we have not always addressed requests for compensation expeditiously. We intend the interim awards program to

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<sup>38</sup> We expect that the rates charged ORA and the utilities by their consulting expert witnesses include the costs for non-billable activities. Such witnesses are routinely asked on the record what hourly rate of compensation they are charging for their testimony, so this information is available.

help mitigate the cash flow problems which may result from waiting for a decision on a request for compensation. The SB 960 time constraints will also shorten the length of proceedings which otherwise may have extended beyond the 12 and 18 month deadlines.

In addition to these activities which should improve the timing of awards, we have taken some management steps which should improve the timeliness of awards. Specifically, we have consolidated both the responsibility for preparing decisions on requests for compensation, and for reviewing that draft. The presiding officer is consulted for insights into matters like substantial contribution, efficiency of work effort, and duplication among parties.

### **Outreach**

Many parties commented on ways the Commission could improve its outreach to customers and thereby increase participation in its proceedings. Electronic outreach, an ombudsperson program, and “how to” guides on intervention and requesting compensation were among those comments. Some of the suggestions reveal that many intervenors are not aware of the outreach we presently conduct. Before discussing specific suggestions, we will describe our outreach program.

Our outreach efforts are conducted under the leadership of our Public Advisor. The PAO helps consumers by providing general participation assistance and by providing specific assistance on pending proceedings. A consumer may learn from the PAO generally how to file a formal complaint, how to use and comply with Commission procedures, and how to participate in Commission proceedings. In a specific pending proceeding, the PAO attends Public Participation Hearings and assists the public in providing oral comments. It also accepts written, informal comments on pending proceedings and then passes those comments on to the

Commissioners.<sup>39</sup> Ultimately, those comments are placed in the correspondence file for the proceeding. The PAO also provides parties with information on how our rules or existing policy and practice may effect a pending proceeding. The PAO is often called upon by parties for assistance in preparing and tracking Notices of Intent to Claim Compensation and Requests for Compensation.

The Commission has assigned Outreach Officers to Eureka, Los Angeles, and San Diego to ease local access to Commission services and information. Like our PAO, Outreach Officers inform consumers on how to resolve complaints with utilities and take part in Commission proceedings. In addition to providing these services, Outreach Officers answer questions from the media, work with local government officials to answer constituent inquiries on Commission-related matters, and make presentations to local-area service clubs, neighborhood associations and organizations.

We note that approximately 2% of the decisions we have issued which address specific requests for intervenor compensation were issued in water proceedings. No party among those commenting in this rulemaking were water companies, their associations or representatives, or individual consumers, or groups, who identified themselves as customers of private water company services. We are perhaps most in need of improved outreach to private water company consumers so that we can be sure their views are contributing to our decision making in water proceedings.

A number of parties encourage us to make greater use of electronic outreach. As described in more detail below, we have a webpage that provides information to people interested in getting to know more about the Commission generally, and about specific pending matters. We have a project underway to increase

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<sup>39</sup> Written, informal comments may take the form of a letter to the Commission sent either through the mail or to the Public Advisor's electronic address.



the usefulness of the webpage to repeat participants and first-time participants. Our Public Advisor may be contacted through electronic mail by way of a link on our webpage or directly at "public.advisor@cpuc.ca.gov" or "public.advisor.la@cpuc.ca.gov."

Commenters also suggest the Commission appoint an active community member as an ombudsperson for a geographic region and utility. The Alkon Report suggested that an ombudsperson program could be used to identify, educate and train community members, presumably about the Commission, participation in proceedings, and pending matters of importance to the public generally.

As described in the Alkon Report, the ombudsperson program would be an extension of our PAO. We are not in a position to, nor are we inclined to, create new, salaried positions of "ombudspersons." A volunteer core of ombudspersons interested in helping to "get the word out" about the Commission and pending matters of importance to the public could be helpful, but would require additional thought to ensure that volunteers are neutral, properly trained and up-to-date on our procedures and pending matters. We are not prepared to endorse such a program at this time, since we received little comment that provided detailed suggestions on these issues. However, we direct the Public Advisor to further evaluate whether an informal, but effective, volunteer ombudsperson program could be created by using our existing Outreach Officers and their contacts in their local areas. The Public Advisor should report to the Commission his findings no later than July, 1998. This report should be provided to the Commission and the Executive Director, and the Public Advisor should be prepared to discuss it with the Commission during staff reports at a regularly scheduled Commission meeting.

An alternative to the ombudsperson program suggested by ICA was to provide the public with an "800" number to the PAO that would be periodically included in utility bills. The Public Advisor is directed to evaluate the costs associated with this proposal, and present the Commission with his opinion on the benefits of it.

The Public Advisor's recommendation on an "800" number to improve outreach should be included in his report on the volunteer ombudsperson program.

Many of the commenters endorse the development of a "how to" guide to intervention at the Commission and to applying for intervenor compensation. The PAO publishes a how to guide which is available from the Commission free of charge. With the new decision making reforms contained in SB 960, the guide will be updated. The Public Advisor is directed to take the comments of the parties filed here on a "how to" guide under consideration during this update.

### **Electronic Means Toward Reducing the Cost of Participation**

The parties are almost unanimous in advocating the Commission accept filings in electronic form, and that the Commission allow parties to meet service requirements through electronic mail. We recognize the advantages of electronic communication in speed and availability of information dissemination. Under the tight time constraints of the recent SB 960 reforms, quickly disseminating information so that parties may react within the statutory deadlines has become even more important.<sup>40</sup> We have already embarked on a fairly aggressive effort to utilize electronic communication to improve our outreach to consumers and stakeholders, and to minimize the costs of participation.

Since 1994 we have been noticing Commission actions, activities and requirements through the internet. The Commission maintains its own "home page" (internet site [www.cpuc.ca.gov](http://www.cpuc.ca.gov)) where interested members of the public may readily access our Daily Calendar, general information about the Commission, and information, including decisions and rulings, in major proceedings, such as our Electric Restructuring Proceeding.<sup>41</sup> More recently, service lists for most of our active

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<sup>40</sup> SB 960 (ch. 96-856) created, for example, the opportunity for a party to appeal a Commission determination of the nature, or "category," of a proceeding within 10 days of that Commission action.

<sup>41</sup> We are working toward making all Commission decisions and rulings available.

proceedings, including this docket, are available on the internet, and may be downloaded to an intervenor's personal computer when a mailing to all parties on the service list is needed.

We intend to institute electronic filing and included revising our rules to accomplish this task in our 1997 Workplan. The real money-saver to parties, however, is in allowing parties to meet service requirements through electronic means. The technical details of accomplishing this, and other enhancements to notification to parties and access to formal and informal filings, is a task described by our Executive Director in his announcement creating and convening the Electronic Notice and Access Technical Group.<sup>42</sup> Rules revisions necessary to provide for electronic notice and access will be accomplished through a separate rulemaking. We expect to initiate the rulemaking by the first quarter of 1998.

#### **Database of Intervenor Compensation Issues**

The PAO has created a database, using Microsoft Access, to track information contained in the compensation decisions. Each decision has been broken down into categories, which include, for example compensation decision number, proceeding number, intervenor, total amount requested, amount awarded, and substantial contribution. The database also contains information on hourly fees per witness, specifying the name and type of witness. The database can be searched for key concepts such as disallowances, reimbursement rates for travel time, time spent preparing requests for compensation, or use of market rates. Compensation decisions can be grouped by proceeding number and total awards per intervenor, or to find the average hourly rate for a witness. This database provides an enhanced version of the function the Alkon Report envisioned for the matrix of intervenor compensation decisions. It will be searchable on the Commission's website and will also be available for downloading in its Access format at the website.

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<sup>42</sup> A copy of the announcement is contained in Appendix E.

### **Next Steps**

We have identified three areas where we believe amendment to the governing statutes may be appropriate. We have asked parties to present us with specific suggested language. When Assigned Commissioner Knight issued his ruling on scope, he allowed for discussion among parties of modification proposals. We do not direct any such further discussion, however, parties are not prohibited from meeting and conferring on legislative proposals prior to presenting us with any such proposals.<sup>43</sup>

Parties are invited to present suggested amendments to Public Utilities Code §§ 1802(b), 1802(h) and 1803, as requested in this order, and more generally to the governing statute to provide support for the optional track as a means for awarding periodic payments. Suggested amendments should be presented in writing to the General Counsel no more than 30 days from the effective date of this decision.

Before each legislative session, it is our standard practice for the General Counsel's Office to prepare for the Commission's consideration the legislative proposals it recommends the Commission sponsor in that session. We direct the General Counsel to prepare a recommendation for legislative changes to the intervenor compensation governing statutes, as described above, based on this decision and the responsive proposals parties present, for our consideration.

In the event any legislative reforms we may seek are not adopted, we may wish to reassess the intervenor program and determine if further modifications, within the existing statutory construct, are appropriate. If so, we will open a new rulemaking and seek additional input from interested stakeholders.

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<sup>43</sup> Commissioner Knight's ruling on scope also envisioned that a second decision may be necessary in the event we needed further discussion of modification proposals. Since we have not directed any further discussion and we adopt or reject all of the proposals presented, there is no need for a further decision.

### **Findings of Fact**

1. We initiated this rulemaking and investigation by inviting comment on our intervenor compensation program. We stated that we would consider changing the rules, regulations, and policies which govern the program. We acknowledged that some changes to the program would need to be considered by the Legislature since for the change to take effect would require changes in the governing statutes, Public Utilities Code §§ 1801-1812.

2. Comprehensive review of the intervenor compensation program is appropriate at this time because the regulatory environment for some of the industries the program applies to has changed since the inception of the program, and even since the more recent legislative amendments to the governing statutes.

3. Participation in our formal policy development proceedings by a broad base of consumers has aided our efforts. As we progress from policy development to policy implementation in the telecommunications and energy industries, we continue to believe that a broad base of public input, when not otherwise represented, can assist us in perfecting the restructured marketplaces.

4. We do not believe that the intervenor compensation program is no longer needed, or should be “sunset” or phased out, now that restructuring of the telecommunications and energy industries is well under way.

5. When customers no longer make a substantial contribution to the Commission’s decision making, the program, by its own governing statutes, will no longer provide customers compensation.

6. The reforms embodied in SB 960 will greatly aid the customer interested in participating in a Commission proceeding where hearings are held.

7. As a result of the SB 960 reforms, some of the uncertainties that have chronically saddled customers interested in participating in a Commission proceeding will be significantly reduced, though not eliminated.

8. As we reviewed the comments and considered changes to our intervenor compensation program, we bore the principles in Appendix A, as modified, in mind.

We will also keep them in mind as we consider specific, future requests for compensation that may be filed in our dockets.

9. We regard the instruction to complainants in D.95-10-050 (*Grinstead v. PG&E*) sufficient guidance on the eligibility for intervenor funding for complaint actions.

10. Local government public education institutions are a unique and important customer, whose views, absent the participation of SPURR/REMAC, are otherwise absent from our proceedings. We therefore would support a Legislative amendment to make it clear that local public education Joint Powers agencies, like SPURR/REMAC, are customers able to avail themselves of our intervenor compensation program.

11. We do not support the special exceptions to § 1802(b) that DCA seeks. We are empathetic to the budget constraints state government agencies face, and the internal choices each entity must make about allocating the resources the Legislature dedicates to their achieving their missions. The focus of the intervenor compensation program should remain on reducing the barriers to participation customers and their citizen-advocacy groups face.

12. Groups should indicate in the Notice of Intent the percentage of their membership that are residential ratepayers. Similarly, a “representative authorized by a customer” should identify in his Notice of Intent the residential customer or customers that authorized him to represent that customer.

13. An intervenor’s motivation for participating in a Commission proceeding cannot be determined with precision, and an intervenor’s occupation, in and of itself, should not preclude that intervenor from requesting compensation for participation. However, the intervenor must show that he will represent customer interests that would otherwise be underrepresented.

14. If an eligible intervenor makes a substantial contribution to a Commission proceeding, the Commission should award reasonable compensation without reservations related to that intervenor’s occupation or possible motivations.

15. As the telecommunications and energy industries become increasingly competitive, the participation of third-party customers may not be necessary for a fair determination of the proceeding as described in § 1801.3(f).

16. The governing statutes make an important distinction between groups and individuals both in terms of meeting the definition of customer and in demonstrating significant financial hardship.

17. For ease to the intervenor and to minimize the administrative burden on our staff, we will establish a procedure and model filing for individual intervenors to obtain a protective order for use in intervenor compensation proceedings.

18. Modifying “substantial contribution” to include a “good faith participation” standard for certain, non-litigated proceedings will so reduce the accountability and control value of the standard as to make it meaningless.

19. A broader substantial contribution standard, which affords the Commission greater discretion to make an award, while being tangibly defined so as to ensure value to ratepayers, may overcome the discouraging effect the present definition has on the presentation of novel and creative recommendations.

20. Regardless of whether we take a broad or narrow view of what constitutes a “contention or recommendation” under § 1802(h), we will continue to require allocation of costs and time by task and substantive issue.

21. In the past, board members have been reimbursed for their reasonable expenses and received a per diem. We are not convinced by any party that this practice should change.

22. In D.97-10-026, we re-interpreted Rule 76.72 and concluded that the pendency of an application for rehearing of a decision should not preclude a customer from requesting, and potentially receiving, compensation for its substantial contribution to that decision.

23. The Commission, through decisions, has adopted and applies a policy of awarding interest from the 75<sup>th</sup> day after the date of the filing of a complete compensation request.

24. We will continue our practice of evaluating substantial contribution in light of potential duplication, and apply a discount, as appropriate.

25. We will continue to apply an efficiency adder to compensable hours spent performing a responsibility beyond those normal to a customer's role when the customer has made a demonstration of that efficiency in its request for compensation.

26. We have previously determined that travel time is compensable at one-half the normal hourly rate approved, unless the customer provides a detailed showing that the time was used to work on issues for which we grant compensation. We will continue that practice.

27. We have reduced by one half the attorney's rates applied to time spent preparing a compensation request, except in cases where the compensation claim involves technical and legal analysis deserving of compensation at higher rates.

28. The present system for funding compensation awards works quite well for proceedings initiated by a utility or a complainant. It is clear under these circumstances who the "subject of the hearing, investigation, or proceeding" is for purposes of applying § 1807. It is also quite clear when the proceeding is an enforcement action initiated by the Commission.

29. In most rulemakings, where policy affecting an industry or all regulated industries is established, selective application of § 1807 is unduly unfair.

30. We find unconvincing the argument that the costs associated with intervenor compensation will chill participation - especially since at present, the 6 energy and telecommunications utilities required to pay compensation awards from 1994 through 1996 paid, on average, between \$77,000 and \$512,000 each annually.

31. It is appropriate to limit the responsibility for payment of compensation awards to utilities. We will not initiate an effort to amend the Public Utilities Code to expand our authority over non-utility market participants in Commission proceedings.

32. In order to implement a broader-based funding approach, California-jurisdictional utilities that participate in our proceedings should file with our Public



Advisor in San Francisco a letter reporting their California-jurisdictional revenues for the most recent calendar year.

33. When utilities choose to participate in a quasi-legislative, rulemaking proceeding through an association, the association should file a statement in the proceeding identifying its California-jurisdictional utility members as of that date, and verifying that the necessary revenue report is on file with the Public Advisor.

34. Since we are not adopting the good faith standard for substantial contribution, there would be little benefit to customers in providing a process for determining, upfront, a more authoritative estimate of the amount of a possible award.

35. By reducing the accountability and control mechanisms, and providing early small claims and interim awards, we would be encouraging participation in a manner that would improve the number of participants in our proceedings. However, we would be failing to meet the intent of the statute that we administer the program in a manner that encourages *effective and efficient* participation, compensated when a substantial contribution is made.

36. Absent a substantial contribution, there is no assurance that ratepayers will benefit from the participation of a customer.

37. We find compelling the arguments made by CALTEL, DMM, and Weil, but not to the point of abandoning interim funding along the lines offered by the DOI. Instead, we create an optional track an intervenor may elect which would increase the likelihood that participation will result in a substantial contribution and provide ratepayers value while lessening the disadvantages these three parties identified.

38. The optional track should be available in formal proceedings, on a proceeding-specific basis, at the discretion of the Assigned Commissioner, with implementation and oversight delegated to the Presiding Officer.

39. The optional track may provide the party electing to use the approach periodic payments throughout the timeframe of participation under the condition that compensation will be capped at the amount submitted in the Notice of Intent.

40. The substantial contribution of an eligible customer to an interim decision on procedure should be compensated.

41. We are not prepared to endorse an annual cap on intervenor compensation awards. We have retained the accountability and control mechanisms we believe are necessary to ensure ratepayers receive value for compensated participation.

42. Compensation for a customer's participation should be in proportion to the benefit ratepayers receive as a result of that participation.

43. Where a common fund is created, or benefits which accrue generally to ratepayers from participation in a ratesetting or quasi-legislative proceeding, payment to a customer in excess of the benefit ratepayers receive as a result of that customer's participation would not be reasonable.

44. We do not believe the line-item funding limitation approach would be administratively feasible or practical.

45. Through our database of intervenor compensation decisions, a survey of the hourly rates paid witnesses and advocates participating at the Commission is readily available.

46. A volunteer core of ombudspersons interested in helping to "get the word out" about the Commission and pending matters of importance to the public could be helpful, but would require additional thought to ensure that volunteers are neutral, properly trained and up-to-date on our procedures and pending matters.

47. Rules revisions necessary to provide for electronic notice and access will be accomplished through a separate rulemaking.

48. The PAO has created a database, using Microsoft Access, to track information contained in the compensation decisions. This database provides an enhanced version of the function the Alkon Report envisioned for the matrix of intervenor compensation decisions. It will be searchable on the Commission's website and will also be available for downloading in its Access format at the website.

49. No party argued in comments on the first proposed opinion that hearings are needed. There are no material disputed facts on which the Commission must make a finding. There is no need for non-evidentiary, legislative style hearings.

### **Conclusions of Law**

1. The Petition for Leave to Intervene as a party made by the Greenlining Institute and Latino Issues Forum (jointly) should be granted. All other interested persons that filed and served comments complied with the “party status” process laid out in Ordering Paragraphs 2 and 3 of the rulemaking/investigation and/or made an appearance at the prehearing conference. They are granted party status.

2. The law authorizes intervenor funding in complaint proceedings. The Commission’s determination in *Milton Grinstead v. Pacific Gas and Electric Co.*, cited above, provides customers instruction on when they may be eligible for compensation in a complaint case.

3. Where, as the result of the Notice of Intent, the ALJ preliminarily determines that the participation of third-party customers is not necessary, the ALJ shall issue a ruling (otherwise discretionary under § 1804(b)(1)).

4. It is arguable that SPURR/REMAC fall into the government exclusion in § 1802(b).

5. When filing its Notice of Intent, a participant should state how it meets the definition of customer: as a participant representing consumers, as a representative authorized by a customer, or as a representative of a group or organization that is authorized by its bylaws or articles of incorporation to represent the interests of residential customers. A group or organization should provide a copy of its articles or bylaws, noting where in the document it is authorized to represent the interest of residential ratepayers.

6. The law defines significant financial hardship and sets two standards: the “cannot afford, without undue hardship, to pay” standard and the “comparison test” standard.

7. The “cannot afford, without undue hardship, to pay” standard applies to a participant representing customers and a representative authorized by one customer. The group or organization authorized by its bylaws to represent customers must meet the “comparison test” standard.

8. We will determine which of these two standards should be applied to a representative authorized by a group of customers (but without authorization in its bylaws or articles) given the form of customer asserted and the customer’s specific financial hardship showing.

9. Upon issuance of the notice of the availability of the standard format(s), all customers participating in Roadmap proceedings should use the standard format(s) when seeking compensation in a Roadmap proceeding.

10. The Commission should continue its longstanding practice of providing per diem, and not intervenor compensation, for the participation of a customer on a limited-membership board.

11. We are not convinced by the various legal arguments presented in comments that our policy of reducing by  $\frac{1}{2}$  the attorney’s rate, as appropriate, is ill-conceived or unlawful. In reducing by  $\frac{1}{2}$  the attorney’s rate we arrive at what is in our judgement a reasonable hourly fee for the service provided.

12. Under § 1807, we have authority to order all subject utilities to contribute to any award of compensation.

13. When the proceeding is a rulemaking which effects an industry or industries, and not just a utility or class of utilities (that is, when it is categorized as “quasi-legislative”), responsibility for the payment of any awards of compensation should be more broadly shared among regulated industry participants to the proceeding.

14. Funding intervention in quasi-legislative Commission proceedings is not akin to funding lobbying activities of public interest groups at the Legislature.

15. Any utility participating in a quasi-legislative, rulemaking proceeding (whether individually or through an association) that fails to report its revenues to the Public

Advisor in San Francisco may be deemed to have withdrawn from participation and will forfeit any rights it otherwise had associated with party status in the proceeding.

16. Any participating association with utility members that fails to timely submit a statement identifying its utility members and verifying that the necessary revenue report is on file may be deemed to have withdrawn from participation and will forfeit any rights it otherwise had associated with party status.

17. The Commission's more relaxed form of rate regulation still allows the costs of an award as an expense for the purpose of establishing rates. If a utility chooses not to include the costs of an award in its rates so that the amount shall be fully recovered by its ratepayers, then that is a choice of utility management that we respect.

18. We will not adopt a program, like a small claims process, for awarding intervenors absent any substantial contribution determination.

19. Parties should alert us, through a motion, of the need for a procedural decision confirming the status or impact on the ongoing process of, for example, a workshop report, consensus proposal, or a settlement.

20. The burden to demonstrate what the comparable market rate is that the Commission should take into account in considering a request for compensation is on the customer seeking compensation. Bearing this burden may be a barrier to participation, but it is an appropriate burden.

21. Since we have found that there is no need for hearings, and no party argued to the contrary as provided in the Ruling on Scope, we confirm Commissioner Knight's July 2, 1997, preliminary determination that there is no need for hearings. Therefore, pursuant to Rule 6.6, the rules and procedures of Article 2.5 cease to apply to this proceeding.

### **INTERIM ORDER**

**IT IS ORDERED** that:

1. We adopt the principles in Appendix A both as a guide for the changes to the program, and as a guide in considering future requests for compensation.

2. Parties are invited to present suggested amendments to Public Utilities Code §§ 1802(b), 1802(h) and 1803, as requested in this order, and more generally to §§ 1801-1812 to provide support for the optional track as a means for awarding periodic payments. Suggested amendments should be presented in writing to the General Counsel no more than 30 days from the effective date of this order.

3. We direct the Public Advisor and the Telecommunications Division to work together to develop standard format(s) for compliance with the matrix requirement in Roadmap proceedings. The standard format(s) should be available for use by intervenors no later than 120 days from the effective date of this decision. The Public Advisor shall promptly notice the availability of the standard format(s) to all third party intervenors in Roadmap proceedings.

4. California-jurisdictional utilities that participate in our proceedings shall annually file with our Public Advisor in San Francisco a letter reporting their California-jurisdictional revenues for the most recent calendar year.

5. Parties are invited to comment on the proposal for allocating responsibility for the payment of any compensation awards by utilities participating in quasi-legislative, rulemaking proceedings through an association. Specifically, comments on the proposal appearing on pages 59-60, Finding of Fact 33 and Conclusions of Law 15 and 16 are due May 14 and reply comments are due May 19.

6. We direct the Public Advisor to further evaluate whether an informal, but effective, volunteer ombudsperson program could be created by using our existing Outreach Officers and their contacts in their local areas. The Public Advisor should report to the Commission his findings no later than July, 1998. This report should be provided to the Commission and the Executive Director, and the Public Advisor should be prepared to discuss it with the Commission during staff reports at a regularly scheduled Commission meeting.

7. The Public Advisor is directed to evaluate the costs associated with establishing a toll-free telephone number, and present the Commission with his opinion on the benefits of it. The Public Advisor's recommendation on whether to establish a toll-free

number to improve outreach to the general public should be included in his report on the volunteer ombudsperson program.

8. We direct the General Counsel to prepare a recommendation for legislative changes to the intervenor compensation governing statutes, as described above, based on this decision and the responsive proposals parties present, for our consideration.

9. We direct the Chief Administrative Law Judge to ensure that the Administrative Law Judges conform the procedure used to assess eligibility for and awards of intervenor compensation to the changes to the intervenor compensation program administration we adopt today, especially with respect to rulings on Notices of Intent.

This order is effective today.

Dated April 23, 1998, at Sacramento, California.

RICHARD A. BILAS  
President  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners

I will file a written dissent.

/s/ P. GREGORY CONLON  
Commissioner

APPENDIX A

Principles

1. The timing of compensation should serve to facilitate participation.
2. The Commission should help parties conserve resources by making well-considered and timely decisions.
3. The determination of “substantial contribution” should leave intervenors indifferent as to whether they participate in alternative processes or litigation.
4. The Commission’s policies, including those affecting intervenor compensation, should strive to ensure that all parties participate efficiently and effectively; efficiencies should be expected and extraordinary efficiencies should be rewarded.
5. The Commission should encourage the presentation of multiple points of view, even on the same issues, provided that the presentations are not redundant.
6. Cooperation among intervenors should be encouraged where feasible and appropriate.
7. An intervenor should not be required to enter into or join a settlement in order to receive compensation for participation in the settlement process.
8. Eligibility standards should not unduly discourage first-time and small-party intervenors.
9. The Commission should make a timely offer of educational information, including all applicable laws and rules, and standard sample filings, and offer an orientation program for first-time parties.
10. The Commission may, upon the participant’s request, keep confidential personal financial information provided by a participant in support of a Request for Compensation.
11. The contribution of an intervenor should be eligible for compensation regardless of the type of proceeding in which it was made.
12. In at least some circumstances, it should be possible to receive compensation before a final decision is issued.
13. An award of intervenor compensation must be determined by the Commission and should not be negotiated independently by the parties.
14. In order to receive compensation, an intervenor must meet the Commission’s eligibility requirements.
15. The Commission should use its Outreach and Field Offices to encourage and assist intervenors and prospective intervenors in regions served by those offices.

(END OF APPENDIX A)



APPENDIX B

Model Motion for Protective Order\_\_  
Regarding Personal Financial Information

APPENDIX B

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

(proceeding caption)

(docket number)

Motion for Protective Order of     (individual intervenor's name)      
Regarding Personal Financial Information

I have filed separately today a (Notice of Intent to Claim Compensation or Request for Compensation), with attached personal financial information supporting my eligibility to claim compensation. I have filed it under seal. I submit this motion pursuant to General Order (GO) 66-C and request a limited protective order directing that my personal financial information be withheld from public inspection.

GO 66-C § 2.2 excludes from public inspection “[r]ecords or information of a confidential nature furnished to, or obtained by the Commission.” My personal financial information is confidential in nature. Making it generally available for public inspection would unnecessarily intrude on my privacy. Commission staff should be permitted to review this information because it provides facts pertinent to my showing of significant financial hardship, which is a component of my eligibility request. I recognize that parties of record may also wish to review and comment on this information, to discover facts that might support related pleadings before the Commission. To accommodate such review, I consent to the Commission’s use of an appropriate nondisclosure agreement.

Dated \_\_\_\_\_ at     (location)    .

    (signature)      
(Name)  
(Address)  
(Telephone Number)

(END OF APPENDIX B)

APPENDIX C

Model Nondisclosure Agreement Governing Disclosure of An Intervenor's  
Financial Information

APPENDIX C

Nondisclosure Agreement Regarding  
Personal Financial Information of [name of intervenor] in  
[docket number]

I am a party or representative of a party in [docket number].

I understand that the personal financial information filed by [name of intervenor] in this proceeding is confidential, and I agree that I will use the information only for the purpose of responding to that person's Notice of Intent to Claim Compensation or Request for Compensation.

I will not disclose, copy or disseminate the confidential information in any manner, and I will safeguard the confidential information from inadvertent or incidental disclosure. I understand that confidentiality protections continue after this proceeding is completed.

Dated \_\_\_\_\_ at \_\_\_\_\_ (location)\_\_\_\_\_.

(Signature) \_\_\_\_\_  
(Name)  
(Address)  
(Telephone Number)

(END OF APPENDIX C)

APPENDIX D

Resolution F-621  
Interim Advisory Committee Standard of Expense  
Reimbursement for Commission Established Advisory Committees

APPENDIX E

Electronic Notice and Access Technical Group

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