

Decision **DRAFT DECISION OF ALJ KOTZ** (Mailed 10/18/2005)

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

Rulemaking to Set Hourly Rates for Purposes of  
Calculating Intervenor Compensation Awards,  
Pursuant to Public Utilities Code Section 1801  
and Following, for Work Performed in Calendar  
Year 2005.

Rulemaking 04-10-010  
(Filed October 7, 2004)

**FINAL DECISION ON 2005 RATES FOR  
INTERVENORS' REPRESENTATIVES**

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ATTACHMENT A – Intervenors’ Proposed Rates for Attorneys: 2005  
Intervenors’ Proposed Rates for Experts: 2005

## FINAL DECISION ON 2005 RATES FOR INTERVENORS' REPRESENTATIVES

### 1. Introduction

In today's decision, we approve principles to govern hourly rates for intervenors' representatives.<sup>1</sup> We base these rates on (1) compensation data provided by utilities regarding the in-house and outside representatives who appear on their behalf before this Commission, and (2) the information provided by intervenors regarding the training and experience of their representatives. These rates are presumptively reasonable for calculating awards to intervenors for qualifying hours worked in calendar year 2005.

### 2. Background

Resolution ALJ-184 (August 19, 2004), which was Attachment 2 to the order instituting this rulemaking, states the background and intent of the rulemaking and resolves several threshold issues. The task of the rulemaking itself was to create data sets appropriate to carrying out the Commission's duties in setting intervenors' hourly rates under Pub. Util. Code § 1806. In relevant part, that section provides as follows:

The computation of compensation ... 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

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<sup>1</sup> "Representatives" for purposes of today's decision includes anyone with expertise that might be useful in presenting evidence or argument at the Commission. Thus, the term is not limited to lawyers but includes engineers, accountants, and economists, among others.

comparable training and experience who are offering similar services.

Today's decision constitutes the first iteration of what we envision as an annual process for updating hourly rates based on new compensation data and proposed rates from intervenors. This process should ensure compliance with the provisions of § 1806 and improve the fairness and transparency of the hourly rate determinations that go into the calculation of awards to intervenors.

### **3. Development of the Record**

The range of potential issues under § 1806 is considerable. For example, how should the "market," to which § 1806 refers, be defined? Regarding the dollars per hour "market rate" paid by the utilities to their employees, what inputs (benefits, overheads) should be included in the dollars, and what assumptions should be made regarding the annual "billable" or "productive" hours worked, as distinguished from, e.g., vacation, training or administrative time. Not surprisingly, utilities differ regarding their approaches to compensation and personnel practices. Accordingly, a common reporting format and simplifying assumptions were needed to enable a fair analysis of the utilities' compensation data.

These issues were addressed and, to a remarkable extent, resolved at workshops held on December 9, 2004, and February 9, 2005. Certain utilities and intervenors continue to debate two conceptual issues, which we address later in today's decision. For now, however, these issues remain conceptual because the range of hourly rates proposed by the intervenors has proved in fact to be largely noncontroversial.

The success of the workshops is due to the participants, for which we acknowledge and thank them. Detail could easily have swamped this process;

that it did not do so is a tribute to the focus, candor, and collaborative spirit displayed at the workshops.

In summary, the intervenors' hourly rates we establish today for their work performed in 2005 are based on (1) a series of data sets<sup>2</sup> from the utilities, which include both compensation data and summary information regarding their representatives' qualifications, and (2) the intervenors' proposals, which analyze the utility data sets in relation to the qualifications of representatives who will appear on behalf of the intervenors. The intervenors' proposals were subject to comment and reply comment on April 6 and 18, respectively.

The Commission's costs of representation are also relevant under § 1806. Thus, in Resolution ALJ-184, we had our Executive Director review the utility data and report any instances in which the Commission had paid rates exceeding those paid by the utilities. The Executive Director duly reported, on June 7, 2005, that the Commission had not paid rates exceeding those paid by the utilities.

Finally, we note that Verizon presented an alternative proposal to the above data collection process. Verizon advocated retaining a private company,

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<sup>2</sup> "Preliminary" data sets were submitted on November 19, 2004, by each utility that had been required by the Commission to pay an award for intervenors' work performed in 2001, 2002, or 2003. Revised data sets, using a spreadsheet developed by Pacific Gas and Electric Company (PG&E), were submitted on January 31, 2005, by the state's largest utilities. These utilities then provided 2004 data in submissions on March 4 and (with additional data for in-house representatives) on May 13. Consequently, our utility compensation data come chiefly from PG&E, San Diego Gas & Electric Company, Southern California Edison Company (Edison), Southern California Gas Company, SBC California, and Verizon California Inc. (Verizon). These utilities historically have paid 85-95% of all intervenors' compensation awards for which we have put the payment responsibility on individual utilities.

with expertise in personnel recruitment and compensation, to develop and analyze the “market rate” information. At Verizon’s invitation, two prominent human resources consulting firms with extensive utility experience submitted responses describing how they would approach the project. The responses addressed scope of work, timing, project team, and cost, among other things.

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

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

The responses elicited by Verizon provide concrete examples that may be evaluated in terms of how well they address the issues posed in the first two questions. The third question is more problematic, particularly if the Commission itself is expected to solicit bids and award, administer, and fund the consulting contract.

## **4. Conceptual Issues**

### **4.1. An Evolving Process**

We are pleased with the results of this attempt at an all-inclusive revision to intervenors' hourly rates. We recognize, however, that it is a first attempt. As such, the process used here should be subject to refinement based on experience and further consideration of alternatives, such as that proposed by Verizon, or use of an index narrowly targeted to the cost of the professional services that representatives provide. Accordingly, while we are confident the hourly rates we approve today are reasonable, this rulemaking is not necessarily a template for future hourly rate updating.

### **4.2. In-House Versus Outside Representatives**

Some intervenors and utilities debate whether the Commission, in setting intervenors' hourly rates, should rely on pay scales for in-house representatives, outside representatives, or some blend. Given the lack of controversy regarding the range of intervenor rates proposed in this proceeding, we find that the debate is not yet ripe for definitive resolution, but we will offer some guidance for future hourly rate updates.

The nature of the debate is easy to understand. Employees generally receive a salary that seems low relative to the hourly rates charged by outside representatives, even after taking account of employee benefits and overheads in addition to their base salary. Intervenors argue their circumstances and services parallel those of outside representatives, and their hourly rates should be set accordingly. Utilities argue against exclusive reliance on the rates charged by outside representatives. PG&E would use a "blend" of data from in-house and

outside representatives to determine intervenors' hourly rates; Edison would rely exclusively on compensation data for in-house representatives.

Much of the debate centers on the degree of risk intervenors face in recovery of their fees and costs of representation, and whether and how we should take account of risk in setting intervenors' hourly rates. For example, according to Aglet Consumer Alliance, a "comparable market rate" as contemplated by § 1806 would be set at a level to account for (among other risks intervenors face) "payment contingencies, the risk of nonpayment, and the timing of eventual payment." PG&E suggests that intervenors exaggerate these risks, noting, e.g., that intervenors may substantially contribute to a decision, and thus qualify for compensation, without "prevailing" on the merits. Edison considers risk to be irrelevant to hourly rate determination; specifically, Edison reads "similar services" in § 1806 to refer to the type of tasks actually required in a Commission proceeding, not the circumstances of payment.

We consider that hourly rate determinations under § 1806 will involve weighing various factors and the use of sound judgment. Risk is among the relevant factors: The same sentence from which Edison extracts "similar services" also directs our attention to "market rates." To further complicate the question, risks may be asymmetric. Outside representatives must find paying clients and set budgets accordingly. Intervenors risk late payment and disallowances. Based on this record, we cannot say the level of risk is more, less or the same in considering "similar services." What we know about markets supports the intervenors' contention that risk counts. On the other hand, invoking risk does not automatically entitle intervenors to a risk premium.

We agree with PG&E about the use of a blend of data from in-house and outside representatives. Section 1806 requires consideration of the broad market

for regulatory expertise, with special attention to the rates for services paid by the utilities and the Commission itself. What the statute does not provide is a simple formula for translating all these inputs (“market rates,” “comparable training and experience,” “similar services”) into hourly rates for particular intervenor representatives. We expect, however, that analysis of the data we receive in the updating process will enable us to establish a reasonable range of rates for representatives classified by their training and their experience.

We find encouraging the fact that the actual hourly rate proposals submitted by intervenors in this proceeding do, in general, fall within a reasonable range. (PG&E itself acknowledges that, for the most part, it does not disagree with rates proposed by intervenors.) We suspect that one reason for the relative lack of controversy over the rate proposals is the qualifications that many intervenors’ representatives bring to the table; they include individuals with national reputations and decades of experience. Such representatives would be highly compensated whether they were working in-house or outside.

#### **4.3. Productive Hours**

As part of the compensation data collected, we directed utilities to develop an “effective hourly rate” for salaried in-house representatives. The rate was to reflect benefits and an allocation of overheads. The issue here is the extent to which the effective hourly rate should account for time such as vacation, sick leave, or other time not spent on regulatory work (e.g., training, administrative matters, other assignments). The PG&E spreadsheet reduces annual hours by an

allowance for such non-productive time, which has the result of increasing the effective hourly rate of an in-house representative.<sup>3</sup>

We find that the PG&E spreadsheet approach regarding productive hours is appropriate. First, we note that outside representatives typically charge only for “billable” hours, i.e., those hours performing the work for which they were retained. The productive hours concept corresponds roughly to billable hours and thus enables a more realistic comparison between hourly rates for in-house and outside representatives. Second, under the statute, we may only compensate intervenors for time that is related to and necessary for their substantial contribution to a Commission decision. Thus, the statute itself suggests that we use productive hours as the basis for our hourly rate calculations.

## **5. Currently Authorized Hourly Rates**

Here we examine the authorized hourly rates paid to intervenors in 2003 and 2004 in light of the data from utilities on their expenses for representation in our proceedings (new intervenor rates proposed for 2005 are examined in Sections 6 and 7 of this decision). Regarding the hourly rates we currently authorize for intervenors, we find these rates are within the ranges of hourly rates that utilities pay their representatives overall. This is true both for attorneys and experts, at all levels of experience. The currently authorized intervenor rates are generally higher than those that utilities pay their in-house representatives; however, considering all the utility data, we find that our

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<sup>3</sup> As compared to Edison’s preferred approach, namely, to divide the annual salary by 2,080 [40 hours per week times 52 weeks].

currently authorized rates do not exceed the “comparable market rate” within the meaning of § 1806.

Pursuant to the schedule outlined in the ALJ’s February 18, 2005 ruling, the state’s six major utilities and 15 intervenors filed comments and related compensation data for 2003-2004 (the utilities earlier filed 2003 data).<sup>4</sup> The tables in the next two sections summarize the data.

### **5.1. Rates for Attorneys: 2003-2004**

The table below shows hourly rates for attorneys for 2003 and 2004. The data from the intervenors is supplemented by our own historical records of previous awards. The participants in this proceeding agreed the data for attorney hourly rates would be disaggregated into the following groups, based on the number of years since completion of law school: 0-2 years; 3-4 years; 5-7 years; 8-12 years; and 13 years and over.

Generally, we found a concentration of attorneys (data points) in the higher levels of experience for intervenors and the utilities, with both groups having long experience in utility-related work and work before the Commission. The number of filed data points for intervenors is shown in parenthesis for each level of experience. For the utilities, only three of the utilities filed data sets with a breakdown of the number of data points (individuals) for 2003, and one utility filed a breakdown for 2004. The utility data points also were not disaggregated into the levels of experience described above. Using these data sets, we conservatively estimate that the utility attorney rate ranges are based on about

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<sup>4</sup> Initial data were filed by many utilities, then only by the large utilities as the proceeding progressed. See note 2 above.

100 in-house attorneys and 50-75 outside attorneys for each year. The breadth of the utility sample relative to the much smaller number of intervenor attorneys suggests that the rate ranges we derive from the sample are reasonably robust for our purposes.

### Attorney Rates 2003-2004

Years Experience	2003	2004
<b>13+ years</b>		
Utilities (outside)	\$195-\$625	\$205-\$585
Intervenors (11)	\$250-\$450	\$250-\$490
Utilities (in-house)	\$185-\$420	\$170-\$475
<b>8-12 years</b>		
Utilities (outside)	\$170-\$490	\$190-\$535
Intervenors (5)	\$275-\$300	\$270-\$325
Utilities (in-house)	\$150-\$220	\$135-\$215
<b>5-7 years</b>		
Utilities (outside)	\$250-\$425	\$250-\$400
Intervenors (1) *	\$225-\$250	\$250-\$270
Utilities (in-house)	\$115-\$160	\$130-\$165
<b>3-4 years</b>		
Utilities (outside)	\$230-\$395	\$185-\$400
Intervenors (0)	N/A	N/A
Utilities (in-house)	N/A	\$160
<b>0-2 years</b>		
Utilities (outside)	\$165-\$395	\$130-\$400
Intervenors (1)	N/A	\$190
Utilities (in-house)	N/A	N/A

\* One individual awarded two rate levels each year

For 2003 and 2004, we find that all currently authorized intervenor attorney rates fall within the range of utility outside attorney rates. The utility

outside attorney rates comprise a wider range than the intervenor rates, which may be due to a wider range of specialties and project-specific work for which the utilities hire outside attorneys. The rates paid to in-house utility attorneys are lower than those paid to intervenor attorneys in all categories for these years. However, at the most senior attorney level, which includes 11 of the 18 intervenor attorneys in our data, the top of the range of rates for both years for in-house utility attorneys is only slightly lower than the top of the range for intervenor attorneys.

For 2004, intervenor attorney rates increased an average of 8% from 2003 (the increase deemed reasonable in Resolution ALJ-184). The average increase for utility outside attorneys for 2004 was roughly 5%. For utility in-house attorneys (based on limited data), there appears to have been little or no increase, except at the high end of the range for the most senior attorneys. By comparison, in reviewing other cost-of-living data readily available to the public,<sup>5</sup> we found the general rate of inflation for 2004 to be 2.7%.

## **5.2. Rates for Experts: 2003-2004**

The data on the hourly rates paid to experts show that, as with rates for attorneys, all currently authorized rates for 2003 and 2004 for intervenor experts fall within the range of those rates utilities paid to their outside experts, with utility expert rates comprising a wider range than intervenor expert rates. The rates utilities paid to their in-house experts also comprise a wider range than intervenor rates for 2004, and are very close to the rate range for intervenors for 2003. The table below shows these rate ranges. Based on the table, we find our

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<sup>5</sup> Social Security Administration; U.S. Dept. of Labor; Federal Reserve Bank.

rates for experts to be reasonable even if we looked only to the rates that utilities pay their in-house experts.

Similar to the data for attorneys, the number of data points filed for intervenor experts is shown in the table. For the utilities, the actual number of data points is extrapolated from three data sets for 2003 and one data set for 2004.

#### Expert Rates 2003-2004

	2003 Range	2004 Range
<b>Utilities*</b>		
Outside (125)	\$65-\$450 **	\$90-\$475
In-House (200)	\$70-\$315	\$60-\$420
<b>Intervenors (28)</b>	\$110-\$330	\$110-\$360

\* For utilities, excludes rates paid to executive level experts (company presidents, directors and officers).

\*\* Excludes rate of \$735 paid by one utility to one outside expert in 2003.

Unlike the rates for attorneys, the rates for experts were not disaggregated into levels based on years of experience. However, where the experience level of the individual experts was provided, we found that, similar to attorneys, most experts appearing in Commission proceedings have at least 10 years' experience, including some with over 25 years' experience.

For intervenors, most rates paid to individual experts increased by 8% from 2003 to 2004 (the increase deemed reasonable in Resolution ALJ-184). The table aggregates the utility data, but looking at each utility individually, we found no major increases for these years, and in some cases found decreases.

## 6. Intervenors' Proposed Rates for 2005

Intervenors generally are proposing rate increases for work performed in 2005. For individual attorneys, intervenors propose increases from 1-40%, with a median increase of 10%, compared to currently authorized rates for those attorneys. For individual experts, intervenors propose increases from 8-65%, with a median increase of 12%, compared to currently authorized rates for those experts.<sup>6</sup> As we discuss below, we find that many of these proposed increases for individuals are unreasonable because they fail to consider the utility cost data, especially the generally stable hourly rates for 2003-2004 reported by the utilities.

The intervenor proposals vary widely, depending on the intervenor and the individual representative, but they rely chiefly on three perceptions. First, many intervenors regard Resolution ALJ-184 as providing the basis for a similar general increase in 2005. However, we instituted this rulemaking in large part to provide a better record than we ever had before from which to derive a reasonable escalation rate for intervenor fees. We now have that record so further reliance on Resolution ALJ-184 is misplaced.

Second, some intervenors believe that many or most of our currently authorized rates are below the "comparable market rate" required by § 1806. They propose increases to close this perceived gap. As discussed earlier, however, the data we have collected refute this belief. Our currently authorized rates meet the § 1806 comparability requirement.

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<sup>6</sup> Attachment A contains a summary of the intervenors' hourly rates proposed for 2005.

Third, and more appropriately, many intervenors base proposed increases on the training and experience of individual representatives. For example, an additional year of work may have moved an attorney to a higher experience level. Also, the last authorized rate for several representatives predates 2004. Further, the currently authorized rate for a few representatives seems to fall demonstrably below the rate for their peers among utilities and intervenors. We find that proposals geared to the training and experience of individual representatives persuasively justify an increase in many cases, although not necessarily so sizeable an increase as that proposed.

In short, we will not authorize a general increase in intervenor rates for 2005 over those rates authorized for 2004. We discuss below the general principles we will apply in setting rates for intervenor hours worked in 2005.

## **7. Authorized Hourly Rates for Work Performed in 2005**

In this part of today's decision, we establish principles and approve ranges to guide authorized hourly rates for work performed in 2005. We begin with our general approach and then discuss particular issues raised by the showings of the intervenors in support of their hourly rate proposals.

Initially, we intended to set individual rates for all intervenor representatives in this proceeding. We have decided not to do so, given the large number of intervenor representatives, especially those for whom no authorized rate currently exists. Instead, the principles and ranges set forth below should enable quick determination of the appropriate hourly rate for each type of intervenor representative and level of experience. First-time representatives must make a showing in the compensation request to justify their proposed hourly rate taking into consideration rates previously awarded representatives with comparable training and experience.

The recent utility data show little or no increase from 2003 to 2004 in the hourly rates that utilities are paying for representation in Commission matters. The very limited utility data for 2005 are consistent with this trend. Thus, absent the considerations listed below, we will not authorize an increase from previously authorized rates for work performed in 2005.

The following tables show the range of rates authorized for intervenor attorneys and experts in 2004. We will authorize rates only within these same ranges for 2005. Intervenors new to our proceedings, with work performed in 2004 or 2005, will be authorized rates within these same ranges.

2005 Hourly Rates for Intervenors' Attorneys:  
(based on years' experience since completion of law school)

13+ years:	\$270-\$490*
8-12 years:	\$270-\$325
5-7 years:	\$250-\$270
3-4 years:	\$185-\$220**
0-2 years:	\$135-\$190***

\*The low-end range for 2004 is \$250, but this is anomalous in light of the range for 8-12 years and thus is increased to \$270 for 2005.

\*\*No 2004 data for intervenors for 3-4 years. Low-end rate from utility outside attorneys. The high-end rate is approximately 15% above the rate for 0-2 year level (the average differential requested by intervenors for 2005 between these same levels).

\*\*\*Low-end rate from utility outside attorneys - no data from intervenors.

2005 Hourly Rates for Experts:

\$110-\$360\*

\* Exact Rate to be determined from training and experience of individual as compared to peers.

Under the following conditions, a request justifying an increase in a previously authorized rate for a particular representative, for work performed in 2005, may be considered. No rates will be authorized outside the ranges shown above.

1. Where a representative's last authorized rate was for work done before 2004, an increase is reasonable, but we will limit the increase to 3% per year, which is roughly the recent rate of inflation as reported by various government agencies. (See note 5.)
2. Where additional experience since the last authorized rate would move a representative to a higher level of qualification (e.g., from intermediate to senior), an increase is reasonable to bring the representative's hourly rate within the range of the representative's peers at the higher level.
3. Where a representative's last authorized rate is below that of the range of rates shown in the tables above for representatives with comparable qualifications, an increase is reasonable to bring the representative's rate to at least the bottom level of the rate range. Here, we have in mind certain representatives who have historically sought rates at or below the low end of the range of rates for their peers<sup>7</sup>. We emphasize, however, that for any given level of qualifications, there will always be a range of rates in the market, so this increase is intended to narrow but not necessarily eliminate perceived disparities.

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<sup>7</sup> For example, William Marcus of JBS Energy, Inc. has approximately 30 years' experience and is a recognized expert in energy-related matters, yet has consistently requested small rate increases at rates below that of his peers.

## 8. Future Hourly Rate Updates

We envision an annual ongoing process for updating the hourly rates paid to intervenors. As stated in Resolution ALJ-184, this annual process should be short and informal. To that end, we designate the Chief Administrative Law Judge, in consultation with the President of the Commission, to take the necessary steps to coordinate and facilitate a process for updating the hourly intervenor rates for work performed in 2006. Such steps may include holding workshops, adjusting the timing or the content of the data sets, and providing for comment periods. The following procedures should facilitate and simplify the process, but they in turn may be revised and refined over time, upon further consideration of any alternatives or as the Commission deems necessary.

### Utilities:

1. Beginning in 2006, the state's six largest utilities shall annually serve on all parties to this proceeding, by April 30, data sets showing, for the two preceding calendar years, the hourly rates paid to all outside and in-house representatives (attorneys and experts) who participate in our proceedings, using the spreadsheet format and type of data developed in this proceeding.
2. The data shall include the effective hourly rates paid to employees and the as-billed hourly rates of outside representatives, along with the number of data points (individuals) included in each level or group.
3. The data shall be accompanied by analysis of any escalation in rates over the two preceding years.
4. For attorneys, the data shall be disaggregated into the same levels of experience (years since completion of law school) described earlier; 0-2 years; 3-4 years; 5-7 years; 8-12 years; and 13 and over years.

5. For experts, the data shall be disaggregated by job classification and by levels of experience relevant to the classification: 0-2 years (entry); 3-9 years (journey); and 10 and over years (senior).
6. The data may be treated as confidential under the guidelines described later in today's decision.

**Intervenors:**

1. For any given year, all intervenor proposed rates shall be within the same range of utility rates from the year immediately preceding that year in which the work was performed, for individuals with similar training and experience. For example, intervenor rates for work performed in 2006 shall be within the range of utility rates for 2005, subject to possible escalation (below).
2. Escalation, if any, to previously authorized rates shall be based on the increases in utility costs of representation, as shown in the utility data sets for the two preceding years.
3. Where additional experience since the last authorized rate would move a representative to a higher level of qualification (e.g., from intermediate to senior level), an increase beyond the inflation rate is reasonable to bring the representative's hourly rate within the range of the representative's peers at the higher level.
4. An increase beyond the escalation rate may be reasonable on the basis of a specific showing that a representative has historically sought rates that appear to be at the low end of the range of rates for their peers. This increase is intended to narrow but not necessarily eliminate perceived disparities.

**9. Confidentiality of Compensation Data**

In Resolution ALJ-184, we discussed confidentiality issues as follows:

We anticipate some concern regarding confidentiality, particularly for personal financial data. We note that we have granted confidential treatment for the personal financial data submitted by intervenors to establish “significant financial hardship,” which is one component of eligibility to claim intervenor compensation. Utilities must provide cost data, as described above, but they may aggregate the data and may omit the names of individuals, provided that the utility certifies that the data submitted comply fully with the [resolution’s] requirements .... Further, when submitting information claimed to be confidential, the party asserting the claim must submit a redacted (public) and an unredacted (sealed) version of the document containing the information and must state the statutory basis for asserting confidentiality under the Public Records Act. (Gov. Code § 6250 et seq.)

Many utilities did request confidential treatment for some of the data they submitted, beyond redaction of individuals’ names. Other utilities did not request further confidential treatment, and among those that did, there is no clear pattern.<sup>8</sup>

At the first workshop, intervenors noted that the redactions seemed excessive. They correctly point out that utility personnel costs may be litigated as a component of revenue requirement in general rate cases, that utility expert witnesses are routinely cross-examined regarding their fees, and that much compensation data are required to be reported periodically pursuant to federal securities law or general order of this Commission.

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<sup>8</sup> For example, Verizon reported base pay and incentives but redacted its calculation of overheads as a component of the effective hourly rate. Several utilities redacted the hourly rates paid to outside counsel.

In response, the ALJ said that, in his opinion, and for the unique purposes of this proceeding, the public interest in revealing the redacted information was relatively slight. We agree. For example, neither the reasonableness of utility costs nor the credibility of utility witnesses is at issue here. It is of course necessary that intervenors have access to all the utility data, including redacted data, but intervenors had access to the full data sets upon execution of nondisclosure agreements.

In short, we will grant the motions for confidential treatment. In doing so however; we emphasize the peculiar nature and needs of this proceeding. By granting the motions here, we do not intend to disturb our precedent and practice as they may have evolved in other types of proceedings.

#### **10. Intervenor Status in this Rulemaking**

On August 23, 2005, the Greenlining Institute (Greenlining) filed a notice of intent (NOI) to claim intervenor compensation for its participation in this rulemaking. On August 29, 2005, the Assigned Commissioner, President Peevey, ruled that Greenlining is not eligible to receive compensation, stating that Greenlining, and other intervenors participating in this proceeding, are essentially serving their own interests and not acting in their usual capacity as a customer representative.

Although Greenlining was ruled ineligible, the Assigned Commissioner also addressed the timeliness of its NOI. Greenlining filed its NOI approximately 10 months after this rulemaking commenced. Under §1804(a)(1), the NOI is normally due within 30 days after a prehearing conference (PHC) is held. No PHC was held in this proceeding, as is generally the case in a rulemaking. However, we encourage intervenors in such proceedings to file the NOI as soon as they have decided to participate in the proceeding.

We affirm the Assigned Commissioner's Ruling. As President Peevey noted, intervenors' financial stake in this proceeding is direct, immediate and substantial. This proceeding is unique in this regard, so no inference may be drawn regarding intervenors' ability in general to advocate on behalf of their constituents. Similarly, the guidance regarding NOI filing is helpful for rulemakings and other proceedings where no PHC is held.

## **11. Comments on Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on November 7, 2005 by five parties (two intervenor groups and three utilities). Reply comments were filed on November 14, 2005 by three intervenors and two utilities. In light of the comments, we have made minor changes to correct or clarify the decision but make no changes to our fundamental determinations. Our specific responses to the comments are set forth below.

### **11.1. Utility Comments**

The utilities<sup>9</sup> focused on what they believe are burdensome requirements for future annual reports of compensation data. They make four recommendations: (1) use data sets submitted for experts by job classification but otherwise aggregated into one range level, as opposed to disaggregated levels of years of experience similar to that used for attorneys (PG&E, Verizon and Edison); (2) use available cost-of-living data to determine intervenor rates instead of requiring utilities to file annual data sets of hourly rates for their

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<sup>9</sup> PG&E, Verizon, SBC, and Edison.

representatives (SBC); (3) require new data every three years, instead of annually, and use available cost-of-living data in the two off-years (Verizon); and (4) extend the deadline for filing annual data sets to April 30, instead of March 31 (PG&E, Verizon and Edison).

On the hourly rates for utility experts, we find it is appropriate to disaggregate the data by experience as well as job classification to determine an appropriate market rate level. The rate table for experts used in this proceeding is severely aggregated, from \$110 to \$360 between the bottom and top hourly rates for intervenor experts, without regard to the type of expertise or years of experience. In order to more accurately determine a “market rate” (§ 1806), we want more analysis in future updates. It seems reasonable, for example, that experts be disaggregated at least into the entry, journey and senior levels. We also want to know whether material rate differences exist based on the type of expertise (engineering, economics, etc.). These factors seem fundamental to a decision on expert compensation, and our desire for more information on this subject is a strong reason why we continue with our original plan to do another hourly rate update in 2006.

On using cost-of-living data, §1806 requires that rates paid to intervenors shall be based on “market rates paid to persons of comparable training and experience,” and that those rates may not “exceed the comparable market rate for services paid by the commission or the public utility.” Using cost-of-living data as the sole determinant for setting intervenor rates would not comply with the statute or necessarily track the escalation in hourly rates for professional services, and we will not modify the draft decision in this area.

Regarding the annual due date for data sets, PG&E and the other utilities recommend it be extended to April 30, in view of the analysis and time required

to compile an accurate record. No party opposes this request, and we have modified this order accordingly.

### **11.2. Intervenor Comments**

The intervenors<sup>10</sup> generally state that: (1) our authorized hourly rate ranges for work performed in 2005 are inadequate and supported by insufficient data; (2) establishing hourly intervenor rates should take into account intervenors' asserted high risk of compensation delays or disallowances; (3) "productive hours" should be further defined; (4) intervenors should be eligible for compensation in this proceeding (reversing the Assigned Commissioner's Ruling of August 29, 2005); and (5) proceeding-specific multipliers should be allowed for increases to hourly rates.

Regarding the hourly rates authorized for 2005, intervenors argue that using rate ranges to determine "market rates" does not allow an adequate analysis of how the hourly rates for a specific individual might change from year to year. We disagree. Through the three principles discussed in Section 7, we provide ways for intervenors to make rate increase proposals for individuals based on specific circumstances. The intervenors also state that for 2005 work the data provided by the utilities is so limited that a reliable picture of "market rates" cannot be determined. Again we disagree. The utilities' data bases provide a large population of representatives, at least for 2003 and 2004. The data are adequate for our purpose, which is to derive a general escalation rate for this period.

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<sup>10</sup> The Utility Reform Network (TURN), San Luis Obispo Mothers For Peace (MFP). The Greenlining Institute and Latino Issue Forum filed replies generally supporting TURN.

Also regarding rates, the intervenors point out an inconsistency in the draft decision in the 2005 authorized rate ranges for attorneys (Section 7). The high-end rate for the 3-4 year experience level was the same as the 0-2 year level. This was mostly due to the minimal data points (intervenor attorneys) in both experience levels. We correct this inconsistency, and the decision now reflects a higher rate for the 3-4 year level.

The intervenors comment that the elements of risk they face should be accounted for in determining hourly rates. The utilities assert risk is irrelevant in determining hourly rates as the statute only allows intervenor compensation for the actual time directly related to or necessary for their substantial contribution to a Commission decision. As previously stated in this decision (Section 4.2), risk has been considered as a relevant factor, in that we have used a blend of in-house and outside rates to establish hourly rates for intervenors.

The intervenors comment that “productive hours” should exclude all tasks (e.g., training, work before the legislature) that are regularly performed by in-house representatives but unrelated to Commission proceedings. Exclusion could have the effect of raising the hourly rates of in-house representatives. The record is not clear on how much in-house productive hours would have to change before they cause in-house rates to exceed outside rates. Furthermore, as PG&E notes, its method does not include over-time hours worked by in-house representatives (inclusion would effectively lower the hourly rate). The uncertainty regarding productive hours is one reason we have decided to use a blend of in-house and outside hourly rates. This approach is reasonable given the state of the record in this proceeding.

Regarding the Assigned Commissioner’s Ruling, the intervenors cite a previous proceeding on intervenor compensation rules (R.97-01-009 and

D.00-02-0440) where intervenors were granted eligibility to claim compensation, and they assert on that basis that they should be granted eligibility here.

However, R.97-01-009 was a broad overall review of the rules and policies of the intervenor program, by no means limited to hourly rate issues. Here, we are reviewing only the actual hourly rates paid to intervenors, not broad policy rules. We therefore find the intervenors have a direct financial interest in the outcome, and affirm the Assigned Commissioner's Ruling.

Lastly, the intervenors commented on the continued use of hourly rate multipliers. As addressed in Resolution ALJ-184 (Attachment 2 to the subject rulemaking), rate multipliers are outside the scope of this proceeding, case-specific, and do not change adopted hourly rates.

## **12. Assignment of Proceeding**

This proceeding is assigned to Commissioner Michael R. Peevey and ALJ Steven Kotz.

## **Findings of Fact**

1. The purpose of this rulemaking is to develop a process for determining the hourly rates to be used in calculating intervenor compensation awards for work performed in 2005.

2. It is necessary to develop a process for determining hourly rates for intervenors for 2006 and beyond. This process is expected to evolve and may differ from the process used for today's decision.

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

4. To determine market rates, it is necessary to collect data from the utilities and the intervenors relating to hourly rates paid for comparable services.

5. The parties developed a reasonable schedule and reporting format for filing data sets of hourly rates, and reviewed alternative proposals for collecting data.

6. Verizon presented an alternative proposal to the data collection process that will not be used for 2005, but may be revisited for 2006 if Verizon wishes to renew its proposal.

7. The Commission's own costs of representation are relevant under the meaning of § 1806.

8. The Executive Director reported that the Commission has not paid rates exceeding those paid by the utilities.

9. The data show a high concentration of representatives of the intervenors and the utilities (outside and in-house) appearing in Commission proceedings at the higher levels of experience.

10. The hourly rates currently authorized for intervenors for work performed in 2003 and 2004 are fully within the range of rates paid by utilities to their outside representatives, for both attorneys and experts, with similar training and at all levels of experience.

11. The hourly rates currently authorized for intervenors for work performed in 2003 and 2004 is slightly higher than the rates utilities pay their in-house representatives with similar training and experience.

12. The currently authorized 2003 and 2004 intervenor rates are reasonable and do not exceed the "comparable market rate" within the meaning of § 1806.

13. The last authorized increase in hourly rates for some intervenors was prior to 2004.

14. Some intervenors have historically sought rates that appear to be in the low end of the range of authorized rates for their peers.

15. Cost-of-living data readily available to the public from several federal agencies shows the general rate of inflation for 2004 to be 2.7%.

16. On August 23, 2005 Greenlining filed a NOI for intervenor compensation in this proceeding, and was ruled ineligible by the Assigned Commissioner on August 29, 2005.

### **Conclusions of Law**

1. Increases in hourly rates for work performed by intervenors in 2005 should not be authorized above rates previously authorized for 2004, except as discussed in the foregoing opinion.

2. For intervenors new to our proceedings for work performed in 2004 or 2005, authorized hourly rates should be within the same range of rates previously authorized for 2004 for other intervenors, for the same type of work and level of experience.

3. By April 30, 2006, and annually thereafter, or until further order, the state's six largest investor-owned utilities should file data sets, as described herein, on the hourly rates paid to outside and in-house representatives participating in our proceedings in the two preceding years.

4. Intervenors requesting an escalation of rates for work performed in 2006 and thereafter should include sufficient justification in the request for compensation, and be guided by the principles contained in today's decision.

5. The Assigned Commissioner's Ruling in this proceeding, dated August 29, 2005, denying intervenor status to Greenlining should be affirmed.

6. Today's decision should be made effective immediately.

**O R D E R****IT IS ORDERED** that:

1. No increases in hourly rates paid to intervenors for work performed in our proceedings in 2005 will be authorized above those rates previously authorized, except as described in today's decision.

2. For intervenors new to our proceedings for work performed in 2004 or 2005, hourly rates shall be within the same range of rates as those previously authorized for other intervenors for 2004, and as shown in the tables herein.

3. By April 30, 2006, and annually thereafter, Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas and Electric Company, Southern California Gas Company, SBC California, and Verizon California Inc. shall serve data sets, as described herein, on the hourly rates they paid to attorney and expert representatives, both in-house and outside, for participation in our proceedings in the two preceding years.

4. The Chief Administrative Law Judge, in consultation with the President of the Commission, may take reasonable steps to coordinate and facilitate the hourly rate updating process for work performed in 2006 and beyond. Such steps may include, but are not limited to, holding workshops, adjusting the timing or contents of the utility data sets, providing for comment on the data sets, and considering refinements to the updating process.

5. Intervenors requesting increases in previously authorized rates, for work performed in 2006 and thereafter, shall be guided by the principles in today's decision.

6. The Assigned Commissioner's Ruling in this proceeding, dated August 29, 2005, is affirmed.

7. Rulemaking 04-10-010 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**ATTACHMENT A****Intervenors' Proposed Rates for Attorneys: 2005**

The table below summarizes the rates for attorneys proposed by the intervenors for work performed in 2005. The first column shows 2004 rates paid by utilities and authorized for intervenors, the second column 2005 rates proposed by intervenors, and the third column the average percent increase (measured from the top of the rate range) from 2004. For 2005, the intervenors are proposing hourly rate increases for attorneys ranging from 1-40% above rates authorized for 2004, with a median increase of 10%. The number of data points for the intervenors is shown in parenthesis for each level of experience.

<b>Years Experience</b>	<b>2004</b>	<b>2005 (Requested)</b>	<b>% Increase</b>
<b>13+years</b>			
Utilities (outside)	\$205-\$585	N/A	N/A
Intervenors	\$250-\$490 (11)	\$265-\$530 (13)	8%
<b>8-12 years</b>			
Utilities (outside)	\$190-\$535	N/A	N/A
Intervenors	\$270-\$325 (5)	\$280-\$415 (7)	28%
<b>5-7 years</b>			
Utilities (outside)	\$250-\$400	N/A	N/A
Intervenors	\$250-\$270 (1)	\$320-\$335 (2)	18%
<b>3-4 years</b>			
Utilities (outside)	\$185-\$400	N/A	N/A
Intervenors	N/A	\$220-\$230 (2)	N/A
<b>0-2 years</b>			
Utilities - outside	\$130-\$400	N/A	N/A
Intervenors	\$190 (1)	\$200 (2)	5%

**Intervenors' Proposed Rates for Experts: 2005**

The table below identifies the range of rates requested by intervenors for 2005 for experts. The number of data points for intervenors is shown in parenthesis in the table. For 2005, the intervenors are proposing hourly rate increases for experts ranging from 8-65% above rates authorized for 2004, with a median increase of 12%. The utilities did not file hourly rate data for 2005 for experts.

	<b>2004 Range</b>	<b>2005 Range (Requested)</b>
<b>Utilities*</b>		
Outside	\$90-\$475	
In-House	\$60-\$420	
<b>Intervenors</b>	\$110-\$360 (28)	\$140-\$405 (43)

\* For utilities, excludes rates paid to executive level experts (company presidents, directors and officers).

**(END OF ATTACHMENT A)**