

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-184
Administrative Law Judge Division
_____, 2004

R E S O L U T I O N**RESOLUTION ALJ-184. Adopting annual process for setting hourly rates to use in calculating compensation awards to intervenors.**

I. Introduction

In today's resolution, we adopt an annual process for setting and updating hourly rates for use by intervenors in seeking compensation for substantially contributing to a Commission decision, as provided in the statutory intervenor funding program. (Pub. Util. Code §§ 1801-1812. Unless otherwise stated, all citations to statute are to the Public Utilities Code.) The hourly rates that we establish through this process will govern intervenors and their representatives who have recently participated in our proceedings, and will provide guidance to other intervenors and representatives.

II. Background

In Decision (D.) 03-10-061 and D.03-10-062, we directed the Executive Director and Chief Administrative Law Judge to "develop a comprehensive process for the Commission to annually set rates for intervenor attorney, expert, and paralegal fees...." On October 29, 2003, the Executive Director and Chief Administrative Law Judge wrote to over 40 regular participants in our proceedings, including frequent intervenors and utilities from the various regulated industries. Their letter invited comments and suggestions to begin development of this annual process. Specifically, the Commission sought input on the following questions:

1. What annual process do you recommend for setting hourly rates?
2. How would the annual process you recommend meet (1) the standards of Section 1806, and (2) the goals of D.03-10-062, specifically, "promote fairness in awards, both in absolute and relative terms" and "increase administrative efficiency [so that intervenors are paid] on a more expedited basis"?

3. Consistent with Section 1806, what information should the Commission accept or require in setting hourly rates?

Aglet Consumer Alliance (Aglet), SBC Pacific Bell (SBC), Pacific Gas and Electric (PG&E), Southern California Edison (SCE), The Utility Reform Network (TURN), AT&T Communications of California, Inc., Greenlining Institute (Greenlining), and Grueneich Resource Advocates served opening comments, on November 14, 2003. Latino Issues Forum (LIF) served opening comments on November 25, 2003. SCE and Greenlining served reply comments on December 2, 2003 and PG&E, Aglet, LIF, SBC, and TURN served reply comments on December 3, 2003.

The comments raise three main issues, which we discuss and resolve below. We expect, however, to refine the process over time, based on our experience and suggestions by everyone involved.

III. Individual Rates vs. General Ranges

Commenters differ on whether the process should produce individual rates for particular advocates or ranges of rates based upon general levels of training and experience. Some commenters suggest that the number of advocates eligible to claim intervenor compensation is sufficiently small that standardized rates for general levels of training and experience are unnecessary and cannot accurately account for different levels of experience and skill. Some commenters suggest that we adopt default rates based on general levels of training and experience but allow advocates to seek higher rates if they feel their specific training, experience, and skill warrant. Others recommend adopting ranges of rates based on training and experience, allowing advocates to present evidence of where they fall within the range.

After reviewing the comments, we propose to adopt rates for individual advocates based on their specific training and experience, taking into consideration the compensation of persons with comparable training and experience. With the additional data that we intend to gather, we can adopt fair rates for these advocates for a particular calendar year.

We intend that, in general, when we adopt a rate for a particular advocate for a particular calendar year, the intervenor seeking to recover fees for that advocate's work in that calendar year will use that rate in calculating the intervenor's compensation request. This generalization is subject to several qualifications. We observe, first, that historically we have augmented an advocate's rate by a "multiplier" in consideration of various specific factors on a case-by-case basis. We will continue that practice, but because a multiplier is case-specific, it does not actually change the adopted hourly rate for that advocate. Second, an intervenor may request an adjustment to an adopted hourly rate but must show good cause for doing so. For example, if a court or

regulatory agency awarded the advocate a higher hourly rate for work in the same calendar year, the intervenor may ask us to use the higher rate. The burden is on the intervenor to justify the higher rate, and in the example just given, we would expect the intervenor to address, among other things, the standard used by the court or agency in setting the higher rate and the comparability of the work performed at the Commission to the work performed at the court or agency.

Finally, the adopted rate carries our expectation about the level of the advocate's performance; to the extent that the advocate performs above or below that level in a particular proceeding we would consider augmenting or reducing the hourly rate. For example, we expect that advocates with experience before the Commission have a certain level of knowledge about our Rules of Practice and Procedure and filing requirements, so a seasoned advocate who fails to follow these rules would not be performing at a level consistent with what we would expect from someone of that training and experience. Thus, in that circumstance, we may consider awarding a lower hourly rate for the advocate's work in that proceeding. Similarly, an advocate who surpasses expectations may ask us to award a higher hourly rate. For example, where an advocate served ably in the dual role of attorney and expert, eliminating the intervenor's need to employ separate individuals for each role, we may consider awarding a higher hourly rate for that advocate's work in that proceeding.

Of necessity, we can adopt specific hourly rates only for those advocates who already have experience at the Commission. We also encourage new intervenors and advocates to participate in our proceedings. The annual process will develop information that will enable prospective intervenors to project reasonable rates by referring to ranges of training and experience revealed in that process. Particularly for attorney advocates, we have found from over 20 years of setting hourly rates that the rates tend to fall within three ranges, based on length of relevant experience and roughly corresponding to the associate, partner, and senior partner levels within a law firm. We expect to continue to specify these general ranges, which should be utilized by new intervenors and advocates in developing their proposed hourly rates.

IV. Data Requirements

Section 1806 requires that the Commission "take into consideration the market rates paid to persons of comparable training and experience who offer similar services" when awarding compensation to advocates eligible for intervenor compensation. For this consideration, we must have sufficient data about the training and experience of advocates of both intervenors and others offering similar services on behalf of utilities and this Commission. We also need information about the "comparable market rate" for those service providers that are paid by utilities and the Commission. Commenters

propose various types of information be gathered during a proceeding to set hourly rates.

So that we may assess the training and experience of Commission practitioners, we propose that current or prospective intervenors that expect to make requests for compensation for work in a given calendar year submit information about the training and experience of the personnel they expect to perform work on their behalf. The information submitted must cover both attorneys and non-attorneys. Intervenors must include the past rates adopted for their advocates in their filing and a proposed rate for the upcoming year. On the same date as the intervenor filing, respondent utilities¹ must submit a list of the training and experience of in-house personnel who have worked on matters before the Commission during the prior calendar year.² The utilities must prepare a similar list for outside counsel, experts, or other service providers who have supported the utilities' efforts before the Commission during the prior calendar year. Each of the utilities' lists must identify the title of the individual and type of service provided, describe the individual's training (for example, degrees and years obtained), and indicate the individual's experience appearing or supporting work before the Commission.

We agree with commenters that we currently have insufficient information regarding the "market rate for services paid by the ... public utility, ... to persons of comparable training and experience who are offering similar services." (§ 1806.) Therefore, we direct the utilities to provide this information for all persons identified on the above-described lists. For in-house personnel, the utilities must develop an effective hourly rate by identifying salary, benefits and other compensation, and an allocation of overheads for each individual listed. For outside service providers, the utilities must identify the rates charged to the utility (and the usual billing rate, if different) for each individual listed.³

¹ The "respondent utilities" will be each utility that we have required to pay an award for intervenor work performed in any of the three calendar years preceding the calendar year for which we are setting hourly rates.

² This listing must include in-house utility witnesses, attorneys, and project managers; however, the utility may limit the listing to those persons who have participated in Commission proceedings during the past three years or will participate in the upcoming calendar year.

³ To the extent that this information suggests logical ranges for comparing compensation rates for persons with similar experience, we encourage the utilities to group them accordingly.

Hourly rates paid by the Commission itself to its staff and consultants are also relevant under Section 1806, which says in part that the compensation we award “may not, in any case, exceed the comparable market rate for services paid by the commission or the public utility, whichever is greater” (emphasis added). We assume that hourly rates in the private sector generally exceed those paid by the Commission, but we will test this assumption by having our Executive Director review the data provided by the utilities. Following this review, the Executive Director will report instances, with appropriate data, in which the Commission has paid rates exceeding those paid by the utilities. Absent any such instances, the report need only note that fact, without further data.

In addition, we encourage intervenors and other interested persons to submit other information, for example, market surveys or benchmarking studies. We also invite independent experts or individuals with specialized knowledge of billing information to submit relevant information at the same time as intervenors and utilities submit their data.

As a general matter, Section 1806 requires us to look first to the compensation of practitioners before this Commission in setting rates for intervenors because of the statute’s requirement to consider the costs of providers of similar services. However, we allow intervenors and others, when appropriate, to refer to rates charged or awarded for work in other forums.

V. Timing

Commenters propose different timing for the annual process. Some commenters suggest that rates be set for a base year and then adjusted annually by some type of index (for example, the Consumer Price Index) for some period of time before the base rate is re-evaluated. Some commenters suggest that rates be based on prior year data and applied retroactively to the awards for the past year. Others suggest that we adopt rates prospectively for the coming year. Others suggest that it is sufficient if rates are adopted for a given calendar year by April of that same year, as requests for compensation for work performed during January through March are unlikely to be resolved before April.

We agree with TURN that intervenors are unlikely to request an award of compensation for work performed in a given year prior to April of that same year. Therefore, our procedure is designed to adopt rates no later than April 30 for use that calendar year.

As described above, we are requiring utilities to submit data on compensation paid to in-house and outside representatives for the prior calendar year. We will adjust the prior year rates by the Consumer Price Index to bring them to a current year basis. The

rates requested by each intervenor will be compared against the adjusted utility rates and other data submitted to assess whether the intervenor requests the market rate for persons of comparable training and experience who are offering similar services.

We do not at this time adopt a base year rate with subsequent annual adjustments based on an index of general inflation; we agree with certain parties that market rates for advocates do not necessarily move in lockstep with inflation rates. We are open to considering an index that is more narrowly targeted to cost increases for the professional services that we compensate through the intervenor compensation program.

We will use the following generic schedule for the annual process beginning for 2005 calendar year rates:

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|------------|--|
| January 15 | Utilities submit data/Intervenors submit proposed rates and supporting information |
| February 5 | Filings (by intervenors, utilities, or other interested persons) describing how January 15 data do or do not support proposed rates for particular advocates |
| March 23 | Draft decision adopting rates |
| April 22 | Commission adopts hourly rates |

This timing would begin for 2005 calendar year rates.

The draft resolution contemplated doing the same process in the middle of this year to derive 2004 calendar year rates. Several considerations, including our review of comments on the draft resolution, prompt us to revise our approach to 2004.

First, there are reasonable concerns and questions about how the new process will work. To address them, we will institute the rulemaking for 2005 rates soon after our adoption of this resolution. We build into the rulemaking time to work out implementation issues before launching the above schedule. This implementation phase will include submission of preliminary data sets for utilities' 2003 costs of representation in our proceedings. Following submission, there will be a workshop. Our intent is that this implementation process will help all the participants reach a common understanding on matters such as level of detail, format, and aggregation.

Second, we will use an alternative approach, discussed in the draft resolution, for establishing 2004 rates. Under this approach, we will adopt an escalation factor and allow intervenors to use that factor to calculate award requests for work done in 2004. In other words, where we have approved an hourly rate for an advocate for 2003, an

intervenor may escalate that rate by the factor when seeking compensation for that advocate's work done in 2004. There will be a rebuttable presumption that a rate so escalated is reasonable.

The comments contain information that supports an escalation factor of 8%.⁴ In fact, 8% is at the low end of the information; however, we note that the Of Counsel surveys (which TURN and Aglet regularly rely on and which report annualized increases exceeding 10% in recent years) do not appear to reflect changes in public sector salaries. The latter, which are relevant to hourly rate determination under Section 1806, have not, at least at the State level, kept pace with private sector salaries. Consequently, under these limited circumstances, we find an 8% escalation factor is reasonable.

An intervenor may still make an individualized showing in appropriate circumstances, e.g., regarding an advocate new to our proceedings, or an advocate who (in the intervenor's opinion) had progressed to a significantly higher level of expertise since we had last set an hourly rate for that advocate. Similarly, a utility could oppose an increase to an advocate's hourly rate, whether the increase was predicated on the escalation factor or an individualized showing.

VI. Nature of the Annual Process

The annual process should provide greater certainty to intervenors and reduce controversy in particular award requests. We want to keep the annual process short and informal because we recognize that the cost of a slow burdensome process might outweigh the hoped-for benefits. Thus, we will use notice-and-comment procedure for receiving input from utilities, intervenors, and other participants. Analysis of the data should be straightforward, and we see no need for evidentiary hearings.

⁴ The most remarkable information comes from PG&E, whose comments attach copies of two opinions by federal district court judge Vaughn R. Walker (N.D. Cal.). On the one hand, Judge Walker approves hourly rates for certain attorneys in 2001-02 that are somewhat lower than some rates this Commission has approved for the corresponding timeframe. On the other hand, Judge Walker uses census data for the San Francisco metropolitan area that indicate (under his methodology) an increase in the average hourly billing rate of almost 27% from 2001 to 2002. This calculation does not necessarily tell us about hourly rate escalation in more recent years, which concern us here; further, we note that Section 1806, which governs our determination of hourly rates, does not depend on census data and differs from the statute and judicial precedents to which the federal court is subject.

We will formalize the process, however, to the extent of issuing an order instituting rulemaking. The reports and comments produced for the annual process shall be submitted for filing in the corresponding rulemaking docket.

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 requirements of Part IV above. 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.)

VII. Comments on Draft Resolution

As provided by Section 311(g)(1) and Rule 77.7(c) of the Commission’s Rules of Practice and Procedure, this resolution was mailed in draft for public review and comment. We received comments from Aglet, Greenlining, PG&E, SBC, SCE, TURN (joined by Utility Consumers’ Action Network), Valencia Water Company (Valencia), and Verizon California Inc. (Verizon). We received replies from AT&T, LIF, WorldCom, Inc. (MCI), SBC, SCE, and TURN (joined by Aglet).

In general, commenters expressed support for the proposed annual process. Several utility commenters assert that the cost information was excessive in detail, and that further steps should be taken to protect personal privacy and confidentiality when appropriate. In response, we have changed the draft resolution in various ways, in particular, adopting a proposal by TURN and Aglet to reduce the cost information burden. Further, we will not try to do a full-scale proceeding for calendar year 2004 rates this year, as contemplated by the draft resolution. Instead, we authorize (with certain qualifications) the use of an escalation factor by intervenors seeking new hourly rates for calendar year 2004, and we require data filings and a workshop in preparation for the first (calendar year 2005) formal rulemaking fully implementing the annual process.

Besides those issues discussed above, only two other issues appear in the comments. First, several commenters debate our use of “multipliers,” which we mentioned in Part III of the draft resolution solely to explain that the annual process makes no change to our historic practice regarding their use. The subject is otherwise beyond the scope of this resolution. Similarly, these commenters debate whether intervenors do or do not

face greater risks or delays than litigants in other forums in recovering their fees and costs. The debate is irrelevant for purposes of setting hourly rates under Section 1806.

Second, Valencia asks that “small” utilities (in essence, those with annual California revenues less than \$500 million) be excluded from the annual process. We will retain the requirement that a utility participate in the annual process if we ordered the utility to pay an award for intervenor work performed in any of the three calendar years preceding the calendar year for which we are setting hourly rates. In practice, intervenor awards involving small utilities are infrequent, but they occur often enough that, consistent with § 1806, we should have data on costs of representation incurred by those utilities.

Findings

1. To date, the hourly rates used for calculating intervenor compensation awards have been developed and updated largely on a case-by-case basis.
2. An annual process for developing and updating hourly rates may be preferable to the case-by-case approach, in that the annual process may reduce controversy, avoid redundant litigation, and improve the perceived and actual fairness of the adopted hourly rates.
3. The annual process set forth in this resolution should be implemented with the understanding that the process may be refined over time.
4. It is reasonable under the circumstances to use an 8% escalation factor, as described in Part V, to set hourly rates for work performed in calendar year 2004.

Order

1. The annual process set forth in this resolution is adopted for developing and updating hourly rates of intervenors’ representatives.
2. To set hourly rates for calendar year 2005, the Commission will institute a Rulemaking utilizing the adopted annual rate process. The annual process, with such refinements as the Commission may adopt over time, will be implemented through annual rulemakings, beginning with calendar year 2005.

3. For calendar year 2004 only, the Commission will use a blend (described in Part V of the discussion) of an escalation factor and current procedures to set hourly rates.

This resolution is effective today.

I hereby certify that this resolution was adopted by the Public Utilities Commission at its regular meeting of _____, 2004, and that the following Commissioners approved it.

WILLIAM AHERN
Executive Director