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Decision 02-06-070 June 27, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038 (Filed November 16, 2000)
Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan. (U 39 E)	Application 00-11-056 (Filed November 22, 2000)
Petition of The Utility Reform Network for Modification of Resolution E-3527.	Application 00-10-028 (Filed October 17, 2000)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision awards The Utility Reform Network (TURN) $573,335.70 in compensation for its contribution to Decision (D.) 01-01-018, D.01-03-029, D.01-03-081, D.01-03-082, D.01-04-005, and D.01-05-064.

1. Background

TURN's compensation request is large, but we note that the request covers contributions to many decisions at the heart of the current energy crisis. In these decisions, adopted during different phases of the proceeding, the Commission addressed the requests of Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (Edison) for immediate rate increases in response to extraordinary circumstances in California's wholesale power markets.

The first phase concluded with an increase in rates for PG&E and Edison customers of one-cent per kilowatt-hour (kWh) in D.01-01-018. Prior to D.01-01-018, the Commission issued D.00-12-067, which consolidated the above-captioned applications and a petition (docketed as Application (A.) 00-10-028) filed by TURN as one proceeding with different phases.

D.01-03-082, issued in the second phase, is an interim opinion granting PG&E and Edison authority to increase rates by an additional three-cents per kWh over those rates adopted in D.01-01-018. In this second phase five issues were considered:

a. Review of the independent audits of PG&E and Edison, and determination of whether or not the Commission should grant further rate increases.
b. TURN's accounting proposal to reconcile various balancing and memorandum accounts.
c. Consideration of whether the rate freeze under Assembly Bill (AB) 1890 has ended on a prospective basis.
d. Greenlining/Latino Issues Forum's California Alternative Rates for Energy (CARE) proposal.
e. Parties' proposals for tiered residential rates.

D.01-03-082 concluded that the utilities were experiencing serious financial shortfalls in revenues necessary to provide adequate electric service to their customers. That decision also adopted changes in accounting rules proposed by TURN, which recognize amounts utilities realized both on their sales of capital assets and in revenues from selling electricity generated by their own plants. D.01-03-082 also exempted low-income customers from the rate increase while stating that the rate freeze under AB 1890 has not ended, and provided opportunity for parties to comment on a tiered residential rate proposal.

The third phase of these consolidated proceedings resulted in D.01-03-081 and D.01-04-005. These decisions address the issues of implementing AB 1X, signed into law February 1, 2001, and codified in Section 360.5.[1] That statute authorizes the California Department of Water Resources (DWR) to purchase electric power for sale directly to retail end-use customers served by utilities, and establishes the California Procurement Adjustment (CPA) which sets the amount of the utility retail rate which is transferred to DWR to pay for power purchases. D.01-03-081 requires utilities to provide DWR with monies collected for power paid for by DWR, sets out the proposed method to calculate the CPA, calculates for each utility a proposed CPA rate, and implements Section 360.5. D.01-04-005 applies the CPA rate to determine CPA revenue used by the DWR in the process of issuing bonds and addresses comments of parties on the CPA methodology proposed in D.01-03-081.

In the fourth phase, D.01-05-064 allocated the three-cents per kWh authorized in D.01-03-082 to customer classes. The Commission adopted five tiers for residential usage, excluding CARE and medical baseline customers. All shortfalls in revenue were allocated to non-exempt sales for residential usage above 130% of baseline amounts, and to commercial and industrial customers. Agricultural customers were limited to increases of 15% to 20% depending on their tariff schedule.

TURN timely filed its compensation request on July 16, 2001. No party filed a response to the request but SCE filed comments on the draft decision.

[1] All statutory references are to the Public Utilities Code.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests pursuant to Sections 1801-1812. Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference or by a date established by the Commission. The NOI must present information regarding the nature and extent of the customer's[2] planned participation and an itemized estimate of the compensation the customer expects to request. Here, TURN timely filed its NOI after the first prehearing conference.

The customer, either at the NOI stage or later, must also show that the costs of effective participation, if not compensated, would constitute a "significant financial hardship" (as defined by Section 1802(g)) for the customer. Regarding TURN, we had made a recent finding of significant hardship by ruling on December 29, 2000 in another proceeding (A.00-09-002). This recent finding, pursuant to Section 1804(b)(1), creates a rebuttable presumption of TURN's eligibility for compensation in other Commission proceedings, such as the consolidated proceedings here, that start within a year of the finding. No one has challenged this presumption, so we find that TURN continues to be eligible under the statute and prior ruling.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to

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[2] To be eligible for compensation, an intervenor must be a "customer" as defined by Section 1802(b). In D.98-04-059 (footnote 14), we affirmed 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.) In today's decision, as in the statute, the terms "customer" and "intervenor" are used interchangeably.

file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. TURN timely filed its request for an award of compensation on July 16, 2001. Under Section 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "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."

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with Section 1806.

3. Substantial Contribution to Resolution of Issues

Under Section 1802(h), a party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision, or it may advance a specific policy or procedural recommendation that the Administrative Law Judge or Commission adopted. A substantial contribution includes evidence or argument

that supports part of the decision even if the Commission does not adopt a party's position in total.[3]

3.1 Contribution to D.01-03-082

TURN's contribution here was multi-faceted. TURN proposed changes to accounting rules we had adopted in Resolution E-3527 when TURN determined that those rules were leading to results that were inconsistent with the "rate freeze" principle embodied in AB 1890. TURN explained that it filed a petition to modify the Resolution, and the petition was subsequently consolidated with the Rate Stabilization docket. The Commission issued D.01-03-082 in which it adopted TURN's proposed accounting changes across the board.

In D.01-03-082, the Commission also granted the utilities a rate increase of three cents/kWh, despite TURN's objections. TURN points out, however, that the Commission also imposed a significant limitation on the use of the funds collected, namely, that the funds could only be used for power costs incurred after the effective date of the decision.

[3] The Commission has provided compensation even when the position advanced by the intervenor is rejected. See D.89-03-063 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved). See also D.89-09-103 (modifying D.89-03-063) where we hold that in certain exceptional circumstances, the Commission may find that a party has made a substantial contribution in the absence of the adoption of any of its recommendations. Such a liberalized standard should be utilized only in cases where a strong public policy exists to encourage intervenor participation because of factors not present in the usual Commission proceeding. These factors must include (1) an extraordinarily complex proceeding, and (2) a case of unusual importance. Additionally, the Commission may consider the presence of a proposed settlement.

We conclude that TURN, through its filings and petition consolidated with the applications in this docket, made a substantial contribution to D.01-03-082.

3.2 Contribution to Other Decisions

In D.01-05-064, we addressed the revenue allocation and rate design issues created by the three-cent increase authorized by D.01-03-082. TURN stated that it substantially contributed to that decision because the Commission adopted TURN's positions on (1) definition of "equity" in rate design principles and goals, (2) revenue allocation methodology, (3) five-tier residential rate structure, and (4) non-residential rate spread, and several other smaller issues. We agree with TURN that its participation resulted in a far-reaching and substantial contribution to D.01-05-064. TURN also made substantial contributions to D.01-03-029, on the issue of the proper accounting for employee reductions and other cost-cutting measures, and to D.01-01-018, on the issue of utility shareholders bearing a share of the unanticipated costs of electricity procurement.

3.3 Contribution of TURN's Federal Court Work

TURN also has participated in federal court litigation[4] initiated by the utilities and seeks compensation for this work. According to TURN, the utilities argued that under the filed rate doctrine, the Commission could not prevent the utilities from raising rates to collect increased wholesale procurement costs.

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[4] Southern California Edison v. Lynch et al., Case No. 00-12056-RSWL (Mcx), United States District Court for the Central District of California (Western Division) (filed November 13, 2000); Pacific Gas and Electric Company v. Lynch et al., Case No. CV 00-4128 (SBA), United States District Court for the Northern District of California (filed November 8, 2000).

TURN stated that its participation in the federal court litigation was necessary to ensure that the Commission could address the merits of the issues in the decisions covered by the present applications.

TURN stated that it made a substantial contribution to the federal court litigation by attaining, over the vigorous objection of both utilities, the status of formal intervenor pursuant to Federal Rule of Civil Procedure 24(b)(2). According to TURN, federal court intervention requires a far more rigorous showing than intervenor status at the Commission. TURN explained that initially the federal court only allowed it to participate as amicus curiae, with limited rights of participation. After reviewing TURN's motion to dismiss and opposition to SCE's motion for preliminary injunction (discussed in greater detail below), the court found that TURN's participation "would be helpful for the court in supporting the complex factual, legal issues involved in this case" and allowed TURN to participate as a formal intervenor.[5]

TURN also pointed out that it entered into a Joint Defense Agreement with the Commission on December 4, 2000. TURN stated that this agreement allowed TURN and the Commission to coordinate and share information related to the litigation without losing any claim of privilege. TURN said that counsel for TURN and the Commission consulted extensively on strategic and technical issues, to the mutual benefit of both parties.

In response to TURN's assertions of "coordination" with the Commission, SCE[6] contended that TURN failed to identify any specific topic on

[5] Reporter's Transcript of Proceedings, CV 00-1056-RSWL, February 12, 2001, page 7.

[6] SCE's motion to accept its response for filing is granted.

which the parties consulted. SCE posited that the Commission and TURN might raise claims of privilege in regard to the details of these consultations.

We decline to open a new potential dispute regarding privilege. We are satisfied that the parties entered into an agreement to consult and coordinate because both parties perceived the agreement to be advantageous. Moreover, we note that the time records presented by TURN reflect numerous consultations between TURN's lawyers and the Commission's lawyers.

SCE also contended that TURN overstated its role in the federal litigation, particularly above and beyond that of the Commission. However, even SCE appears to acknowledge that TURN could present more specific arguments than the Commission. Some issues in the federal litigation were simultaneously before the Commission, and the Commission could not predetermine the outcome of these other proceedings by presenting definitive arguments in federal court. (See, e.g., § 454.) TURN was thus able to argue specific recommendations but the Commission was limited to hypothesizing a number of potential results. In this way, TURN could use its status to present arguments that complemented the Commission's.

TURN also emphasized its work in opposing SCE's motion for a preliminary injunction. Specifically, SCE had asked the court to require that:

> Defendants [the Commission], or their agents, servants, employees, attorneys and all those in concert or participation with them shall:
>
> a. Establish rates that will enable SCE to recover its future net wholesale power costs on a current basis, subject to refund; and
>
> b. Establish rates that will enable SCE immediately to begin recovering its past wholesale procurement costs, subject to refund; and

> c. Return to the Court within seven days with a specific rate plan that complies with these requirements; or
>
> Defendants, their agents, servants, employees, attorneys and all those in concert or participation with them are hereby restrained and enjoined from enforcing the CPUC's January 19, 2001, order, or any other provision of state law, that would require SCE to continue to provide electricity to all customers, to the extent SCE cannot pay for the costs of such electricity from the corresponding portion of retail rates.

[Proposed] Order Granting Plaintiff Southern California Edison Company's Motion for Preliminary Injunction, Case No. 00-12056-RSWL (January 22, 2001) (emphasis omitted).

In response to SCE's request, TURN filed a 19-page brief in opposition. To provide factual support for the brief, TURN also supplied the court with declarations from Michel P. Florio (explaining the cause of the energy crisis), Peter Navarro (outlining the likely effects of rate increases sought by the utilities), and William Marcus (describing alternative means to meet SCE's revenue needs), and a supplemental declaration by Florio on SCE's risk of bankruptcy. The Commission in its brief cited to the Navarro and Florio declarations.

The court denied SCE's motion for a preliminary injunction. The court characterized SCE's requested injunction as violating the Eleventh Amendment to the Unites States Constitution because, in the court's view, the requested injunction would "effectively usurp the regulatory authority of the State over intrastate retail rates."[7]

[7] Southern California Edison v. Lynch, CV 00-12056 RSWL, Order Denying Plaintiff's Motion for Preliminary Injunction (February 15, 2001) at page 2.

TURN's request for compensation for its federal court work raises two fundamental questions. First, may the Commission, under the intervenor compensation statutes, compensate an intervenor for work done in a forum (here, federal court) other than a Commission proceeding? Second, if the answer to the first question is yes, did TURN's federal court work make a "substantial contribution" to the Commission decisions that are the subject of TURN's compensation request? As discussed below, we answer both questions in the affirmative. Our discussion begins with the threshold question of whether the intervenor compensation statutes authorize compensation for work in a forum other than a Commission proceeding.

In its Comments on the Draft Decision awarding TURN compensation, SCE challenged the Commission's authority to award compensation for TURN's work in the federal court. SCE argued that the intervenor compensation statutes, §§ 1801-1812, only provide for compensation for participation in Commission proceedings. SCE cited to § 1802(f), among others, where "proceeding" is defined as any of several kinds of proceedings "before the commission." From this language, SCE concluded that the Commission must deny TURN's request for compensation for the work in federal court.

In response, TURN pointed to § 1802 (a) where "compensation" is defined to include the costs of "judicial review." As judicial review is necessarily before an entity other than the Commission, TURN concludes that the Commission may grant TURN's request for compensation for the federal court work.

In analyzing this issue, we turn first to the plain words of the statute. With emphasis added, § 1803 states that:

> 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.

As noted by SCE, § 1802(f) defines "**proceeding**" as: "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." However, the term "**hearing**" is not defined in the statute.

Because "hearing" is not defined in the statute, we must interpret the statute, guided by the legal principles of statutory construction, as well as our own precedent. We recently reviewed these principles:

> [W]e look to the well recognized principles of statutory construction. The California Supreme Court has stated: "To interpret statutory language, the courts must ascertain the intent of the legislature so as to effectuate the purpose of the law." (California Teachers Assn. v. Governing Bd. of Rialto United School Dist. (1997) 14 Cal.4th 627, 632.) In determining the Legislature's intent, they are to "scrutinize the actual words of the statute giving them a plain and commonsense meaning." (People v. Vallodoli (1996) 13 Cal.4th 590, 597.) "In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore, a practical construction is preferred." (California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal.4th 1133, 1147.) "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a

> result consistent with the legislative purpose. . . ." (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1159.)

D.01-11-031 (modifying D.01-04-006, and denying rehearing as modified) (November 8, 2001).

Applying these principles to § 1803 requires that the Commission use the plain and commonsense meaning of "hearing" to achieve a reasonable and practical construction that is consistent with the legislative purpose. Giving effect to each word leads to the conclusion that the Legislature intended to allow compensation for (1) participation in "proceedings" before the Commission and (2) participation in "hearings" before other entities but only so far as such participation is linked to the "substantial contribution" for which compensation is claimed. Any other interpretation of "hearing" would render the word surplusage in contravention of the judicial precedent quoted above.

Our interpretation of § 1803 also harmonizes with § 1802(a), which allows compensation for "judicial review." As TURN correctly pointed out, this section clearly contemplates the Commission granting compensation for work done before other entities. Section 1802(a) defines "compensation" to include the costs "of obtaining judicial review." In its reply comments, TURN stated that the statute clearly provides for an award of costs for work during judicial review of Commission decisions, and does not distinguish between judicial review in the state courts and judicial review in the federal courts. TURN also stated that SCE's arguments to the federal court sought to prevent the Commission from enforcing its earlier decisions against SCE, such that the federal lawsuits amounted to judicial review of the earlier decisions.

Black's Law Dictionary, 7th ed. (1999), defines "judicial review" as "a court's review of a lower court's or an administrative body's factual or legal findings." As SCE's lawsuit illustrates, in addition to the state courts, the federal

courts may also review the Commission's actions. Furthermore, judicial review of our "findings" occasionally is sought, as SCE did here, during a proceeding rather than after a final order. Accordingly, we agree with TURN that the only logically consistent interpretation of §§ 1802(a) and 1803 is that the Commission, under certain circumstances, may grant compensation for work before other entities.

The circumstances under which we can compensate work done before other entities are narrow, however. As quoted above, § 1803 requires that the customer's presentation make a "substantial contribution to adoption, in whole or in part, to the commission's order or decision." Thus, the work before the other entity must have a direct effect on the Commission's decision.[8] We view this limitation as key to our ability to evaluate whether the work has met the standards of § 1803. This limitation is a formidable impediment to obtaining compensation for work before other entities. Only extraordinary circumstances would support the findings necessary for such an award. Drawing on D.89-09-103, discussed in footnote 3, as well as our precedent, discussed below,

[8] Such an interpretation is also consistent with judicial precedent, albeit applying a different statute. Pursuant to Code of Civil Procedure § 1021.5, California's "Private Attorney General" statute, successful plaintiffs may petition the court for attorney's fees in "any action which has resulted in the enforcement of an important right affecting the public interest" if three conditions are met: (1) a significant benefit, either pecuniary or nonpecuniary, has been conferred upon the general public or a broad class of people; (2) the necessity and financial burden of private enforcement make an award appropriate; and (3) the fees should not, in the interests of justice, be paid out of any recovery. When confronted with the question of whether to award attorney fees for work performed before an administrative agency either before or after the court litigation, the California courts have allowed recovery where the services before the administrative agency were "useful and necessary to the ultimate resolution of the action and directly contributed to that resolution." Wallace v. Consumers Co-op of Berkeley, (1985) 170 Cal. App.3d 836, 848-9.

we find that such an award may be proper where (1) a strong public policy exists to encourage intervenor participation due to factors not present in the usual Commission proceeding, (2) the intervenor's participation in the non-Commission forum was necessary and not the intervenor's choice of forums, and (3) the case is of unusual importance due the scope of its potential impacts.

The Commission has previously awarded compensation for work done outside the Commission, specifically before the California Legislature and the Federal Energy Regulatory Commission (FERC). The Commission authorized compensation for activities before the Assembly Committee on Utilities and Commerce and the Senate Committee on Energy and Public Utilities held in response to allegations of irregularities in the decision-making process for the Implementation Rate Design (IRD) decision. In addition to the Commission and its senior staff, several parties to the underlying proceeding appeared to offer testimony and recommendations for changes to the Commission's decision-making process. In considering the ensuing intervenor compensation request from one of the appearing parties, the Commission stated: "We believe that time devoted to these hearings was properly chargeable for intervenor compensation. The procedural matters discussed and advice obtained were a part of the guidance that went into the eventual decision in this matter." (D.95-08-051, Re Alternative Regulatory Frameworks for Local Exchange Carriers, (1995) 61 CPUC2d 142, 148.)

D.98-10-030 also involved a unique set of facts, where the FERC was addressing the then-proposed structure of the Power Exchange (PX) and the Independent System Operator (ISO), entities critical to the operation of newly deregulated energy markets. The Commission sought comments from parties to assist in developing the Commission's comments to FERC. In a subsequent

request for internvenor compensation, the Commission found that the work performed in preparing the FERC comments could be included:

> We made it clear then that we were a party to the FERC proceedings wherein ISO and PX final policy and implementation details were being established. However, in our role of shepherd, we solicited and received comments from parties in this docket on the ISO and PX applications filed by the utilities before FERC. These comments were relied upon by the Commission in preparing its August 14 comments to FERC. We agree with UCAN and, for purposes of evaluating the compensability of WEPEX working group activities, regard our August 14, 1996, comments to FERC as an "order or decision" under § 1802(h).
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> TURN's interpretation of § 1802(h) strays too far from a plain reading of the statute. It would have the Commission compensate participation occurring after August 14, 1996, without any link to a future Commission product against which substantial contribution could be evaluated. That being said, we do not rule out the possibility that such a product exists or may come to exist in the future. Therefore, we will deny without prejudice compensation requested for ISO, PX, and WEPEX activities which occurred after our August 14, 1996, filing to FERC.

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, D.98-10-030 (October 8, 1998).

Here, the utilities sought to use the federal court to undermine this Commission's authority over retail ratemaking. As TURN noted in its request for compensation, these issues represent literally billions of dollars for the utilities' customers and arise under the well-known financial and power supply emergency conditions that resulted from deregulation. These circumstances fit well within the standards set out above to guide our exercise of discretion under §

1803. Due to the financial and power supply emergency, the public interest is well-served by the participation of experienced and knowledgeable intervenors, such as TURN, before all tribunals whose jurisdiction is involved. The utilities chose the federal court forum, not TURN, and it cannot be disputed that this is a case of unusual importance to all Californians.

In sum, TURN's participation in the federal court forum was helpful in protecting the Commission's authority to act as it eventually did. In this way, TURN's federal court actions significantly contributed to "the eventual decision in this matter." Accordingly, we will recognize TURN's expenses for participation in the federal court as part of its intervenor compensation claim.

We believe this outcome is consistent with the letter, spirit, and intent of the intervenor compensation statute. The federal court litigation was an essential component of these consolidated proceedings and the Commission decisions that are the subject of TURN's compensation request. As such, TURN could not practically or effectively advocate its position before the Commission without first helping to overcome utility litigation intended to prevent the Commission from acting on the very points TURN was seeking to raise at the Commission.

4. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of $649,134.95, as follows:

Attorney Fees—TURN Staff Counsel						
Robert Finkelstein	201.75	hours	X	$280	=	$56,490.00
	429.75	hours	X	$320	=	$137,520.00
	41.25	hours	X	$160	=	$6,600.00
Michel P. Florio	124.75	hours	X	$350	=	$43,662.50
Matthew Freedman	104.25	hours	X	$190	=	$19,807.50
				Subtotal	=	$**264,080.00**
Attorney Fees—Outside Counsel						
Michael Strumwasser	456.8	hours	X	$425	=	$194,140.00
Fredric Woocher	9.7	hours	X	$425	=	$4,122.50
Harrison Pollak	456.0	hours	X	$250	=	$114,000.00
Johanna Shargel	2.0	hours	X	$250	=	$500.00
Expenses						$10,818.97
				Subtotal	=	$**323,581.47**
Expert Witness Fees and Expenses						
JBS ENERGY INC.						
William Marcus	236.32	hours	X	$160	=	$37,811.20
Gayatri Schilberg	20.10	hours	X	$115	=	$2,311.50
Jeff Nahigian	45.25	hours	X	$100	=	$4,525.00
JBS Expenses						$482.92
				JBS Subtotal	=	$**45,130.62**
Other Costs						
Photocopying expense						$13,148.28
Postage costs						$1,902.11
Fax charges						$18.40
Federal Express/Delivery costs						$39.52
Attorney travel						$67.50
Consultant fee[9]						$531.25
Phone costs						$292.61
Lexis charges						$343.19
				Subtotal	=	$16,342.86
TOTAL						$**649,134.95**

[9] This fee reflects limited consultations (4.25 hours) with economist Ian Goodman. His hourly rate ($125) has been approved previously by the Commission.

4.1 Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was "productive," as that term is used in Section 1801.3, where the Legislature gave the Commission guidance on program administration. (Mimeo. at 31-33, and Finding of Fact 42.) In that decision, we discuss the requirement that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

We did not attribute our adopted positions in D.01-03-081, D.01-03-082, D.01-04-005, and D.01-05-064 to specific parties, although we have discussed their various contributions throughout. Furthermore, we have considered the substantial contributions of TURN through its cross-examination, briefs, and other participation in this proceeding. TURN stated that as the principal author and proponent of the accounting changes adopted in D.01-03-082, it can claim primary credit for helping all consumers avoid being assigned billions of dollars in unintended cost recovery. TURN similarly points out that its arguments on the revenue allocation issues assisted the Commission in reducing by hundreds of millions of dollars the costs allocated to residential and small commercial customers. In a context of unprecedented proposals to increase rates, we believe that TURN's participation was productive and greatly assisted us in our overall decision-making, as well as with specific decisions on certain disputed issues. The results of these decisions provided significant savings to ratepayers.

While we did not adopt all the arguments presented by TURN, our deliberations were enhanced by TURN's arguments and analysis. Most importantly, we benefited from TURN's initiative in proposing the accounting changes, and TURN's pursuit of implementation of those changes. Although TURN's compensation request is considerable, the ratepayer savings on the issues advanced by TURN greatly exceed the amount of the request.

4.2 Hours Claimed

TURN documented its claimed hours through detailed records of the time spent by its attorneys, outside counsel, and outside experts in the different phases of this proceeding. The records indicate both the professional hours and the activities associated with the hours. TURN stated that each of its attorneys reviewed the hourly tabulations and only included those that were reasonable for the underlying task. TURN also noted that its attorneys addressed a wide range of issues in this complex group of proceedings, and that it provided the highest quality advocacy on very short notice, using far fewer resources than the other parties, particularly the utilities. TURN concluded that its participation reflected impressive efficiency, and consequently that all hours included were reasonable.

We have reviewed the detailed billing information submitted by TURN. We conclude that the hourly breakdowns and allocation of hours reasonably support the claimed hours for TURN.

4.3 Hourly Rates

TURN's requested hourly rates and the approved hourly rates for its attorneys are set out below:

Attorney	2000		2001	
	Requested	Approved	Requested	Approved
R. Finkelstein	280	280	320	310
M. Florio	350[10]	315[11]	350	350
M. Freedman	190	180	180	180
Strumwasser	425	315	425	350
F. Woocher	425	315	425	350
H. Pollak	250	180	250	190
J. Shargel	250	180	250	190

For their work in 2001, attorneys Finkelstein and Florio request an increase of 14% and 13%, respectively, from their approved hourly rates for 2000. The Commission has a practice of increasing hourly compensation on an annual basis in recognition of increased experience and other factors. The most common increase is $10/hour, see, e.g., D.01-09-045, but the Commission recently approved an increase of $20 hour, or about 10%, in D.01-11-054. We will authorize an increase for Finkelstein and Florio of 10%, with the amount rounded to the nearest $10. Consequently, Finkelstein's hourly rate for 2001 will be $310

[10] TURN notes that Florio's annual rates have been set by the Commission on a fiscal year basis, "for reasons no longer clear but still respected." To simplify our procedures, we will take this opportunity to move Florio to a calendar year basis.

[11] After TURN submitted its request for intervenor compensation in this proceeding, the Commission approved a rate of $315/hour for Florio for 2000 in D.01-11-014 but left open the appropriate rate for 2001 in recognition of this pending request.

($280 x 1.1 = $308, rounded to $310) and Florio's rate will be $350, as requested ($315 x 1.1 = $346.50, rounded to $350).

Attorneys Woocher and Strumwasser did not appear before this Commission but rather represented TURN in the federal court litigation. TURN requested an hourly rate of $425 each. TURN stated that the best evidence of the applicable market rate for attorneys with federal court experience is found in the rates paid by the utilities for outside counsel in the same proceeding. Citing to filings before the United States Bankruptcy Court, TURN stated that PG&E paid its counsel an average of $469 for work on the same matter. TURN therefore concluded that its requested hourly rate of $425 was substantially less and therefore reasonable. Neither utility challenged this assertion.

Turning to the directive found in § 1806, we find that we must "take into consideration the market rates paid to persons of comparable training and experience who offer similar services." We have reviewed and carefully considered the hourly rate information provided by TURN. As set out above, we have found that the federal court work can be included in the intervenor compensation award due to the substantial contribution the work made to the Commission's decisions. Historically, we have not set task-by-task compensation rates for attorneys but rather looked to experience and training. Here, it just so happens that the federal court tasks were performed by different attorneys than the Commission tasks. Both sets of attorneys, however, substantially contributed to the same decisions. Consistent with our past practice, we will compensate both on the same basis of experience and training. Accordingly, Strumwasser and Woocher, with training and experience levels comparable to Florio's, shall be compensated at Florio's hourly rate.

Attorney Freedman is a new staff attorney at TURN. We previously approved a compensation rate of $170 for 1997 for a TURN attorney of

comparable skill and experience. We will increase that amount by $10 for all work in this proceeding, as requested by TURN.

Attorneys Pollack and Shargel have more extensive overall legal experience than Freedman, but their energy litigation experience is comparable to Freedman. We will, therefore, compensate them at the same level as Freedman.

TURN also requests compensation for its expert witnesses, William Marcus, Gayatri Schilberg, and Jeff Nahigian of JBS Energy, Inc. at rates of $160, $115, and $100, respectively. These hourly rates reflect modest increases from our previously approved rates for 1999, and will be approved.

As modified, TURN's overall request is:

Attorney Fees—TURN Staff Counsel						
Robert Finkelstein	201.75	hours	X	$280	=	$56,490.00
	429.75	hours	X	$310	=	$133,222.50
	41.25	hours	X	$155	=	$6,393.75
Michel P. Florio	87.5	hours	X	$315	=	$27,562.50
	37.25	hours	X	$350	=	13,037.50
Matthew Freedman	104.25	hours	X	$180	=	$18,765.00
				Subtotal	=	$**255,471.25**
Attorney Fees—Outside Counsel						
Michael Strumwasser	104.1	hours	X	$315	=	$32,791.50
	352.7	hours	X	$350	=	$123,445.00
Fredric Woocher	5.9	hours	X	$315	=	$1,858.50
	3.8	hours	X	$350	=	$1,330.00
Harrison Pollak	87.3	hours	X	$180	=	$15,714.00
	368.7	hours	X	$190	=	$70,053.00
Johanna Shargel	2.0	hours	X	$190	=	$380.00
Expenses						$10,818.97
				Subtotal	=	$**256,390.97**
Expert Witness Fees and Expenses						
JBS ENERGY, INC.						
William Marcus	236.32	hours	X	$160	=	$37,811.20
Gayatri Schilberg	20.10	hours	X	$115	=	$2,311.50
Jeff Nahigian	45.25	hours	X	$100	=	$4,525.00
JBS Expenses						$482.92
				JBS Subtotal	=	$**45,130.62**
Other Costs						
Photocopying expense						$13,148.28
Postage costs						$1,902.11
Fax charges						$18.40
Federal Express/Delivery costs						$39.52
Attorney travel						$67.50
Consultant fee						$531.25
Phone costs						$292.61
Lexis charges						$343.19
				Subtotal	=	$16,342.86
TOTAL						$**573,335.70**

4.4 Other Costs

TURN requests $16,342.86 for other costs (e.g., photocopying, postage, fax, delivery fees, legal research). These costs have been itemized by date, amount, and activity. Based on the scope of TURN's work, documents needed, the number of phases of the proceeding, and the size of the service list (238), these costs appear reasonable.

5. Award

We award TURN $573,335.70. Our calculation is based on the hourly rates described above.

We will assess responsibility for payment equally among PG&E and Edison. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing August 11, 2001 (the 75th day after TURN filed its compensation request) and continuing until each utility makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission Staff may audit TURN's records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

6. Comments on Draft Decision

Comments and reply comments on the draft decision were filed by TURN and SCE.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.01-01-018, D.01-03-029, D.01-03-081, D.01-03-082, D.01-04-005, and D.01-05-064 in this proceeding.

2. TURN has made a showing of significant financial hardship by reference to a previous determination.

3. TURN contributed substantially to D.01-01-018, D.01-03-029, D.01-03-081, D.01-03-082, D.01-04-005, and D.01-05-064.

4. TURN has requested hourly rates for attorneys, as modified above, and experts are no greater than the market rates for individuals with comparable training and experience.

5. The miscellaneous costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of Sections 1801-1812, which govern awards of intervenor compensation.

2. TURN should be awarded $573,335.70 for its substantial contribution to D.01-01-018, D.01-03-029, D.01-03-081, D.01-03-082, D.01-04-005, and D.01-05-064.

3. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded $573,335.70 in compensation for its substantial contribution to Decision (D.) 01-01-018, D.01-03-029, D.01-03-081, D.01-03-082, D.01-04-005, and D.01-05-064.

2. Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (Edison) shall each pay TURN $286,667.85, within 30 days of the effective date of this order. PG&E and Edison shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in

Federal Reserve Statistical Release G.13, with interest, beginning July 16, 2001 and continuing until full payment is made.

This order is effective today.

Dated June 27, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

Commissioner Henry M. Duque, dissenting:

I must respectfully dissent from the majority decision. There should be two straightforward questions answered in the majority decision. The first question is whether intervenor compensation may be awarded for participation in outside proceedings, such as the state or federal courts. I agree with the majority decision that the answer to the first question is "yes." The statute defines compensation to include the costs for "obtaining judicial review" of a Commission decision. As pointed out by TURN, judicial review must necessarily come from entity other than the Commission.

The difference between my dissent and the majority decision should then come down to a second question – Did TURN incur its costs to obtain judicial review of a Commission decision? I believe that the that the answer to this second question is "no." TURN did not file either lawsuit or otherwise petition for judicial review. Rather, TURN intervened as a defendant and actively sought dismissals of the lawsuits. A defendant who intervenes on the side of the Commission is seeking to prevent, not to obtain, judicial review.

Moreover, the federal district court proceedings did not involve direct review of a Commission decision. Edison's federal lawsuit did not challenge the Commission's authority to rule on the TURN accounting proposal. Edison did not ask the federal court to enjoin Commission proceedings relating to the TURN accounting proposal. TURN's worked involved an attempt to obtain a dismissal based on various jurisdictional theories in addition to discovery and other motion work unrelated to the TURN accounting proposal.

It is not so much a different answer to the second question but the failure to answer which I find troubling about the majority decision. A fair argument was made by TURN that it indirectly sought review of past Commission decisions and was therefore entitled to compensation. For reasons unknown, TURN's argument is not adopted in the majority decision

The majority decision instead employs a tortured and indefensible legal analysis to reach the desired outcome. The majority decision makes up a definition for the term "hearing" in the statute. "Hearing" is defined to include federal court hearings. This would appear reasonable except for the other statutory language requiring that we adopt an order or decision in the hearing for which compensation is sought. (Pub. Util. Code § 1803(a)) Obviously, the Commission does not adopt its orders or decisions in federal court lawsuits. Hearing in this statutory context can only mean hearings before the Commission. The majority decision goes on to rely on an entirely different attorney fee statute, a statute inapplicable to utility proceedings, to fashion new guidelines for awarding compensation.

Yet the Commission does not have authority to expand, beyond the limitations of Section 1801, et seq., the proceedings or participation for which intervenor compensation can be awarded. In Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, the California Supreme Court held that "the commission lacked both equitable and regulatory power under the existing statutory scheme to award such fees in quasi-legislative proceedings. Any such authority, CLAM ruled, must come expressly from the Legislature. . .Section 701 implies no regulatory authority to award fees and participation costs. If any doubt remained on that score, the Legislature, by adopting explicit, limited fee rules for the period beginning January 1, 1985, has foreclosed the notion that an additional implied authority also exists." (Southern Cal. Gas Co. v. Public Utilities Com. (1985) 38 Cal.3d 64,66,68.)

Finally, the majority decision makes no mention of the following decisions denying compensation for federal court proceedings. Most recently, in D.99-04-052, the Commission denied a request for compensation for the failure to comply with the notice requirements of Section 1804(a). The Commission went on to address the compensation requested for a federal writ of review:

> "The federal lawsuit did not directly challenge a decision in this proceeding. Accordingly, work on the lawsuit does not qualify for compensation, consistent with our policy expressed in Decision No. 98-12-048 and Decision No. 97-05-040." (D.99-04-052, *mimeo*, p. 4.)

The Commission similarly denied compensation for participation in Federal Energy Regulatory Commission (FERC) proceedings. In the electric industry restructuring docket, R.94-04-031 and I.94-04-032, TURN requested compensation for its participation in matters relating to the development of the Independent System Operator and The Power Exchange. (D.98-10-030, *mimeo*, pp. 18, 23.) TURN acknowledged that "direct participation in a FERC proceeding is not compensable under California's intervenor compensation statutes." (TURN Request for Compensation in R.94-04-031, July 7, 1997, p. 11.) The Commission agreed that such participation involved proceedings clearly beyond the limitations of Section 1802(f):

> "We will not compensate TURN for the preparation of FERC intervention, for that activity is not compensable under the statute. (See § 1802(f) and (h))" (D.98-10-030, *mimeo*, p. 23.)

The Commission repeated this policy in D.97-06-062. The Commission stated:

> "[C]ustomer advocates cannot qualify, under existing California statutes (PU Code § 1801 et seq.), for intervenor compensation following their successful participation in federal proceedings even though their efforts may benefit California customers."
> (D.97-06-062, *mimeo*, p. 2.)

And finally, in D.98-11-014, TURN even voluntarily omitted attorney hours and costs associated with its participation in federal court cases. TURN originally sought compensation for its contributions to the PG&E Gas Accord Settlement and for intervention in a federal lawsuit. In the federal lawsuit, PG&E challenged the Commission's authority to disallow recovery of purchase costs for natural gas. Parties objected to compensation for the federal proceedings for the reason that no contribution was made to a Commission decision. TURN later omitted the requested compensation because it claimed no contribution to a Commission decision for those hours. This resulted in an approximately $20,000 reduction to its intervenor compensation request. (D.98-11-014, *mimeo*, p. 11.)

I have not been cited any Commission decisions awarding compensation for participation in federal court proceedings. While we have awarded compensation for comments filed at the Commission which led to the Commission making its own FERC filings, that is clearly distinguishable. The compensated participation occurred in a Commission proceeding and not at the FERC. There is no dispute that the statute allows compensation for participation in Commission proceedings.

For all of these reasons, I must dissent from the majority decision.

/s/ HENRY M. DUQUE
Commissioner

June 27, 2002

San Francisco, California