

Decision 84 05 015

MAY 2 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and
Electric Company for authority
to adjust its electric rates
effective August 1, 1983.

Application 83-04-19
(Filed April 7, 1983)

(See Decision 83-08-057 for appearances.)

INTERIM ORDER ON REQUEST FOR AWARD OF COMPENSATION

By a petition filed September 16, 1983, Toward Utility Rate Normalization (TURN) requests an award of compensation and fees for its participation in this proceeding. The request is made under Rule 76.26 of our Rules of Practice and Procedure.¹ Pacific Gas and

¹ The relevant portions of Rule 76.26 are as follows:

" . . . Such a request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. This breakdown of services and expenses shall be related to specific issues. The request shall also describe how the participant has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of an issue. In order to be eligible for compensation, a participant must raise a different issue, present or elicit new or different evidence, raise new or different arguments in support of a position or take a different position from that of the staff and any other party.

"In proceedings where some or all of the relief sought by a participant is obtained without a Commission order or decision the participant may be entitled to compensation by clearly establishing a causal relationship between its participation and such relief.

(CONTINUED)

Electric Company (PG&E) filed a protest to TURN's request on October 14, 1983. PG&E argues that TURN has not made the contribution it claims, and has not itemized costs by issues. PG&E also opposes TURN's request for a multiplier.

¹ (FOOTNOTE CONTINUED)

"Such contribution' shall be that contribution which, in the judgment of the Commission, greatly assists the Commission to promote a public purpose in a matter relating to an issue by the adoption, at least in part, of the participant's position. A showing of substantial contribution shall include, but need not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the participant. A showing should also include an analysis of other factors which may affect the appropriate amount of the award. These factors include, but are not necessarily limited, to the following:

1. Time and labor expended in the participation.
2. The novelty and difficulty of the issues presented.
3. The skill required to participate effectively.
4. The preclusion of other employment due to participation in this matter.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time constraints imposed by the proceeding.
8. The amount involved and the results obtained.
9. The experience, reputation, and ability of the participants.
10. Awards in similar cases."

No other party responded to TURN's petition.

Procedural Issue

TURN acknowledges that our rules under which it filed its request are on appeal before the California Supreme Court (S. F. Nos. 24603, 24605, and 24606). In the appeal, the adoption of our rules is challenged as beyond our jurisdiction. TURN states that it does not expect any compensation to be paid before the Court's review is completed. TURN urges, however, that the issue of substantial contribution be addressed while the record is still fresh. Any award of compensation would be stayed pending the Court's action.

PG&E believes it would be more efficient to defer TURN's request until the Court has acted on the appeal.

This order will determine what award should be made under our rules. Our order however will be stayed pending the outcome of the Court's decision.

Requested Award

The award requested by TURN in its petition is as follows:

M. Florio - Attorney Fees	
182.5 hours x \$100	\$18,250.00
Multiplier of 1.5	27,375.00
<u>Other Reasonable Costs</u>	
Copying Costs	253.67
Postage Costs	38.92
Attorney Expenses	34.75
Total	<u>\$27,702.34</u>

This is the first Commission proceeding in which TURN has requested that a multiplier be applied in determining the amount of compensation to be awarded. TURN stresses that it does not intend to seek such enhanced relief on a routine basis, since it believes that such an extraordinary award should be limited to exceptional circumstances. TURN submits that this proceeding presents such exceptional circumstances. PG&E argues against the enhanced award in this case. For reasons discussed subsequently in this decision we will decline to apply a multiplier in this proceeding.

Substantial Contribution

TURN's petition alleges that its participation substantially contributed to the adoption, in whole or in part, of positions on several issues. These included: (1) the need for a second update of the application to include the April 1983 snow survey; (2) recognition of above-normal hydro carryover into 1984; (3) reflection of above-normal purchases of Pacific Northwest energy in the staff's estimate; (4) certain items regarding the Chevron oil contract; (5) the ratemaking treatment of fuel oil sales losses; and (6) the need for further review of the operations of Geysers Unit #15.

The objective of our rules awarding compensation in utility rate proceedings is to encourage the widest possible participation by the public, in particular those organizations which would not have the necessary finances to effectively participate absent an award. We will now review TURN's request in light of this objective. ✓

The April Forecast Update

TURN asserts that PG&E's revision of the forecast year hydro availability to include the April 1983 snow survey was TURN's greatest single contribution to the proceeding in terms of dollars. TURN asserts that its cross-examination of PG&E's witness Pretto established the factual foundation regarding the need and potential availability for the update. TURN, based on this cross-examination, requested PG&E be ordered to provide a further revision of its forecast, which PG&E initially opposed based on the ECAC procedures established in our D.82-09-02. Before a ruling could be made PG&E indicated that it would provide the update. The update showed that more hydro power was available than originally forecast. The hydro power replaced more expensive fossil fuel generation in the forecast, resulting in reduction of \$94 million in the forecast-period revenue requirement.

TURN argued that absent its effective cross-examination and persuasive argument, there is no reason to believe the second update would have been offered. PG&E argued that the demand for a second update to include the results of the April snow survey was vigorously and tenaciously pursued by staff and other intervenors as early as the prehearing conference in this matter, even though then the applicable rules did not allow such an update, and the witness presenting the staff forecast offered to perform a similar update for his showing. In addition to TURN, staff counsel and counsel for the California Manufacturers Association (CMA) argued for the second update. PG&E states that, as the issue of the second update was initially and repeatedly raised by staff and pursued by other parties, TURN cannot claim to be the sole developer of that issue.

We must concur with PG&E that TURN did not originate the issue of the April snow report update, but we believe that TURN's persistence was an important element in the ultimate disposition of

that issue.² Although TURN did not originate the issue, nor was it the only party to pursue the issue, TURN made a substantial contribution and it should receive fees.

Above-Normal Hydro Carryover

TURN stated in its petition that the matter of above-normal hydro carryover into 1984 "was truly TURN's issue in this case", as no other party mentioned the topic in prepared testimony and the issue was first raised in TURN's cross-examination of PG&E witness. After PG&E admitted a hydro carryover and the amount was quantified, the staff was directed by the Administrative Law Judge (ALJ) to include such data in its exhibit. TURN argued for the full carryover, but the decision adopted a compromise figure.

TURN argued that there is nothing whatsoever to suggest that this matter would have arisen without TURN's participation. TURN stated that 322 gigawatt hours (gwh) of additional hydro generation adopted in the decision replaced 3480 thousand decatherms (Mdth) of gas, which equates to a reduction on the test year revenue requirement of \$18.6 million.

PG&E agrees that TURN was the primary party to raise and develop this issue. TURN has made a substantial contribution on this issue.

² It should be noted here that, based on a petition filed on July 21, 1983 by PG&E, the rules governing ECAC and AER proceedings adopted in D.83-02-076 in OII 82-09-02 were modified by D.83-11-019 dated November 2, 1983 to specifically allow for the receipt of updated information based on PG&E's April 1 snow survey and the effect of recent decisions in AER proceedings. Staff and TURN supported PG&E's request. (Conclusions of Law 14 and 16.)

Northwest Power Purchase Adjustment

The estimate of purchases of Pacific Northwest power adopted in D.83-08-057 was 1652 gwh greater than PG&E's estimate. This resulted from changes in the staff estimate suggested by TURN, and adopted by the staff. The adjustment resulted in a reduction in the test year revenue requirement of \$53.7 million.

PG&E admits that TURN was the primary party to raise and develop the issue. TURN has made a substantial contribution on this issue.

Chevron Issues

TURN raised on its brief the issue of whether PG&E should be guaranteed in ECAC a 100% allowance for the facility charge contained in PG&E's contract with Chevron for purchase of fuel oil. This contract was in dispute in a prior proceeding, and any facility charge actually assessed under the contract is to have balancing account treatment until the Chevron contract issues in dispute are finally decided. TURN proposed that D.83-08-057 should contain a statement that no guarantee of full recovery should be implied because of the interim balancing account treatment of the facility charge pending civil court resolution of the Chevron dispute. TURN states that its proposal was adopted in Conclusion of Law 6 of D.83-08-057.

PG&E argued that this was a moot issue, as our staff had made it clear on the record that pending resolution of the Chevron dispute, ECAC treatment of the facility charge would be contingent upon the reasonableness review. PG&E also cites the prior D.82-12-109, which states that the charge would be subject to further review in a future case. PG&E argued that TURN made no substantial contribution on this issue in this proceeding. We concur.

TURN further stated that it presented other facts regarding the Chevron contract that were developed in the course of the proceeding. TURN's opening brief contained a recommendation that PG&E be required to include certain language in any subsequent agreement with Chevron. TURN states that at pages 17 to 19 of the decision, the Commission considered TURN's argument and stated that ". . . we will adopt TURN's proposal. . .". In its Petition for Modification, TURN has sought clarification of the extent to which that proposal was in fact adopted. Depending upon the resolution of that question, TURN states that it has made a more or less substantial contribution on this issue. PG&E argued that issue is moot, and no substantial contribution was made.

In Decision (D.) 83-11-063 (November 22, 1983) we clarified D.83-08-057 by indicating we had not adopted TURN's proposal, but acknowledged that TURN's efforts may prove to be valuable to the ultimate resolution of the problem.

After the close of the hearing, Chevron filed a complaint for injunctive and declaratory relief, which is now pending in the United States District Court for the Northern District of California. The issues before this Commission resulting from the Chevron contract cannot be decided until the federal court action becomes final. Therefore, any resolution of the broader substantial contribution issue is premature at this point.

Fuel Oil Sales Losses

TURN stated that it was the only party that devoted significant attention to the reasonableness of the costs of certain losses which PG&E incurred in selling excess fuel oil. TURN stated that CMA also discussed the matter, but from a totally different perspective. TURN argued that while its analysis was stated in the traditional terminology of "prudence," TURN's basic point was that

ratepayers should not be required to bear these costs as recorded in the balancing account.

TURN stated that D.83-08-057 addressed this matter in great detail (pp. 10-16), and while the Commission viewed the oil sales in a somewhat different light than TURN had suggested, it reached the same fundamental conclusion regarding cost recovery:

"...it would also be unreasonable and at odds with D.82-12-109 if ratepayer exposure to the cost of excessive oil purchases by PG&E were increased merely because PG&E made cost-saving sales of its holdings. This is precisely the problem that TURN raises." (P. 13.)

TURN argued that it prevailed in major part on this issue. TURN stated that it was not its objective to brand PG&E as "imprudent," but rather to assure that ratepayers not be forced to bear unjustified costs. TURN argued that while no specific dollar amount was disallowed from the balancing account, the Commission expressed "the present intent of denying rate recovery on some portion of oil sales losses..." (P. 16), and that Finding of Fact 5 adopted the essence of TURN's argument:

"It is not reasonable for cost recovery from ratepayers on fuel oil sale losses during the review period to be higher than what ratepayer costs would have been if the oil had been held, using the carrying cost rates adopted in D.82-12-109." (P. 46.)

TURN asserts that it alone brought this issue to the Commission's attention, and that it demonstrated that PG&E's proposed cost recovery was unreasonable. TURN argued that the fact that no specific dollar amount has yet been identified does not negate that contribution, and that it would be unfair to deny TURN compensation solely because the Commission's consideration of this issue is as yet incomplete. TURN argued that it made a substantial contribution to the adoption of Finding 5 in this proceeding.

PG&E's reply stated as follows: TURN has argued that oil sale losses should be disallowed. TURN's argument was based on the theory that the decision to hold or sell oil should have been made using the Energy Cost Balance Account (ECBA) interest rate since that was the cost allowed in D.82-12-109 (see D.83-08-057, pp. 10-11). On that basis, TURN asserted that the oil sale loss was improperly incurred and should be disallowed. (TURN's Opening Brief, pp. 34-41.) The Commission, however, rejected the economic analysis based on ECBA interest rates which TURN had supported. D.83-08-057 explicitly found that PG&E made the right economic choice in selling fuel oil (pp. 11-12 and Finding of Fact 4, p. 46). The decision plainly stated that the "economically efficient choice between such alternatives [carrying the oil versus selling it] can only be arrived at if the continued carrying option is evaluated at its higher real cost, the corporate cost of capital." (Id. 13) Hence the Commission rejected TURN's proposal to use the ECBA rate to judge the prudence of the sales and TURN cannot claim to have contributed to the Commission's position on the correct economic analysis.

PG&E argued that TURN dismissed this significant difference by characterizing the Commission as viewing oil sales "in a somewhat different light" than TURN. TURN then tries to take credit for reaching what it deems the same conclusion as the Commission, that ratepayers should not bear increased costs because of the sale. TURN, however, advocated complete disallowance of oil sale losses and would not provide for any recovery of oil sale losses as the Commission did in its "formula." Furthermore, PG&E argued that the Commission relied on an analysis that was analogous to PG&E's methodology in developing the formula for determining allowable and unallowable oil sale losses (D.83-08-057, P. 15). PG&E argued that we did not adopt a methodology advanced by TURN; therefore, TURN's

claim for fees on the oil sale loss issue exaggerates the extent to which TURN's ideas are reflected in the Commission's decision.

The award should include only the amount of fees that is reasonable in relationship to the results obtained. On that basis, 50 percent of the fees sought (before the multiplier) should be awarded.

Geyser's Unit No. 15

TURN claims credit for the fact that Geysers Unit No. 15 was kept open for further analysis in the next reasonableness case. TURN, however, was not the only party to express reservation about Geysers Unit 15. In its reasonableness report, our staff stated that additional information was needed on Geysers' operations and indicated that the issue could not be considered closed. (Ex. 9, pp. 3-5.) Moreover, D.82-12-109 raised the Geysers issues and expressly stated that the Geysers' operations should be reviewed in the next reasonableness case. As this issue, like that of the Chevron contract, was not decided in D.83-08-057, no award is appropriate.

Multiplier

As noted in the introductory portions of this decision, TURN has requested that a multiplier be applied in determining the amount of compensation to be awarded as a result of its participation in this proceeding. In this instance the multiplier, if fully applied, would result in a fifty percent enhancement of TURN's requested award. TURN correctly states that the Commission's OII 100 decision clearly contemplated that adjustments to the usual hourly fee might be appropriate in certain circumstances (D.83-04-017, mimeo pp. 40-42), and that the Commission also noted that the "Lodestar"

method had been approved by the California Supreme Court in Serrano v Priest (1977) 20 Cal 3d 25. TURN indicates that it is essentially requesting application of the "Lodestar" method in this case. TURN then addresses the ten special factors in Rule 76.26 in justifying its request.

TURN argues that its participation, when considered in light of the Rule 76.26 factors, results in an overall positive rating of five, thus justifying a multiplier of 1.5. This analysis is based on TURN's assertion that its participation should be rated positively on the following factors:

1. TURN's attorney made exceptionally efficient use of time to target significant issues (Factor 1);
2. This proceeding placed increased importance on forecast issues, due to the increased AER percentage, and TURN alone raised the crucial issue of hydro carryover (Factor 2);
3. A high level of specialized skills was required for participation in this proceeding, as evidenced by the fact that only four parties actively participated (Factor 3);
4. TURN's participation was extremely risky since it had retained no expert witness and thus relied only on cross-examination and briefs to make its points (Factor 6);
5. TURN's participation was key to a reduction of \$170 million from the amount requested by PG&E (Factor 8); and
6. Given the experience, reputation, and ability of the other participants in the proceeding, TURN performed exceptionally well (Factor 9).

PG&E disputes each and every point listed above, arguing that TURN's contributions were not unusual, that TURN overstated the

complexity of the issues, and that TURN had the advantage (unavailable to PG&E and staff) of being able to target important issues selectively.

In prior portions of this decision we have reviewed TURN's contributions to the results adopted in D.83-08-057 and we determine in this decision the number of hours reasonably expended by it in making those contributions. We have also noted that in prior comparable decisions this Commission has determined the amount of \$100 per hour for attorneys' fees to be reasonable (D.84-03-007 in A.82-12-57). Clearly TURN achieved excellent results, especially in focusing on the hydro carryover issue. We believe our award fully recognizes this contribution and that an enhanced award is not justified in this instance. Based on our analysis of TURN's valuable participation in developing the issues in question, we believe that in this case a multiplier is not required to provide reasonable compensation to TURN. Thus we will not award the requested multiplier. ✓

Compensation To Be Awarded

Attached to TURN's request for compensation are detailed summarizations of the hours spent by TURN's attorney, Michael Florio, in the preparation for and participation in this proceeding. Those hours are not segregated according to issues. Of the total of 182.5 hours, 87 are devoted to hearing and prehearing work. The balance of 95.5 hours are devoted to preparation of TURN's brief and its Petition For Modification. As TURN presented no witness, its

position in full was made known to the Commission and the parties only in its brief.

As indicated above, we found that 50% of the fees sought on the fuel oil sales issue should be awarded, and that no award should be made for the Chevron and the Geysers Unit 15 issues. Based on the material in the brief, it appears that about 30% of the attorney's time was spent on the fuel oil sales issue, about 10% on the Chevron issue, and about 5% on the Geysers Unit 15 issue. Therefore, 50% of the hours spent on the fuel oil sales issue, and all of the hours spent on the Chevron and Geysers Unit 15 issues should be excluded from the award. The amount of \$100 per hour for attorney fees has been found reasonable and used in recent awards (see D.84-03-007 dated March 7, 1984, in A.82-12-57, San Diego Gas & Electric, award to Welfare Rights Organization).

The calculation of the reasonable award based on the foregoing is as follows:

<u>Calculation of Hours</u>	
<u>Total Hours</u>	182.5
<u>Less:</u>	
Fuel Oil Sales Issues (50% of 30%)	27.375
Chevron Issue (10%)	18.25
Geysers Unit 15 Issue	<u>9.125</u>
	54.75
<u>Hours Subject to Award</u>	127.75
<u>Calculation of Award</u>	
127.75 hours at \$100 per hour	\$12,775.00
Other Reasonable Costs	<u>327.00</u>
Total	\$13,102.00

Findings of Fact

1. Under Rule 76.26 of our Rules of Practice and Procedure, TURN seeks an award of compensation and fees in the amount of \$27,702.34.

2. D.83-08-057 in this proceeding found TURN eligible for compensation under Rule 76.26.

3. TURN has not separated by issues its summarization of attorney's time spent in this proceeding.

4. We have determined in the preceding opinion those issues to which TURN made a substantial contribution and an award is appropriate under our Rule 76.26, and those issues to which no award should be accorded.

5. Of the total 182.5 hours of attorney's time claimed by TURN, 127.75 hours should be subject to an award as calculated in the preceding opinion.

6. \$100 per hour is reasonable compensation for the time of TURN's attorney.

7. The issues developed by TURN were neither so complex or unusual to justify the award a multiplier as an enhancement to the compensation found reasonable under Rule 76.26.

8. An award of compensation to TURN in the amount of \$13,102 will be reasonable.

Conclusions of Law

1. TURN has complied with the requirements of Article 18.6 of our Rules of Practice and Procedure and TURN should be awarded compensation.

2. As the issue of our authority to make awards under Article 18.6 is before the California Supreme Court, we will stay this order pending the outcome of the Court's decision on this issue. ✓

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall pay to Toward Utility Rate Normalization (TURN) \$13,102.

2. In PG&E's first general rate application following the payment of the award to TURN, PG&E shall include in its revenue requirement an additional amount of \$13,102, plus interest from the date of payment of the award to the date of filing of its application.

3. This order is stayed pending further order of the Commission.

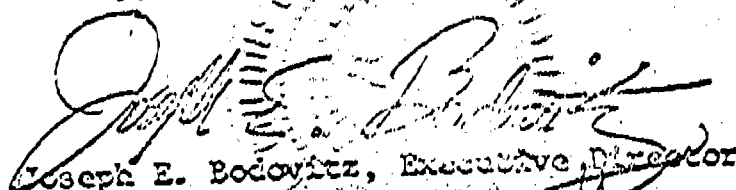
This order is effective today.

Dated May 2, 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director

claim for fees on the oil sale loss issue exaggerates the extent to which TURN's ideas are reflected in the Commission's decision.

In Hensley the Court found that in the circumstances described under this heading, that is, where only limited success was achieved, the award should include only the amount fees that is reasonable in relationship to the results obtained. On that basis, 50 percent of the fees sought (before the multiplier) should be awarded.

Geyser's Unit No. 15

TURN claims credit for the fact that Geysers Unit No. 15 was kept open for further analysis in the next reasonableness case. TURN, however, was not the only party to express reservation about Geysers Unit 15. In its reasonableness report, our staff stated that additional information was needed on Geysers' operations and indicated that the issue could not be considered closed. (Ex. 9, pp. 3-5.) Moreover, D.82-12-109 raised the Geysers issues and expressly stated that the Geysers' operations should be reviewed in the next reasonableness case. As this issue, like that of the Chevron contract, was not decided in D.83-08-057, no award is appropriate.

Multiplier

As noted in the introductory portions of this decision, TURN has requested that a multiplier be applied in determining the amount of compensation to be awarded as a result of its participation in this proceeding. In this instance the multiplier, if fully applied, would result in a fifty percent enhancement of TURN's requested award. TURN correctly states that the Commission's OII 100 decision clearly contemplated that adjustments to the usual hourly fee might be appropriate in certain circumstances (D.83-04-017, mimeo pp. 40-42), and that the Commission also noted that the "Lodestar"

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1. Under Rule 76.26 of our Rules of Practice and Procedure, TURN seeks an award of compensation and fees in the amount of \$27,702.34.

2. D.83-08-057 in this proceeding found TURN eligible for compensation under Rule 76.26.

3. TURN has not separated by issues its summarization of attorney's time spent in this proceeding.

4. We have determined in the preceeding opinion those issues to which TURN made a substantial contribution and an award is appropriate under our Rule 76.26, and those issues to which no award should be accorded.

5. Of the total 182.5 hours of attorney's time claimed by TURN, 127.75 hours should be subject to an award as calculated in the preceding opinion.

6. \$100 per hour is reasonable compensation for the time of TURN's attorney.

7. The issues developed by TURN were neither so complex or unusual to justify the award a multiplier as an enhancement to the compensation found reasonable under Rule 76.26.

8. An award of compensation to TURN in the amount of \$13,102 will be reasonable.

Conclusions of Law

1. TURN has complied with the requirements of Article 18.6 of our Rules of Practice and Procedure and TURN should be awarded compensation.

2. As the issue^{of} our authority to make awards under Article 18.6 is before the California Supreme Court, we will stay this order pending the outcome of the Court's decision on this issue. 102

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall pay to Toward Utility Rate Normalization (TURN) \$13,102.

2. In PG&E's first general rate application following the payment of the award to TURN, PG&E shall include in its revenue requirement an additional amount of \$13,102, plus interest from the date of payment of the award to the date of filing of its application.

3. This order is stayed pending further order of the Commission. This order is effective on date of signature.

Dated MAY 2 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners