

Decision 89 07 046

JUL 19 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**ORIGINAL**

Application of PACIFIC GAS AND ELECTRIC COMPANY for Commission order finding that PG&E's gas and electric operations during the reasonableness review period from February 1, 1987 to January 31, 1988, were prudent.

Application 88-04-020  
(Filed April 7, 1988)

Application of PACIFIC GAS AND ELECTRIC COMPANY for authority to adjust its electric rates effective August 1, 1988.

Application 88-04-057  
(Filed April 21, 1988)

OPINION ON TURN'S REQUEST FOR COMPENSATION

Summary

Toward Utility Rate Normalization (TURN) requests compensation of \$23,616.87 for its contribution to Decision (D.) 88-11-052, D.88-12-040, and D.88-12-100, which addressed the forecast phase of the Energy Cost Adjustment Clause (ECAC) proceeding for Pacific Gas and Electric Company (PG&E). We find that TURN made a substantial contribution to these decisions, and we award compensation of \$19,119.87.

Introduction

On February 24, 1989, in D.89-02-057, we found TURN eligible for compensation for any substantial contributions it makes to decisions in this proceeding. On March 27, 1989, TURN filed its request for compensation of \$23,616.87 for its contributions to D.88-11-052, D.88-12-040, and D.88-12-100.

Rule 76.56 of the Commission's Rules of Practice and Procedure governs requests for compensation:

"Following issuance of a final order or decision by the Commission in the hearing or proceeding, a customer who has been found by the Commission...to be eligible for an award of

compensation may file within 30 days a request for an award. The request shall include, at a minimum, a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding...."

Rule 76.52(h) defines "final order or decision" to mean "an order or decision that resolves the issue(s) for which compensation is sought." Although none of the decisions that are the subject of TURN's request is designated as a final opinion, the decisions completed the forecast phase of this proceeding, and they resolved the issues for which TURN seeks compensation.

The 30-day deadline for filing the request for compensation under Rule 76.56 is ambiguous, but we have interpreted this rule to allow filings within 30 days of either the issuance of the final order or decision in the proceeding or the decision finding the customer eligible for compensation (D.86-01-034, D.86-01-035). In this case, TURN's request came more than 30 days after the issuance of the last of the decisions that are the subject of its request and more than 30 days after the date of the decision finding TURN eligible for compensation. For calculating the due dates of applications for rehearing, however, Rule 85 defines the date of issuance as "the date when the Commission mails the order or decision to the parties in the action or proceeding." A similar approach makes sense for the filing of requests for compensation. Since D.89-02-057, the decision finding TURN eligible for compensation was mailed on February 27, TURN's filing of March 27 was made within 30 days of the date of issuance of the decision on eligibility. Thus, the filing met the deadlines of Rule 76.56.

No other party responded to TURN's request.

Issue To Be Decided

Rule 76.58 requires the Commission not only to determine whether TURN made a substantial contribution to the decisions that

are the subject of its request, but also to describe that substantial contribution and to set the amount of the compensation to be awarded. According to Rule 76.52(g), an intervenor has made a "substantial contribution" when:

"...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 had adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer."

Thus, the threshold issue is whether the party made a substantial contribution to our decision and, if so, on what issues. If a party has made a substantial contribution on a certain issue, the elements that make up the award are the fee level, the number of compensable hours, and the degree of success.

The fee award may also be adjusted in a variety of ways. The fee level may be adjusted by the experience, reputation, and ability of the attorney; the skill required to perform the legal service properly; or the customary fee for comparable services. The number of compensable hours may be adjusted by the time and labor required to present the case, the efficiency of the presentation, the novelty and difficulty of the issue, or the duplication of effort involved in presenting the party's position. In considering the degree of the party's success, we consider the amount of money involved, the importance of the issue, and whether the party achieved partial or complete success on the issue.

We will consider these elements in evaluating TURN's claim.

Substantial Contribution

TURN asserts that it made a substantial contribution to the three decisions on eight issues related to the load forecast. We will comment on each of these issues separately.

First, TURN claims that it pointed out the effects of the recent drought on PG&E's sales to seven industrial customers who are partially served by the City and County of San Francisco (CCSF). We accepted TURN's evidence on this issue, and D.88-11-052 reflects TURN's recommended adjustment. We conclude that TURN made a substantial contribution on this issue.

TURN's second asserted contribution related to an adjustment of sales to the Modesto and Turlock Irrigation Districts. D.88-11-052 noted that TURN's method for estimating the amount of the increased sales was "rough," "presented problems," and was based on an assumption contradicted by TURN's testimony. Nevertheless, no party challenged TURN's assumptions, and we decided that the adjustment advocated by TURN was "roughly correct." We conclude, subject to the reservations expressed in the decision, that TURN made a substantial contribution on this issue.

Third, TURN testified during the hearings that a reduction of CCSF generation made in a revised forecast of hydroelectric generation should be matched by an increase in sales for resale. PG&E stipulated to TURN's proposed adjustment, and the adjustment was reflected in D.88-11-052. TURN made a substantial contribution to the decision on this issue.

Fourth, TURN's witness pointed out that PG&E's initial estimates of sales to agricultural customers were based on rates that were too high and that conflicted with PG&E's estimates of agricultural rates in other parts of the ECAC application. The rates underlying the agricultural sales forecast also exceeded expected rate changes from other proceedings. This error eventually affected the calculation of revenues at present rates, according to TURN.

Tracing this issue through the course of the proceeding is extremely complex, and TURN's ultimate contribution to the decision is difficult to evaluate. TURN's initial point seemed to

be that using the lower agricultural rates it believed were correct would result in increased sales to the agricultural class, because of the relatively high price elasticity in that class. PG&E accepted TURN's point and adjusted its forecast of agricultural sales slightly (Tr. 2:70-73). However, TURN's recommended adjustment was rejected in D.88-11-052. The agricultural sales figure adopted in D.88-11-052 was developed by the Commission's Division of Ratepayer Advocates (DRA). DRA's figure was based on modeling differences, rather than different assumptions from PG&E's about agricultural rates (Tr. 3:306, 310-312).

In its request, TURN states that its brief on resource assumptions pointed out that PG&E's position was inconsistent: either the price used in its forecast of agricultural sales was too high, or its forecast of agricultural revenues at present rates was too low. Correcting the forecast to increase agricultural revenues at present rates would reduce the revenue requirement and consequently the amount of any rate increase granted PG&E. TURN points out that both PG&E and DRA increased their estimates of agricultural revenues at present rates during the second phase of the hearings. TURN acknowledges that "some of this change was due to unrelated factors," but it claims that "the bulk of the revision was a direct result" of its pointing out the discrepancy between the rates used for the sales forecast and for calculation of revenues at present rates. TURN believes that it made a substantial contribution that was reflected in the revenues for present rates eventually adopted in the decisions.

TURN is correct that both PG&E and DRA increased their estimates of agricultural revenues at present rates over the course of this proceeding. However, there is no indication in the record that these adjustments were inspired by TURN's testimony. PG&E acknowledged that it made adjustments to reflect new agricultural time-of-use rates and refinements to its data on customer load shapes (Ex. 63, p. 5; Tr. 19:1978-1979). DRA's revised estimates

were based on PG&E's approach, with some corrections for apparent errors (Tr. 20:2146-2150). Neither explanation of the revisions mentioned the points raised by TURN. DRA's estimate of agricultural revenue at present rates was accepted by PG&E (Ex. 62, p. 1), and the figure adopted in D.88-12-100, App. B, is essentially the same as DRA's recommendation.

TURN has not demonstrated that its testimony affected the final estimate of agricultural revenues at present rates, and the record does not support TURN's claim of a direct link between its points and the revisions that were reflected in the adopted estimate. Thus, we cannot conclude, based on the information in the record, that TURN has made a substantial contribution on this issue.

TURN's fifth claim of substantial contribution concerned the forecast of economic activity used in developing the load forecast. TURN believes that it was instrumental in the Commission's decision to reject PG&E's proposal to give partial weight to what was referred to as a "pessimistic" economic scenario. TURN presented testimony on economic outlooks prepared by the Twelfth Federal Reserve District for the Western states and by Security Pacific National Bank for all of California. TURN used these sources to advocate upward adjustments to PG&E's recommended sales figures. Our decision to employ an unweighted optimistic scenario, however, was based on DRA's recommendations, rather than on information presented by TURN. Many of the specific sales figures we adopted in that decision were those recommended by DRA, not TURN's proposed adjustments, and DRA's figures were derived from PG&E's optimistic forecast of economic activity for its service area. TURN's sources considered activity in a larger geographic area, and TURN's recommended sales were higher than those we adopted. Although TURN's recommended forecasts went in the same direction as DRA's and TURN's "minimum" recommendation

echoed DRA's position, we cannot say that TURN has made a substantial contribution to our resolution of this issue.

Sixth, TURN pointed out that an increase in the forecasted loads of the Sacramento Municipal Utility District (SMUD), the result of a newer forecast from SMUD, was not reflected in purchased power estimates that are part of PG&E's transactions with SMUD. DRA's witness made the adjustment suggested by TURN (Ex. 14, p. 4-2) and acknowledged TURN's influence (Tr. 6:578). The updated estimate of SMUD's load was adopted in D.88-11-052. We agree that TURN made a substantial contribution on this issue.

TURN's seventh asserted contribution was its pointing out that its proposed adjustments to sales for resale, which were adopted, required a recalculation of the jurisdictional allocation percentage. D.88-12-040 adopted TURN's calculation, and we conclude that TURN has made a substantial contribution on this issue.

Finally, TURN points out that D.88-11-052 adopted its recommendation that PG&E should be required to report on the lower capacity payments PG&E makes to independent power producers when the contractual capacities of their projects are derated for failure to meet certain criteria. We agree that TURN has made a substantial contribution on this issue.

#### Compensation

TURN requests compensation for 89.75 hours of its attorney's time at the rate of \$160 per hour, 68.5 hours of its witness's time at \$100 per hour, 18.75 hours of its witness's associate's time at \$80 per hour, and other costs of \$906.87, for a total of \$23,616.87.

#### Compensable Hours

TURN was able to allocate the time spent in this case to broad categories, but it was unable to allocate its time among the issues just discussed. TURN has not sought compensation for the hours it devoted to the general areas of revenue allocation and

reasonableness. The issues it seeks compensation for all have to do with the load forecast. TURN was able to allocate its time between these load forecast issues and common or unallocable hours. As our preceding discussion has indicated, however, it is necessary to find some method of adjusting TURN's requested hours to reflect the degree of its substantial contribution on load forecast issues.

From our review of TURN's filing and the record in this case, and in light of TURN's inability to allocate its hours more finely, we believe that it is fair to assume that the eight issues TURN seeks compensation required equal amounts of time. Thus, we will reduce the hours TURN claimed for load forecast issues and for briefing by one-fourth, to reflect our conclusion that TURN did not make a substantial contribution to our decision to adopt the unweighted optimistic forecast of economic activity or to the adopted estimate of agricultural revenues at present rates.

According to TURN's filing, a total of 50.5 hours of its attorney's time were devoted to load forecast issues. We will allow recovery for 3/4 of the total, or 37.9 hours.

An additional 7.75 hours were devoted to briefing. We will permit recovery for 5.8 hours.

A similar adjustment must be made to the time claimed by TURN's expert witness and his associate. The witness claims 33.75 hours for preparation of the testimony and briefs that address these issues, and his associate claims 18.75 hours. We will allow recovery of 23.3 hours and 14.1 hours, respectively, for this portion of the expert witness's time.

We agree with TURN that it should receive full compensation for its common time, because most of its time was spent on these load forecast issues and it achieved considerable success for its efforts. The attorney's common or unallocable time amounted to 31.5 hours, and the expert witness's came to 34.75 hours.



Thus, we will allow recovery for 75.2 hours of the 89.75 hours claimed by TURN's attorney, 58.05 hours of the 68.5 hours claimed by the expert witness, and 14.1 hours of the 18.75 hours claimed by the witness's associate.

Hourly Fee

Rule 76.60 sets the bounds for the calculation of compensation:

"[The calculation] shall take into consideration the compensation paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the market value of services paid by the Commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services."

TURN requests an hourly fee of \$160 for the time of its attorney. In D.86-12-053, we approved an hourly rate of \$150 for Mr. Florio's time. The \$10 per hour increase it requests, TURN states, "is intended only to capture the effects of inflation, and does not represent a request for full reevaluation of Mr. Florio's base rate at this time." TURN presents supporting material to show the increase in the Consumer Price Index (CPI) since we established the base hourly rate for Mr. Florio, the increase in the national average CPI for all urban consumers, and the increase in the CPI for the San Francisco Bay Area. TURN concludes, "Clearly TURN's requested increase of \$10 per hour represents nothing more than an 'indexing' change to reflect inflation."

TURN appears to be proposing a new way to allow for increases to hourly rates without requiring the Commission to perform a complete evaluation of the relevant market for legal services. However, the rules on intervenor compensation and the underlying statutes do not appear to permit this sort of indexing for inflation. The standard for compensation is primarily "the compensation paid to persons of comparable training and experience

who offer similar services" and is limited by the market value paid by the Commission or the utility for comparable services (Rule 76.60; Public Utilities (PU) Code § 1806). The inflation measures that TURN has presented are relevant only if TURN can demonstrate that the fees paid for similar services to persons of comparable experience and training have escalated at the same rate as the package of goods and services that make up the various CPIs. The specific fees paid for comparable services are subject to the pressures of a competitive market and may increase at a greater or lesser rate than general inflation, but only the changes in the fees for these services are relevant to our consideration.

For these reasons, the sort of indexing that TURN proposes is inappropriate. Although TURN presented information on the fees of large Bay Area law firms as part of its request, the request did not purport to make the showing required by the rules.

We note that in D.89-03-018, which approved a settlement of TURN's compensation for its contribution to several natural gas cases, we authorized an hourly fee of \$160 for Mr. Florio. However, we limited this rate to that "specific proceeding," and we further stated, "For the future, however, we will expect to see any increases in hourly rates fully supported. An uncontested settlement gives us no basis for finding an increase reasonable." (Mimeo. p. 34.)

We will therefore base our award on the currently authorized rate for Mr. Florio of \$150. TURN may supplement its request if it wishes to seek to establish a higher rate for his services, based on the compensation paid to persons of comparable training and experience who offer similar services.

Compensation for TURN's expert witness is apparently based on the fees charged to TURN, and in any event are at rates that we have authorized for this witness in the past. The hourly fees of \$100 for Mr. Marcus and of \$80 for his associate are reasonable.

Other Reasonable Costs

TURN also seeks recovery for other reasonable costs totaling \$906.87. These costs are broken down into several categories. The amount of these expenses seems reasonable when viewed both as individual categories and in total, and they do not exceed 25% of the advocate's and expert witness's fees (Rule 76-52(c)). We will authorize recovery of the claimed expenses.

Conclusion

TURN is entitled to compensation of \$19,119.87.

As discussed in previous Commission decisions, this order will provide for interest commencing on June 10, 1989 (the 75th day after TURN filed its request) and continuing until full payment of the award is made.

TURN is placed on notice it may be subject to audit or review by the Commission Advisory and Compliance Division. Therefore, adequate accounting records and other necessary documentation must be maintained and retained by the organization in support of all claims for intervenor compensation. Such record-keeping systems should identify specific issues for which compensation is being requested, the actual time spent by each employee, the hourly rate paid, fees paid to consultants, and any other costs for which compensation may be claimed.

Findings of Fact

1. TURN has requested compensation totaling \$23,616.87 for its participation in the forecast phase of this proceeding.
2. TURN was found eligible for compensation in D.89-02-057.
3. TURN made significant contributions to D.88-11-052, D.88-12-040, and D.88-12-100 on six issues relating to the load forecast.
4. TURN did not make a significant contribution on the issue of the economic forecast underlying the load forecast or on the calculation of agricultural revenues at present rates.

5. An hourly rate of \$150 is a reasonable fee for Mr. Florio, and hourly rates of \$100 and \$80 are reasonable fees for TURN's witness and his associate.

6. After adjustments are made for the lack of a significant contribution on the issues of the forecast of economic activity and the calculation of the agricultural revenues at present rates, the time claimed for TURN's participation in this proceeding is reasonable for the issues on which it made a significant contribution.

7. The other costs of \$906.87, claimed in connection with TURN's participation in this proceeding, are reasonable.

Conclusions of Law

1. TURN made substantial contributions to D.88-11-052, D.88-12-040, and D.88-12-100.

2. TURN made substantial contributions on all of the load forecast issues for which it seeks compensation, except for the issues of the forecast of economic activity and the calculation of agricultural revenues at present rates.

3. PU Code § 1807 and Rule 76.60 establish the compensation paid to persons of comparable training and experience who offer similar services as the primary consideration in determining reasonable fees for compensation.

4. TURN should be permitted to supplement its request to establish an hourly rate of \$160/hour for its attorney.

5. Reasonable compensation for TURN's contribution to D.88-12-052, D.88-12-040, and D.88-12-100 is \$19,119.87.

6. PG&E should be ordered to pay TURN \$19,119.87, plus any interest accrued after June 10, 1989.

ORDER

IT IS ORDERED that Pacific Gas and Electric Company (PG&E) shall pay Toward Utility Rate Normalization (TURN) \$19,119.87 within 15 days as compensation for TURN's substantial contributions to D.88-11-054, D.88-12-040, and D.88-12-100. PG&E shall also pay TURN interest on this amount, calculated at the three-month commercial paper rate, beginning June 10, 1989, and continuing until full payment of the award is made.

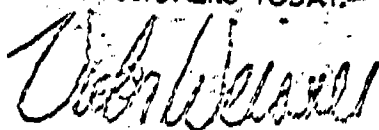
This order is effective today.

Dated JUL 19 1989, at San Francisco, California.

G. MITCHELL WILK  
President  
FREDERICK R. DUDA  
STANLEY W. HULETT  
JOHN B. OHANIAN  
Commissioners

Commissioner Patrick M. Eckert,  
being necessarily absent, did  
not participate.

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

  
Victor Weiss, Executive Director