

Decision 89 10 032 OCT 12 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
SAN DIEGO GAS & ELECTRIC COMPANY)
for authority to Increase its Rates)
and Charges for Electric, Gas)
and Steam Service.)

Application 84-12-015
(Filed December 17, 1984)

And Related Matter.)

I.85-02-010
(Filed February 6, 1985)

OPINION ON UCAN'S REQUEST FOR COMPENSATION

Summary

Utility Consumers' Action Network (UCAN) requests compensation of \$27,153.95 for its contribution to Decision (D.) 89-02-074. We find that UCAN made a substantial contribution to this decision, and we award compensation of \$8,773.12.

Introduction

In D.86-06-055, we found UCAN eligible for compensation for any substantial contributions it makes to decisions in this long-running proceeding. On May 2, 1989, UCAN filed its request for compensation of \$28,703.95 for its contribution to D.89-02-074.

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." D.89-02-074 was intended to be the final decision in this proceeding.

D.89-02-074 was decided on February 24, 1989. UCAN attempted to file its request on March 16, but its filing contained an erroneous caption and docket number. UCAN did not correct its error and successfully file its request until May 2, well beyond the 30-day limit of Rule 76.56. However, other parties received proper notice of UCAN's request, and no one appears to have been harmed or disadvantaged by UCAN's mistake. In light of UCAN's good faith attempt to file on time, its service on affected parties, and the nature of its error, we will deem UCAN's request to be timely filed. Our acceptance of UCAN's filing is limited to the facts and circumstances of this filing, and our failure to enforce the 30-day requirement in these circumstances should not be viewed as establishing any sort of precedent for excusing failures to comply with any of our rules. It is particularly important that requests for compensation be filed timely. Our ability to process these assumes that they will be filed 30 days after our decision issues and our resources are generally available to handle requests filed timely. However, as administrative law judges move on to other assignments, late requests for compensation become difficult to work into their schedule without disruption, and without recollection of the participation becoming stale.

San Diego Gas & Electric Company (SDG&E) attempted to file its opposition to UCAN's request on April 14. Since UCAN's filing was not on record in this case, however, SDG&E's response was not accepted for filing until May 2, when UCAN's request was filed. SDG&E opposes UCAN's request because it believes that UCAN did not make a substantial contribution to the decision on the issues relating to SDG&E's economy energy purchases and its contracts with Public Service Company of New Mexico (PNM) and

Tucson Electric Power Company (TEP). SDG&E argues that the Commission should deny UCAN compensation for the hours claimed for these issues and should make a proportionate reduction in the amount allowed for compensation for unallocable costs and the costs of preparing the request. SDG&E calculates its recommended reduction in compensation to amount to at least \$10,123.

UCAN attempted to respond to SDG&E's opposition on April 15. For the reasons described earlier, UCAN's response was not filed until May 2. UCAN accepted SDG&E's point about its participation on issues relating to economy energy purchases, and UCAN accordingly reduced its request by \$1,550. (This appears to be a miscalculation, since the components of its reduction add up to \$1,750.) UCAN rejects SDG&E's other contentions. The revised compensation request is therefore \$27,153.95.

Issue To Be Decided

Rule 76.58 requires the Commission not only to determine whether UCAN made a substantial contribution to D.89-02-074, 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 various 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 UCAN's claim.

Substantial Contribution

UCAN acknowledges that none of its specific proposals was adopted by the Commission. However, it believes that it brought certain issues to the Commission's attention, defined issues, proposed remedies, and presented legal arguments. UCAN argues that the Commission has previously recognized raising and defining issues of law and fact as substantial contributions. This is the type of contribution that UCAN believes it made to D.89-02-074.

UCAN's claimed contributions fall into three general areas.

First, UCAN believes that it focused on the cost-effectiveness of the PNM contract and demonstrated the opportunities for demand-side management as an alternative to the PNM contract. UCAN contends that the decision reaffirmed the importance of demand-side management as an alternative to purchased power. In recognition of its limited success on this issue, UCAN requests compensation for only 25% of the hours it devoted to this issue.

In D.89-02-074, we rejected UCAN's specific argument that SDG&E should have relied on demand-side management to reduce demand

to displace the need for the PNM contract (mimeo. pp. 83-84). UCAN was nevertheless instrumental in keeping before us the idea that conservation and load management should be considered as potential resources. To this limited extent, UCAN made a substantial contribution to the decision on this issue.

Second, UCAN contends that it developed the background for the Commission to find SDG&E imprudent for agreeing to a change in the assignment clause of the contract with TEP without obtaining corresponding concessions from TEP. Because it did not provide the Commission with a basis for a disallowance on issues related to the TEP contract, UCAN asks for compensation for only 50% of its hours devoted to the TEP contract issues.

The issue of SDG&E's consenting to an amendment of the assignment clause was raised and developed primarily by the Commission's Division of Ratepayer Advocates (DRA). According to the record, UCAN's role in developing this issue was very limited. We cannot conclude that UCAN made a substantial contribution on this issue.

UCAN's third asserted area of contribution has to do with its answers to three of the six questions posed in D.86-06-026, the decision that granted the rehearing that led to the present decision. The questions concerned various aspects of the balancing account established for transactions over the Southwest Powerlink (SWPL).

Our first question asked for estimates of the difference between the cost of purchased power transmitted over SWPL and avoided cost. UCAN claims that it provided arguments against SDG&E's position that a capacity credit should be allowed for economy energy purchases. D.89-02-074 rejected SDG&E's position (mimeo. p. 135).

SDG&E's argument in favor of a capacity credit for economy energy purchases was opposed by both DRA and UCAN. Although DRA did much to develop this issue, UCAN supplied

independent arguments against SDG&E's point. There was some overlap between DRA's and UCAN's arguments, but UCAN made several separate arguments that justify a conclusion that UCAN made a significant contribution to the decision's resolution of this question.

UCAN also believes it made a contribution in answering the third question posed in D.86-06-026. This question concerned the standard of value to be used to measure the value of power transmitted over SWPL to ratepayers.

Our discussion of this question in D.89-02-074 begins by noting that our decision to eliminate the SWPL balancing account made a detailed examination of the standard of value for the balancing account unnecessary. We went on to discuss valuation of resources in general terms, and we noted that our discussion of this general issue relied on "the concepts that the Commission has outlined in its decision on Qualifying Facility Standard Offer methodologies" (mimeo. p. 141). We went on to elaborate on principles that we had previously developed in proceedings on the standard offers. UCAN did not make a substantial contribution to this discussion.

UCAN further contends that it contributed to our resolution of the fifth question, which asked about SWPL's role in SDG&E's resource plan. UCAN asserts that it argued in favor of flexibility, a position that we adopted.

Although we endorsed flexibility in the use of SWPL, our decision was not the result of UCAN's general and brief discussion of this issue. Thus, UCAN did not make a substantial contribution on this issue.

UCAN also seeks compensation for its work on several motions and legal issues.

First, UCAN believes that we adopted its arguments against SDG&E's motion for bifurcation. Since no such motion was filed by SDG&E, we assume that UCAN refers to the oral motion to

strike that SDG&E presented at the third prehearing conference on March 29, 1987. However, SDG&E's motion was withdrawn after changes in the schedule made the motion unnecessary (Tr. 54:5958-5959). Thus, there was no decision to which UCAN could be found to have contributed.

Second, UCAN believes it should receive compensation for its arguments against the admission of testimony by a former commissioner, even though SDG&E withdrew the testimony. Before the testimony was withdrawn, however, we had determined that the former commissioner should be allowed to testify (D.87-07-009) and ruled directly against UCAN's arguments. UCAN thus did not make a significant contribution to this resolution.

Third, UCAN claims it made a contribution by presenting legal arguments in its rebuttal brief that responded to SDG&E's interpretation in its opening brief of some recent court decisions related to the United States Supreme Court's decision in Nantahala Power and Light Company v Thornburg (1986) 476 U.S. 953.

UCAN presented arguments that overlapped considerably with DRA's arguments and somewhat with the position of the City of San Diego. We adopted many of the arguments of these parties, and we conclude that UCAN made a substantial contribution on this issue.

Compensation

In its revised request, UCAN seeks compensation for roughly 185.5 hours of its attorney's time at the rate of \$125 per hour, 44.5 hours of its witness' time at \$55 per hour, 4.75 hours of its witness' associate's time at \$35 per hour, its witness' direct costs of \$343.03, and other costs of \$986.34, for a total of \$27,153.95. UCAN's calculation contains an error, and its revised request should be for \$26,963.95. Even when corrected, however, UCAN's total assumed total costs for UCAN's witness is \$3,187.11. The bills UCAN submitted in support of its request total \$2,956.78. Only this lower amount is justified in the request. UCAN made

further reductions in its response to SDG&E's opposition to the request, so the amount requested for UCAN's witness appears to be \$2,544.28. Therefore, UCAN's total request, as revised and corrected, appears to be for \$26,750.23.

Compensable Hours

UCAN was able to allocate its time in this case to broad categories, but UCAN was not successful in demonstrating a substantial contribution for all of the hours it claimed within its broad categories. In its request, UCAN reduced the number of hours claimed in some categories to reflect that we did not adopt its primary recommendations. As the discussion of UCAN's substantial contributions has demonstrated, however, it is necessary to make further adjustments to UCAN's requested hours.

On the PNM issues, UCAN requested compensation for 25% of its recorded hours on this topic. We feel that this adjustment fairly reflects the extent of UCAN's contribution, and we will base our award in this area on 25% of the 104.8 hours recorded by UCAN's attorney.

We previously concluded that UCAN did not make a substantial contribution to our conclusion about the amendment of the assignment clause of the TEP contract. Thus, UCAN should receive no compensation for the 68.3 hours devoted to this area.

UCAN adjusted its request for compensation on the six SWPL-related questions posed in D.86-06-026. The hours recorded on this topic were reduced by 50% because UCAN sought compensation only for its response to three of the questions. We have concluded that UCAN made a substantial contribution only to our decision to deny a capacity credit for economy energy purchased over SWPL. Since UCAN has not allocated its hours by topic, we will assume that each question consumed the same amount of hours. Thus, we will further reduce the hours for compensation to one-sixth of the 42.5 hours recorded in this area (equivalent to one-third of the

hours requested for the three questions for which UCAN sought compensation).

UCAN did not make a substantial contribution to the two motions for which it requested compensation, and no compensation should be awarded for the 30.8 hours UCAN claimed for its work on these motions. However, UCAN did make a substantial contribution on the Nantahala issues, and we will grant compensation for the four hours it spent on this issue in preparing its rebuttal brief.

Thus, for the attorney's time underlying UCAN's requested compensation for the PNM contract issues, the TEP contract issues, the SWPL questions, and the two motions, we will allow compensation for 33.3 hours.

UCAN also requests compensation for time spent on preparation of the case, briefing, and other unallocable or common hours. To reflect its limited success in this proceeding, UCAN requests compensation of only half of its recorded hours in this area.

When a party is only partially successful in demonstrating that it has made a substantial contribution on the issues it pursued in a proceeding, as UCAN was in this case, we normally allocate preparation time in proportion to the degree of contribution (D.85-08-012). We have already concluded that UCAN made a substantial contribution in its rebuttal brief to our resolution of the arguments concerning the Nantahala case, and we will compensate UCAN fully for the four hours identified with this issue. For the remainder of the common time, we will apply the ratio of UCAN's attorney's hours spent on issues on which UCAN made a substantial contribution to our decision (33.3) to the attorney's total hours recorded for the PNM contract, the TEP contract, and the SWPL questions, as shown in UCAN's request (215.6). (Time spent on the two motions is accounted for separately.) Applying the resulting ratio of 0.154 to the remaining common hours yields 17.7 hours. Adding back in the four hours for the Nantahala work,

we conclude that UCAN should receive compensation for 21.7 hours of its common time.

UCAN also requests compensation for the time and expenses of its expert and his associate. The bills of the witness do not permit allocation by issue, so we will apply the ratio calculated above to the expert's total hours, which we previously limited to the amount supported in UCAN's filing. Of the 44.5 hours claimed by the expert and the 4.75 hours claimed by his associate, we will allow compensation for 6.9 hours and 0.7 hours, respectively.

Compensation Request

UCAN also requests compensation for 19.1 hours that it spent in preparing its request for compensation. In light of UCAN's limited success in demonstrating that its requested compensation was justified and the errors in its request, some adjustment to the hours requested for preparation of the compensation request seems justified. We will permit UCAN full recovery of the time spent compiling its hours and costs and reading the decision (7.3 hours), but we will apply the ratio previously developed to the time spent drafting the request (11.8 hours). Thus, we will allow compensation for 9.1 hours.

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."

UCAN requests an hourly rate of \$125 for the time of its attorney, Mr. Shames. In D.89-12-085, we approved an hourly rate of \$125 for Mr. Shames' time. We find that the requested hourly

rate of \$125 is reasonable and does not exceed the market rate for an attorney of Mr. Shames' training, experience, and expertise.

The compensation requested for UCAN's expert witness is apparently based on the fees charged to UCAN, and in any event the requested rates are reasonable for an expert of Mr. Marcus' training and experience. The hourly fees of \$55 for Mr. Marcus and of \$35 for his associate are reasonable.

Other Reasonable Costs

UCAN also requests recovery of \$986.34 of expenses related to its participation. This is half of the total expenses UCAN incurred for its participation. We will apply the ratio established earlier to the total expenses incurred by UCAN (\$1,972.68), and award compensation of \$303.79. We will also apply this ratio to the costs associated with the participation of UCAN's expert witness. Of the \$343.03 of costs claimed by the witness, we will allow recovery of \$52.83.

Conclusion

UCAN is entitled to compensation of \$8,773.12. The components of this award are set forth in the following table:

<u>Item</u>	<u>Hours</u>	<u>Amount</u>
PNM Issues	26.2	\$3,275.00
TEC Issues	0	0
SWPL Questions	7.1	837.50
Motions	0	0
Unallocable Hours	21.7	2,712.50
Compensation Request	9.1	1,137.50
Expert Witness		
Marcus	6.9	379.50
Associate	0.7	24.50
Costs		52.83
Other Costs		<u>303.79</u>
Total		\$8,773.12

As discussed in previous Commission decisions, this order will provide for interest commencing on July 16, 1989 (the 75th day after UCAN filed its request) and continuing until full payment of the award is made.

UCAN 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. UCAN has requested compensation totaling \$27,153.95 for its participation in this proceeding.
2. UCAN was found eligible for compensation in D.86-05-055.
3. UCAN made a significant contribution to D.89-02-074 on the issues of demand-side management as an alternative to the PNM contract, capacity credits for economy energy, and the interpretation of the Nantahala case.
4. UCAN did not make a significant contribution to D.89-02-074 on the other issues for which it sought compensation.
5. An hourly rate of \$125 is a reasonable fee for an attorney of Mr. Shames' training, experience, and expertise, and hourly rates of \$55 and \$35 are reasonable fees for UCAN's witness and his associate.
6. After adjustments are made for the lack of a significant contribution on certain issues, the time claimed for UCAN's participation in this proceeding is reasonable.
7. A reasonable way to adjust UCAN's unallocated time, other costs, and its witness' costs is to develop a ratio of the hours found to support UCAN's actual substantial contribution to the

total hours UCAN's attorney recorded for issues on which UCAN claimed a substantial contribution.

Conclusions of Law

1. UCAN made a substantial contribution to D.89-02-074 on the issues of demand-side management as an alternative to the PNM contract, capacity credits for economy energy, and the interpretation of the Nantahala case.

2. SDG&E should be ordered to pay UCAN \$8,773.12, plus any interest accrued after July 16, 1989.

ORDER

IT IS ORDERED that San Diego Gas & Electric Company (SDG&E) shall pay Utility Consumers' Action Network (UCAN) \$8,773.12 within 15 days as compensation for UCAN's substantial contribution to D.89-02-074. SDG&E shall also pay UCAN interest on this amount, calculated at the three-month commercial paper rate, beginning July 16, 1989, and continuing until full payment of the award is made.

This order is effective today.

Dated OCT 12 1989, at San Francisco, California.

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

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

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director