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Decision 91-06-005 June 5, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Application of San Diego Gas &)
Electric Company (U 902-M) for an)
Ex Parte Order Granting Authority)
to Increase Expenditures to Support)
Demand Side Management Programs; to)
Implement Balancing Account)
Treatment for New DSM Program)
Expenditures; to Recover Increased)
Expenditures in Future Rates; and to)
Implement Incentive Mechanisms.)

ORIGINAL

Application 90-04-034
(Filed April 19, 1990)

In the Matter of the Application of)
Southern California Edison Company)
(U 338-E) for an Ex Parte Order)
Authorizing Expenses, Implementation)
of Incentive and Performance)
Mechanisms, and Revision of Rates.)

Application 90-04-036
(Filed April 24, 1990)

In the Matter of the Application of)
Southern California Gas Company)
for authority to expand Demand)
Side Management Programs. (U 904 G))

Application 90-04-037
(Filed April 25, 1990)

Application of Pacific Gas and)
Electric Company for Authority)
to Adjust its Electric and Gas)
Rates Effective January 1, 1991)
to Implement an Expanded Customer)
Energy Efficiency Program)
Resulting From the Statewide)
Collaborative Process. (U 39 M))

Application 90-04-041
(Filed April 25, 1990)

**OPINION ON TOWARD UTILITY RATE
NORMALIZATION'S REQUEST FOR COMPENSATION**

Summary

Toward Utility Rate Normalization (TURN) requests compensation of \$69,082.88 for its contributions to Decision (D.) 90-08-068 and D.90-12-071. We find that TURN made a substantial contribution to these decisions, and we award compensation of \$65,426.88.

Introduction

On December 19, 1990, in D.90-12-071, we found TURN eligible for an award of compensation in this proceeding.

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.90-12-071 was designated as the final order in this proceeding. D.90-12-071 was dated December 19, 1991, and mailed on December 21. The timeliness of TURN's request, filed January 22, 1991, requires some discussion.

TURN asserts that its filing is within the 30-day period required in Rule 76.56. In making this assertion, TURN apparently counts from the mailing date of D.90-12-071 on December 21. Since the 30th day after December 21 (January 20) fell on a weekend, which was followed by a holiday on Monday, January 21, TURN filed on the next business day, January 22. (See Rule 44.2.)

TURN apparently assumes that the date of issuance is the date of mailing, rather than the date a decision is made and publicly announced. However, if the date of issuance means the date a decision is made and publicly announced, then TURN's filing was due within 30 days after December 19, or on January 18, and TURN's request is untimely.

Rule 85 defines the date of issuance as the date of mailing, but that definition is clearly stated to be limited to the purposes of that rule, the time for filing applications for rehearing. No similar definition appears in the rules on intervenor compensation (Article 18.7). Although we construe our rules liberally (Rule 87), our construction of the intervenor compensation rules is constrained by the fact that they are nearly identical to the authorizing statutes, Public Utilities Code Sections 1801-1808. In interpreting these rules, we must take care not to conflict with either the statutes' explicit provisions or the legislative intent in enacting the statutes. In other contexts, the Legislature has defined date of issuance to mean date of mailing (e.g., Public Utilities Code Sections 1731(b), 1756), and the absence of such a definition in the sections providing for intervenor compensation could be viewed either as an oversight or as an intentional omission.

We agree with TURN that it is reasonable to interpret our rules to require filing of the request for compensation within 30 days of the date of the mailing of the final decision, and courts have applied a similar interpretation in comparable situations. (Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board (1979) 93 Cal. App. 3d 922, 929.) Under this interpretation, TURN's filing is timely. However, it is not altogether clear that this interpretation comports with the authorizing legislation.

TURN submits that it made substantial contributions to D.90-08-068 and D.90-12-071 through its participation in the collaboration of a variety of organizations interested in improving and expanding the demand-side management (DSM) programs of regulated California energy utilities. TURN believes it was particularly instrumental in developing proposals for giving a utility's shareholders an incentive to have the utility develop effective DSM programs. TURN was also the only party exclusively representing the interests of residential ratepayers, and it worked to ensure that a proportionate share of the DSM programs was directed to the residential class. TURN attaches to its request the declarations of several other participants in the collaborative group, and these declarations verify TURN's contribution.

No party responded to TURN's request for compensation.

Issues to be Decided

Rule 76.58 requires the Commission not only to determine whether TURN made a substantial contribution to D.90-08-068 and D.90-12-071, 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."

This case also presents a novel issue that was raised in D.90-12-071:

"...we caution TURN to keep in mind as it prepares its request for compensation that it may be compensated only for participation in Commission proceedings. We question whether its participation in the collaborative process itself, which occurred prior to the filing of

these applications, is participation in a Commission proceeding." (D.90-12-071, mimeo. p. 17.)

Can TURN Be Compensated for Participating in the Collaborative Group?

TURN answers the concerns expressed in D.90-12-071 in two ways.

First, TURN argues that the collaboration on DSM was a Commission proceeding. The collaborative group grew out of suggestions made during an en banc hearing in Investigation (I.) 86-10-001, when the Commissioners indicated their support of the sort of informal meetings of affected parties that became the collaborative group. In addition, the collaborative group was an essential predicate to the four consolidated applications (the captioned proceedings), which were filed specifically to implement the ideas developed by the collaborative group. These applications reflected the agreements and results of the collaborative group, as do the decisions on these applications.

Second, TURN argues that policy reasons support compensating TURN for its participation in the collaborative group. Many of the issues related to the applications were resolved even before the applications were filed, during the deliberations of the collaborative group. The agreements of the collaborative group were a necessary backdrop to the stipulations eventually reached with the utilities, and in this respect were similar to the time a utility spends preparing its Notice of Intention to file a general rate case. TURN states that it has been compensated previously in similar circumstances (see D.89-03-018, mimeo. pp. 8-9).

TURN also believes that the collaborative group could be viewed as a complex, multi-party, and multi-issue settlement negotiation. The Commission has held that parties may be compensated for time spent in settlement negotiations (D.90-07-018, mimeo. p. 3).

Moreover, in light of the goal of encouraging participation by intervenors, TURN argues that it would be unfair to deny compensation for its participation merely because the participation took place before the formal filing of an application (see D.88-12-085, 30 CPUC 2d 299, 339).

We do not agree with TURN's characterization of the collaboration as a Commission proceeding. Our proceedings begin with formal filings (for applications or complaints) or decisions (for investigations and rulemakings), and the commencement and scope of our proceedings are much more definite than they were for the collaborative group. Our encouragement of various interests to meet to attempt to develop a proposal to introduce incentives into DSM programs had no legal effect, as can be easily seen by asking what the consequences would have been if the parties rejected our invitation. Our encouragement had no legal status, and parties were free to reject the invitation with impunity.

However, we nonetheless conclude that TURN's participation as part of the collaborative group may be compensated. The key to our conclusion is Rule 76.52(g)'s tying of the definition of "substantial contribution" to our judgment that the intervenor's presentation has substantially assisted us in making our order or decision. As we will subsequently discuss, it is clear that the collaborative group reached agreements that were reflected in both the captioned applications and in the decisions on those applications, D.90-08-068 and D.90-12-071. These agreements permitted us to process these applications quickly and without hearings, although the subject matter of these applications would ordinarily be controversial. The specific policy recommendations emerging from the collaborative group reflected TURN's contribution and were adopted in the decisions.

A second definition poses no bar to compensating TURN for its work as part of the collaborative group. "Compensation" refers to an intervenor's reasonable costs of participation in a hearing

or proceeding (Rule 76.52(a)). We do not read this rule to state that only the costs incurred at a hearing are compensable. We have consistently awarded compensation for reasonable costs of preparation. TURN participated in this proceeding by being part of the collaborative group and by helping negotiate the settlements of the four captioned applications, which resulted in the decisions that are the bases for the claim of compensation. It is reasonable in these circumstances to view work performed as part of the collaborative group as preparation for the four applications. In a more direct manner, work related to the settlements of the four applications qualifies as participation in a proceeding.

Thus, we conclude that under the circumstances of this case, TURN may be compensated for the work it performed as part of the collaborative group.

Substantial Contribution

We agree with TURN's assertion that it made substantial contributions to D.90-08-068 and D.90-12-071. The declarations attached to TURN's request document the opinions of several other members of the collaborative group that TURN played a major role in at least two aspects of the eventual agreement among the participants. The diversity of the interests represented in these declarations leaves us with little doubt about the extent of TURN's claimed contribution.

TURN contributed substantially to the development of incentive mechanisms to reward shareholders for successful implementation of DSM programs and to impose penalties for a utility's failure to achieve specified levels of DSM. The development of such incentives was one of the chief goals and accomplishments of the collaborative group. Negotiations among the members of the group led to agreement on the incentive proposals of Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (Edison) before these utilities filed their applications. (See D.90-08-068,

mimeo. pp. 8-9, 13, 23.) TURN did not initially agree with Southern California Gas Company (SoCal) on the level of its incentives, and TURN accordingly opposed SoCal's proposed settlement. After further negotiations, TURN and SoCal came to an agreement that was reflected in their joint supplemental comments. (See D.90-08-068, mimeo. pp. 21-22.) We adopted the agreed incentives. (D.90-08-068, mimeo. p. 44.)

TURN also advocated making DSM programs available to residential customers. As a result, the amounts allocated for programs aimed at residential customers are roughly proportional to the residential class' share of each utility's revenue requirement.

We conclude that TURN made significant contributions to D.90-08-068 and D.90-12-071.

Compensation

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 compensation for 425.3 hours of the time of its attorney, Joel Singer, at the rate of \$160 per hour, or \$68,048.00, and for \$1,034.89 of its photocopying, postage, and attorney's expenses, for a total request of \$69,082.88. The discrepancy between TURN's total request and its components is unexplained, and in the remainder of this decision we will rely on the slightly lower total request figure and reduce the requested compensation for expenses.

TURN requests an increase in the hourly rate for Singer's compensation from the currently authorized rate of \$140 (see

D.90-09-049, D.90-08-021). TURN argues that the current rate was established for work performed in 1989, and that Singer's increased skill and experience and the general increase in attorneys' rates justify a \$20 increase. TURN contends that Singer's experience makes him comparable to an experienced associate in a private firm. According to Of Counsel magazine, portions of which TURN attaches to its request, the average hourly rate for attorneys in six large private firms in San Francisco is \$192.50, and the lowest rate is \$175.

The work that is the subject of this request spanned 1989 through 1991. We agree with TURN that, based on Singer's increased experience and the survey of six large firms' charges in mid-1990, an hourly fee of \$160 is currently a reasonable rate for Singer. However, we see no need to overturn our previous determination that a fee of \$140 is reasonable for work performed in 1989.

(D.90-08-021, D.90-09-049.) Therefore, we will apply the increased fee only to the time recorded in 1990 and 1991. (See D.88-12-098, mimeo. p. 16.) We find that the requested hourly rate of \$160 is reasonable for work performed after 1989 and does not exceed the market rate for an attorney of Singer's training, experience, and expertise.

A second adjustment must be made to TURN's request. TURN asks for compensation in connection with its participation in the en banc hearing of July 20, 1989. That hearing, however, was part of another proceeding, I.86-10-001, and TURN has already requested and received compensation for its contribution to that proceeding (D.90-07-018.) We will not compensate TURN for the 8.6 hours it requested for its work in I.86-10-001.

We conclude that the time claimed for TURN's contribution, except for the 8.6 hours associated with I.86-10-001, is reasonable. We will authorize compensation for 114.0 hours at the 1989 rate of \$140, or \$15,960.00, and 302.7 hours at a rate of \$160, or \$48,432.00, for total fees of

\$64,392.00. We also find that TURN's requested expenses, as modified, of \$1,034.88 are reasonable and should be included in its compensation.

TURN is therefore entitled to compensation of \$65,426.88.

Allocation

TURN also addressed the question of how to allocate its compensation among the utilities involved in this consolidated proceeding. To the extent possible, TURN separately recorded the time devoted to each utility's proceeding. TURN also recorded hours in a general category for time, such as that spent attending meetings of the collaborative group, that could not be assigned to a single utility. TURN allocated the time in the general category equally among the four utilities.

We find TURN's proposed allocation to be reasonable under the circumstances, and we will follow TURN's approach.

Conclusion

TURN is entitled to compensation of \$65,426.88, to be paid by PG&E (\$20,484.22), SoCal (\$16,884.22), Edison (\$16,358.22), and SDG&E (\$11,700.22).

As discussed in previous Commission decisions, this order will provide for interest commencing April 7, 1991 (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 requested compensation totaling \$69,082.88 for its participation in these proceedings.
2. TURN was found eligible for compensation in D.90-12-071.
3. TURN made significant contributions to D.90-08-068 and D.90-12-071 by helping develop incentive mechanisms for DSM and by ensuring the availability of DSM programs for the residential class. TURN's contributions on these points were reflected in our decisions.
4. In D.90-09-049 and D.90-08-021, we found that an hourly rate of \$140 was reasonable for Singer for work performed in 1989. An hourly rate of \$160 is a reasonable fee for work performed after 1989 by an attorney of Singer's training, experience, and expertise.
5. Except for time related to I.86-10-001, the time claimed for TURN's participation in this proceeding is reasonable.
6. The other costs claimed in connection with TURN's participation in this proceeding are reasonable.
7. TURN's proposed method of allocating fees among the four utilities in this proceeding is reasonable.

Conclusions of Law

1. TURN made substantial contributions to D.90-08-068 and D.90-12-071.
2. PG&E should be ordered to pay TURN \$20,484.22.
3. SoCal should be ordered to pay TURN \$16,884.22.
4. Edison should be ordered to pay TURN \$16,358.22.
5. SDG&E should be ordered to pay TURN \$11,700.22

ORDER

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall pay Toward Utility Rate Normalization (TURN) \$20,484.22 within 15 days as compensation for TURN's substantial contributions to D.90-08-068 and D.90-12-071. PG&E shall also pay TURN interest on this amount, calculated at the three-month commercial paper rate, beginning April 7, 1991, and continuing until full payment is made.

2. Southern California Edison Company (Edison) shall pay TURN \$16,358.22 within 15 days as compensation for TURN's substantial contributions to D.90-08-068 and D.90-12-071. Edison shall also pay TURN interest on this amount, calculated at the three-month commercial paper rate, beginning April 7, 1991, and continuing until full payment is made.

3. Southern California Gas Company (SoCal) shall pay TURN \$16,884.22 within 15 days as compensation for TURN's substantial contributions to D.90-08-068 and D.90-12-071. SoCal shall also pay TURN interest on this amount, calculated at the three-month commercial paper rate, beginning April 7, 1991, and continuing until full payment is made.

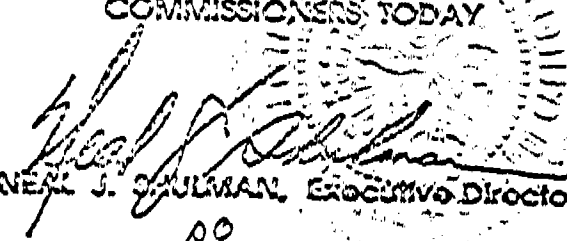
4. San Diego Gas & Electric Company (SDG&E) shall pay TURN \$11,700.22 within 15 days as compensation for TURN's substantial contributions to D.90-08-068 and D.90-12-071. SDG&E shall also pay TURN interest on this amount, calculated at the three-month commercial paper rate, beginning April 7, 1991, and continuing until full payment is made.

This order is effective today.

Dated June 5, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SCHULMAN, Executive Director