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Decision 91-06-010 June 5, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SAN DIEGO GAS &)
ELECTRIC COMPANY: (1) for Authority)
to Increase its Electric Rates)
Effective May 1, 1991; and (2) for)
a Commission Order Finding the)
Company's Gas and Electric)
Operations and Expenses Reasonable)
for the Applicable Record Periods.)
(U 902-E))

ORIGINAL

Application 90-10-003
(Filed October 1, 1990)

INTERIM OPINION

On February 26, 1991, Utility Consumers' Action Network (UCAN) filed a combined "Request for Finding of Eligibility and Award of Intervenor Compensation" for its participation in this proceeding, the 1990-91 Energy Cost Adjustment Clause (ECAC) proceeding of San Diego Gas & Electric Company (SDG&E). UCAN's request for compensation of \$21,167.77 is unopposed.

1. Request for Finding of Eligibility

The request for a finding of eligibility is made under Rule 76.54 of the Commission's Rules of Practice and Procedure, which sets the time limits for filing of requests and responses and prescribes the elements of a request.

1.1 Timeliness of Eligibility Request

Rule 76.54 requires filing of a request for eligibility within 30 days of the first prehearing conference or within 45 days after the close of the evidentiary record. The final hearing in the forecast phase of this proceeding was held on February 19, 1991, and the forecast phase was submitted with the filing of reply briefs on March 4, 1991. UCAN's request for eligibility was timely filed.

1.2 Elements of the Request

Rule 76.54(a) sets out four requirements for a request for finding of eligibility:

- "(1) A showing by the customer that participation in the hearing or proceeding would pose a significant financial hardship. A summary of the finances of the customer shall distinguish between grant funds committed to specific projects and discretionary funds...;
- "(2) A statement of issues that the customer intends to raise in the hearing or proceeding;
- "(3) An estimate of the compensation that will be sought;
- "(4) A budget for the customer's presentation."

1.2.1 Significant Financial Hardship

Rule 76.54(a)(1) eliminates the need for redundant showings that participation in the proceeding will pose a significant financial hardship for the customer:

"If the customer has met its burden of showing financial hardship in the same calendar year, ...the customer shall make reference to that decision by number to satisfy this requirement."

UCAN states that it filed an extensive request for compensation in Application (A.) 88-12-035. By Decision (D.) 91-03-009, which was issued in that proceeding on March 13, 1991, we found that UCAN had demonstrated significant financial hardship under Rule 76.52(f). Ordering Paragraph 2 of D.91-03-009 provides that the determination of significant financial hardship in that proceeding shall carry over to other proceedings in which UCAN participates in calendar year 1991. Thus, by referring to its request in A.88-12-035, UCAN has met the requirement of Rule 76.54(a)(1).

1.2.2 Statement of Issues

Rule 76.54(a)(2) requires the party to submit a statement of issues that it intends to raise. With the exception of its reply brief, UCAN had already completed its expected participation in this proceeding when it filed the request. UCAN was active in the resolution of issues related to revenue requirement, revenue allocation, and rate design; and it litigated the contested Century Power refund issue. UCAN therefore meets this requirement by referring to the issues that it actually raised in this proceeding.

1.2.3 Estimate of the Compensation

Rule 76.54(a)(3) requires an estimate of the compensation to be sought. Since UCAN's eligibility request is combined with its request for compensation, the estimate is the same as its actual request of \$21,167.77.

1.2.4 Budget

Rule 76.54(a)(4) requires a budget for the party's presentation. UCAN is viewing its participation retrospectively, and notes that its budget for this filing is identical to its estimate of the compensation it will seek.

1.3 Common Legal Representative

Rule 76.54(b) allows other parties to comment on the request, including a discussion of whether a common legal representative is appropriate. Under Rule 76.55, our decision on the request for eligibility may designate a common legal representative. No party commented on the appropriateness of a common legal representative, and we find no need to designate such a representative in this proceeding.

1.4 Conclusion on Eligibility

UCAN has timely filed its request for a finding of eligibility and has met the four requirements of Rule 76.54(a). In addition, no party has responded to UCAN's request or raised the issue of the appropriateness of a common legal representative.

Therefore, UCAN is eligible for compensation for its participation in this case.

2. Request for Award of Intervenor Compensation

UCAN's request for compensation is made pursuant to Rule 76.56. The requirements of this rule are addressed below.

2.1 Timeliness of Request

Rule 76.56 provides for filing of requests for compensation after a decision is reached:

"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, pursuant to Rule 76.55, to be eligible for an award of compensation may file within 30 days a request for an award."

The final decision in this case is D.91-04-063, which was mailed on April 25, 1991. UCAN acknowledges that its February 26 request "may be deemed premature," but asserts that it is "in accord with the Commission's informal policy encouraging compensation requests filings prior to decision."

UCAN appears to acknowledge that its compensation request is not technically in compliance with the above-quoted provision of Rule 76.56. We note, moreover, that such early filings could lead to more significant problems than merely technical ones. Rule 76.56 goes on to provide that the compensation request shall describe the customer's substantial contribution to the proceeding. Rule 76.52(g) defines substantial contribution as one which:

"...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."

Rule 76.56 permits the Commission staff and other parties to respond to compensation requests within 30 days after service, but when compensation requests are filed early, parties may find it difficult or impossible to determine a position on whether the

intervenor will make a substantial contribution to the decision before it is issued. Such early filings can also place an added burden on decisionmakers if they are required to ferret out the relevant factual or legal contentions or specific policy or procedural recommendations which were presented by the intervenor and adopted in the final decision.¹

Fortunately for UCAN, these concerns are not overriding in this case. As discussed in the following section, the nature of this largely settled proceeding allows us to determine whether it substantially contributed on the basis of its February 26, 1991 filing. No party has opposed UCAN's request or the early filing of the request. Accordingly, under Rule 87, we deem UCAN's request to have been timely filed.

Intervenors considering predecision filing of requests for compensation are placed on notice that for the future, we will carefully review such requests on a case-by-case basis. To ensure the procedural rights of other parties, we will also entertain appropriate requests to file responses to compensation requests after issuance of the final decision, even though the 30-day response period set forth in Rule 76.56 may have passed.

2.2 UCAN's Contribution to the Decision

UCAN notes that it was an active participant in all conferences and hearings in this proceeding. It submitted testimony pertaining to SDG&E's revenue requirements and revenue allocation. It participated in settlement discussions and signed a joint recommendation of parties. Additionally, UCAN participated in litigation of the Century Power refund issue.

1 Of course, a party requesting compensation on the basis of its anticipated substantial contribution also runs an added risk of failing to persuade the Commission of its actual contribution to the final decision.

2.2.1 Joint Recommendation

Most of the contested issues in the forecast phase of A.90-10-003 were settled by a joint recommendation of all active parties. UCAN submitted the testimony of its consultant William Marcus. This analysis permitted UCAN to play a central role in settlement discussions. UCAN was also active in the analysis of residential rate design, modeling, and other revenue requirements matters that were not part of its prepared direct testimony. The parties to the joint recommendation expressly acknowledged UCAN's contribution to the workshop process which in turn led to resolution of most issues. UCAN notes that the Commission has previously recognized its contributions in settled applications and awarded compensation. (D.90-09-073 and 30 CPUC 2nd 299 at 339 (1988).)

We conclude that UCAN made a substantial contribution on the issues addressed and resolved by the joint recommendation, and that it is entitled to an award for reasonable expenses related thereto.

2.2.2 Century Power Settlement

This issue was brought to the Commission's attention as a result of UCAN's successful motion for a ruling requiring SDG&E to provide testimony on the Century Power refund. D.91-04-063 ultimately adopted UCAN's contention that these proceeds should be reflected in rates adopted in this proceeding.

There was an overlap of Division of Ratepayer Advocates' (DRA), City of San Diego's (City), and UCAN's challenges to SDG&E's position that the Century Power settlement proceeds should be accorded ratemaking treatment only in a future ECAC proceeding. Nevertheless, it was UCAN that caused the issue to be raised. UCAN also presented unique arguments in its brief and reply brief that were instrumental to the Commission's decision. In our opinion, UCAN's presentation did not materially duplicate those of DRA or City to such a degree that a proportional reduction of the award

would be warranted under Rule 76.53(c). We conclude that UCAN is eligible for the full amount of its reasonable expenses related to the Century Power issue.

2.3 Amount of Award

2.3.1 Hours

UCAN maintained detailed timesheets for its attorney, with hours broken down by date and work description and segregated into three categories: "Revenue Requirement and Allocation Costs", "Century Power-Revenue Requirement", and "Intervenor Compensation Request". The totals for these categories are 67.3 hours, 36.2 hours, and 3.8 hours respectively, or a grand total of 107.3 hours. UCAN states that it excluded from its request any hours not directly relevant to the preparation of issues that were discussed in settlement or to the litigated Century Power issue. In reviewing these timesheets, we find that 107.3 hours is not excessive for calculating UCAN's reasonable advocates' fees.

Expert witness fees were incurred by UCAN for the work of Marcus, Jeffrey Nahigian, and Kevin Hanson of JBS Energy, Inc. (JBS). UCAN states that all of their time was spent on the revenue requirement and allocation issues. Since these issues were addressed in the settlement process to which UCAN made a substantial contribution, it is not necessary for UCAN to make an allocation of these expert witness fees by issue.

UCAN submitted JBS's invoices as attachments to the compensation request. The invoices show that JBS billed UCAN 27.50 hours for Marcus, 58.25 hours for Nahigian, and 16.00 hours for Hanson. While these invoices do not show a detailed breakdown of hours by type of work activity, the amounts are consistent with the hours reflected in other ECAC proceedings and with the scope of work reflected in the prepared testimony of UCAN in this proceeding. We find that the hours charged by JBS are reasonable.

2.3.2 Hourly Rates

UCAN seeks an hourly rate of \$135 for its attorney, Michael Shames. This is the same rate that was found to be reasonable for Shames in D.90-09-073, for work performed in SDG&E's previous ECAC proceeding (A.89-09-031). We find this rate to be reasonable for work performed in 1990 and 1991.

For expert witness fees, UCAN requests hourly rates of \$75 per hour for Marcus, \$50 an hour for Nahigian, and \$40 an hour for Hanson. UCAN states that these fees were deemed reasonable by the Commission in D.90-09-073. According to UCAN, the expertise of these witnesses would command much greater fees in the market, but they heavily discount their fees to UCAN for charitable purposes.

In reviewing D.90-09-073, we find that we authorized "...one witness' time at \$75 per hour..." and "...its witness' associate's time at \$45 per hour...." D.90-09-073 did not identify these witnesses by name, but from reviewing the compensation request filed by UCAN in that proceeding, of which we take official notice, it is clear that the "witness" that the Commission referred to was Marcus and the "associate" that the Commission referred to was Nahigian. Thus, UCAN is seeking the same rate that was authorized in D.90-09-073 for Marcus, and an increase of \$5 per hour for Nahigian.

By D.91-04-054 dated April 24, 1991, we awarded compensation to Toward Utility Rate Normalization for its contribution to a decision in Pacific Gas and Electric Company's recent ECAC proceeding. TURN had engaged JBS's services for that proceeding. In that decision we found that hourly rates of \$120 for Marcus and \$60 for Nahigian were reasonable. Based on our previous decisions, and the below-market discounts that JBS allows for UCAN, we find that the hourly rates of \$75 and \$50 requested for Marcus and Nahigian respectively are reasonable.

We are unable to make any findings regarding the hourly rate requested for Hanson. UCAN's request neither identifies the

qualifications of this witness nor identifies a previous decision where we awarded compensation on the basis of time charged for him. We cannot award compensation solely on the basis of a witness' association with a firm whose other principals or associates have been the subject of awards. Under Rule 76.60 we must also have a basis for determining the training and experience of the person and whether the amount requested exceeds the market value paid by the Commission or by the utility.

Accordingly, we cannot award compensation for Hanson's time. However, we will permit UCAN to file a supplemental request to remedy this deficiency.

2.3.3 Other Reasonable Costs

UCAN seeks \$1,094.27 for postage, express delivery, copying, long distance telephone, telecopying, travel, and parking costs. This is a combined amount reflecting both the costs directly incurred by UCAN and the costs billed by JBS. These costs do not exceed the limits prescribed by Rule 76.52(c); they are reasonable and will be adopted.

2.4 Conclusion on Award of Compensation

UCAN has substantially assisted the Commission in this proceeding, and is entitled to compensation as shown below:

Attorney Fees: 107.3 hours @ \$135		\$14,458.50 ²
Expert Witness Fees		
27.50 hours @ \$75 per hour	\$2,062.50	
58.25 hours @ \$50 per hour	<u>2,912.50</u>	
Subtotal-Expert Witnesses	\$4,975.00	4,975.00
Other Costs		<u>1,094.27</u>
Total Award		\$20,527.77

In accordance with the foregoing discussion, UCAN may file a supplemental compensation request for time charged by JBS

² UCAN requests attorney fees of \$14,458.50. UCAN appears to have transposed numerals, since 107.3 hours times \$135 per hour yields a product of \$14,485.50.

for services of Hanson. It may also supplement its request to correct an apparent computational error described in Footnote 2.

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 recordkeeping 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's request for eligibility to claim compensation was timely filed, and it addressed all four elements required by Rule 76.54(a) of the Commission's Rules of Practice and Procedure.

2. In D.91-03-009, the Commission found that UCAN had demonstrated that its participation would pose a significant financial hardship as defined in Rule 76.52(f), and ordered that the finding of significant financial hardship be carried over to other proceedings in which UCAN participates in calendar year 1991.

3. It is not necessary to designate a common legal representative for the interests UCAN represents in this proceeding.

4. UCAN requests \$21,167.77 in compensation for its participation in this proceeding.

5. UCAN made a substantial contribution on each of the major issues in which it participated in this proceeding, and there is no material duplication of the contribution or presentation of other parties.

6. The time claimed for UCAN's participation in this proceeding is reasonable.

7. In D.90-09-073 we found that an hourly rate of \$135 is a reasonable fee for an attorney of Shames' training, experience, and expertise.

8. The hourly rates requested for expert witnesses Marcus and Nahigian of JBS's staff are reasonable.

9. There is insufficient basis in UCAN's request for determining the reasonableness of the hourly rate requested for witness Hanson of JBS.

Conclusions of Law

1. UCAN should be ruled eligible to claim compensation for its participation in this proceeding.

2. UCAN's request for compensation should be accepted as timely filed.

3. UCAN made a substantial contribution to D.91-04-063 on the resolution of issues in discussions which led to the joint recommendation of the parties, and in litigating the Century Power refund issue.

4. UCAN's requested hourly rates for its attorney and for Marcus and Nahigian are reasonable and should be adopted.

5. SDG&E should be ordered to pay UCAN \$20,527.77 in accordance with Rule 76.61.

6. This order should be made effective on the date it is signed to provide reimbursement to UCAN at the earliest possible date for expenses it has already incurred.

INTERIM ORDER

IT IS ORDERED that:

1. Utility Consumers' Action Network (UCAN) is eligible to claim compensation for its participation in this proceeding.

2. UCAN is awarded compensation of \$20,527.77 for its substantial contribution to Decision 91-04-063. UCAN may file a

supplemental request for compensation in accordance with this decision.

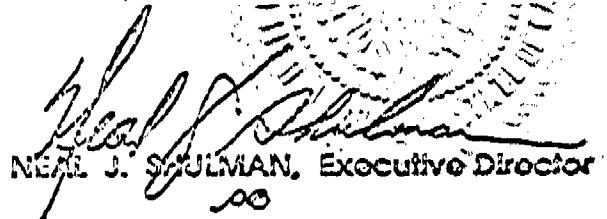
3. San Diego Gas & Electric Company shall pay \$20,527.77 to UCAN in accordance with Rule 76.61 of the Rules of Practice and Procedure.

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. SAULMAN, Executive Director