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Decision 92-02-070 February 20, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF ILLINOIS

Investigation on the Commission's own motion into the matter of post-retirement benefits other than pensions.

ORIGINAL

I.90-07-037
(Filed July 18, 1990)

And Related Matters.

Application 88-12-005
(Filed December 5, 1988)

I.89-03-033
(Filed March 20, 1989)

OPINION ON INTERVENOR'S REQUESTS FOR COMPENSATION

Summary

Toward Utility Rate Normalization (TURN) requests \$13,839 in compensation for its contributions to Decision (D.) 91-07-006 and D.91-10-024, which completed the first phase of this proceeding. In this decision we find that TURN has made a substantial contribution to D.91-07-006 and D.91-10-024 pursuant to Rule 76.52(g) of the Commission's Rules of Practice and Procedure, and we award TURN compensation in the amount of \$13,325.

Background

The Financial Accounting Standards Board (FASB) issued for comment a draft proposal to account for post-retirement benefits other than pensions (PBOPs).¹ The FASB, upon receipt of comments, finalized its draft and issued Statement of Financial Accounting Standards No. 106 (FAS 106).

¹ PBOPs consists of employee benefits such as medical and dental care, life insurance, and legal services.

FASB's FAS 106 requires all entities that offer PBOPs to recognize as a current expense and record as a liability the costs of PBOPs as they are earned by employees rather than when they are paid after the employees retire. This new accounting treatment is effective for fiscal years beginning after December 15, 1992.

We opened and bifurcated Investigation (I.) 90-07-037 to consider the ratemaking effects of implementing FAS 106. The first phase addressed PBOPs pre-funding and was concluded with the issuance of D.91-07-006. D.91-07-006 authorized the utilities to pre-fund PBOPs benefits with tax deductible contributions to an independent trust and found TURN eligible to claim compensation for its participation in this investigation.

Subsequently, GTE California Incorporated (GTEC) and Pacific Bell filed applications for rehearing of D.91-07-006. By D.91-10-024 we denied the applications for rehearing and made minor modifications to the Phase I decision.

Testimony on the second phase of the investigation addressing the adoption of FAS 106 is currently being heard.

TURN filed its request for compensation on November 14, 1991, within 30 days after the issuance of D.91-10-024. However, to the extent that TURN seeks compensation for its contribution to D.91-07-006, its request was not filed on time. Rule 76.52(h) states, in part, "The filing of an application for rehearing shall not alter the finality of an order or decision for the limited purpose of applying the 30-day filing deadline for a request for compensation as set forth in Rule 76.56." Thus, the request for compensation for TURN's contribution to D.91-07-006 was due within 30 days of that decision, and not within 30 days of the decision resolving the applications for rehearing of D.91-07-006, as TURN assumed.

TURN apparently believed that it would be more efficient to file only one request, covering both decisions, after the applications for rehearing had been resolved. While efficiency is

a commendable goal, we do not encourage parties to ignore the explicit provisions of the rules to further goals they believe are worthwhile. This is particularly true in this instance, where a sound reason underlies the requirements of the rule. Under TURN's approach, an intervenor would wait to file its request for compensation until after after petitions for rehearing are resolved. If no application for rehearing is filed, however, the intervenor following this approach would not become aware of this fact until after the period for filing applications for rehearing has passed. This period, 30 days after issuance of the decision (Rule 85), is coterminous with the allowed period for filing requests for compensation. Thus, an intervenor will not find out that no applications for rehearing of a particular decision have been filed until the period for filing requests for compensation has passed. The result is that either the intervenor will be denied compensation because its request is too late, frustrating the purpose of the compensation program (Rule 76.51), or the Commission will have to rule on a request to waive a time limit that has been established by the Legislature (Public Utilities (PU) Code § 1804(c)), frustrating our attempts to process requests for compensation expeditiously.

We desire to encourage the participation of intervenors like TURN, and we will take some extraordinary steps to construe TURN's request to be timely filed with regard to TURN's contribution to D.91-07-006. Because PU Code § 1804(c), like Rule 76.56, requires a request for compensation to be filed within 30 days of issuance of a final order or decision, we will waive, under the authority of Rule 87, the previously quoted provision of Rule 76.52(h). Having waived the portion of the rule that states that filing of an application for rehearing does not affect the finality of the appealed decision, we will deem D.91-10-024 to be the decision resolving the issue for which TURN seeks compensation. By thus construing D.91-10-024 to be the "final decision" for the

limited purposes of accepting TURN's request, we avoid direct conflict with the parallel statutory provisions of PU Code § 1804(c).

Our waiver of the provisions of Rule 76.52(h) is specific to the circumstances of TURN's filing and should not be relied on by intervenors in the future. We do not wish to convey the impression that a party may disregard the deadlines and other provisions of the PU Code and our rules with impunity. TURN and other intervenors are expected to comply with the applicable statutes and rules, even if compliance is inconvenient at times. In this instance, the correct practice would have been for TURN to file its request for compensation for work related to D.91-07-006 within 30 days of the issuance of that decision and to file a later supplement or separate request for its work related to D.91-10-024.

We attempt to resolve requests for intervenor compensation promptly, but these efforts are thwarted when intervenors intentionally or negligently disregard the applicable rules and statutes. In an earlier decision, we were forced to address a motion to accept TURN's late-filed request for compensation; in this decision we have addressed an untimely request at our own initiative. Each of these efforts slowed our processing of TURN's request and caused additional staff time to be expended in reviewing the filing and considering the appropriate resolution. If TURN and other intervenors wish to continue to receive expeditious treatment of their requests for compensation, they must live up to their obligation to submit complete and timely requests.

TURN claims that it made a substantial contribution to the decisions and seeks reimbursement for the following costs and expenses:

Attorney Fees (1990) 46.00 hours @ \$160	\$ 7,360
(1991) 34.25 hours @ \$175	5,994
Photocopy Expenses	356
Postage Costs	113
Telephone Charges	16
Total	<u>\$13,839</u>

Review of TURN's Compensation Request

Rule 76.53 requires an intervenor to meet the following criteria before it can be awarded compensation:

- a. Its participation without an award of fees or costs imposes a significant financial hardship.
- b. It made a substantial contribution² to the adoption of a Commission decision.
- c. Its participation did not materially duplicate the contribution or presentation of any other party to the proceeding.

The first requirement, financial hardship, has been met by TURN in the granting of its eligibility request, pursuant to D.91-07-006. Therefore, TURN has already satisfied this requirement.

Substantial Contribution

TURN asserts that it made a substantial contribution to D.91-07-006 and D.91-10-024 within the meaning of Rule 76.52(g). Specifically, TURN claims that it successfully argued that Pacific Bell and GTEC should not have the opportunity to raise rates to . . .

² Rule 76.52(g) defines substantial contribution to mean, in the judgment of the Commission, the intervenor'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 intervenor.

reflect pre-funding costs until the two utilities substantiate in the second phase of the investigation that PBOPs costs are a component of the "Z factor."³ TURN also argues that it successfully opposed the Administrative Law Judge's (ALJ) proposed decision language allowing Pacific Bell and GTEC the opportunity to recover PBOPs pre-funding costs in their October 1, 1991 price cap filings.

TURN also claims that it successfully opposed the applications of Pacific Bell and GTEC to rehear D.91-07-006. Specifically, TURN asserts that D.91-10-024 agreed with TURN that the advice letter process used for Pacific Bell's and GTEC's price cap filings would not be adequate to decide whether the two utilities were entitled to increase their rates.

Duplicative Participation

TURN's compensation request does not address duplicative participation. However, as discussed in GTEC's response to TURN's request, duplication is an issue that must be decided in granting TURN any award.

Responses to TURN's Request

Pacific Gas and Electric Company (PG&E) and GTEC filed responses to TURN's request for compensation. PG&E does not oppose TURN's request. However, PG&E asserts that it should not be required to contribute to any award paid to TURN because the substantial contribution claims of TURN relate to only Pacific Bell and GTEC.

3 The Z factor is a component of the price cap formula established for the major local exchange telephone companies' incentive-based rate regulation.

We concur with PG&E. TURN's participation in this proceeding to date has been restricted to impacts on Pacific Bell and GTEC. Accordingly, Pacific Bell and GTEC should equally share in the payment of any award we may grant TURN.

GTEC claims that TURN's compensation request is excessive and that TURN overstates its contribution to the "Decision." GTEC does not identify which decision it is referring to. However, we must conclude from GTEC's subsequent protest statement ("TURN seeks recovery of \$13,839 for its so-called significant contribution to D.91-10-024") that GTEC refers to D.91-10-024. We must also conclude that GTEC misread TURN's compensation request because TURN is seeking compensation for its contribution to D.91-07-006 as well as to D.91-10-024.

GTEC claims that TURN's compensation request is excessive because TURN's November 9, 1990 concurrent brief demonstrates that its argument that it would be premature to pre-fund PBOPs prior to implementing the FASB statement was based on the comments, testimony, and motions filed by the Division of Ratepayer Advocates (DRA).

GTEC also claims that TURN's brief focused on the issue of whether Pacific Bell should be allowed to recover as a component of the Z factor the costs associated with funds that it had already placed in a trust for the 1989 and 1990 calendar years. GTEC summarizes that TURN should not receive any compensation for this issue at this time because the Commission deferred consideration of this retroactive ratemaking issue to the second phase of the investigation.

GTEC opposes TURN's proposal to increase the hourly rate of its counsel from \$160 in 1990 to \$175 in 1991. GTEC asserts that this 9% increase in the hourly rate is not appropriate in an era of very low inflation, and at a time when major law firms are laying off associates and either holding attorney salaries constant or reducing them. If we grant TURN a compensation award,

GTEC concludes that the \$160 hourly rate for TURN's counsel should be used for any allowable 1991 attorney hours.

TURN's Reply to GTEC's Response

TURN filed a reply to GTEC's response on December 11, 1991 stating that "GTEC's opposition is another in a long series of frivolous responses by GTEC to TURN compensation requests."

TURN disputes GTEC's claim that TURN duplicated DRA's contribution to the investigation. TURN acknowledges that the first paragraph of its brief supports DRA's position on certain issues. However, TURN points out that the same paragraph states that TURN will not discuss those issues in its brief because DRA will address them in its own brief. The remaining 12 pages of TURN's brief addressed issues that DRA did not discuss in comments or testimony.

TURN also asserts that GTEC's opposition to TURN's requested \$175 hourly compensation rate for its counsel's work in 1991 reflects GTEC's persistent refusal to acknowledge that the standard for compensation set by Rule 76.60 is the market value of legal services.

TURN summarizes that GTEC's response is a waste of the Commission's and TURN's time. Therefore, as a signal to GTEC, TURN requests that its compensation request be increased by 3.0 hours for the time counsel spent to prepare the reply to GTEC's opposition at the \$175 hourly rate times a factor of two (3.0 hours x \$175 x 2 = \$1,050) in recognition of GTEC's vexatious litigation posture.

Discussion

Substantial Contribution and Duplicative Participation

GTEC's argument that TURN provided minimal contribution in this proceeding was successfully refuted by TURN in its reply to GTEC's response. TURN was instrumental in deferring the consideration of allowing Pacific Bell and GTEC to recover pre-funded PBOPs costs through the Z factor and in moving the Z factor

consideration from Pacific Bell's and GTEC's October 1, 1991 price cap filings to the second phase of this investigation. While some of TURN's participation overlapped that of DRA, it is our judgment that TURN's presentation did not materially duplicate that of DRA.

In summary, TURN made a substantial contribution to Ordering Paragraph 6 of D.91-07-006 which requires Pacific Bell, GTEC, and DRA to present testimony and evidence in the second phase of this investigation on the appropriate Z factor treatment of PBOPs costs. TURN also made a substantial contribution to D.91-10-024 which denied Pacific Bell's and GTEC's requests for a rehearing of the requirement that they make their PBOPs Z factor showing in the second phase of the investigation. Accordingly, we find that TURN has made a substantial contribution in this proceeding.

Hourly Rate

TURN seeks an hourly rate of \$160 for its attorney, Thomas J. Long, for 46.00 hours of work performed during the 1990 calendar year and a \$175 hourly rate for 34.25 hours of work performed during 1991, for a total of \$13,354.

In support of the \$160 hourly rate for 1990, TURN asserts the Commission has already found the \$160 hourly rate to be reasonable for Long's work performed in 1990. According to TURN, D.91-07-048 awarded an \$160 hourly rate for Long's "work performed in the Fall of 1990."

TURN seeks a \$15 hourly rate increase to \$175 in 1991 to set Long's hourly rate at a level closer to the market rate for an attorney with comparable training and experience. In support of the hourly rate increase, TURN attached a declaration from Long summarizing his training and experience, a declaration from the law firm Long previously worked for, and a survey of attorney billing rates from the June 4, 1990 edition of Of Counsel magazine.

Long graduated from the New York University School of Law in 1985. Upon graduation, he served a one-year clerkship with a United States District Court judge and became a member of the California Bar in 1986. In October 1986 he joined the litigation department of Morrison & Foerster as an associate. In 1987 and 1988 he devoted a substantial portion of his time to "pro bono" work. Long assumed his present position with TURN in October 1990.

According to the declaration of Richard G. Seeborg, a partner in the law firm of Morrison & Foerster, had Long continued to work for Morrison & Foerster in the fall of 1990, the firm would have billed clients for his services at a rate in excess of \$175 per hour.

TURN also attached a survey from the June 4, 1990 edition of Of Counsel magazine to demonstrate that the hourly billing rates for the "High Associate" category of the San Francisco law firms surveyed range from a low of \$175 to a high of \$215. Therefore, TURN asserts that the \$175 hourly rate for work performed by Long in 1991 is at the low end of the range of market rates for attorneys of Long's training and experience and should be approved.

As stated by TURN, we have resolved Long's 1990 hourly rate in D.91-07-048. Therefore, it should not be necessary to revisit it in this proceeding. However, a review of D.91-07-048 and TURN's related compensation request discloses an inconsistency between TURN's showing leading to D.91-07-048 and its showing in this proceeding.

In the showing leading to D.91-07-048, TURN provided an almost identical declaration from Long, and exact copies of a declaration from Seeborg and survey of billing rates from the June 4, 1990 edition of Of Counsel magazine to support the \$160 hourly rate requested by TURN for Long.

In its current showing, TURN did not provide any new evidence to substantiate that Long should be awarded a \$15 hourly wage increase for his 1991 work. More importantly, TURN failed to

disclose in its current compensation request that D.91-07-048 continued an \$160 hourly rate for work performed by Long in 1991. Consistent with D.91-07-048, we will apply a \$160 hourly rate to Long's 1990 and 1991 hours associated with TURN's substantial contribution to this proceeding.

We do not concur with TURN's assertion that GTEC took a vexatious litigation posture in responding to TURN's compensation request. On the contrary, it was GTEC's opposition to the increase in hourly rate which led us to research the 1991 hourly rates approved for Long and to discover TURN's less-than-complete statement regarding compensation rates approved for Long. Therefore, TURN's request for an award enhancement is without merit and should be denied. We will supplement TURN's award, without enhancement, for the three hours of time Long spent to reply to GTEC's response to TURN's compensation request.

Having concluded that TURN made a substantial contribution in this proceeding, we will award TURN \$12,840 for Long's work performed in this proceeding. This award consists of payment at \$160 per hour for 46.00 hours in 1990 and 37.25 hours of work in 1991, as detailed in Appendix A of TURN's request and supplemented to account for TURN's reply to GTEC's response to TURN's request.

Other Costs

TURN presented an itemization of costs for photocopy, postage, and telephone expenses totaling \$485. These amounts do not appear to be in dispute, and will be adopted as reasonable given their minor significance in relation to the totality of TURN's compensation request. The addition of these other costs to the attorney fees awarded to TURN result in a total compensation award of \$13,325. Pursuant to Commission practice in granting other compensation awards, such as D.86-07-009, TURN should be authorized to receive interest on its award beginning from the 75th day following the filing of TURN's compensation request.

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 recordkeeping systems should identify specific issues for which compensation is being requested, such as the actual time spent by each employee, the hourly rate paid, fees paid to consultants, and other costs for which compensation may be claimed.

Findings of Fact

1. TURN requests \$13,839 in compensation for its contribution in D.91-07-006 and D.91-10-024.
2. TURN was found eligible to claim compensation for its participation in this investigation by D.91-07-006.
3. In D.91-07-006, TURN met Rule 76.53(b)'s requirement that its participation without an award of fees or costs imposes a significant financial hardship.
4. TURN's participation in this proceeding to date has been restricted to impacts on Pacific Bell and GTEC.
5. TURN made a substantial contribution to D.91-07-006 and D.91-10-024.
6. TURN's substantial contribution did not materially duplicate that of DRA.
7. D.91-07-048 awarded TURN an hourly rate of \$160 for work performed by Long in 1990 and in 1991.
8. TURN did not substantiate its claim that GTEC took a vexatious litigation posture in responding to TURN's compensation request.
9. TURN's request to raise Long's hourly rate to \$175 used the same documentation filed in a prior proceeding to substantiate the \$160 hourly rate granted for Long in D.91-07-048.

10. GTEC's opposition to TURN's compensation request was instrumental in determining that Long was granted a \$160 hourly rate for work performed in 1991.

11. TURN's itemization of other costs is not in dispute and appears reasonable given their minor significance in relation to the totality of TURN's compensation request.

12. Consistent with D.86-07-009, TURN is entitled to interest on its compensation award beginning from the 75th day following the filing of TURN's compensation request.

Conclusions of Law

1. Rule 76.52(h) is waived in part to allow D.91-10-024 to be deemed the decision that resolves the issue for which TURN seeks compensation.

2. TURN should be compensated for its substantial contribution to D.91-07-006 and D.91-10-024 consistent with the preceding discussion.

3. Pacific Bell and GTEC should each be ordered to pay TURN \$6,662.50 as compensation for TURN's substantial contribution to D.91-07-006 and D.91-10-024.

4. This order should be made effective today to assure that TURN will receive this compensation award without further delay.

ORDER

IT IS ORDERED that:

1. Toward Utility Rate Normalization's (TURN) request for compensation for its contribution to Decision (D.) 91-07-006 and D.91-10-024 is granted in the amount of \$13,325.

2. Pacific Bell shall pay TURN \$6,662.50 within 30 days, as compensation for TURN's substantial contribution to D.91-07-006 and D.91-10-024. Pacific Bell shall also pay TURN interest on the \$6,662.50 principal amount, calculated at the three-month commercial paper rate, commencing on January 28, 1992 and continuing until payment of the award is made.

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3. GTE California Incorporated (GTEC) shall pay TURN \$6,662.50 within 30 days, as compensation for TURN's substantial contribution to D.91-07-006 and D.91-10-024. GTEC shall also pay TURN interest on the \$6,662.50 principal amount, calculated at the three-month commercial paper rate, commencing on January 28, 1992 and continuing until payment of the award is made.

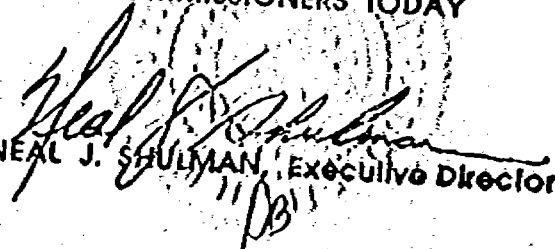
This order is effective today.

Dated February 20, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

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

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


NEAL J. SHULMAN, Executive Director