

MAY 22 1992

Decision 92-05-057 May 20, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the)
 Commission's own motion to establish)
 rules and procedures governing)
 utility demand-side management.)

ORIGINAL
 R.91-08-003
 (Filed August 7, 1991)

Order Instituting Investigation on)
 the Commission's own motion to)
 establish procedures governing)
 demand-side management and the)
 competitive procurement thereof.)

I.91-08-002
 (Filed August 7, 1991)

O P I N I O N1. Summary

The Natural Resources Defense Council (NRDC) requests compensation for its contribution to Decision (D.) 92-02-075 and D.92-03-038 in this multi-phase proceeding. NRDC was found eligible for compensation in this proceeding by D.92-02-067. NRDC's total compensation request is \$12,566.50. We find that NRDC has made a significant contribution to D.92-02-075 and D.92-03-038 and award \$7,571.50. This downward adjustment to NRDC's request reflects the level of duplication in NRDC's contribution and other adjustments to requested compensable hours and rates.

2. Background

This proceeding was initiated on August 7, 1991, with the issuance of an Order Instituting Rulemaking and companion Order Institution Investigation (OIR/OII). The OIR/OII included proposed rules and procedures governing the funding, evaluation, and implementation of utility demand-side management (DSM) programs. Interested parties were offered the opportunity to comment on those proposed rules by September 23, 1991. Based on those comments, we issued our adopted DSM rules on February 20, 1992 in D.92-02-075.

The OIR/OII also directed utilities to develop and present pilot DSM bidding programs for consideration in this proceeding. For this purpose, the OIR/OII endorsed the formation of a Bidding Advisory Committee, with representatives from utilities, consumer and environmental groups, energy service companies and other interested parties. Pacific Gas and Electric Company's (PG&E) pilot bidding proposal went to evidentiary hearing in October 1991, and we issued a final order on the design, size, and funding level of PG&E's pilot on March 13, 1992 in D.92-03-038.

On October 9, 1991, NRDC submitted its Request for Finding of Eligibility for Compensation in this proceeding, along with a request for compensation for expenses incurred as of that date. In D.92-02-067, we found that NRDC met the requirements of Rule 76.54(a), and was, therefore, eligible for an award of compensation for its participation in this proceeding. However, we directed NRDC to resubmit its request for compensation at a later date, once we had issued an order or decision that resolved the issues for which NRDC seeks compensation. (D.92-02-067, mimeo. p. 6.) NRDC augmented its October 9, 1991 request for compensation on March 23, 1992, to cover its contribution to both D.92-02-075 and D.92-03-038. On April 9, 1992, PG&E sent a letter to the assigned Administrative Law Judge (ALJ) outlining the role that NRDC played in the development of PG&E's DSM bidding pilot. No other parties responded to NRDC's request for compensation. At the request of the assigned ALJ, NRDC submitted supplemental information on its Bidding Advisory Group participation on April 13, 1992, with an amended request totalling \$12,566.50.

3. Intervenor Compensation Program Requirements

Article 18.7 of our Rules of Practice and Procedure (Rules) establishes the rules for awarding compensation to public utility customers in Commission proceedings. The process is a two-step procedure, involving:

1. A request for eligibility filed within 30 days of the first prehearing conference or

within 45 days after the close of the evidentiary record. (Rule 76.54.)

2. A request for compensation filed within 30 days after issuance of a final order or decision by the Commission in the hearing or proceeding by a customer who has been found eligible for compensation in the proceeding. The filing must include a detailed description of services and expenditures and a description of the customer's substantial contribution to the proceeding. (Rule 76.56.)

Pursuant to Rule 76.53, the Commission may award compensation to intervenors who satisfy the following requirements:

1. The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the Commission's order or decision;
2. Participation or intervention without an award of fees or costs imposes a significant financial hardship; and
3. The customer's presentation does not materially duplicate the contribution or presentation of another party to the proceeding.

Rule 76.52 defines "substantial contribution" as follows:

"Substantial contribution' means that, 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."

We address whether NRDC meets these various requirements, in the following sections.

4. Eligibility/Filing Requirements

As described above, we found NRDC eligible for compensation in D.92-02-067. NRDC's request for compensation is also timely under the 30-day rule. (See Section 2 above.) Finally, NRDC's request contains the required description of its contribution to the proceeding and the itemized expense categories under which it requests compensation. Therefore, NRDC has met the eligibility and filing requirements of our Rules.

5. Substantial Contribution

NRDC is seeking compensation for its participation in two distinct phases of this proceeding: (1) in the development of rules governing DSM (D.92-02-075) and (2) in the authorization of PG&E's pilot DSM bidding program (D.92-03-038). NRDC participated in the development of DSM rules by filing written comments on September 23, 1991. NRDC participated in PG&E's bidding pilot by attending DSM Bidding Advisory Committee meetings and sponsoring a witness, Mr. Ralph Cavanagh, to testify on the portion of the September 23 comments that related to DSM bidding. NRDC did not cross-examine other witnesses or file a brief in this phase of the proceeding.

With respect to the DSM rules, D.92-02-075 adopted positions consistent with NRDC's filed comments in the following areas: earnings caps for DSM, treatment of load retention and load building programs, procedural recommendations concerning fuel substitution programs, and the treatment of environmental externalities in cost-effectiveness calculations. On these issues D.92-02-075 specifically acknowledges arguments presented by NRDC

and others in reaching our final determinations.¹ (See D.92-02-075, mimeo. pp. 26, 28, 38, 54.) With regard to PG&E's bidding pilot, we also find that NRDC made a substantial contribution to D.92-03-038, in which we adopted positions on the partnership form of bid and shareholder incentives that were consistent with NRDC's recommendations. Along with other parties, NRDC presented arguments that contributed to our decision to approve the partnership form of bid, and to allow PG&E to earn shareholder incentives on the pilot program. (See D.92-03-038, pp. 9-10, 11, 34-35, 36-38.)

NRDC also requests recognition for its role in helping the principal parties develop the consensus positions on DSM rules that were filed on December 10, 1991. (Request, p. 3.) We do not find that this presentation of consensus positions substantially assisted us in our deliberations because (1) the document itself consisted only of a marked up version of the proposed rules, without any discussion of rationale or presentation of arguments for changing the proposed rules as recommended and (2) the document was untimely filed. (See D.92-02-075, Finding of Fact 10.) Accordingly, D.92-02-075 makes no reference to the consensus positions presented in that document in the discussion of issues, positions, or rationale for adopting our final rules. We relied on the September 23, 1991 filings in reaching our determinations.

1 NRDC also states that it substantially contributed to our decision to reject the Rate Impact Measure and Utility Cost Test as primary ranking tests. We disagree. In its comments, NRDC only mentions in passing that it supports the proposed rules regarding these tests, but gives no arguments in support of that position. (See NRDC's Comments, p. 6.) This simple statement of support did not aid us in making the findings or conclusions regarding these two tests of cost-effectiveness. In all other areas mentioned above, NRDC provided arguments in support of its recommendations that assisted our decisionmaking.

In sum, we find that NRDC made a significant contribution to D.92-02-075 and D.92-03-038 in the issue areas described above.

6. Financial Hardship

In D.92-02-067, we found that "NRDC has demonstrated that its participation in these proceedings would pose a significant financial hardship under Rule 76.52(f) and Rule 76.54(a)(1)." (Finding of Fact 3, mimeo. p. 7.) Therefore, NRDC complies with the above-quoted Rule 76.53(b) setting forth the requirement for awards.

7. Duplication

Rule 76.53 provides that intervenor's fees may be awarded if participation did not duplicate the contributions of other parties. We have carefully reviewed other parties' filed comments in the rulemaking to evaluate the level of duplication in NRDC's participation. Based on our review, we find that NRDC provided unique recommendations/arguments regarding the treatment of load building and load retention programs. Although other parties expressed reservations about these types of programs, NRDC was the only party to suggest the "burden of proof" requirement that was incorporated into our final rules. In the other three areas, we find that NRDC's recommendations and arguments duplicate in whole or in part the presentations of other parties. Similarly, NRDC's recommendations and arguments in favor of the partnership form of bid and inclusion of shareholder incentives were also duplicative in part of other parties' presentations. We consider the impact of duplication on NRDC's award in Section 8 below.

8. 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."

NRDC requests compensation in the amount of \$12,556.50, broken down as follows:

1. D.92-02-075: DSM Rules
 - a. Initial Comments, September 23, 1991

Ralph Cavanagh	17 hrs. at \$175	\$ 2,975.00
David Goldstein	4 hrs. at \$175	700.00
		<u>\$ 3,675.00</u>
 - b. Negotiations, December 10, 1991 Filing

Ralph Cavanagh	12 hrs. at \$175	\$ 2,100.00
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 - c. Postage and Xeroxing of Comments

		<u>166.50</u>
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Total for D.92-02-075: \$ 5,941.50
2. D.92-03-038: PG&E's Bidding Pilot
 - a. Cross-Examination of Ralph Cavanagh/ \$ 315.00
attendance at hearings
(1.8 hrs. at \$175)
 - b. Ralph Cavanagh's attendance at \$ 6,300.00
Bidding Advisory Group meetings
for PG&E's Pilot
(36 hrs. at \$175)

Total for D.92-03-038: \$ 6,615.00

TOTAL COMPENSATION REQUEST: \$12,556.50

8.1 Hourly Rate

In D.90-07-066, D.89-03-034 and D.88-07-025, we approved an hourly rate of \$150 for Mr. Cavanagh's time. NRDC requests that this fee be increased by \$25 per hour to \$175. NRDC supports its request with reference to prevailing market rates and to our decision, in certain circumstances, to award an enhancement or "efficiency adder" to the base rate where attorneys have acted as both advocates and experts. With regard to the efficiency adder,

we have granted the enhancement on the basis that ratepayers benefit from the efficient presentation of an intervenor's position. However, in this instance, NRDC did not participate in a dual capacity. The rulemaking phase of the proceeding did not go to evidentiary hearings. Moreover, for the phase of the proceeding that did go to hearings, Mr. Cavanagh did not cross-examine witnesses or file briefs. We therefore cannot conclude that Mr. Cavanagh's contribution warrants an efficiency adder.

At the same time, however, we acknowledge that NRDC's prevailing rate of \$150 has not been reassessed since 1988. In support of the \$175 rate, NRDC attached the resumes of Mr. Cavanagh and Dr. Goldstein and a survey of attorney billing rates from the June 3, 1991 Of Counsel magazine.

Mr. Cavanagh has an impressive resume and over 12 years' experience as an attorney, including about 11 years in his present position with NRDC. He has extensive experience as both an attorney and a witness on energy and demand-side management topics before regulatory agencies. Mr. Cavanagh was recently appointed as one of the fifteen members of the Energy Subcommittee of the President's Commission on Environmental Quality.

Dr. Goldstein has an equally impressive background as the co-director of NRDC's energy programs over the last 10 years, and has numerous technical and policy publications on energy and energy efficiency to his credit. Dr. Goldstein has also served as a staff scientist at Lawrence Berkeley Laboratory, and on several energy advisory committees nationwide.

The Of Counsel survey presents a range of \$175 to \$230 in hourly billing rates for the "High Associate" category of the San Francisco law firms surveyed. Hence, NRDC's requested hourly rate of \$175 for Mr. Cavanagh represents the low range for the surveyed firms. We also note that the hourly rate of \$175 is within the

general range of approved rates for attorneys of comparable training and experience in recent compensation decisions.²

We therefore agree with NRDC that the \$150 level is below market rates for attorneys of Mr. Cavanagh's experience and should be increased to \$175 per hour. We consider the low end of the survey range appropriate compensation for Mr. Cavanagh's participation because, in our judgment, the subject matters involved in this aspect of the proceeding, and upon which NRDC focused its participation, were not unduly complex. As we stated in D.87-10-078, "we have the discretion to employ a high or low range figure, based on the experience of the attorney involved, the complexity of the subject matter and the particular expertise required.... Each situation must be separately analyzed, based on the facts presented."³ In no sense do we intend to denigrate the importance of the DSM issues that NRDC addressed, but they certainly require much less technical analysis in the presentation than, for example, complex rate design issues, difficult regulatory accounting issues, or some of the cost-effectiveness issues raised in this phase of the proceeding.

NRDC also requests a \$175 hourly rate for Dr. Goldstein, who participated in this proceeding by co-authoring NRDC's September 23, 1991 comments on the proposed DSM rules. Per the assigned ALJ's request, NRDC provided information on Dr. Goldstein's recent compensation level for intervening at California Energy Commission (CEC) proceedings.⁴ By order dated August 20, 1991 (Docket 90-CON-1), the CEC's Efficiency Standards

2 See, for example, D.92-02-070, D.91-11-067, and D.91-12-055.

3 D.87-10-078, mimeo., p. 31.

4 Dr. Goldstein has never participated as an expert witness on DSM in any of this Commission's proceedings, for which NRDC sought compensation.

Committee approved intervenor funding for Dr. Goldstein at the level of \$150 per hour. We consider that level to be an appropriate market value for Dr. Goldstein's participation in this proceeding and will award compensation at the same rate.

8.2 Compensable Hours

As discussed above, NRDC's participation in developing the December 10, 1992 filing did not represent a substantial contribution to D.92-02-075. Therefore, we will not award compensation for the 12 hours of Mr. Cavanagh's time that were allocated to this activity.

NRDC requests compensation for its participation in Bidding Advisory Committee meetings. Since the use of Bidding Advisory Committees was endorsed in the OIR/OII, we consider participation in those meetings compensable, as is preparation time spent in pre-hearing workshops directed by the Commission or assigned ALJ. In its April 13, 1992 supplemental filing, NRDC provided information on the costs of attending the 1990/1991 Advisory Group workshops that addressed PG&E's proposed pilots.⁵ NRDC included a letter from PG&E's project manager for the pilot bid, which described Ralph Cavanagh's participation in these meetings as "an active participant, adding his experience and insights to the group discussion... [and] also a critical catalyst for the resolution of significant points of disagreement."

5 In its supplemental filing, NRDC withdrew its original request for compensation for two Bidding Advisory Group meetings that took place after the close of evidentiary hearings on PG&E's bidding pilot. The focus of those meetings was to develop DSM-only bidding pilots for the other energy utilities, not PG&E. If NRDC participates in the upcoming hearings on other utilities' pilot bidding programs, then NRDC may include and request compensation for the costs of participating in these workshops as a component of preparation costs.

Since the OIR/OII clearly endorsed the PG&E model of using an advisory group in developing its proposals, it is reasonable in these circumstances to view work performed as part of the Bidding Advisory Committee as preparation for PG&E's bidding pilot application.⁶ This treatment is consistent with our determinations in D.91-06-005, where we approved compensation for Toward Utility Rate Normalization's participation in DSM collaborative group meetings. As in that case, it is clear that NRDC's and other parties' participation in the Bidding Advisory Committee meetings substantially assisted the utility in developing substantive aspects of its proposal, and aided all parties in identifying remaining areas of contention. As a result, we were able to process PG&E's bidding pilot proposal in a more efficient manner, i.e., with a minimal amount of hearing days.

Thus, we conclude that under the circumstances of this case, NRDC may be compensated for the work it performed as part of the Bidding Advisory Committee. We view Mr. Cavanagh's 36 hours of attending those meetings as compensable, subject to the duplication adjustments described below.

8.3 Adjustment For Duplication

As described in Section 7 above, NRDC's contribution to D.92-02-075 and D.92-02-038 was duplicative, in whole or in part, of other parties' contributions with the exception of one issue. We also note that NRDC's 15 pages of comments presented several recommendations that were not adopted in D.92-02-075. These include NRDC's proposed solution to creamskimming problems, proposed language clarifications/additions on the intent of Public Utilities Code § 701.1 and on DSM budget expansions, and NRDC's recommendation

⁶ See D.92-02-075, mimeo. pp. 43-44. PG&E's bidding pilot proposal was originally filed in Application 91-04-003. In the DSM OIR/OII, we directed PG&E to remove the bidding pilot from that docket, and resubmit it for consideration in this proceeding.

to delay requiring a shift to ex post measurement of DSM savings. At the same time, we acknowledge that NRDC provided a unique perspective to this proceeding, particularly to PG&E's bidding pilot, as the only nongovernmental intervenor without a direct economic stake in the outcome. Since NRDC did not break down its participation by issue, we must adjust the number of compensable hours by a factor that we believe properly reflects the above observations. In our judgment, adjustments of 50% for D.92-02-075 and of 15% for D.92-02-038 are reasonable. We apply these duplication adjustments equally to all activities associated with the preparation of NRDC's position on issues, including NRDC's attendance and participation in the Bidding Advisory Committee meetings.

Thus, the total compensable hours are 40.6 hours of Mr. Cavanagh's time and two hours of Dr. Goldstein's time.

8.4 Other Reasonable Costs

NRDC requests recovery of \$166.50 for copying and mailing costs associated with the September 23, 1991 filed comments. NRDC is entitled to recover this amount.

9. Allocation

NRDC did not address the question of how to allocate NRDC's compensation among the utilities involved in this proceeding. NRDC's comments on the proposed DSM rules addressed policies affecting all four major energy utilities: PG&E, Southern California Edison Company (Edison), San Diego Gas & Electric Company (SDG&E), and Southern California Gas Company (SoCalGas). Therefore, it is reasonable to allocate the responsibility for paying NRDC's compensation for contributing to D.92-02-075 equally among these four utilities. The responsibility for paying NRDC's compensation for participation in PG&E's bidding pilot should be allocated to PG&E.

10. Conclusion

NRDC is entitled to compensation of \$7,571.50. The components of this award are set forth in the following table:

1. <u>D.92-02-075: DSM Rules</u>	
a. <u>Initial Comments, September 23, 1991</u>	
Ralph Cavanagh 8.5 hrs. at \$175	\$ 1,487.50
David Goldstein 2 hrs. at \$150	<u>300.00</u>
	\$ 1,787.50
b. Postage and Xeroxing of Comments	<u>166.50</u>
Total for D.92-02-075	\$ 1,954.00
2. <u>D.92-03-038: PG&E's Bidding Pilot</u>	
a. Cross-examination of Ralph Cavanagh/ Attendance at Hearings (1.5 hrs. at \$175)	\$ 262.00
b. Ralph Cavanagh's Attendance at Advisory Group Meetings for PG&E's Pilot (30.6 hrs. at \$175)	\$ 5,355.00
Total for D.92-03-038	\$ 5,617.50
TOTAL COMPENSATION AWARDED:	\$ 7,571.50

NRDC's compensation will be allocated to PG&E, Edison, SDG&E, and SoCalGas as follows:

PG&E	\$ 6,106.00
SDG&E	488.50
SoCalGas	488.50
Edison	<u>488.50</u>
Total	\$ 7,571.50

NRDC 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. NRDC has requested compensation totaling \$12,556.50 for its contribution to D.92-02-075 and D.92-03-038 in this multi-phase proceeding.

2. NRDC was found eligible for compensation in D.92-02-067.

3. NRDC made significant contributions to D.92-02-075 on the issues of earnings caps for DSM, treatment of load retention and load building programs, procedural recommendations concerning fuel substitution programs, and the treatment of environmental externalities in cost-effectiveness calculations.

4. The December 10, 1991 filing of consensus positions in this proceeding was untimely filed and consisted of a marked up version of the proposed rules, without any discussion of rationale or presentation of argument for changing the proposed rules as recommended.

5. NRDC made significant contributions to D.92-03-038 on the issues of the form of bid and inclusion of shareholder incentives in PG&E's pilot bidding program.

6. Mr. Cavanagh did not participate in a dual role in this proceeding because he did not cross-examine witnesses or file briefs.

7. A recent Of Counsel survey of San Francisco law firms indicates a market rate for attorneys of Mr. Cavanagh's experience in the range of \$175 to \$230 per hour.

8. The subject matters involved in this phase of the proceeding, and upon which NRDC focused its participation, were not unduly complex.

9. Dr. Goldstein was compensated in 1991 by the California Energy Commission as an intervenor in a DSM-related proceeding at an hourly rate of \$150.

10. NRDC's contribution to D.92-02-075 and D.92-03-038 was duplicative, in whole or in part, of other parties' contributions with the exception of one issue.

11. NRDC provided a unique perspective to this proceeding, particularly to PG&E's bidding pilot, as the only nongovernmental intervenor without a direct economic stake in the outcome.

Conclusions of Law

1. NRDC made substantial contributions to D.92-02-075 and D.92-03-038.

2. The December 10, 1991 consensus recommendations, and NRDC's participation in developing this filing, did not make a significant contribution to D.92-02-075.

3. Mr. Cavanagh's contribution to D.92-02-075 and D.92-03-038 does not warrant an "efficiency adder."

4. Compensating Mr. Cavanagh at the low end of the Of Counsel survey results, at \$175 per hour, is reasonable given the level of complexity of NRDC's presentation and contribution to D.92-02-075 and D.92-03-038.

5. An hourly rate of \$150 for Dr. Goldstein is commensurate with market rates for his participation in DSM-related proceedings.

6. Duplication adjustments of 50% and 15% to NRDC's contribution to D.92-02-075 and D.92-03-038, respectively, are reasonable.

7. PG&E should be ordered to pay NRDC \$6,106.00.

8. Edison should be ordered to pay NRDC \$488.50.

9. SDG&E should be ordered to pay NRDC \$488.50.

10. SoCalGas should be ordered to pay NRDC \$488.50.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company shall pay Natural Resources Defense Council (NRDC) \$6,106.00 within 30 days as

compensation for NRDC's substantial contributions to Decision (D.) 92-02-075 and D.92-03-038.

2. Southern California Edison Company shall pay NRDC \$488.50 within 30 days as compensation for NRDC's substantial contribution to D.92-02-075.

3. San Diego Gas & Electric Company shall pay NRDC \$488.50 within 30 days as compensation for NRDC's substantial contribution to D.92-02-075.

4. Southern California Gas Company shall pay NRDC \$488.50 within 30 days as compensation for NRDC's substantial contribution to D.92-02-075.

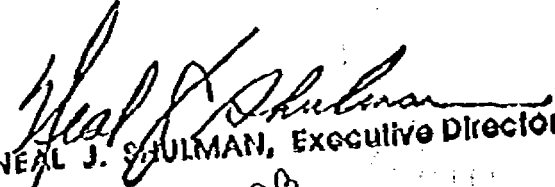
This order is effective today.

Dated May 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
DB