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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation by Rulemaking into the adoption of new Rules of Practice and Procedure to process and administer requests for attorney and witness fees and other expenses of participants in Commission proceedings.	OII 100 (Filed November 13, 1981)

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OPINION

On November 13, 1981, the Commission issued Decision (D.) 93724 in Application (A.) 59308 and Order Instituting Investigation (OII) 100 under Article 3.5 of the Rules of Practice and Procedure as a rulemaking proceeding. The purpose of OII 100 was to adopt new Rules of Practice and Procedure to administer and process requests by public participants for the award of attorney and witness fees and related reasonable expenses. Proposed Rules 76.21 through 76.32 were attached and comments were solicited from a wide range of utilities and interested parties who appear regularly before this Commission.

D.93724 discussed the rationale for our conclusion that we had authority to promulgate rules for awarding attorney and/or witness fees in Commission proceedings other than electric rate proceedings (where our authority derives from the Public Utility Regulatory Policies Act of 1978 (PURPA)) and quasi-judicial proceedings (where our authority derives from Public Utilities (PU) Code §§ 701 and 734 to award attorney fees was affirmed by the California Supreme Court in Consumers Lobby Against Monopolies v Public Utilities Commission (1979) 25 Cal 3d 891 (the CLAM decision)). OII 100 specifically stated that it was not the proceeding in which to address the appropriateness of participant fees since the Commission had already found that they were in D.93724.

Comments on the proposed rules were filed by Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); Southern California Gas Company (SoCal); Environmental Defense Fund (EDF); Toward Utility Rate Normalization (TURN); The Pacific Telephone and Telegraph Company (Pacific); General Telephone Company of California (General); Southern Pacific Pipe Lines, Inc. and San Diego Pipeline Company (Pipeline Companies); The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Transportation Company, Union Pacific Railroad Company, and Western Pacific Railroad Company (Railroad Companies); Dominguez Water Corporation; San

Gabriel Valley Water Company (San Gabriel); Southwest Suburban Water; California Water Association; Public Advocates, Inc. on behalf of the League of United Latin American Citizens, American G.I. Forum, Oakland Citizens' Committee for Urban Renewal, Chinese for Affirmative Action, and Glide Memorial Methodist Church (Low-Income Organizations); State of Illinois Governor's Office of Consumer Services; John C. Lakeland; and the Commission staff (staff).

In addition to its comments, PG&E filed an application for a stay of all proceedings in OII 100 pending resolution of the issue of the Commission's authority to issue the proposed rules. PG&E argued that it has filed a petition for rehearing of D.93724 in time under Rule 86 to result in an automatic stay of that decision, and that since the basis for OII 100 had been stayed, it made sense to stay OII 100 also.

On February 4, 1982, we issued D.82-02-067 which extended the stay of D.93724 until further order of this Commission; and on the same day, by D.82-02-065, we invited additional comments addressing whether the Commission has the authority to adopt and implement rules of the nature proposed in OII 100. Since we proposed to resolve the jurisdictional issue concurrently with our consideration of the proposed rules in OII 100, PG&E's motion for a stay of OII 100 will be denied.

Additional comments were received from staff, Lakeland, EDF, Pacific, California Farm Bureau Federation (Farm Bureau), San Gabriel, Edison, General, PG&E, and San Diego Gas & Electric Company (SDG&E). As provided in Government Code § 11346.4 the proposed rules were sent to the Office of Administrative Law (OAL) on October 15, 1982 and were published in the California Register. Comments were received from the Center for Public Interest Law, University of San Diego School of Law (Center), and from Edison. The rules sent to OAL reflected some of the changes suggested by staff and parties to the original rules set forth in the OII and accordingly the comments of Center and Edison's second set of comments on the rules themselves

address slightly different rules than did parties who commented on the proposed rules appended to OII 100. Many of Edison's second comments repeated the suggestions it made in the first set of comments.

The Commission's Existing Public Utility Regulatory Policies Act of 1978 (PURPA) Rules

Article 18.5

Proposed Article 18.6 was modeled after a narrower set of compensation rules which appear as Article 18.5 of the Commission's Rules of Practice and Procedure. Those rules cover compensation of "consumers" who contribute to decisions concerning a set of electric utility issues specified in the federal PURPA.[1] Sections 121 and 122 of PURPA prescribe the eligible "PURPA standards," and authorize state ratemaking authorities to award compensation.

Article 18.5 was adopted in D.91909 (June 17, 1980) in OII 39 (filed March 13, 1979), the Commission's rulemaking to implement its authority under PURPA.[2]

PURPA narrows the circumstances under which compensation can be awarded to proceedings in which consumers have "substantially contributed to the approval, in whole or in part, of a position advocated by such consumer..." This limitation appears in Rule 76.06 of Article 18.5, and in proposed Rule 76.26 of this proceeding.

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[1] Public Law 95-617, 16 USC 2601 et seq., 92 Stat. 3117.

[2] Article 18.5, as adopted in D.91909, contained Rules 76.01 through 76.10. In D.92602 (January 6, 1981), the rules were modified, including the addition of Rule 76.11, concerning "Provisions for Reimbursement" in cases that were pending at the time Article 18.5 was adopted.

PURPA allows compensation for "reasonable" fees. Article 18.5 provides that these fees shall be computed at prevailing market rates, rather than at the rate actually billed by or to the consumer/participant. Proposed Article 18.6 contains the same interpretation of reasonableness.

PURPA also allows ratemakers to include a preliminary determination that uncompensated participation would impose a "significant financial hardship" on the consumer, or to designate a "common legal representative" from among would-be participants who otherwise would represent overlapping interests. Under Article 18.5, Rule 76.03 provides for a preliminary "Request for Finding of Eligibility for Compensation." Proposed Rule 76.23 copies this provision.

Since the adoption and effective date of the PURPA rules, they have been applied in a number of proceedings, and three awards have been made.[3] The history of the PURPA rules in particular proceedings demonstrates that advocate compensation rules can be applied in a reasonable and flexible manner, without undue administrative burden.

General Comments on the Issue of the Commission's Jurisdiction to Award Compensation

Virtually all of the comments, except those of EDF, Lakeland, and the staff, assert that the Commission lacks authority to award compensation in quasi-legislative proceedings under the rationale set forth in the CLAM decision. Additionally, Pacific argues that California statutes (specifically California Code of Civil Procedure (CCP) § 1021) deny authority to the Commission to award attorney fees, that most other jurisdictions do not permit or provide for awards of fees, and that awards of fees in quasi-

[3] D.93371 (August 4, 1981 in A.58605); D.82-08-085 (August 18, 1982 in A.60153); and D.82-11-052 (November 17, 1982 in A.60560).

legislative cases would be unconstitutional, requiring a utility to support financially the political views and activities of others. Edison also joins in this last contention. San Gabriel argues that allowing attorney fees and costs to participants is unfair to utilities and ratepayers because no reciprocal liability attaches to such participants to pay for what it characterizes as frivolous and unmeritorious contentions by such participants requiring additional expenses by the utility to respond. It further argues that water companies in particular would be unreasonably burdened by awards of attorney fees since they may only file for general rate increases once every three years and may therefore have to carry an award which has been paid as a deferred expense for an overlong period of time before recovery through rates.

Lakeland favors the intent to provide compensation to public participants on the ground that it enhances the inputs made to the Commission and tends to prevent distortion of the views on a particular issue if they are presented only by the utilities and the staff. Lakeland believes, however, that simply extending the exercise of Commission authority to award compensation under § 701 may well prove invalid and he suggests exploration of alternative mechanisms which might be established to "get the money from the ratepayer to the public participant." One such mechanism might be establishing an incentive program to be administered by utilities on behalf of their ratepayers.

EDF's comments discuss the Commission's substantive authority to award fees, the ripeness of the substantive issue, and the Commission's procedural authority to adopt and implement rules. Basically, EDF has no quarrel with the Commission's discussion of its substantive authority in D.93724 insofar as it applied prospectively to OII 100. EDF notes that our assertion of authority to award fees and costs in quasi-legislative proceedings does not comport with the letter of the CLAM decision but is intended to comport with

CLAM's rationale. It notes further that our newly expressed policy may not be ripe for review at least until final rules are promulgated in OII 100 and possibly not until an actual fee application is processed under these rules. Lastly, out of an abundance of caution, EDF asserts that the Commission has procedural authority to adopt and implement procedural rules governing the reimbursement of fees and expenses under PU Code § 1701.

EDF recommends that the Commission treat this matter and D.93724 in A.59308 entirely separately. With respect to D.93724 it recommends that the Commission clarify that D.93724 is not final and deny all applications for rehearing of D.93724 on that ground, receive briefs in A.59308 on the proper standard to be applied in that matter under Ordering Paragraph 1(a) of D.93724, and then reach a decision on the eligibility of EDF for attorney fees and costs in A.59308. With respect to OII 100, it recommends simply that the Commission proceed to final decision and adoption of rules.

The staff makes two points: first, that the Commission has the authority under California Constitution Article XII and PU Code § 1701 to determine its own procedures and hence to issue procedural rules setting up a public participation program based upon the reimbursement of certain fees and expenses incurred by qualifying participants; and second, that the CLAM decision does not bar the Commission from adopting and implementing the reimbursement program.

Staff's rationale for the latter proposition springs from California Constitution Article VI, § 2 which provides that the concurrence of four justices present at the argument is necessary for the Supreme Court to render judgment. Staff cites 16 Cal Jur. 3d, Court #143:

> "Grounds or reasons that are stated in an opinion but are not concurred in by a majority of the Court, amount, only to the personal opinions of those who write or concur in them, and beyond that are not authority,"

noting that the Court was sharply divided in its reasoning for treating quasi-judicial matters differently than quasi-legislative matters when considering the Commission's authority to award attorney fees. Staff believes that given the division among the members of the Court, CLAM is simply not binding precedent for any of the opinions it presents.

Additionally, staff believes that CLAM lacks precedential effect given the dissimilarity of its facts to the present situation. In CLAM, the Court considered only two specific requests for attorney fees. It did not address the Commission's power to institute a general public participation program of the kind proposed by OII 100 and further, that any precedential effect CLAM may have had is now diminished to the extent that the Commission's concerns about the administrative problems associated with an attorney fee program have been resolved.

All other parties filing additional comments took issue with the Commission's jurisdiction to award attorney fees in proceedings that were not quasi-judicial. Because the grounds upon which the various parties based their objections are similar, they will be reviewed in summary form rather than in a repetitious party-by-party manner.

The first objection, and one which appeared in almost all parties' comments opposing the Commission's jurisdictions is that the California Supreme Court, in reaching its holding in CLAM, used legal principles of general application and was not primarily concerned with any particular administrative or policy problems which might confront the Commission in administering attorney fee awards. Parties state that CLAM remains binding authority and that it clearly holds that the Commission lacks jurisdiction to award attorney fees in quasi-legislative proceedings absent specific legislation, such as PURPA, authorizing it. Parties argue that the Commission cannot unilaterally annul a decision of the Supreme Court which is based on

still current law on the basis that the policy arguments against compensation of participants in quasi-legislative proceedings no longer apply. In California a decision of the State Supreme Court that has never been reversed or modified is absolutely binding on lower courts.

Parties go on to argue that even if the Commission had jurisdiction to award fees in quasi-legislative cases, such an award would not be appropriate under the existing legal theories of "common fund," "substantial benefit" or "private attorney general." They point out that in the quasi-legislative context there most often will be no "fund" created by a particular advocacy position and hence it would be necessary to increase rates to fund any award. Similarly, in the public utility context there is not always a clear indication when the Commission adopts a position that any particular ratepayer or group of ratepayers would be benefited. Under the "substantial benefit" theory, those benefiting should contribute to the cost. This identification is not always possible in the context of utility regulation; therefore, there is no guarantee, or even likelihood, that those benefiting are those who would pay.

Lastly, the "private attorney general" theory provides fees when a litigant has vindicated an important public policy, requiring private enforcement and based on the Constitution or statute. Parties argue that in general, Commission decisions are the best effort of the Commission to balance conflicting economic interests and cannot be characterized as vindicating important rights affecting the public interest.

Several parties commented that the proposed rules would violate the First and Fourteenth Amendment rights of the utilities and their ratepayers and would be unfair because no reciprocal liability attaches. Parties argue that the proposed rules require utilities and their ratepayers to provide financial support for the views of participants advocating positions in quasi-legislative

proceedings. The utilities, the argument goes, will be forced (until they are ultimately compensated) to provide financial support for these views. This compulsory funding of the political views and activities of others violates both the California Constitution (Article I, § 3) and the United States Constitution (First and Fourteenth Amendments).

The comment on unfairness notes that a utility's legal costs in rate cases ordinarily are taken into account in establishing the utility's cost of service. Where additional expenses are incurred in refuting frivolous and unmeritorious contentions of a consumer participant, such additional expenses would be borne by the utility and ultimately be passed through to the ratepayers. Those who give rise to such additional fees and costs should bear the obligation of paying for such fees and expenses, yet the proposed rules do not provide for such reciprocity. The comment is more in the nature of observing an omission from the proposed rules rather than a fatal defect.

Lastly, the parties argue that the Commission lacks specific statutory authority to award attorney fees in quasi-legislative proceedings. CCP § 1021 provides:

> "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

Parties have reviewed PU Code §§ 701 and 728 and assert that the powers granted the Commission under these sections are insufficient to sustain jurisdiction to award attorney fees. Further, parties cite CCP § 1021.5 which provides that courts (emphasis by parties) can award attorney fees "in any action which has resulted in the enforcement of an important right affecting the public interest" if certain conditions are met. Parties also cite the provision in PU Code § 453(b) which provides in part,

> "A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees."

They argue that § 453(b) indicates a clear legislative intent to limit award of attorney fees to the courts. Parties argue that CLAM holds that CCP § 1021 does not preclude the Commission's awarding attorney fees in quasi-judicial cases only because the Commission has the powers of a court of equity and can thus avail itself of the three equitable exceptions to the general rule expressed by CCP § 1021 (common fund, substantial benefit, and private attorney general).

Discussion

It is important to keep in mind that the CLAM decision dealt only with two types of Commission proceedings, quasi-judicial reparations proceedings, and quasi-legislative ratemaking proceedings. It did not address the myriad other proceedings which come before this Commission which largely fall into the quasi-legislative category but which are not directly involved with ratemaking. The CLAM decision does not address the authority to award attorney fees in these proceedings. Even when addressing only the two types of proceedings, reparations and ratemaking, the Court in CLAM differed sharply over the authority of the Commission to award attorney fees. Our discussion in D.93724 concerning the petition of EDF for compensation in A.59308 addressed these differences in some detail and we will not repeat it here. We note only that it is precisely these differences, plus the total lack of discussion of quasi-legislative proceedings other than ratemaking, which led to our careful analysis of the CLAM opinion and to our conclusion in D.93724 and in this decision that it is appropriate for us to establish a procedure for awarding compensation in matters

which come before us for which there is no mechanism currently in place.

We are not persuaded that the arguments adduced by parties opposing our assertion of jurisdiction to award compensation are of sufficient weight to cause us to conclude otherwise than we did in D.93724. We are particularly not impressed with the arguments that we lack power to award attorney fees because there is no statutory provision for it or that because courts are authorized to award attorney fees under CCP § 1021.5 and PU Code § 453 the Commission is therefore denied the power, by negative implication, to award attorney fees under PU Code § 701. The CLAM decision effectively disposed of those arguments (25 Cal 3d 891 at 906). It went on to state, "The proper focus of our inquiry, therefore, is under what circumstances jurisdiction to award attorney fees is cognate and germane to and consistent with regulation of public utilities and established legal principles." (Id. at p. 906.) Similarly, the CLAM decision disposed of the argument that requiring the public to pay for the Commission staff which represents them and for attorney fees for intervenors results in payment for multiple representation. The CLAM court specifically rejected this policy argument against recognizing the jurisdiction of the Commission to award attorney fees.

We are left then with a decision which recognizes that "the Commission staff cannot fully and adequately represent all facets of the public interest, and in some instances...it may fail to discern the ratepayers' rights. Public interest intervenors therefore fill a gap in the ratemaking process." (Id. at 911) but which nevertheless ultimately rejects the Commission's authority to award fees in ratemaking cases. Our analysis of the rationale of the decision and our conclusion that the dichotomy between quasi-legislative and quasi-judicial cases set forth in CLAM no longer controls is set forth extensively in D.93724 at page 28 et seq. We

have reviewed this discussion and find it equally pertinent today. We see no need to repeat it in this decision and will simply reaffirm it here.

Effective public participation is an essential element of administrative action in the protection of the public interest. We are charged with protecting that interest and we promulgate rules today which will assist us in that effort by providing a framework within which to compensate parties providing that effective public participation.

General Comments on Proposed Rules

Although several parties included comments on our authority to award attorney fees in their initial comments, those matters will be addressed in a separate section and only the comments on the rules themselves will be discussed here.

The Pipeline Companies and the Railroad Companies filed similar comments noting that the OII had not been served on either, and that the proposed rules were apparently not intended to apply to pipeline companies or railroad companies. Both recommended that the proposed rules be modified to specifically exclude railroad companies and pipeline companies. In addition, the Railroad Companies contend that any intrastate transportation provided by a rail carrier in California is subject to the jurisdiction of the Interstate Commerce Commission (ICC) under 49 U.S.C. ¶ 11501(b)(4)(B) since the California Public Utilities Commission has not sought certification from the ICC that its standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the ICC.

The OII was not served on the regulated transportation industry generally and we did not receive comments from any other entities furnishing transportation services in California.

Without addressing the merits of Railroad and Pipeline Companies' arguments, we do not find it administratively convenient

at this time to apply our rules with respect to compensation to any part of the regulated transportation industry in California. There are relatively few issues which come before us involving regulated transportation which involve the type of broad public participation we wish to encourage by enacting these rules. If at some time in the future we decide to apply these rules to the regulated transportation industry, notice and an opportunity for comment will be provided.

California Water Association generally expressed its opposition to OII 100 as an unnecessary expense to the utility customer. The Low-Income Organizations, on the other hand, found the proposed rules highly beneficial to the public, designed to help maximize efficient and effective public participation. Neither commented on the content of the rules.

In addition to its specific comments discussed below, PG&E made two general comments about the proposed rules. First, it does not believe that the PURPA rules on compensation can be fairly applied to all types of Commission proceedings and all kinds of issues. It believes that such an automatic expansion is an invitation to arbitrariness. Secondly, PG&E believes that the rules will consume substantial amounts of staff time in evaluating compensation requests because of the breadth of the issues for which compensation can now be awarded. PG&E asserts that the definitions of the key terms in the proposed rules are so vague that in practice, they will permit the Commission to award compensation any time it wishes to do so and that the standards set forth in Rule 76.26 are so ill-defined that they amount to no standards at all.

EDF also took issue with use of the PURPA format on the grounds that PURPA-type rules can accommodate only conventional issues, and predictable positions of advocacy. EDF believes that the issues on which the Commission seeks to ensure public participation through awards of attorney fees may well include those which have not been considered in depth before and which cannot be easily defined in

advance. In addition, the PURPA format will exclude important new issues by requiring that a party's showing be adopted by the Commission in a formal order in the proceeding in question. EDF believes that the more original the contribution, the higher the importance of the issue and the higher the financial stakes, the less likely that the Commission will adopt it in the first proceeding in which it appears, no matter how valuable and compelling the showing.

Edison believes that it may be possible for a consumer to apply for and receive compensation for costs incurred in the pursuit of a position on an issue of highly subjective value and that ratepayers should not be required to assume the expense of intervention of a consumer unless they receive a demonstrable benefit by virtue of that consumer's participation in the proceeding. Edison is also concerned that the rules do not sufficiently address the role of the Commission's legal and technical staff in representing the interests of the people in Commission proceedings, and why it is necessary to fund third parties to intervene and pursue issues in a proceeding.

Pacific has a similar concern, characterizing the intervenors as lobbyists who are advocating positions in legislative proceedings before the Commission. Pacific points out that these views will not be those of the entire body of a utility's ratepayers, yet when the Commission orders the utility to be made whole, the entire body of ratepayers will have to support the views. This compulsory funding of the political views and activities of others violates both the California Constitution and the United States Constitution, according to PG&E.

Lastly, SoCal recommends generally that a ceiling be placed on the total amount of dollars available for attorney fees awards in any one case or proceeding and that some mechanism be established for limiting the number of participants, particularly those purporting to represent a general class of ratepayer, to a reasonable number in any

given case. SoCal believes it unfair, unreasonable, and a clear economic waste to allow multiple intervenors to present the same or similar presentations regarding the same or similar issues. SoCal also recommends that sanctions be established for failure to comply with whatever rules are adopted.

We will bear all of these comments in mind while redrafting the rules and will comment on them individually where appropriate.

Specific Comments on Proposed Rules

Rule 76.21 - Purpose

> Proposed: The purpose of this article is to establish procedures for awarding reasonable fees and costs to consumers of public utilities who participate in proceedings of this Commission.

The staff takes issue with the use of the word "consumer" as it appears here, in the definitions in proposed Rule 76.22, and elsewhere in the proposed rules. Staff notes that use of this term is inconsistent with our stated purpose to establish general procedures for considering awards of participant fees in all Commission proceedings as expressed in D.93724, and may prevent awards to persons or organizations which seek to represent environmental, community, small business, worker, or other nonconsumer interests. It suggests using instead the term "participant" and defining that term as follows:

> "'Participant' means any individual, group of individuals, public or private organization, or association, partnership, or corporation taking part or intending to take part in a Commission proceeding."

Lakeland made similar comments with respect to the use of the term "consumer" noting that it appeared that only consumers and consumer advocacy organizations could qualify and that no other type of public participant would be considered. He mentioned other types of participants such as manufacturers, dealers, and users of

products, devices, and services which produce or use products or services of public utilities or alter or displace the production or use of such products or services. Lakeland contends that it is the participation, rather than the participant, which must be subject to qualification because it is the participation which may benefit the ratepayer, without respect to who did the participating. These comments serve to focus our attention on the end result and achieve the same effect that the staff recommends. We will use the term "participant" throughout the rules in lieu of "consumer".

Edison proposes the following modification:

> "The purpose of this article is to establish procedures for awarding reasonable Compensation to Consumers who, under significant financial hardship, make a substantial contribution to the adoption, in whole or in part, in a Commission order of a Position advocated by the Consumer related to public utilities Issues in Commission Proceedings."

Edison argues that the rule as proposed clearly contemplates the awarding of compensation only in very limited circumstances, that is, significant financial hardship and substantial contribution.

We agree with Edison that, as a matter of actual practice, compensation will be awarded only in the most meritorious circumstances; however, we believe that this restriction should come at the end of the process when we determine whether a participant has made a substantial contribution in the proceeding. Were we to narrow the purpose of the rules as Edison suggests, we might discourage rather than encourage many presentations.

> Adopted: The purpose of this article is to establish procedures for awarding reasonable fees and costs to participants in proceedings before this Commission.

Rule 76.22 - Definitions

a. Proposed: "Compensation" means reasonable attorney fees, expert witness fees, and other reasonable costs.

TURN suggests the substitution of the term "advocate fees" for "attorney fees" pointing out that many parties to Commission proceedings are nonattorney advocates who can and do produce a record and results that bear recognition. We agree.

Edison substitutes the term "recorded professional fees" for "attorney fees", discussing the issue of "recorded vs. billed" more completely under its comments on reasonable fees (Rule 76.22(i)). Use of the term "recorded" could imply to some that the Commission would award compensation at the recorded rate rather than examining the reasonableness of that rate. We disagree. We will retain the word "reasonable" in the definition to avoid this impression. Edison recommends the term "professional fees" to recognize that other than attorney representatives may be compensated. We find a substantial possibility of confusion between "professional fees" and "expert witness fees" and will therefore adopt TURN's language.

> Adopted: "Compensation" means reasonable advocate and expert witness fees, and other reasonable costs.

b. Proposed: "Public Utilities Issue" means an issue relating to the operations of one or more of the public utilities of this State and regulated by this Commission.

PG&E believes that the definition must be narrowed, consistent with its general belief that the proposed rules are vague and overbroad. PG&E did not make any specific suggestions for language changes to accomplish this narrowing.

Edison suggests the following modification:

> "'Issue' means a public utilities issue relating to the rates charged or the customer procedures adopted by one or more of the public utilities of this state and regulated by this commission."

Edison believes that ratepayers should bear the burden of paying for consumer compensation only when they receive a material benefit from

the participant's intervention. Edison believes that such a benefit would be either an impact on rates or a procedural benefit obtained by the ratepayer in their dealings with the utility. Edison does not believe that a position advocated by a participant providing only a subjective benefit, such as an esthetic benefit or one which impacts only a limited class of utility customers, should be compensated.

We do not review the matter as narrowly as Edison does but we agree that the definition would be enhanced if it were made more specific.

> Adopted: "Issue" means an issue relating to the rates, charges, service, facilities, practices, or operations of one or more of the public utilities of this State that are regulated by this Commission.

c. Proposed: "Public Utilities Policy Position" means a factual contention, legal contention, or specific recommendation relating to a public utilities issue to be addressed in a proceeding of this Commission.

Edison was the only party to comment on this definition and its purpose was to eliminate the use of the word "public utilities" so that the definition was clear about which party was advocating the position. Edison had made a similar change in its proposed language for proposed Rule 76.22(b). The clarification makes sense and we will adopt it.

> Adopted: "Position" means a factual contention, legal contention, or specific recommendation by a party relating to an issue to be addressed in a Commission proceeding.

d. Proposed: "Consumer" means any retail customer of a public utility, any authorized representative of such a consumer, or any representative of a group or an organization empowered, under its articles of incorporation or bylaws to represent the interests of consumers.

San Gabriel suggests addition of language requiring that consumer be a retail customer of (1) a utility which is a party to a particular Commission proceeding and (2) which has been granted leave to intervene by the Commission in the particular proceeding. San Gabriel considers the present definition overly broad. It believes it essential that the definition of consumer should be limited to the retail customers of a public utility which is a party to the particular proceeding because to do otherwise would permit participation fees to individuals or organizations with no standing or little discernible interest in the proceeding. Further, San Gabriel believes that the proposed rules must not be written to create a right of intervention which would not otherwise be allowed under the Commission's existing rules.

Our existing Rule 53 provides for intervention in complaint proceedings under certain limited circumstances: however, Rule 54 provides for participation without intervention in investigation or application proceedings. We do not wish to require by our rules regarding compensation a motion for leave to intervene where none is required now and accordingly, will not adopt San Gabriel's suggested language in this regard. San Gabriel's concern that the consumer be a retail customer of a utility which is a party to a proceeding is addressed by our adoption of the staff term "participant" in lieu of "consumer." Any participant to our proceedings must state his interest and area of inquiry and if it appears that it will not be germane to the particular proceeding, it will be obvious at the outset.

Consistent with its comments on proposed Rule 76.21, staff proposes that the word "consumer" be eliminated and the word "participant" be substituted.

By D.82-06-065 issued June 15, 1982 we indicated that governmental entities which are supported by tax revenues were not eligible to claim intervenor compensation under PURPA. In that decision we specifically concluded that Contra Costa County was ineligible to claim intervenor fees because it was a governmental entity with taxing power. We reasoned that if we were to allow eligibility for intervenor fees under PURPA to entities that have the power of taxation, we would be placing ratepayers in the position of funding activity that can and should be funded by taxpayers. We further stated that we never intended nor did we believe Congress intended that governmental entities be eligible to claims fees under PURPA.

We reaffirm our conclusions in D.82-06-065 and deny eligibility to governmental entities for participant compensation under PURPA or under the rules adopted today.

We will adopt the following definition of "participant":

> Adopted: "Participant" means any individual, group of individuals, organization, or association, partnership, or corporation taking part or intending to take part in a Commission proceeding. For the purposes of these rules, the term participant does not include governmental entities.

e. Proposed: "Expert Witness Fees" means recorded or billed costs incurred by a consumer for an expert witness with respect to a public utilities issue.

Edison proposed a modification which eliminated the term "or billed " and added a clause "and confirmed by the Commission to be reasonable." Edison fears that the use of "billed" costs may encourage the practice of experts billing fees in anticipation of receiving a favorable compensation award from the Commission with a corresponding reduction for any fees not recovered in the Commission's decision. We concur and will adopt the modification.

Pacific has suggested that the phrase "in a proceeding" be added immediately after the word "incurred" on the theory that fees and costs might be incurred with regard to issues outside of Commission proceedings but which would not be covered by the proposed rules.

We will adopt Pacific's basic modification (and include it in proposed Rules 76.22(f) and (i) as well) but will add the words "in connection with a proceeding" so that the recovery, if authorized, will include fees and expenses incurred in preparation for a hearing and not be limited to time actually spent in hearing.

General notes that the term "expert" is not defined and states that the Commission should make it clear what it will expect in the way of qualifications and background for persons to be considered experts. We are reluctant to do this, since we do not impose this prior requirement in the regular course of our proceedings which are not currently subject to third party compensation. We think that adequate safeguards exist during the hearing process itself for any party, after voir dire, to challenge a witness' credentials as an expert. We prefer to treat the matter on

a case-by-case basis as it arises, rather than by setting down rigid standards in advance.

> Adopted: "Expert Witness Fees" means recorded costs incurred in connection with a Commission proceeding by a participant with respect to an issue and confirmed by the Commission to be reasonable.

f. Proposed: "Other Reasonable Costs" means reasonable out-of-pocket expenses incurred by the consumer with respect to a public utilities issue.

General believes the term "other reasonable costs" is unclear and asks whether the Commission intends to compensate participants for expenses, such as travel, hotel, etc. other than attorney and expert witness fees. General does not suggest specified language to cure the perceived problem. No other party expressed such uncertainty and we are not inclined to view it as a major problem. We think the use of the conjunctive indicates that other reasonable costs means something besides advocate and expert witness fees - if it did not, then the term would be mere surplusage. The type of out-of-pocket expenses contemplated may include, but certainly is not limited to travel, hotel, duplication of documents, postage, and other such expenses.

PG&E and SoCal believe that the term should be amended to correspond to Rule 76.02(f) in Article 18.5 which limits such costs to 25% of the sum of attorney fees and expert witness fees awarded, payable at the end, rather than at any stage of the proceeding.

Edison also suggests a 25% limitation but suggests that in the occasional situation when a consumer may desire to incur costs in excess of the 25% limitation, provision could be made for an independent eligibility determination so that the Commission and other parties could address the reasonableness of this expenditure.

We agree that there should be a limitation on other costs and will adopt 25% as a reasonable amount. We will not adopt Edison's proposal for a prior Commission determination that costs in

excess of this limit are reasonable. Such a proposal merely adds another step in layers of approval necessary under these rules. Our adopted rule will provide adequate notice to participants that the Commission will not normally consider authorizing recovery of other expenses in excess of 25% of recorded advocate and expert witness fees, and the participant who incurs costs in excess of the 25% limit does so risking nonrecovery. As with any costs under these rules, the reasonableness must be substantiated by the participant before the Commission will authorize recovery of any amount.

> Adopted: "Other Reasonable Costs" shall include out-of-pocket expenses incurred by the participant with respect to an issue but shall not normally exceed 25% of the reasonable advocate fees and expert witness fees awarded. The burden of establishing that any costs incurred were reasonable is on the participant.

g. Proposed: "Party" means any interested party, respondent, utility, or Commission staff of record in the proceeding.

TURN suggests that this definition should be expanded to include the full range of possible participants such as complainants, protestants, etc. We concur.

> Adopted: "Party" means any interested party, respondent, utility, complainant, protestant, or Commission staff of record in a proceeding.

h. Proposed: "Proceeding" means any application, case, investigation or other formal matter before the Commission.

San Gabriel suggests addition of the phrase "to which a particular public utility is a party or is a named respondent." San Gabriel is concerned that the Commission is creating an overly broad right of intervention (and compensation) by allowing retail customers of any public utility to claim compensation with no standing or little discernible interest in the proceeding.

Edison recommends that the proceeding be one which may affect all or a substantial number of the ratepayers of a utility subject to the jurisdiction of the Commission. It argues that it would be inequitable to require ratepayers to provide compensation for an individual ratepayer (such as a complainant) pursuing concerns and issues which do not impact ratepayers as a whole.

Since we have adopted the term "participant" for use in Rule 76.21 and 76.22(d) in lieu of "consumer" we have substantially broadened the scope of that definition and perforce the one in this section. The limitation suggested by San Gabriel therefore becomes moot and we will not adopt it. We agree in principle with the concerns expressed by Edison that the entire body of ratepayers not bear the expense of compensating those with limited issues; however, we will address that matter under the "substantial contribution" portion of proposed Rule 76.26 rather than burdening the definition with it.

> Adopted: "Proceeding" means any application, case, investigation, rulemaking, or other formal matter before the Commission.

i. Proposed: "Reasonable fees" means fees recorded or billed by the consumer in support of its participation, which shall be computed at prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

Both EDF and TURN point out the potential for confusion between the term "fees" and "salaries" and recommend that a clear distinction be drawn between the two terms. An employee's salary reflects only the compensation derived by that individual whereas a professional fee includes a wide variety of cost components such as secretarial support, office overhead, supervisory time, etc. TURN recommends

that the second sentence either be deleted or clarified to refer to "fees (as distinguished from employee salaries)". EDF recommends that the rules be made more explicit to reflect the fact that fees are calculated at prevailing market rates for outside attorneys and experts including the rates paid by the Commission or utility to such outside contractors rather than the salary paid by the Commission or the utility to its own in-house staff.

Pacific recommends a limitation to fees incurred by the participant which are evidenced by appropriate account entries and bills. This same consideration was raised with respect to Rule 76.22(e) and we will adopt similar language here.

Edison proposes a two-pronged definition for recorded professional fees: (1) those hours recorded by an attorney or other professional person multiplied by their hourly rate if retained or (2) if employed, annual salary, including benefits, of the attorney or professional person divided by 2,080 hours and confirmed by the Commission to be reasonable.

Edison objects to using a market "reasonableness" standard on the ground that it is likely to inflate the fees for which ratepayers will be required to reimburse the participant. Edison contends that since an award, if any, will be made after the proceeding has been completed and since recorded fees and costs would obviously have been sufficient for the presentation of the participant's position, that is the appropriate standard for an award. Anything greater would represent a windfall to the participant.

We believe that participants should recover reasonable fees associated with participation in a proceeding. The standard used to test the reasonableness of these fees should be the prevailing market rate for persons of comparable training and experience who are offering similar services. We are concerned that Edison's second test has the infirmities that concern TURN and EDF, namely that

overheads, which can be substantial, are not included. Additionally, Edison's proposed modification eliminates the cap which limits fees to the greater of those paid by the Commission or the utility. This cap is a desirable feature of the proposed rule and should be retained. We will include the clarifying language distinguishing fees from salaries which TURN proposed and EDF supported.

> Adopted: "Reasonable Fees" means fees recorded by the participant in support of its participation in a proceeding. Reasonableness shall be computed at the prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees (as distinguished from employee salaries) exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

General notes generally that Rule 76.22 does not define the term "expert," and recommends that the Commission make it clear what it will expect in the way of qualifications and background for persons to be considered experts. As previously mentioned, we do not presently have guidelines or requirements which must be met before a person can be considered "expert" in his/her area of testimony and we see no reason to impose a more stringent regulation on those who seek compensation for appearing before us than on those who appear before us now. We will continue to examine this issue on a case-by-case basis, as we do presently, and will not adopt a specific definition for the term "expert".

Rule 76.23 - Participant's Request

Rule 76.24 - Showing of Other Parties

Rule 76.25 - Commission Ruling

These three rules address the timing of a filing for a Request for a Finding of Eligibility for Compensation, the contents of that request, the timing of responses to the request, and the

timing and content of the Commission's ruling on the request. Since these three rules are inextricably bound together, we will discuss them as a unit, addressing TURN's comments first. These proposed rules are virtually identical to Rules 75.23 - 25 relating to funding for PURPA participation and TURN is the only third party to date to file for and be granted compensation for its participation in our proceedings on PURPA issues.

TURN believes that the first step must be to determine exactly what functions the "eligibility phase" of the compensation procedures is designed to fulfill. TURN notes that the proposed rules leave the impression that a negative determination on eligibility would preclude a party from later seeking compensation; however, D.93724 on PURPA compensation gives a very different interpretation:

> "We must remember, however, that any finding of eligibility in no way ensures compensation, nor does a negative finding necessarily preclude compensation.". (Mimeo., p. 38.)

TURN asks if a finding of eligibility is irrelevant to whether or not a party can apply for and receive compensation, why is a filing required at all? TURN enumerates three possible useful functions of such a phase:

1. The threshold question of significant financial hardship should be determined early in a proceeding so that parties know prior to making their presentation whether or not they meet the Commission's standards on this issue.
2. Parties who manifestly lack the competence to effectively pursue their aims should be weeded out at the earliest possible time.
3. A general statement of the parties' interests in the proceeding would be useful to determine at the outset whether the matters are in fact relevant to the case.

TURN argues that it is neither reasonable nor useful that a party state all of the issues which it intends to pursue, along with its position, in an eligibility filing. It is simply not possible to know, early in a complex proceeding, every issue that may arise which will be of interest. Further, locking parties into inflexible stances early in the proceeding is not conducive to compromise and it ignores the learning process which inevitably occurs as parties come to understand other parties' viewpoints in greater detail as the proceeding progresses.

TURN was the only party to address the issue of whether an eligibility phase was necessary. Other parties commented on the rules themselves in some detail but simply assumed that the eligibility phase was necessary. Given our experience with PURPA filings under similar rules, we are inclined to agree with TURN that rigid structures and definitive positions at this stage serve no useful purpose. We view the eligibility phase essentially as a protection for the participant who intends to claim compensation and who would not otherwise participate in the proceeding or who would participate on a more limited scale after receiving a negative finding from the Commission on eligibility for compensation. If a third party such as TURN is willing to enter a proceeding and participate with only minimal indication at the beginning of the proceeding on the Commission's part that it would meet the financial test to be considered for compensation we see no reason to burden it, other parties, or the Commission with exhaustive eligibility filings.

After consideration, we believe that a Notice of Intent to Claim Compensation might accomplish the same purpose with less paperwork. Such a filing would address the sole question of financial hardship and, at the option of the participant, could be made either before evidentiary hearings begin in a proceeding, or after hearings are concluded (also, see Rule 76.31). Naturally the earlier the filing is made, the earlier the participant will have a

a ruling from the Commission on whether this threshold test is met. All other matters, including relevance of the issues to the proceeding, duplication of issues covered by the staff, and common legal representation by parties pursuing the same or similar interests will be addressed by the Administrative Law Judge (ALJ) during the course of the proceeding. This will eliminate the need for specificity of issues to be addressed together with the participants' position early in the proceeding (as is presently required under our PURPA compensation rules) before the staff reports are released and before any party has had time to analyze all the issues. EDF notes and we agree that such an arrangement will put parties at greater risk, since they will have to conduct their studies and make their showings with only the indication that they meet the financial need criteria but with no other assurance that they are eligible for fees and costs. It also places the risk of proceeding to participate in areas covered by the staff or by another party on the participant since the Commission will not award compensation for issues developed by the staff nor will it award compensation to two parties for developing the same issue. By giving guidance through the ALJ rather than having the Commission commit to an advance determination of eligibility, we hope to maximize input from third parties consistent with efficient conduct of the proceeding.

Since the ALJ is presently responsible for avoiding unnecessary cumulative evidence, limiting the number of witnesses or the time for testimony on a particular issue (Rule 58) he/she is in a unique position to point out to parties that they may not receive compensation for duplicate presentations or for presentations taking the same position as the staff. The ALJ is also in the best position to determine the relevance of issues to the proceeding.

Because the Notice of Intent to Claim Compensation would address only the question of hardship, we see no reason to require

comment from the staff as proposed Rule 76.24 presently does; however, we will provide a limited opportunity for comment from any party who wishes to make it.

SoCal and TURN both suggest that the criteria to be used in establishing the showing required for "significant financial hardship" be clarified. Not unpredictably, the recommendations go in opposite directions. SoCal urges a narrowing of the proposed rule. In particular, it feels the terms "adequately represented" interest and "necessary for a fair determination" are overly broad. TURN advocates a statement that the phrase "significant financial hardship" is to be construed broadly with consideration being given to all financial burdens of the intervenor, including those associated with intervention in other cases. SoCal also suggested that only one intervenor be allowed to represent an interest and TURN suggested that a party's financial status need be determined only once a year instead of with each filing.

Pacific recommended that a budget for each particular item to be addressed in a proceeding be filed, that provision be made for an amendment of the participant's request at the time the change occurred rather than at the conclusion of the proceeding, and that proof of authority to represent those claimed to be represented be required.

Edison suggests a modification to require a statement of position on each issue and the potential ratepayer benefits which would be obtained by virtue of the adoption of the participant's position be required.

Since our desire in promulgating these rules for compensation is to encourage the broadest possible public participation in our proceedings, it makes little sense to set up regulatory barriers to that participation early in the proceeding. Accordingly, we will interpret the phrase "significant financial hardship" broadly and will not require detailed budgets for each item

a participant intends to pursue. We do, however, think it wise to require that an overall budget for the proceeding be filed to allow determination of hardship to be made, and to indicate the extent of financial commitment to the participation. The budget should be considered preliminary in nature and subject to revision if the positions by the participant or other parties change. We will adopt Pacific's proposal for an amendment to the participant's request and will require an amended budget to reflect changes greater than 20%. We make this provision because we are going to adopt TURN's suggestion for an annual consideration of financial hardship. We also will require a budget for each proceeding a participant enters, however, so that we can monitor financial hardship on a continuing basis.

Edison points out in its second comments on the rules that, while a finding of financial hardship in no way ensures an award of compensation, the converse, that is that a negative finding does not preclude compensation, is not true. It points out that in order to be eligible for compensation a participant must demonstrate financial hardship, and argues that once this Commission has rendered its opinion on this issue, it should not be relitigated. We agree and will not provide for further filings on the issue of compensation if financial hardship has not been demonstrated.

We see little value to the Commission in requiring a statement of position on the issues the participant chooses to pursue since the risk of noncompensation for duplicate showings clearly lies on the participant. Similarly, a statement of expected benefits is of virtually no use for evaluating financial hardship and is premature at best. Any award of compensation will be made based on results, not on preliminary expectations.

The staff has recommended that Rule 76.25 be revised to delegate the Ruling on Eligibility to the presiding ALJ with a right of appeal to the Commission. The suggestion appeals to us and we

would adopt it if we were retaining the entire eligibility phase as contemplated in proposed Rules 76.23, 76.24, and 76.25. Since we are adopting the streamlined procedure calling only for a Notice of Intent to Claim Compensation, we think the determination of financial hardship, particularly since it is to be made only once a year and will be valid in multiple proceedings conducted by different ALJs, is better made by the Commission.

We have not provided for the designation of a common legal representative consistent with our position that it is the participant who should bear the risk of proceeding with a showing that duplicates that of the staff or another participant. It is difficult at the beginning of a proceeding to know whether interests of different participants are truly identical or merely sound alike. It is equally difficult to determine at the beginning of a presentation whether two participants will use the same means to get to an identical end. Rather than restrict either presentation by appointment of a common legal representative, we encourage all participants to coordinate their efforts to the extent possible, since we will not award compensation to more than one party for the same issue. Additionally, we reaffirm our current Rule 58 which authorizes the presiding officer to limit the number of witnesses or the time for testimony upon a particular issue. Once it becomes obvious that testimony by two or more participants is cumulative, we expect the ALJ to exercise discretion to limit testimony so that the hearing proceeds expeditiously.

Edison also suggested deleting the provision for compensation for judicial review as constituting an unnecessary burden for the ratepayer, not improving the quality of the Commission's proceedings, and encouraging frivolous appeals of Commission decisions and orders. We disagree. Utilities can and do appeal our decisions and include the cost of the appeal in legal and regulatory expense which is borne by the ratepayer. Why should

participants be treated differently? If a participant vindicates his position through judicial review and meets the substantial contribution test set forth in the rules following, we believe that it is entitled to recover the costs of judicial review on the same basis as for the participation in our proceeding. We doubt very much that this will lead to frivolous appeals, since the simple fact that a participant appeals will not entitle it to compensation and even if it prevails on review of its position, compensation will be paid only on a finding of substantial contribution.

Center suggests that some time limit be placed on the Commission for issuing its decision on eligibility, suggesting 30 days after the comments of staff and other parties. Since we only have two conferences a month at which decisions are issued, and since we are required to publish an agenda of matters to be considered 10 days before each conference, this time appears unreasonably short. We appreciate the desire of parties to know when they might expect a decision, however, and will adopt a limitation of 60 days.

> Adopted Rule 76.23: As soon after the commencement of a proceeding as is reasonably possible, but in any event before the evidentiary hearings begin in a proceeding, or after evidentiary hearings are completed, the participant shall file with the Commission's Docket Office and serve on all the parties to the proceeding a Notice of Intent to Claim Compensation, in compliance with Rules 2, 3, 4, 6, and 7 and with an attached certificate of service by mail on appearances. In all cases, the Notice of Intent must set forth the following:
>
> a. A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such participant. Such showing should address the factors set forth in Rule 76.25(a)(1) or (2). A summary description of the finances for the participant should distinguish between grant funds committed to specific projects and

discretionary funds. If the Commission has determined that the participant has met its burden of showing financial hardship previously in the same calendar year, participant shall make reference to that decision by number to satisfy this requirement.

b. In every case, a specific budget for the participation shall be filed showing the total compensation which the participant believes it may be entitled to, the basis for such estimate, and the extent of financial commitment to the participation. If at any time during the proceeding changes in the issues, scope, or positions of parties cause a fluctuation of more than 20%, plus or minus, in the estimated budget, the participant shall file an amended budget and serve it on all parties.

c. A statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the Notice of Intent to Claim Compensation is filed.

Adopted Rule 76.24: The Commission staff and any other party to the proceeding may file a statement within 15 days after the participant's filing commenting on any portion of that filing and making appropriate recommendations to the Commission. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on appearances.

Adopted Rule 76.25: Within 45 days after the comments of staff and other parties are due, the Commission shall issue a decision ruling on:

a. Whether the participant has met its burden of showing significant financial hardship in this proceeding or in a prior proceeding in the same calendar year. This can be shown by participants:

(1) Who have, or represent an interest:

other-
wise be adequately represented in the proceeding, and

(B) Whose representation is necessary for a fair determination in the proceeding, and

(C) Who have, or represent an interest but are unable to participate effectively in the proceeding because such person cannot afford to pay reasonable advocate fees, expert witness fees, and/or other reasonable costs of preparing for, and participating in such proceeding (including fees and costs of obtaining judicial review of such proceeding), or

(2) Who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.25(a)1(C).

The Commission may also point out similar positions, areas of potential duplication in showings, unrealistic expectations for compensation, and any other matter of which it is aware which would affect the participant's ultimate claim for compensation. Failure of the Commission to

point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation.

Rule 76.26 - Compensation Filings of Participant

Proposed Rule 76.26: Following issuance of a Commission order or decision during a proceeding pursuant to Rule 76.25 a consumer may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7 and shall have a certificate of service by mail on appearances attached. Such request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. To the extent possible, this breakdown of services and expenses shall be related to specific public utilities issues. The request shall also describe how the consumer has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of a public utilities issue. "Substantial contribution" shall be that contribution which, in the judgment of the Commission, substantially assists the Commission to promote a public purpose in a matter relating to a public utilities issue by the adoption, at least in part, of the consumer's position. A showing of substantial contribution shall include, but not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the consumer.

The first issue raised by several comments was one of timing of the request. San Gabriel recommended that a request for compensation be filed within 10 days following the issuance of a Commission order or decision in the proceeding. PG&E believes that such request should only be filed at the conclusion of a proceeding,

because it is only then that the Commission can evaluate whether the applicant has made a "substantial contribution". Pacific believes that the question of compensation should be deferred until after the final decision has been issued and any appeals have been concluded. It notes that it would be administratively inefficient to award compensation for a decision that may ultimately be reversed or modified significantly. While we agree with Pacific that it is inefficient to award compensation for a decision that may be reversed or modified, postponement of the filing for compensation until court review seems unduly lengthy, especially if the issue being reviewed is different from the one for which compensation is being claimed. PG&E is correct that it is only at the conclusion of a proceeding that the Commission can evaluate whether a substantial contribution has been made, but it overlooks the fact that proceedings are frequently continued to examine certain issues after the main decision is issued. It is unclear whether PG&E intended its language to preclude filing a claim for compensation until the proceeding had actually been closed. If so, we think this too is an unreasonable delay. We would prefer to see a claim filed within 30 days after a Commission decision which disposes of the issue(s) raised by the participant for which compensation is claimed. This will allow analysis of the claim at the same time petitions for rehearing are being considered and will permit maximum discretion to the Commission for authorizing payment of the claim or deferring consideration of it until after rehearing, if granted, or after court review, if sought.

More fundamental than timing, however, is a matter raised by TURN, EDF, and staff; namely, is it necessary that a participant's position be adopted in whole or part in a Commission decision in order to be eligible for compensation. The staff addresses the matter in the context of proceedings in which there is no final rule or decision (such as A.59308, the Harry Allen/Warner Valley application of PG&E and Edison). Staff proposes that the following language be added to clarify Rule 76.26:

"In proceedings where some or all of the relief sought by a participant is obtained without a Commission order or decision, the participant may be entitled to compensation by clearly establishing a causal relationship between its participation and such relief."

Edison objects to this clarification on the grounds that it will involve the Commission in endless litigation relating to the intent of the parties concerning the relief sought in the particular action or the utility's motivation for taking certain actions which may impact the proceeding. Edison overlooks the fact that the burden is on the participant, not the Commission, to establish the causal relationship between its participation and the relief obtained. We believe that such a clarification is desirable and will adopt the staff language; however, it only addresses that unusual situation where there is no Commission decision. It does not address the much more common situation, noted by EDF and TURN, where a party has raised and pursued a novel issue in a proceeding and the Commission issues a decision which defers action on the issue to another proceeding, or notes with interest the presentation made but suggests that it be raised again later or for any number of reasons does not adopt or reject the position in its decision in the proceeding in which it was first raised.

TURN suggests that if the proposal is ultimately adopted in a later case, simple fairness requires that the participant receive compensation for the efforts spent in originally presenting the concept. TURN alleges that some of the most creative participant contributions would be shortchanged by a policy that refused to recognize the reality of issue carry-over between cases.

EDF argues that the requirement of a formal decision or order is unnecessary and that what matters is that a position "prevail" in the sense of having a significant or decisive impact on the outcome of a proceeding whether or not that outcome is embodied

in a formal decision. It cites Rich v City of Benicia (1979) 98 Cal App 3d 428 in support of this position. EDF recommends that the standard for success be changed to a Commission finding that the applicant's showing has had "an unusually significant impact" either (1) on a Commission action which is likely to result in a substantial benefit to a class of ratepayers or (2) on the outcome of the proceeding in which it was presented.

Our adoption of the language the staff recommended essentially embodies the spirit of part (2) of EDF's recommendation. We have some difficulty with the concept of issue carry-over embodied in part (1), however. While it is true that ideas or issues raised in one proceeding are frequently explored and more fully developed in another, it is rare that the idea or issue remains clear-cut from one proceeding to the next. More commonly the germ of the idea will remain but the thrust or focus will change, making assessment of contribution from the original proceeding to the subsequent one very difficult, if not impossible.

The California Supreme Court noted in CLAM that isolating the contribution of each of numerous intervenors is likely to be impossible given the complexity of ratemaking proceedings. (CLAM 25 Cal 3d 891 at 909.) Our experience with isolating contributions under the PURPA guidelines has not proved as burdensome as initially envisioned precisely because the issues are limited both in scope and to a single proceeding. The ease of administration of the PURPA provisions for attorney fees prompts us to develop these rules for non-PURPA issues and proceedings. We are wary, however, of undertaking more than we can reasonably handle and therefore will limit our rules to providing compensation only where a demonstration is made that the Commission's order or decision has adopted factual contentions, legal contentions, and/or specific recommendations presented by the participant, excepting those cases where the relief sought by a participant is obtained without a Commission order.

Several parties, including the staff, suggested that the meaning of the term "substantial contribution" itself be clarified. SoCal suggests that the term "promote a public purpose" is much too vague and not capable of fair application on a case-by-case basis. SoCal suggests that additional factors should be considered, including the social importance of the issue vindicated by the litigation, the need for group intervention and the magnitude of the resulting burden of pursuing such issue, and the number of people benefiting from vindication of such issue.

Staff recommends that Rule 76.29 be expanded to set forth the major factors to be considered in computing a fee award. Since the participant's filing would have to address these matters, we think it more appropriate to discuss staff's recommendations under Section 76.26. Staff cites two cases, Johnson v Highway Express, Inc. 488 F 2d 714 (5th Cir. 1974) and Waters v Wisconsin Steel Works of International Harvester Co., 502 F 2d 1309 (7th Cir. 1974), which contain similar itemized factors which trial courts were directed to consider in making fee awards. The factors from the Johnson case are cited below:

1. Time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of other employment by the attorney due to acceptance of the case.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time limitations imposed by the client or by the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation, and ability of the attorneys.

10. The undesirability of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

The staff also noted that the "Lodestar" method was used in certain courts. Here a court first determines fees in terms of actual hours worked and the normal billing rates to arrive at a lodestar sum which is then modified by the court in light of various contingency factors such as the risks of the litigation and of nonpayment, preclusion of other work, undesirability, quality of representation, complexity and novelty of the issues, and the results obtained. This method was approved by the California Supreme Court in Serrano v Priest (1977) 20 Cal 3d 25 (Serrano III) using the time spent and the reasonable hourly compensation as a touchstone and taking into consideration seven relevant factors, some of which militated in favor of augmentation and some in favor of diminution to arrive at its award. The relevant factors were:

1. The novelty and difficulty of the questions and the skill in presenting them.
2. The preclusion of other employment by the attorneys.
3. The contingent nature of the fee award, both from the point of view of eventual victory on the merits and the establishment of eligibility for an award.
4. The fact that an award against the State would ultimately fall on the taxpayers.
5. The fact that the attorney involved received public and charitable funding for bringing lawsuits of this character.
6. The fact that moneys awarded would not inure to the individual benefit of the attorneys involved but to the organizations that employed them.
7. The fact that in the court's view, the two law firms involved had an equal share in the success of the litigation.

As with the Johnson factors, some of the Serrano III factors are more applicable to our proceedings than others.

Obviously, certain of the factors in Johnson such as 6, 10, and 11, and parts of 7 and 8 will have little or no applicability to our proceedings. However, the consideration of the remainder may prove useful in our assessment of a reasonable fee award and participants are encouraged to address as many of these items as they believe are appropriate to their presentation in their filings for compensation. Since our aim in establishing these rules is maximum flexibility, we will not now adopt a particular approach for determining the amount of reasonable fees to the exclusion of others. Our concern at this point is merely to give participants greater guidance in what we will consider a substantial contribution, not to establish a rigid formula for determining fees. As we gain experience with participants' filings and begin to make determinations of reasonable fees it may well be that certain factors will stand out above others in our consideration; however, until that time we decline to lock ourselves into a particular approach.

Lastly, TURN notes the following language from D.91909 and suggests that similar language be included in this decision to provide the "gloss" for future interpretations of Rule 76.26 in specific cases:

> ". . . Decision-making is a process. Substantial contributions are made in many ways and at many times in the process. A record is more than a dry tabulation of facts leading to a clear decision.
>
> "Persuasively raising a new issue at a prehearing conference can change the nature of a proceeding. The vigorous juxtaposition of conflicting facts and opinions in a brief can be far more important to a decision than any of the facts or opinions standing alone. Intense cross-examination of a single key witness can contribute more than an entire affirmative presentation." (Mimeo. p. 14.)

This is still our view of the decision-making process and we repeat the language here to reaffirm it. TURN suggests inclusion of the following language in the rules themselves, again to make clear when compensation is merited:

> "In order to be eligible for compensation, a participant must raise a different issue, present or elicit new or different evidence, raise new or different arguments in support of a position or take a different position from that of the staff."

We will include this language, part of which comes from D.91909, consistent with our intent to give the broadest possible scope to these rules; however, we point out to all participants that an indirect contribution, such as intense cross-examination, is more difficult to isolate than a direct contribution, such as an affirmative showing. To the extent possible, we will try to acknowledge in our decisions individual factors that have contributed to our decision on a particular issue; however, the burden of isolating and substantiating the contribution remains with the participant claiming compensation, not with the Commission or the presiding ALJ.

> Adopted Rule 76.26: Within 30 days following the issuance of a Commission order or decision for which a ruling under Rule 76.25 has been made, a participant may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on appearances. Such a request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. This breakdown of services and expenses shall be related to specific issues. The request shall also describe how the participant has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of an issue. In order to be eligible for compensation, a participant must

raise a different issue, present or elicit new or different evidence, raise new or different arguments in support of a position or take a different position from that of the staff and any other party.

In proceedings where some or all of the relief sought by a participant is obtained without a Commission order or decision the participant may be entitled to compensation by clearly establishing a causal relationship between its participation and such relief.

"Substantial contribution" shall be that contribution which, in the judgment of the Commission, greatly assists the Commission to promote a public purpose in a matter relating to an issue by the adoption, at least in part, of the participant's position. A showing of substantial contribution shall include, but need not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the participant. A showing should also include an analysis of other factors which may affect the appropriate amount of the award. These factors include, but are not necessarily limited, to the following:

1. Time and labor expended in the participation.
2. The novelty and difficulty of the issues presented.
3. The skill required to participate effectively.
4. The preclusion of other employment due to participation in this matter.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time constraints imposed by the proceeding.
8. The amount involved and the results obtained.

9. The experience, reputation, and ability of the participants.

10. Awards in similar cases.

Rule 76.27 - Staff Audit of Participant's Records

> Proposed Rule 76.27 - Staff Audit of Consumer's Records: At the direction of the Commission, the Commission staff may audit the records and books of the consumer to the extent necessary to verify the compensation sought is reasonable. Within 20 days after completion of the audit, if any, an audit report shall be filed with the Commission.

Pacific argues that since the utility will be paying the bill, the utility should be able to audit the books and records of the participant or, in the alternative, the staff should be required to perform such an audit. PG&E joins Pacific in this recommendation. San Gabriel also recommends that the audit be mandatory and that notice of the filing of the audit report with the Commission be sent to all appearances.

TURN proposes the following language as a part (b) addition to the presently proposed language of Rule 76.27:

> "Alternatively, or in addition to (a) above, the ALJ may request additional information from the participant in order to clarify or substantiate the amount of the compensation request."

TURN believes that a full-scale audit should not be required when only a few specific questions are of concern.

With respect to the recommendations of Pacific and PG&E, we point out that it is not the utility that will be paying the bill, but the utility's ratepayers and it is therefore appropriate that the Commission staff perform any audit of the participant's books and records.

Although the staff did not suggest delegation of authority to the assigned ALJ to order an audit of a participant's records after a claim for compensation has been filed, we believe such a

delegation would contribute to administrative efficiency and more expeditious processing of claims for compensation. The assigned ALJ is initially in the best position to evaluate the completeness and accuracy of the filing and should be well aware of the complexity of the participation and attendant claim and, therefore, best able to recognize whether or not an audit is necessary, or whether a simple request for additional data would suffice to give the Commission a complete record on which to base a decision on the claim for compensation.

We do not see a compelling need to make the audit and the attendant report mandatory, particularly in view of our already limited staff resources. We believe that by adopting TURN's suggested addition, we have provided adequate safeguards for the analysis of compensation requests and can therefore leave the language regarding audits permissive, rather than mandatory. Certainly when the compensation request is large in dollar amount or complex in its fee schedules then participants can reasonably expect an audit by the Commission staff; however, we believe it best to provide for discretion to audit at this time.

There is merit in San Gabriel's suggestions that when an audit report is filed with the Commission, that it be served on all parties by mail. We will make such a provision in our adopted rule.

> Adopted Rule 76.27: At the direction of the assigned ALJ, the Commission staff may audit the record and books of the participant to the extent necessary to verify the compensation sought is reasonable. Within 20 days after completion of the audit, if any, an audit report shall be filed with the Commission and served on all parties.
>
> In addition to, or in lieu of an audit, the ALJ may request additional information from the participant in order to clarify or substantiate the amount of the compensation.

Rule 76.28 - Protests

> Proposed Rule 76.28: Within 15 days of the filing of a request for compensation or within 15 days after the filing of the staff audit, if any, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service on appearances by mail.

PG&E was the only party to comment on this rule and it noted that the number of fee requests is likely to increase under these rules and the Commission should consider enlarging the time in which protests must be filed and a decision on a final fee application must be issued. It did not make specific recommendations for the enlargement of time. We agree that the time should be extended and further believe that reasonable time for protests is 30 days, given that some of the compensation requests can be expected to be quite complex while others may be relatively straightforward.

> Adopted Rule 76.28: Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, whichever is later, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on parties.

Rule 76.29 - Commission Decision

> Proposed Rule 76.29: Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, or within 20 days of the filing of protests, if any, the Commission shall issue a decision describing the contribution found to have been made and the compensation awarded.

Pacific suggests that 20 days is much too short a time in which to decide matters of compensation which are expected to be

complex and difficult. Pacific points out a number of matters which must be considered and raises questions about each which the Commission must consider in reaching its decision, the most difficult being the extent to which the participant has contributed to the final result. We concur that 20 days is an unreasonably short time period and will remove the time limitation for the Commission's decision.

Pacific also notes that no standards are set forth in Rule 76.29 to guide the Commission in reaching a decision. Pacific asks what factors is the Commission going to take into account and how much weight is going to be given to each. This general subject was discussed extensively under Rule 76.26 and we set forth certain items to be addressed by participants in support of a substantial contribution. We believe these provide sufficient guidance without unduly restricting the discretion of the Commision in its decision-making function.

Edison proposes extensive modifications to the proposed rule which would require the Commission to make a finding on the percentage level of each participant's contribution on each issue adopted by the Commission, and if the contribution is more than 50%, would require a finding on the reasonable level of compensation for each issue, taking into consideration the results of any audits conducted under Rule 76.27, and lastly would require that the commensurate level of compensation awarded be computed by multiplying the amount of compensation requested and found reasonable by the percentage contribution. Findings also would be required on the percentage for determining other reasonable costs. We think this suggested modification is unduly mechanistic in nature and generally sags under its own weight. We agree with Edison that the issue of compensation is likely to be complex and for that reason we believe each request will have to be weighed and processed individually rather than by a complicated mechanical formula. Just as we did not

adopt Edison's proposed modifications of Rule 76.26 with respect to the percentage level of each participant's contribution, we will not adopt Edison's proposal here.

The staff proposed modification for Rule 76.29 was discussed fully in our discussion under Rule 76.26 and need not be repeated here.

> Adopted Rule 76.29: As soon after the filing of a request for compensation or as soon after the filing of an audit report or protests, if any, as is reasonably possible, the Commission shall issue a decision describing the contribution found to have been made by a participant and the compensation to be awarded. The decision shall specify the basis for finding a substantial contribution and for setting the attendant award of compensation.

Rule 76.30 - Payment of Compensation

> Proposed Rule 76.30:
>
> a. The utility shall pay any award of compensation to the consumer within 30 days after the Commission's decision is issued, unless a timely application for rehearing with respect to the issue of compensation is filed, in which case no payment will be required until an order denying rehearing or an order after rehearing is issued.
>
> b. The amount of this payment shall be assigned to a deferred expense account for inclusion in the utility's next general rate case.

Both PG&E and Edison suggest that the proposed rule be amended to provide for payment after the Commission's decision is final (Edison) or after completion of judicial review of the decision awarding compensation (PG&E). We think this period overlong, particularly with respect to completion of judicial review. We will extend the date of payment to 45 days after decision, however, which will provide an additional two weeks after the time for filing for

judicial review. This will allow a period for stay of the payment of the award if, at the Commission's discretion, such a stay is warranted.

PG&E and Pacific both suggest that it should be made clear that all fee awards paid by the utility will automatically be allowed as an expense item in the next general rate case or other current proceeding without further litigation. San Gabriel suggests recovery in the next offset proceeding. Edison suggests the following language:

> "Compensation paid shall be recovered dollar-by-dollar [sic] by the utility in its next general rate case, including interest calculated at the commercial paper interest rate (three-month prime commercial paper rate) in effect for each month until the general rate case decision is issued."

We agree that fee awards should only be litigated once, and that once paid, should be recovered through base rates as soon as possible and without further litigation. We disagree that interest should accrue. Interest does not accrue as a matter of course for other deferred accounts and no compelling reason has been shown why it should be included here. In comparison with some amounts held in deferred accounts, we would normally expect fee awards to be small. Further, we note that Edison did not offer to pay the participant interest on the fee award from the time of Commission decision until the date actually paid. Since there will be some lag in payment of the award, and since we will provide for recovery in the next general rate case, attrition adjustment, or other proceeding changing base rates, we do not perceive a need for the utility to accrue interest on the award.

Center argues that Rule 76.30 should contain a provision to award participants "fees-on-fees" in those proceedings where the utility appeals a compensation award and upon rehearing, the award is upheld. Center believes that participants should be compensated for

the costs of rehearing. Since we provided in Rule 76.25(1)(C) that fees and costs of obtaining judicial review by participants may be claimed, we will make provision here for an amended claim should participants find that they have incurred additional costs as a result of an application for rehearing of a compensation award filed by another party. We caution participants, however, that they are not required by our rules of practice to respond to applications for rehearing, and accordingly, we do not expect to see substantial amendments to claims for compensation for work done in this phase of a proceeding.

Lastly, Edison and San Gabriel raised the issue of a fee award in a proceeding involving multiple utilities. Edison suggests that payment be made by the utilities in proportion that their respective number of customers bears to the total compensation awarded. We will adopt the spirit but not the mechanics of this suggestion. We can think of instances where number of customers would not be an appropriate basis for allocation of payment, and will reserve that for our discretion.

Adopted Rule 76.30:

a. The utility shall pay any award of compensation to the participant within 45 days after the Commission's decision becomes effective.

b. If additional costs are incurred as a result of an application for rehearing on the issue of compensation, the participant may file an amended claim setting forth these costs and substantiating them in the same manner as the original claim.

c. The amount of this payment shall be assigned to a deferred expense account for recovery in the utility's next general rate case, attrition allowance, or other proceeding changing base rates. Such recovery shall be the amount authorized by the Commission for payment and shall be had without further

litigation of the reasonableness of the amount. Such recovery shall not include interest.

d. In case of an award in a proceeding involving more than one utility, payment will be made by each utility in a proportion to be determined by the Commission.

Rule 76.31 - Participant Request After Hearing

Proposed Rule 76.31:

a. A consumer who has not requested a finding of eligibility for compensation pursuant to Rule 76.23 may make such a request after hearings have begun. Such request shall not be granted unless the requirements of Rule 76.23 are met and the consumer can demonstrate that absent participation by the consumer, an important public utilities issue has not or will not be adequately considered in the proceeding.

b. A request under this Rule shall be filed within five days of the date of the appearance by the consumer in the proceeding. Any comment by the staff or any party, in the nature of that described in Rule 76.25 shall be made at the first regularly scheduled conference after the filing of the consumer's request. All filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and shall have a certificate of service on appearances by mail attached.

General suggests that a consumer who wishes to file under this rule should be required to explain the reasons why a request for a finding of eligibility was not filed under Rule 76.23.

San Gabriel recommends that such late requests not be granted unless the consumer can demonstrate that absent participation a public utilities issue determined by the Commission to be of material importance will not be adequately considered.

Edison proposes that no late requests be entertained after hearings begin without a showing of good cause which would be limited to lack of knowledge of the proceeding or incapacity precluding prior participation in the proceeding.

All three suggestions basically address the same issue, that is, a tightening-up of the provisions for late requests for compensation. We agree that some amendment of the proposed rule is justified, since late requests circumvent the entire policy established by other provisions of these rules. Of the three suggestions, we believe General's is the most reasonable and will adopt it. It provides for maximum flexibility but at the same time places the burden of explanation squarely on the petitioner who would file late.

The staff has recommended that the presiding ALJ be delegated authority to rule on a participant's request after hearing begins. Because we provided that the Commission itself would make the determination of eligibility for those who file timely under these rules, we see no reason to provide otherwise for those who file late.

TURN suggests that the rule be expanded to permit an eligibility filing by a consumer who has already been an appearance in the case to cover those situations where a party has been monitoring a case without intent to participate actively but who later decides to assume a more active role. TURN argues that the party who monitors would not be placed at a disadvantage relative to a party who has never entered an appearance at all. With our adoption of a streamlined eligibility filing and with the provision that a finding of eligibility is valid for a calendar year, we do not perceive any necessity for TURN's proposed modification and will not adopt it. The purpose of this is to provide a minimum exception to the timing of the filing requirements for good cause shown. Wholesale exceptions, based on individual perceptions of when it is

practicable to make the eligibility filing, defeat the very order and purpose of the rules. San Gabriel notes that comments by staff and parties on requests for finding of eligibility under Rule 76.31 are to be made at the Commission's first regularly scheduled conference after filing the requests and suggests clarifying whether the comments are to be presented orally or in written form. It is our intention that all comments be in written form, and consistent with our extension of time for staff and parties to reply to timely filed requests for a finding of eligibility, we will amend this rule to reflect our intent and to provide a fixed time within which comments may be filed.

Adopted Rule 76.31:

a. A participant who has not requested a finding of eligibility for compensation under Rule 76.23 may make such a request after evidentiary hearings have begun. Such request shall not be granted unless good cause for the late request is shown and unless the requirements of Rule 76.23 are met and unless the participant can demonstrate that, absent participation by the participant, an important issue has not or will not be adequately considered in the proceeding.

b. A request under the Rule shall be filed within five days of the date of the appearance by the participant in the proceeding. Comments by the staff or any party, in the nature of that described in Rule 76.25, shall be made within 20 days after the filing of the participant's request. All filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on parties.

Rule 76.32 - Provisions for Reimbursement

Proposed Rule 76.32: For causes which are pending on the date these rules become effective, where the rules concerning time for filing requests, responses thereto, and time for a Commission decision thereon cannot

> be met, parties may file requests for compensation in compliance with all of the remaining rules. Such requests must be filed within 60 days of the date the order adopting this rule is made effective. The Commission will consider all such requests on an individual basis.

Edison, TURN, PG&E, and Center have each filed comments directed at establishing just which proceedings will be covered by these rules. Edison's proposal is the most stringent. It requires that, in cases where all evidence has been taken, no consideration for compensation be provided; and in cases where evidence has been partially completed, compensation should be provided to consumers for their contribution only in the remaining portion of the proceeding.

PG&E has no specific recommendation but points out that as the rule now stands, applicants for compensation would not have to present a proposed budget and may be able to recover compensation without showing the "significant financial hardship" the future applicant will be required to show.

TURN's reading of the proposed rule and D.93724 assumes that Article 18.6 will apply only to cases in which a final decision has not been issued as of the effective date of the rules and that requests filed after the effective date of the rules will be held without action until judicial review of D.93724 is completed. TURN also recommends further elaboration of the type of filing contemplated by Rule 76.32. It suggests an abbreviated notice of the party's intent to seek compensation for those matters in which hearings are in progress or completed when the rules become effective and a normal eligibility filing for those matters which have not gone to hearing when the rules become effective.

Center comments on Rule 76.32 as amended to apply to proceedings initiated after the effective date of the decision promulgating the rules. It states that the precedent established by Rule 76.11 (the PURPA equivalent of Rule 76.32), the original version

of Rule 76.32 set forth in OII 100, and the language of D.93724 all imply that the Commission will not arbitrarily reject all compensation applications in cases pending when the rules become effective. Center argues that it is patently unfair to deny participants who have engaged in Commission proceedings since OII 100 was issued on November 13, 1981, the right to seek compensation under the provisions of Article 18.6. Center alleges that administrative considerations should not control our decision in this matter, rather we should ask "Are there participants in pending cases who may qualify for compensation under the provisions of Article 18.6? If so, should we not make every effort to reward their efforts and thus encourage their participation in future Commission proceedings?"

We agree that it serves us and prospective participants well if it is clear at the outset to which proceedings the rules apply. These rules are intended to apply to issues raised subsequent to the effective date of this order in pending proceedings and to proceedings initiated after the date on which the rules have become effective. A proceeding will be deemed initiated on the date an application or complaint is filed or an order instituting investigation is issued.

The application of these rules to issues raised subsequent to the effective date of this order and to matters filed on or after the effective date of the order promulgating these rules is in no way designed to affect the requests of EDF for compensation for its participation in A.59308 and OII 26. These requests are presently pending before us and will be addressed on their own merits in each proceeding.

Adopted Rule 76.32: These rules will apply to issues raised subsequent to the effective date of the order promulgating these rules in any pending cases, applications, investigations, and rulemakings, and to all cases, applications, and investigations filed

on or after the effective date of the order promulgating these rules, without regard to the formal status of the matter on the effective date of these rules. A proceeding will be deemed initiated on the date an application or complaint is filed or an order instituting investigation is issued. Times for filing various requests and responses set forth in these rules shall be adhered to except that any Commission decision on the requests will be held in abeyance until these rules become effective.

Findings of Fact

1. As matters coming before the Commission increase in complexity the Commission becomes more and more dependent on expert public participation to provide a complete record on which to base a decision.

2. Operation under the rules established in D.91909 implementing §§ 121 and 122 of the federal PURPA has provided a framework and administrative experience for award of attorney fees.

3. Award of reasonable advocate and expert witness fees and related expenses is administratively feasible.

4. The Commission has a duty to protect the public interest and to ensure public participation in its proceedings.

5. Public participation is encouraged when it is compensated.

Conclusions of Law

1. PU Code § 701 provides that the Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

2. Public participation in certain types of proceedings before the Commission is guaranteed by PU Code §§ 728 and 1005.

3. The CLAM decision addressed awards of attorney fees only in reparations cases and in ratemaking proceedings under two very narrow factual situations.

4. The Commission lacks the internal resources to represent fully and adequately all facets of the public interest.

5. The Commission may and should establish a procedure to compensate qualified public participants for their participation in matters before the Commission.

6. The rules set forth in Appendix A set forth the terms and conditions under which participants may request award of attorney fees for all proceedings except proceedings to which PURPA applies.

7. The rules set forth in Appendix A are reasonable and should be adopted.

8. The following order should be effective today because of the compelling public interest in getting a compensation program underway.

9. Since the jurisdictional issues raised by PG&E's motion for stay are disposed of in this decision the motion should be denied.

O R D E R

IT IS ORDERED that:

1. The rules attached as Appendix A are adopted as part of the Commission's Rules of Practice and Procedure, and they are effective 30 days from today.

2. Pacific Gas and Electric Company's motion for a stay of Order Instituting Investigation 100 is denied.

This order is effective today.

Dated April 6, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

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

Joseph E. Bodovitz, Executive Director

76.21 (Rule 76.21) Purpose.

The purpose of this article is to establish procedures for awarding reasonable fees and costs to participants in proceedings before this Commission.

76.22 (Rule 76.22) Definitions.

(a) "Compensation" means reasonable advocate fees, expert witness fees, and other reasonable costs.

(b) "Issue" means an issue relating to the rates, charges, service, facilities, practices, or operations of one or more of the public utilities of this State that are regulated by this Commission.

(c) "Position" means a factual contention, legal contention, or specific recommendation by a party relating to an issue to be addressed in a Commission proceeding.

(d) "Participant" means any individual, group of individuals, organization, association, partnership, or corporation taking part or intending to take part in a Commission proceeding. For the purpose of these rules the term participant does not include governmental entities.

(e) "Expert Witness Fees" means recorded costs incurred in connection with a Commission proceeding by a participant with respect to an issue and confirmed by the Commission to be reasonable.

(f) "Other Reasonable Costs" shall include out-of-pocket expenses incurred by the participant with respect to an issue but shall not normally exceed 25% of the reasonable advocate fees and expert witness fees awarded. The burden of establishing that any costs incurred were reasonable is on the participant.

(g) "Party" means any interested party, respondent, utility, complainant, protestant, or Commission staff of record in a proceeding.

(h) "Proceeding" means any application, case, investigation, rulemaking, or other formal matter before the Commission.

(i) "Reasonable Fees" means fees recorded by the participant in support of its participation in a proceeding. Reasonableness shall be computed at the prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees (as distinguish from employee

salaries) exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

76.23 (Rule 76.23) Participant's Request.

As soon after the commencement of a proceeding as is reasonably possible, but in any event before the beginning of evidentiary hearings the proceeding, or after evidentiary hearings are completed, the participant shall file with the Commission's Docket Office and serve on all the parties to the proceeding a Notice of Intent to Claim Compensation, in compliance with Rules 2, 3, 4, 6, and 7 and with an attached certificate of service by mail on appearances. In all cases, the Notice of Intent must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such participant. Such showing should address the factors set forth in Rule 76.25(a)(1) or (2). A summary description of the finances for the participant should distinguish between grant funds committed to specific projects and discretionary funds. If the Commission has determined that the participant has met its burden of showing financial hardship previously in the same calendar year, participant shall make reference to that decision by number to satisfy this requirement.

(b) In every case, a specific budget for the participation shall be filed showing the total compensation which the participant believes it may be entitled to the basis for such estimate, and the extent of financial commitment to the participation. If at any time during the proceeding changes in the issues, scope, or positions of parties cause a fluctuation of more than 20%, plus or minus, in the estimated budget, the participant shall file an amended budget and serve it on all parties.

(c) A statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the Notice of Intent to Claim Compensation is filed.

76.24 (Rule 76.24) Showing of Other Parties.

The Commission staff and any other party to the proceeding may file a statement within 15 days after the participant's filing commenting on any portion of that filing and making appropriate recommendations to the Commission. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on appearances.

76.25 (Rule 76.25) Commission Ruling.

Within 45 days after the comments of staff and other parties are due, the Commission shall issue a decision ruling on:

(a) Whether the participant has met its burden of showing significant financial hardship in this proceeding or in a prior proceeding in the same calendar year. This can be shown by participants:

(1) Who have, or represent an interest:

(A) Which would not otherwise be adequately represented in the proceeding, and

(B) Whose representation is necessary for a fair determination in the proceeding, and

(C) Who have, or represent an interest but are unable to participate effectively in the proceeding because such person(s) cannot afford to pay reasonable advocate fees, expert witness fees, and/or other reasonable costs of preparing for, and participating in such proceeding (including fees and costs of obtaining judicial review of such proceeding), or

(2) Who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.25(a)(1)(C).

The Commission may also point out similar positions, areas of potential duplication in showings, unrealistic expectations for compensation, and any other matter of which it is aware which would affect the participant's ultimate claim for compensation. Failure of the Commission to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation.

76.26 (Rule 76.26) Compensation Filings of Participant.

Within 30 days following the issuance of a Commission order or decision for which a ruling under Rule 76.25 has been made, a participant may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on appearances.

Such a request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. This breakdown of services and expenses shall be related to specific issues. The request shall also describe how the participant has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of an issue. In order to be eligible for compensation, a participant must raise a different issue, present or elicit new or different evidence, raise new or different arguments in support of a position or take a different position from that of the staff and any other party.

In proceedings where some or all of the relief sought by a participant is obtained without a Commission order or decision the participant may be entitled to compensation by clearly establishing a causal relationship between its participation and such relief.

"Substantial contribution" shall be that contribution which, in the judgment of the Commission, greatly assists the Commission to promote a public purpose in a matter relating to an issue by the adoption, at least in part, of the participant's position. A showing of substantial contribution shall include, but need not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the participant. A showing should also include an analysis of other factors which may affect the appropriate amount of the award. These factors include, but are not necessarily limited, to the following:

1. Time and labor expended in the participation.
2. The novelty and difficulty of the issues presented.
3. The skill required to participate effectively.
4. The preclusion of other employment due to participation in this matter.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time constraints imposed by the proceeding.
8. The amount involved and the results obtained.

9. The experience, reputation, and ability of the participants.

10. Awards in similar cases.

76.27 (Rule 76.27) Staff Audit of Participant's Records.

At the direction of the assigned ALJ, the Commission staff may audit the record and books of the participant to the extent necessary to verify the compensation sought is reasonable. Within 20 days after completion of the audit, if any, an audit report shall be filed with the Commission and served on all parties.

In addition to, or in lieu of an audit, the ALJ may request additional information from the participant in order to clarify or substantiate the amount of the compensation.

76.28 (Rule 76.28) Protests.

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, whichever is later, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on parties.

76.29 (Rule 76.29) Commission Decision.

As soon after the filing of a request for compensation or as soon after the filing of an audit report or protests, if any, as is reasonably possible, the Commission shall issue a decision describing the contribution found to have been made by the participant and the compensation to be awarded. The decision shall specify the basis for finding a substantial contribution and for setting the attendant award of compensation.

76.30 (Rule 76.30) Payment of Compensation.

(a) The utility shall pay any award of compensation to the participant within 45 days after the Commission's decision becomes effective.

(b) If additional costs are incurred as a result of an application for rehearing on the issue of compensation, the participant may file an amended claim setting forth these costs and substantiating them in the same manner as the original claim.

(c) The amount of this payment shall be assigned to a deferred expense account for recovery in the utility's next general rate case, attrition allowance, or other proceeding changing base rates. Such recovery shall be the amount authorized by the Commission for payment and shall be had without further litigation of the reasonableness of the amount. Such recovery shall not include interest.

(d) In case of an award in a proceeding involving more than one utility, payment will be made by each utility in a proportion to be determined by the Commission.

76.31 (Rule 76.31) Participant Request After Hearing.

(a) A participant who has not requested a finding of eligibility for compensation under Rule 76.23 may make such a request after evidentiary hearings have begun. Such request shall not be granted unless good cause for the late request is shown and unless the requirements of Rule 76.23 are met and unless the participant can demonstrate that, absent participation by the participant, an important issue has not or will not be adequately considered in the proceeding.

(b) A request under the Rule shall be filed within five days of the date of the appearance by the participant in the proceeding. Comments by the staff or any party, in the nature of that described in Rule 76.25, shall be made within 20 days after the filing of the participant's request. All filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on parties.

76.32 (Rule 76.32) Provisions for Reimbursement.

These rules will apply to issues raised subsequent to the effective date of the order promulgating these rules in any pending cases, applications, investigations, and rulemakings, and to all cases, applications, and investigations filed on or after the effective date of the order promulgating these rules, without regard to the formal status of the matter on the effective date of these rules. A proceeding will be deemed initiated on the date an application or complaint is filed or an order instituting investigation is issued. Times for filing various requests and responses set forth in these rules shall be adhered to except that any Commission decision on the requests will be held in abeyance until these rules become effective.

(END OF APPENDIX A)

San Gabriel suggests addition of language requiring that consumer be a retail customer of (1) a utility which is a party to a particular Commission proceeding and (2) which has been granted leave to intervene by the Commission in the particular proceeding. San Gabriel considers the present definition overly broad. It believes it essential that the definition of consumer should be limited to the retail customers of a public utility which is a party to the particular proceeding because to do otherwise would permit participation fees to individuals or organizations with no standing or little discernible interest in the proceeding. Further, San Gabriel believes that the proposed rules must not be written to create a right of intervention which would not otherwise be allowed under the Commission's existing rules.

Our existing Rule 53 provides for intervention in complaint proceedings under certain limited circumstances; however, Rule 54 provides for participation without intervention in investigation or application proceedings. We do not wish to require by our rules regarding compensation a motion for leave to intervene where none is required now and accordingly, will not adopt San Gabriel's suggested language in this regard. San Gabriel's concern that the consumer be a retail customer of a utility which is a party to a proceeding is addressed by our adoption of the staff term "participant" in lieu of "consumer." Any participant to our proceedings must state his interest and area of inquiry and if it appears that it will not be germane to the particular proceeding, it will be obvious at the outset.

Consistent with its comments on proposed Rule 76.21, staff proposes that the word "consumer" be eliminated and the word "participant" be substituted. We concur and adopt the following definition of "participant":

> Adopted: "Participant" means any individual, group of individuals, public or private organization, or association,

partnership, or corporation taking part or intending to take part in a Commission proceeding.

e. Proposed: "Expert Witness Fees" means recorded or billed costs incurred by a consumer for an expert witness with respect to a public utilities issue.

Edison proposed a modification which eliminated the term "or billed " and added a clause "and confirmed by the Commission to be reasonable." Edison fears that the use of "billed" costs may encourage the practice of experts billing fees in anticipation of receiving a favorable compensation award from the Commission with a corresponding reduction for any fees not recovered in the Commission's decision. We concur and will adopt the modification.

Pacific has suggested that the phrase "in a proceeding" be added immediately after the word "incurred" on the theory that fees and costs might be incurred with regard to issues outside of Commission proceedings but which would not be covered by the proposed rules.

We will adopt Pacific's basic modification (and include it in proposed Rules 76.22(f) and (i) as well) but will add the words "in connection with a proceeding" so that the recovery, if authorized, will include fees and expenses incurred in preparation for a hearing and not be limited to time actually spent in hearing.

General notes that the term "expert" is not defined and states that the Commission should make it clear what it will expect in the way of qualifications and background for persons to be considered experts. We are reluctant to do this, since we do not impose this prior requirement in the regular course of our proceedings which are not currently subject to third party compensation. We think that adequate safeguards exist during the hearing process itself for any party, after voir dire, to challenge a witness' credentials as an expert. We prefer to treat the matter on

TURN argues that it is neither reasonable nor useful that a party state all of the issues which it intends to pursue, along with its position, in an eligibility filing. It is simply not possible to know, early in a complex proceeding, every issue that may arise which will be of interest. Further, locking parties into inflexible stances early in the proceeding is not conducive to compromise and it ignores the learning process which inevitably occurs as parties come to understand other parties' viewpoints in greater detail as the proceeding progresses.

TURN was the only party to address the issue of whether an eligibility phase was necessary. Other parties commented on the rules themselves in some detail but simply assumed that the eligibility phase was necessary. Given our experience with PURPA filings under similar rules, we are inclined to agree with TURN that rigid structures and definitive positions at this stage serve no useful purpose. We view the eligibility phase essentially as a protection for the participant who intends to claim compensation and who would not otherwise participate in the proceeding or who would participate on a more limited scale after receiving a negative finding from the Commission on eligibility for compensation. If a third party such as TURN is willing to enter a proceeding and participate with only minimal indication at the beginning of the proceeding on the Commission's part that it would meet the financial test to be considered for compensation we see no reason to burden it, other parties, or the Commission with exhaustive eligibility filings.

After consideration, we believe that a Notice of Intent to Claim Compensation might accomplish the same purpose with less paperwork. Such a filing would address the sole question of financial hardship and, at the option of the participant, could be made either before evidentiary hearings begin in a proceeding, or after hearings are concluded (or later, see Rule 76.31). Naturally the earlier the filing is made, the earlier the participant will have

participants be treated differently? If a participant vindicates his position through judicial review and meets the substantial contribution test set forth in the rules following, we believe that it is entitled to recover the costs of judicial review on the same basis as for the participation in our proceeding. We doubt very much that this will lead to frivolous appeals, since the simple fact that a participant appeals will not entitle it to compensation and even if it prevails on review of its position, compensation will be paid only on a finding of substantial contribution.

Center suggests that some time limit be placed on the Commission for issuing its decision on eligibility, suggesting 30 days after the comments of staff and other parties. Since we only have two conferences a month at which decisions are issued, and since we are required to publish an agenda of matters to be considered 10 days before each conference, this time appears unreasonably short. We appreciate the desire of parties to know when they might expect a decision, however, and will adopt a limitation of 60 days.

> Adopted Rule 76.23: As soon after the commencement of a proceeding as is reasonably possible, but in any event before the evidentiary hearings begin in a proceeding, the participant shall file with the Commission's Docket Office and serve on all the parties to the proceeding a Notice of Intent to Claim Compensation, in compliance with Rules 2, 3, 4, 6, and 7 and with an attached certificate of service by mail on appearances. In all cases, the Notice of Intent must set forth the following:
>
> a. A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such participant. Such showing should address the factors set forth in Rule 76.25(a)(1) or (2). A summary description of the finances for the participant should distinguish between grant funds committed to specific projects and

Rule 76.28 - Protests

> Proposed Rule 76.28: Within 15 days of the filing of a request for compensation or within 15 days after the filing of the staff audit, if any, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service on appearances by mail.

PG&E was the only party to comment on this rule and it noted that the number of fee requests is likely to increase under these rules and the Commission should consider enlarging the time in which protests must be filed and a decision on a final fee application must be issued. It did not make specific recommendations for the enlargement of time. We agree that the time should be extended and further believe that reasonable time for protests is 30 days, given that some of the compensation requests can be expected to be quite complex while others may be relatively straightforward.

> Adopted Rule 76.28: Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on parties.

SS

Rule 76.29 - Commission Decision

> Proposed Rule 76.29: Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, or within 20 days of the filing of protests, if any, the Commission shall issue a decision describing the contribution found to have been made and the compensation awarded.

Pacific suggests that 20 days is much too short a time in which to decide matters of compensation which are expected to be

the costs of rehearing. Since we provided in Rule 76.25(1)(C) that fees and costs of obtaining judicial review by participants may be claimed, we will make provision here for an amended claim should participants find that they have incurred additional costs as a result of an application for rehearing of a compensation award filed by another party. We caution participants, however, that they are not required by our rules of practice to respond to applications for rehearing, and accordingly, we do not expect to see substantial amendments to claims for compensation for work done in this phase of a proceeding.

Lastly, Edison and San Gabriel raised the issue of a fee award in a proceeding involving multiple utilities. Edison suggests that payment be made by the utilities in proportion that their respective number of customers bears to the total compensation awarded. We will adopt the spirit but not the mechanics of this suggestion. We can think of instances where number of customers would not be an appropriate basis for allocation of payment, and will reserve that for our discretion.

Adopted Rule 76.30:

a. The utility shall pay any award of compensation to the participant within ~~30~~ 45 days after the Commission's decision becomes effective.

b. If additional costs are incurred as a result of an application for rehearing on the issue of compensation, the participant may file an amended claim setting forth these costs and substantiating them in the same manner as the original claim.

c. The amount of this payment shall be assigned to a deferred expense account for recovery in the utility's next general rate case, attrition allowance, or other proceeding changing base rates. Such recovery shall be the amount authorized by the Commission for payment and shall be had without further

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3. The CLAM decision addressed awards of attorney fees only in reparations cases and in ratemaking proceedings under two very narrow factual situations.

4. The Commission lacks the internal resources to represent fully and adequately all facets of the public interest.

5. The Commission may and should establish a procedure to compensate qualified public participants for their participation in matters before the Commission.

6. The rules set forth in Appendix A set forth the terms and conditions under which participants may request award of attorney fees for all proceedings except proceedings to which PURPA applies.

7. The rules set forth in Appendix A are reasonable and should be adopted.

8. The following order should be effective today because of the compelling public interest in getting a compensation program underway.

9. Since the jurisdictional issues raised by PG&E's motion for stay are disposed of in this decision the motion should be denied.

O R D E R

IT IS ORDERED that:

1. The rules attached as Appendix A are adopted as part of the Commission's Rules of Practice and Procedure, and they are effective ~~on the effective date of this decision, or~~ 30 days from today.

2. Pacific Gas and Electric Company's motion for a stay of Order Instituting Investigation 100 is denied.

SS This order becomes effective ~~30 days from~~ today.

Dated APR 6 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

76.21 (Rule 76.21) Purpose.

The purpose of this article is to establish procedures for awarding reasonable fees and costs to participants in proceedings before this Commission.

76.22 (Rule 76.22) Definitions.

(a) "Compensation" means reasonable advocate fees, expert witness fees, and other reasonable costs.

(b) "Issue" means an issue relating to the rates, charges, service, facilities, practices, or operations of one or more of the public utilities of this State that are regulated by this Commission.

(c) "Position" means a factual contention, legal contention, or specific recommendation by a party relating to an issue to be addressed in a Commission proceeding.

(d) "Participant" means any individual, group of individuals, public or private organization, or association, partnership, or corporation taking part or intending to take part in a Commission proceeding.

(e) "Expert Witness Fees" means recorded costs incurred in connection with a Commission proceeding by a participant with respect to an issue and confirmed by the Commission to be reasonable.

(f) "Other Reasonable Costs" shall include out-of-pocket expenses incurred by the participant with respect to an issue but shall not normally exceed 25% of the reasonable advocate fees and expert witness fees awarded. The burden of establishing that any costs incurred were reasonable is on the participant.

(g) "Party" means any interested party, respondent, utility, complainant, protestant, or Commission staff of record in a proceeding.

(h) "Proceeding" means any application, case, investigation, rulemaking, or other formal matter before the Commission.

(i) "Reasonable Fees" means fees recorded by the participant in support of its participation in a proceeding. Reasonableness shall be computed at the prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees (as distinguish from employee

salaries) exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

76.23 (Rule 76.23) Participant's Request.

As soon after the commencement of a proceeding as is reasonably possible, but in any event before the beginning of evidentiary hearings the proceeding, the participant shall file with the Commission's Docket Office and serve on all the parties to the proceeding a Notice of Intent to Claim Compensation, in compliance with Rules 2, 3, 4, 6, and 7 and with an attached certificate of service by mail on appearances. In all cases, the Notice of Intent must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such participant. Such showing should address the factors set forth in Rule 76.25(a)(1) or (2). A summary description of the finances for the participant should distinguish between grant funds committed to specific projects and discretionary funds. If the Commission has determined that the participant has met its burden of showing financial hardship previously in the same calendar year, participant shall make reference to that decision by number to satisfy this requirement.

(b) In every case, a specific budget for the participation shall be filed showing the total compensation which the participant believes it may be entitled to the basis for such estimate, and the extent of financial commitment to the participation. If at any time during the proceeding changes in the issues, scope, or positions of parties cause a fluctuation of more than 20%, plus or minus, in the estimated budget, the participant shall file an amended budget and serve it on all parties.

(c) A statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the Notice of Intent to Claim Compensation is filed.

76.24 (Rule 76.24) Showing of Other Parties.

The Commission staff and any other party to the proceeding may file a statement within 15 days after the participant's filing commenting on any portion of that filing and making appropriate recommendations to the Commission. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on appearances.

9. The experience, reputation, and ability of the participants.

10. Awards in similar cases.

76.27 (Rule 76.27) Staff Audit of Participant's Records.

At the direction of the assigned ALJ, the Commission staff may audit the record and books of the participant to the extent necessary to verify the compensation sought is reasonable. Within 20 days after completion of the audit, if any, an audit report shall be filed with the Commission and served on all parties.

In addition to, or in lieu of an audit, the ALJ may request additional information from the participant in order to clarify or substantiate the amount of the compensation.

76.28 (Rule 76.28) Protests.

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on parties.

76.29 (Rule 76.29) Commission Decision.

As soon after the filing of a request for compensation or as soon after the filing of an audit report or protests, if any, as is reasonably possible, the Commission shall issue a decision describing the contribution found to have been made by the participant and the compensation to be awarded. The decision shall specify the basis for finding a substantial contribution and for setting the attendant award of compensation.

76.30 (Rule 76.30) Payment of Compensation.

(a) The utility shall pay any award of compensation to the participant within 30 days after the Commission's decision becomes effective.

(b) If additional costs are incurred as a result of an application for rehearing on the issue of compensation, the participant may file an amended claim setting forth these costs and substantiating them in the same manner as the original claim.