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Decision 97-10-026 October 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Decrease Its Rates and Charges for Electric and Gas Service, and Increase Rates and Charges for Pipeline Expansion Service.

ORIGINAL
Application 94-12-005
(Filed December 9, 1994)

And a related matter.

Investigation 95-02-015
(Filed February 22, 1995)

OPINION GRANTING INTERVENOR COMPENSATION

Summary

This decision grants The Utility Reform Network (TURN) \$16,551.15 for its contribution to Decision (D.) 96-11-014.

Background

On January 7, 1997, TURN filed a request for award of compensation, augmented March 27, 1997, in the amount of \$17,323.65 for its contribution to D.96-11-014. In this decision, the Commission addressed Pacific Gas and Electric Company's (PG&E's) compliance with our order (D.95-09-073) that PG&E undertake a number of improvements to its call center operations and customer communications practices. These improvements were ordered to promote higher quality service and safety both generally and during storm-related and other emergencies. In D.96-11-014, we found that PG&E had failed to comply with certain of the improvements we ordered in D.95-09-073, and as a result, penalized PG&E in the amount of \$480,000, plus interest.

In its request, TURN acknowledges that PG&E had filed an application for rehearing of D.96-11-014 on the issues for which TURN requested compensation:

"On December 9, 1996, PG&E filed an Application for Rehearing of D.96-11-014. TURN could have chosen to await resolution of the Application for Rehearing before filing this Request (see Rule 76.72 of the Commission's Rules of Practice and Procedure). TURN believes, however, that PG&E has not stated grounds justifying rehearing of D.96-11-014, and thus elects to file this Request at this time. In the unlikely event that rehearing of D.96-11-014 is granted, TURN reserves the right to augment this request." (TURN's Request, page 2, footnote 2.)

This request presents the Commission with a question regarding proper interpretation of Rule 76.72 of our Rules of Practice and Procedure (Rules): Is a request for compensation ripe for decision when the issues for which the customer requests compensation are the subject of an application for rehearing? We will address this question first, then consider the specifics of TURN's request for compensation.

Discussion

The Commission's intervenor compensation program is governed by Public Utilities Code §§ 1801 - 1812, and Rules 76.71 - 76.76.¹ By these statutes and rules, eligible customers are compensated for reasonable costs incurred in making a substantial contribution to a Commission order or decision. The issuance of a "final order or decision" is identified in § 1804 (c) as the event that is supposed to trigger the filing of a request for award. But the statute does not define "final order or decision." The Commission's Rule 76.72 defines final order or decision.

"For purposes of this article, 'final order or decision' means an order or decision that resolves an issue on which the customer believes it has made a substantial contribution or the order or decision closing the proceeding. If an application for rehearing challenges a decision on an issue on which the customer believes it made a substantial contribution, the 'final order or decision' on that issue means the order or decision denying rehearing on that issue, the order or decision that resolves that issue after rehearing, or the order or decision closing the proceeding."

When the Commission adopted this rule, it stated:

¹ Further references to sections are to the Public Utilities Code, and further references to rules are to the Rules of Practice and Procedure, unless otherwise noted.

"The definition allows intervenors to file for compensation for their contribution to intermediate Commission decisions, and not to have to wait for the last decision in a particular docket. The existing definition of final order or decision is modified to accommodate the uncertainty that arises when an application for rehearing affecting the request for award is filed. ... Delaying the request for award until after the Commission's final resolution of the issue after administrative appeals avoids the need to file a request until the intervenor is certain that it has made a substantial contribution to the Commission's ultimate determination on that issue."

(48 CPUC 2d 389, 391 (D.93-03-023).)

The applicability of this rule was discussed with TURN by the assigned Administrative Law Judge (ALJ). TURN responded in writing to the assigned ALJ by letters dated April 1, 1997 and April 24, 1997 from Theresa Mueller and Thomas Corr, respectively. TURN believes that compensation on an issue can and should be awarded even if rehearing on that issue is pending. Because the Commission has made such awards in the past, TURN argues that this practice should continue.² TURN contends that the first sentence of Rule 76.72 suggests that intervenors may apply for compensation as soon as the Commission issues a decision which resolves an issue in their favor, even if the proceeding remains open due to any number of reasons. In TURN's view, this includes the filing of an application for rehearing. Therefore, TURN argues that the second part of the rule should not be read as imposing a strict limitation on the Commission whenever an application for rehearing happens to be filed.

TURN also opposes application of Rule 76.72 on a strict basis because just compensation could be delayed or denied on the basis of a frivolous application for rehearing. However, should the Commission take the view that compensation cannot be awarded while rehearing is pending, TURN recommends that the compensation award, if one is ultimately granted, should include interest from 60 days after the filing of the application of rehearing.

² See for example D.95-09-009, D.96-07-046, and D.96-08-029.

With respect to our intervenor compensation program, our overarching goal has always been to encourage efficient and effective participation by intervenors. As directed in § 1801.3 (e), we intend that:

"Intervenor compensation be awarded to eligible intervenors in a timely manner within a reasonable period after the intervenor has made the substantial contribution to a proceeding that is the basis for the compensation award."

In the past when we have applied Rule 76.72, we have applied that part of the rule that clarifies that the decision need not close the proceeding for a request for compensation and an award to be timely. We have also applied the rule, stating that a decision on an application for rehearing was issued and so now the request will be addressed, thereby indicating that review of a compensation request was delayed because a final order or decision had not been issued. However, as TURN points out, we have also awarded compensation, without reference to the rule or the pending rehearing, when applications for rehearing are pending on the same issues that were the subject of the request for compensation.

As Legal Division recently noted in its September 1997 Monthly Management Report, we have a backlog of matters on rehearing. Approximately 20% of our pending applications for rehearing have been pending for more than 3 years. The decision here for which TURN is requesting compensation was issued 11 months ago. Although this backlog is not a new phenomenon, we have become concerned that strict interpretation of Rule 76.72 may run counter to the intent of the governing statute. To ensure eligible intervenors receive awards of compensation for substantial contributions in a reasonable period, we will re-interpret Rule 76.72, and apply TURN's interpretation of the rule. TURN's interpretation is a fairer, more equitable interpretation in light of our rehearing backlog and the statutory intent of the program. TURN's request for an award of compensation is therefore ripe for a decision.

We recognize that this interpretation may result in our awarding compensation to an intervenor based on its substantial contribution to a decision subject to a pending

application for rehearing. Upon considering the application for rehearing, we may then modify the decision or grant rehearing. As a result of that modification or rehearing, we may no longer adopt "in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations" presented by the intervenor, thereby removing the "substantial contribution" basis for the award.³ However, that modification or decision on rehearing would not remove the fact that a majority of the Commission was at an earlier time persuaded to adopt a contention or recommendation presented by the intervenor.

Unless and until this aspect of our rules is modified as part of our generic examination of intervenor compensation (Rulemaking 97-01-009/Investigation 97-01-010), we intend to apply Rule 76.72 as interpreted in this order. Having addressed the question of proper interpretation of Rule 76.72 and determined that TURN's request is ripe for decision, we will address the specifics of the request.

Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to the governing statutes, §§ 1801-1812. Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference or by a date established by the Commission. The NOI must present information regarding the nature and extent of compensation and may request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an intervenor requesting compensation to provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" means that,

"in the judgment of the commission, the customer's presentation has substantially assisted the Commission in the making of its order or

³Substantial contribution is defined in § 1802(h), and is partially cited here.

decision because the order or decision has adopted in whole or in part on one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation."

Section 1804(e) requires the Commission to issue a decision which determines whether or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

NOI to Claim Compensation

In response to its NOI, TURN was found eligible to request compensation in this proceeding in the Administrative Law Judge Ruling of March 3, 1995, where it was noted that a rebuttable presumption of eligibility was in place pursuant to § 1804(b). Consistent with the requirement of PU Code § 1804(c) and our re-interpreted Rule 76.72, TURN's request was timely filed within 60 days of the issuance of our decision, D.96-11-014.

Contributions to Resolution of Issues

In any proceeding involving multiple intervenors, we must consider (1) if the intervenor has made a substantial contribution to the decision of the Commission, satisfying the requirements of §1802, and (2) to what extent, if any, such contribution duplicated that of any intervenor.

In its request, TURN presents the basis for the substantial contribution it claims it made to the decision. TURN states that it alone argued that PG&E should be fined for its failure to comply with D.95-09-073. Further, TURN asserts that it alone proposed the methodology for assessing the penalty. Although the Commission did not adopt the full penalty calculated and recommended by TURN, TURN argues that the Commission relied on its arguments in reaching the conclusions contained in D.96-11-014.

We agree with TURN that it made a substantial contribution to the making of our decision. Although we did not adopt all of TURN's contentions and recommendations, we did conclude, largely on the basis of TURN's presentation, that PG&E did not comply with Item 1 of D.95-09-073, and we adopted TURN's methodology for calculating the penalty. (D.96-11-014, slip op., p. 16.) TURN's contribution did not duplicate that of any other intervenor.

The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$17,323.65 as follows:

Professional Fees - Attorneys

Michel Peter Florio

4.0 hours x \$260 = \$ 1,040

Thomas P. Corr

58.50 hours x \$225 = \$13,162.50

Professional Fees - Experts and Consultants

Gayatri Schilberg

28.15 hours x \$100 = \$ 2,815

William Marcus

0.75 hours x \$140 = \$ 105

Subtotal \$17,122.50

Other Costs

Photocopying = \$ 105.80

Postage = \$ 14.35¹

Transportation = \$ 28

Telephone and FAX = \$ 52

Subtotal \$ 200.15

TOTAL \$17,323.65

¹ In its request, TURN includes a postage cost of \$15.35. This appears to be an error which we correct in restating its position.

TURN requests compensation for all of the time it reasonably devoted to its participation in this phase of the proceeding, including the time spent by its experts and consultants analyzing PG&E's compliance filing.

Hours Claimed

In its request, TURN documented the claimed hours devoted to this call center phase of the proceeding by presenting a daily breakdown of hours with a brief description of each activity for each attorney. It also presented the fees for experts and consultants aggregated by the monthly invoices presented to TURN, showing the number of hours and billing rate for analysis of PG&E's compliance filings, and assistance in devising the litigation strategy TURN pursued in this phase of the proceeding. We also note that TURN's request includes time spent in preparing its response to PG&E's application for rehearing, as envisioned in § 1802(a) and Rule 76.73.

We find TURN's claimed hours to be reasonable.

Hourly Rates and Other Costs

The hourly rates TURN requests for its attorneys are the same rates applied by the Commission for work performed by these attorneys in 1995. The \$260 hourly rate for Mr. Florio was adopted by the Commission in Decisions 96-06-020 and 96-08-023. The \$225 hourly rate for Mr. Corr was adopted by the Commission in Decisions 96-05-052 and 96-10-072. We therefore find them reasonable. However, TURN's calculations reflect full attorney fees for preparation of its compensation request. As we have discussed in prior orders, we have held that compensation requests are essentially bills for services, and do not require a lawyer's skill to prepare. Accordingly, we have reduced the attorney's rates for time spent preparing the compensation request, except in cases where the compensation claim involves technical and legal analysis deserving of compensation at higher rates. (See, for example, D.96-08-023, D.97-02-047, and D.97-02-048.) We do not believe that TURN's compensation request in this proceeding is such a case. Accordingly, we authorize one-half of TURN's

attorney fees for the 6.75 hours spent on the compensation request (and the March 27, 1997, augmentation to it).⁵

The hourly rates TURN requests for its experts and consultants include a \$5.00 hourly increase above the previously approved rates for Ms. Schilberg and Mr. Marcus. They reflect the "recorded or billed costs incurred by [TURN]", although neither actually appeared as an "expert witness" in this phase of the proceeding (§ 1802 (c)). In its March 27, 1997, augmentation of its request, TURN adequately substantiates the hourly rates for its experts and consultants as comparable, to below, the market rates paid to persons of comparable training and experience who offer similar services to participants appearing before this Commission, as required by §1806.

We find TURN's request for \$200.15 for other expenses to be reasonable.

Award

Accordingly, we will grant TURN's request for compensation related to D.96-11-014 in the amount of \$16,551.15. This amount reflects the \$772.50 reduction from the requested amount associated with preparation of the compensation request.

Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing March 23, 1997 (the 75th day after TURN filed its compensation request) and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission's Energy Division may audit TURN's records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

⁵ This adjustment results in a \$772.50 reduction based on 6 hours of Mr. Corr's time at \$112.50 and .75 hours of Mr. Florio's time at \$130.

Findings of Fact

1. PG&E has filed an application for rehearing on the issues for which TURN is requesting compensation in this proceeding. That application is currently pending.

2. TURN's interpretation of Rule 76.72 is a fairer, more equitable interpretation in light of our rehearing backlog and the statutory intent of the intervenor compensation program.

3. TURN's request for an award of compensation is timely.

4. As a result of modification of a decision in the context of considering an application for rehearing, or the granting of rehearing, the Commission may no longer adopt a contention or recommendation presented by an intervenor. That action would not remove the fact that a majority of the Commission was at an earlier time persuaded to adopt a contention or recommendation presented by the intervenor.

5. TURN contributed substantially to D.96-11-014.

6. TURN's claimed hours are reasonable.

7. TURN has requested hourly rates for attorneys that have previously been approved by the Commission.

8. TURN's requested attorney fees for preparation of its compensation request, and augmentation to it, should be reduced by 50%, consistent with prior treatment of such costs.

9. TURN's requested hourly rates for experts and consultants include a \$5 hourly increase above the rates previously approved by the Commission.

10. TURN's requested hourly rates for experts and consultants are comparable, to below, the market rates paid to persons of comparable training and experience who offer similar services to participants appearing before this Commission and are, therefore, reasonable.

11. The other costs incurred by TURN are reasonable.

Conclusions of Law

1. Rule 76.72 should be read to allow an intervenor to file a request for compensation after a final order or decision has been made in a case on which the

intervenor believes it has made a substantial contribution, regardless of the pendency of an application for rehearing.

2. TURN has fulfilled the requirements of §§ 1801-1812 which govern awards of intervenor compensation.

3. TURN should be awarded \$16,551.15 for its contribution to D.96-11-014.

4. Because there are no outstanding issues in this proceeding, it should be closed.

5. This order should be effective today so that TURN may be compensated without further delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network's (TURN) is awarded \$16,551.15 in compensation for its substantial contribution to Decision 96-11-014.

2. Rule 76.72 shall be read to allow an intervenor to file a request for compensation after a final order or decision has been made in a case on which the intervenor believes it has made a substantial contribution, regardless of the pendency of an application for rehearing.

3. Pacific Gas and Electric Company (PG&E) shall pay TURN \$16,551.15 within 30 days of the effective date of this order. PG&E shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest beginning March 23, 1997, and continuing until full payment is made.

4. This proceeding is closed.

This order is effective today.

Dated October 9, 1997, at San Francisco, California.

Dated August 1, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

COMMISSIONER HENRY M. DUQUE, DISSENTING:

Let me start by stating that I believe that intervenors are a crucial part of the Commission's deliberative process and it pains me to feel compelled to vote this way. The root of the problem is that this Commission has not acted rapidly to resolve applications for rehearing. If we had acted on these rehearing requests, we wouldn't have been required to choose between the draft orders and the alternates. As it is, by adopting the alternates, we are in a position of approving compensation based on a substantial contribution showing that may change as a result of the decision on rehearing. In the past we have not been consistent about awarding compensation related to issues subject to rehearing. The alternates adopted today do not attack the root of the problem, our slow deliberation on rehearing matters, and in fact, they might provide parties with less incentive to push us to resolve these matters expeditiously.

These orders point out how crucial it is that we revisit the definition of substantial contribution in our intervenor compensation OIR. Under our current definition of substantial contribution, whether a party "wins" or "loses" on an issue seems to drive whether their contribution is considered substantial. Because of this definition, the resolution of rehearing requests may significantly affect what is considered eligible for compensation. However, it is my personal opinion that even if a party does not "win" on a given issue, their participation often contributes significantly to narrowing the range of debate and clarifying the issues. Under a different standard for substantial contribution, TURN's request in this case might not revolve on whether this Commission was timely in resolving rehearing requests.

Let me make it clear that based on the current standard, I felt that I could not support the award of compensation at this time, only because the Commission had not reached a final decision. I am eagerly looking forward to the draft order in the intervenor compensation OIR so that we may develop and explore other potential definitions of substantial compensation.

/s/ Henry M Duque

HENRY M. DUQUE

Commissioner

San Francisco, California
October 9, 1997

COMMISSIONER HENRY M. DUQUE, DISSENTING:

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Let me make it clear that based on the current standard, I felt that I could not support the award of compensation at this time, only because the Commission had not reached a final decision. I am eagerly looking forward to the draft order in the intervenor compensation OIR so that we may develop and explore other potential definitions of substantial compensation.


HENRY M. DUQUE
Commissioner

San Francisco, California
October 9, 1997