

ALJ/KLM/jva

Decision 98-04-027 April 9, 1998

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APR 10 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company to Identify and Separate Components of Electric Rates, Effective January 1, 1998.

Application 96-12-009
(Filed December 6, 1996)

And Related Matters.

Application 96-12-011
(Filed December 6, 1996)

Application 96-12-019
(Filed December 6, 1996)

O P I N I O N

Summary

This decision awards \$109,178.78 to The Utility Reform Network (TURN) for its contributions to Decision (D.) 97-08-056. This decision denies the request for compensation of the Environmental Defense Fund (EDF).

Background

Section 1801 et seq. of the PU Code and Article 18.8 of the Commission's Rules of Practice and Procedure establish that intervenors to our proceedings may be compensated for their participation and define the criteria under which compensation is appropriate. Specifically, requests for compensation must demonstrate that the intervenor made a "substantial contribution" to the Commission's order and provide a detailed description of services and expenditures.

TURN and EDF filed requests for compensation in these proceedings within 60 days of the issuance of a final order, pursuant to PU Code § 1804(c). Both seek compensation for their contributions to D.97-08-056. That order allocated the costs of Pacific Gas and Electric Company's (PG&E), Southern California Edison Company's (Edison), and San Diego Gas & Electric Company's (SDG&E) electricity operations between functions and set forth requirements for the format of utility bills following the introduction of direct access, among other things. The order thereby "unbundled"

utility costs in anticipation of competition in generation markets, scheduled to be introduced January 1, 1998.

TURN'S Request

TURN seeks \$109,178.78 for its contributions to D.97-08-056. TURN asserts that, as one of the most active parties to the proceeding, it made a substantial contribution to the order, providing extensive testimony, conducting cross-examination at hearings, and filing briefs. TURN states the Commission adopted numerous recommendations made by TURN and in many cases inferred its agreement with TURN's positions in its factual and legal analysis. TURN observes that the Commission set forth its policy orientation consistent with that of TURN's witness. It proceeded to adopt TURN's recommendations regarding load dispatching costs, a cost of capital review, customer marketing costs, balancing accounts, rate design for the CARE program and baseline rates, and bill format. We concur generally with TURN's characterization of the Commission's order relative to TURN's analysis and recommendations and find that TURN made a substantial contribution to D.97-08-056.

TURN also seeks full compensation for its participation in the Commission's "Ratesetting Working Group" for work accomplished prior to the filing of these applications but after January 1, 1997. The Commission created the Ratesetting Working Group as part of the process of developing unbundled utility rates. TURN argues that the Commission has endorsed the work of such groups as now integral to its processes and that therefore TURN is entitled to compensation for its contributions to the work of such groups. TURN refers to D.96-08-040 which awarded compensation to intervenors who participated in working groups, noting that the efforts are "essential in building a California consensus." Consistent with our order in D.96-08-040, we will grant TURN's request for compensation for its participation in the Ratesetting Working Group.

TURN presents a detailed accounting of the costs it incurred in participating in these dockets and the Ratesetting Working Group. Generally, it bills for the work of three attorneys and three witnesses as follows:

ATTORNEYS -

Robert Finkelstein 256.5 hours @ \$235

Michel Florio 4.0 hours @ \$275

Michael Shames 42.8 hours @ \$190

JBS ENERGY INC. EXPERTS -

William Marcus 120.75 hours @ \$145

Jeff Nahigian 3.5 hours @ \$80

173 hours @ \$85

Greg Ruzovan 1 hour @ \$85

The rates for Mr. Finkelstein, Mr. Florio, and Mr. Shames for work undertaken in 1997 are all higher than rates approved by the Commission for these attorneys in past compensation decisions. The Commission approved an hourly rate for Mr. Shames of \$180 for work undertaken in 1996. TURN argues here that the amount is substantially below the market rate for an attorney with Mr. Shames' experience, training, and skill. Mr. Shames has been involved in litigating utility matters since 1982. In the same year, he founded UCAN, which advocates on behalf of consumer interests in Commission proceedings. TURN presents the results of a billing survey undertaken by "Of Counsel" for attorney rates in the San Francisco area. The range for partners TURN presents is between \$175 an hour and \$450 an hour. In light of these hourly market rates, we agree with TURN that \$190 an hour is not excessive for Mr. Shames and approve that rate here.

The hourly rate changes for Mr. Finkelstein and Mr. Florio were presented initially in TURN's request for compensation for its contributions in Rulemaking (R.) 94-04-031. Normally, we would apply the results of a corresponding order in this decision. However, because we issue this order before we issue an order in R.94-04-031, we address the hourly rate increases here and incorporate TURN's request in R.94-04-031 by reference. In that proceeding, TURN requests an increase of about 7%, from \$220 an hour to \$235 an hour for Mr. Finkelstein. TURN asserts that this higher level reflects market rates for an attorney with Mr. Finkelstein's experience and

training. TURN observes that Mr. Finkelstein graduated from law school in 1985 and has been active in legal services litigation since that time. He joined TURN in 1992 and has worked extensively in energy matters ever since. TURN presents prevailing attorney rates from a survey undertaken by "Of Counsel," rates which range from \$135 an hour to \$400 for partners. We concur that TURN's request for an increase in Mr. Finkelstein's hourly rate is reasonable and will adopt it for work undertaken in 1997.

For Mr. Florio, TURN requests an increase in hourly rate from \$260 to \$275. TURN observes that Mr. Florio has been actively litigating utility matters before this Commission for many years, having been admitted to the California Bar in 1978. TURN applies the same "Of Counsel" survey results to propose an hourly increase which is equal to the average partner rate presented in the survey. We concur with TURN's assertion that its request for an increase for Mr. Florio is reasonable and we will adopt it for work undertaken in 1997.

TURN seeks \$33,245.75 in costs billed to TURN by JBS Energy Inc. for expert witnesses and analysis. TURN observes that the rate for Mr. Marcus has already been approved by the Commission in D.97-05-070. TURN seeks \$5 more per hour for Mr. Ruzovan and Mr. Nahigian than the Commission has previously approved. TURN explains that both of these witnesses have more than ten years of experience in utility regulation. TURN justifies the requested increase by observing that the hourly rate represents a 3% increase in hourly rates over the previous year. TURN observes that the hourly rate charged by two witnesses who testified in the Enova-Pacific Enterprises merger case (Application 96-10-038) billed \$500 an hour and \$300 an hour. TURN observes that PG&E recently presented four nonstaff experts with hourly rates ranging from \$173 to \$225. TURN argues that in light of these consultant rates, JBS Energy Inc.'s billed hourly rates are modest. We agree and approve the requested hourly rates for witnesses hired by TURN.

Finally, TURN seeks \$6,423.53 for expenses associated with copying, mailing, and travel. These are reasonable expenses in light of the complexity and duration of the proceedings.

We grant TURN's request for compensation in the amount of \$109,178.78. We will allocate the amount between the three utilities according to each utility's share of total retail sales of electricity in 1996, consistent with our practice adopted in D.96-08-040.

EDF's Request

EDF requests \$23,961 in compensation for its contributions to D.97-08-056.¹ EDF and others proposed a method by which to calculate the compensation transition charge by rate class which the Commission adopted. Edison filed a protest to EDF's request arguing that EDF is not entitled to compensation in this proceeding because it failed to file a notice of intent to claim compensation, fails to demonstrate that it made a substantial contribution to D.97-08-056, and improperly seeks funding for activities undertaken on behalf of private entities that are not entitled to compensation. Edison subsequently withdrew its opposition following "further discussion and consultation."

Before addressing whether EDF has fulfilled the requirements which would entitle it to compensation, we address a more basic issue, that is, EDF's status as a party to these proceedings. Rule 54 of the Commission's Rules of Practice and Procedure requires those who wish to participate in a proceeding to enter an appearance at a hearing and at the same time to state their interest in the proceeding and the positions they intend to present. We are within our discretion to make exceptions to the requirements of Rule 54 with an affirmative showing by the moving party and a ruling.

In these proceedings, EDF did not enter an appearance at any hearing pursuant to Rule 54. According to its request for compensation, it became involved in the proceeding after the filing of briefs. On the date designated for filing comments on the proposed decision, July 21, 1997, EDF filed a "motion to intervene." Neither the

¹ Following an inquiry from the assigned Administrative Law Judge (ALJ) by telephone, EDF sent a letter to the ALJ and all parties, dated October 29, 1997, which in effect amended EDF's request to \$20,197.80 on the basis that activities occurring prior to July 14, 1997, should not be compensated because EDF did not intend to become a party prior to that date.

administrative law judge nor the Commission has granted EDF's motion to intervene in this proceeding. EDF is therefore not a party to these proceedings.

Whether EDF is entitled to compensation in these proceedings even though it does not have status as a party is another matter. We could grant EDF's motion to intervene here and proceed to consider its request for compensation. In the context of this compensation request, however, the act would be an empty one. EDF has not satisfied the provisions of Section 1804(a) of the Public Utilities Code which are prerequisite to an award of compensation. Section 1804(a) requires that "a customer who intends to seek an award under this article shall, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent (NOI) to claim compensation." Following that filing, the assigned administrative law judge may permit other parties to comment on the NOI and, if a showing of significant financial hardship is included in the NOI, must issue a responsive ruling within 30 days with regard to the party's eligibility. In this proceeding, EDF did not file an NOI to claim compensation. Its request for compensation asks the Commission to accept the NOI it filed in R.94-04-031 on July 28, 1994 in lieu of a filing here. It justifies its request on the basis that these proceedings are "subsidiary" to R.94-04-031.

R.94-04-031 is a subsidiary proceeding to these only to the extent that all proceedings addressing electric regulation are subsidiary to R.94-04-031. R.94-04-031 arguably addressed almost every imaginable policy issue affecting electric regulation. Therefore, granting EDF's request to consider its NOI filed in R.94-04-031 fulfillment of the requirement to file an NOI here would require us, in effect, to allow parties to file a single NOI which would apply to dozens of proceedings.

Granting EDF's request would require us to violate the letter and spirit of Section 1804(a). The purpose of Section 1804(a) is to provide intervenors with some preliminary assessment of their eligibility for compensation and to provide other parties and the Commission notice of an intervenor's intent. Although EDF could arguably waive its right to a finding of eligibility early in the proceeding, it may not waive its responsibility to notify parties and the Commission of its intent to claim compensation. It is not reasonable to assume that a party to these proceedings would consider EDF's

NOI in R.94-04-031 a signal that EDF intended to claim compensation here, especially since EDF filed its NOI in R.94-04-031 more than two years before these applications were filed. More to the point, the statute does not permit an intervenor or the Commission to accept an NOI filed in one proceeding as a substitute for an NOI in another.

The rules governing the process for attaining party status and Section 1804 are designed in part to assure that an intervenor who is accorded the privileges of party status also assumes the attendant responsibilities. In this case, for example, where EDF did not seek party status until after the proposed decision was filed, EDF asks us to accept an NOI filed in a rulemaking--where parties may engage in ex parte communications without conditions--as a substitute for filing an NOI in these proceedings--where disclosure of ex parte communications is required. In fact, EDF met with decision-makers and provided them with written materials in this proceeding but did not file notices of its ex parte communications, apparently because it had not filed its motion to intervene. If EDF had filed the NOI in this proceeding as required by Section 1804 or had satisfied Rule 54, it would have had to file ex parte notices, consistent with Rule 1. The effect of EDF's ambiguous procedural status is to provide it with privileges that are not accorded to others. Although EDF did not file the NOI or enter an appearance at a hearing, it seeks to enjoy the benefits of party status by expecting compensation for its work, meeting with decision-makers on behalf of its constituency, and filing responses to applications for rehearing filed by other parties. It has assumed no corresponding obligation to notify the parties of the extent of its interest, participate in the development of the record or file ex parte notices.

We deny EDF's request that we accept the NOI it filed in R.94-04-031 as fulfillment of the requirement to file an NOI in these proceedings. We find that EDF is not eligible to claim compensation in these consolidated proceedings. We do not need to reach the question of the reasonableness of its requested compensation.

We are disappointed that EDF did not follow the appropriate procedures in this proceeding because we believe it made make a substantial contribution in this proceeding. EDF was an advocate and supporter of calculating the CTC on an average basis over a specified time period, rather than calculating the CTC on a residual basis as advocated by many parties and recommended to the Commission by the ALJ in the Proposed Decision. EDF's position was adopted by the Commission, in part due to EDF's advocacy. Although some of EDF's work may have duplicated efforts by private firms advocating on their own behalf, EDF convinced the Commission of the strong public policy benefits that use of an average CTC method would promote. EDF's method promotes the efficient use of energy by providing pricing incentives for customers to shift energy usage to lower-cost time periods. EDF's advocacy of these positions was based largely on its view that environmental benefits would result from adoption of its preferred approach.

Findings of Fact

1. TURN filed a timely application seeking compensation for its contributions to D.97-08-056.
2. TURN made a substantial contribution to D.97-08-056.
3. The hourly rates TURN seeks for its attorneys are reasonable.
4. The hourly rates TURN seeks for its witnesses, as billed by JBS Energy Inc., are reasonable.
5. EDF did not enter an appearance at a hearing in these proceedings as required by Rule 54.
6. EDF did not file an NOI in these proceedings as required by Section 1801.
7. EDF filed a motion to intervene in these proceedings on the date for filing comments on the proposed decision, July 21, 1997. The Commission has not granted EDF's motion.
8. EDF is not a party to these proceedings.
9. EDF's request for compensation states EDF met with decision-makers and provided them with written materials. EDF did not file ex parte notices consistent with

Rule 1.

Conclusions of Law

1. The Commission should grant TURN's request for compensation in these proceedings.
2. The Commission should deny EDF's request for compensation in these proceedings.
3. The Commission should allocate the compensation granted in this order to PG&E, Edison, and SDG&E according to their proportionate share of retail sales of electricity in 1996, consistent with D.96-08-040.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$109,178.78 in compensation for its substantial contribution to Decision 97-08-056.
2. The request of Environmental Defense Fund for compensation in these proceedings is denied.
3. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison), and San Diego Gas and Electric Company (SDG&E) shall, within 30 days of the effective date of this order, pay TURN the award granted in this order in shares proportional to their retail sales of electricity in 1996. PG&E, Edison, and SDG&E shall 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 December 21, 1997 and continuing until full payment is made.

This order is effective today.

Dated April 9, 1998, at San Francisco, California.

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