

ALJ/BAR/jva *

Decision 98-08-027 August 6, 1998

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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric
Company to Establish an Experimental
Performance-Based Ratemaking Mechanism.
(U 902-M)

Application 92-10-017
(Filed October 16, 1992)

OPINION

This decision awards Utility Consumers' Action Network ("UCAN") \$24,820 in compensation for its substantial contributions to Decisions (D.) 97-12-041 and D.97-04-085.

1. Background

On April 23, 1997, in D.97-04-085, the Commission granted San Diego & Electric Company's (SDG&E) request to suspend the requirement that a test year 1999 general rate case (GRC) be filed. UCAN opposed the motion, but its factual and legal contentions were later recognized by the Commission in forming its order of December 3, 1997, described below.

On December 3, 1997 in D.97-12-041, the Commission concluded the midterm evaluation of SDG&E's experimental base rate performance-based-ratemaking (PBR) mechanism. In this decision, the Commission vacated the requirement that SDG&E file a GRC for a 1999 test year and further suspended the requirement that SDG&E file a GRC in future years. In lieu of a GRC, the utility was directed to include a 1999 cost-of-service showing in the distribution PBR application that by previous directive was to be filed by December 31, 1997. The decision further suspended the requirement for a final evaluation of the

experiment and ordered the PBR's experimental revenue sharing mechanism and non-price performance incentives to be retained for 1998.

UCAN, a party to the proceeding, submitted its Request for Compensation (Request) on January 2, 1997. SDG&E's original application (A.92-10-017) in the proceeding was made in 1992 and UCAN was found eligible to claim compensation for the proceeding on February 25, 1993. Two previous intervenor awards to UCAN in this proceeding were approved on October 6, 1993 (D.93-10-023) and August 11, 1995 (D.95-08-024). The former granted UCAN \$62,207.29 after a claim of \$71,489.24 was submitted. The latter granted UCAN \$136,105.77 after a claim of \$173,718.18 was submitted.

This is the third and presumably final claim to be filed by UCAN in the proceeding. In its Request, UCAN claims continuing eligibility for compensation based on the Commission's initial finding of eligibility on February 25, 1993 and the continuing nature of the proceeding from inception, the final order of which was not issued until December 3, 1997 (D.97-12-041). Public Utilities Code § 1804(c) allows the intervenor 60 days after the issuance of the Commission's final order to file the request for any award.¹

UCAN claims compensation in the amount of \$34,965.68 for their participation in the midterm evaluation. No party filed a response to UCAN's Request. The phase for which compensation is sought commenced with a

¹ All following section references pertain to the Public Utilities Code unless otherwise indicated.

Commission workshop on December 4, 1996. Per SDG&E's initial proposal on the matter, this phase was conducted as a collaborative workshop process. Further workshops as well as settlement discussions and prehearing conferences were held over the next several months. No agreement was ever reached among the parties. In addition to SDG&E and UCAN, the only other entity actively participating in the midterm evaluation was the Office of Ratepayer Advocates (ORA). It is parenthetically noted that during the course of the evaluation, SDG&E utilized a contracting consultant, Vantage Consulting, Inc., to gather facts and make recommendations, some of which are included with the parties' filings.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to §§ 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.

Intervenors must contribute substantially to the proceeding in order to qualify for an award. 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 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 determining 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.

3. UCAN's Eligibility for Compensation

Pursuant to Rule 76.76, the Commission finds UCAN remains eligible for intervenor compensation based on earlier findings of eligibility in this proceeding. UCAN's request of January 2, 1998 is thus appropriate and, since filed within the 60 day envelop of the December 3, 1997, decision is timely.

4. UCAN's Contribution to the Decisions

UCAN was involved in the midterm evaluation from the initial workshop on December 4, 1996 through the final process of filing comments on October 22, 1997. A review of UCAN's filed documents, their factual and legal contentions throughout this phase, and D.97-12-041 on the midterm evaluation reveals that UCAN's contentions and recommendations were adopted "in part" by the Commission. (§ 1802(h).)

In the first decision, D.97-04-085, in which the Commission granted SDG&E's motion to suspend the requirement for filing a test year 1999 GRC, UCAN's factual contentions regarding the utility's GRC evaluation history were rejected. Notwithstanding the factual dispute, UCAN's well reasoned legal contention on that issue was adopted in part in Section 3.3 of the decision ("PBR Starting Point"). UCAN's substantial contribution was its reasoning in contending the PBR distribution starting point required an appropriate revenue level, and that current distribution expenses of the utility must be documented and reviewed. UCAN's contentions in this regard were noted in D. 97-04-085 and remained relevant through the issuance of D.97-12-041 on December 3, 1997.

UCAN's position was consistent as the proceeding continued. Several issues inherent to the April decision carried through for deliberation in D.97-12-041. UCAN contended and the Commission adopted the view that SDG&E be required to include with its distribution PBR application a 1999 cost-of-service showing to establish a revised base revenue requirement for distribution. Other contentions presented by UCAN were rejected, including UCAN's proposal that the utility's GRC filing requirement for 1999 be maintained, that SDG&E's sharing mechanism be suspended, and that excess earnings be redirected as a credit against competitive transition costs.

"Substantial contribution" by the aforesaid statutory definition requires UCAN to present factual or legal contentions, or policy or procedural recommendations which the Commission ultimately adopts. Central to the request for compensation process is the identification of the issues under which

the contentions or recommendations were put forth (see D.95-03-007 and D.96-06-029). Identifying issues is not a precise science, but the burden is rightly on the requesting customer to tie each item of requested compensation to a particular issue within the framework of the decision. We might add that the best method of identifying issues in our view is for the requesting customer to simply follow the format and headings of the underlying decision. In most cases the issues are stated by heading or subtitle.

In its Request, UCAN accurately cited the statutory change authorizing the Commission to award fees and costs to a customer whose contentions were adopted only in part by the Commission. However, UCAN then claimed that change indicated "the Legislature's desire to award full compensation wherever and whenever an intervenor has made contributions to a Commission decision." (Request, p. 3.) We do not agree. UCAN's reading of the statute effectively strips "substantial" out of "substantial contribution" and we therefore reject such a liberal application of the stated standard. In examining UCAN's role, we find continuous and valuable participation by it in the process, but not quite to the extent claimed in the Request.

Unfortunately the format of UCAN's Request did not readily identify the issue(s) to which each cost was allocated. This allocation of costs among the issues for which a substantial contribution is claimed and compensation requested is a longstanding requirement (see e.g., decisions D. 92-08-030, D.95-05-003, D.96-05-052). In the main text of the Request, UCAN cited "Examples of UCAN's Substantial Contribution to 97-12-041." (Request, p. 4.) UCAN then described three categories of activities. They were "participation in development of the Vantage Consulting report," "settlement process," and "comment process." In its narrative on the comment process, UCAN identified three issues ultimately addressed by the Commission and how UCAN's

recommendations fared in each. That was quite satisfactory and enlightening. Unfortunately, UCAN's Tab "A" containing all detail for counsel's and expert's claimed hours were listed by category of activity (Vantage, settlement, comment processes, et al.), thus making it difficult to equate the time(s) with any particular issue.

A collaborative workshop process, authorized by the Administrative Law Judge (ALJ) at the commencement of the evaluation phase, necessarily presents certain claim and billing anomalies. While the collaborative process may be akin to alternate dispute resolution in some ways, the informal nature of the process requires the customer to carefully document time and effort so as to enable any observer the means to at least partially reconstruct events and/or issues covered at any one time in the process. UCAN appeared to recognize this by acknowledging there was "no administrative record of the...[Vantage et al]...process." (Ibid.) UCAN then attached a portion of the Vantage consulting report listing UCAN's participation and contentions.

While the reasonableness of the specific compensation requested is addressed in Section 5 below, compensation in general terms is dependent upon the customer's contribution. Notwithstanding the collaborative workshop process approved by the ALJ, the Commission cannot on its own basis accept UCAN's claim of time as it relates to "participation in development of the Vantage Consulting report." (Item "IIC" of Request.) Vantage was a contractor of SDG&E. From the record we see no stipulation that Vantage had special status to represent any entity other than the one that retained it, i.e. SDG&E. Moreover, it is clear from all filings that UCAN presented its own factual and legal contentions without regard to the Vantage report. UCAN, in short, if it expects to receive compensation, may not bootstrap elements of its compensation request to third party reports unless an articulable and distinct basis is presented to

account for UCAN's time and costs. While this factor does not substantially reduce UCAN's award from that requested in its attachments, it is worth future consideration by UCAN and all customers.

In line with such reasoning, UCAN's claim of substantial contribution through coordination with the ORA and the Farm Bureau is rejected in part. Our scrutiny in this aspect is appropriate in view of UCAN's partial success in getting its contentions adopted by the Commission or, adopted only "in part." ORA was not a major player throughout the process, and indeed ORA on January 31, 1997 indicated in a filing that its participation in the evaluation would be limited. ORA did present a motion to the Commission on an issue, and UCAN's response was influential. As to the Farm Bureau, that entity filed no pleadings in this proceeding and UCAN provided no documentation on any informal role for that organization in this proceeding. UCAN's claimed time for coordination with Farm Bureau is thus rejected.

Notwithstanding the lack of clarity in UCAN's approach as addressed above, the Commission would likely grant a request in its entirety if the merit were otherwise apparent and/or reasonable conclusions could be made from the four corners of the document. We now examine UCAN's Request on that basis and, considering the foregoing comments, make the following determinations of reasonableness.

5. The Reasonableness of Requested Compensation

UCAN requests compensation in the amount of \$34,965.68 as follows:

Attorney Fees

Michael Shames

168.4 hours

x

\$185

=

\$31,154.00

Expert Witness Fees and Expenses

William Marcus

7.0 hours	x	\$140 (FY96)	=	\$ 980.00
.5 hours	x	\$145(FY97)	=	72.50
3.5 hours	x	\$105 ²	=	367.50

Gayatri Schilberg

6.5 hours	x	\$105	=	682.50
Fax 1/9/97 and 6/5/97			=	28.50
Subtotal			=	\$ 2,131.00

Other Costs

Travel			=	\$ 1,477.00
Photocopying			=	61.05
Postage			=	58.50
Telephone			=	33.13
Overnight delivery			=	24.00
Subtotal			=	\$ 1,680.68
TOTAL			=	<u>\$34,965.68</u>

The most significant portion of the requested reimbursement lies with the hourly fee of UCAN's counsel, Michael Shames. Mr. Shames requests a new hourly rate of \$185. UCAN states that Mr. Shames' compensation was approved in 1996 at \$180 per hour (e.g. D.97-12-012). UCAN's rationale for the increase is that § 1806 instructs the Commission to take into consideration the market rates paid to persons of comparable training and experience, and that Mr. Shames has more experience than in 1996 and hence a slight raise in fee is justified. UCAN fails to provide any documentation which supports its § 1806 argument that a rate of \$185 is within the range of rates paid to persons with training and

² This is the rate which appears in Attachment B, Invoice 10893. UCAN does not explain in its Request why this rate is applied, rather than the \$145 rate otherwise applied to Mr. Marcus' hours. Perhaps it is a typographical error. However, since it appears to be

Footnote continued on next page

experience comparable to Mr. Shames. UCAN fails to describe Mr. Shames training and experience. However, since we are familiar with the market and Mr. Shames' ability, we will authorize a \$185 hourly rate for work performed by Mr. Shames in 1997. We caution UCAN that such omissions of supporting documentation will not be overlooked in the future.

Of the attorney hourly fees spent in travel—per Commission practice—a rate of 50% of the attorney's normal billable rate is authorized. To this end, UCAN properly applied the 50% rate in the request. In excess of 34 hours travel was documented and will be reimbursed at 50% of the attorney rate. However, UCAN did not reduce by 50% the attorney rate it applied to the five hours spent preparing the compensation request. This is also a Commission practice (see, e.g. D.93-06-022 at p.6, D.93-09-086, at p. 9, and D.91-12-074, at p. 14.). UCAN's Request did not take the skill of an attorney to prepare, and as pointed out above, is deficient in meeting certain requirements (e.g. allocation of costs by issue). UCAN will be compensated at 50% of the attorney rate for the five hours it spent preparing the compensation request.

5.1. UCAN's "Attachment A" for Attorney Fees

UCAN requests 168.4 hours for the three phases of activities cited. Phase I was listed as "Prehearing, Workshop and Discovery Activities" from December 3, 1996 to April 7, 1997. Phase II was listed as "Settlement Activities" from April 15, 1997 to August 11, 1997. Final Phase III was listed as the "Comment Process" from August 23, 1997 to October 17, 1997.

the rate UCAN was actually billed, we will not correct for what appears to be an error on the part of JBS Energy.

5.1.1. Attorney Fees Commencing December 3, 1996

UCAN requests 97.4 hours for these Phase 1 activities, of which we find 93.3 hours reasonable. Hours where compensation is not granted involve consultations with ORA, Vantage, and/or Farm Bureau. ORA's letter of January 31, 1997 should have alerted UCAN that it was no longer an active participant in that phase of the proceeding and, as noted above, the Farm Bureau was not active. Time spent coordinating with ORA and the Farm Bureau was not effective and efficient participation.

5.1.2. Attorney Fees commencing April 15, 1997

UCAN requests 44.5 hours for Phase II activities. We find 40.1 hours reasonable. Coordination with TURN is not reasonable in that no documentation exists to indicate that TURN was present in the proceeding. UCAN offers no argument that such coordination contributed anything meaningful.

5.1.3. Attorney Fees commencing August 23, 1997

UCAN requests 21.5 hours for Phase III activities. We find 18.1 of the hours reasonable. Time associated with UCAN's "proposed rebuttal testimony" is not compensable. The Commission granted SDG&E's motion to strike the testimony as an improper procedural initiative by UCAN. The fact that UCAN's input was allowed by the Commission as commentary does not translate into an entitlement for reasonable fees and costs. The Commission notes that UCAN in its Request specifically offered that expert Mr. Marcus' time was not included because of the ruling on the motion. The Commission applies the same principle to the attorney's time. It would be unfair to grant the attorney compensation for an event which has been ruled inappropriate for other members of his advocacy team. We therefore conclude that such time did not

make a substantial contribution toward the outcome and is not compensable. As with previous reference to ORA liaison, that time is not compensable.

5.1.4. Attorney Fees for Final Decision Review and Preparation of Compensation Request

Five hours are requested to compensate UCAN for preparation of the Request. This amount is deemed reasonable.

5.2. Claimants Attachment "B" for Expert and Miscellaneous Costs

UCAN requested \$2,131.00 for reimbursement of expert's services and \$1,680.68 for miscellaneous costs (e.g. travel, copying, postage). For the expert's service, four invoices are presented with an invoice date and number. Billing for expert services is denied for reasons described below. Other individual line items are approved except as noted.

5.2.1. Expert's Services

To assess the reasonableness of compensating a customer for the costs of expert's services, the Commission should be informed of the services provided and the dates of service. JBS Energy, Inc.'s invoices submitted by UCAN lack both and this lack of detail is not corrected by a narrative description in the Request proper of the services provided. The dates provided at the top of the JBS invoices appear to be the dates of the documents. In any case, dates are lacking for each entry on the invoices and no description of the service rendered is anywhere provided. While the Commission, through experience, is generally aware that UCAN has in the past retained Mr. Marcus as an expert, the entries for "William B. Marcus" in the invoices list nothing except the individual's name. Likewise the services of "Gayatri Schilberg" are billed on invoice #10706, but nothing more is provided as to what service she performed or what issues was addressed. The narrative description in the text merely says JBS was retained to conduct analysis. Conclusionary billing merely listing hours and rate is

unsatisfactory if the customer expects full compensation for the requested items. The retaining client, it would seem, should demand of the expert the same specificity required of the client if indeed full satisfaction of the Request is expected. The Commission further notes UCAN's comments that "His rates...(Mr. Marcus)...and those of Ms. Schilberg have been found reasonable by the Commission in numerous compensation decisions." (UCAN's Request, p. 6.) No citation or documentation was provided to sustain this assertion. As a matter of respect, we have no reason to doubt UCAN's assertion; however the Commission should not be expected to search its files to sustain evidentiary matters that can and should be provided by the customer in its request. The burden is on the customer. For over a decade, UCAN has been an active participant in our proceedings, and has sought and received compensation for its substantial contributions. It is well aware of our requirements.³ Lacking a description of the services performed by the expert and the dates of service, the amount claimed in Attachment "B" (\$2,131.00) must be denied.

5.2.2. Miscellaneous Costs

UCAN requests \$1,680.68 in miscellaneous cost. It is noted that while individual trip expenses for airplane fares, room, and per diem were correctly listed by date, van and taxi costs and airport parking costs contained no date. The entry for "overnight delivery costs"(\$24.00) was likewise absent any dates. While these items are relatively minor and will not invoke a denial of the items, all customers should document such items of travel and special delivery by the date such cost items were incurred. (Mass production items such as copying and telephone calls are too voluminous for that task and need not be

³ In fact, UCAN presents, in its May 30, 1997, Request for Compensation in A.96-04-038, an acceptable example of the proper documentation detail for expert services.

specified by date. The Commission reserves that function, if applicable, for the audit procedures authorized by § 1804(d)).

6. Award

To summarize, the Commission has approved as reasonable, the following fees and costs: attorney hours for the three phases described are 93.3 hours (24.6 in 1996 and 68.7 in 1997), 40.1 hours, and 18.1 hours respectively. Additionally, five hours for attorney fees are approved for review and submission of the compensation request. Overall attorney fees authorized are 101.3 hours at the hourly rate of \$185 (\$18,740.50), 11.5 hours at the hourly rate of \$180 (\$2,070), 30.6 hours at the hourly rate of \$92.50 (\$2,830.50), and 13.1 hours at the hourly rate of \$90 (\$1,179). Costs authorized are \$1,680.68.

We award UCAN \$24,820 calculated as described above. 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 18, 1998, (the 75th day after UCAN filed its compensation request) and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put UCAN on notice that the Commission Energy Division may audit UCAN's records related to this award. Thus, UCAN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. UCAN'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.

Findings of Fact

1. UCAN has made a timely request for compensation for its contribution to D.97-12-041 and D.97-04-085.
2. UCAN has made a showing of significant financial hardship by demonstrating the economic interests of its individual members would be extremely small compared to the costs of participating in this proceeding.
3. UCAN contributed substantially to D.97-12-041.
4. UCAN has requested a 1997 hourly rate for attorney Michael Shames of \$185 that is no greater than the market rates for individuals with comparable training and experience, and is therefore reasonable.
5. The miscellaneous costs incurred by UCAN are reasonable.

Conclusions of Law

1. UCAN has fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.
2. UCAN should be awarded \$24,820 for its contributions to D.97-12-041 and D.97-04-085.
3. This order should be effective today so that UCAN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. Utility Consumers' Action Network (UCAN) is awarded \$24,820 in compensation for its substantial contribution to Decisions (D.) 97-12-041 and D.97-04-085.
2. San Diego Gas & Electric Company (SDG&E) shall pay UCAN \$24,820 within 30 days of the effective date of this order. SDG&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 18, 1998, and continuing until full payment is made.

This order is effective today.

Dated August 6, 1998, at San Francisco, California.

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