

Decision 99-04-004 April 1, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Standards of Conduct Governing Relationships
Between Energy Utilities and Their Affiliates.

Rulemaking 97-04-011
(Filed April 9, 1997)

ORIGINAL

Order Instituting Investigation to Establish
Standards of Conduct Governing Relationships
Between Energy Utilities and Their Affiliates.

Investigation 97-04-012
(Filed April 9, 1997)

OPINION AWARDING COMPENSATION

This decision grants the request of the Utility Reform Network (TURN) for an award of \$11,022.01 in compensation for its contributions to Decision (D.) 98-04-029 and D.98-11-026.

1. Background

On March 27, 1998, TURN and the Office of Ratepayer Advocates (ORA) filed a motion in this proceeding entitled "Emergency Motion for a Cease and Desist Order and Appropriate Sanctions Against Pacific Gas and Electric Company" (PG&E). D.98-04-029 grants the motion in part and finds that its subject—a March 23, 1998 advertisement by PG&E Energy Services --violates Rule V. F.1 of the affiliate transaction rules we adopted in D. 97-12-088, an earlier decision in this proceeding. Because of mitigating circumstances, D.98-04-029 denies the motion in part and declines to impose the injunctive relief requested by TURN and ORA. D.98-04-029 defers assessment of an appropriate monetary penalty pending receipt of more information and additional comments in this proceeding.

D.98-11-026 imposes a penalty of \$1,680,000 against PG&E for 90 separate violations of Rule V.F.1., including those associated with advertisements which appeared before March 23. The penalty consists of \$17,500 for each of the 20 violations stemming from the March 16, 1998, "High Voltage" advertisements and \$19,000 for each of the 70 violations associated with subsequent advertisements.

On January 5, 1999 TURN filed a request for compensation for its contributions to D.98-04-029 and D.98-11-026. PG&E filed an opposition on February 4 and TURN filed a reply on February 11.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 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 decision because the order or decision has adopted in whole or in part 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.

3. Eligibility

By ruling dated June 10, 1997, Administrative Law Judge Janet Econome found that TURN was eligible to claim compensation in this proceeding, having filed its NOI on a timely basis and demonstrated significant financial hardship. D.98-11-020 awarded TURN compensation for its contribution to development of the affiliate transactions rules we adopted in D. 97-12-088. Rule 76.76 of the Rules of Practice and Procedure provides that an eligibility finding extends to later phases of the same proceeding. PG&E's arguments to the contrary ignore Rule 76.76.

TURN's January 5, 1999 compensation request updates its prior NOI and clarifies that, by filing the motion and participating in the Commission process which ensued, TURN indeed represented customer interests which would otherwise have been underrepresented or possibly not represented at all. TURN notes our discussion of the importance of this factor in the decision in our recent intervenor compensation rulemaking. (See D.98-04-059, p. 28.)

4. Contributions to Resolution of Issues

The TURN/ORR motion brought a serious matter to our attention. We discuss the major aspects of this contribution below and identify only a single,

minor issue where we wholly rejected TURN's arguments. In our decision in the intervenor compensation rulemaking, we agreed with the view "that the fees and costs associated with a customer's recommendation or contention which were not adopted by the Commission are not compensable" but we indicated our inclination to review a customer's recommendations broadly rather than narrowly when considering whether a substantial contribution has been made. (See D.98-04-059, p. 46.) Elsewhere we have stated that "...where the Commission does not wholly adopt the customer's position, contribution to an ALJ's proposed decision reinforces a substantial contribution to an order or decision." (D.92-08-030, p. 4.) We have applied this policy equally to contribution to a commissioner's alternate decision. (D.98-11-020, p. 4.) PG&E's arguments that an intervenor must show that "but for its contribution" we could not have resolved a matter as we did is plainly at odds with the statutory framework underlying the intervenor compensation program, particularly §§ 1801.3 and 1802(h).

TURN's compensation request discusses its contribution on four issues: identification of the violation and the need for significant penalties; calculation of an appropriate monetary penalty; need for a cease and desist order; need for corrective advertising. Several issues underlie both D.98-04-029 and D.98-11-026, but as statute requires, TURN's compensation request discusses its contribution to each decision separately. Our review of these decisions indicates that TURN's arguments for substantial contribution generally are well-taken.

Most notably, D.98-04-029 finds that PG&E violated Rule V.F.1 of our Affiliate Transaction Rules, as TURN asserted. (See D.98-04-029, p. 7; Finding of Fact 1; Conclusion of Law 1, 3; Ordering Paragraph 1.) D.98-04-029 concludes that the Commission might assess a monetary penalty against PG&E, a result that TURN advanced. (D.98-04-029, pp. 3-4, 12-13; Conclusion of Law 2, 3, Ordering

Paragraph 3.) D.98-04-029 declines to grant TURN's request for a cease and desist order, however. PG&E offered evidence that it had begun to take corrective action prior to the date the motion was filed and we concluded that a future ban on use of the corporate logo by affiliates was unnecessary. (D.98-04-029, pp. 11-12; Finding of Fact 4, Conclusion of Law 3, Ordering Paragraph 1.)

Our subsequent decision, D.98-11-026, assesses a penalty. While we did not adopt the \$10 million penalty that TURN recommended, we did adopt several of TURN's recommendations about the serious nature of the violation and how to calculate the penalty. (See, D.98-11-026, pp. 13-15, 18-23; Finding of Fact 7-14; Conclusion of Law 4, 5, 7, 8; Ordering Paragraph 1.) TURN argued that in addition to a penalty, we should order corrective advertising and one commissioner advanced this idea in an alternate decision. (See, CPUC 10/22/98 agenda item H-2b, p. 24.) Ultimately, this alternate failed on a vote of 2-3 and we determined not to require corrective advertising in light of mitigation undertaken by PG&E.

In sum, we find that TURN made a substantial contribution to D.98-04-029 and D.98-11-026, or to an alternate decision which we considered, on all issues except the need for a cease and desist order.

TURN represents that though it worked with ORA on the issues underlying D.98-04-029 and D.98-11-026, TURN assumed primary responsibility for drafting the parties' joint pleadings and "took the lead in identifying PG&E's violation of the affiliate rules and in litigating the penalty." The Public Utilities Code requires administration of the intervenor compensation statutes to avoid duplication (§ 1801.3(f)) but also states, in § 1802.5:

"Participation by a customer that materially supplements, complements, or contributes to the presentation of another party, including the commission staff, may be fully eligible for

compensation if the participation makes a substantial contribution to a commission order or decision, consistent with Section 1801.3."

PG&E's argument suggests that an intervenor's participation is superfluous when ORA is a party. The argument is clearly inconsistent with the intervenor compensation program's statutory framework, particularly §§ 1801.3 and 1802.5. We conclude that TURN's participation avoided duplication with ORA, within the context of this framework. We will make no reduction to TURN's compensation request for duplication.

5. The Reasonableness of Requested Compensation

TURN requests compensation for its contributions to D. 98-04-029 and D.98-11-026 as follows:

Attorney Fees

Theresa Mueller

1997-98 (23.25 hours at \$205/hr) \$ 4,766.25

Paul Stein

1998 (20.75 hours at \$170/hr) \$ 3,527.50

1998-99 (9.00 hours at \$85/hr - comp prep) \$ 765.00

Michel Peter Florio

1997-98 (0.50 hours at \$290/hr) \$ 145.00

Subtotal \$ 9,203.75

Other Reasonable Costs

Photocopying expense \$ 750.18

Postage \$ 245.80

On-Line Legal Research \$ 32.57

Subtotal \$ 1,028.55

Total Costs (Request) \$10,232.30

5.1. Hours Claimed

TURN's compensation request includes detailed time records for Theresa Mueller, Paul Stein, and Michel Florio and describes the activities undertaken, the date, and the number of hours expended. TURN documents its attorneys' participation in the underlying matter between March and October, 1998. In addition, TURN documents 9.00 hours Mr. Stein subsequently spent drafting the compensation request.

We accept TURN's time allocation among the four issues it identifies: identification of the violation and the need for significant penalties - 40%; calculation of an appropriate monetary penalty - 50%; need for a cease and desist order - 5%; need for corrective advertising - 5%. Consistent with our discussion above subtitled "Contributions to Resolution of Issues," we allow all TURN's hours less a 5% reduction for the time devoted to the need for a cease and desist order.

5.2. Hourly Rates

TURN requests an hourly rate for its attorneys as follows: \$205 per hour for Theresa Mueller; \$170 per hour for Paul Stein, and \$290 per hour for Michel Florio. We have previously approved each of these rates for the time periods documented here and apply these rates in this proceeding. (See, for example, D.98-12-058 [Mueller and Florio]; D.98-08-016 [Stein].) TURN bills time Mr. Stein spent preparing the compensation request at one-half of his approved 1998 rate, or \$85 per hour. This reduction is consistent with our intervenor compensation guidelines. (D.98-04-059, p. 51.)

5.3. Other Costs

TURN's miscellaneous costs of \$1,028.55 include expenses for photocopying, postage and on-line legal research attributable to this proceeding. All items are appropriately included and all amounts appear reasonable. We

make no reduction for the limited amount of time TURN spent on the need for a cease and desist order since the impact on these costs could only have been negligible.

5.4. TURN's Reply

TURN requests an additional \$1,250.00 for time its attorney, Robert Finkelstein, spent on the reply to PG&E's opposition. This sum represents five hours of Mr. Finkelstein's time at \$250 per hour, the rate we approved in D.99-02-005. TURN reasonably requests compensation at Mr. Finkelstein's full hourly rate. The reply is a response to legal and factual argument raised by another party; unlike the initial compensation request, it cannot be characterized as an invoice for services.

6. Award

TURN has made a persuasive showing that its participation benefited ratepayers by preserving the integrity of our affiliate transaction rules. Though that benefit is difficult to quantify monetarily, we conclude that it outweighs the costs of TURN's participation. We award TURN \$11,022.01. This award is summarized below:

Request:

Attorney Fees

Theresa Mueller

1997-98	(23.25 hours at \$205/hr)	\$ 4,766.25
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Paul Stein

1998	(20.75 hours at \$170/hr)	\$ 3,527.50
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1998-99	(9.00 hours at \$85/hr - comp prep)	\$ 765.00
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Michel Peter Florio

1997-98 (0.50 hours at \$290/hr) \$ 145.00

Subtotal \$ 9,203.75

less 5% \$ 460.19

Adjusted Subtotal \$ 8743.56

Other Reasonable Costs

Photocopying expense \$ 750.18

Postage \$ 245.80

On-Line Legal Research \$ 32.57

Subtotal \$ 1,028.55

Total (Request) \$ 9,772.01

Reply:

Robert Finkelstein

1998 (5 hours at \$250/hr) \$ 1,250.00

Total Costs (Request & Reply) \$11,022.01

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 the 75 day after TURN filed its compensation request and continuing until the utility makes full payment of the 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.

7. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.98-04-029 and D.98-11-026.

2. By ruling dated June 10, 1997, Administrative Law Judge Janet Econome found that TURN was eligible to claim compensation in this proceeding, having filed its NOI on a timely basis and demonstrated significant financial hardship.

3. TURN's January 5, 1999 compensation request updates its prior NOI and clarifies that, by filing the motion and participating in the Commission process which ensued, TURN represented customer interests which would otherwise have been underrepresented or possibly not represented at all.

4. TURN contributed substantially to D.98-04-029 and D.98-11-026, or to an alternate decision which we considered, on three issues: identification of the violation and the need for significant penalties; calculation of an appropriate monetary penalty; need for corrective advertising

5. TURN took the lead in developing a consumer position in this proceeding; TURN's participation avoided unnecessary duplication with ORA.

6. TURN has requested hourly rates for its attorneys that we have previously approved.

7. The miscellaneous costs incurred by TURN are reasonable.

8. The costs TURN incurred preparing its reply to PG&E's opposition are compensable and reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.

2. TURN should be awarded \$11,022.01 for its contribution to D.98-04-029 and D.98-11-026.

3. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$11,022.01 in compensation for its substantial contribution to Decision (D.) 98-04-029 and D.98-11-026.

2. Pacific Gas and Electric Company shall pay TURN \$11,022.01 within 30 days of the effective date of this order. The utility 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 commencing the 75 day after TURN filed its compensation request and continuing until full payment is made.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners