

Decision 00-02-008 February 3, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Southern California Edison Company For Authority To Adopt a Revenue-Sharing Mechanism for Certain Other Operating Revenues.

Application 97-06-021  
(Filed June 12, 1997)

**OPINION AWARDING COMPENSATION**

This decision grants The Utility Reform Network (TURN) an award of \$47,037.73 in compensation for its substantial contribution to Decision (D.) 99-09-070.<sup>1</sup> In that decision, we adopted, with conditions, a settlement between Southern California Edison Company (Edison) and the Commission's Office of Ratepayer Advocates (ORA) concerning the proper accounting treatment of certain Edison revenues from non-tariffed products and services known as "Other Operating Revenues" (OOR).

TURN was the sole party that objected to the settlement, and its opposition led to more comprehensive proceedings and a greater understanding of the settlement. TURN also raised several points that led either to clarification of the final decision approving the settlement, or to the imposition of conditions upon the settlement. TURN's request is unopposed. Therefore, we find that TURN contributed substantially to the decision and is eligible for intervenor compensation.

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<sup>1</sup> *Application of Southern California Edison Company (U 338 E) for Authority to Adopt a Revenue-Sharing Mechanism for Certain Other Operating Revenues, D.99-09-070.*

## 1. Background

The settlement upon which TURN provided comment stemmed from Edison's June 12, 1997 application for authority to adopt a revenue sharing mechanism for certain OOR. Edison proposed to allocate a portion of the OOR to ratepayers, and the remainder to Edison's shareholders, in varying percentages depending on the type of revenue at issue. ORA (and others) sought alternative allocation percentages, but ultimately reached agreement with Edison as to an appropriate sharing mechanism.<sup>2</sup>

TURN opposed the settlement principally because TURN contended the percentage of revenues allocated to ratepayers was lower than was justified. If not for TURN's participation, the Commission would have had a skeletal record from which to review the settlement. TURN's opposition led to more comprehensive proceedings and a greater understanding of the settlement. Also, in approving the settlement, we imposed conditions that reflected TURN's views, or made clarifications in response to criticisms TURN leveled. The changes we made to the settlement, and the conditions we imposed on the parties, ultimately resulted in substantial ratepayer savings. For this, we find TURN at least in part responsible, and thus eligible to be compensated for its efforts.<sup>3</sup> We turn to the requirements for an award of intervenor compensation.

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<sup>2</sup> Besides ORA and TURN, the other parties that filed protests or responses to Edison's application were Southern California Gas Company; Southern California Utility Power Pool and Imperial Irrigation District; and the California Association of Plumbing-Heating-Cooling Contractors. After Edison and ORA sought approval of the settlement, the remaining parties were silent; TURN was the only active party to protest the settlement.

<sup>3</sup> In addition, the Administrative Law Judge (ALJ) adopted TURN's position that ratepayers should share in a greater percentage of revenue from "passive" activities, even though the final decision did not.

## 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 Sections 1801-1812.<sup>4</sup> 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 the customer's planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility for compensation.

In addition to filing a NOI, a party seeking intervenor compensation must also meet the statutory requirements for such awards. 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.

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<sup>4</sup> All statutory citations are to the California Public Utilities Code.

Section 1804(e) provides for the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award, which we do here. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services.<sup>5</sup> In the following paragraphs, we examine each of the statutory requirements in turn.

### **3. NOI to Claim Compensation and Timeliness of Request**

TURN filed a timely NOI in this proceeding on March 9, 1999. The assigned ALJ found TURN eligible for compensation in this proceeding by a ruling dated April 13, 1999. Thus, TURN has satisfied the requirements of Section 1804(a).

### **4. Substantial Contribution to Resolution of Issues**

TURN asserts that it made a substantial contribution to our decision to approve the settlement in this proceeding by fleshing out the issues we were called upon to decide, pointing out errors in the proponents' analysis of the settlement, and seeking conditions on and clarification of the terms of the settlement.

A party may make a substantial contribution to a decision in a number of ways.<sup>6</sup> It may offer a factual or legal contention upon which the Commission relies in making a decision,<sup>7</sup> or it may advance a specific policy or procedural

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<sup>5</sup> Pub. Util. Code § 1806.

<sup>6</sup> Pub. Util. Code § 1802(h).

<sup>7</sup> *Id.*

recommendation that the ALJ or Commission adopts.<sup>8</sup> A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.<sup>9</sup> The Commission has provided compensation even when the position advanced by the intervenor is rejected.<sup>10</sup>

TURN asserts that it substantially contributed to D.99-09-070 in several ways. Its most important contribution, TURN asserts, was in

flesh[ing] out many of the topics and issues addressed in the proposed settlement. In this way, TURN was instrumental in the development of a record that the Commission could more confidently rely upon as sufficient to support its final action.<sup>11</sup>

While the Commission ultimately adopted the settlement, it used the TURN analysis in several key ways that, TURN asserts, saved Edison's ratepayers a substantial amount of money. For instance, as a result of the debate initiated by TURN, the final decision clarified that the adopted revenue-sharing mechanism applied on a prospective basis only. As a result, certain revenues accrued prior to the effective date of the decision were subject to a 50/50 shareholder/ratepayer sharing mechanism, rather than 70/30 or, in some cases, 90/10.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> D.89-03-96 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to document thoroughly the safety issues involved).

<sup>11</sup> TURN's Request for Compensation (Request) at 6.

We agree that TURN's participation as the sole party objecting to the settlement illuminated points upon which the parties did not focus. TURN's contentions led in some instances to concessions by the parties in response that ultimately clarified the terms of the settlement. TURN's greatest contribution to this proceeding was in fleshing out the record and raising concerns about the settlement that otherwise might not have come up.

TURN also points out that it successfully posed concrete changes or clarifications to the settlement. First, it asserts that it clarified the record as to the appropriate effective date for the settlement, and the revenues to which the adopted sharing mechanism applied. We find TURN's claim to be justified. TURN's raising of these points caused Edison and ORA to clarify their own positions, so that the final decision accurately reflected the parties' agreement.<sup>12</sup>

Second, TURN correctly asserted that the settlement's proponents misconstrued Commission precedent on proper revenue sharing mechanisms.<sup>13</sup> Edison and ORA claimed that the Commission had in the past approved a 50/50 shareholder/ratepayer allocation for *net* revenues from "passive" activities, justifying the settlement's 70/30 allocation of certain *gross* revenues.<sup>14</sup> TURN pointed out, and we agreed, that Commission precedent had adopted a 50/50 split of *gross* revenues, not *net* revenues as Edison and ORA asserted. Thus, the proponents' 70/30 allocation of gross revenues was not consistent with

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<sup>12</sup> D.99-09-070, *mimeo.*, at 7.

<sup>13</sup> Request at 4-5.

<sup>14</sup> The Commission approved revenue sharing based on *gross* revenues in this proceeding because we found that "[t]his type of sharing protects the ratepayers from significant downside business risk, while providing the opportunity for gains over the life of each endeavor the utility makes to utilize an asset." D.99-09-070, *mimeo.*, at 25.

Commission precedent. While we ultimately adopted the proponents' sharing mechanism on other grounds,<sup>15</sup> TURN's clarification of precedent caused us closely to scrutinize this aspect of the settlement before approving it.<sup>16</sup>

We agree that TURN's participation helped develop a fuller record on the propriety of the settlement, and caused us to clarify the settlement and impose conditions on the settling parties that ultimately benefited ratepayers. Thus, TURN made a substantial contribution to D.99-07-070.

**5. The Reasonableness of Requested Compensation**

TURN requests compensation in the amount of \$47,037.73, as follows:

Attorney Fees						
Robert Finkelstein	6.0	Hours	X	\$235	=	\$1,410.00
	18.5	Hours	X	\$250	=	\$4,625.00
	134.75	Hours	X	\$265	=	\$35,708.75
	9.0	Hours	X	\$132.50	=	\$1,192.50
Michel P. Florio	0.75	Hours	X	\$300	=	\$225.00
Theresa Mueller	6.0	Hours	X	\$195	=	\$1,170.00
				Attorney Fee Subtotal	=	\$44,331.25

<sup>15</sup> Indeed, TURN's argument led the ALJ to adopt a 60/40 shareholder/ratepayer split in her draft decision. Intervenors may be compensated for their work that contributes to a draft decision even if the final Commission decision differs from the draft. See D.99-11-006, *mimeo.*, at 14, citing D.99-04-004 and D.96-08-023.7

<sup>16</sup> D.99-09-070, *mimeo.*, at 31-38.

Expert Witness Fees and Expenses JBS Energy Inc.						
William Marcus	2.5	Hours	X	\$150	=	\$375.00
Gayatri Schilberg	0.38	Hours	X	\$110	=	\$41.80
JBS Fax Expenses					=	\$12.00
				JBS Subtotal	=	\$428.80
Other Costs						
Photocopies					=	\$1,631.65
Postage					=	\$249.47
Fax charges					=	\$89.20
Phone					=	\$3.82
LEXIS					=	\$289.29
Fed Ex					=	\$14.25
				Other Costs Subtotal	=	\$2,277.68
			TOTAL		=	\$47,037.73

## 6. Overall Benefits of Participation

Before analyzing TURN's figures, we first must examine whether the amount TURN spent was reasonable in light of the benefits it produced for ratepayers. In order to obtain compensation, a customer must demonstrate that its participation is "productive," as that term is used in Pub. Util. Code § 1801.3.<sup>17</sup> That is, an intervenor's costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are

<sup>17</sup> See D.98-04-059, *mimeo.*, at 31-33, and Finding of Fact 42.

directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding the compensation of unproductive participation.

We find TURN's participation was productive in that the costs it claims for its participation were less than the benefits realized. Through TURN's participation, the Commission had a record on which to assess the reasonableness of the Edison/ORR settlement proposal. While it is difficult to put a dollar figure on the benefits TURN realized for ratepayers, TURN provides us some guidance in this regard.

TURN clarified that the settlement excludes certain revenues. Thus, those revenues will be subject to a customary 50/50 shareholder/ratepayer split under Edison's performance-based ratemaking (PBR) process. The proponents' filing appeared to suggest an allocation of greater than 50 percent of revenues to shareholders, and a lesser allocation to ratepayers. TURN sought clarification of this point, and our decision reflected that the 50/50 allocation under PBR properly reflected the proponents' agreement.<sup>18</sup>

While TURN was unable to assess the dollar amount that would accrue to the ratepayers as a result of this clarification, it asserted that its participation increased by no less than 20%, and as much as 40%, the benefits accruing to ratepayers. TURN was unaware of the total dollars in the accounts at issue. However, it accurately pointed out that if those account balances totaled only \$250,000, its approximately \$50,000 intervenor compensation award would be

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<sup>18</sup> Request at 4, citing D.99-09-070, *mimeo.*, at 4-5, Finding of Fact 3; see also D.99-09-070, *mimeo.*, at 7.

justified by the 20% increase in revenues flowing to ratepayers. TURN asserted its belief that the balances totaled far more than \$250,000.<sup>19</sup> Neither settling party challenged this assertion.

In addition, TURN claims that its participation clarified that emissions trading credits would be excluded from the revenue sharing mechanism adopted in the settlement.<sup>20</sup> While it acknowledged that "the benefits to ratepayers from the exclusion of revenue from emissions trading credits will only be known with the passage of time," TURN estimated that ratepayer savings ultimately would "[dwarf] the amount of compensation" it seeks.<sup>21</sup> No party challenged this assertion.

We find that the benefits realized by TURN's participation outweigh the costs it claims for that participation. No other party duplicated TURN's efforts, given that TURN was the only party objecting to the settlement. Thus, TURN's efforts in this proceeding were productive and deserving of compensation.

## **7. Hours Claimed**

TURN documented its claimed hours by presenting a daily breakdown of hours for each of its attorneys, including a brief description of each activity. The hourly breakdown presented by TURN reasonably supports its claim for total hours. Given the quality and comprehensiveness of TURN's comments on the proposed settlement, and the fact that no other party challenged the settlement, we believe that TURN's time was well spent.

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<sup>19</sup> Request at 7.

<sup>20</sup> D.99-09-070, *mimeo.*, at 7.

<sup>21</sup> Request at 8.

## 8. Hourly Rates

The hourly rates TURN requests – both for attorneys and experts – reflect, in some instances, increases in rates previously approved. In other cases, we have already allowed such rates in previous proceedings, and adopt those rates here based on those earlier decisions. We treat each of TURN's requests separately below.

### 8.1 Robert Finkelstein

TURN seeks compensation for work by Robert Finkelstein conducted in fiscal years 1997, 1998 and 1999. TURN requests \$250/hour for work Finkelstein performed in fiscal 1998, and \$235/hour for work he performed in fiscal 1997. We previously adopted these rates for similar services performed by Finkelstein during the same time periods, and we will apply those rates here.<sup>22</sup>

In addition, TURN seeks an increase for the first time in this proceeding to an hourly rate of \$265 for work performed in fiscal 1999. Finkelstein has been practicing law for 13 years, including seven years at TURN. He has performed extensive work on electric utility issues since joining TURN in 1992.

In support of the increase in Finkelstein's 1999 hourly rate to \$265/hour, TURN cites two attorney fee surveys that we believe justify the increase. The first, the Of Counsel survey, shows a range of partner billing rates for selected major law firms in San Francisco and other major cities. According to the Of Counsel survey, excluding outliers on either end, these rates range from \$175-500 per hour. Viewed another way, the rates average \$220 at the low end and \$399 at

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<sup>22</sup> See D.98-04-028, *mimeo.*, at 7-8 (1997 and 1998 rates); D.98-12-006, *mimeo.*, at 6 (1998 rates); D.99-02-006, *mimeo.*, at 7 (1998 rates).

the high end. In view of this range of rates, we find Finkelstein's requested rate of \$265/hour to be reasonable.

In another survey, performed by the management consulting firm of Altman Weil, Inc., for California attorneys with 11-15 years experience, the survey shows an average rate of \$219, an upper quartile rate of \$270, and a ninth decile rate of \$295. Because Finkelstein practices in San Francisco, where rates are considerably higher than rates in less expensive parts of California, the Altman Weil rates are conservative. We find that placing Finkelstein's 1999 hourly rate in the range of the \$270 Altman Weil upper quartile rate is reasonable. Thus, we find that Finkelstein may receive compensation of \$265/hour for work performed in this proceeding in fiscal 1999.

### **8.2 Michel Peter Florio**

TURN requests an hourly rate of \$300 for the work of Michel Florio in fiscal 1999. We recently adopted this rate for similar services performed by Florio during the same time period, and will apply it here.<sup>23</sup>

### **8.3 Theresa Mueller**

TURN requests an hourly rate of \$195 for work performed by Theresa Mueller in this proceeding. We previously adopted this rate for similar services performed by Mueller during the same time period (1996-97), and will apply it here.<sup>24</sup>

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<sup>23</sup> See D.99-11-049, *mimeo.*, at 7-8.

<sup>24</sup> See D.99-11-049, *mimeo.*, at 8; D.98-08-016, *mimeo.*, at 16.

#### **8.4 Time Spent Preparing Compensation Request**

TURN requests compensation for time preparing its compensation request at \$132.50/hour, half of Finkelstein's 1999 requested hourly rate of \$265. As we approve the \$265 rate for 1999 work herein, and have awarded compensation at half the normal rate for preparing such requests in the past,<sup>25</sup> we find TURN's request reasonable here. We award TURN \$1,192.50 for the nine hours of work Finkelstein spent to prepare its compensation request.

#### **8.5 JBS Energy Staff**

TURN seeks compensation at \$150/hour for the 2.5 hours JBS Energy Inc.'s (JBS) William Marcus spent on this proceeding (total fees \$375.00), and \$110/hour for the .38 hours spent by Gayatri Schilberg. While these amounts are each \$5.00 more per hour than our previous awards for Marcus' and Schilberg's services,<sup>26</sup> TURN represents that the higher rates "reflect the actual 'recorded or billed costs' that TURN incurred in retaining Marcus' services." Moreover, the rate is "consistent with JBS' standard billing rates during the period when the work was performed."<sup>27</sup>

TURN explains that the JBS staff prepared a model that compared the ratepayer impact of the settlement's revenue sharing mechanism to that under Edison's PBR.<sup>28</sup> In reaching our decision, we required reassurance that the

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<sup>25</sup> See D.99-05-014, *mimeo.*, at 5; D.99-10-050, *mimeo.*, at 11.

<sup>26</sup> See D.98-04-027 and D.98-08-027.

<sup>27</sup> Request at 18.

<sup>28</sup> *Id.*

settlement did not leave ratepayers worse off than the existing PBR mechanism.<sup>29</sup> Thus, we believe the JBS analysis was useful to our decision, and we award TURN the requested amount (\$428.80) for JBS' services.

### **8.6 Other Costs**

TURN claims \$2,277.68 in other costs for items such as photocopying, postage and Lexis research. TURN states that these costs relate exclusively to its work in this proceeding. Based on this representation, we award TURN its requested costs.

### **9. Award**

We award TURN \$47,037.73 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 February 2, 2000 (the 75<sup>th</sup> day after TURN filed its compensation request) and continuing until Edison makes its full payment of the award.

As in all intervenor compensation decisions, we put TURN on notice that the 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.

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<sup>29</sup> D.99-09-070, *mimeo.*, at 22-25.

**10. Section 311(g)(2) – Uncontested decision grants relief requested**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

**Findings of Fact**

1. TURN has made a timely request for compensation for its contribution to D.99-09-070.

2. TURN contributed substantially to D.99-09-070.

3. TURN has requested revised 1999 hourly rates for attorney Robert Finkelstein that are no greater than the market rates for individuals with comparable training and experience.

4. TURN has requested 1997-98 hourly rates for its attorneys that have already been approved by the Commission.

5. TURN's requested 1999 rates for its experts' professional services are reasonable based on our prior awards to those experts and the usefulness of the experts' work to this proceeding.

6. The miscellaneous costs incurred by TURN are 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 \$ 47,037.73 for its contribution to D.99-09-070.

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 \$ 47,037.73 for its contribution to Decision 99-09-070.
2. Southern California Edison Company (Edison) shall pay TURN within 30 days of the effective date of this order. If for any reason Edison's payment is delayed beyond February 2, 2000, the 75th day from TURN's request for compensation, Edison 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 on February 2, 2000 and continuing until full payment is made.
3. This proceeding is closed.

This order is effective today.

Dated February 3, 2000, at San Francisco, California.

RICHARD A. BILAS  
President  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
CARL W. WOOD  
LORETTA M. LYNCH  
Commissioners