

Decision 00-02-038 February 17, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Gas and Electric Company, to establish the eligibility and seek recovery of certain electric industry restructuring implementation costs as provided for in Public Utilities Code Section 376.

Application 98-05-004
(Filed May 1, 1998)

San Diego Gas & Electric Company, for (1) a determination of eligibility for recovery under Public Utilities Code Section 376 of certain cost categories and activities, (2) a finding of reasonableness of the costs incurred through 12/31/97, (3) approval of an audit methodology for verifying the eligibility of Section 376 costs for recovery from 1998 through 2001, and (4) approval of a section 376 balancing account mechanism to recover eligible costs.

Application 98-05-006
(Filed May 1, 1998)

Southern California Edison Company, to address restructuring implementation costs pursuant to Public Utilities Code Section 376, in compliance with Ordering Paragraph 18 of D.97-11-074.

Application 98-05-015
(Filed May 1, 1998)

OPINION AWARDING COMPENSATION

This decision grants The Utility Reform Network (TURN) an award of \$42,606.32 in compensation for its substantial contribution to Decision (D.) 99-05-031 and D.99-09-064. In those decisions, we adopted settlements pertaining to recovery by Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E) and Southern California Edison Company (Edison) (collectively, Electric Utilities) of the costs of certain electric industry restructuring and implementation pursuant to Pub. Util. Code § 376.

TURN initially objected to the settlements. In withdrawing its objections after several rounds of briefing, testimony and evidentiary hearings, TURN secured concessions by the settling utilities that resolved its concerns and significantly benefited the utilities' ratepayers. We therefore find that TURN contributed substantially to the decisions and is eligible for intervenor compensation.

Background

The settlements at issue resolved applications the Electric Utilities filed in 1998 seeking recovery of electric industry restructuring costs pursuant to Pub. Util. Code § 376.¹ Section 376, enacted in 1996, provides for electric utility recovery of certain restructuring costs associated with implementation of direct access, the Power Exchange (PX) and the Independent System Operator (ISO).

TURN seeks compensation based on its protests of the PG&E and Edison applications,² and on its contribution to our decisions as a whole. As to PG&E, TURN alleges that its efforts improved the terms of the settlement by clarifying that PG&E could not seek recovery in its Performance Based Ratemaking (PBR) proceeding for the costs it recovers pursuant to § 376. As to Edison, TURN sought and received assurances that distribution rates would not be used as the vehicle for recovery of restructuring-related costs. Finally, TURN asserts that it contributed to the decisions as a whole by successfully proposing general Commission guidelines governing § 376 cost recovery.

We turn to the requirements for an award of intervenor compensation.

¹ All statutory references are to the California Public Utilities Code.

² TURN seeks no compensation from SDG&E.

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 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.

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 rates paid to people with comparable training

and experience who offer similar services.³ In the following paragraphs, we examine each of the statutory requirements in turn.

NOI to Claim Compensation and Timeliness of Request

TURN filed a timely NOI in these consolidated proceedings on July 27, 1998. The assigned Administrative Law Judge (ALJ) found TURN eligible for compensation by a ruling dated August 20, 1998. TURN then filed its compensation request within 60 days of issuance of our final decision in these proceedings — our September 23, 1999 decision adopting the Edison settlement. Thus, TURN’s request is timely.

Substantial Contribution to Resolution of Issues

TURN asserts that it made a substantial contribution to our decision to approve the settlements in these proceedings. We agree.

A party may make a substantial contribution to a decision in a number of ways.⁴ It may offer a factual or legal contention upon which the Commission relies in making a decision,⁵ or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopts.⁶ 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.⁷ The

³ Pub. Util. Code § 1806.

⁴ Pub. Util. Code §1802(h).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Commission has provided compensation even when the position advanced by the intervenor is rejected.⁸

PG&E Settlement

As to the PG&E application, TURN asserts that it contributed to the settlement principally on two policy grounds.⁹ First, TURN was concerned that there was overlap between the costs PG&E contended it was entitled to recover under § 376 and costs covered by PG&E's pending Test Year 1999 General Rate Case (GRC) application.¹⁰ Second, TURN opposed any cost recovery under § 376 from retail ratepayers to the extent those costs were associated with PG&E's wholesale contract responsibilities.¹¹

TURN ultimately withdrew its opposition to the settlement after PG&E made concessions that satisfied TURN's concerns. As to TURN's first objection, PG&E agreed to establish an Electric Restructuring Costs Account (ERCA) rather than seeking direct access, PX and ISO cost recovery in its 1999 GRC.¹² We found that PG&E would need to file a new application to seek recovery of the costs in the ERCA account, and expressed our pleasure that PG&E had withdrawn its alternative proposal to place such costs in base rates through its 1999 GRC.¹³

⁸ 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).

⁹ Request at 4-6.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4-5.

¹² D.99-05-031, *mimeo.*, at 24-25.

¹³ *Id.*

As to the wholesale/retail issue, TURN withdrew its opposition on this ground during the course of settlement negotiations. However, TURN points out that one of the principles in our decision approving the PG&E settlement "embraces TURN's position: 'No § 376 treatment shall be allowed which imposes costs on retail ratepayers associated with the utilities' wholesale contract responsibilities.'"¹⁴

TURN's decision to withdraw its opposition to the settlement did not come early in the proceeding. PG&E did not agree to forego seeking cost recovery in its 1999 GRC until after TURN had already participated in several rounds of briefing and in the evidentiary hearing. In view of the significant results TURN achieved, we find its efforts contributed substantially to our decision.

Edison Settlement

With regard to the Edison settlement, TURN also alleges that its participation resulted in greater benefits for the ratepayers. TURN's principal concern was that Edison's "distribution rates not be used as the vehicle for recovery of restructuring-related costs."¹⁵ As TURN points out, the Edison settlement agreement, as modified by the Commission, does not allow for post-freeze recovery of eligible restructuring implementation costs through distribution rates. Thus, TURN achieved its key goal in the settlement agreement. We agree, therefore, that TURN is entitled to compensation for its efforts.

¹⁴ Request at 5, citing D.99-05-031, *mimeo.*, at 24.

¹⁵ Request at 5-6, citing D.99-09-064, Attachment 1, p. 10.

Proceedings in General

TURN also made general contributions to our decisions. For example, TURN alleges that it proposed several guidelines for ratemaking treatment of restructuring implementation costs that we adopted in our decisions. TURN asserted in its comments that,

Identification and recovery of all restructuring implementation costs should be addressed in this proceeding. Implementation costs should not be included in distribution rates or in distribution [PBR] mechanisms.¹⁶

Consistent with TURN's suggestion, our decisions held that,

Identification of all restructuring implementation costs should be addressed in this proceeding. Restructuring-related costs other than restructuring implementation costs shall be recoverable from customers.¹⁷

Likewise, TURN proposed a guideline providing that,

Section 376-eligible costs should be recovered from all customers, regardless of their procurement choice, absent compelling evidence to the contrary.¹⁸

In keeping with this proposal, we adopted a guideline stating that,

All customers benefit from establishing the new market structure[;] therefore all customers must pay for these costs.

¹⁶ Request at 3 (emphasis in original).

¹⁷ D.99-05-031, *mimeo.*, at 33, Adopted Guideline 1, *mimeo.*, at 58, Conclusion of Law 23; D.99-09-064, *mimeo.*, at 34-35, Adopted Guideline 1.

¹⁸ Request at 3, citing TURN Opening Brief at 1, 3.

Section 376-eligible costs shall be recovered from all customers, regardless of their procurement choice.¹⁹

We find that TURN made a substantial contribution both to the contents of the settlements, and to our guidelines governing general ratesetting treatment of implementation costs. Thus, TURN is eligible for intervenor compensation in these proceedings.

The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$42,606.32, as follows:

Attorney Fees

<i>Michel P. Florio</i>	87.25	Hours	X	\$300	=	\$26,175.00
	1.25	Hours	X	\$150	=	\$187.50
<i>Robert Finkelstein</i>	51.0	Hours	X	\$265	=	\$13,515.00
	11.5	Hours	X	\$132.50	=	\$1,523.75
				<i>Attorney Fee Subtotal</i>	=	\$41,401.25

¹⁹ D.99-05-031, *mimeo.*, at 36, Adopted Guideline 6; D99-09-064, *mimeo.*, at 34, Adopted Guideline 6.

**Expert Witness Fees and Expenses
JBS Energy Inc.**

<i>William Marcus</i>	2.5	Hours	X	\$145	=	\$362.50
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Other Costs

<i>Photocopies</i>					=	\$714.41
<i>Postage</i>					=	\$97.95
<i>Fax charges</i>					=	\$20.10
<i>Phone</i>					=	\$10.11
				<i>Other Costs Subtotal</i>	=	\$842.57
			TOTAL		=	\$42,606.32

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 § 1801.3.²⁰ That is, an intervenor's costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers should 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 unproductive participation.

We find TURN's participation was "productive" in that the costs it claims for its participation were far less than the benefits realized. While it is difficult to put a dollar figure on the benefits TURN realized for ratepayers, TURN provides

²⁰ See D.98-04-059, *mimeo.*, at 31-33, and Finding of Fact 42.

us some guidance in this regard. TURN states that its participation was productive because it

[made] it less likely that the utilities would recover restructuring-related costs in distribution rates. For the small customers whose interests TURN represents, an allocation of these costs by any factor other than a distribution-based factor is an improvement.²¹

TURN attempts to quantify its achievement, at least in part. It notes that if PG&E had obtained distribution-based recovery of restructuring implementation costs in its 1999 GRC, residential and small commercial customers would have been assigned more than 60% of the costs. TURN estimates PG&E small customer savings in 1999 of \$3 million based on this contribution. We agree that this savings contrasts favorably with TURN's compensation request of \$42,606.32. Thus, the benefits realized by TURN's participation outweigh the compensation it seeks, and TURN's efforts were productive.

Duplication

TURN also submits that its hours should not be reduced for duplication of the showings of other parties.²² We agree.

With regard to the PG&E settlement, TURN alleges that it did not duplicate the showing of the Commission's Office of Ratepayer Advocates (ORA) because ORA "performed a detailed and comprehensive review" of certain issues in the proceeding, while TURN focused on policy.²³ TURN also claims that "ORA settled its disputed issues with PG&E far earlier in the process

²¹ Request at 7 (emphasis in original).

²² *Id.* at 6-7.

²³ *Id.* at 6.

than did TURN, and was willing to settle the § 376 case without more specifically resolving the overlap with the Test Year 1999 GRC."²⁴

TURN is correct. ORA, PG&E and others jointly filed a motion seeking adoption of the settlement agreement at a time when TURN still opposed the settlement.²⁵ TURN did not withdraw its opposition to the settlement until PG&E "voluntarily withdr[e]w from its [GRC] the incremental restructuring-related costs that were included in its base rate request. Instead, PG&E [agreed to] seek to recover these costs through the [ERCA]."²⁶ Thus, we find that TURN did not duplicate the efforts of ORA.

With regard to the Edison settlement, TURN concedes that there was "some overlap" in its positions and those of other commenters.²⁷ Both the California Farm Bureau Federation and TURN sought to ensure that § 376 costs would not be included in distribution rates.²⁸ TURN claims that it "took the lead in pursuing this issue and that it was largely through [TURN's] efforts that a successful resolution was achieved."²⁹ In TURN's comments on our Proposed Decision, TURN adds that it was the sole party to submit testimony on the issue of the inclusion of § 376 costs in distribution rates.³⁰

²⁴ *Id.*

²⁵ D.99-05-031, *mimeo.*, at 5.

²⁶ *Id.*, *mimeo.*, at 7.

²⁷ Request at 6-7.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ Comments of TURN on the Draft Decision on Intervenor Compensation (Comments) at 3.

In view of TURN's clarification in its Comments, we agree that its award for participation on the Edison settlement should not be reduced for duplication.

Hours Claimed

TURN documents 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 participation, both in comments and in evidentiary hearings, we believe that the hours spent by TURN were reasonable.

6.1 Hours Claimed & Allocation to Issues

Because TURN seeks intervenor compensation from both PG&E and Edison, it allocates its costs between those parties in conformity with D.85-08-012.³¹ TURN acknowledges that it "[was] able to allocate a substantial portion of [its] hours in this proceeding on a utility-specific basis."³² TURN's time records segregate hours easily associated with the PG&E settlement and those associated with the Edison settlement.³³ Neither PG&E nor Edison contested TURN's allocation, and we find it reasonable that these parties should pay compensation for the hours allocated to them.³⁴

³¹ In D.85-08-012, we first proposed allocation of time based on the following three criteria: (1) Allocation by Issue is Straightforward; (2) Allocation by Issue is almost Impossible; and (3) Allocation by Issue is Problematic, and may depend on the Type of Proceeding.

³² Request at 10.

³³ *Id.* and Appendix A (hours allocated to PG&E marked "PGE", and to Edison marked "SCE").

³⁴ As the table on pp. 8-9 of this Opinion shows, TURN allocated 61.25 hours to PG&E and 14 hours to Edison. The hours carry different rates depending on attorney, but result in charges of \$16,870 to PG&E and \$4,095 to Edison. Request at 19, n. 11.

Where TURN was unable to allocate hours among the parties, it devised a variety of additional timekeeping categories:

Gen: General preparation time not allocable by issue that varies in magnitude depending upon the total number of issues addressed in the case.

Base: General preparation time not allocable by issue that does not vary significantly in relation to the number of issues covered.

GH: Time spent presenting and defending testimony on issues not easily allocable to one utility or another.

#: Time spent drafting testimony.

Comp: Hours spent preparing the intervenor compensation application.³⁵

³⁵ Request at 10-12.

TURN's hours on each issue break down as follows:

Category	Attorney	Number of Hours	Totals
PG&E (PGE)	<i>Florio</i>	18.25	61.25
	<i>Finkelstein</i>	43.00	
Edison (SCE)	<i>Florio</i>	11.00	14.00
	<i>Finkelstein</i>	3.00	
General (Gen)	<i>Florio</i>	21.00	25.00
	<i>Finkelstein</i>	4.00	
Base	<i>Florio</i>	10.75	10.75
Hearings (GH)	<i>Florio</i>	9.50	10.50
	<i>Finkelstein</i>	1.00	
Testimony (#)	<i>Florio</i>	16.75	16.75
Compensation (Comp)	<i>Florio</i>	11.50	12.75
	<i>Finkelstein</i>	1.25	
		Total Attorney Hours	151.00³⁶

We find appropriate TURN's allocation of its time, although we will reduce TURN's award from Edison for hours in the "SCE" category by 20% because TURN concedes its efforts on the Edison settlement were duplicative of those of other parties. Otherwise, TURN's time records adequately support its claim and the hours appear to be allocated fairly. No party has challenged TURN's methodology. Thus, TURN may recover all of its claimed hours, save 20% of its "SCE" hours from Edison, allocated as follows:

³⁶ The 151-hour figure matches TURN's total claimed hours as reflected in the table on pp. 8-9 of this Opinion.

PG&E		Edison	
<i>Hours directly allocated</i>	\$16,870.00	<i>Hours directly allocated</i>	\$4,095.00
<i>50% of remaining hours</i>	\$10,820.66	<i>50% of remaining hours</i>	\$10,820.66
Total PG&E	\$27,690.66	Total Edison	\$14,915.66
Total Award		\$42,606.32 ³⁷	

Hourly Rates

TURN seeks hourly rates for attorney Michel Florio and expert William Marcus that we have already approved in other proceedings for similar work. It seeks an increased hourly rate for attorney Robert Finkelstein. TURN requests an hourly rate of \$300 for the work of 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.³⁸

TURN seeks an increased hourly rate of \$265 for work by Robert Finkelstein conducted in fiscal 1998-99. 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 fiscal year 1998-99 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

³⁷ Based on TURN's figures, by our calculations, TURN's total award would be \$42,785.69. Because we cannot tell whether TURN's error is in calculation, or in failing to include the proper costs in its request, we use the lower number from which to subtract the 20% duplication figure.

³⁸ See D.99-11-049, *mimeo.*, at 7-8.

and \$399 at 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 \$295.³⁹ 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 on this proceeding in fiscal 1998-99.

Time Spent Preparing Compensation Request

TURN requests half its attorneys' normal rates for time spent preparing this compensation request. We have awarded compensation at half the normal rate for preparing such requests in the past, and do so again here. Florio's requested rate of \$150 is half the hourly rate we approve here and approved in a recent decision.⁴⁰ Finkelstein's requested rate of \$132.50 an hour is half the rate we approve in the foregoing discussion. We find TURN's request reasonable, and award TURN \$1,711.25 for the 12.75 hours of work its attorneys spent preparing this compensation request.

³⁹ Request, Appendix B.

⁴⁰ D.99-11-049, *mimeo.*, at 7-8.

JBS Energy Staff

TURN seeks compensation at \$145 per hour for 2.5 hours of JBS Energy Inc.'s William Marcus (total fees \$362.50). We have previously awarded TURN this rate for Marcus' work, and do so again here.⁴¹

Other Costs

TURN claims \$842.57 in other costs for items such as photocopying, postage and telephone usage. TURN states that these costs relate exclusively to its work in this proceeding. Based on this representation, we award TURN its requested costs.

Award

We award TURN its total requested amount of \$42,606.32, divided as follows:

PG&E	\$27,690.66
Edison	\$14,915.66
TOTAL	\$42,606.32

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 January 31, 2000 (the 75th day after TURN filed its compensation request) and continuing until PG&E and Edison make their full respective award payments.

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

⁴¹ See D.98-04-027 and D.98-08-027.

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.

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. TURN filed Comments on February 2, 2000, clarifying its role with regard to the Edison settlement and causing us to reverse our initial decision to reduce TURN's award by \$819 for duplication. Thus, we have revised the draft decision at pages 11 – 12 to reflect this change.

Findings of Fact

1. TURN made a timely request for compensation.
2. TURN contributed substantially to D.99-05-031 and D.99-09-064.
3. TURN has requested a revised fiscal 1998-99 hourly rate for attorney Robert Finkelstein that is no greater than the market rates for individuals with comparable training and experience.
4. TURN has requested an hourly rate for attorney Michel Florio that has already been approved by the Commission.
5. TURN has requested an hourly rate for expert William Marcus that has already been approved by the Commission.
6. The miscellaneous costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation.
2. TURN should be awarded \$42,606.32 for its contribution to D.99-05-031 and D.99-09-064. Of this figure, PG&E shall pay \$27,690.66 and Edison shall pay \$14,915.66.

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 \$42,606.32 for its contribution to Decision (D.) 99-05-031 and D.99-09-064. Of this figure, Pacific Gas and Electric Company (PG&E) shall pay \$27,690.66 and Southern California Edison Company (Edison) shall pay \$14,915.66.

2. PG&E and Edison shall pay their respective portions to TURN within 30 days of the effective date of this order. If for any reason either payment is delayed beyond January 31, 2000, the 75th day from TURN's request for compensation, PG&E and Edison shall also pay interest on their respective portions of the award (if their portion is delayed) at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest, beginning on January 31, 2000 and continuing until full payment is made.

3. This consolidated proceeding is closed.

This order is effective today.

Dated February 17, 2000, at San Francisco, California.

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