

Decision 00-04-026 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion to consider the line extension rules of electric and gas utilities.

Rulemaking 92-03-050
(Filed March 31, 1992)

Request by Pacific Gas and Electric Company to File New Form 79-875 for Temporary Service Agreements for both Gas & Electric Service.

Application 91-06-016
(Filed June 7, 1991)

OPINION DENYING COMPENSATION

This decision denies three requests filed by Utility Design, Inc. (UDI) for awards of compensation for its participation in Rulemaking (R.) 92-03-050 and Application (A.) 91-06-016. The three requests are as follows: (1) June 9, 1997, request for an award of compensation for contribution to Decision (D.) 94-12-026; (2) February 17, 1998, request for an award of compensation for contributions to D.95-12-013 and D.97-12-099; (3) August 23, 1999, request for an award of compensation for contribution to D.99-06-079.

1. Background of A.91-06-016 and R.92-03-050

A.91-06-016 was filed by Pacific Gas and Electric Company (PG&E) seeking modification of Resolution G-2942, issued May 8, 1991. Resolution G-2942 approved certain tariff language relating to temporary gas facilities installed by customers. PG&E requested that the resolution be modified to reflect that any customer-installed facilities be designed by PG&E. The request to modify the resolution was denied in D.92-04-010.

R.92-03-050 was instituted by the Commission on March 31, 1992. In this proceeding the Commission stated its desire to consider the Line Extension Rules of the gas and electric utilities and revisions to such rules. The Commission opened the proceeding to allow interested parties to participate in a comprehensive review of the existing extension rules, review underlying data and policy decisions, and to then propose comprehensive revisions to the existing tariffs.

In D.92-04-010, the Commission stated that A.91-06-016 was to be closed. However, the closure of that proceeding was not effectuated until the issuance of D.97-12-099. Issues related to design of distribution facilities continued to be considered in both R.92-03-050 and A.91-06-016 until the issuance of D.97-12-099. From that date forward the remaining issues related to the design of distribution facilities were considered in R.92-03-050.

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 (PHC) or by a date established by the Commission. The NOI must present information regarding the nature and extent of planned participation in the proceeding, and an itemized estimate of compensation that the customer expects to request. The NOI may also 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 judgement 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 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. NOI to Claim Compensation and ALJ Rulings

A synopsis of the procedural history relevant to UDI's requests for compensation follows. On June 29, 1993, UDI filed an NOI to Claim Compensation. PG&E filed a Response to the NOI on July 16, 1993. An Administrative Law Judge's Ruling (ALJ) was issued in R.92-03-050, dated August 20, 1993. The ALJ Ruling found that the NOI was timely filed, but directed UDI to file an amendment to its NOI. The NOI was found deficient because it was intended to cover participation in R.92-03-050, A.91-06-016, and Case (C.) 89-10-054. The ALJ Ruling required UDI to file separate NOIs for each proceeding. It also directed UDI to apportion its participation between the three

proceedings in the amended NOI. The ALJ Ruling noted that UDI's NOI did not contain any documentation in support of its claim of financial hardship.

On September 15, 1993, UDI filed an Amended Notice of Intent to Claim Compensation (Amended NOI) in R.92-03-050. In the Amended NOI, an estimate of the cost of participation was set forth, but no evidence of financial hardship was provided. UDI summarily stated that it had demonstrated that its uncompensated participation would result in severe financial hardship. (Amended NOI, p. 8.) Both PG&E and Southern California Gas Company (SoCal Gas) filed responses to the Amended NOI. Pub. Util. Code § 1804 (a)(2)(C)(1) provides that if an NOI includes a showing of financial hardship the ALJ shall issue a preliminary ruling addressing whether a showing of significant financial hardship has been made. Because neither the NOI nor the Amended NOI included a showing of financial hardship, no preliminary ruling on financial hardship was issued.

Following the filing of UDI's initial NOI on June 29, 1993, the ALJ presiding over A.91-06-016 also issued an ALJ Ruling on the NOI, dated September 10, 1993.¹ The ALJ Ruling found that the NOI was timely filed, but directed UDI to file an amended NOI. UDI was directed to address in the amended NOI whether UDI is a customer as defined in Pub. Util. Code § 1802(b). It was also put on notice that it had not made a showing of financial hardship in support of its statement that it could not afford to pay the costs of effective participation in this proceeding.

¹ As noted above, the NOI was filed in three cases: R.92-03-050, A.91-06-016, and C.89-10-054. For this reason, ALJ Rulings were issued in R.92-03-050 and A.91-06-016 ruling on the same NOI filed by UDI on June 29, 1993.

On October 13, 1993, UDI filed an Amended NOI in A.91-06-016. In that filing, UDI stated that it is a customer as defined in Pub. Util. Code § 1802(b) because it represents existing ratepayers and future ratepayers. UDI augmented its showing of financial hardship by attaching an unaudited one page income statement for the year ending August 31, 1992. No preliminary ruling was issued to address whether UDI had made a showing of significant financial hardship. Arguably a preliminary ruling should have been issued pursuant to Pub. Util. Code § 1804(a)(2)(C)(1). The showing appears inadequate to support a preliminary finding of financial hardship in 1993 because it consisted of an out-of-date income statement, and did not contain a balance sheet which may have shown assets or equities that could be used to fund intervenor participation. Had a preliminary ruling been issued it would have likely found that there was insufficient evidence provided to support a finding of financial hardship.

By ALJ Rulings in both R.92-03-050 and A.91-06-016, UDI has been provided with the opportunity to provide evidence of financial hardship for each year in which it performed work for which it seeks compensation. An ALJ Ruling Granting Leave to File Supplemental Information was issued on June 25, 1999, in both R.92-03-050 and A.91-06-016. UDI has chosen not to provide evidence of financial hardship until a determination is reached on whether it qualifies as a "customer" under Pub. Util. Code § 1802(b). (See UDI Response to June 25, 1999, ALJ Ruling Requesting Additional Information, filed September 2, 1999.)

4. Summary of Requests for Compensation

4.1 Request for Compensation for Contribution to D.94-12-026

In D.94-12-026 the Commission adopted a settlement agreement proposed by various parties in the proceeding. The settlement agreement

implemented certain changes to the existing gas and electric line extension rules. The changes modernized the rules by providing for revenue-based allowances and other rule changes such as a nonrefundable discount option. The proceeding was left open for further hearings to refine the revenue-based allowances and calculation methods, and to address the issues of applicant installation and design, and the sharing of savings arising from competition. The Commission concluded that the question of applicant installation and design should be addressed in a separate phase of this proceeding, and the parties should attempt to negotiate a mutually acceptable applicant pilot design program. The pilot design program was intended to permit identification of issues, and accurate quantification of potential savings, if any, from "unbundling" the design of utility facilities. The assigned ALJ was directed to set a schedule for review of the results of the pilot program and to schedule workshops and hold evidentiary hearings if necessary, so that the Commission would be able to address the question of applicant design in 1995.

On June 9, 1997, UDI filed a Request for Award of Compensation in R.92-03-050, for its contribution to D.94-12-026.² A Response to UDI's Request was filed by the Joint Utility Respondents (JUR)³ on July 9, 1997. UDI filed a Reply to the JUR Response on July 28, 1997.

² The Request for Compensation for contribution to D.94-12-026 was timely filed, because that decision did not become final until an application for rehearing was dismissed in D.97-04-038.

³ The Joint Utility Respondents (JUR) are: PG&E, San Diego Gas and Electric Company (SDG&E), Southern California Edison Company (Edison), Southern California Gas Company (SoCal Gas), and Southwest Gas Corporation.

In its Request UDI states that it made a substantial contribution to D.94-12-026 because it was a primary participant at each stage of the proceeding, and was the "catalyst" for several of the positions adopted in the decision. UDI states that it represented "the interests of the building community in particular and the ratepayers in general." (Request, p. 4.) UDI seeks an award of compensation in the amount of \$161,487.

The JUR argue that UDI is not a "customer" for purposes of intervenor compensation, and that it has not demonstrated "significant financial hardship." The JUR also challenge UDI's assertion that it made a substantial contribution to the decision. In its Reply to the JUR, UDI reasserted the positions set forth in its Request. It argued that "...without UDI's participation, the interests of the competitors to the Joint Utilities in the line extension construction and design business would not be adequately represented." (Reply, p. 2.)

An ALJ Ruling dated June 25, 1999, concluded that the NOI, Amended NOI, and Request did not provide sufficient information upon which to make a determination on the preliminary question of whether UDI is eligible for an award of compensation. The ALJ Ruling directed UDI to supplement its Amended NOI. UDI was directed to provide additional information to enable a determination to be reached regarding whether UDI is a "customer" for purposes of Pub. Util. Code § 1802(b). UDI was also directed to provide information to enable the Commission to determine if the significant financial hardship requirement has been met. The supplemental filing was due on or before July 26, 1999. UDI was subsequently granted an extension of time until September 1, 1999, to make the supplemental filing. The assigned ALJ also granted UDI's request to defer its showing of financial hardship until after the Commission reached a determination as to whether UDI qualifies as a "customer."

On September 2, 1999, the "Motion of UDI to Accept Filing of Response to ALJ's June 25, 1999 Ruling One Day Late" was filed, along with an attached Response. We have reviewed the Motion and we grant UDI's motion for acceptance of its late Response. The Response addresses the issue of UDI's qualification as a "customer" for purposes of intervenor funding. The JUR filed a "Response to UDI's Presenting Additional Information on Eligibility" on September 23, 1999.⁴ The UDI Response providing supplemental information, and the JUR Response are addressed below in our discussion on the issue of UDI's qualification as a "customer" for purposes of intervenor funding.

4.2 Request for Compensation for Contribution to D.95-12-013 and D.97-12-099

In D.95-12-013 the Commission ordered the major California gas and electric utilities to implement a 24-month pilot program to test the feasibility of applicants designing distribution facilities for gas and electric service to their projects.⁵ At the time of the decision, these facilities were designed by the utilities.

D.97-12-099 was issued following implementation of the applicant design pilot program. The Commission concluded that the pilot program had been a success, and that the program should be implemented as a regular utility tariff option. The tariff option provides builders with a choice between utility

⁴ This filing also addresses UDI's request for an award of compensation for contribution to D.99-06-079. The filing, dated September 23, 1999, is entitled "Response of the Joint Utility Respondents to (1) Request by UDI for an Award of Compensation Regarding D.99-06-079 and (2) Response by UDI Presenting Additional Information on Eligibility for Intervenor Compensation."

⁵ The Commission noted that typically an applicant would be a developer requiring gas and/or electric service to a project.

design or design by third-party designers for residential gas and electric distribution facilities to their projects. On February 17, 1998, UDI filed a Request for an Award of Compensation in A.91-06-016 for its contributions to D.95-12-013 and D.97-12-099. A Response to UDI's Request was filed by the JUR on March 18, 1998. UDI filed a Reply to the JUR Response on April 2, 1998.

In its Request for Compensation, UDI argues that it made a substantial contribution to the two decisions that resulted in a permanent applicant design program. UDI details the contributions that it claims it made throughout the proceeding. UDI asks for an award in the amount of \$162,421.78.

In its response the JUR argue that UDI is not a "customer" for purposes of intervenor compensation. The JUR state "UDI is, as its name implies, an engineering consulting firm which sells its services to developers as they install utilities in their projects. UDI participated in these line extension related proceedings to expand the market for its services." (Response, p. 1.) The JUR also contend that UDI has not shown that it meets the significant financial hardship requirement for intervenor compensation. UDI in its Reply responds on the "customer" issue, stating that it has skillfully represented "applicants, designers, and consultants."

An ALJ Ruling dated June 25, 1999, concluded that the NOI, Amended NOI, and Request did not provide sufficient information upon which to make a determination on the preliminary question of whether UDI is eligible for an award of compensation. The ALJ Ruling directed UDI to supplement its Amended NOI. The ALJ Ruling, filed in A.91-06-016, is identical to the ALJ Ruling filed in R.92-03-050. Accordingly, UDI appropriately filed its response as one document bearing the caption of both A.91-06-016 and R.92-03-050. We discuss UDI's "Response to June 25, 1999, ALJ Ruling" and the JUR "Response to UDI's Presenting Additional Information on Eligibility" below in our discussion

on the issue of UDI's qualification as a "customer" for purposes of intervenor funding.

4.3 Request for Compensation for Contribution to D.99-06-079

In D.99-06-079 the Commission ruled on issues related to the gas and electric line installation process. Issues considered included site specific costs and the elimination of nonrefundable inspection fees. In its Request, UDI claims that it made a substantial contribution to this decision by participating in the identification of issues that needed to be addressed in this phase of the proceeding, and by contributing to the development of a complete record. UDI indicates that among other activities, it participated in workshops, commented on workshop reports, provided witnesses concerning site specific costs, commented on the proposed decision, and filed a petition to modify D.99-06-079 to clarify language in the decision. UDI defers discussion of its qualification as a "customer" for purposes of intervenor compensation to its Response to ALJ's Ruling, filed September 2, 1999. UDI requests compensation in the amount of \$141,691.16.

The JUR filed a Response to the Request on September 23, 1999. The JUR oppose UDI's request on the bases that UDI does not qualify as a "customer," and that UDI represented the same interests as the California Building Industry Association (CBIA) which has not claimed intervenor compensation.

5. Qualification As a "Customer"

In order to qualify as a "customer" for purposes of intervenor compensation, Pub. Util. Code § 1802(b) requires that an intervenor fall into one of three statutory categories. The intervenor must qualify as one of the following: (1) a participant representing consumers; (2) a representative authorized by a customer; (3) a representative of a group or organization that is

authorized by its bylaws or articles of incorporation to represent the interests of residential ratepayers.

In the NOI, the Amended NOI, and the Requests filed in R.92-03-050 and A.91-06-016, UDI did not clearly articulate its customer category. Thus, the ALJ issued a Ruling in both dockets granting UDI leave to file supplemental information regarding its qualification as a "customer" for purposes of eligibility for an award of compensation. (See ALJ Rulings in R.92-03-050 and A.91-06-016, dated June 25, 1999.)

On September 2, 1999, UDI filed in both dockets a Response to the June 25, 1999, ALJ Ruling. The Response argues that UDI qualifies as a "customer" for purposes of Pub. Util. Code § 1802(b) because it represents "the interests of future customers of utility systems" in these proceedings. (Response, p. 1.) UDI states "(e)very day, UDI represents the concerns of future customers in its coordination and design of gas and electric distribution systems." UDI says it represents customers with respect to customer choice in distribution design and construction, though builders ultimately provide the product (i.e., the home) that customers purchase. UDI is an engineering design firm that provides line extension design services.

From UDI's explanation we conclude that it now asserts that it qualifies under the first category, that is, as a participant representing consumers. However, in filings previous to the September 2, 1999 Response, UDI characterized its representation differently. For example, it stated that it represents applicants for line extensions, and that it represents the interests of designers and consultants. It also stated more generically that "UDI has represented applicants in establishing their right to choose who designs gas and electric facilities for their projects." UDI's concerns appear to be more aligned with those of competitors to the utilities than with the interests of consumers.

This conclusion is also consistent with UDI's statement that it represents the interests of competitors in the line extension and construction business.

UDI's many formulations of its customer status requires the Commission to critically examine that status in terms of Pub. Util. Code § 1802(b). On the one hand, we note that a business squarely meets the definition of customer, for purposes of intervenor compensation, when it pursues issues relating to its status as a consumer of utility services. The clearest example is that of a business advocating for changes to a tariff under which the business takes service. On the other hand, we would exclude from the definition of customer a competitor of a utility when the competitor is advocating for changes expanding its opportunities to compete.

We do not understand the intervenor compensation statutes to encompass such a broad definition of customer. First, statutory construction rules require that statutes be read in a manner to give meaning to each part of the statute. We believe that an interpretation granting customer status to anyone offering a competing service would make the customer status test illusory. The mere assertion that customers would be better off if they had competitive alternatives would confer customer status. Second, and separate from statutory requirements, we find that it makes sound policy sense to preclude competitors that have a clear and substantial competitive interest in an issue from claiming compensation for advocacy efforts on that issue. We believe that an intervenor ultimately funded by ratepayers should be single-mindedly pursuing the interest of the utility customers that it purportedly represents. The intervenor compensation program should be implemented in a manner that ensures customer interests are represented by entities free from conflicts that may arise in representing two interests, the competitor's as a competitor and the ratepayers' as customers (either residential or business).

Turning to UDI's theory of customer status relied on in its September 2, 1999 Response, UDI concedes that Pub. Util. Code § 1802(b) does not clearly define a "customer" as a participant who represents future customers. UDI asks the Commission to infer that the Legislature intended to include representation of future customers, though the statute does not so read. We reject UDI's argument that a participant who is a utility competitor and whose interests overlap with those of present or future ratepayers should automatically be considered a "customer" for purposes of intervenor compensation. We have considered this issue in the past.⁶ We have previously rejected the argument that a representative of business customers should be allowed to obtain compensation for its efforts to improve, through the regulatory process, its business prospects under the auspices of representing customers. (D.98-04-059, mimeo., p. 29, fn. 14.)

We also reject UDI's claim that it should be granted intervenor compensation because "no other party provides the same expertise as UDI." (UDI Response, 9/2/99, p. 6.) Accepting for the sake of argument UDI's assertion that it provided valuable expertise in this proceeding, we disagree with the conclusion that this expertise, in itself, entitles UDI to an award of intervenor compensation. Because UDI does not qualify as a "customer" it is not eligible to receive an award of intervenor compensation.

Finally, we reject the argument that UDI should be awarded intervenor compensation because it "acted in reliance on the Commission in these

⁶ We do not reach the issue of whether a participant that is not a competitor may qualify as a "customer" based solely on the participants' alleged representation of future utility customers.

proceedings." It claims that because the Commission is only now ruling on the issue of UDI's eligibility for compensation, fairness requires that UDI be granted an award. We disagree on several grounds. First, the Public Utilities Code does not contain any requirement that the Commission decide as a preliminary matter whether a participant qualifies as a "customer" for purposes of intervenor compensation. Second, UDI was put on notice in the ALJ Ruling on the NOI in A.91-06-016, dated September 10, 1993, that the Commission had questions about UDI's qualification as a "customer." Finally, even if the Commission had found UDI eligible, such a finding would not ensure an award of compensation.

6. Substantial Contribution Standard and Reasonableness of Request

UDI is not eligible to receive an award of intervenor compensation. Therefore, we do not reach the question of whether UDI made substantial contributions to the decisions at issue, nor do we reach the question of the reasonableness of the request for compensation.

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. On January 31, 2000, UDI filed comments on the draft decision. For clarity, changes have been made to the discussion section regarding qualification as a customer.

8. Award

Because we conclude that UDI is not eligible to receive an award of compensation, we deny UDI's request for compensation for contributions to D.94-12-026, D.95-12-013, D.97-12-099, and D.99-06-079.

Findings of Fact

1. UDI has made timely requests for compensation for its contributions to D.94-12-026, D.95-12-013, D.97-12-099, and D.99-06-079.

2. UDI is an engineering design firm that provides line extension design services. UDI sells its services to developers as they install utilities in their projects.

3. UDI asserts that it qualifies as a "customer" under Pub. Util. Code § 1802(b) because it is a participant representing consumers.

4. UDI has a private business interest in these proceedings because opening up the line extension business to competition will expand the market for UDI's services. The fact that UDI may provide services to current or potential future customers does not mean that UDI can be considered to represent those customers.

Conclusions of Law

1. UDI does not qualify as a "customer" under Pub. Util. Code § 1802(b) and is not eligible to receive an award of compensation under the Commission's intervenor compensation program.

2. This order should be made effectively immediately in order to resolve the longstanding questions of UDI's eligibility.

O R D E R

IT IS ORDERED that:

1. The request of Utility Design, Inc. for an award of compensation in the amount of \$161,487 for its contribution to Decision (D.) 94-12-026 is denied.

2. The request of Utility Design, Inc. for an award of compensation in the amount of \$162,421.78 for its contributions to D.95-12-013 and D.97-12-099 is denied.

3. The request of Utility Design, Inc. for an award of compensation in the amount of \$ 141,691.15 for its contribution to D.99-06-079 is denied.

4. Rulemaking 92-03-050 shall remain open to address other matters and Application 91-06-016 is closed.

This order is effective today.

Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners