

Decision 99-02-005 February 4, 1999

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

In the Matter of the Application of Southern California Edison Company to Adopt Incentive Based Ratemaking Mechanisms Specified in D.96-09-045 and D.96-11-021.

Application 97-12-047  
(Filed December 31, 1997)

**OPINION AWARDING COMPENSATION**

This decision grants the unopposed request of The Utility Reform Network (TURN) for an award of \$24,040.02 in compensation for its contribution to Decision (D.) 98-07-077 and D.98-08-015.

**1. Background**

Recently, in D.98-07-077 and D.98-08-015, we reviewed various aspects of the performance-based ratemaking (PBR) mechanism proposed by Southern California Edison Company (Edison). D.98-07-077 approves, on an interim basis, adjustments to system reliability and customer satisfaction measures and orders additional, future customer satisfaction measures. D.98-08-015 approves interim standards for maintenance, replacement, and repair (MR&R) of the utility's major distribution facilities but defers any earnings opportunity pending the compilation and review of additional data. Both decisions defer final approvals to Edison's midterm review.

On December 31, 1997, at our direction, Edison filed the PBR application which initiated this proceeding and we held a prehearing conference on February 23, 1998. Thereafter, on March 11, Commissioner Duque issued an Assigned Commissioner's ruling and scoping memo ordering, among other things, a workshop on MR&R issues. We did not hold evidentiary hearings in

this proceeding but took written comments from parties prior to the issuance of both D.98-07-077 and D.98-08-015. TURN now seeks compensation for its contribution to both decisions via two filings, 1) a request for compensation and 2) comments on the ALJ's draft decision. TURN's comments seek to supplement the showing in its compensation request in order to cure certain defects in its request.

## **2. Requirements for Awards of Compensation**

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Public Utilities (PU) 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**

TURN timely filed its NOI after the first prehearing conference. By ruling dated April 10, 1998, Administrative Law Judge Angela Minkin found TURN had established significant financial hardship and was eligible to file a claim in this proceeding for intervenor compensation. TURN filed a request for compensation on October 5, 1998 which is within the 60-day period following the issuance of D.98-08-015 and therefore timely.

### **4. Contributions to Resolution of Issues**

TURN was the only party to oppose Edison's initial application (see TURN's Response and Conditional Protest) and thereafter participated in this proceeding at the prehearing conference, at workshops on MR&R issues, and by filing comments on the issue groups underlying both D.98-07-077 and D.98-08-015.

We conclude that TURN's request accurately represents its procedural and substantive contributions to both decisions. Procedurally, TURN was an early advocate of deferring final adjustment and approval of Edison's PBR to the mid-term review. Commissioner Duque's scoping memo adopted such an approach and we confirmed it in both decisions. (D.98-07-077, p. 7, Finding of Fact 4, Ordering Paragraph 2; D.98-08-015, p. 6, Findings of Fact 1 and 3, Ordering Paragraphs 1 and 2.)

Substantively, with respect to matters underlying D.98-07-077, TURN challenged the customer satisfaction measures proposed and argued for establishment of a process for considering business office closures. We agreed, conceptually, and determined to review both issues again in the mid-term review. Though we adopted Edison's customer satisfaction proposal on an interim basis, we ordered Edison to develop a more objective measure. (D.98-07-077, Finding of Fact 4, Ordering Paragraph 2.) And while we did not adopt, verbatim, TURN's suggestions for notice of business office closures and for related advice letter filings, our order includes much of TURN's proposal. (D.98-07-077, pp. 14-15, Finding of Fact 7, Ordering Paragraph 4.)

With respect to D.98-08-015, we noted that TURN was the only party to develop an alternative to Edison's MR&R PBR proposal. (D.98-08-015, p. 3.) At the workshops, however, TURN and others agreed that adoption of a reward-penalty structure should be deferred until data is available on failure rates for specified distribution equipment. D.98-08-015 agrees. (D.98-08-015, p. 6, Findings of Fact 2, 3, 5, Ordering Paragraphs 2, 3.) Finally, TURN persuasively argued the \$10 million incentive adopted in D.96-09-092 was applicable only to the deferred MR&R activities. (D.98-08-015, pp. 6-7, Finding of Fact 4.)

TURN represents that it "took the lead in developing and presenting the consumer position in this proceeding," coordinating with the Office of Ratepayer Advocates (ORA) to minimize duplicative efforts and produce joint filings. The PU Code requires administration of the intervenor compensation statutes to avoid duplication (§ 1801.3(f)) but also states:

"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." (§ 1802.5.)

We conclude that TURN's participation avoided duplication with ORA. We will make no reduction to TURN's compensation request for duplication.

**5. The Reasonableness of Requested Compensation**

TURN requests compensation in the amount of \$25,601.27 as follows:

Attorney's Fees (TURN staff)

Robert Finkelstein	1.25 hrs @ \$235	\$ 293.75
	49.25 hrs @ \$250	\$12,312.50
Subtotal		\$12,606.25

Expert Witnesses' Fees & Expenses

JBS Energy, Inc. (JBS)

William Marcus	.5 hrs @ \$145	\$ 217.50
Gayatri Schilberg	109 hrs @ \$105	\$11,576.25

JBS Expenses		\$ 129.50
JBS Subtotal		\$11,923.25

Other Costs:

Photocopying		\$858.80
Postage		131.86
Telefax		53.60
Telephone		27.51
Subtotal		\$1,071.77

**TOTAL: \$25,601.27**

**5.1. Hours Claimed**

TURN submits detailed time records for its attorney, Robert Finkelstein, and describes the activities undertaken, the date, and the number of hours expended. TURN includes a limited amount of time (1.25 hours) spent prior to the filing of Edison's application in December 1997, but this time is not unreasonable given the nature of the proceeding, including our prior, public direction to Edison to file a PBR proposal.

TURN' request does not include documentation of the hours billed by its consultants, William Marcus and Gayatri Schilberg, of JBS Energy, Inc. TURN merely claims that number of hours billed is "modest." While Marcus' 1.5 hours are minimal indeed, Schilberg's 109 hours are less so; moreover, the Legislature has not authorized us to apply a lower or higher standard of scrutiny depending upon the size of a compensation request.

Nor does TURN's request allocate its attorney's or its experts' time expenditures by issue or task. We confirmed this requirement in D.98-04-059, which issued in our intervenor compensation rulemaking in April 1998. (D.98-04-059, pp. 44-47.) TURN notes that we have pointed out such an omission in the past. (D.97-10-027, p. 8.) However, in its request, TURN argues that the nature of this proceeding—the limited number of issues, the workshop process itself, including the lack of prepared testimony or of formal hearings, and the limited number of hours claimed—makes such an allocation more difficult and less valuable. TURN also argues that "... our substantial contribution to the Commission's decisions warrants an award of full compensation for the time devoted to this proceeding, and therefore any allocation of hours by issue should have no impact on any award of compensation." (TURN request, p. 8.) TURN's comments explain that this statement is incomplete and was not intended to suggest that finding a party has substantially contributed to a Commission decision renders unnecessary a review of the hours claimed. TURN states it meant: "An award of full compensation is warranted given the breadth of our substantial contribution to the Commission's decision." (TURN comments, p. 4.)

The ALJ's draft decision concluded that despite TURN's failure to include an issue allocation, detailed documentation of Finkelstein's hours provide us with a basis for making a factual determination that the hours he claims are reasonable and for allowing his hours. However, the ALJ pointed out we could

not make a similar factual determination for TURN's experts. Since they clearly assisted in the development of TURN's positions, the ALJ recommended we not take so harsh an action as to disallow all their time (though we could do so), but make an adjustment allowing Marcus' 1.5 hours but reducing Schilberg's 109 hours by one-third to 73 hours.

TURN's comments do not contend that the ALJ's draft contains factual or legal errors. Rather, TURN seeks to cure the defect in its compensation request and includes an allocation of its experts' time by task. TURN urges us to consider this information and cites D.98-12-006, where we made a full award, after the ALJ informally requested that TURN supplement its showing to cure the same kind of defect identified here. TURN admits that the missing information could have been provided in its request and states that its omission "was not attributable to any desire to mislead the Commission or otherwise take advantage of the intervenor compensation program". (TURN comments, p. 7.)

We will accept TURN's comments as a Motion to Set Aside Submission for the purpose of curing a defect in its compensation request by supplementing that showing. Since no reply comments were filed, we treat the motion as unopposed and accept the supplemental information. However, we remind TURN that the burden is on the applicant to submit a fully supported request for intervenor compensation so that the Commission may expeditiously review and process such requests. A submission that does not meet the requirements of statute and our implementing rules must be denied. While we may exercise our discretion to permit an applicant to supplement its request, particularly where the applicant is inexperienced or admits inadvertent error, the inefficiency and the resultant burden on our resources does not incline us to do so routinely.

In this case, we accept the supplemental information TURN has provided in order to provide consistency with our treatment of the compensation request

underlying D.98-12-006 because that request was filed at about the same time as this one. Based on the supplemental showing, we allow all of Schilberg's time, or 109 hours.

### **5.2. Hourly Rates**

TURN requests that we authorize compensation for Finkelstein at the rates of \$235/hour for 1997 and \$250/hour for 1998. We approved the 1997 rate previously in D.98-04-028 and adopt it here. TURN supports its request that we increase Finkelstein's 1998 rate by \$15/hour with a recitation of his education and experience in matters before this Commission and elsewhere. TURN also provides market survey information to demonstrate that \$250/hour is within the range of rates charged by Bay Area attorneys with Finkelstein's experience. We authorize compensation at the rate of \$250/hour for work Finkelstein performed in 1998.

Next we consider TURN's recurring argument that we should authorize compensation for the 4.5 hours Finkelstein spent preparing the compensation request at his full rate, rather than at 50%. TURN continues to challenge our policy determination that compensation requests "are essentially bills for services, and do not require a lawyer's skill to prepare." We confirmed this policy in D.98-04-059 and clarified that we would only deviate from it "in cases where the compensation claim involves technical and legal analysis deserving of compensation at higher rates." (D.98-04-059, p. 51.) We recognize that in proceedings which do not involve prepared testimony or evidentiary hearings, an intervenor's obligation to establish substantial contribution may be more challenging and may require more complex argument. We also note, approvingly, that 4.5 hours of preparation time is small compared to some larger claims where we reduced the hours, as well as the attorney's rate. (See



A.97-12-047 ALJ/XJV/naz

D.98-11-020, p. 6.) But for the defects in TURN's request, we would be persuaded to allow Finkelstein's full rate for these 4.5 hours; instead, we authorize compensation at one-half his 1998 rate, or \$125/hour.

TURN requests compensation for Schilberg at the rate of \$105/hour and for Marcus, at \$145/hour. We have approved both rates previously and adopt them here. (See, for example, D.98-08-027.)

**5.3. Other costs**

TURN's miscellaneous costs of \$1,071.77 include expenses for photocopying, postage, and FAX and telephone usage attributable to this proceeding. All items are appropriately included and all amounts appear reasonable. We authorize compensation in full for these expenditures. TURN includes an additional \$129.50 for costs incurred in this proceeding by JBS Energy, Inc. These costs include travel expenses (billed at 50%) and FAX charges. We find these costs reasonable and authorize compensation in full.

**6. Award**

We award TURN \$24,040.02 calculated as follows:

Attorney's Fees (TURN staff)

Robert Finkelstein	1.25 hrs @ \$235	\$ 293.75
	44.75 hrs @ \$250	11,187.50
	4.50 hrs @125	<u>562.50</u>

Subtotal \$11,045.00

Expert Witnesses' Fees & Expenses

JBS Energy, Inc. (JBS)

William Marcus	1.50 hrs @ \$145	\$ 217.50
Gayatri Schilberg	109.00 hrs @ \$105	<u>11,576.25</u>

JBS Subtotal \$ 11,793.75

Other Costs:

TURN		\$ 1,071.77
JBS		<u>129.50</u>

Subtotal \$ 1,201.27

**Total Award \$24,040.02**

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 December 19, 1998, the 75<sup>th</sup> day after TURN filed its compensation request and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that ORA 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 PU Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. TURN filed comments on January 25, 1999.

**Findings of Fact**

1. TURN has made a timely request for compensation for its contribution to D.98-07-077 and D.98-08-015.

2. By ruling dated April 10, 1998, Administrative Law Judge Angela Minkin found TURN had filed its NOI on a timely basis, had established significant financial hardship and was eligible to file a claim in this proceeding for intervenor compensation.

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

4. TURN's substantial contributions to D.98-07-077 and D.98-08-015 include advocating: deferral of final adjustment and approval of Edison's PBR to the mid-term review; development of additional customer satisfaction measures; establishment of a process for considering business office closures; and application of the \$10 million incentive adopted in D.96-09-092 to deferred MR&R , only.

5. TURN has requested hourly rates for its attorney and experts that have either already been approved by the Commission or may be considered market rates for individuals with comparable training and experience.

6. The miscellaneous costs incurred by TURN are reasonable.

7. Consistent with our established policy, we award compensation for 4.5 hours Finkelstein spent preparing TURN's compensation request at one-half his hourly rate, or \$125/hour.

### **Conclusions of Law**

1. We accept TURN's comments as a Motion to Set Aside Submission for the purpose of curing a defect in its compensation request by supplementing that showing.
2. TURN has fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.
3. TURN should be awarded \$24,040.02 for its contribution to D.98-07-077 and D.98-08-015.
4. 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 \$24,040.02 in compensation for its substantial contribution to Decision (D.) 98-07-077 and D.98-08-015.
2. The Southern California Edison Company shall pay TURN \$24,040.02 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, beginning December 19, 1998, and continuing until full payment is made.

This order is effective today.

Dated February 4, 1999, at San Francisco, California.

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