Decision **DRAFT DECISION OF ALJ BROWN** **(Mailed 5/10/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Require California Natural Gas and Electric Utilities to Preserve Interstate Pipeline Capacity to California.	Rulemaking 02-06-041 (Filed June 27, 2002)

OPINION GRANTING IN PART AND DENYING IN PART INTERVENOR COMPENSATION

This decision grants in part and denies in part the motion to accept a late-filed notice of intent (NOI) to claim compensation by The Utility Reform Network (TURN). This decision denies TURN's concurrent request for an award of $32,810.41 related to Decision (D.) 04-01-047 because TURN did not timely file its NOI, and its motion comes after the proceeding was closed and more than 17 months after the due date for the NOI. However, we grant compensation in the amount of $12,846.25 for TURN's work that made a substantial contribution to D.02-07-037 and D.03-04-061 because no prehearing conference (PHC) was held relating to the issues addressed in these decisions.

Background

On May 31, 2002, the Federal Energy Regulatory Commission (FERC) issued an order indicating that marketers currently serving California may turn back up to 725 MMcf/d of firm capacity on the El Paso pipeline to El Paso's east of California (EOC) customers.[1] This Commission was concerned that unless

[1] El Paso Natural Gas Company, et al., 99 FERC Section 61,244 (2002).

California replacement shippers or California utilities acquired the turned back capacity, it could be permanently lost to California. Because the FERC order required the EOC marketers to decide by July 31, 2002, how much capacity they would be turning back, the Commission expedited its rulemaking process and issued D.02-07-037 on July 27, 2002, requiring the natural gas and largest electric utilities to acquire the turned back capacity. This portion of the proceeding was considered "Phase I." TURN filed an application for rehearing of that decision which resulted in D.03-04-061.

A PHC was held on September 10, 2002, for Phase II, and then a scoping memo issued detailing the issues for Phase II. The parties filed testimony and rebuttal in April 2003, and evidentiary hearings were held April 28 through May 2, 2003. Opening briefs were filed July 7, 2003. TURN participated actively throughout the entire course of the proceeding.

D.04-01-047 established cost allocation methodologies for Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCalGas), Southern California Edison Company (Edison), Southwest Gas Corporation (Southwest Gas), and San Diego Gas & Electric Company (SDG&E) for the costs of the turned back capacity on El Paso Natural Gas Company's (El Paso) interstate pipeline that the utilities were ordered to procure pursuant to D.02-07-037.

TURN's NOI to seek compensation was due on October 10, 2002—30 days after September 10, 2002, when the assigned Administrative Law Judge (ALJ) held the PHC. However, TURN did not file its NOI until March 25, 2004, 17 months after the statutory deadline and after the proceeding was already closed.

Requirement for Awards of Compensation

The intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires that the intervenor satisfy all of the following procedures and criteria to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient NOI to claim compensation within 30 days of the PHC (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)

2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)

3. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)

4. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)

5. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention or recommendations by a Commission order or decision. (§§ 1802(h), 1803(a).)

6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

Because TURN did not timely file its NOI, we address each requirement in order.

Untimely NOI

TURN filed its NOI on March 25, 2004, nearly two months after the third decision in this proceeding was final and more than 17 months after the due date for the NOI. TURN explains that because there were multiple phases in this proceeding, its attorney mistakenly assumed that the NOI had been filed.

In D.00-03-044, we denied compensation to TURN because of an untimely NOI. There, as here, TURN did not file its NOI until after the proceeding was completed. We stated the following in that decision, and reiterate it here, omitting citations but retaining emphasis in the original:

> We reaffirmed the importance of the NOI in D.98-04-059, our Rulemaking examining the intervenor compensation process. . . . We made clear that applicants failing to meet the NOI requirement subsequent to April 23, 1998, when D.98-04-059 was effective, would face an uphill battle in establishing eligibility for compensation.
>
> * * *
>
> While D.98-04-059 did not hold that exceptions to the NOI filing requirement would never be granted, it stressed several benefits of the NOI requirement:
>
> - "The information filed in the [NOI] should provide a basis for a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. . . . The nature and extent of the customer's planned participation, in combination with the scope of the proceeding as detailed in the scoping memo ruling, should enable the presiding officer to make a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented."
>
> * * *
>
> - "The statute requires the customer, at the stage where the Notice of Intent is filed, to provide a statement of the nature and extent of the customer's planned participation. At this stage, the customer has therefore provided the Commission with the issue(s) it intends to address, as best as the customer can at that early stage of the proceeding."
>
> Moreover, it cannot be ignored that the NOI is a *statutory* requirement. Section 1804(a)(1) provides that "A customer who intends to seek an award under this article *shall*, within 30 days after

> the PHC is held, file and serve on all parties to the proceeding a notice of intent to claim compensation." (Emphasis added.)
>
> While we have occasionally waived this requirement despite the statute's mandatory language, we indicated in D.98-04-059 that we would be reluctant to do so in the future. Furthermore, in the prior cited cases, the NOI was only a few days late, or, in the case of a new intervenor, 55 days late. Those cases cannot be likened to this one, in which TURN filed its NOI nine months after it was due. Moreover, in the [Southeast Alliance for Environmental Justice] Ruling, the intervenor was seeking compensation for the first time.
>
> Even if we do have discretion to waive the NOI requirement in some cases, TURN does not invoke that portion of § 1804(a) that grants us such discretion. We may waive the deadline where, within the 30-day NOI filing period, a party cannot reasonably be expected to identify the issues as to which it will participate. However, TURN nowhere asserts that it was unable to identify such issues prior to November 12, 1998, the date on which it concedes its NOI was due. Rather, it bases its motion for late filing solely on attorney inadvertence.
>
> We cannot, on this record, grant TURN's request. We will deny compensation in this proceeding.

The same reasoning supports denying TURN's request here, as we cannot find that TURN's late NOI is excusable as it relates to TURN's work on Phase II issues. TURN is an experienced practitioner before this Commission, not a new intervenor unfamiliar with Commission rules and practices.

However, as TURN points out in comments on the draft decision, no PHC was held for Phase I of this proceeding. Had the proceeding ended at that point without a PHC, TURN would have been eligible to claim compensation. (See D.04-02-014.) Therefore, we will consider the portion of TURN's request that relates to work performed prior to the September 10, 2002 PHC to be timely filed.

Customer Status and Significant Financial Hardship

TURN's late-filed NOI demonstrates that TURN is a Category 3 customer and has established a significant financial hardship. TURN has satisfied these two procedural requirements.

Timely Filing of the Request for Compensation

TURN filed its request for compensation within 60 days of the final decision in the proceeding. Although we deny compensation related to TURN's work associated with D.04-01-047, intervenors may file their request for compensation after the final decision is issued in the proceeding pursuant to § 1804(c), rather than immediately following the decision for which they are claiming compensation. Given the facts of this case, TURN's request for compensation is timely.

Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding, we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See § 1802(h).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (See §§ 1802(h) and 1802.5.) As described in § 1802(h), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

> In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is

> then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.[2]

Even where the Commission does not adopt any of the customer's recommendations, compensation may be awarded if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order.[3] For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the customer made a substantial contribution. With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding. We limit our review to TURN's work in the proceeding prior to October 10, 2002, and its claims with respect to its substantial contributions to D.02-07-030 and D.03-04-061.

The first phase of this proceeding sought comments on proposed rules to require California utilities to acquire turned back El Paso capacity and resulting cost recovery. TURN, as well as almost all other parties in the proceeding, recommended against obligatory acquisition of additional El Paso capacity. The Commission disagreed and ordered utilities to acquire the additional capacity in D.02-07-037. Contrary to the positions taken by representatives of noncore customers, who argued that only core customers would utilize, and therefore, should pay for, additional interstate pipeline capacity, TURN emphasized that benefits from acquisition of additional capacity would flow primarily to noncore

---

[2] D.98-04-059, 79 CPUC 2d, 628 at 653.

[3] See D.03-12-019, discussing D.89-03-063 (31 CPUC 2d 402) (awarding San Luis Obispo Mothers for Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, although ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

customers purchasing at the border. The Commission explicitly noted that additional pipeline capacity will provide price and reliability benefits to noncore customers. (D.02-07-037, pp. 13-14.)

D.02-07-037 also authorized full recovery of pre-existing capacity rights, rejecting TURN's arguments to the contrary. TURN filed an application for rehearing of D.02-07-037, alleging that the Commission committed error when it authorized PG&E to recover all costs of its pre-existing Transwestern capacity. The Commission agreed, granted limited rehearing on this issue in D.03-04-061, and ordered the issue to be addressed in second phase of the proceeding.

Thus we find that although TURN did not prevail on all issues that it pursued in the first phase of this proceeding, TURN was the only party advocating for a different allocation of SoCalGas' capacity costs and TURN was the only party that contested the cost recovery of PG&E's pre-existing Transwestern capacity. We find that TURN made a substantial contribution to D.02-07-037 and D.03-04-061.

Reasonableness of Costs Requested

TURN requests $12,846.25 for its participation in the first phase of this proceeding, as follows:

ATTORNEYS				
	Year	Rate	Hours	Total
Marcel Hawiger	2002	$200.00	59.90	$11,980.00
Michel P. Florio	2002	$385.00	2.25	$866.25
TOTAL				**$12,846.25**

The components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the

customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation.

To assist us in determining the reasonableness of the requested compensation, D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of a customer's participation should bear a reasonable relationship to the benefits realized through its participation. This showing assists us in determining the overall reasonableness of the request.

TURN states that the Transwestern cost recovery settlement (which was part of Phase II) resulted in a benefit to PG&E's core customers of approximately $10 million. Although this specific dollar figure was the result of work TURN performed in Phase II, which we do not review because the NOI was late, the possibility of these savings would not have existed had it not been for TURN's efforts in the first phase of this proceeding that resulted in D.02-07-037 and D.03-04-061. Thus we find that TURN's efforts were productive.

Because not all of a customer's efforts in a proceeding result in substantial contributions to Commission decisions, we must assess whether the hours claimed are reasonable. TURN documented its claimed hours by presenting a daily breakdown of the hours of its attorneys, accompanied by a brief description of each activity. The hourly breakdown reasonably supports the claim for total hours.[4] Since we found that TURN's efforts made a substantial contribution to the delineated decisions, we need not exclude from TURN's award compensation for certain issues. The hours claimed are reasonable.

---

[4] TURN separated the hours associated with compensation matters from its substantive work and does not request compensation for this time given the procedural deficiencies of its compensation related filings.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. TURN seeks an hourly rate of $200 and $385 for work performed by Hawiger and Florio, respectively, in 2002. The Commission has previously approved these rates for work performed in 2002, and we find them reasonable.

In its comments on the draft decision, TURN did not allocate any direct expenses to the first phase of the proceeding, so we do not authorize any expenses.

Award

As described above, we award TURN $12,846.25.

Consistent with previous Commission decisions, we will order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing the 75th day after TURN filed its compensation request and continuing until full payment of the award is made.

We direct PG&E, SDG&E, and SoCalGas as respondents in this proceeding to allocate payment responsibility among themselves based upon their California-jurisdictional gas revenues for the 2002 calendar year, to reflect the year in which the work at issue occurred.

We remind all intervenors that Commission staff may audit their records related to this award and that intervenors 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 requested compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

Comments on Draft Decision

Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment may be waived because this is an intervenor compensation decision. However, we allowed the normal 30-day period for comment on this decision. TURN filed comments on June 1, 2004. We have modified the original decision to authorize compensation for TURN's work that made a substantial contribution to issues addressed in Phase I, which occurred prior to the September 10, 2002 PHC.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Carol A. Brown is the assigned ALJ in this proceeding.

Findings of Fact

1. No PHC was held prior to a decision being issued on Phase I matters.
2. TURN filed its NOI on March 24, 2004, far beyond the statutorily required 30 days after the PHC for Phase II.
3. TURN has met all the procedural requirements to request compensation for its Phase I contributions to D.02-07-037 and D.03-04-061.
4. TURN made a substantial contribution to D.02-07-037 and D.03-04-061.
5. TURN's requested hourly rates for attorneys have previously been found reasonable.
6. The total of TURN's reasonable costs is $12,846.25.

Conclusions of Law

1. Although TURN filed its NOI late, TURN has fulfilled, for work performed prior to the PHC, the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor

compensation for its claimed fees and expenses incurred in making substantial contributions to D.02-07-037 and D.03-04-061.

2. TURN's failure to file a timely NOI precludes an award of intervenor compensation to TURN for its participation in Phase II of this proceeding.

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

O R D E R

IT IS ORDERED that:

1. The Motion to Accept Late-Filed Notice of Intent to Claim Intervenor Compensation of The Utility Reform Network is granted in part and denied in part.

2. The Utility Reform Network (TURN) is awarded $12,846.25 in compensation for its substantial contributions to Decision (D.) 02-07-037 and D.03-04-061.

3. Within 30 days of the effective date of this decision, Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCalGas), and San Diego Gas & Electric Company (SDG&E) shall each pay TURN the respective utility's share of TURN's total award. The shares shall be computed on the basis of each utility's share of California-jurisdictional gas revenues for the 2002 calendar year.

4. PG&E, SoCalGas, and SDG&E shall also pay interest on the award beginning June 8, 2004, at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, and continuing until full payment is made.

5. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision(s):	
Contribution Decision(s):	D0207037; D0304061; D0401047
Proceeding(s):	R0206041
Author:	ALJ Brown
Payer(s):	Pacific Gas and Electric Company, Southern California Gas Company, San Diego Gas & Electric Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network	March 25, 2004	$45,656.66	$12,846.25	Failure to file timely NOI

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Marcel	**Hawiger**	**Attorney**	**The Utility Reform Network**	**$200**	**2002**	**$200**
Michel	**Florio**	**Attorney**	**The Utility Reform Network**	**$385**	**2002**	**$385**