Decision 02-10-056 October 24, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and their respective holding companies, PG&E Corporation, Edison International, and Sempra Energy, Respondents, have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems.	Investigation 01-04-002 (Filed April 3, 2001)

O P I N I O N

1. Summary

This decision awards The Utility Reform Network (TURN) $50,233.56 in compensation for its contribution to Decisions (D.) 02-01-037 and D.02-01-039. The award is less than the $51,199.81 requested by TURN due to lower adopted attorney rates.

2. Background

In these decisions the Commission investigated whether the respondent utilities, Southern California Edison Company (Edison), Pacific Gas and Electric Company (PG&E), and San Diego Gas and Electric Company (SDG&E), and their respective holding companies violated Commission decisions and relevant statutes.

D.02-01-037 denies the motions of PG&E Corporation (PG&E Corp), Edison International, and Sempra Energy (collectively, the Holding Companies)

that the proceeding be dismissed as it pertains to them for lack of jurisdiction. The Holding Companies argued that the conditions imposed on them in Commission decisions authorizing their formation are only parts of a contract between the Commission and the Holding Companies, and therefore are enforceable only in an action for breach of contract in Superior Court. The Commission determined, however, that the orders authorizing formation of the Holding Companies were valid Commission orders fulfilling the Commission's duties to protect ratepayers from the risks that attended the formation of the Holding Companies.

In D.02-01-037, the Commission determined that it would be unreasonable and illogical to conclude the Commission can issue orders but not enforce these orders. Since the conditions imposed on the Holding Companies are valid Commission orders, therefore they are also enforceable by the Commission. Conversely, the Commission said that even if the orders were not valid, the Commission's jurisdiction may not be challenged now as the Holding Companies did not file timely applications for rehearing, as required under Sections 1731 and 1709.[1] Furthermore, the Commission determined that the Holding Companies cannot seek the Commission's approval to form, accept the benefits that flow from that approval, and then challenge the Commission's authority to enforce the requirements of that approval. D.02-01-037 concludes that the Commission has authority both to enforce the conditions imposed in the underlying proceedings, and to investigate whether new conditions must be imposed in order to protect ratepayers.

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[1] All statutory references are to the Public Utilities Code unless otherwise noted.

In D.02-01-039, the Commission provided an initial interpretation of the "first priority condition" incorporated into the decisions approving the Holding Companies for PG&E, Edison and SDG&E. The Holding Companies, and their respective utilities, PG&E, Edison and SDG&E (collectively, Respondents) argued that the first priority condition is limited to various financial requirements and investment in utility plant. Thus Respondents contended the first priority condition cannot be interpreted to require infusion of operating funds for energy purchases. TURN, the Office of Ratepayer Advocates, the City and County of San Francisco, and the City of Long Beach asserted, however, that the language of the first priority condition requires infusion of money into the utility subsidiary when the utility's access to capital is impaired such that discharge of its obligation to serve or its ability to operate normally is threatened. TURN also argued that the term "capital" in the condition must be given an expansive meaning to distinguish it from "balanced capital structure" as used in the Holding Company decisions.

The Commission rejected Respondents' narrow definition of capital, and adopted the expansive definition advocated by TURN. The Commission also determined that the decisions forming the Holding Companies should be broadly interpreted and not limited in the manner suggested by Respondents, and that the context of these decisions shows the Commission was concerned with preventing the utilities from becoming unable to acquire sufficient money to meet their obligation to serve. The Commission also found that contrary to Respondents' arguments, infusions of working capital can provide a return on investment and do not constitute a "taking." While PG&E Corp contended that

there was no reasonable opportunity to earn a return on working capital,[2] the Commission rejected this argument, noting that corporate owners regularly infuse working capital into corporations as a means to return a company to profitability. Similarly, the Commission rejected PG&E Corp arguments implying that the first priority condition was unconstitutional and that holding companies should not be expected to infuse capital into their regulated subsidiaries. The Commission found that the formation of the holding companies and the transfer of assets to unregulated utility subsidiaries increased the ability of holding companies to raise capital, but similarly decreased the ability of the related utility to raise capital. This transfer necessarily implied that the holding companies would be expected to infuse capital in the utilities in time of need to leave ratepayers indifferent to the transfers of assets from the utilities to the holding companies.

3. 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. (Unless otherwise noted, all statutory citations are to the Pub. Util. Code.) Section 1802(b) requires an intervenor to be a "customer," as defined in the statute, in order to be eligible for compensation.[3] Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after 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

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[2] PG&E Corp defined working capital as cash for operating expenses.

[3] The statute uses "intervenor" and "customer" interchangeably, as does today's decision.

planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility.

The customer, either at the NOI stage or later, must also show that the costs of effective participation, if not compensated, would constitute a "significant financial hardship" (as defined by § 1802(g)) for the customer. Regarding TURN, the assigned Administrative Law Judge (ALJ) in consultation with the assigned Commissioner made a finding of eligibility for compensation by ruling in this proceeding on July 23, 2001.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. TURN timely filed its request for an award of compensation on March 15, 2002. Under §1804(c), an intervenor requesting compensation must 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 that determines whether the customer has made a substantial contribution and what amount of compensation to award. 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.

4. Substantial Contribution to Resolution of Issues

Under § 1802(h), a party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision, or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted. 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.[4]

D.02-01-037 and D.02-01-039, with a few exceptions, do not reference the positions taken by parties. However, TURN asserts (and we agree) that by comparing its filings with the decisions, we can determine that TURN made a substantial contribution to the proceeding. In its filings, TURN argued that the Commission possessed the authority to issue the conditions for holding companies, including the ability to enforce those conditions on the holding companies. TURN also argued that the original acceptance of these conditions by the holding companies presumed that they were enforceable at the Commission. TURN also contested the arguments of the holding companies that

[4] The Commission has provided compensation even when the position advanced by the intervenor is rejected. *See* D.89-03-063 (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 thoroughly document the safety issues involved).

the conditions imposed by the Commission represented a contractual relationship between the Commission and the holding companies. Both of these positions were adopted by D.02-01-037. TURN's filings made a substantial contribution to resolution of these issues.

In D.02-01-039, we addressed the meaning of the first priority condition. TURN's filings argued that the original conditions adopted in the holding company decisions failed to adopt the Respondents' narrow definition of capital. TURN also argued that the obligation to serve extends beyond maintaining infrastructure, and includes procurement of power. We noted TURN's arguments, as well as those of other parties, and adopted both of these positions in D.02-01-039. TURN's arguments and analysis on these issues made a substantial contribution to this decision.

TURN was most helpful in advocating the importance of applying a ratepayer indifference standard to the consequences of the holding company formations. As TURN noted in its brief, holding companies cannot insist on a one-way flow of capital from utilities to holding companies if this flow would impair the obligation to serve. We agreed with this position in D.02-01-039, and concluded (*id.*, p. 32) that holding companies infuse resources into the utility subsidiaries "to rebalance the scales and make ratepayers indifferent to the continuing asset transfers that formation of the holding company system would require."

TURN also made substantial contributions on the issues of the authority of the Commission over holding companies, the definition of capital, the breadth of the first priority condition and the meaning of the ratepayer indifference standard. Consistent with TURN's arguments, we adopted these positions in D.02-01-037 and D.02-01-039. Taken as a whole, we agree with TURN that its

filings and arguments made substantial contributions to D.02-01-037 and D.02-01-039.

5. The Reasonableness of Requested Compensation

TURN requests $51,199.88 as follows:

Attorney Fees – TURN staff counsel		
Matthew Freedman	85.25 hours x $200/hour	= $17,050.00
	8.25 hours x $100/hour[5]	825.00
Randy Wu	22.00 hours x $350/hour	7,700.00
Robert Finkelstein	7.75 hours x $310/hour	2,402.50
	5.5 hours x $155/hour	852.00
Michel Florio	3.25 hours x $350/hour	1,137.50
	Subtotal:	**$29,967.50**
Attorney Fees-Outside Counsel		
Scott Hempling	21.75 hours x $350/hour	$7,612.50
Scott Rubin	24.25 hours x $330/hour	8,002.50
David Lapp	7.25 hours x $190/hour	1,377.50
	Subtotal	**$16,992.50**
Other Costs		
Photocopying expense		$3,341.40
Postage costs		384.32
Phone charges		3.22
Lexis charges		510.87
	Subtotal	**$4,289.31**
	Total	**$51,199.81**

5.1 Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was "productive," as that term is used in § 1801.3, where the Legislature gave the Commission guidance on

[5] Preparation of compensation request @ 50% of normal hourly rate.

program administration. (*See* D.98-04-059, *mimeo.*, at 31-33, and Finding of Fact 42). In that decision we discuss the requirement that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

It is difficult to establish precise monetary benefits associated with TURN's participation in this proceeding. However, the potential financial consequences associated with the first priority condition, and the reaffirmation of Commission enforcement powers with respect to the holding companies are significant. These financial consequences may lead to a substantial return of capital from holding companies to the utility subsidiaries. As one means of measuring these financial consequences, TURN notes the amounts of money involved in related litigation. One measure is the litigation initiated by the California Attorney General seeking over $4 billion dollars in restitution for violations of the first priority condition by PG&E Corp. Also, a lawsuit filed by the City of San Francisco seeks the return of billions of dollars from PG&E Corp to the utility and its ratepayers. Although these are potential benefits rather than benefits realized, applying even a small probability of success to these amounts results in benefits greatly exceeding TURN's compensation request.

Furthermore, even in the absence of precisely defined financial benefits, we have previously recognized the qualitative benefits of intervenor

participation where that participation assisted the Commission in developing the record on a matter of great public imporatance.[6] In weighing TURN's substantial contribution to the issues in this proceeding, and the potential benefits for ratepayers, we find that TURN's participation in these two decisions was productive.

5.2 Hours Claimed

TURN documents its claimed hours through detailed daily records indicating the hours for its attorneys, the hours for outside legal counsel, and descriptions of the activities associated with all of these hours. The hours are also allocated to various issues in the proceeding. These hours and the associated activities reasonably support the claimed hours, including the time spent for preparing the compensation request.

5.3 Hourly Rates – TURN Staff Counsel

We will adopt rates of $310 per hour for Finkelstein, and $350 per hour for Florio. These are the same rates requested by TURN and adopted by us in D.02-06-070. TURN requests a rate of $200 per hour for Freedman, $20 per hour more than adopted in D.02-06-070. In its compensation request for that proceeding (Application 00-11-038), TURN indicated that while it would agree to a lesser rate on an interim basis, it would consider seeking an increased rate in a later proceeding. In this request, TURN has provided additional information on Freedman indicating an increase in his responsibilities and noting his additional experience. After considering this additional experience and responsibility, we

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[6] *E.g.*, in D.00-10-014 we compensated TURN for its substantial contribution to D.00-05-022 on utility responses to emergency standards and major power outages despite TURN's inability to assign a dollar value to its participation and productivity.

will adopt a rate of $190 per hour for Freedman for 2001, a $10 increase over the $180 rate adopted in D.02-06-070.

TURN requests a rate of $350 per hour for Wu. In D.02-09-040 we adopted a 2001 rate of $350 per hour for Wu, and will adopt that rate herein.

5.4 Hourly Rates – Outside Counsel

TURN requests a rate of $350 per hour for Hempling, the same rate as for Florio. TURN submits that Hempling has worked almost as many years as Florio in energy related matters. Hempling has experience on a wide range of energy issues with numerous state regulatory commissions. He also practiced and provided testimony before the Federal Energy Regulatory Commission, the United States Senate and the House of Representatives. Particularly important for this proceeding is Hempling's experience with issues arising under the Public Utilities Holding Company Act. Considering his background, knowledge, and experience we adopt a rate of $350 per hour for his services.

TURN requests a rate of $330 per hour for Rubin, a rate mid-way between Florio and Finkelstein. Rubin's experience since 1983 has been entirely in utility regulation, and although he has more years of experience than Finkelstein, he has less than Florio. He has extensive experience in consumer matters, and he has produced expert witness testimony, and published articles on regulation and development of competition in regulated utilities. We agree with TURN that his background, knowledge and experience place him between Florio and Finkelstein, and therefore we will adopt a rate of $330 per hour for Rubin.

TURN requests a rate of $190 for Lapp. TURN notes this is the same rate TURN sought for Freedman's work in 2000. Lapp is a 1998 law graduate. He has worked as a law clerk for two years doing legal research, and then as an

attorney for two years emphasizing electricity regulatory law and policy. Although his legal background, knowledge and experience compare favorably with Freedman, Freedman had many years of additional experience in energy matters prior to his work as an attorney. In recognition of this difference in backgrounds, we will adopt a rate of $180 per hour for Lapp.

5.5 Other Costs

TURN requests $4,239.81 in other costs (photocopying, postage, phone charges and Lexis charges). Our review of the amount of work performed by TURN, its interaction with outside counsel, the size of the service list,[7] and the number of documents prepared in the proceeding leads us to conclude that these other requested costs are reasonable.

[7] Initially, the service list included several hundred individuals.

6. Award

We award TURN $50,233.56 calculated accordingly:

Attorney Fees - TURN Staff Counsel		
Freedman	85.25 hours x $190/hour	=$16,197.50
	8.25 hours x $95/hour	783.75
Wu	22.0 hours x $350/hour	7,700.00
Finkelstein	7.75 hours x $310/hour	2,402.50
	5.5 hours x $155/hour	852.50
Florio	3.25 hours x $350/hour	1,137.50
	Subtotal:	**$29,073.75**
Attorney Fees – Outside Counsel		
Scott Hempling	21.75 hours x $350/hour	$7,612.50
Scott Rubin	24.25 hours x $330/hour	8,002.50
David Lapp	7.25 hours x $180/hour	1,305.00
	Subtotal:	**$16,920.00**
Other Costs		
Photocopying expense		$3,341.40
Postage costs		384.32
Phone charges		3.22
Lexis charges		510.87
	Subtotal:	**$4,239.81**
	Total:	**$50,233.56**

We will assess responsibility for payment among Edison, PG&E, and SDG&E according to their respective share of the California jurisdictional revenues filed with the Commission for each utility for 2001. These revenues include combining the gas and electric revenues for PG&E and SDG&E. We adopt this methodology to reflect the nature of the combined electric and gas

issues in this proceeding. This methodology results in the following allocation of award payment responsibility.

PG&E	55.5%
Edison	34.4
SDG&E	10.1
	100.0%

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 May 29, 2002 (the 75th day after TURN filed its compensation request) and continuing until the utility makes its full payment.

As in all intervenor compensation decisions, we put TURN on notice that the Commission Staff 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. Procedural Matters

Pursuant to Rule 77.7(f)(6), the otherwise applicable 30-day period for public review and comment is being waived.

8. Comments on Draft Decision

This is a compensation decision per § 1801. Accordingly, under our Rule 77.7 (f)(6), the otherwise applicable 30-day period for public review and comment is being waived.

9. Assignment of Proceeding

Loretta Lynch is the Assigned Commissioner and Bruce DeBerry is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.02-01-037 and D.02-01-039.

2. TURN has made a showing of significant financial hardship by demonstrating the economic interests of its individual members would be extremely small compared to the costs of participating in this proceeding.

3. TURN contributed substantially to D.02-01-037 and D.02-01-039.

4. Except as noted in the Opinion, TURN has requested hourly rates for attorneys that are no greater than the market rates for individuals with comparable training and experience.

5. TURN has requested hourly rates for attorneys Finkelstein ($310 per hour), Wu ($350 per hour) and Florio ($350 per hour) that have already been approved by the Commission.

6. The adopted rate of $190 per hour for attorney Freedman is reasonable based on his previous adopted rate, and his experience.

7. $350 per hour is reasonable for Hempling's professional services considering his experience, background, and rates paid to other attorneys.

8. $330 per hour is reasonable for Rubin's professional services considering his experience, background, and rates paid to other attorneys.

9. $180 per hour is reasonable for Lapp's professional services considering his experience, background, and rates paid to other attorneys.

10. The other costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.

2. TURN should be awarded $50,233.56 for its contribution to D.02-01-037 and D.02-01-039, calculated as described in the foregoing opinion.

3. Per Rule 77.7 (f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

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 $50,233.56 in compensation for its substantial contribution to Decision (D.) 02-01-037 and D.02-01-039.

2. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison), and San Diego Gas and Electric Company (SDG&E) shall pay TURN the following compensation amounts: PG&E, $27,879.63; Edison, $17,280.34; and SDG&E, $5,073.59 within 30 days of the effective date of this order. PG&E, Edison, and SDG&E shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, beginning May 29, 2002, and continuing until full payment is made.

3. The comment period for today's decision is waived.

This order is effective today.

Dated October 24, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD

GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

Compensation Decision Summary Information

Compensation Decision(s):	D0210056
Contribution Decision(s):	D0201037 D0201039
Proceeding(s):	I0104002
Author:	ALJ DeBerry
Payer(s):	Pacific Gas and Electric, Southern California Edison Company, and San Diego Gas & Electric Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Disallowance
The Utility Reform Network	3/15/02	$51,199.81	$50,233.56	Failure to justify hourly rates

Witness Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Matthew	Freedman	Attorney	The Utility Reform Network	$200	2001	$190
Randy	Wu	Attorney	The Utility Reform Network	$350	2001	$350
Robert	Finkelstein	Attorney	The Utility Reform Network	$310	2001	$310
Michel	Florio	Attorney	The Utility Reform Network	$350	2001	$350
Scott	Hempling	Attorney	The Utility Reform Network	$350	2001	$350
Scott	Rubin	Attorney	The Utility Reform Network	$330	2001	$330
David	Lap	Attorney	The Utility Reform Network	$190	2001	$180