

INTERIM OPINION ON REQUEST OF THE EXTENSION CONNECTION, INC.
FOR FINDING OF ELIGIBILITY FOR COMPENSATION

On January 15, 1988, The Extension Connection, Inc. (TEC) filed a Request for Finding of Eligibility for Compensation under Article 18.7 (Rules 76.51 through 76.62) of the Commission's Rules of Practice and Procedure. TEC is an independent company providing inside wiring services in competition with Pacific Bell (Pacific). TEC filed a complaint against Pacific on November 17, 1986, which was docketed as Case (C.) 86-11-028 and consolidated with Pacific's general rate case and related proceedings for hearings held in November 1987 on inside wiring issues. The issues TEC raised are (1) structural separation of a utility's inside wire installation and repair activities from its regulated activities; (2) procedures for allocating investment and costs between a utility's inside wire-related activities and its regulated activities; (3) utility provision of inside wiring information to its customers; and (4) alternative Standard Network Interface (SNI) designs.

Following an Administrative Law Judge's (ALJ) Ruling granting an extension of time, Pacific filed a response on March 15, 1988 in which it opposes TEC's request. According to Pacific, Article 18.7 is not applicable because the issues raised by TEC in this proceeding are not for the purpose of modifying a rate or establishing a fact or rule that may influence a rate. Pacific further contends that TEC's interests have otherwise been adequately represented by other parties and therefore TEC has not met the first test in Rule 76.52(f)(1) for a showing of significant financial hardship. Finally, Pacific argues that TEC's showing that it cannot afford to pay the costs of effective participation is deficient. Pacific concludes that the Commission should find that TEC has not met its statutory burden for its request for eligibility for compensation under Article 18.7.

Applicability of Article 18.7

Article 18.7 of the Rules of Practice and Procedure, based on Public Utilities Code Section (§) 1801 et seq., has the following purpose:

"to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the Commission...to modify a rate or establish a fact or rule that may influence a rate." (Rule 76.51.)

Rule 76.51 creates a two-prong test regarding the applicability of Article 18.7 to TEC's request. First, TEC must show that it is a public utility "customer" within the meaning of Article 18.7. Rule 76.52(e) defines "customer" as follows:

"any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation subject to the jurisdiction of the Commission; any representative who has been authorized by a customer, or any representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers..."

TEC asserts that it falls within the first portion of this definition of "customer," i.e., that it is a "participant representing consumers, customers, or subscribers." As TEC points out, the Commission has interpreted this subcategory of "customers" as being limited to "actual customers of the utility who represent more than their narrow self-interest; they must also represent the broader interests of at least some other consumers, customers, or subscribers." (Decision (D.) 86-05-007, mimeo. p. 4.) TEC recognizes that it has a self-interest as an inside wiring business in this proceeding. However, it purchases telephone service and thus is also a customer of Pacific. TEC contends that the overlap between its business interests and the interests of all ratepayers.

in being provided a reliable, safe, and useful network interface that is not subject to abuses such as toll fraud is sufficient for it to meet the test in D.86-05-007 that a customer must represent the broader interests of other customers in order to be found eligible for compensation. Pacific does not contest TEC's assertion that it is a "customer" within the meaning of Rule 76.52(e).

The second relevant requirement in Rule 76.51 is that the proceeding in which compensation is sought must be "to modify a rate or establish a fact or rule that may influence a rate." In its opposition to TEC's request, Pacific contends that each of the four issues raised by TEC fails this test; it concludes as a result that TEC's request cannot be considered under Article 18.7.

Regarding the first issue cited by TEC, that is, structural separation, Pacific argues that if the Commission were to order structural separation as requested by TEC the impact would be on detariffed rates for inside wiring services rather than on regulated rates. Since inside wiring rates are not regulated directly by the Commission, Pacific argues that they would not fall within the scope of Article 18.7.

Pacific argues similarly that any ruling on utility provision of information regarding inside wiring services would impact only the costs of providing detariffed inside wiring services and detariffed inside wiring rates, and that such rates are not within the scope of Article 18.7.

Pacific asserts that TEC did not state that a different SNI would change Pacific's current revenue requirements in any way. Pacific submits that there is no evidence in the record that its revenue requirements would change at this time due to the type of network interface used. It also argues that the scope of an SNI deployment program is not the subject of this phase of the proceeding, citing an ALJ ruling dated June 15, 1987, and thus that

the revenue requirement impacts of such deployment are also not the subject of this proceeding.

Pacific concedes that the cost allocation issue alone arguably could have an impact on rates.

Discussion

Pacific's arguments that this proceeding will not modify or influence rates are not convincing. First, we disagree with Pacific's assertion that only tariffed rates fall within the scope of Article 18.7. While the Commission does not directly set inside wiring rates and charges, the regulatory oversight which we do retain, and indeed many of the parties' proposals in this proceeding, would undoubtedly "influence" inside wiring rates, the relevant criterion in Rule 76.51. Further, since inside wiring activities are treated above the line for ratemaking purposes, the inside wiring expenses and revenues adopted as reasonable in this proceeding will have a direct impact on tariffed rates for other services. Pacific does not prevail in its arguments.

The question of whether TEC is a "customer" for the purposes of Article 18.7 is more problematic. TEC presents us with a set of facts unique among the many requests which have been made for eligibility for compensation under Article 18.7.

TEC's self-interest and participation in this proceeding arise due to its existence as a competitor rather than a customer of Pacific. To fit its request within the strictures of Article 18.7, TEC would have us conclude that, because TEC's positions on certain issues in this proceeding allegedly coincide with the interests of customers as a group, TEC "represents" those customers. Following TEC's reasoning to an extreme, any participant in our proceedings, regardless of the genesis of its self-interest, could argue that its position "represents" the interests of customers. If coincidence with customers' interests is the primary criterion for establishing "representation," such an argument would likely prevail in any instance where the Commission

ultimately adopts the participant's position as reasonable and in the public interest. Since compensation is awarded only when the participant's position is adopted, it seems to us that TEC's view of what constitutes "representation" would make unnecessary the determination that a participant in a proceeding is a "customer." We believe that an interpretation of "representation" more narrow than a mere coincidence of interests is appropriate.

This conclusion is consistent with what we see as the legislative intent in drafting Senate Bill (SB) 4, which was codified as § 1801 et seq. In reviewing the legislative history of SB 4, we note that early versions of the bill limited eligibility for compensation under its terms to representatives of residential customers. While an amendment broadened the parties eligible for compensation by deletion of the word "residential" throughout the bill, the ultimately adopted limitation on eligibility to "customers" as defined in § 1802(e) and mirrored in our Rule 76.52(e) is on its face more restrictive than the eligibility of all "participants," as allowed by the Commission in its prior compensation rules (Article 18.6, which was superceded by Article 18.7).¹ This deviation from our established terminology leads us to conclude that the Legislature intended the compensation provided under the terms of the adopted SB 4 to be proffered only to parties (or their representatives) whose participation arises directly from their interests as customers.

1 In Article 18.6, eligibility was extended to "participants in proceedings," with "participant" defined as "any individual, group of individuals, organization, association, partnership, or corporation taking part or intending to take part in a Commission proceeding," except that the term did not include governmental entities. (Rule 76.22(d).)

As a result, we will refine our interpretation in D.86-05-007 of the phrase "participant representing consumers, customers, or subscribers" found in § 1802(e) and Rule 76.52(e), so that such participants must be actual customers of a utility whose self-interests in the proceeding arise primarily from their role as customers of the utility, in addition to the already-established requirement that they represent the broader interests of at least some other consumers, customers, or subscribers.

Based on this interpretation, we conclude that TEC does not represent customers and thus is not a "customer" as defined by Rule 76.52(e). As a result, TEC does not meet the threshold test in Rule 76.51 to establish applicability of Article 18.7 and its request for a finding of eligibility for compensation under Article 18.7 should be denied. We need not address Pacific's arguments that TEC has not met other requirements of Article 18.7.

As discussed in prior compensation decisions (for example, D.86-01-032), the existence of the intervenor funding rules in Article 18.7 does not preclude us from awarding fees under other terms in appropriate instances in quasi-judicial proceedings. There are three recognized equitable theories which may be applied to support such awards of attorney fees: the "common fund" theory, the "substantial benefit" theory, and the "private attorney general" theory. TEC has not argued that this is a quasi-judicial proceeding or that it may be eligible for compensation under any of these theories. We believe that consideration of these alternative avenues of compensation would be best left until after a Commission decision has been rendered on the substance of this proceeding. TEC may renew its request for compensation at that time if it desires to do so.

Findings of Fact

1. The Commission's regulatory oversight of inside wiring services and many of the parties' proposals in this proceeding would influence inside wiring rates.

2. The inside wiring expenses and revenues to be adopted as reasonable in this proceeding will have a direct impact on tariffed rates for other services.

3. TEC is an independent company providing inside wiring services in competition with Pacific.

4. TEC's self-interest and participation in this proceeding arise due to its existence as a competitor rather than a customer of Pacific.

5. TEC must be a "customer" within the meaning of Rule 76.52(e) to be eligible for compensation under the terms of Article 18.7.

6. TEC asserts that it is a "participant representing consumers, customers, or subscribers" and thus a "customer" within the meaning of Rule 76.52(e).

7. In D.86-05-007, the Commission interpreted "participant representing consumers, customers, or subscribers" as being limited to actual customers of the utility who represent the broader interests of at least some other consumers, customers, or subscribers.

8. TEC contends that the overlap between its business interests and the interests of all ratepayers is sufficient for it to meet the test in D.86-05-007.

9. If coincidence with customers' interests were adequate to establish that a participant in a proceeding "represents" customers, the overall determination in Rule 76.52(e) that the party is a "customer" would be unnecessary.

Conclusions of Law

1. "Participant representing consumers, customers, or subscribers" in Rule 76.52(e) should be interpreted to apply only to actual customers of a utility whose self-interests in a proceeding arise primarily from their role as customers of the utility and who represent the broader interests of at least some other consumers, customers, or subscribers.

2. TEC is not a "customer" as defined by Rule 76.52(e).

3. TEC is not eligible for compensation under Article 18.7.

INTERIM ORDER

IT IS ORDERED that the request of The Extension Connection, Inc. for a finding of eligibility for compensation under Article 18.7 of the Commission's Rules of Practice and Procedure is denied.


This order is effective today.

Dated DEC 9 1988, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.



Victor Weisner, Executive Director

APPENDIX A

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List of Appearances

Defendant in C.86-11-028, Applicant in A.85-01-034, and Respondent in OII 84: Bonnie Packer, Attorney at Law, for Pacific Bell.

Respondent in OII 84 and Interested Party in A.85-01-034: Kenneth K. Okel and Kathleen S. Blunt, Attorneys at Law, for General Telephone Company of California.

Complainant in C.86-11-028 and Interested Party in A.85-01-034: Graham & James, by Boris H. Lakusta, David J. Marchant, and Martin A. Mattes, Attorneys at Law, for The Extension Connection, Inc.

Respondents in OII 84: Pelavin, Norberg, Harlick & Beck, by Alvin H. Pelavin, Jeffrey F. Beck, Alan M. Weiss, and Lizbeth Morris, Attorneys at Law, for Citizens Utilities Company of California, Calaveras Telephone Company, California-Oregon Telephone Company, Capay Valley Telephone System, Inc., Ducor Telephone Company, Evans Telephone Company, Foresthill Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Company, The Ponderosa Telephone Company, Sierra Telephone Company, The Siskiyou Telephone Company, The Volcano Telephone Company, Smaller Independent Telephone Companies, CP National Corporation, and Tuolumne Telephone Company; Orrick, Herrington & Sutcliffe, by Robert J. Gloistein, Attorney at Law, for Continental Telephone Company of California; Cooper, White & Cooper, by E. Garth Black, Attorney at Law, for Roseville Telephone Company; and Rick Campbell, Attorney at Law, for CP National and Tuolumne Telephone Company.

Interested Parties: Chickering & Gregory, by C. Hayden Ames, Attorney at Law; Jon F. Elliott and Mark Barmore, Attorneys at Law, and Sylvia Siegel, for Toward Utility Rate Normalization (TURN); Graham & James, by Boris H. Lakusta, David J. Marchant, and Martin A. Mattes, Attorneys at Law, for California Hotel and Motel Association; Armour, St. John, Wilcox, Goodin & Schlotz, by Thomas J. MacBride, Jr., Attorney at Law, for Telephone Answering Services of California, Inc.; Shea & Gould, by Alan Pepper, Attorney at Law, for Western Burglar & Fire Alarm Association; August A. Sairanen, Jr., for State of California, Department of General Services, Telecommunication Division; John Witt, City Attorney, by William Shaffran, Deputy City Attorney,

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for the City of San Diego; Louise Renne, City Attorney, by Leonard Snaider, Deputy City Attorney, for City and County of San Francisco; R. S. Wyde, for Security Pacific Bank; Dennis E. Love, for The Extension Connection; Major Rebecca S. Weeks and Captain Robert K. Lacy, Attorneys at Law, for the Department of Defense and the other Federal Executive Agencies; Ted Willie, for API Alarm Systems; and Shelley Ilene Rosenfield, Attorney at Law, for the City of Los Angeles.

Division of Ratepayer Advocates: Carol L. Matchett, Attorney at Law, Thomas Lew, and Emily T. Marks.

(END OF APPENDIX A)

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, for authority to increase intrastate rates and charges applicable to telephone services furnished within the State of California.

Application 85-01-034 (Filed January 22, 1985; amended June 17, 1985 and May 19, 1986)

Application of General Telephone Company of California (U 1002 C), a California corporation, for authority to increase and/or restructure certain intrastate rates and charges for telephone services.

Application 87-01-002 (Filed January 5, 1987)

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers.

I.87-11-033 (Filed November 25, 1987)

And Related Matters.

I.85-03-078 (Filed March 20, 1985)

OII 84 (Filed December 2, 1980)

C.86-11-028 (Filed November 17, 1986)

I.87-02-025 (Filed February 11, 1987)

C.87-07-024 (Filed July 16, 1987)

(See Appendix A for appearances.)