

Decision 89 07 063 JUL 19 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Toward Utility Rate
Normalization,

Complainant,

vs.

Pacific Bell Telephone
Corporation, General Telephone
of California, US Sprint
Communications Company,

Defendants.

ORIGINAL

Case 88-04-058
(Filed April 22, 1988)

OPINION

This order grants, in part, Toward Utility Rate Normalization's (TURN) request for compensation in this complaint case. On April 10, 1989, TURN filed a request for compensation for its participation in this complaint case against General Telephone of California (GTEC), Pacific Bell Telephone Corporation (PacBell), and US Sprint Communications Company (US Sprint) for backbilling interLATA traffic.

TURN requests compensation in this case from the Advocates' Trust Fund (Trust). Because the Declaration of Trust does not provide procedural guidance, TURN followed the same procedural rules found in Article 18.7 of the Commission's Rules of Practice and Procedure.

PacBell filed, on May 10, 1989, a response to TURN's request, protesting the award on grounds that TURN did not make a substantial contribution to the outcome of the case. GTEC also filed comments on May 10, protesting the request.

I. History of the Proceeding

TURN filed this complaint against US Sprint and PacBell on April 22, 1988, challenging Pacific's backbilling of US Sprint's traffic. It amended its complaint on May 12, 1988, to add GTEC as a respondent.

Shortly after TURN filed its complaint, PacBell filed an advice letter to modify its tariffs. Advice Letters 15388 and 15388A eliminated prospectively the backbilling provisions to which TURN's complaint objected. Specifically, the advice letters limited backbilling of most types of interexchange customer calls to 90 days prior to the original billing date. In Resolution T-12091, we approved the advice letters.

Subsequently, the Commission held hearings in this case on the issue of whether customers should be relieved from backbilled amounts retroactively. Decision (D.) 89-03-011 resolved the complaint and found in favor of defendants.

II. Issues

A. Is TURN's Request for Compensation from the Trust Appropriate in this Case and Should It Use Procedures Outlined in Article 18.7?

The Commission created the Trust on November 11, 1982. By its terms, the Trust may be used for attorney fees in "quasi-judicial" complaint cases as defined by CLAM v PUC. The Trust is designed to provide compensation where it might not otherwise be available.

Most compensation requests brought before us are filed under Rule 18.7, rather than from the Fund. Rule 18.7 permits compensation for participation in proceedings which affect rates. This case affected billing practices and not rates. Additionally,

this proceeding is quasi-judicial. TURN therefore has appropriately requested compensation under the Trust. Absent procedural guidance under the terms of the Trust instrument, TURN's application of Rule 18.7 procedures is reasonable and prudent.

The following addresses whether TURN is eligible for compensation, whether it made a substantial contribution to the outcome of the case, and the appropriate level of the award.

B. Is TURN Eligible for Compensation?

Rule 76.54(a) requires that a Request for Finding of Eligibility be filed within 30 days of the first prehearing conference or within 45 days after the close of the evidentiary record. TURN filed such a request on October 11, 1988, within 45 days of the date of the last filing in the proceeding.

Under our rules, TURN must meet four requirements to be eligible for compensation. First, it must show that participation would cause significant financial hardship. We found, in D.88-07-035, that TURN had met its burden of showing financial hardship for participation in proceedings during 1988.

Second, TURN must present a statement of issues it intends to raise in the hearing. TURN's October 11 filing refers to its opening brief for a list of issues, which include discontinuance of backbilling.

Third, TURN must provide an estimate of the compensation it expects to seek. TURN's October 11 filing estimated a request of approximately \$33,000 for its work in this case. At the time of its filing, that amount included work on that portion of the complaint which addressed reparations in addition to prospective tariff changes.

Finally, TURN must estimate its total budget. TURN estimated a \$33,000 budget for this case.

Both PacBell and US Sprint replied to TURN's request for finding of eligibility in this case. Both expressed confusion

about the purpose of the filing. US Sprint argued that TURN had not addressed the criteria under the terms of the Trust which an intervenor must satisfy in order to receive compensation. PacBell commented that if refunds were to be ordered in this case, the appropriate source of payment for any award to TURN would be the refund pool.

TURN's reply to these comments correctly points out that its filing was made pursuant to Article 18.7 of our rules in the absence of procedural guidelines under the Trust. TURN is also correct that its October 11 filing is not a request for compensation but a request for a finding of eligibility. Therefore, that filing did not need to demonstrate fulfillment of the criteria under which Trust awards are made.

D.89-03-011 found that TURN's request for a finding of eligibility required no Commission action since TURN did not prevail on the issues which were the subject of that order. TURN now seeks compensation for its participation in the resolution of issues which it raised in its initial complaint but which were addressed by way of advice letters prior to completion of hearings in this complaint. Accordingly, the language in D.89-03-011 does not apply to this specific filing.

We will grant TURN's request for finding of eligibility since it has met the requirements of Article 18.7.

We also address one further requirement of the Trust. The Trust instrument states that no award may be made where a party's own economic interest is sufficient to motivate participation. TURN is not seeking reparations for itself, but for its constituency which is comprised of residential and small business customers.

C. Did TURN Make a Substantial Contribution?

Fees paid out of the Trust may be awarded where a private party has "made a direct, primary, and substantial contribution to

the result of the case," under the Trust. An award is based on three factors, each discussed in turn below.

1. The Strength or Societal Importance of the Public Policy Vindicated by the Litigation

TURN's request states the Commission's adoption of TURN's proposed backbilling tariff changes, in Rulemaking (R.) 85-09-008 and in Resolution T-12091, attest to the societal importance of the backbilling issue. Neither GTEC's nor PacBell's response challenge the importance of the issue.

We agree with TURN that the issue of backbilling is one which we considered in R.85-09-008, and resolved in part by T-12091, because of its importance to utility customers.

2. The Number of People Standing to Benefit from the Decision

TURN states that thousands of people were likely to have benefited from the resolution of the backbilling issue. TURN states that it and the Commission's Consumer Affairs Branch received about a thousand complaints related to backbilling prior to the issuance of Resolution T-12091, and believes these customers represent only a small portion of those affected. GTEC comments that TURN produced no evidence in hearings to support its position that hundreds of complaints had been received.

Although TURN did not provide evidence in hearings regarding consumer complaints, we do not doubt that the resolution of the backbilling issues affected a large number of customers.

3. The Necessity for Private Enforcement and the Magnitude of the Resultant Burden on the Complainant

TURN believes that unfair backbilling practices would not have ceased without its intervention. TURN states that PacBell and GTEC changed their tariffs in direct response to TURN's complaint and discussions between TURN and the utilities. Its request for

compensation includes letters to the Executive Director describing the chronology of events leading to the tariff changes.

PacBell does not agree that TURN has shown that it made a substantial contribution to the outcome of the case. First, PacBell argues that the issue of backbilling was resolved in an advice letter filing, not this complaint case, pointing out that the Commission denied any relief requested by TURN in Case (C.) 88-04-058. PacBell also argues that TURN's complaint could not have had any influence in PacBell's decision to file its advice letter. PacBell argues that the record in C.88-04-058 shows that PacBell had begun drafting the advice letter in January 1988, three months before TURN's complaint was filed.

Finally, PacBell states more generally that mere assertions that the timing of the advice letter is "just too curious to be a simple coincidence" does not meet the Trust's standard that a party demonstrate "clearly and convincingly" that it has made a "direct, primary and substantial showing" in the case.

GTEC's response points out that if TURN was concerned with the issue of backbilling, "it should have intervened in the backbilling case at the outset." GTEC adds that TURN's complaint was dismissed in D.89-03-011.

First, we will address PacBell's contention, and GTEC's implicit concern, that TURN may not receive compensation because the matter in this case was resolved by advice letter. We wish to encourage the efficient resolution of matters before us. If we were to deny TURN's request on the basis that the issue did not go to hearing, we may simultaneously promote the use of a costly hearing process when other procedural avenues are more suitable. Neither do we wish to provide the utilities with an incentive to preempt intervenor awards by filing advice letters when they anticipate a Commission ruling in favor of intervenors. If the advice letters were filed in response to TURN's complaint, it is

reasonable to consider TURN's role in the development of the tariff change. For these reasons, we will not dismiss this request on the basis that the issue was resolved by way of advice letter.

Notwithstanding this, favorable resolution of the backbilling issues could have ultimately occurred without TURN's intervention in this case. Prior to the issuance of Resolution T-12091, we had identified the backbilling issue in R.85-09-008. In fact, as TURN points out, D.86-12-025 actually imposed certain backbilling limitations in 1987. The order was stayed pending further consideration. In the interim, TURN filed its complaint and the issue was resolved by advice letter filing.

The record in this case shows that PacBell had begun drafting its advice letter three months before TURN filed its complaint. PacBell may have filed its advice letter absent the filing of TURN's complaint. On the other hand, PacBell did not file its advice letter during the three month period before TURN's complaint was filed, and, according to TURN affidavits, stated no intention of doing so.

We agree with TURN that the timing of the advice letters is unlikely to have been coincidental. We believe it more likely that PacBell and GTEC filed their advice letters anticipating the effect of TURN's complaint and seeking to mitigate the controversy that TURN's complaint identified. For these reasons, we believe TURN's intervention did influence, to some extent, the ultimate resolution of the subject backbilling practices.

Although we find TURN's intervention affected the resolution of the backbilling issue, we will reduce TURN's requested compensation for the primary reason that the issue had already been identified in R.85-09-008 and addressed in D.86-12-025. In addition, the issues were not as complex as those in many of our proceedings. Specifically, the issue was simply whether utility tariffs should limit how far back utilities should

be able to bill for interexchange company services. Accordingly, we will award TURN 33% of its requested compensation.

D. Are TURN's Cost Estimates Reasonable?

The Commission is required by the Trust instrument to determine a reasonable level of fees according to the time spent, expenses, level of skill, and comparable fees paid to others practicing public utility law.

TURN requests a compensation award in the amount of \$8,495.05 for work accomplished up to, but not after, the time it filed its amended complaint. Specifically, TURN requests compensation for 67 hours of attorney fees at \$125.00 an hour plus \$120.05 for postage, copying, and telephone expenses.

TURN's attorney, Mark Barmore, has previously been granted an hourly fee of \$90.00 by the Commission. TURN believes the higher wage is commensurate with fee awards granted by the Commission for attorneys with comparable experience. We agree that Mr. Barmore's fees are reasonable. Accordingly, we will grant TURN \$2,803.37 in intervenor fees from the Trust.

Findings of Fact

1. TURN has filed a request for compensation from the Trust for its participation in this proceeding.
2. TURN has applied the procedural guidelines in Article 18.7 since the Trust instrument does not provide such guidelines.
3. TURN filed, on October 11, 1988, a request for finding of eligibility in this proceeding.
4. The purpose of the Trust is to provide compensation in quasi-judicial proceedings and in cases where funding would not otherwise be available.
5. TURN did not seek relief for itself in this proceeding, but for its ratepayer constituents.

6. D.86-12-025 addressed the issue of backbilling for which TURN seeks compensation. That order was stayed pending further review.

7. PacBell filed Advice Letters 15388, 15388A, and 15388B requesting tariff changes which were consistent with certain of TURN's proposals in this complaint case. Its advice letters were filed shortly after TURN filed this complaint, and the Commission approved those tariff changes in Resolution T-12091.

8. The record in this proceeding shows that PacBell began drafting subject advice letters in January 1988.

9. Even if PacBell began drafting an advice letter in January 1989, it is uncertain whether, absent TURN's complaint filing, PacBell would have filed the advice letter or that it would have proposed the backbilling limitations ultimately adopted by the Commission.

10. The issue in this case was less complex than those in many Commission proceedings.

11. The backbilling practices at issue are likely to have affected thousands of utility ratepayers.

12. TURN requests compensation in this case for expenses incurred up to the time it filed its amended complaint, but not for expenses incurred in litigating the issues on which it did not prevail.

Conclusions of Law

1. This proceeding is quasi-judicial in nature.

2. Compensation available under Article 18.7 is not available to TURN in this proceeding because the outcome in this proceeding did not affect utility rates.

3. D.88-07-035 found that TURN had demonstrated significant financial hardship, a finding which would carry-over to its participation in proceedings throughout 1988.

4. TURN's proposal to use procedural guidelines provided for in Article 18.7 is reasonable.

5. TURN's October 11, 1988, filing fulfilled the requirements of Article 18.7 for a finding of eligibility. TURN's request for a finding of eligibility should therefore be granted.

6. D.89-03-011 found in favor of defendants on the issues in this complaint case which were not resolved by Resolution T-12091.

7. It is reasonable to assume that TURN's complaint filing influenced the filing of the PacBell and GTEC advice letters.

8. TURN's requested hourly attorney fee is reasonable.

9. TURN's request for compensation in this proceeding should be discounted by 67% because the Commission identified the backbilling issue prior to the filing of TURN's complaint, and because TURN's burden in this case was generally less onerous than it would have been in a more complex proceeding.

ORDER

IT IS ORDERED that:

1. Toward Utility Rate Normalization's (TURN) request for compensation from the Advocates' Trust Fund is granted in part.

2. Trustee, Sumitomo Bank, shall pay to TURN the sum of \$2,803.37 plus interest at the three-month commercial paper rate commencing on June 19, 1989 and continuing until payment is made.

3. The Executive Director shall serve Sumitomo Bank and Trust Company a copy of this decision by certified mail. ✓

This order is effective today.

Dated July 19, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Patricia M. Eckert,
being necessarily absent, did
not participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABO'S
COMMISSIONERS TODAY.

Victor Weiszer
Victor Weiszer, Executive Director

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2. Trustee, Pacific Union Bank and Trust Company, shall pay to TURN the sum of \$2,803.37 plus interest at the three-month commercial paper rate commencing on June 19, 1989 and continuing until payment is made.

This order is effective today.

Dated _____, at San Francisco, California.

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3. The Executive Director shall serve Sumitomo Bank and Trust Company a copy of this decision by way of certified mail.

This order is effective today.

Dated JUL 19 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Patrick M. Eckert,
being necessarily absent, did
not participate.