

FEB 22 1991

Decision 91-02-038 February 21, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

**ORIGINAL**

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

And Related Matter.

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

OPINION

On June 26, 1990, the "Request for Finding Eligibility and Request for Compensation" (Request) was filed by Toward Utility Rate Normalization (TURN). TURN sought a finding of eligibility for compensation and an award of \$5,206 for its alleged substantial contribution to Decision (D.) 90-06-016. By that decision, the Commission approved the proposal of GTE California Incorporated (GTEC) and other local exchange carriers to revise the exchange area boundaries and offer Zone Usage Measurement (ZUM) service in certain exchanges in southern California.

In D.90-06-016, the Commission also found that GTEC had improperly regraded customers who had residential exchange service under Universal Lifeline Telephone Service (ULTS) rates. 47,379 ULTS customers who failed to recertify their continued eligibility for the ULTS rate were reclassified from flat rate to measured rate service in violation of GTEC's tariff. The Commission required GTEC to notify each regraded customer of the customer's option to convert to flat rate service at no charge, to refund to the customer amounts which had been paid under measured service in excess of what the customer would have paid under flat rate service, and to credit each such customer with \$9.75, the cost of

one month's flat rate basic exchange service, which could be used to offset the service connection charge required of customers who wished to switch back to ULTS rates.

TURN is seeking compensation under Article 18.7, Intervenor's Fees and Expenses, Rule 76.51 et seq., of the Commission's Rules of Practice and Procedure (Rules). TURN first asks the Commission to establish a new deadline for its Request for Finding of Eligibility because it is uncertain when the two events specified in Rule 76.54 as the alternate deadlines for such requests will occur. Secondly, TURN claims that it made its annual showing of financial hardship for 1990 in another proceeding. TURN would satisfy the other requirements for a finding of eligibility, that is, a statement of issues to be raised, an estimate of compensation to be sought, and a budget, with reference to its Request for Compensation, which is the second part of its filing.

TURN claims that it made a substantial contribution to D.90-06-016; it had intervened in this phase of GTEC's rate case for the sole purpose of addressing the issue of GTEC's unauthorized regrade of ULTS customers to measured service; it had cross-examined the GTEC witness on this issue and argued the matter in its brief; and it had recommended a penalty for GTEC's conduct which was adopted, in part, by the Commission. An itemization of costs plus a detailed breakdown of its attorney's time was provided.

On July 11, 1990, the "Response of GTE California Incorporated to the request for Finding of Eligibility and Request for Compensation of Toward Utility Rate Normalization" was filed. GTEC claims that the Request is untimely under Rule 76.51, TURN's participation did not amount to "substantial contribution", and the requested hourly rate for attorney fees is excessive. According to GTEC, it was the Division of Ratepayer Advocates (DRA) and GTEC who introduced the issue of GTEC's regrade of ULTS customers into the proceeding. According to GTEC, after submission of the proceeding,

the utility and DRA proposed that compensation be paid for the incorrect regrading and that a plan be established for refunds. In contrast, TURN did not advance its penalty proposal in the evidentiary hearings but introduced it for the first time in its current brief. GTEC concludes that TURN is not entitled to any compensation.

On July 27, 1990, the "Reply of TURN Regarding Compensation" was filed. TURN characterizes GTEC's response as vexatious litigation and calls upon the Commission to reprimand the utility for excessive litigation over tiny amounts of intervenor compensation. TURN reiterates that it seeks a deadline for the filing of its eligibility request for administrative convenience now, rather than at the conclusion of the Alternative Regulatory Framework proceeding (I.87-11-033), so that the Commission can act on TURN's compensation request in a timely manner, before the record of the proceeding becomes stale. TURN argues that GTEC has not suggested any prejudice that could result from the granting of TURN's motion. As to TURN's contribution, the penalty adopted in D.90-06-016 was TURN's idea, and the penalty was separate and distinct from the refunds that GTEC had offered. Finally, TURN seeks compensation for the time expended by its senior attorney in responding to GTEC's opposition to its request for compensation.

#### Discussion

##### Timeliness of Filing

Rule 76.54 requires a customer seeking compensation to file a Request for Finding of Eligibility for Compensation within 30 days of the first prehearing conference or within 45 days after the close of the evidentiary record. For good cause shown, the ALJ may establish a different deadline for the filing of the request upon motion of any party.

The issue of timeliness turns on how the Commission chooses to define the evidentiary record in this proceeding. The issue of expanding ZUM service in GTEC's service territory was

subjected to further proceedings in the GTEC general rate case by a decision in the Pacific Bell (Pacific) general rate case. In D.88-08-024, the Commission consolidated the GTEC and Pacific general rate cases with the investigation into Alternative Regulatory Frameworks for Local Exchange Carriers (I.87-11-033), "to facilitate the supplemental rate designs and development of the surcredit/surcharge mechanisms." There, the Commission also discussed the interdependence of the rate designs for Pacific Bell (Pacific) and GTEC, the potential deregulation of certain services, pricing flexibility, and supplemental rate design. Subsequently, it became apparent that coordination between the implementation of GTEC's ZUM plan and the expansion of local calling areas pursuant to the Phase II decision in I.87-11-033 was required.

The foregoing illustrates the ongoing nature of the consolidated proceeding. Moreover, the Commission gave no notice that the evidentiary record would be considered "closed" during any "phase" of the consolidated proceeding. Under these circumstances, we find that the evidentiary record has not closed for purposes of triggering the deadline for filing a Request for Finding of Eligibility. TURN's request is not untimely.

TURN has asked the Commission to establish July 9, 1990 as its deadline for filing its Request for Finding of Eligibility. That date coincides with the current July 9 deadline for TURN's Request for Compensation. GTEC has not alleged that any harm would result from granting TURN's request.

In the case of a consolidated proceeding, an intervenor could postpone filing its request for finding of eligibility until the close of the evidentiary record for the entire proceeding. However, we would discourage this practice because we recognize that such a delay would require the evaluation of eligibility after memories have faded and the record has become stale. The better practice would be for intervenors to request a finding of eligibility no later than the time established by Rule 76.56 for

filing a request for compensation. Since Rule 76.56 requires that compensation requests to be filed no later than 30 days after the issuance of a final order or decision, application of the 30-day deadline to the request for finding of eligibility in consolidated proceedings would help ensure a reasonable basis for determining the eligibility of an intervenor for compensation.

On this basis, we conclude that TURN's July 9, 1990 Request for Finding of Eligibility is timely.

Eligibility for Compensation

The Commission determined in D.90-09-024 that TURN would incur "significant financial hardship" as defined by Rule 76.52 (f)(2) for the year 1990. Based on this decision, we find that Rule 76.54 (1) has been satisfied.

The other requirements of Rule 76.54, Request for Finding of Eligibility, were satisfied by the contents of TURN's Request for Compensation with which the Request for Finding of Eligibility was consolidated.

Request for Compensation

Rule 76.56 provides that a customer who has been found to be eligible for an award of compensation pursuant to Rule 76.55 may file a request for compensation within 30 days of issuance of a final order or decision by the Commission. The request must include a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding. Parties may respond to the request; the customer may reply to any responses filed.

D.90-06-016 was issued June 8, 1990. The Request for Compensation was timely filed. TURN claims that it substantially contributed to the Commission's decision to grant each of the approximately 47,000 customers a \$9.75 credit. Although during the evidentiary hearing GTEC had admitted the fact of the regrade and was working with the DRA to remedy the situation, GTEC and DRA had proposed only that GTEC notify the regraded customers that they had

were improperly switched from flat rate to measured rate service, and that GTEC offer them an opportunity to recertify as lifeline customers or return to regular flat rate service at no charge. TURN was the only party to recommend the allocation of a credit to each regraded customer. TURN proposed the credit as a penalty to GTEC, based on what TURN perceived as a long-standing strategy to convert residential customers to measured rate service.

We found, "GTEC's violation of its own tariff in favor of GTEC's well-established goal of residential measured service disregards this Commission's authority". We adopted a penalty, as suggested by TURN, but in a lesser amount than proposed. Under these facts, we find that TURN has made a substantial contribution to D.90-06-016.

TURN seeks compensation for attorney fees in the amount of \$4,970, copying expenses of \$144, and postage costs of \$92. TURN provided a daily listing of the tasks performed by the attorney in connection with this proceeding that was derived from contemporaneous time records. The hours claimed are reasonable.

TURN seeks an hourly rate of \$140 for its attorney, Mark Barmore. TURN was compensated for services rendered by Mr. Barmore during 1990 at the rate of \$140 per hour by D.90-12-026. It is reasonable to apply the same rate of compensation in this case, since Mr. Barmore's contribution to the proceeding occurred in 1990.

The costs of copying and postage and were reasonably incurred to advance TURN's position. TURN should receive compensation for those costs as well.

Finally, we consider the time expended by TURN's senior attorney in reply to GTEC's protest against TURN's request for compensation. TURN suggests that GTEC should pay TURN for three hours of attorney time at the rate normally received by its senior attorney. In keeping with our practice of compensating intervenors for the time spent in prosecuting their requests for compensation,

we require GTEC to pay TURN for three hours of attorney time. Compensation should be calculated at Mr. Florio's hourly rate of \$175. TURN should be awarded an additional \$525. We decline to enhance this amount to deter vexatious litigation because we believe that a colorable claim underlay GTEC's arguments against TURN's request for compensation.

#### Conclusion

TURN should be awarded a total of \$5,731 to compensate it for its substantial contribution to the restitution of improperly graded ULTS customers ordered in D.90-06-016. In keeping with our prior decisions, interest calculated at the 3-month U.S. Treasury Bill rate from the 75th day after TURN's filing of its Request for Compensation should be added to the award. Since the Request was filed on June 26, 1990, interest should be calculated on the unpaid portion of \$5,731 from September 10, 1990 up to the date on which TURN is paid.

#### Findings of Fact

1. The Commission determined that intervention in a Commission proceeding during 1990 would impose on TURN "significant financial hardship" as defined by Rule 76.52(f)(2) in D.90-09-024.
2. TURN represents the interests of residential customers of GTEC, particularly those opposed to the conversion of residential basic exchange service to measured service.
3. TURN's request for finding of eligibility was filed before the close of the evidentiary record of the consolidated proceeding for which TURN claims a substantial contribution to the Commission's decision.
4. TURN was the only party to recommend that GTEC issue a one-time refund to each of the approximately 47,000 customers affected by GTEC's unlawful regrade. TURN proposed a refund equivalent to a one-month charge for flat rate service for every year since the customer was regraded and argued that the cost of the customer notification and conversion program proposed by DRA

and GTEC be considered a "2" factor in GTEC's next price cap mechanism filing in October 1990.

5. In D.90-06-016, the Commission adopted a one-time refund to the regraded customers equal to one month's charge for flat rate service as a penalty to GTEC. The Commission also ordered that the cost of the refund, GTEC's customer notification program, and the cost of converting customers back to flat rate service be excluded from GTEC's future annual Price Cap mechanism advice letter filings and its future annual Shareable Earnings Advice Letter filings.

6. TURN's attorney, Mr. Barmore, reasonably expended 35.5 hours to advance TURN's position in this proceeding.

7. The work performed by Barmore on behalf of TURN is compensable at the rate of \$140 per hour.

8. The claimed copying and postage expenses totalling \$236.00 were reasonably incurred.

9. TURN's attorney, Mr. Florio, reasonably expended 3 hours to reply to GTEC's opposition to TURN's request for compensation. The reasonable rate of compensation for Mr. Florio is \$175 per hour.

10. The request for compensation was filed on June 26, 1990. The seventy-fifth day after the filing of the request was September 9, 1990, a Saturday. The decision awarding compensation should have issued no later than September 11, 1990 pursuant to Rule 76.58.

11. This order should be effective today to prevent the unnecessary accrual of interest expense.

Conclusions of Law

1. TURN's request for finding of eligibility for compensation was filed in a timely manner because the proceeding in which TURN participated has been consolidated with other ongoing proceedings for which the evidentiary record is still being compiled.

2. In a case where an intervenor claims a contribution to a decision in a consolidated proceeding, the request for finding of eligibility should be filed either within 30 days of the first prehearing conference, as provided in Rule 76.54, or no later than the deadline for filing a request for compensation pursuant to Rule 76.56.

3. TURN is eligible to receive compensation for its participation in the ZUM phase of I.87-02-025 et seq.

4. TURN made a substantial contribution to the Commission's decision to order GTEC to credit each of the improperly regraded ULTS customers with the cost of one month's flat rate basic exchange service.

5. TURN's request for compensation should be granted.

6. TURN should be awarded interest on the unpaid amount of compensation ordered herein. The interest should be calculated at the 3-month Treasury Bill rate in existence from September 11, 1990 until the compensation has been paid.

ORDER

IT IS ORDERED that:

1. GTE California Incorporated (GTEC) shall pay Toward Utility Rate Normalization (TURN) compensation in the amount of \$5,731 consisting of the amount claimed for TURN's contribution to D.90-06-016 (\$5,206) and compensation for TURN's reply to the opposition of GTEC (\$525).

2. GTEC shall pay TURN interest on the unpaid balance of TURN's compensation award, \$5,731, calculated at the 3-month Treasury Bill rate in existence from September 11, 1990 until the award has been fully paid.

This order is effective today.

Dated February 21, 1991, at San Francisco, California.

PATRICIA M. ECKERT  
President

G. MITCHELL WILK

JOHN B. OHANIAN

Commissioners

I abstain.

DANIEL W. FESSLER  
Commissioner

I abstain.

NORMAN D. SHUMWAY  
Commissioner

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

*Neal J. Shulman*  
NEAL J. SHULMAN, Executive Director