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Decision 91-08-006 August 7, 1991

AUG 8 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own
motion to determine the feasibility
of implementing New Funding Sources
and Program Reductions in the Deaf
and Disabled Program Pursuant to
Section 2881 of the Public Utilities
Code.

ORIGINAL

I.87-11-031
(Filed November 25, 1987)

(See D.89-05-060 for appearances.)

OPINION

On January 28, 1991 the California Association of the Deaf (CAD) filed a request for a finding of eligibility for compensation. CAD seeks this finding of eligibility based on its participation in the Commission's approval of the 1991 Deaf and Disabled Telecommunications program budget. No responses to CAD's request were received. We grant CAD's request.

CAD submits its request in compliance with Article 18.7 of our Rules of Practice and Procedure (Rules 76.51 through 76.62). We will discuss in turn the elements of eligibility.

A. Purpose

Rule 76.51 contains the purpose:

"The purpose of this article is 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."

This proceeding most recently involved the Commission's approval of the 1991 Deaf and Disabled Telecommunications Program (DDTP) budget. The budget impacts the level of surcharge assessed

telephone subscribers under Public Utilities (PU) Code § 2881(d). This proceeding may modify a rate, or establish a fact or rule that may influence a rate, and therefore is consistent with the purpose of this article and falls within the definition of applicable proceedings.

B. Party and Customer

CAD is an interested party in a proceeding for the purpose of modifying a rate, and, therefore, is a party under Rule 76.52(d). CAD is a customer under Rule 76.52(e) because it represents consumers of a telephone corporation subject to the jurisdiction of the Commission.

C. Time for Filing

Rule 76.54 requires that any filing of a request for eligibility be filed within 30 days of the first prehearing conference or within 45 days of the close of the evidentiary hearing record. There was no prehearing conference in this phase of the proceeding. CAD filed its request within 45 days of December 12, 1990, when the last set of reply comments were filed with the Commission. Even though the budget approval did not require evidentiary hearings, we treat the filing of the reply comments as the close of the evidentiary hearing record in this phase of this proceeding since the reply comments were the last opportunity for parties to influence the record in this matter. CAD's request was filed timely.

D. Items in Request

Rule 76.54(a) requires that a request for eligibility include four items:

- "(1) A showing by the customer that participation in the hearing or proceeding would pose a significant financial hardship. A summary of the finances of the customer shall distinguish between grant funds committed to specific projects and discretionary funds...;

- "(2) A statement of issues that the customer intends to raise in the hearing or proceeding;
- "(3) An estimate of the compensation that will be sought;
- "(4) A budget for the customer's presentation."

The adequacy of CAD's filing on each of these items is addressed in turn.

1. Significant Financial Hardship

Rules 76.52(f)(1) and (2) define "significant financial hardship" to mean both:

- "(1) That, in the judgment of the Commission, the customer has or represents an interest not otherwise adequately represented, representation of which is necessary for a fair determination of the proceeding; and,
- "(2) Either that the customer cannot afford to pay the costs of effective participation, including advocate's fees, expert witness fees, and other reasonable costs of participation and the cost of obtaining judicial review, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding."

a. Interest Not Otherwise Adequately Represented

The first element of a demonstration of significant financial hardship is a showing that:

"...the customer has or represents an interest not otherwise adequately represented, representation of which is necessary for a fair determination of the proceeding."

CAD avers that it is a nonprofit membership organization made up primarily of deaf individuals. CAD represents the interests of the deaf beneficiaries of the DDTP, according to

CAD. Since the budget directly affects the interests of deaf Californians, CAD argues that the deaf community needs to be represented to ensure a fair determination. Moreover, CAD asserts that, at least with respect to the relay services, the Commission is required to "solicit the advice [and] counsel...of statewide nonprofit consumer organizations of the deaf, during the...implementation of the system." (PU Code § 2881(b).)

CAD argues that the interests of CAD members are not adequately represented for the following reason. The DDTP budget has been developed by telephone utilities and reviewed by the DDTP Administrative Committee (DDTPAC). Two of the Committee members represent deaf interests, but the committee has nine members, including representatives of the utilities and the Commission. The input of the two members representing the deaf interests is therefore diluted and the budget as presented does not necessarily reflect their views.

CAD points out that the other active participants in this proceeding are the Division of Ratepayer Advocates (DRA) and the three major telephone utilities. DRA represents all ratepayers. The interests of all ratepayers are not necessarily consistent with those of the program beneficiaries, a small and much more intensely interested subset of all ratepayers. The utilities provide DDTP equipment and services and are reimbursed by the D.E.A.F. Trust. Utility interests can and do often conflict with those of the program beneficiaries, as well as those of all ratepayers. No party other than CAD represents solely the interests of deaf program beneficiaries, according to CAD. In such circumstances, their interests cannot otherwise be adequately represented, asserts CAD.

We conclude that CAD represents an interest that is not otherwise adequately represented. We find this by analogy to the responses that may be filed by the utilities. The utilities sit on the DDTPAC, but yet may file responses to the comments made on the budget by DRA. To the extent the DDTPAC may file a

response, it is unnecessary for the utilities or CAD to file the same response. To the extent the utilities or CAD has a response not made by DDTPAC, the utilities or CAD may file a response. We find that CAD represents an interest that may overlap with parts of DRA's and DDTPAC's interests, but is an interest not otherwise adequately represented. CAD has met the first prong of the significant financial hardship test.

This request, however, raises a unique conflict-of-interest issue that requires careful analysis. On the one hand, CAD serves as an important member of the DDTPAC. We place great reliance on the efforts of the DDTPAC, and CAD's membership offers it a special opportunity to affect the program from within. In that capacity, CAD has an obligation to offer its best insights and advice for the benefit of the program and, ultimately, the consumers that CAD represents and the public. On the other hand, through the intervenor compensation program CAD can potentially receive substantial payment for contributions that could mirror those it might offer through the DDTPAC. CAD thus faces a conflict between its obligation to offer full participation to the DDTPAC and the possibility of receiving intervenor compensation for efforts outside the DDTPAC.

We hesitate to attempt to resolve this conflict through a simple determination of what CAD's role should be. We could prohibit DDTPAC members from claiming compensation for related outside activities, yet that might lead CAD and others to refuse appointments to oversight committees, or cause us to lose the potential benefit of outside contributions that genuinely do not overlap with oversight committee duties. The other extreme (of prohibiting CAD's membership in the DDTPAC if it wishes to claim compensation) would cost us the benefits that CAD and similar groups can offer directly as participants in the oversight process.

Some conflicts cannot be resolved but must be managed instead. We will seek to manage this one by informing CAD that it may participate both on the DDTPAC and in the intervenor

compensation program where appropriate, but that we will review its intervenor compensation requests with an eye towards CAD's obligations to the DDTPAC. We will expect a full and honest effort from CAD in its DDTPAC role, but will allow CAD to claim compensation for contributions made outside that role to the extent that they do not duplicate CAD's appropriate DDTPAC efforts. For CAD and for other intervenors that face this conflict through service on an oversight committee like DDTPAC, we will require them in their requests for compensation to make a showing that the requested compensable activities do not come at the expense of a full and fair effort as an oversight committee member. We recognize that this standard is not precise, but we believe it will prove workable.

In this way we will balance the interests that conflict. Provided that intervenors who serve on oversight committees fulfill those obligations, we will award compensation for other contributions even if they are made on a related subject. The result may be something of a reduced opportunity for oversight committee members to be paid for their contributions, but that result is fair when weighed against the opportunity to influence programs from the inside and the obligations of oversight committee members to the Commission and the general public.

b. Cannot Afford to Pay or Economic Interest Small

The second prong of the significant hardship test requires CAD to demonstrate either that it cannot afford to pay the costs of effective participation, or that as a group the interest of the individual members is small in comparison to the costs of effective participation. CAD offers that the benefit of telecommunications devices for the deaf (TDD) and relay service use may be worth hundreds of dollars to an individual deaf subscriber, although the impact on the individual of the issues currently at stake is less and not easily quantifiable. The cost of effective participation, according to the CAD, is great since it requires knowledgeable review of the DDTP budget and DRA's comments as well

as the ability to skillfully present comment before the Commission. Knowledgeable review requires not only the ability to analyze budgets, it also requires knowledge of the DDTP itself, including DDTP history and past Commission proceedings involving programs going back to the early 1980's, according to CAD. CAD claims the cost of such review and comment is great in comparison to the economic interest of any one deaf program beneficiary.

We agree with CAD that the economic interest of the individual members of CAD is small in comparison to the costs of effective participation in the proceeding. We note, however, that this is the public's utilities commission. (See D.85-12-084; D.91-03-021.) Any person of whatever ability can come before us and be heard.

c. Summary of Finances

The last part of the first item that must be in a request for eligibility is a summary of the finances of the customer distinguishing between grant funds committed to specific projects and discretionary funds. The rule is not entirely clear. We do not apply this rule to make ineligible a customer simply when the customer has discretionary funds that exceed funds committed to specific projects. Rather, we examine the whole budget to determine whether a financial hardship exists.

CAD estimates the compensation it will seek to be \$2,475. In a supplemental letter CAD indicates that the great bulk of income and expenses are unrestricted and that as of October 27, 1990 CAD had \$5,826 in unrestricted funds. Nonetheless, monthly expenses run ahead of income. At the time CAD prepared comments on the DDTP budget, expenses exceeded revenues by \$2,566. For all of 1990, CAD's unaudited expenses exceeded revenues by \$2,204. We therefore find that CAD's financial showing demonstrates expenses exceed income and discretionary finances are insufficient to fund CAD's proposed budget. CAD therefore meets this criterion.

As we noted above regarding the conflict of interest issue, however, CAD had two opportunities to file comments in this

proceeding. First, its comments might have been included as part of DDTPAC's showing. Second, it filed comments on its own behalf. Therefore, it is important for CAD to clearly distinguish at the time it files its request for compensation any costs (e.g., as part of the \$2,475) incurred as part of serving its role on the DDTPAC, as opposed to its role in filing its own comments, as well as how its requested compensable activities did not come at the expense of a full and fair effort as an oversight committee member. In the future, we will require this as part of an intervenor's request for a finding of eligibility for compensation. In this case, we will allow CAC to include the information in its request for compensation.

d. Conclusion

We conclude that CAD represents an interest that is not otherwise adequately represented and that the economic interest of the individual members is small in comparison to the costs of effective participation. We find that participation would pose a significant financial hardship to CAD since its expenses exceed its income and discretionary finances are insufficient to fund CAD's proposed budget.

2. Statement of Issues

Rule 76.54(a)(2) requires a statement of issues that the party intends to raise. CAD observes that it raised the following issues in its reply comments:

- a. the lack of effective program outreach activities, particularly for Pacific Bell;
- b. the lack of centralized procurement of equipment;
- c. the failure to explore alternative means of equipment distribution as previously ordered; and
- d. the higher program costs and illegality of purchasing telephone services at tariffed rates.

CAD meets this requirement.

3. Estimate of Compensation

Rule 76.54(a)(3) requires CAD to provide an estimate of the compensation it will seek to recover. CAD estimates it will seek \$2,475.

4. Budget

Rule 76.54(a)(4) requires a budget for the customer's presentation. CAD submits the following budget:

Advocate Fees	
12 hours at \$200 per hour.	\$2,400
Copying costs	30
Postage	45
TOTAL	\$2,475

E. Common Legal Representative

Rule 76.54(b) allows other parties to comment on the request, including a discussion of whether a common legal representative under Rule 76.59 is appropriate. Under Rule 76.55, our decision on the request may designate a common legal representative.

No party commented on this issue. Therefore, we find no current need to designate a common legal representative in this proceeding.

F. Conclusion

We find that the budget approval process falls within the definition of applicable proceedings, that CAD is a party and a customer for the purpose of determining eligibility for compensation, and that CAD filed its request timely. We find that CAD represents an interest that, although it may overlap with the interests of other parties, is not otherwise adequately represented. We find the economic interest of CAD's individual members is small compared to the cost of effective participation. We find no need to designate a common legal representative. We

find that CAD has shown its participation would pose a significant financial hardship. Therefore, we find CAD eligible to file a request for compensation. We note, however, that the cost of CAD's participation filing its own comments are the costs we find eligible for potential compensation. CAD's application for compensation must clearly distinguish any costs CAD incurred as part of the DDTPAC from costs incurred when it filed its comments on its own behalf in this proceeding, as well as how its requested compensable activities did not come at the expense of a full and fair effort as an oversight committee member.

CAD is placed on notice it may be subject to audit or review by the Commission Advisory and Compliance Division. Therefore, adequate accounting records and other necessary documentation must be maintained and retained by the organization in support of all claims for intervenor compensation. Such record-keeping systems should identify specific issues for which compensation is being requested, the actual time spent by each employee, the hourly rate paid, fees paid to consultants and any other costs for which compensation may be claimed.

Findings of Fact

1. The budget approval process may modify a rate, or establish a fact or rule that may influence a rate, and therefore is an applicable proceeding within the rules for intervenor compensation.

2. CAD is a party and a customer for the purpose of determining eligibility for compensation.

3. CAD timely filed its request for a finding of eligibility for compensation.

4. CAD represents an interest that, although it may overlap with the interests of other parties, is not otherwise adequately represented.

5. Intervenors who serve on oversight committees might have a unique conflict of interest, wherein they must choose to fully

participate on the oversight committee or work outside the committee and perhaps be compensated for that outside effort.

6. Rather than either prohibiting committee members from claiming intervenor compensation or prohibiting committee membership if the customer also wishes to seek compensation, this conflict is best managed by allowing CAD to participate both on the DDTPAC and in the intervenor compensation program, but requiring CAD to clearly distinguish any costs it incurred in its committee role versus its intervenor role, and to make a showing that its requested compensable activities did not come at the expense of a full and fair effort as an oversight committee member.

7. The economic interest of CAD's individual members is small compared to the cost of effective participation.

8. There is no need to designate a common legal representative.

9. CAD's expenses exceed income, and discretionary finances are insufficient to fund CAD's proposed budget.

10. CAD identified issues that it raised in its reply comments and therefore meets the criterion of submitting a statement of issues it intends to raise.

11. CAD submitted an estimate of the compensation it will seek to recover.

12. CAD submitted a budget for its presentation.

Conclusion of Law

CAD's request for a finding of eligibility for compensation should be granted.

ORDER

IT IS ORDERED that California Association for the Deaf (CAD) is eligible to file a request for compensation in this proceeding. CAD's request for compensation must clearly distinguish between costs incurred by CAD as part of the Deaf and Disabled

Telecommunications Program (DDTP) Administrative Committee and those incurred by CAD for its filing of comments on the 1991 DDTP budget, and must make a showing that its requested compensable activities did not come at the expense of a full and fair effort as an oversight committee member.

This order is effective today.

Dated August 7, 1991, at San Francisco, California.

PATRICIA M. ECKERT

President

G. MITCHELL WILK

JOHN B. OHANIAN

NORMAN D. SHUMWAY

Commissioners

Commissioner Daniel Wm. Fessler,
being necessarily absent, did
not participate.

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

NEAL J. SHULMAN, Executive Director