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Decision 92-02-073 February 20, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the Rules, Practices, and Procedures of all telephone corporations as listed in Appendix A attached to the O.I.I. concerning the billing of subscribers for telephone calls.	R.85-09-008 (Request for Compensation filed May 28, 1991)

ORIGINAL

O P I N I O N

Pursuant to Rule 76.51 of the Rules of Practice and Procedure, the Center for Public Interest Law (CPIL) submits its request for compensation of $29,739 for its substantial contribution to this proceeding. This request is submitted by CPIL on its own behalf and for Network Project's (NP) prior participation, in accordance with the statement filed in this proceeding in early 1987 that all filings would be joint.

AT&T Communications of California, Inc. (AT&T), US Sprint Communications Co. (Sprint), and GTE California Incorporated (GTEC) oppose the request on the grounds that not only did CPIL not make a substantial contribution to this proceeding but it unreasonably caused the matter to be extended over five years at great expense to the telephone companies, with no benefit to anyone.

CPIL claims that it is entitled to compensation because this Commission has through this proceeding changed the practices of the Interexchange Carriers (IECs) regarding billing practices, particularly misbilling for uncompleted calls. The Commission did so, in CPIL's opinion, not simply because of the eventual decision it issued, Decision (D.) 91-04-069, but because the very existence of this proceeding prodded the IECs to themselves change their technology and practices.

CPIL alleges that it has from the outset urged two positions: that the IECs meet AT&T's standard for billing accuracy, and that the IECs adopt the best available technology for billing or pay a price in the market. CPIL claims that in 1985 they did neither, but now they do both.

CPIL frames the issue thusly:

> "The first question here is whether the standard for and behavior of the IECs is different than it was when this proceeding began in 1985. The answer, unequivocally, is yes.
>
> "The second question is whether the Commission's process leading to this decision and that result would have happened but for the intervention of CPIL. The answer is unequivocally no."

CPIL states that its interest in this proceeding began in mid-1986 when an administrative law judge's (ALJ) proposed decision was issued May 6, 1986. At that time, it filed exceptions to the proposed decision arguing that the proposed decision was unfair to consumers and would prompt no change in the IEC's practices. NP specifically called upon the Commission to use AT&T as the referent for accuracy in billing.

The Commission agreed. In D.86-12-025 (23 CPUC 2d 24) (modified by D.87-03-043) the Commission said:

> "We agree in large part with the analysis of the Network Project. The right of consumer choice is predicated upon the availability of reliable, fairly priced telephone services. Billing for calls not completed constitutes service neither reliable nor fairly priced. . . . As the Network Project implicitly asserts, AT&T is the standard by which other carriers' rates are adjudged. Therefore, we will hold further hearings in January 1987 to consider the Project's concerns." (23 CPUC 2d at 29.)

CPIL asserts that following D.87-03-043, the telephone companies consistently fought implementation of the Commission's

orders and continuously sought to disrupt the proceedings and bury CPIL with frivolous discovery requests.

CPIL seeks compensation for its activities that kept the heat on the companies. The major activities for which CPIL seeks compensation are:

1. The work involved in challenging the original proposed decision, which resulted in a decision that adopted CPIL's concerns.

2. The work mandated by the Commission itself in preparing for the prehearing conference.

3. The work of CPIL in drafting and negotiating a confidentiality agreement that was adopted by all parties.

4. The work involved in evaluating the data provided by the companies and then advocating a delay in the hearings because of the inadequate responses, which delay was agreed to by the ALJ.

5. The work involved in responding to the various motions, requests, and other pleadings of the companies, in nearly every case resulting in ratification or adoption of CPIL's position.

6. The work involved in seeking a settlement.

7. For the work involved in the intervenor compensation eligibility request, which was approved, and for the request for compensation which CPIL asks be approved herein.

AT&T alleges that CPIL's participation extended this matter from 1986 until its closure in 1991 by D.91-04-069. No hearings were ever held on the issues raised by CPIL and no substantive changes in procedures were mandated by the Commission as a result of CPIL's allegations.

AT&T argues that CPIL's claim that its participation in R.85-09-008 caused the interexchange carriers (other than AT&T) to

accelerate their conversion to equal access (which moots the primary issue in R.85-09-008) is spurious and should not be taken at face value by the Commission. In AT&T's opinion, the conversion to equal access by AT&T's competitors is clearly a national issue driven by equal access availability and competitive considerations.

AT&T contends that while the allegations of CPIL had no appreciable effect on either the billing practices or equal access purchases of the interexchange carrier industry, those allegations did absorb significant amounts of time and resources of the Commission and the interexchange carriers. AT&T was required to respond to a number of complex data requests and at one point was accused of lack of cooperation simply because it could not provide the type of data CPIL imagined should be available. All of this was unnecessary. The billing inaccuracy issue has been resolved, in the main, by ubiquitous equal access. Where it is still a problem, interexchange carriers are quick to use this to their competitive advantage with customers. CPIL has had no effect on this environment. Therefore, CPIL's request for compensation should be denied.

GTEC and Sprint echo AT&T. They point out that hearings were never held on the issues raised by CPIL and further that the Commission never mandated substantive changes in procedures based on CPIL's allegations.

Sprint asserts that CPIL's involvement in this proceeding had no effect on Sprint's plans to convert to equal access facilities. Sprint has, over the years, participated in federal antitrust actions and state and federal regulatory proceedings advocating rapid implementation of equal access long before CPIL said one word on the subject to this Commission.

Sprint believes that CPIL is attempting to claim credit for developments that were and are continuing to occur industry-wide and nationwide following divestiture of the Bell System in 1984.

Sprint concludes that CPIL's request for compensation should be denied because its filings have not made any direct, primary and/or substantial contribution to any desirable result in this proceeding; its participation only served to divert time and resources of the Commission and the parties from other more important cases and issues, and had no effect on an equal access process being driven by a federal judge and federal and state regulators; and CPIL's lack of understanding of the technological and policy issues involved in this case should not be rewarded with compensation just because the hours are claimed. In Sprint's opinion, CPIL's request should be denied because it made no substantial contribution to the Commission's decision.

Discussion

In the fable the rooster crowed, the sun rose, and the rooster believed the sun rose because he crowed. The rooster was wrong. And CPIL is wrong in believing that because of its pleading, billing for uncompleted calls has improved. The improvement has come from advanced technology that became available; from competition that forced technology-deficient companies to improve; and from adequate financing. The billing problem is a national problem, not a local one. And it is being solved on the national level, not just in California. We have reviewed the extensive file in this proceeding and conclude that although CPIL participated there is no causal relationship between the participation and the result. The goal was achieved, not by the prodding of the lawyers, but by forces that were at work regardless of what the lawyers did.

A customer may be awarded advocates' fees if "the customer's presentation makes a substantial contribution to the

adoption, in whole or in part, of the Commission's order or decision." (Rule 76.53(a).)

> "'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 had adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer." (Rule 76.52(g).)

To determine if CPIL made a substantial contribution, we must look to the Commission's decisions in this rulemaking. A review of pertinent parts of those decisions shows CPIL's participation and its failure to influence the final outcome. In D.86-12-025, which dealt with many issues, most of which have no bearing on billing for uncompleted calls, we said in regard to uncompleted calls:

> "The Network Project, a nonprofit consumer research organization, submits that it has received numerous customer complaints to the effect that the IECs routinely bill for calls not completed (either unanswered or busy) and calls connecting to a BOC (Bell operating company) recording. The Project asserts that informing customers that they may receive billings for uncompleted calls, and upon complaint, may receive a credit is insufficient to adequately address the issue. The Network Project would place the onus upon the IEC to verify that calls being billed were in fact completed. The Project recommends, inter alia, that all one-minute calls be automatically credited, i.e., not billed, unless the carrier demonstrates an error-free rate commensurate with AT&T's historical performance.
>
> "We agree in large part with the analysis of the Network Project. The right on consumer choice is predicated upon the availability of reliable, fairly priced telephone services. Billing for calls not completed constitutes service neither reliable nor fairly priced. We suspect that most long distance customers that

choose an IEC other than AT&T are expecting that they will not, as was the case with their prior AT&T service, be billed for calls not completed. As the Network Project implicitly asserts, AT&T is the standard by which other carrier's rates and services are adjudged. Therefore, we will hold further hearings in January 1987 to consider the Project's concerns. The Project should be prepared to submit the following information:

"a. The nature and extent of the problem associated with IEC billing of calls not completed; and,

"b. The error-free rate of AT&T and, if available, of other carriers.

"Upon receipt of that information and any data submitted by the California-certificated IECs, it is our intention to bar the billing by IECs of intrastate interLATA calls of less than a one minute duration unless the IEC can demonstrate that it has achieved or exceeded the error-free rate of AT&T."

D.87-03-043 modified D.86-12-025 by striking the above quote and substituting:

"We have determined that hearings are necessary to resolve the issue of billing by IECs of uncompleted interLATA calls of less than one minute duration. The Network Project implicitly asserts that AT&T is the standard by which other carrier's rates and services should be judged.

"In order to properly address this issue, we shall direct AT&T to submit evidence as to its error rate. In addition, all participating IECs shall, at a minimum, submit evidence which will inform the Commission of the following facts regarding their billing of interLATA calls of less than one minute duration:

"1) the quantity and percentage of these calls for 1985 and 1986; 2) the amount of revenues associated with these calls for 1985 and 1986; 3) the primary locations where these calls have occurred; 4) the

quantity of customer complaints relating to these calls in 1985 and 1986; 5) company policy for handling such complaints; and 6) their own error rate regarding billing for uncompleted calls during 1985 and 1986. The Network Project should be prepared to make any affirmative showing it has."

"IT IS FURTHER ORDERED:

"Rehearing of D.86-12-025 is granted, limited to the following issues:

"1. The matter of billing for uncompleted calls by interexchange carriers; and

"2. The matter of the extension of the backbilling limitation to access charges."

The next decision of importance in determining the extent of CPIL's participation was D.91-04-069 when we terminated the rulemaking. That decision gives further background on the issues, the filings and the maneuvers of the parties. We set forth pertinent excerpts. The ordering paragraph was simple:

"IT IS ORDERED that:

"1. To fulfill the requirements of PU Code § 766.5, all IECs shall inform their customers of their billing procedure for uncompleted calls at least once each year either through bill inserts or on the customer's bill. This information shall state the circumstances that will cause an uncompleted call to be billed and the method to obtain a credit or refund for the erroneous billing."

This merely fulfilled the statutory requirement that we order the utilities to notify their customers of their uncompleted call procedure.

The body of the opinion and the findings of fact are instructive. In referring to NP and CPIL we said:

"Network and CPIL filed a joint petition for modification of D.86-12-025 and D.87-03-043 on July 13, 1989. Network and CPIL argue that the problem of IECs erroneously billing consumers

for calls not completed remains unresolved. Network and CPIL offer modifications that would address this problem by imposing certain reporting requirements, billing restrictions, customer notification requirements, and refund policies on IECs. All respondents oppose the petition of Network and CPIL, and recommend that the Commission close the proceeding by issuing a final decision based on the record now before the Commission."

Our findings were:

"Findings of Fact

"1. Commission records show the incidence of all billing complaints involving IECs for the years 1987, 1988, and 1989:

	1987	1988	1989
Telephone Lines in Service	16.4 million	16.8 million	16.9 million
Billing Complaints	1819	2913	1261
Complaints per Line in Service	.00011	.00017	.00007

"2. The Commission does not have a subcategory within billing complaints for complaints which concern billing for uncompleted calls because so few complaints are received on this subject.

"3. The great majority of billing complaints concern the amount of the bill for completed calls that allegedly were not made from the customer's telephone. Normal practices of the utility in these instances is to remove the charge because the cost of investigation far exceeds the cost of the call.

"4. In the telecommunications industry of 1990 all major IECs and most of the small IECs utilize hardware answer supervision to determine whether or not a call is completed. As a result, there are so few billing errors for uncompleted calls that accurate statistics are not available.

"5. To impose a system of monitoring and reporting on the IECs to determine the extent of a problem, which if it exists at all is insignificant, would create costs far in excess of any possible savings. Such costs, if imposed, would be an expense of the telephone companies passed through to ratepayers."

The excerpts from the opinions which have been set forth above show the issues that were raised by CPIL. In D.86-12-025, we said that NP did not believe that informing customers that they may receive billing for uncompleted calls was adequate. Yet, in D.91-04-069, that is exactly what we did. Further, in D.86-12-025, we said that NP proposed that one minute calls be automatically credited unless the carrier demonstrates an error-free rate. That was the issue raised and that recommendation was rejected.

In D.91-04-069, we set forth the issues raised by NP and CPIL where we said "Network and CPIL offer modifications that would address this problem (the erroneous billing problem) by imposing certain reporting requirements, billing restrictions, customer notification requirements, and refund policies on IECs." We specifically rejected NP's/CPIL's recommendations. No issue raised by CPIL was decided in CPIL's favor.

CPIL asserts that an intervenor need not achieve a favorable judgment in order to be a successful party. A defendant's voluntary action induced by intervenor's lawsuit should still support an attorney's fee award on the rationale that the lawsuit spurred defendant to act and was a catalyst speeding defendant's response. The critical fact is the impact of the action, not the manner of its resolution. We agree with that statement, as an abstract statement, but it is not applicable in this proceeding. The action of the telephone utilities to improve their billing practices was not induced by intervenor's actions, nor were the telephone utilities spurred to act because of intervenor's assertions, nor were intervernor's assertions a

catalyst speeding defendant's response. In our opinion, intervenor's actions had no effect on the telephone utilities' response to the problem of billing for uncompleted calls. In our opinion, the response of the telephone utilities to this problem was spurred primarily by competition in the marketplace and secondarily by Public Utilities Code Section 776.5, and our own rulemaking investigation.

Findings of Fact

1. CPIL and NP did not make a substantial contribution to D.91-04-069.

2. D.91-04-069 did not adopt in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by either CPIL or NP.

Conclusion of Law

No advocates' fees should be paid to either CPIL or NP.

O R D E R

IT IS ORDERED that the request for an award of compensation of the Center for Public Interest Law and Network Project is denied.

This order is effective today.

Dated February 20, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

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

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

NEAL J. SHULMAN, Executive Director