

Decision 97-03-022 March 7, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion into
Universal Service and to Comply with the Mandates
of Assembly Bill 3643.

Rulemaking 95-01-020
(Filed January 24, 1995)

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ORIGINAL**OPINION GRANTING INTERVENOR COMPENSATION**

This decision grants intervenor compensation to Utility Consumers' Action Network (UCAN) in the amount of \$51,272.83 for its substantial contributions to Decision (D.) 95-07-050 and D.96-10-066.

Procedural Background

The Commission initiated the above captioned rulemaking (OIR) and investigation (OII) on January 24, 1995. This proceeding was opened as part of the Commission's comprehensive review of how regulatory policies regarding universal service need to be revised as a result of the opening of monopoly telecommunications markets to competition. Initial comments to the questions raised in the OIR/OII were filed in March 1995 from interested persons. As a result of those initial comments, the Commission issued D.95-07-050. That interim decision described and set forth a proposed set of universal service rules. Opening and reply comments to the proposed rules were solicited by the Commission in the fall of 1995. A series of public participation hearings were also held throughout the state regarding the proposed rules.

Evidentiary hearings were held in late April and early May of 1996 on issues regarding the cost proxy models. After the filing of briefs, the proposed decision of the assigned Administrative Law Judge (ALJ) was mailed on August 5, 1996. Comments to

the proposed decision were filed in late August and early September, and an en banc oral argument was held before the Commission on August 27, 1996.

A revised proposed decision was mailed to the parties for comment on October 9, 1996. Those comments were reviewed, and appropriate changes were made. This process culminated in the issuance of D.96-10-066, and the adoption of the universal service rules.

Provisions Regarding Intervenor Compensation Awards

The applicable intervenor compensation rules are found in Public Utilities Code Section 1801 and following, and in Article 18.8 of the Commission's Rules of Practice and Procedure.¹ In order for the Commission to award compensation to a "customer" for preparation and participation in a proceeding, the customer must comply with Section 1804 and satisfy both of the following requirements:²

"(a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.

"(b) Participation or intervention without an award of fees or costs imposes a significant financial hardship." (Section 1803.)

Section 1804 provides in part that a notice of intent to claim compensation must be filed by the customer. That notice of intent must include a statement of the nature and extent of the customer's planned participation, and an itemized estimate of the compensation that the customer expects to request. The notice of intent may also

¹ Unless otherwise stated, all statutory references are to the Public Utilities Code.

² A "customer" is defined in Section 1802(b) to mean the following: " 'Customer' means any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is 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, but does not include any state, federal, or local government agency, any publicly owned public utility, or any entity that, in the commission's opinion, was established or formed by a local government entity for the purpose of participating in a commission proceeding."

include a showing by the customer that participation in the proceeding would pose a significant financial hardship.

On May 11, 1995, pursuant to Section 1804(a)(1), an ALJ ruling was issued which described the procedure for filing a notice of intent to claim compensation in this proceeding. UCAN filed its notice of intent to claim compensation on June 9, 1995. UCAN elected to make its showing of significant financial hardship in that notice of intent by referencing two other rulings in other Commission proceedings wherein UCAN received findings of significant financial hardship. UCAN received a finding of significant financial hardship in a March 24, 1995, ruling issued in Application 94-11-013, and in a January 27, 1995, ruling in Rulemaking (R.) 92-03-050. Under Section 1804(b)(1), those previous findings entitle UCAN to a rebuttable presumption of eligibility for compensation in this proceeding. No one challenged this presumption. As a result, UCAN has made a showing of significant financial hardship. In an ALJ ruling in this proceeding dated August 21, 1995, UCAN was found eligible for an award of compensation in accordance with Section 1804(b)(1).

Following the issuance of D.96-10-066, UCAN timely filed its request for an award of compensation on December 3, 1996.

Did UCAN Make A Substantial Contribution?

The next issue to address is whether UCAN made "a substantial contribution to the adoption, in whole or in part, of the commission's order or decision."

(Section 1803(a).) The term "substantial contribution" is defined in subdivision (h) of Section 1802 as follows:

"'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 has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable

expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation."

If the person requesting compensation is found to have made a substantial contribution, then the Commission must describe the substantial contribution and determine the amount of compensation to be paid. (Section 1804(e).)

UCAN's June 9, 1995, notice of intent to claim compensation identified the following two primary issues that it wanted to address in this proceeding.

"1. Promote consumer access to relevant and understandable pricing and service information to insure the development of Universal Service goals as effective competition enters the telecommunication marketplace.

"2. Investigate, develop and propose a funding mechanism which will specifically provide for the development of new services and applications to eventually be included as part of Universal Service. This funding mechanism will be designed to reduce or eliminate the aggregate subsidy required for Universal Service programs."

UCAN asserts in its request for compensation that in its March 1995 comments to the OIR/OII, and in its September and December 1995 comments to D.95-07-050, it raised the above issues. UCAN also states that it made specific recommendations regarding the definition of basic service, the equitable deployment of advanced technologies, and customer information. UCAN also points out that these recommendations were adopted by the Commission in D.96-10-066.

The purpose of D.95-07-050 was to issue a set of proposed rules pertaining to universal service responsibilities in a competitive market. The development of the proposed rules set forth in D.95-07-050 came largely from the March 1995 comments to the OIR/OII. UCAN provided comments regarding what service elements should be included in the definition of basic service, and the procedure for reviewing the definition of basic service. UCAN's comments to the OIR/OII also stimulated discussion and thought about how advanced telecommunications technologies can be made available to the general population. UCAN also commented on the need for consumers to have access to price and service information.

The set of proposed rules contained in D.95-07-050 was then further refined as a result of the comments filed in the Fall of 1995, the public participation hearings that were held, and the evidentiary hearings into the proxy cost models. All of these events led to the adoption of D.96-10-066.

In D.96-10-066 at pages 26 to 29, the Commission adopted several of UCAN's recommended refinements regarding the service elements that make up the basic service definition. These include free touch tone dialing, free white pages telephone directory, free and unlimited access to 911/E911, and free access to 800 or 800-like toll free services.

With respect to the review of the basic service definition, D.96-10-066 adopted a recommendation by UCAN and others that there should be an opportunity for an immediate review of the basic service definition, instead of having to wait three years to review the definition. In addition, D.96-10-066 adopted three of the four criteria that UCAN suggested be used in deciding whether a service element should be included in the basic service definition. (D.96-10-066 at pp. 37-38.)

UCAN's comments to the OIR/OII had suggested that a mechanism be designed to promote greater access to advanced technologies. This led to the Commission to ask for additional comment on this issue. (See D.95-07-050, pp. 25-26.) In D.96-10-066, the Commission borrowed UCAN's proposal of creating working groups or alliances to address the issue of deployment of advanced technologies. The result of this was the creation of the Universal Service Working Group (USWG). Some of the ideas for the adopted criteria for the USWG can find its genesis in UCAN's comments. (See D.96-10-066, pp. 43, 46-47.)

UCAN also advocated for the inclusion of consumer information regarding prices and services. UCAN, in conjunction with The Utility Reform Network (TURN), developed a matrix of the type of information they believed should be made available to consumers. In D.96-10-066, the Commission adopted in large part, the matrix that UCAN and TURN proposed. In addition, the Commission adopted UCAN's suggestion that an annual report summarizing the complaint history for each certificated carrier be prepared. (D.96-10-066, pp. 70-71.)

As described above, we find that UCAN made a substantial contribution in this proceeding. UCAN's participation substantially assisted in the development of the proposed rules in D.95-07-050, which formed the foundation for the final universal service rules that were adopted in D.96-10-066. UCAN's comments to D.95-07-050, and its participation in the public participation hearings also led the Commission to adopt many of UCAN's suggestions in D.96-10-066.

The Amount Of Compensation To Be Paid

Having found that UCAN has made a substantial contribution, the next step is to determine the amount of compensation to be paid. (Section 1804(e).)

UCAN points out that although the Commission did not adopt all of UCAN's recommendations, under Section 1802(h) an intervenor may still receive full compensation for its expenses related to an issue if the intervenor achieves only partial success. UCAN asserts that its contributions led to the successful advancement of factual and legal contentions in the Commission's decision.

We agree with UCAN that it should still receive full compensation for the issues that it made substantial contributions on, even though not all of its recommendations were adopted. Section 1802(h) is clear that if the customer's participation results in a substantial contribution, even if the decision only partially adopts the customer's recommendations, the Commission can still award the customer compensation for all reasonable fees and costs incurred in preparing or presenting that recommendation. Although we did not adopt all of UCAN's comments and recommendations, UCAN's presentations on the issues of concern to them, led us to critically evaluate the issues and to develop solutions. Accordingly, there should be no reduction in UCAN's compensation.

UCAN has also included in this request for compensation, its expenses incurred as a result of the all party negotiations ordered in D.94-12-053. In that decision, the Commission ordered that negotiations among the parties take place in I.87-11-033 to determine if an all party settlement could be reached with respect to the New Regulatory Framework review, intraLATA presubscription, local exchange

competition, and network unbundling. UCAN had originally intended to seek compensation for those efforts in the Local Competition docket, R.95-04-043/ I.95-04-044. However, the issues which UCAN discussed in those negotiations dealt with issues that were addressed in this proceeding.

Although many of the topics covered at the all party negotiations involved issues other than universal service, we believe that UCAN's participation in those negotiations should be compensated. UCAN's participation enabled it to gain a more focused understanding of the issues which it presented in this proceeding. Accordingly, we will allow UCAN to recover the expenses associated with the all party negotiations.

UCAN seeks compensation in the amount of \$51,272.83. \$33,756 of this amount is for Lisa Briggs' time at a rate of \$120 per hour. \$13,160 is for Michael Shames' time at a rate of \$175 per hour. The remaining \$4,356.83 is for travel costs, and copying and postage.

UCAN asserts that its miscellaneous costs, and its billing rates for both of its attorneys are reasonable and consistent with Section 1806. Section 1806 provides in part that the computation of compensation shall take into account the market rates paid to persons of comparable training and experience who offer similar services. UCAN points out that in D.96-08-040, Shames was compensated at a rate of \$175 per hour for his work in 1995. UCAN states that Briggs has been compensated at a rate of \$100 per hour for work done before the Commission in 1993, and was compensated at a rate of \$120 per hour for work performed before the California Department of Insurance.

We have reviewed the number of hours spent by UCAN's counsel in this proceeding, and the associated miscellaneous costs. We find the miscellaneous costs, the number of hours billed, and the hourly rates to be reasonable. UCAN should be awarded compensation in the amount of \$51,272.83.

Section 1804(e) provides that the Commission shall issue a decision on whether a customer has made a substantial contribution within 75 days after the filing of a request for compensation. The Commission in prior decisions has adopted the policy of granting interest on the amount of compensation after the 75th day. In UCAN's case,

interest should commence on February 16, 1997 and be based on the three month commercial paper rate as reported in the Federal Reserve Statistical Release G.13.

Which Carriers Should Have To Pay The Award Of Compensation?

The only filing responding to UCAN's request for compensation was filed by GTE California Incorporated (GTEC). GTEC asserts that any award of compensation in this proceeding should be recovered from all telecommunications utilities authorized to offer local exchange service in California. In support of GTEC's position, it cites Section 1807, which states in part: "Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding, as determined by the commission...."

GTEC contends that the subject of universal service is broad, and far reaching, and impacts all carriers providing telephone service in California. GTEC further argues that once a competitive local carrier receives a certificate of public convenience and necessity, it cannot avoid having to pay a share of the intervenor compensation award if that carrier was included among the carriers who are the subject of the proceeding. Thus, any award to UCAN should be paid for in an equitable manner by allocating the costs among all the carriers, rather than just GTEC and Pacific Bell.

We are sympathetic to the equity issue that GTEC has raised regarding UCAN's request. The allocation issue in the various telecommunications proceedings has been the subject of much Commission discussion lately. (See D.96-12-029, p. 32; D.96-11-040, pp. 18-19; and D.96-11-020, p. 25.) A strong argument could be made that the universal service rules adopted in D.96-10-066 affect all telecommunications carriers in California, and, therefore, any award of compensation should be allocated among all carriers. However, the practical, and historical method of allocation is to allocate the awards between the telephone utilities according to the number of access lines served. This method of allocation has usually resulted in the awards being paid for by GTEC and Pacific Bell. Those two carriers are the largest local exchange carriers in California, and are likely to remain so until true local competition develops. Accordingly, the

compensation awarded to UCAN should be allocated among GTEC and Pacific Bell in proportion to the number of access lines each serves.

We stated in D.96-11-040 at pages 18 and 19 that this issue of how intervenor compensation awards should be allocated should be resolved by way of comments in one of the "roadmap" telecommunications proceedings. That decision went on to state that "We expect to issue a request for such comments in the near future."

Just last month, we issued R.97-01-009 and I.97-01-010, a combined rulemaking and investigation into the Commission's intervenor compensation program. We noted in that OIR/OII that the regulatory agenda and the regulatory arena have changed since the intervenor compensation program commenced. The changes in industry structures though have not been reflected in the intervenor compensation program. We are considering changing the rules, regulations, and policies associated with this program. In particular, we requested interested parties to file comments on the issue of "who pays", which was briefly discussed in Attachment A (the Alkon Report) to the OIR/OII in Section IX, Options for Change. Since a comprehensive review of the intervenor compensation program is being undertaken in that proceeding, the issue of allocation of the cost of such an award will be examined there.

As with all intervenors seeking compensation, UCAN is reminded that it is subject to audit or review by the Commission staff. Therefore, adequate accounting records and other necessary documentation must be maintained and retained in support of all claims for intervenor compensation. Such record keeping systems should identify specific issues for which compensation is requested, the actual time spent by each employee, attorney and expert witness, the hourly rate paid, fees paid to consultants and any other costs for which compensation may be claimed.

Findings of Fact

1. The Commission initiated this proceeding on January 24, 1995, by opening up an OIR/OII.
2. Initial comments to the questions raised in the OIR/OII were filed in March 1995 from interested persons.

3. On May 11, 1995, an ALJ ruling was issued describing the procedure for filing a notice of intent to claim compensation in this proceeding.
4. As a result of those initial comments, the Commission issued D.95-07-050, an interim decision describing and setting forth a set of proposed universal service rules.
5. Comments to D.95-07-050 were filed in the fall of 1995.
6. The proposed decision of the assigned ALJ was mailed for comment on August 5, 1996.
7. Comments to the proposed decision were filed in late August and early September of 1996.
8. A revised proposed decision was mailed to the parties for comment on October 9, 1996.
9. The Commission adopted final universal service rules in D.96-10-066 in October 1996.
10. UCAN filed its notice of intent to claim compensation on June 9, 1995, and elected to make its showing of significant financial hardship in that notice.
11. In an August 21, 1995, ALJ ruling, UCAN was found eligible for an award of compensation.
12. Following the issuance of D.96-10-066, UCAN timely filed its request for an award of compensation on December 3, 1996.
13. UCAN's recommendations were incorporated into D.95-07-050 and D.96-10-066.
14. UCAN made a substantial contribution in this proceeding.
15. UCAN's participation in the all party negotiations ordered in D.94-12-053 should be compensated in this proceeding.
16. The miscellaneous costs, the number of hours billed by UCAN's attorneys, and the hourly rates charged are reasonable.
17. UCAN is entitled to interest on the amount awarded beginning 75 days from the date UCAN's request for compensation was filed.
18. GTEC's response to UCAN's request for compensation raises the issue of allocating the cost of an award of compensation among all telecommunication carriers.

19. Our previous decisions have apportioned awards between local telephone service providers based on the number of access lines each serves.

20. GTEC and Pacific Bell are the largest local exchange carriers in California, and are likely to remain so until local competition evolves.

Conclusions of Law

1. In order for the Commission to award compensation to a customer for preparation and participation in a proceeding, the customer must comply with Section 1804, satisfy the substantial contribution test, and make a showing of significant financial hardship.

2. Under Section 1802(h), an intervenor may still receive full compensation for its expenses related to an issue even if the decision only partially adopts the customer's recommendations.

3. UCAN should be awarded \$51,272.83 for its contributions to D.95-07-050 and D.96-10-066.

4. Interest should accrue beginning February 16, 1997, and should continue until full payment is made.

5. The award of compensation in this decision should be allocated between GTEC and Pacific Bell in proportion to the number of access lines each serves.

6. Since a comprehensive review of the intervenor compensation program is being undertaken in R.97-01-009 and I.97-01-010, the issue of allocation of the cost of such an award will be examined in that proceeding.

O R D E R

IT IS ORDERED that:

1. The December 3, 1996, request for compensation filed by Utility Consumers' Action Network (UCAN) is granted to the extent set forth herein.

2. UCAN is awarded \$51,272.83, plus any applicable interest, in compensation for its contributions to Decision (D.) 95-07-050 and D.96-10-066.

3. GTE California Incorporated and Pacific Bell shall, within 30 days of the effective date of this order, each pay UCAN their share of the amount awarded to UCAN, plus interest, at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release G.13, such interest to begin accruing on February 16, 1997, and continuing until full payment is made.

4. The issue of allocating the cost of intervenor compensation awards among the class of public utilities affected by a generic industry proceeding shall be addressed in the rulemaking and investigation into the Commission's intervenor compensation program, Rulemaking 97-01-009 and Investigation 97-01-010.

This order is effective today.

Dated March 7, 1997, at San Francisco, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEPPER

RICHARD A. BILAS

Commissioners