

JUN 11 1997

Decision 97-06-017 June 11, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Jere Green, dba
Jere's Interiors,

Complainant,

v.

Cherry Communications, Inc.,

Defendant.

Case 96-02-025
(Filed February 7, 1996)

Investigation on the Commission's Own Motion into the Operations, Practices and Conduct of Cherry Payment Systems, Inc. as Parent Company to Cherry Communications, Inc., and James Elliot, Chairman of the Board of Cherry Communications, to Determine Whether They Have Complied with the Laws, Rules, Regulations and Applicable Tariff Provisions Governing the Manner in Which California Consumers are Switched from One Long-distance Carrier to Another, and Other Requirements for Long Distance Carriers.

I.95-10-007
(Filed January 13, 1997)

OPINION

This order denies the request of Jere Green, dba Jere's Interiors (complainant), for compensation in Case (C.) 96-02-025. We also deny complainant's companion request to seek compensation in Investigation (I.) 95-10-007.

Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Public Utilities (PU)

Code §§ 1801-1812.¹ Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference or by a date established by the Commission. The NOI must present information regarding the nature and extent of planned participation in the proceeding and an estimate of requested compensation. The NOI may include a showing that participation in the hearing or proceeding would pose a significant financial hardship. Alternatively, such a showing must be included in the subsequent request for compensation. Section 1802(g) defines "significant financial hardship" to mean:

"...either that the customer cannot afford, without undue hardship, to pay the costs of effective participation, including advocate's fees, expert witness fees, and other reasonable costs of participation, 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."

In response to the NOI, Section 1804(b)(2) directs the assigned administrative law judge (ALJ) to point out, among other things, areas of potential duplication in showings and unrealistic expectations for compensation.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(e) requires an intervenor requesting compensation to provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "[s]ubstantial contribution" means that:

"in the judgment of the commission, the customers 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

¹ Prior to 1993, compensation pursuant to PU Code § 1801 et seq. was limited to hearings or proceedings for the purpose of modifying a rate. However, in AB 1975 (Stats. 1992, c. 942) the Legislature modified the definition of compensation to include all formal proceedings of the Commission. This change became effective on January 1, 1993. Complainant appropriately filed a notice of intent referencing the requirements under this new statute, as opposed to under the Advocates Trust Fund, and we review the compensation request in light of these statutory requirements.

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."

Section 1804(e) requires the Commission to issue a decision which determines whether or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

Procedural Background

On February 7, 1996, complainant filed a formal complaint against Cherry Communications Inc. (Cherry) alleging that Cherry had become her long distance provider without her authorization and that Cherry had overbilled her for the services she did use. Ms. Green had previously filed an informal complaint with the Commission regarding Cherry but was dissatisfied with the progress made in that informal process.

In her complaint, Ms. Green requested compensation for stress and anxiety caused by Cherry's aggressive collection efforts, compensation for the alleged forgery of a letter of authorization, compensation for four months of allegedly faulty line usage and loss of business, and for interest on these amounts. Ms. Green also requested that the Commission order Cherry to reimburse her for all expenses incurred in prosecuting the complaint, including compensation for all time spent by Ms. Green and her representative, Kathleen Lyon. In addition, Ms. Green requested that the Commission open an investigation into Cherry's operations.

On April 4, 1996, Cherry filed its answer to Ms. Green's complaint. In the answer, Cherry denied the substantive allegations and interposed five affirmative defenses. First, Cherry alleged that the complaint failed to state a cause of action. Second, Cherry

alleged that the relief sought by Ms. Green constituted damages and that the Commission had no authority to award damages. Third, Cherry alleged, and provided a supporting declaration, that the letter of authorization which Ms. Green alleged to have been forged was signed by Ms. Green's son-in-law, who had represented himself as being authorized to make such a change. Fourth, Chery alleged that the then-on-going investigation by the Commission of Cherry's overall operations, Investigation (I) 95-10-007, obviated the need for another investigation as requested by Ms. Green. Finally, Cherry alleged that it had reached a full settlement of the differences between them when, in the informal settlement process, Cherry credited her account for the full outstanding balance.

At the April 19, 1996 prehearing conference, the assigned ALJ explained that the majority of Ms. Green's requests for relief were for damages, which are beyond the Commission's jurisdiction. The ALJ also described the pending Cherry investigation, which at that point was awaiting filing of a settlement agreement between Cherry and the Commission's Safety and Enforcement Division (S&E).² After reviewing the monetary relief requested by the complainant, the ALJ determined that the maximum amount the Commission could award the complainant was \$240.88. The parties agreed to attempt to settle this matter, but without success. No hearings were held and no factual findings regarding Ms. Green's allegations or Cherry's response were made.

On May 2, 1996, Ms. Green filed a motion for leave to intervene in I.95-10-007. Cherry and S&E jointly submitted the final settlement agreement to the Commission on May 28, 1996. Also on May 28, 1996, Ms. Green requested that the assigned ALJ dismiss her intervention petition, contingent upon the Commission accepting the settlement agreement. If the Commission rejected the agreement, then Ms. Green sought to participate in any further proceedings. This request was granted on May 29, 1996.

² On October 18, 1995, the Commission issued an Order Instituting Investigation (OII) and Order to Show Cause investigating allegations that Cherry violated regulations governing how telephone customers are switched from one interexchange carrier to another (I.95-10-007).

On May 17, 1996, Kathleen Lyon filed an NOI on Ms. Green's behalf. In the NOI, Ms. Lyon stated that she was assisting Ms. Green with her complaint in C.96-02-025 and also the investigation against Cherry, I. 95-10-007. For her efforts in this proceeding, Ms. Lyon estimated that she would be requesting compensation of \$110 per hour for up to 200 hours as well as \$2,500 in out-of-pocket expenses, for a total of up to \$24,500. On May 29, 1996, Cherry filed a response to the NOI and on June 12, 1996, Ms. Lyon filed Ms. Green's reply to Cherry's response.

By Decision (D.) 96-07-049, dated July 17, 1996, the Commission dismissed the portions of Ms. Green's complaint which requested damages. The Commission found Ms. Green's request for an investigation of Cherry to be moot, and also dismissed that portion of the complaint. The Commission indicated that if Cherry voluntarily paid Ms. Green the maximum potential damages of \$240.88 plus interest, then the Commission would dismiss the final component of the complaint. Cherry subsequently paid Mrs. Green and the Commission dismissed the complaint in D.96-09-052, issued September 16, 1996.

By D.96-09-041, issued September 4, 1996 in I.95-10-007, the Commission adopted the settlement agreement between Cherry and S&B. The settlement agreement imposed certain restrictions on Cherry's future operations in California and required Cherry to make restitution to certain former customers.

On November 14, 1996, complainant filed a request for funding in the amount of \$27,802.21 that covered both the complaint proceeding and the OII. By ruling dated November 19, 1996, the assigned ALJ determined that complainant's NOI was timely as it related to the complaint docket, but was untimely with respect to I.95-10-007. She also ruled that the NOI failed, as to I.95-10-007, to meet the statutory standard regarding planned participation. The ALJ concluded that complainant met the eligibility requirement for C.96-02-025, but not for I.95-10-007. Finally, the ALJ pointed out areas of potential duplication and unrealistic expectations for compensation, and permitted complainant to submit an amendment to its request for funding on or before December 19, 1996.

Complainant's amended request for compensation was filed on December 19, 1996. Complainant also filed on the same day a motion to accept late-filed notice of intent to claim compensation in I.95-10-007. Cherry filed responses protesting the motion and complainant's requested compensation in C.96-02-025. Complainant filed replies to Cherry's responses.

Requested Compensation

Complainant requests compensation in the amount of \$27,802.21 for participation in C.96-02-025 and I.95-10-007, broken down as follows:

Mrs. Green's hours (22 hrs. @ \$65/hr.)	\$ 1,430.00
Mrs. Lyon's hours (236.7 hrs. @ \$110/hr.)	\$26,042.50
Postage/FAX/photocopies and mailing	\$ 174.08
Travel Expenses	\$ 106.56
Phone calls	\$ 49.07
TOTAL REQUEST OF COMPENSATION:	\$27,802.21

Discussion

As described above, PU Code § 1801, et seq., provides for compensation to intervenors in Commission proceedings where the intervenor makes a substantial contribution to the proceeding and where a showing is made that participation without an award of fees would impose a significant financial hardship. Compensation is limited to reasonable costs and requires that the intervenor meet certain prerequisites in terms of an NOI, and a timely request for intervenor compensation.

We first address complainant's motion to file a late-filed NOI in the Cherry investigation, I.95-10-007. Complainant's initial NOI was served by mail on the parties on May 14, 1996, and filed with the Commission on May 17, 1996. The prehearing conference in this matter was held on November 8, 1995. As the assigned ALJ duly noted, complainant's initial NOI was served far in excess of 30 days after the prehearing conference and was therefore untimely.

Ms. Green argues in her motion that she was precluded from participating in I.95-10-007 and filing a timely NOI because the Commission failed to properly inform

her of the status of her informal complaint and the issuance of the investigation. (Motion, pp. 9-11.) We point out to Ms. Green, and her representative Ms. Lyon, that Commission staff is not responsible for personally informing potentially interested parties when a Commission investigation is initiated. All new proceedings are listed on our Daily Calendar, which is available on the Internet, in our San Francisco and Los Angeles offices, and also by subscription. We also have a Public Advisor's office that will answer inquiries about Commission activities. It is the responsibility of the public to avail itself of these resources.

Even if we were to accept the late-filed NOI, the arguments presented in that document underscore the fact that Ms. Green was not a participant in I.95-10-007 and, by definition, is not eligible for intervenor compensation in that proceeding. This was also made clear by the ALJ's ruling dated November 19, 1996.

With regard to the complaint proceeding, for which a timely NOI was filed, the outcome was based on administrative efficiency, not on any facts or allegations put forward by Ms. Lyons on behalf of complainant. Ms. Green's request for compensation does not contend that her complaint made a substantial contribution to the decision in that case, but rather, that her efforts in submitting an *informal* complaint made a substantial contribution to the Cherry investigation. (Amended Request, pp. 9-11.) As the assigned ALJ noted, this assertion does not conform to the record in the investigation proceeding:

"The NOI, and particularly Ms. Green's reply, focus on the role that Ms. Green's informal complaint may have had in initiating the OII. This suggests that Ms. Green believes that her efforts in submitting her informal complaint may be sufficient to be deemed 'participation' within the intervenor compensation statute.

"In support of her claim, Ms. Green states in the reply her understanding that her complaint was a primary cause of the OII (Reply at 8). This understanding is inconsistent with the testimony offered in the OII.... In his declaration, S&E's chief investigator, Fred Patterson states that he was assigned to investigate Cherry in July 1995. Mr. Patterson's supervisor told him that the case came to his attention 'through a formal complaint (C.95-03-007) by Wayne Wakefield and a number of informal complaints

received in the Consumer Affairs Branch (CAB) of the CPUC.' (I.95-01-007, Exhibit 11 at 2.) The records of the CAB show that they received 29 informal complaints against Cherry from January 1 to July 1, 1995. Ms. Green's complaint was one of the 29.

"In addition to the CAB complaint information, the Commission received evidence at the preliminary hearing which indicated that over 5,000 customers had contacted Pacific Bell and stated that they had been switched without their authorization. (See D.95-12-019, mimeo. at 10.)

"It appears that Ms. Green's informal complaint, while part of the Commission's records in this case, was not a primary cause of the OII. Therefore, to the extent such activities could have been deemed 'participation' within the terms of the intervenor compensation statute, Ms. Green has failed to demonstrate that her activities made a substantial contribution to the final decision in the case." (Section 1804(e).) (ALJ Ruling dated November 19, 1996.)

We also concur with the ALJ's observations that complainant's efforts to benefit the public through her actions were clearly duplicative:

"One area of substantial duplication is protection of the public. Intervenors can, and have, played an important role in bringing matters to the Commission's attention, and in successfully urging otherwise unrepresented points of view in large proceedings. In these ways, the intervenor funding statute brings additional views and issues to the Commission so that it might best exercise its duty to protect the public.

"Ms. Green's role in the complaint case and in the OII would not appear to have accomplished either goal. The Commission was aware of the allegations of unauthorized transfer of customers due to the 5,000 complaints received by Pacific Bell as well as the complaints received by the CAB. The public's interest in limiting Cherry's activities in California has been ably represented by S&B....

"The duplicative nature of the complaint proceeding, as regards protection of the public, is also clear. A full month before the prehearing conference in the complaint docket, S&B and Cherry had announced their agreement, in principle, to settle the case. Any benefits to the broader public that Ms. Green's individual complaint may have are completely overshadowed by S&B having secured Cherry's agreement to essentially

suspend its operating authority in California prior to the complaint even coming up for hearing." (ALJ Ruling dated November 19, 1996, pp. 8-9.)

In sum, we conclude that Ms. Green's complaint did not make a substantial contribution to our decisions in either the complaint proceeding (C.96-02-025) or Cherry investigation (I.95-10-007).

There are other requirements for awards of compensation that complainant has failed to meet. Awards for compensation must be based on reasonable costs. (Section 1803.) Ms. Green's amended request does not reflect any of the reservations expressed by the ALJ in her November 19, 1996 ruling. For example, the ALJ noted that the \$110 per hour rate sought by Ms. Lyon was inconsistent with past rulings that Ms. Lyon, as neither an attorney nor an expert, was entitled to a \$60 per hour rate. The ALJ also noted that there should be few costs, if any, after the NOI was filed in mid-1996 and that a determination of reasonableness would have to take into account the question whether incurring these costs was reasonable in light of dollar value at issue. (ALJ Ruling dated November 19, 1996, pp. 9-10.)

In addition to the concerns noted by the ALJ, the itemized costs submitted by complainant call into question the reasonableness of complainant's request. It appears that Ms. Lyon seeks compensation for at least 64 hours (or more than \$7,000) of typing, photocopying, and collating time. This includes an entry of 8.5 hours to retype the formal complaint into the computer. Ms. Lyon similarly charges 8.25 hours (and \$907) for her time on June 12, 1996 to travel to San Francisco to file a document. The document—"Complainants Reply to Defendants 'Response of Cherry Communications, Inc. to Notice of Intent to Claim Compensation'"—is not a pleading envisioned by the Commission's rules. Nor did it justify extraordinary efforts to deliver to the Commission. Indeed, according to Ms. Lyon's records, the document was finished on June 10, 1996 and presumably could have been mailed to San Francisco using an overnight service. It also appears as if roughly 90 hours out of a total 236 hours submitted by Ms. Lyon relate exclusively to her intervenor compensation efforts. At

\$110 per hour, Ms. Lyon seeks roughly \$10,000 related to her efforts to be compensated for representing Mrs. Green in a case ultimately worth \$240.

Finally, complainant has not presented any documentation of significant financial hardship associated with the reasonable costs of intervention. The discussion in her amended request for funding alludes to medical problems and emotional stress unrelated to the complaint, but there is no indication of her financial status and the impact on her finances of the reasonable costs associated with filing a 17-page complaint, sending a representative to the prehearing conference and filing for a reasonable level of compensation. Complainant has failed to demonstrate that her participation, without an award, would impose significant financial hardship.

In sum, complainant has not met the requirements of the statute for intervenor compensation and her request is denied.

Findings of Fact

1. Complainant is eligible for intervenor compensation in C.96-02-025 and has made a timely request for compensation for its contribution to D.96-09-052.
2. Complainant is not eligible for intervenor compensation in I.95-10-007.
3. Complainant did not contribute substantially to D.96-09-052.
4. Complainant's participation in C.96-01-025 and the informal process that proceeded the filing of this complaint did not contribute substantially to the outcome of I.95-10-007.
5. Complainant's request for compensation is not based on reasonable costs in light of the dollar value at issue and the required effort for effective participation in C.96-02-025.
6. Complainant did not substantiate a claim of significant financial hardship.

Conclusions of Law

1. Complainant has not fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.
2. Complainant's request for intervenor compensation should be denied.

O R D E R

IT IS ORDERED that:

1. The request of Jere Green, dba Jere's Interiors, for compensation in Case (C.) 96-02-025 and companion request to seek compensation in Investigation (I.) 95-10-007 are denied.
2. C.96-02-025 and I.95-10-007 are closed.

This order is effective today.

Dated June 11, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners