

Decision 97-10-049 October 22, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.

R.95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.

I.95-04-044
(Filed April 26, 1995)

ORIGINAL

OPINION AWARDING TURN INTERVENOR COMPENSATION

This decision grants The Utility Reform Network (TURN) an award of \$74,424.75 in compensation for its contribution to Decision (D.) 96-09-089, in which the Commission found that GTE California, Incorporated (GTEC) and Pacific Bell (Pacific) had yet failed to demonstrate that local exchange competition, and the new rules allowing such competition, constitute a taking.

1. Background

On September 20, 1996, the Commission issued D. 96-09-089, denying the requests of Pacific and GTEC for compensation based upon anticipated impacts of local exchange competition and our associated regulation. Pacific and GTEC argued that local exchange competition and the rules authorizing local competition denied them the opportunity to earn a fair return on investment and that the Takings Clause of the Constitution entitled them to compensation. We determined that Pacific and GTEC had not adequately supported their claims, but allowed them to apply again for such compensation when the outcome of our regulatory programs has become more concrete. TURN opposed GTEC's and Pacific's requests. TURN presented direct testimony, cross examined witnesses, filed opening and reply briefs, and submitted oral argument. TURN also participated as a member of the California Telecommunications Coalition (Coalition) and acted ex parte, advocating rejection of the utilities' claims.

TURN filed a Request for Compensation (Request) in the amount of \$79,098 for its participation.¹ GTEC filed a response to TURN's Request on January 6, 1997. TURN replied on January 22, 1997, also filing a Motion to Accept Late-Filed Reply. Although TURN missed the filing deadline by one day, we find that the late submission prejudices none of the parties and therefore accept TURN's reply.

2. 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. 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 compensation and may request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) 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 "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."

¹ TURN's initial request was for \$78,498. However, it requested an additional \$600 for the time spent in preparing its response to GTEC's Reply to TURN's Request.

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, if any. 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.

2.1. Eligibility to Claim Compensation

TURN was found to be eligible for compensation in an earlier phase of this proceeding by D. 96-06-029. Under Rule 76.76 of the Commission's Rules of Practice and Procedure, a customer found eligible in one phase of a proceeding remains eligible in later phases of the same proceeding.

D.96-06-089 was mailed on October 7, 1996. TURN filed its Request on December 6, 1996. This satisfies the requirement of PU Code § 1804(c) that such requests be filed within 60 days following the issuance (mailing) of a final decision. TURN's Request is therefore timely.

2.2. Contributions to Resolution of Issues

TURN believes that it made a substantial contribution to D. 96-09-089 in that the Commission adopted many of TURN's positions and agreed with TURN that Pacific and GTEC had not demonstrated that the Commission's regulatory program denies them the opportunity for a fair return on their investment. TURN contends that its oral argument and briefs were influential in shaping conclusions on the issue of whether competition alone can form the basis of a takings claim. TURN points to lengthy discussion of its analysis on case law governing public utilities, competition, and takings. TURN also maintains that its unique perspective influenced our findings on the Equal Protection clause as applied to comparison of electrical and telecommunications industries.

We agree that TURN's participation aided the Commission in examining the issues affecting the franchise-impact case. As a member of the Coalition, TURN argued that Pacific's and GTEC's constitutional takings claim failed because it was preempted by the Telecommunications Act of 1996, a federal act providing for local exchange competition. TURN provided beneficial analysis on the distinction between the impact

of regulation and protection from competition. TURN argued that the carriers' forecasted financial impacts were too speculative in nature, and joined the Coalition in urging that differences between the electrical and telecommunications industries forestall the carriers' claims that Equal Protection demands similar treatment of uneconomic assets in each industry. Our decision generally echoed these points in denying Pacific's and GTEC's claims. While we denied TURN's motion to dismiss the utilities' claims, we conclude that TURN substantially contributed to resolution of the issues affecting Pacific's and GTEC's initial claims.

In the past, we have reduced awards where the intervenor's participation substantially duplicated the contributions of other parties. GTEC urges us to do likewise here, pointing to TURN's dual involvement on its own and as a member of the Coalition, as well as the fact that TURN's position overlapped that of the Coalition and the Commission's Office of Ratepayer Advocates.

The PU Code balances the objective of reducing awards for duplicative involvement with that of encouraging effective participation. Section 1801.3(f) requires that intervenor compensation be "administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding." Section 1802.5 provides: "Participation by a customer that materially supplements, complements, or contributes to the presentation of another party, including the commission staff, may be fully eligible for compensation if the participation makes a substantial contribution to a commission order or decision, consistent with Section 1801.3." We must therefore weigh the effectiveness of an intervenor participating as part of a coalition, noting that party's individual contribution.

We decline to reduce TURN's award here. TURN filed separate and joint briefs and comments, cross examined witnesses, presented its own witnesses, and generally participated as a stand-alone party. TURN's contributions, independent of its involvement with the Coalition, are sufficient to award full compensation.

3. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$79,098 as follows:

Attorney Fees

T. Long				
7.50 hours	x	\$225(1995)	=	\$ 8,438
246.25 hours	x	\$240(1996)	=	\$59,100
2.50 hours	x	\$240(1997)	=	\$600 ²
R. Costa				
49.75 hours	x	\$130	=	\$ 6,648
B. Weston				
11.50 hours	x	\$175	=	\$ 2,013
M. Florio				
2.75 hours	x	\$260	=	\$ 715
B. Finkelstein				
0.75 hours	x	\$210	=	\$ 158

Other Costs

Photocopying Expense	=	\$ 1,341
Postage Costs	=	\$ 272
Computerized Legal Research	=	\$ 23

3.1. Reasonableness of Hours Claimed

TURN asserts that it has reviewed all of the hours incurred and reduced them where necessary, submitting only those hours reasonable to its participation in this proceeding. The majority of the hours submitted by TURN compensate the work of Thomas Long, TURN's attorney with primary responsibility for telecommunications matters. TURN's activities in the course of this proceeding included attending hearings, cross-examining witnesses, and submitting oral argument, in addition to drafting briefs and comments. We find the number of hours claimed by TURN to be commensurate with its participation in the proceeding and may reasonably be compensated.

TURN has submitted a number of hours on the issue of franchise impact that were incurred in the Commission's 1995 universal service proceeding. TURN

²This 2.5 hours of work in 1997 would compensate TURN for the preparation of its Response to GTEC's Reply. TURN elects not to seek a higher rate for this 1997 work at this time.

documents these in Attachment A, listing them separately, and asserts that these hours have not been claimed in that proceeding and will not be claimed elsewhere. TURN's consolidation of hours related to franchise impacts is logical and reasonable.

In accordance with § 1802(a), TURN may receive compensation for costs of obtaining an award. Long's 1996 hours include 19.25 hours for preparing TURN's Request for Compensation. TURN's time expenditure is reasonable for preparation of its Request.

TURN submits detailed timesheets listing its activities by date, with a brief description for each entry. TURN does not allocate these hours by issue, asserting that issue allocation is unnecessary here because only one issue was determined in the course of this hearing. We agree that issue allocation is not essential where a single major issue is presented. However, it should be noted that TURN is not excused from allocating its work by issue where possible. D.85-08-012 discussed guidelines for issue allocation extensively, finding that where time allocation by issue is straightforward, intervenors are expected to submit this information. This continues to be the case even where the intervenor believes that such an allocation is unnecessary due to full adoption of intervenor's proposals by the Commission. TURN has been cautioned several times in the past year to adhere more strictly to our directions on this point, and should regard the present case as an exception rather than license to continue its practices.

More troubling, however, is TURN's apparent reluctance to conform with our clear directives on documentation to support compensation requests in telecommunications Roadmap proceedings. TURN has failed to comply fully with requirements set forth in D.96-06-029, directing intervenors in Roadmap proceedings to submit the following information:

- a. A listing of all telecommunications Roadmap proceedings in which the intervenor has participated. This information should be provided for the current year and all applicable previous calendar years.
- b. A breakdown, by proceeding, of the intervenor's total hours incurred to participate in all Commission proceedings listed in a. above. This should be further broken down by each calendar year and by person.

- c. The hours listed for each proceeding in b. above should be further subdivided as follows: (1) hours already claimed and awarded; (2) hours claimed but still pending; (3) eligible hours incurred, not yet claimed. This information should also be broken down by person.
- d. A breakdown of all the information in c. above by issue area.
- e. An allocation and breakdown of the intervenor's total costs in the same manner as a. through d. above.

(D.96-06-029, p. 27.) This documentation is intended to assist in detecting possible duplicate compensation for hours incurred in the many phases of Roadmap proceedings, in which issues adjudicated may overlap.

TURN submits numerous graphs in ostensible fulfillment of these requirements. (Request, Attachment D.) In the body of its Request, however, TURN asserts that the complexity of tabulating hours more recently incurred has led it to conclude that a cutoff date should be used for hours incurred but not yet claimed. TURN chooses May 20, 1996 for this self-imposed cut-off date, ignoring that D.96-06-029 specifically states that "[t]his information should be provided for the current year and all applicable previous calendar years" with no mention of optional omissions. TURN adds that it has used the same cut-off date for an August 30, 1996 submission, opining that its matrices "should satisfy the Commission's concern while avoiding unnecessary expenditures of compensable time on the part of TURN." (Request, p. 18.) TURN comments that "[I]f the Commission disagrees with TURN's judgment, we will of course comply with any request for supplemental information." (Request, p. 18, note 9.)

TURN cites what it believes to be the only possible sources of duplication. These consist of a number of hours incurred on the franchise impact issue in the 1995 universal service proceeding, listed in Attachment A and claimed in this Request; and some overlap on issues addressed in the local competition docket, already compensated and not claimed here. TURN asserts that "the duplication issue arises only for projects occurring before 1996, and TURN has ensured that it has not duplicated any hours or costs it claimed in prior fee requests." (Request, p. 19.) Essentially, TURN asks us to trust its own assessment of what potential duplication arises from its Request.

TURN's method is problematic for several reasons. Even assuming that a cut-off date were acceptable in preparing the matrices, TURN has chosen a date that does little to serve the Commission's purposes in avoiding duplicate compensation. Indeed, it would appear that TURN's cut-off date best serves TURN's purposes, since by using an identical cut-off date to that used in a prior submission, TURN has had to perform no additional substantive work on the charts in preparing its Request. This observation is confirmed by consulting TURN's August 30, 1996 submission, supplemental information filed in compliance with an Administrative Law Judge's ruling. This supplement was filed to complete a May 20, 1996 compensation request for participation in D. 96-03-020 and D. 96-04-052. The cut-off date of May 20, 1996 was perfectly sensible for a request finalized on that date. It is unacceptable for a request prepared seven months later.

Comparison of TURN's present Request with the completed version of its prior request reveals that TURN's matrices are essentially the same in each submission. In the present Request, TURN has simply changed the headings on any columns listing "[hours] claimed/pending" to "[hours] claimed/awarded." All other figures retained remain the same. TURN's prior request is more thorough, listing unclaimed hours incurred on franchise impact, among other things. TURN's present matrix omits information but nowhere adds anything, despite the obvious fact that there has been at least one additional Roadmap compensation award in the interim which is not recorded here.

TURN's assurance that only two possible areas of duplication exist is somewhat helpful, but fails to address the possibility that TURN itself has missed something in its assessment. The preparation of a matrix is meant at least in part to illustrate activity that could give rise to duplicate hours so that potential problems may be investigated. In addition, a complete, fully updated matrix would make any duplication more obvious. Without inclusion of more recent compensation decisions, however, the Commission is forced to comb through decisions issued between the cut-off date and the compensation request in order to verify TURN's assertions.

The potential for duplication should be even more obvious where the cut-off date used precedes by four months the decision for which compensation is requested. TURN continued to incur costs for its participation in this proceeding long past its cut-off date of May 20, 1996. The matrix it has submitted is of limited use in verifying its assertions.

TURN's cut-off date therefore serves only to avoid the clear directives outlined in D. 96-06-029. Acceptance of TURN's rationale would essentially allow TURN to use its preferred method of simply certifying that it has not submitted any duplicate hours.

This approach has recently been rejected. We explained:

While the sworn declaration of counsel attesting to the truth of the filing is important in assuring the overall integrity of the intervenor compensation process, the Commission must exercise its oversight responsibilities to require reasonable documentation of claimed costs and complete an independent review of the filing before approving an intervenor award of compensation. It does not matter whether claimed costs are truthfully presented, if the costs are not allocated in a manner enabling the Commission to match issues with related costs and to compute an accurate compensation award for each separate proceeding.

(D.97-02-043, p. 7) That decision also emphasized that the matrix was not solely designed to prevent duplication, but also to provide an allocation of costs and issues for which compensation is sought:

[T]he need for allocation by issue goes beyond the concern over double counting. Cost allocation by issue is particularly important where an intervenor is awarded compensation only for some, but not all, of the issues for which it claims credit. Without an allocation of costs and hours by issue, the Commission lacks requisite information with which to quantify the monetary award for those specific issues eligible for compensation.

(D.97-02-043, p. 5-6.) For this reason, TURN's matrix also falls short by recording some hours inaccurately. TURN notes in its Request: "The hours shown above may not precisely reflect the actual compensation awards because of reductions and disallowances in those decisions." (Request, Attachment D.) By submitting outdated matrices incorrectly reflecting past awards, TURN effectively ignores the import of our directives in D. 97-02-043.

Sorting through TURN's incomplete submissions is a time-intensive process which simply shifts the burden of which TURN complains to the Commission. TURN's seemingly arbitrary and nonsensical choice for a cut-off date, even assuming a cut-off date were allowed, required considerable time to decipher. In the course of determining the precise nature of TURN's omissions, the Commission is likely to gather enough information to independently verify that no duplication has taken place. While this process obliquely satisfies the goal of preventing duplicate compensation, it is an unacceptable answer to TURN's repeated protestations of inconvenience associated with the matrix requirement. Future requests for compensation in Roadmap proceedings will require a fully updated matrix, accurately reflecting hours incurred and awarded as directed in D. 96-06-029.

TURN notes in its Request that it will file a supplement if its matrices are found deficient. TURN's willingness to supplement a request does not erase the fact that the original version is defective. The process of requesting compensation should not be a trial-and-error process in which an intervenor submits some lesser approximation of what it supposes may slide by the Commission. Such an approach wastes valuable time and effort for all concerned in addition to delaying any eventual award. TURN should submit correct documentation the first time.

TURN has drifted into a pattern of minimal compliance or noncompliance with Commission guidelines on requests for compensation. In the past year alone, TURN has several times been reprimanded and cautioned to provide the requisite information in its requests:

We advise TURN . . . that in future requests for compensation, an itemized listing of all time spent by attorneys and experts, allocated by issue wherever possible, will be expected for an award of compensation. (D.96-08-029, slip op., p. 8.)

TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. Moreover, . . . we believe that TURN must improve its record-keeping for compensation requests . . . TURN's daily time records need to identify the issue on which time has been spent. If TURN had done

that here, it could have saved itself the embarrassment of a disallowance . . . (D.96-11-040, slip op., p. 20.)

TURN's original RFC . . . did not include a summarization of fees and expenses by issue, or by decision. In an ALJ ruling dated August 2, 1996, TURN was directed to provide such a breakdown. (D. 96-11-020, slip op., p. 14.)

TURN did not provide an allocation of its costs or hours by issue . . . TURN should not again expect us to have to ask for an allocation of costs by issue. In the future, we expect TURN to provide an allocation of costs and hours by issue in all of its requests for compensation filed subsequent to this order. (D. 96-06-029, slip op., p. 20.)

TURN has again submitted a request featuring substandard documentation. TURN must provide all of the required information if it expects to be compensated. TURN is put on notice that future requests for compensation that fail to comply with requirements for issue allocation and Roadmap documentation may be substantially reduced or denied.

3.2. Hourly Rates

For attorney Thomas Long, TURN requests a 1995 hourly rate of \$225 and \$240 for 1996. The Commission has previously approved \$225 for Long's work in 1995 (D. 96-06-029). TURN's requested 1996 rate for Long exceeds that approved in D.96-11-040, a 6.6% increase over Long's 1995 rate. TURN points out that the \$230 rate was approved in a decision in which TURN purposefully sought the same rate for Long's 1996 work as it did for 1995, simultaneously requesting a 1995 increase. While the Commission adhered to the rate previously approved for 1995, it allowed the \$230 rate for 1996. TURN submits extensive documentation in the form of declarations and excerpts from the Of Counsel Billing Rate Survey supporting an increase, noting Long's experience and educational record as well as rates at various large San Francisco law firms.

The hourly rate increase of \$10 for Long's 1996 work is adequately substantiated as comparable, to below, the market rates paid to persons of comparable training and experience, as required by § 1806. Long's 1996 rate of \$240 per hour is reasonable.

However, hours spent by Long preparing TURN's compensation request comprise a function more administrative than legal and will be compensated at half his regular rate.³ TURN will be awarded \$600 in compensation for its time in preparing a Reply to GTEC's response, calculated at 2.5 hours multiplied by Long's approved rate of \$240 per hour, however, since the response warranted the effort of an attorney. Since this effort was limited to responding to argument offered by GTEC, we will grant TURN's request that GTEC be required to pay this portion of the award.

The Commission has previously authorized all remaining hourly rates requested by TURN. In D.96-06-029, we approved the rates of \$130 for analyst Regina Costa and \$260 for senior attorney Michel Florio. For contract attorney Bruce Weston, D. 96-11-020 allowed \$175 per hour. Finally, TURN requests an hourly rate of \$210 for attorney Robert Finkelstein, a rate approved in D.96-04-087. We apply these rates here.

3.3. Other Costs

TURN asserts that postage and photocopying costs were incurred in relation to distribution of TURN's pleadings and other correspondence and documentation necessary to TURN's participation. TURN's costs are all reasonable, and should be compensated in full.

4. Award

We award TURN \$76,788, calculated as described above. In its Response to TURN's Request, GTEC asked that any award be apportioned among competitive local carriers with approved certificates of public convenience and necessity.

We do not agree with GTEC that compensation costs should be apportioned more widely. Section 1807 states that "[a]ny award made under this article shall be paid

³ This deduction is consistent with prior practice (see, e.g., D.91-12-074, D.92-11-002, D.93-04-048, D.93-06-022). Exceptions have been made in the past (see, e.g., D.93-10-023 and D.96-11-020). However, as we stated in this docket in D.96-11-020, slip op., p.18, "[n]ow that the matrices have been developed, . . . we fully expect that future requests for compensation will show far fewer hours spent and less senior staff effort on their completion." This adjustment reduces TURN's award by \$2,310 (\$120 x 19.25 hours).

by the public utility which is the subject of the hearing, investigation, or proceeding . . ." GTEC and Pacific have asserted their takings claim in an attempt to protect their interests. It is appropriate that they should be solely responsible for paying any intervenor award.

We will assess responsibility for payment of \$76,188 between Pacific and GTEC in proportion to the number of access lines each serves. We assess on GTEC responsibility for payment of an additional \$600. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing February 19, 1997 (the 75th day after TURN filed its compensation request) and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission may audit TURN's records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.96-09-089.
2. TURN's late-filed reply to GTEC's response prejudices none of the parties.
3. TURN has previously been found eligible to request compensation in these proceedings in D.96-06-029.
4. TURN contributed substantially to D.96-09-089.
5. TURN's independent contribution did not significantly duplicate that of any other party and should not be reduced.
6. TURN has not complied fully with documentation requirements for telecommunications Roadmap proceedings as directed in D.96-06-029.

7. TURN's claimed hours are reasonable.

8. The hourly rates requested by TURN for attorneys Weston, Florio, and Finkelstein, and witness Costa, have been previously approved by the Commission.

9. TURN's requested 1996 hourly rate of \$240 for attorney Long is comparable, to below, the market rates paid to persons of comparable training and experience, and is, therefore, reasonable.

10. TURN's requested attorney fees for preparation of its compensation request should be reduced by 50% consistent with prior treatment of such costs.

11. The miscellaneous costs incurred by TURN are reasonable.

12. TURN's request for compensation for 2.5 hours spent preparing a Reply to GTEC's Response is reasonable and should be compensated at Long's approved hourly rate.

13. Since TURN's Reply was limited to responding to GTEC's Response, GTEC should pay TURN the \$600 cost of preparing the response.

Conclusions of Law

1. TURN's Motion to Accept Late-Filed Reply should be granted.

2. TURN has fulfilled the requirements of §§ 1801-1812 which govern awards of intervenor compensation.

3. TURN has not fulfilled the requirements set forth in D.96-06-029 governing requests for compensation in Commission Roadmap proceedings.

4. TURN should be awarded \$76,788 for its contribution to D.96-09-089.

5. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network's (TURN) Motion to Accept Late-Filed Reply is granted.

2. TURN is awarded \$76,788 in compensation for its substantial contribution to Decision 96-09-089.

3. Pacific Bell (Pacific) and GTB California, Incorporated (GTEC) shall each pay TURN its share of the \$76,188 award, in proportion to the number of access lines Pacific and GTEC serve, and GTEC shall pay TURN an additional \$600, within 30 days of the effective date of this order. Pacific and GTEC shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest beginning February 19, 1997, the 75th day after the request was filed, and continuing until full payment is made.

This order is effective today.

Dated October 22, 1997, at San Francisco, California.

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