

Decision 98-05-036 May 21, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Michael and Kathleen Lyon,

Complainants,

vs.

Matrix Telecom,

Defendant.

ORIGINAL

(ECP)
Case 93-06-051
(Filed June 17, 1993)

Investigation on the Commission's Own Motion and Order to Show Cause Why Matrix Telecom, a Long Distance Carrier, Should Not Be Held in Contempt for Failure to Appear and Fined for Violating Its Tariff.

Investigation 94-03-020
(Filed March 9, 1994)

U-5227-C

OPINION GRANTING INTERVENOR COMPENSATION

This order grants, in part, the request of Michael and Kathleen Lyon (the Lyons) for compensation under the Commission's Intervenor Compensation Program (Public Utilities (PU) Code §§ 1801 - 1812).¹ We award the Lyons \$29,310.00 for their substantial contribution to Decision (D.) 94-07-069 and D.96-09-090.

¹ All future citations are to the PU Code unless otherwise stated.

Background

The Lyons filed a complaint against Matrix Telecom (Matrix) on June 17, 1993, alleging that Matrix had unlawfully switched one of the Lyons' business lines to its long distance service. In D.94-03-045, the Commission found in favor of the Lyons and ordered Matrix to refund the difference between Matrix' rates and those of the Lyons' selected carrier. In addition, the Commission issued an Order to Show Cause and Investigation to determine whether or not Matrix should be fined for slamming-related tariff violations, held in contempt for failure to participate in the complaint proceeding, and divested of its operating authority. Subsequently, in D.94-07-069, the Commission recalendared three issues for further hearing:

1. The status of out-of-state regulatory proceedings in which Matrix has been named and their relevance, if any, to this matter.
2. Whether or not Matrix should be required to mail the earlier decision to its past and current California customers.
3. Whether or not interest should be added to the reimbursements ordered in D.94-03-045.

The Commission consolidated the complaint with the investigation in order to consider these issues.

In D.95-03-040, the Commission granted the Lyons \$17,883 in reimbursement from the Advocates' Trust Fund for their reasonable costs of participation in the expedited complaint proceeding. Matrix filed an Application for Rehearing of this decision, which was denied in D.97-12-116. However, that order did modify D.95-03-040.

The Commission addressed the substantive issues recalendared for hearing in D.96-09-090. In that decision, the Commission ordered Matrix to:

- 1) pay to the general fund of the State of California the sum of \$13,500;
- 2) reimburse the Advocates' Trust Fund in a manner consistent with the order;
- 3) reimburse the Lyons for accrued interest; 4) mail to its current and past

California customers a notice informing them that they receive(d) long-distance service from Matrix and that any questions about choice of carrier be directed to our Consumer Affairs office; and 5) make periodic reports.² The Lyons then sought an additional \$96,078.69 from the Advocates' Trust fund for their participation in the consolidated dockets.

In D.97-03-009, the Lyons request for an additional award from the Advocates' Trust Fund was denied, but the Lyons were informed that they may pursue a finding of eligibility and (if eligible) a request for compensation under the Commission's Intervenor Compensation Program.

On April 7, 1997, the Lyons filed a Motion to Accept Late-filed Notice and a Notice of Intent to Claim Compensation (Original Notice) in these consolidated dockets. On July 7, 1997, the assigned Administrative Law Judge (ALJ) ruled that the Lyons failed to demonstrate that they are eligible, pointed out substantial deficiencies that must be corrected, and provided that within 30 days the Lyons may file a Revised Notice of Intent.

On August 1, 1997, the Lyons filed a Revised Notice of Intent (Revised Notice) which they intend as a supplement to the Original Notice to correct the deficiencies. As corrected, the Lyons seek \$65,891.25 in advocates' fees and \$638.93 in expenses for a total request of \$66,530.18 for their participation since April 13, 1994.³

² D.96-10-045, order correcting clerical error in D.96-09-090, was also adopted.

³ It is worth emphasizing at this juncture that any compensation awarded here will be for costs incurred *after* the period for which recovery through the Advocates' Trust Fund was previously granted.

Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to §§ 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 on 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."

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.

NOI to Claim Compensation

By a ruling issued September 19, 1997, in response to the Lyons' Revised Notice, the assigned ALJ stated that the Lyons demonstrated that participation presents a significant financial hardship, and therefore found the Lyons eligible to request compensation. The assigned ALJ also found the Original Notice, together with the Revised Notice, sufficient to comprise a request for compensation pursuant to § 1804(c). The Lyons timely filed their Notice.

Contributions to Resolution of Issues

The Lyons state that they are requesting compensation for their participation in these proceedings since April 13, 1994. The Investigation commenced on March 9, 1994. During that time period, the Commission adopted five substantive decisions, summarized above. To evaluate whether the Lyons made a substantial contribution, we must look at their participation and evaluate whether the recommendations and contentions they made were adopted by the Commission. Where we find a substantial contribution, we must describe the contribution. We will address the Lyons' contribution to each decision in turn.¹

D.94-07-069: In this decision, the Commission recalendared certain issues for rehearing. Among the issues were two which the Lyons' raised in a Petition for Modification as unresolved by our prior order, D.94-03-045. Specifically, whether Matrix should be required to provide notice to current and past California customers, and whether interest should be added to the reimbursements ordered in D.94-03-045. The Lyons made a substantial

¹The Lyons provide a very brief statement of their substantial contribution in the Original and Revised Notices. Any requests resulting from future participation should identify the decisions and better detail the specific contribution made to each.

contribution to D.94-07-069, which established the issues that were to be addressed in evidentiary hearing.

D.95-03-040: In this decision, the Lyons' were awarded compensation from the Advocates' Trust Fund. The Lyons were awarded reasonable costs incurred and requested as of April 12, 1994. The Lyons recommendations and contentions were adopted, save for the hourly rate applied to calculate the total award. It appears that after the filing of the award request, the Lyons incurred some additional expenses related to the filing, on March 20, 1995, of a response to Matrix's Motion to Submit Comments on the Proposed Order. Given their substantial contributions to decisions resolving the issues in the Complaint and Investigation, the Lyons should be awarded the reasonable costs of requesting compensation.

D.96-09-090: In this decision, the Commission adopted, among other things, the Lyons' recommendation that Matrix reimburse the Advocates' Trust Fund, that Matrix provide certain notice to its current and past California customers, and that Matrix reimburse the Lyons' for accrued interest. The Lyons made a substantial contribution to D.96-09-090, which resolved the remaining issues in the Complaint and Investigation.

D.97-03-009: In this decision, the Commission denied the Lyons' Motion for Compensation from the Advocates' Trust Fund. Given their substantial contributions to decisions resolving the issues in the Complaint and Investigation, the Lyons should be awarded the reasonable costs of requesting compensation.

D.97-12-116: Matrix filed the Application for Rehearing that prompted this decision. From the proceeding docket card, it appears that the Lyons filed a response to the Application for Rehearing. They claim 13.5 hours for preparing the pleading and 6 hours of clerical effort. The Commission, however, did not

rely on the filing in denying the Application. The Lyons did not make a substantial contribution to D.97-12-116.

The Reasonableness of Requested Compensation

The Lyons request compensation in the amount of \$66,530.18 as follows:

Advocate Fees			
Michael Lyon			
19.50 hrs on case (non-clerical)	X	\$60	= \$1,170.00
1.50 hrs on award (non-clerical)	X	\$60	= \$ 90.00
21.00 hrs (non-clerical)	X	\$60	= \$1,260.00
Kathleen Lyon			
354.25 hrs on case (non-clerical)	X	\$110	= \$38,967.50
164.50 hrs on award (non-clerical)	X	\$110	= \$18,095.00
518.75 hrs (non-clerical)	X	\$110	= \$57,062.50
133.00 hrs on case (clerical)	X	\$ 35	= \$ 4,655.00
83.25 hrs on award (clerical)	X	\$ 35	= \$ 2,913.75
216.25 hours (clerical)	X	\$ 35	= \$ 7,568.75
TOTAL ADVOCATE FEES			\$65,891.25
Expenses			
Travel			
2 trips to SF X \$20.00 for gas		\$55.00	
2 trips to Sac X \$15.00 for gas		\$30.00	
Parking		\$ 8.00	
Meals		\$20.00	
Travel Total			\$ 113.00
Postage			\$ 83.09
Photocopy			\$ 202.98
Phone			\$ 239.86
TOTAL EXPENSES			\$ 638.93
TOTAL AWARD REQUESTED			\$66,530.18

Hours Claimed

The Lyons claim a total of 756 hours for their participation in these proceedings since April 13, 1994. They have broken down the hours claimed by activity (i.e., drafting motion, preparing cross examination questions) and

whether the time was spent performing a clerical function (such as typing a pleading) as opposed to an advocate function.

Certain of the hours the Lyons claim are not reasonable or compensable on their face. For example, the 3.75 advocate hours and 1.5 clerical hours spent preparing and filing a motion that was rejected by the Docket Office and therefore never filed, are not reasonable. Also, the 13.50 advocate hours and 6.0 clerical hours spent preparing and filing a response to the Application for Rehearing, disposed of in D.97-12-116, are not compensable since the Lyons failed to make a substantial contribution to that decision. The 20.75 clerical hours spent driving to San Francisco to personally file pleadings, rather than using the Postal Service or express delivery services, are not reasonable. The 5.50 hours spent writing a letter to a legislator is also not compensable since it is not time spent participating in the Commission proceeding.

The additional breakout of hours spent preparing award-related pleadings, shown above, was calculated from the Lyons submission. From this breakout, and adjusting the figures as described in the previous paragraph, we can see that the Lyons spent 466.25 hours on the case proper, and 238.75 of the hours claimed preparing award-related pleadings. That means the Lyons spent 66% of their claimed hours on the case and 34% of their claimed hours seeking an award from the Commission.

From their submission, the Lyons' adjusted claimed hours spent on the case were divided among three types of activities in the following manner:

	M. Lyon non-clerical	K. Lyon	
		non-clerical	clerical
Prehearing Motions	2.00	59.75	12.25
PHC/Hearing Prep/Hearing	13.00	144.00	59.25
Briefs/Comments	3.50	142.25	48.50
Total Adjusted Hours For the Case	18.50	346.00	120.00

The time spent in Prehearing Motions activities include responding to pleadings generated by Matrix and discussing settlement. The PHC/Hearing Prep/Hearing activities include participating in a one-day prehearing conference, a one-day evidentiary hearing, responding to pleadings generated by Matrix (i.e., Motion to Strike), and generally preparing for hearings by reading testimony, preparing questions, and evaluating exhibits. Time spent in Briefs/Comments was spent only in preparing and filing a concurrent brief and comments and reply comments to the Proposed Decision.

We agree with the Lyons that the time spent in these activities largely complemented and supplemented, rather than duplicated, the participation of the Commission's Safety and Enforcement staff. However, the hours are excessive, especially those spent in the Briefs/Comments time period. Some of the excess hours are likely attributable to the fact that the Lyons are not experts in our Rules, in regulatory process, or in presenting a fact-based case. Under these circumstances, we are inclined to allow for recovery of some hours that would otherwise be deemed unreasonable because they are excessive and demonstrate an inefficient use of time. Therefore, we will reduce the Lyons adjusted hours claimed for time spent on the case by 15% to arrive at a reasonable number of hours.

We now turn to the hours claimed for time spent preparing award-related pleadings. A full 34% of the time the Lyons' claimed is spent on requesting compensation for their participation in the case proper. A review of recent decisions awarding compensation to experienced advocates very familiar with our process reveals that less than 1% of the hours spent in a proceeding are attributable to hours claimed for award-related pleadings. This case is not comparable for two reasons. First, the Lyons are not experienced advocates very familiar with our process. Second, the Lyons had a reasonable expectation that

the proper approach to seeking compensation was from the Advocates' Trust Fund. This request was rejected in D.97-03-009, and the Lyons were informed that the Intervenor Compensation Program was the appropriate approach, necessitating a new filing. The Lyons were advised to revise their new filing to correct certain deficiencies, which they did. Again, the need for revisions arose largely from the Lyons inexperience and lack of expertise.

Under these circumstances, the hours claimed for preparing award-related pleadings may be higher than what we typically find reasonable. However, the 238.75 hours the Lyons claim is not reasonable, even under the special circumstances we have noted above. Therefore, we will reduce the advocate and clerical hours claimed for preparing award-related pleadings by 60% to arrive at a reasonable number of hours. Although this is a substantial reduction, it still results in finding reasonable many more hours for preparing award-related pleadings than is our usual practice.

Finally, we turn to hours claimed for clerical work. The Lyons include documentation that K. Lyon, responsible for all the clerical hours claimed, typed at a "senior level" when tested in July 1997. The Lyons argue that, in the local-area, paralegal services typists perform at a comparable speed. Therefore, the Lyons argue that by performing the clerical work themselves they spent equal to or less than the time that would have been spent had a professional typist performed the work. We agree. Where we have found the related advocacy hours claimed reasonable, we also find the clerical hours claimed reasonable.

Hourly Rates

The Lyons request a \$110 hourly rate for the advocate time of K. Lyon, a \$60 hourly rate for the advocate time of M. Lyon, and a \$35 hourly rate for the clerical time of K. Lyon.

The Commission has previously set an hourly rate for both K. and M. Lyon for advocate time. In D.95-03-040, the Commission set a rate of \$60 an hour. In that decision, the Commission noted that the Lyons were neither attorneys nor experts; that their participation required some understanding of their legal rights but did not require any particular expertise or training. The same is true of the Lyons today, and their participation in the consolidated proceedings.

The \$60 an hour rate when set was applied to participation that took place in 1993. Participation in this proceeding took place from 1994 to mid-1997. A minor upward adjustment is therefore warranted, but not to the level K. Lyon seeks. We believe a rate of \$65 an hour for this time period is reasonable for the Lyons' advocacy efforts in the consolidated proceedings.

With respect to the hourly rate for clerical work, the Lyons present documentation that to have a local-area paralegal service type their pleadings from handwritten drafts would have cost from \$35 to \$60 per hour. The rates quoted are presumably the 1997 hourly, local-area rates. The Lyons argue that the \$35 hourly rate they seek for K. Lyon's clerical work is therefore reasonable. We agree and will apply a rate of \$35 an hour to reasonable clerical hours.

Other Costs

The Lyons request \$638.93 in compensation for miscellaneous expenses in their Revised Notice. This total differs from that included in the Original Notice. The Lyons explain that the differences are attributable to additional expenses incurred to file pleadings in the November 1996 to July 1997 timeframe.

Based on this argument, we would expect to see increased charges in postage, photocopy, and telephone expenses. However, the Lyons have submitted increases in travel, along with the expected increases, although no

document is asserted to have been hand delivered during the period. Some of the travel (related to hand delivery of pleadings), reproduction and postage costs requested are associated with claimed hours we have not found to be reasonable. We do not compensate intervenors for meals for one-day travel. We will reduce the travel expenses accordingly, and reduce the reproduction and postage by \$30.00 to reflect the expenses associated with claimed hours we have not found reasonable. The claimed expenses, with the noted reductions, are otherwise reasonable. The Lyons should be awarded \$546.00 (rounding to the nearest whole dollar) in expenses.

Award

We award the Lyons \$29,310.00, calculated as described above and summarized below.

	M. Lyon non-clerical	K. Lyon non-clerical	K. Lyon clerical	
Reasonable Hrs For Case	15.72	294.10	93.29	
Reasonable Hrs For Award	0.60	66.20	29.10	
Total Hrs	16.32	360.30	122.39	
X Adopted Hrly Rate	65	65	35	
Total Advocate Award (rounded)	1,061.00	23,419.00	4,284.00	= 28,764.19
Total Expenses				<u>546.00</u>
Total Award				\$29,310.00

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 October 16, 1997, (the 75th day after the Lyons filed their Revised Notice, which, when taken together with the Original Notice, comprise a compensation request) and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put the Lyons on notice that the Commission Telecommunications Division may audit the Lyons records

related to this award. Thus, the Lyons must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. The Lyons' records should identify specific issues for which it requests compensation, the actual time spent by each person, the applicable hourly rate, any fees paid to consultants, and any other costs for which compensation may be claimed.

Findings of Fact

1. The Lyons have made a timely request for compensation for their contribution to D.94-07-069 and D.96-09-090.
2. The assigned ALJ found, on September 19, 1997, that participation by the Lyons in this proceeding constitutes a significant financial hardship.
3. The Lyons contributed substantially to D.94-07-069 and D.96-09-090.
4. Certain activities for which the Lyons claim hours are not reasonable or compensable on their face.
5. Allowing for the excesses and inefficiencies inherent in lay participation in our proceedings, the hours claimed for time spent on the case proper should be further reduced by 15%, because they are excessive and demonstrate an inefficient use of time, to arrive at a reasonable number of hours.
6. The hours claimed for preparing award-related pleadings are not reasonable, even under the special circumstances of these consolidated proceedings, and should be reduced by 60% to arrive at a reasonable number of hours.
7. Where we found the related advocacy hours reasonable, we also find the clerical hours claimed reasonable.
8. The hourly rates of \$65 for the Lyons' advocate work and \$35 for K. Lyon's clerical work are no greater than the market rates for individuals with comparable training and experience.

9. The miscellaneous costs incurred by the Lyons must be reduced to arrive at a level of reasonable expenses.

10. All pending matters in the complaint and investigation proceedings having been resolved.

Conclusions of Law

1. The Lyons have fulfilled the requirements of §§ 1801-1812 which govern awards of intervenor compensation.

2. The Lyons should be awarded \$29,310.00 for their contribution to D.94-07-069 and D.96-09-090.

3. This order should be effective today so that the Lyons may be compensated without unnecessary delay.

4. These proceedings should be closed.

O R D E R

IT IS ORDERED that:

1. Michael and Kathleen Lyon (the Lyons) are awarded \$29,310.00 in compensation for their substantial contribution to Decision (D.) 94-07-069 and D.96-09-090.

2. Matrix Telecom shall pay the Lyons \$29,310.00 within 30 days of the effective date of this order. Matrix Telecom 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 October 16, 1997, and continuing until full payment is made.

3. This proceeding is closed.

This order is effective today.

Dated May 21, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEPPER

Commissioners