

Decision 98-11-051 November 19, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of AT&T Communications of California, Inc. to be designated a nondominant interexchange carrier.

Application 94-05-042
(Filed May 18, 1994)

ORIGINAL

William A. Ettinger, Attorney at Law, for AT&T Communications of California, Inc., applicant.
Thomas Long, Attorney at Law, for The Utility Reform Network, intervenor.
Janice Grau, Attorney at Law, for the Office of Ratepayer Advocates.¹

O P I N I O N

This decision awards The Utility Reform Network (TURN) \$8,091 of the \$40,456 it requests in compensation for its contribution to Decision (D.) 97-08-060.

1. Background

1.1. General Background

Following the antitrust consent decree breaking up the American Telephone & Telegraph Co., the Commission in Decision D.84-06-113 adopted a two-tiered framework for regulation of interexchange service companies. It designated AT&T Communications of California, Inc. (AT&T), which at the time had roughly 95 percent of the intrastate interLATA market, a "dominant" interexchange carrier (IEC). As such, it made AT&T subject to traditional rate

¹ The Division of Ratepayer Advocates entered an appearance in this proceeding. By Executive Director memorandum dated September 10, 1996, all functions of DRA were transferred to the Office of Ratepayer Advocates (ORA).

base, rate of return regulation. In contrast, it designated AT&T's competitors "nondominant" interexchange carriers (NDIECs), with less stringent regulatory controls.² The dominant/nondominant framework rests on the concept that dominant carriers have the market power either to "extract monopoly profits or to price predatorily, while [nondominant carriers have] the power to do neither." (15 CPUC 2d 423, 467 (1984).) Even then, however, the Commission recognized the emergence of competition in the interexchange market, and noted that "[a]fter equal access allows competitors to provide equivalent service, we will entertain AT&T's application for more flexible regulation." (*Id.* at 473.)

Over the years, the Commission has relaxed the regulatory requirements on AT&T, by granting it pricing flexibility and removing requirements that AT&T use local exchange company billing services. However, the Commission has continued to impose more regulatory controls over AT&T than its competitors. Rulemaking (R.) 92-08-008 proposed more stringent regulation on AT&T than its competitors with regard to affiliated transactions. R.93-04-003 proposed more stringent open access and network architecture development rules on AT&T than its competitors.

1.2. *AT&T's Position*

On May 18, 1994, AT&T filed an application requesting that the Commission designate it a NDIEC and impose upon it the same regulatory requirements as all other NDIECs. It asked that the Commission retain the "Observation Approach" and the Monitoring Plan established by D.88-12-091,

² As NDIECs, AT&T's competitors had the "freedom to set and change their rates as their self-interests indicate, subject only to such conditions as are necessary to protect their customers from exploitation." (15 CPUC 2d 423, 473 (1984).) The current regulatory framework for NDIECs is set out in D.90-08-032, D.91-10-041, D.91-12-013 and D.92-06-034.

modified by D.93-02-010, which the Commission adopted as part of a program permitting AT&T pricing flexibility. AT&T asserted that it no longer had market power as defined by the Commission in D.87-07-017 and which would require it to be subject to more regulatory oversight than its competitors.

1.3. *TURN's Position*

TURN opposed AT&T's request for reclassification because it felt that the market had not kept AT&T sufficiently competitive. It pointed to AT&T's purported failure to pass along the savings it achieved through industry-wide access cost reductions. It claimed that AT&T rates of return "had skyrocketed since AT&T was given pricing flexibility."³ It argued that AT&T had, despite the ordered IRD access charge reductions, increased or only slightly reduced residential and small business rates. It declared that AT&T's charges for long distance calls, credit card service charges and operator assistance would be lower if it had real competition. Finally, it urged the Commission to force AT&T to better design its billing so that customers could see the price increases AT&T had imposed on service items such as directory assistance.

1.4. *ORA's Position*

ORA also opposed AT&T's motion for reclassification, but attempted to take a more conciliatory approach. If it could not prevent the Commission from reclassifying AT&T, it would urge the Commission to impose additional requirements on AT&T's NDIEC status for the next three years. Notably, it wanted AT&T to provide detailed reports on its profits and prices, to be seen as

³ TURN Opening Brief at 4. AT&T's intrastate rates of return for 1994 and 1995, 43.35% and 78.70% with net income of \$180.86 million and \$324.32 million, respectively, are the highest levels of profit the company has ever achieved in California. (*Id.* at 4-5 citing Ex. 2, attachment 6.) TURN insists that access cost savings represent a significant amount of the company's 1995 profits.

an affiliate of a competitive local carrier, and to be subject to more stringent notice requirements before it could take back its billing services. ORA argued that AT&T, despite its diminished market status, still had enough power to "extract monopoly profits or price predatorily" and so needed these controls. As support for this position it pointed to AT&T's high earnings rate, the relatively low number of customers signed up for its discount programs,⁴ and AT&T's admission that technology, not competition, drove down prices.

1.5. *Procedural History*

On April 10, 1996, in Interim Opinion D.96-04-058, the Commission rejected AT&T's and the ORA's joint motion to adopt the settlement⁵ filed in this proceeding on September 27, 1995.

Following a May 1996 prehearing conference which set out the contested issues, the matter went to evidentiary hearings on September 11-12, 1996. AT&T, ORA and TURN participated in the hearings. AT&T presented witnesses and testimony. The parties submitted opening briefs on October 18, 1996, and reply briefs on November 1, 1996.

On October 21, 1996, TURN filed a motion to require AT&T to flow through the full benefits of the Implementation Rate Design (IRD) access cost reductions to consumers; to rescind its recent increases to directory assistance

⁴ Which it attributed to AT&T's failure to market properly.

⁵ The settlement would have required AT&T to: 1) remain designated as the dominant interexchange carrier in the California interexchange market for a period of time; 2) continue to provide reports not required of NDIECs, and provide new reports as well as new information to its customers; 3) institute a price protection plan for Universal Lifeline Telephone Service subscribers; and 4) submit testimony in two years so that the Commission could reach a final decision concerning AT&T's nondominance. In return, the settlement provided that AT&T would not be subject to rate of return regulation, that the company would suspend monthly reporting of rate of return data and report

Footnote continued on next page

and service charges; and to disclose service charges on customer bills. AT&T responded on November 5, 1996. The Commission found that no legal grounds existed for granting the relief requested on the basis of a motion. Moreover, the Commission declined to grant TURN's alternate request that it hold further evidentiary hearings on the basis of statements that focus only on one IEC.

1.6. Commission Decision

Although the Commission found AT&T to be a nondominant carrier, it expressed concern over AT&T's high rate of return on its intrastate rate base. It agreed that AT&T not longer wielded "significant market power" and so could not "extract monopoly prices" or "price predatorily." Thus, it would no longer require AT&T to submit to rate regulation. It would, however, make AT&T annually report its intrastate rate base rate of return until Pacific Bell entered the long distance market. This report would be submitted, under seal, to the Commission's Telecommunications Division.

Commissioner Knight dissented from the additional reporting requirement because he found it to be an undue burden on AT&T.

Commissioner Bilas concurred with the majority decision, but suggested an additional reporting requirement that would capture a ratio showing the concept of pricing at or near marginal cost.

such data annually, and that AT&T would be permitted, as are all NDIECs, to bundle tariffed services with nontariffed products.

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 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 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.

3. NOI to Claim Compensation

TURN timely filed its NOI after the first prehearing conference and was found to be eligible for compensation in this proceeding by a ruling dated February 16, 1996. The same ruling found that TURN had demonstrated significant financial hardship.

4. Contributions to Resolution of Issues

4.1. TURN's Contributions

TURN significantly contributed to the sole issue in this matter, the appropriate regulation and monitoring of AT&T in the future. The Commission adopted TURN's factual contention that AT&T's rate of return on its intrastate rate base should be monitored until Pacific, or a Pacific affiliate, has entered the long distance market in California. This fulfills the requirement listed in § 1802(h) that an intervenor supply a "factual or legal contention, or a specific or procedural recommendation" adopted by the Commission.

Some of TURN's losing arguments influenced individual Commissioners. Notably, the Commission had rejected TURN's proposal to continue reviewing AT&T's prices in relation to the access charge reductions. Commissioner Bilas' concurrence, however, argued for a similar procedure to help allay TURN's concerns. Specifically, Commissioner Bilas wanted AT&T to track Average Switched Revenue per Conversation Minute because he felt it would accurately measure whether access cost reductions were being passed onto the customer.

TURN did not submit any hours it spent on its unsuccessful post hearing motion to have AT&T's rates reduced. It had sought to force AT&T's rates to reflect the access charge reduction granted in D.94-09-065 (IRD decision).

4.2. Relationship To ORA's Contributions

Although ORA advanced similar arguments to TURN, it did not have sufficient numbers of staff people to adequately pursue this matter. TURN took the lead on cross examinations, briefings, and ex parte contacts with the Commissioners. TURN reported that Commissioner Duque's office singled out their ex-parte presentation as being particularly helpful. As noted earlier, Commissioner Bilas adopted TURN's concerns in his concurrence. The full Commission also noted that the final decision reflected changes "driven in great part by the input from TURN and ORA."

Given the disparity in the amount of time and effort spent, the Commission sees no reason to reduce TURN's compensation based on ORA's contributions.

5. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$40,456 as follows:

Attorney's Fees

T. Long

17.50	hours X	\$215 (1994)	=	\$ 3,763
5.75	hours X	\$225 (1995)	=	\$ 1,294
51.25	hours x	\$240 (1996)	=	\$12,300
45.50	hours x	\$250 (1997)	=	\$11,375

M. Florio

2.75	hours x	\$260	=	\$ 715
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Miscellaneous Costs

Photocopying expenses	=	\$ 428
Postage Costs	=	\$ 158
Computerized Legal Research	=	\$ 49
Fax	=	\$ 4

TOTAL = \$40,456

5.1. Hours Claimed

TURN has claimed a total of 183.75 hours. It provided a detailed breakdown by time, date and task in accordance with requirements listed in § 1805(C)(2)(c). Further, TURN voluntarily eliminated time spent on tasks for which the Commission does not compensate, such as contacts with the media. TURN also deducted the time it spent preparing its losing motion on the IRD matter.

We also agree with TURN's contention that a single issue, the appropriate regulation and monitoring of AT&T, was at stake and so TURN did not need to break hours down by any other issue.

As TURN acknowledges, it did not prevail on all of the recommendations it advocated regarding the proper regulation and monitoring of AT&T. In fact, a review of the ordering paragraphs places the recommendation on which it did prevail (continued monitoring of AT&T's rate of return on its intrastate rate base) in the context of the Commission having resolved most of the contentious issues against TURN. Specifically, the Commission decided against TURN in the first four ordering paragraphs, leaving only the monitoring issue, addressed in Ordering Paragraphs 5 through 7, as an issue resolved in TURN's favor. On balance, we therefore conclude that it is reasonable to compensate TURN for 1/5th of the costs it incurred in preparing for and participating in this proceeding.

5.2. *Hourly Rates*

TURN has requested attorney compensation for the years 1994 through 1997. Thomas Long has previously been approved for an hourly rate of \$215,⁶ \$225,⁷ and \$240⁸ in 1994, 1995 and 1996 respectively. TURN has requested that Mr. Long's hourly rate be increased to \$250 for 1997.

The Commission approves Mr. Long's proposed rate increase to \$250 an hour. TURN has demonstrated that Mr. Long has comparable training and experience to private law firm partners offering similar services. TURN has demonstrated that such partners receive hourly rates of \$175 to \$450. TURN's request that Mr. Long receive an hourly rate of \$250 is consistent with the requirements of § 1806.

TURN has requested an hourly rate of \$170 an hour for Mark Shostak. Although Mr. Shostak has never appeared before the Commission, he does have four years experience working as a consumer advocate for the Pennsylvania Office of Consumer Advocates. TURN does not believe this figure reflects Mr. Shostak's true value, which it places at \$185 an hour.⁹ TURN has voluntarily discounted Mr. Shostak's rate to reflect the amount of time it took him to learn California utility law.

The Commission accepts TURN's characterizations of Mr. Shostak's skills and approves a rate of \$170 an hour for Mr. Shostak.

⁶ D. 94-09-022.

⁷ D.96-06-029.

⁸ D. 97-10-049.

⁹ TURN bases this estimation on two previous decisions awarding TURN attorneys with fewer years experience a rate of \$185 an hour. D.96-07-046 (Theresa Mueller) and D.96-07-046 (Peter Allen).

TURN requests that Mr. Florio receive his previously approved hourly rate of \$260 an hour.⁹⁹ The Commission approves this request.

The Commission has a practice of awarding only half the otherwise applicable attorney's rate for the time spent on preparing the compensation request when the preparation of the request did not require the skill of an attorney to prepare.¹⁰⁰ Although this was not a complex, multi-issue request, it does present original argument supporting any hourly rate increase for Mr. Long. We will therefore apply the full hourly rate for the time spent preparing the request.

5.3. Other Costs

TURN has requested \$639 for additional expenses (copying, postage, computerized legal research, and fax). The Commission finds these expenses to be reasonable.

6. Award

We award TURN \$8,091 of the \$40,456 it requests.

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 December 20, 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's Telecommunication's Division may audit TURN records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation.

⁹⁹ D.96-06-020.

¹⁰⁰ D.93-06-022 at 6, D.93-09-086 at 9, and D.91-12-074 at 14.

TURN 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.97-08-060.
2. TURN contributed substantially to D.97-08-060.
3. It is reasonable to apply the previously adopted hourly rates TURN requests for services performed by Mr. Long and Mr. Florio.
4. TURN has requested hourly rates for attorneys Mr. Long and Mr. Shostak for work performed in 1997 and 1996, \$250 and \$170, respectively, that are no greater than the market rates for individuals with comparable training and experience.
5. The miscellaneous costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.
2. TURN should be awarded \$8,091 for its contribution to D.97-08-060.
3. This order should be effective today so that TURN may be compensated without unnecessary delay.
4. All outstanding issues having been addressed, this proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$8,091 in compensation for its substantial contribution to Decision 97-08-060.

2. AT&T Communications of California, Inc. (AT&T), shall pay TURN \$8,091 within 30 days of the effective date of this order. AT&T 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 December 20, 1997 and continuing until full payment is made.

3. This proceeding is closed.

This order is effective today.

Dated November 19, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners