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Decision 98-12-054 December 17, 1998

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.

Rulemaking 95-04-043
(Filed April 26, 1995)

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

Investigation 95-04-044
(Filed April 26, 1995)

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O P I N I O N

This decision grants The Utility Reform Network ("TURN") an award of \$7,076 in compensation for its substantial contribution to Decision (D.) 98-01-024.

1. Background

1.1. General Background

1.1.1. "Road Map" Proceedings Initiated

In December 1994, the Commission issued D.94-12-053 in Investigation (I.) 87-11-033. This decision ordered all parties to participate in negotiations which the Commission hoped would resolve many of the issues associated with the opening of local exchange phone service to competition. These negotiations extended from January 1995 to March 1995. Parties also submitted comments to the Commission Advisory and Compliance Division (CACD) on January 31, 1995, as part of the informal process employed by the Commission to develop interim rules for local competition.

The negotiations ordered by the Commission fell short of resolving the issues surrounding the implementation of local exchange competition. As a result a formal Local Exchange Competition docket was established on April 28, 1995, (R.95-04-043/I.95-04-044) with the issuance of proposed interim rules for local exchange competition. Parties submitted written comments addressing proposed rules on May 24, and the Commission convened a full panel hearing on June 9 to hear oral statements on the merits of the proposed rules. In D.95-07-054 the Commission adopted interim rules for local exchange competition, addressed certain preliminary issues, and set forth a

permitted Pacific and GTEC to file requests for CLC authority within the MSLEC territory, but did not act on the requests until after it had reviewed parties' comments on the implications of potential below-cost pricing by Pacific and GTEC.

Pursuant to an Administrative Law Judge (ALJ) ruling, parties filed comments on this anticompetitiveness issue on October 20, 1997, and filed replies on November 10, 1997. Participating parties included the MSLECs, Pacific, GTEC, AT&T Communications (AT&T) and MCI Communications (MCI) (jointly), the Office of Ratepayer Advocates (ORA), and TURN.

After consideration of these comments, the Commission adopted D.98-01-024, and it is for participation leading to this decision for which TURN claims it is entitled to compensation.

1.4. *TURN's Comments*

The Commission summarized TURN's comments in D.98-01-024. TURN opposed the MSLECs' proposals to institute proceedings for geographic rate deaveraging at this time. TURN felt the MSLECs had failed to justify why Pacific and GTEC should be either excluded from entering the MSLECs' territories or treated differently from other CLCs. TURN argued that the ILECs' ability to average rates in their own service territories has no bearing on their CLC rates.

TURN further denied that the universal service fund mechanism provided any opportunity for the ILECs to improperly subsidize their services offered as CLCs.

Even if Citizens's claims regarding subsidized, below-cost pricing had validity, TURN challenged Citizens's claims concerning the high level of Pacific's costs. In its comments, Citizens had argued that Pacific's statewide average cost per access line was \$25.28. Yet, TURN pointed out that, as shown in

Appendix D of D.96-10-066, that average cost referred only to subsidized lines. TURN argued that Pacific's actual cost is less than \$20.30 per line according to the modified Cost Proxy Model (A.97-03-004).

Finally, TURN saw no inherent problem with the ILECs charging less than the MSLECs for a service when the lower price resulted from competition-driven efficiencies or innovations.

1.5. Commission Decision

1.5.1. Commission Denied All Requests to Keep ILECs Out

In D.98-01-024, the Commission denied all requests to keep the ILECs from entering the MSLEC territories as competitors. It felt the Telecommunications Act legally prevented it from barring competition. It did not believe the ILECs could use their tariffed rates to their advantage as CLCs since those rates did not apply outside the ILECs' home territories. Furthermore, the Commission had previously ordered ILECs to keep separate accounts from their CLC affiliates,³ so the Commission did not think it likely that ILECs would spread their CLC costs among their ratepayers.

1.5.2. Pacific's Physical Proximity Was Not an Unfair Advantage

The Commission also rejected the arguments that Pacific's physical proximity to the MSLECs' territory gave it an unfair advantage. It noted Pacific would face competition not only from the incumbent MSLECs, but also from other large CLCs such as AT&T and MCI with significant financial resources to build their own facilities. We agreed Pacific was positioned to realize certain

³D.95-12-057 (ordering all CLCs, including Pacific and GTEC, to keep their books and records in accordance with the Uniform System of Accounts specified in Title 47, Code of Federal Regulations, Part 32).

economies of scale and scope resulting from the proximity of Pacific's existing local exchange facilities to the MSLECs' service territories, but we believed Pacific's position as a new CLC entrant did not approach that of a dominant carrier. Ultimately the Commission saw nothing inherently anticompetitive about a particular CLC, through economies of scale, being able to offer service more efficiently than certain competitors.

1.5.3. Parties Rehashed Settled Issues

D.98-01-024 reminded parties that issues regarding competitive imbalances between large CLCs and the MSLECs had previously been determined by the interim rules adopted in D.97-09-115. *The only issue at stake in this decision was Pacific's and GTEC's ability to reduce prices below their specific costs of service.* In other words, the Commission had only solicited comments on the issue of the implications of below-cost pricing by the ILECs. It refused to give any further consideration to the MSLECs' general complaints about competition.

1.5.4. Universal Funding Did Not Provide Unfair Advantage

Likewise parties did not persuade the Commission that the universal service funding mechanism provided any unfair competitive advantage to Pacific or GTEC in entering the MSLEC territories. As noted by TURN, the Commission had already adopted measures to ensure that the ILECs do not receive any "windfall" from the universal service fund which could be used to unfairly lower prices for competitive services. In D.96-10-066, the Commission ordered Pacific, GTEC, and the MSLECs to reduce all of their rates within their incumbent territories, except for basic service, by a certain percentage to offset revenues received from the universal service fund. None of these universal service fund rate reductions would apply to rates offered by Pacific or GTEC outside of their incumbent territories in their capacity as CLCs.

Additionally, the amount of universal service fund subsidy which was applicable to Pacific within its home territory would have no bearing on the subsidy it would receive as a facilities-based CLC in the MSLEC territories. Under the rules adopted in D.96-10-066, the amount of support which any qualifying carrier would receive was determined by reference to the rates of the incumbent carrier in that service territory. Thus, any universal service fund support which Pacific would receive as a CLC serving a high-cost customer in Citizens's territory would be measured against Citizens's rates. All facilities-based CLCs serving in a given high-cost area received identical subsidy amounts under the universal service fund mechanism that the incumbent would be eligible to receive. Pacific or GTEC would therefore realize no competitive advantage over the MSLECs resulting from the universal service fund support available within the Pacific's and GTEC's own home territories. Consequently, the Commission found that the universal service fund mechanism does not create any incentive for Pacific or GTEC to engage in below-cost pricing when providing service in the MSLEC territories as CLCs.

1.5.5. MSLECs Did Get Pricing Flexibility

The Commission disputed the MSLECs' claim that they were not being provided appropriate pricing flexibility to respond to the competitive pricing ability of Pacific and GTEC. We referred back to the pricing flexibility we granted MSLECs in D.97-09-115, which mimicked the flexibility given to Pacific and GTEC in D.96-03-020. Although the Commission left open the option of granting additional flexibility as competition grew, it did not feel that time had arrived.

1.5.6. Competitive Markets Require Incentives

The whole point of a competitive market is to provide the incentive for competitors to offer consumers lower-priced services than would be available merely from a single incumbent monopoly provider. If the Commission prohibited CLCs from charging less than the incumbent utility for a given service, it would undermine the benefits of competition since the incumbent's rates would become the default. If a CLC were to propose a rate that is deemed unfair or unreasonable, parties have recourse to file a complaint as provided in the Commission's Rules of Practice and Procedure (see Article 3).

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 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 and Request for Compensation

TURN timely filed its NOI after the first prehearing conference and was found to be eligible for compensation in this proceeding by D.96-06-029, dated June 6, 1996. The same decision found that TURN still had a rebuttable presumption of significant financial hardship.⁴ No party has challenged that status.

On March 9, 1998, TURN filed its Request for Compensation in connection with D.98-01-024 (Request), seeking \$7,576 for its asserted substantial contribution. TURN's Request was timely filed within the allowed 60 days. (§ 1804(c).)

⁴Section 1804(b)(1) states that once an ALJ has made a finding of significant financial hardship, there is created a finding of significant financial hardship in other Commission proceedings commencing within one year of the date of that finding. The ALJ Ruling of August 21, 1995, in R.95-01-020, found that TURN faced significant financial hardship. TURN obtained a similar ALJ ruling on January 5, 1995, in A.94-05-044.

3.1. TURN's Motion Regarding the D.96-06-029 Matrix Requirement

On March 10, 1998 TURN formally requested the Commission to excuse it from compliance with Ordering Paragraph 8 of D.96-06-029 as it applies to this Request. (See Motion for an Order Excusing Compliance). No party filed an objection to TURN's motion.

In D.96-06-029, the Commission directed intervenors in Roadmap proceedings to submit the following information when requesting compensation for participation:

- 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, slip. op. p. 27.)

This matrix is designed to reveal potential duplicate compensation for intervenors participating in multiple Roadmap proceedings.

TURN advanced four reasons in support of its request to be excused from the matrix requirement. One, it only prepared a single pleading in response to an ALJ's request for comments on a specific issue, and none of the hours it

claimed dealt with any other issue or pleading. Two, the Commission can easily verify the claim because TURN included only 24 tasks and asked for just \$7,756, in contrast to typical intervenor compensation requests of \$100,000 or more. Three, the complicated nature of the Roadmap matrices made it prohibitive from a cost perspective for TURN to file the matrices on a matter this simple. Four, TURN posited that no party would be prejudiced by its failure to file this motion. In fact, TURN argued that a Commission denial of this request would prejudice *all* parties since the utilities, and ultimately ratepayers, would have to pay for TURN's additional time, and TURN would have to wait for its compensation.

We grant TURN's motion but only for the first reason stated. The Commission agrees that in D.98-01-024, it emphatically stated that it had asked parties to only brief whether ILECs had the power to reduce its prices *below* their specific costs of service. Thus, TURN correctly argued the limited nature of this request.

The Commission, however, does not find compelling TURN's remaining concerns about prejudice and administrative ease. First of all, *all* parties would be prejudiced by an intervenor's failure to file a roadmap matrix. The requirement's purpose is to prevent ratepayers from paying intervenors for the same work more than once. Costs spent preparing such a request are tangential to that concern. Second, if TURN has reservations about the efficiency and efficacy of the Commission's matrix requirement then it should directly brief that issue. In fact, the Commission recently considered and rejected general arguments to abolish the matrix requirement. (See D.98-04-059 in R.97-01-009/I.97-01-010.) Back door attempts to avoid that requirement on a case by case basis will not be viewed favorably.

4. Contributions to Resolution of Issues

TURN's participation in this phase of the Local Exchange Competition proceeding resulted in a substantial contribution to our decision on ILEC entry into the MSLEC service territories. TURN participated on the single issue of whether the ILECs would have an unfair advantage if allowed to compete in the MSLECs' service territories. In its comments, TURN made a number of arguments that were adopted by the Commission in support of its contention that the ILECs have no unfair advantage over the MSLECs in the MSLECs' service territories, six of which are described below. TURN's contributions were largely unique and not duplicative for other parties.

4.1. Universal Service Fund

TURN's most significant contribution came when it dispelled the MSLECs' arguments that the ILECs could abuse their universal fund support. TURN reminded the Commission that D.96-10-066 prevented ILECs from using the universal funds as a windfall by requiring these carriers to reduce rates on all services except basic service to offset revenues received from the universal service fund. Thus the ILECs would not have extra funds lying around to invest in undercutting the MSLECs' prices.

Moreover, TURN proved that the ILECs would not have any greater advantage with the universal fund when they acted as CLCs in the MSLECs' area. D.96-10-066 required that a CLC's universal service funds be set by the number of incumbent customers it has in that area, not its home area as an ILEC. Thus the ILECs' CLC affiliates would be competing against the MSLECs on an equal footing in the MSLECs' territory. Again, the universal service funds *would not* provide the ILECs' CLC affiliates with extra money from the universal service fund.

4.2. Deaveraging

The Commission adopted TURN's observation that deaveraging Pacific's and GTEC's rates would be a "massive undertaking." TURN argued the resulting delay would unnecessarily delay competition because the MSLECs had not provided a justifiable reason for keeping the ILECs out. The Commission chose not to order deaveraging because it would erect barriers to competition in the form of undue delay.

4.3. Book Keeping Practices

The Commission clarified, per TURN's request, the bookkeeping practices of ILECs in regards to their CLCs. It directed Pacific and GTEC to keep separate books and accounting for their CLCs "in conformance with the Uniform System of Accounts, distinct from their incumbent local carrier (ILEC) operations." If GTEC and Pacific failed to keep the accounts separate, then the Commission may make their entry in the MSLEC territories subject to certain barriers and restrictions.⁵

In D.95-12-057, the Commission had previously decided that CLCs should keep their books in accordance with the Uniform System of Accounts, but this decision specifically applied that rule to CLCs entering MSLEC territory.⁶ The Commission believed this new application would prevent the ILECs from averaging in or subsidizing their CLC costs, their ILECs costs, incurred to provide service in the home territories. Although GTEC had raised its separate bookkeeping requirements for CLCs as a defense to charges of anti-competitive behavior, arguably TURN's request for a clarification brought about the specific application to the competitive entry into the MSLECs' territories.

⁵ D.98-01-024 at Ordering Paragraphs 1 and 2.

⁶ D.98-01-024 at 7.

4.4. *Competition*

TURN disproved the MSLECs practical arguments that the ILECs would unfairly compete with them. TURN undercut Citizens's claim that Pacific's statewide average cost per line was \$25.28 by showing that this figure referred only to the average cost of the subsidized lines. TURN provided documentation that showed Pacific's cost was actually less than \$20.30 per line. This disproved the argument that Pacific's high level of costs would per se indicate that this company would price basic service in the MSLECs' territory below cost.

Further, TURN found no inherent problem with the ILECs' ability to under price the MSLECs if that ability came as a result of innovations and efficiencies. We agreed with this reasoning when we noted that we saw "nothing inherently anticompetitive about a particular CLC, through economies of scale being able to offer services more efficiently than certain competitors."

4.5. *Pricing Flexibility*

TURN advocated the position the Commission adopted towards the MSLECs' request for pricing flexibility. TURN reminded the Commission that D.97-09-115 gave the MSLECs pricing flexibility similar to what we granted Pacific and GTEC in D.96-03-020. Specifically MSLECs could (1) reclassify most local exchange service from Category I to Category II, (2) implement pricing flexibility for Category II services once price floors were determined and (3) phase in implementation of pricing flexibility with customer-specific contracts for Category II services. The Commission concluded that the current state of competition did not warrant any more flexibility.

⁷ D.98-01-024 at 8.

4.6. ILEC Status

TURN contributed to the Commission's decision by providing information necessary to show that Pacific and GTEC could not exploit their ILEC status to unfairly disadvantage the MSLECs. TURN, along with various other parties, explained to the Commission that the ILECs did not have to charge their incumbent rates when they moved out of their home area. Thus, ILECs might not use their subsidized rates to undercut the MSLECs' charges because they would be subject to CLC pricing controls.

5. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$7,576 as follows:

a. Advocate's Fees				
b. Thomas Long				
11.50 hours X	\$250	=		\$2,875
c. Regina Costa				
32.50 hours X	\$130	=		\$4,225
d. Other Costs				
Photocopying				\$ 372
Postage Costs				\$ 104
TOTAL				\$7,576

5.1. Hours Claimed

TURN claimed a total of 44 hours of attorney and analyst time. Consistent with Section 1805(C)(2)(c), it provided a detailed breakdown of hours and expenses claimed which allows the Commission to make a judgment as to the reasonableness of the hours. Given the substantial contribution and the issue at stake, the Commission finds the hours requested reasonable.

5.2. *Hourly Rates*

TURN requested an hourly rate of \$250 for Mr. Thomas Long, a senior attorney for TURN, and claimed that it had requested that amount in A.96-04-038 (SBC merger). TURN is incorrect, for in the SBC merger proceeding it actually requested and received \$240 an hour for services performed by Mr. Long in 1996. (See D.97-10-049, A.96-04-038). The Commission, however, has approved a 1997 hourly rate of \$250 for Mr. Long in D.98-11-051. The services performed by Mr. Long in that proceeding are comparable to the services he performed here so it is reasonable to apply this previously adopted rate.

TURN asks that the Commission apply the previously approved hourly rate of \$130 to the hours spent by Ms. Regina Costa in 1997. That rate was adopted in D.96-06-029 in this docket for work performed by Ms. Costa in 1995. The services performed by Ms. Costa are comparable and so it is reasonable to apply the previously adopted rate.

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.⁴ This was not a complex, multi-issue request, and it does not present any original argument supporting the requested hourly rate increase. We will, therefore, apply one half the otherwise applicable hourly rate for the time spent preparing the request.

⁴ See e.g., D.93-06-022 at 6, D.93-09-086 at 9, and D.91-12-074 at 14. This practice was affirmed in our recent decision in the Rulemaking on the Intervenor Compensation Program (R.97-01-001/I.98-01-020), D.98-04-059 at 51.

5.3. Other Costs

TURN has requested a total of \$476 in postage and photocopying expenses. The Commission finds this to be a reasonable expenditure.

6. Award

We award TURN \$7,076 calculated as described above.

We will assess responsibility for payment among Pacific, GTEC, Citizens and Roseville. TURN correctly pointed out that the "public utilit[ies] which [are] the subject of the . . . proceeding" (§ 1807) were Citizens, GTEC, Pacific and Roseville, as evidenced by our inclusion of all four utilities in the ordering paragraphs of D.98-01-024. Accordingly, the compensation award will be shared among Pacific, GTEC, Roseville, and Citizens in proportion to the number of access lines each company served as of January 7, 1998.

Consistent with previous Commission decisions, we will order that interest be paid by each utility on its share of the award amount (calculated at the three-month commercial paper rate), commencing May 23, 1998 (the 75th day after TURN filed its compensation request) and continuing until each utility makes its full payment of its share of the award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission's Telecommunications Division 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.98-01-024.
2. TURN contributed substantially to D.98-01-024.
3. The 44 hours of attorney and analyst time claimed for participation are reasonable.
4. TURN has requested hourly rates for an attorney and analyst that were previously adopted for the performance of similar service. It is reasonable to apply same rates here.
5. Time spent by TURN in preparing its Request should be compensated at one-half the otherwise applicable attorney rate.
6. 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 \$7,076 for its contribution to D.98-01-024.
3. TURN's Motion for an Order Excusing Compliance with the D.96-06-029 Matrix Requirement should be granted since its participation was limited to a single issue addressed in a single pleading.
4. 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 for an Order Excusing Compliance with Decision (D.) 96-06-029 Matrix Requirement is granted.
2. TURN is awarded \$ 7,076 in compensation for its substantial contribution to D.98-01-024.
3. Pacific Bell (Pacific), GTE California Incorporated (GTEC), Roseville Telephone Company (Roseville), and Citizens Telephone Company (Citizens) shall each pay TURN its share of the award in proportion to the total number of access lines each company served as of January 7, 1998, within 30 days of the effective date of this order. Pacific, GTEC, Roseville, and Citizens 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 May 23, 1998 and continuing until full payment is made.

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

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