

Decision 00-03-043 March 16, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers.

Investigation 87-11-033  
(Filed November 25, 1987)

Application 85-01-034  
(Filed January 22, 1985)

Application 87-01-002  
(Filed January 5, 1987)

Investigation 85-03-078  
(Filed March 20, 1985)

Case 86-11-028  
(Filed November 17, 1986)

Investigation 87-02-025  
(Filed February 11, 1987)

Case 87-07-024  
(Filed July 16, 1987)

And Related Matters.

**O P I N I O N**

This decision grants The Utility Reform Network (TURN) an award of \$9,048.00 in compensation for its contribution to Decision (D.) 97-02-049, but denies TURN's request for a 50% enhancement.

**1. Background**

In D.97-02-049, the Commission denied the joint Petition to Modify D.94-09-065 (Petition) filed by Pacific Bell (Pacific) and GTE California

Incorporated (GTEC). In their petition, Pacific and GTEC alleged that in D.94-09-065 (the Commission's Implementation Rate Design or "IRD" decision), the Commission overestimated the increase in toll and switched access use to result from lower prices, yielding revenue losses for Pacific and GTEC.

Pacific and GTEC contended that the toll elasticity estimate of -.5 which the Commission adopted for both utilities in the IRD decision was without any record support and significantly greater than the estimates determined by the Pacific and GTEC studies. They alleged that for Pacific the elasticity estimate used in the IRD decision resulted in the forecast of \$234 million more in toll calling revenue for Pacific than has materialized, resulting in \$234 million less in price increases that Pacific needed to be revenue-neutral. For GTEC the forecast and corresponding undercollection was alleged to be \$103 million. They contended that to the extent the forecasted revenue was not produced, the IRD decision was not revenue neutral, which violates one of its basic precepts.

The parties cited a similar issue with respect to the elasticity estimate the Commission used to calculate the volume stimulation due to price reductions for switched access. The switched access revenue shortfall alleged for Pacific was approximately \$53 million and for GTEC, \$32 million.

In order to correct this undercollection for toll and switched access, Pacific and GTEC requested price increases to recover an additional \$214 million for Pacific and \$107 million for GTEC.<sup>1</sup>

Pacific and GTEC's Petition was opposed by the Office of Ratepayer Advocates (ORA), the California Telecommunications Coalition (Coalition), of

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<sup>1</sup> The adjustments requested vary from the shortfall alleged due to the arithmetic of netting the toll and switched access overestimation with somewhat reduced implementation costs.

which TURN was a member, and the California Committee for Large Telecommunications Consumers. The decision denying the Petition summarizes ORA's major arguments as follows: (1) during the course of the IRD proceeding parties other than Pacific and GTEC advocated a "true-up" mechanism to deal with the potential for forecasting errors in toll elasticity estimates, but Pacific and GTEC opposed the true-up proposal; (2) it is impossible to segregate the toll stimulation effects from other market effects; and (3) Pacific only provides data on the lack of growth in intraLATA toll volumes, not on factors such as the growth in access lines which would also impact revenues. The Coalition's response provides analysis which is similar to that provided by the other parties.

In addition to its participation in the Coalition, TURN submitted two ex parte letters and engaged in ex parte meetings.

## **2. Requirements for Awards of Compensation**

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Sections 1801-1812 of the Public Utilities Code. (All statutory citations are to the Public Utilities Code.) 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 the customer's planned participation and an itemized estimate of the compensation the customer expects to request. The NOI 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."

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. 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 Section 1806.

### **3. NOI to Claim Compensation**

TURN filed its Request for Finding of Eligibility for Compensation on February 26, 1988, and in D.88-07-035 was found to be eligible for compensation in this proceeding. In D.88-07-035 the Commission concluded that TURN had met the requirements of Rule 76.54(a)(1) [now Rule 76.74]<sup>2</sup> and had shown that its participation in this proceeding would pose a significant financial hardship.

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<sup>2</sup> All Rule citations refer to the Commission's Rules of Practice and Procedure.

Under Rule 76.76 a customer found to be eligible for an award in one phase of a proceeding remains eligible in later phases in the same proceeding. Therefore, TURN's eligibility established in D.88-07-035 is still in effect.

#### **4. Contribution to Resolution of Issues**

A party may make a substantial contribution to a decision in one of several ways.<sup>3</sup> It may offer a factual or legal contention upon which the Commission relied in making a decision.<sup>4</sup> Or it may advance a specific policy or procedural recommendation that the Administrative Law Judge or Commission adopted.<sup>5</sup> A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.<sup>6</sup> The Commission has provided compensation even when the position advanced by the intervenor is rejected.<sup>7</sup>

According to TURN, its work in this case far exceeds the standard for a substantial contribution. TURN was completely successful in gaining the adoption of its recommendation to deny the petition. TURN achieved this result through efficient, targeted participation that supplemented and complemented the work of other parties, most notably ORA. The themes of TURN's presentations – that Pacific and GTEC had previously opposed the true-up they

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<sup>3</sup> Section 1802(h).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> D.89-03-96 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

were requesting in the petition; that Commission and party resources should be devoted to shaping the future, not relitigating the past; that it would be impossible to distinguish the effects of forecasting error from other effects; and that explosive demand for services had rendered the utilities' claims of financial hardship moot—were reflected either in the decision, the concurrence of Commissioner Knight, or in the Commissioners' remarks at the February 19, 1997 meeting. According to TURN, its work was an integral part in preventing the alternate decision of Commissioners Conlon and Neeper -- which would have reopened the IRD proceeding -- from becoming a majority decision. Through the expenditure of less than 40 hours of time, TURN was able to assist in defeating large permanent rate increases (3.75% and 5.94% for Pacific and GTEC respectively) that would have cost ratepayers billions of dollars over future years.

We agree that TURN made a substantial contribution to D.97-02-049 in the areas it identifies. We adopted TURN's proposal to deny Pacific and GTEC's Petition, and therefore benefited from TURN's policy discussion of the issues involved.

## 5. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$13,535 as follows:

• T. Long		
6.5 hours x \$225 (1995)	=	\$ 1,463
30.75 hours x \$240 (1996)	=	\$ 7,380
• R. Costa		
1.00 hour x \$130 (1995)	=	\$ 130
• 50% enhancement for exceptional results	=	\$ 4,487
• Photocopying expenses	=	<u>75</u>
TOTAL	=	\$13,535

### 5.1 Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was "productive," as that term is used in Section 1801.3, where the Legislature gave the Commission guidance on program administration. (See D.98-04-059, mimeo. at 31-33, and Finding of Fact 42.) In that decision we discuss the fact that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

TURN states that through the modest expenditure of 35 hours, and about \$9,000 in attorney and expert time, TURN was able to avoid permanent rate increases of 3.75% and 5.94% for Pacific and GTEC respectively. According to TURN, those permanent increases would have cost ratepayers billions of dollars in increased expenditure for telephone service over the years. We find

TURN's participation was productive in that the costs it claims for its participation were small in comparison to the benefits realized.

## **5.2 Hours Claimed**

TURN documented the claimed hours by presenting a daily breakdown of hours relating to the elasticity issue in I. 87-11-033 for Thomas Long and Regina Costa. The hourly breakdown presented by TURN reasonably supports its claim for total hours.

## **5.3 Hourly Rates**

TURN observes that the efforts of TURN's attorney for which they seek compensation in this request took place primarily in 1995 and 1996. In D.96-06-029 the Commission approved a \$225 hourly rate for Long's work in 1995. In D.97-10-049, we compensated Long's work at \$240 per hour for work in 1996. Therefore a 1996 rate of \$240 per hour for Long is reasonable in this proceeding as well.

In D.96-06-029, we approved an hourly rate of \$130 for the work of Regina Costa, TURN's Telecommunications Research Director, in 1995. TURN indicates that the same rate should apply to the minimal time she devoted to this matter in 1995.

We find TURN's requested hourly rates to be reasonable and consistent with our past treatment of attorney and expert fees for comparable work.

## **5.4 Enhancement**

TURN requests that it be granted a 50% enhancement for the exceptional results it achieved with a minimum of resources. The Commission has enhanced the base fee award to an intervenor in consideration of factors such



as: the size of the award in relation to the results obtained, the efficiency of the intervenor's presentation, the skill required to participate, and the importance and difficulty of the issues. (D.91-08-014.)

According to TURN, each of these considerations justifies an enhancement in this case. Pacific and GTEC sought large permanent rate increases that would have raised the phone bills of virtually every California resident. The elasticity issue and the related issue of the nature of IRD revenue neutrality involved highly complex factual issues. In addition, the draft decisions – particularly the Conlon and Neeper Alternate – raised difficult legal issues about the proper standard for reviewing a request to reopen a proceeding when there is an allegation of gross forecasting error. TURN alleges that because of its intimate understanding of the IRD proceeding, its sound legal analysis, and its ability to place the petition in the proper context of many other developments in telecommunications, TURN was able to make a persuasive and well-supported presentation on behalf of ratepayers. Moreover, TURN says, it was extraordinarily efficient, spending less than 35 hours to present its case. For these reasons, TURN requests an enhancement of \$4,487, or 50% of TURN's requested hourly fees, in recognition of TURN's exceptional efficiency and success.

We reviewed the various decisions cited by TURN where we granted an enhancement of the base fee. In D.88-02-056, where TURN's efforts resulted in a \$43 million dollar savings for ratepayers, we awarded TURN a 25% enhancement in recognition of the dollar amount involved and TURN's level of success. In D.90-01-050, we awarded TURN a 25% enhancement for the time spent on the discount adjustment issue, where TURN's work achieved short-term savings to ratepayers of \$27 million and the subject of the discount adjustment model was highly technical and complex. In D.91-06-015 the

complainant was awarded a 25% enhancement notwithstanding the fact that his complaint was dismissed, because of his contributions to addressing a novel and difficult issue and the contingent value of the proceeding. In D.91-08-014 we awarded Consumer Action a 20% enhancement based on (1) the novelty and difficulty of the issues; (2) the large total dollar amount at stake concerning 900 telephone service, and therefore the large potential cost to consumers if necessary safeguards were not adopted; (3) awards in similar cases; (4) the intervenor's degree of success; (5) the efficiency of the presentation; and (6) the importance of the issue.

In D.94-09-022, which involved an action brought by TURN against Pacific for improper processing of payments between 1986 and 1991, we granted TURN a 35% enhancement. In that case, we declined to grant the 100% enhancement requested by TURN, but approved what we termed a "generous" 35% enhancement in recognition of the large dollars involved, TURN's degree of success, the risks involved because of the complexity of the modeling and quantitative estimates, the contingent nature of any recovery of TURN's expenses, and the exceptional work done by TURN's lead attorney.

We also reviewed D.96-09-024, in which TURN was awarded an enhancement for its work in Southern California Edison's 1995 General Rate Case. TURN requested a 50% enhancement for its work in 1995 in that case based on the following: (1) the degree of success achieved; (2) the difficulties involved in successfully opposing a settlement between the utility and the ORA; (3) its efficient participation when compared to utility staffing on issues addressed both by TURN and Edison; (4) the novelty of the issues, namely, linking a settlement on the revenue requirement phase of the proceeding with a settlement regarding a new ratemaking treatment for Edison's nuclear power plants; (5) the importance of the issues raised; and (6) the contingent nature of

the fee recovery. Based on our analysis of those six factors, we awarded TURN a 25% enhancement for its work on Phase 1 issues in 1995, but did not agree that an enhancement was otherwise appropriate.

In the case before us today, there is no question that TURN made a significant contribution to D.97-02-049, which adopted TURN's recommendation to deny the Petition. However, we need to determine whether TURN's performance in its work on this decision warrants an enhancement. There is no evidence that TURN was uniquely persuasive in its arguments. On the contrary, a review of D. 97-02-049 shows that ORA presents the same arguments in its written comments that TURN states were covered in its ex parte contacts. TURN has described the major themes of its ex parte presentations, and the issues covered are strikingly similar to those covered by ORA. There is no evidence in the record that TURN's arguments were more persuasive than those of other parties, such as ORA. Multiple parties presented the Commission with similar arguments, and no one party was uniquely persuasive. TURN's request for an enhancement in its award is therefore denied.

### **5.5 Other Costs**

TURN requests \$75 for photocopying expenses. TURN did not itemize the number of pages it was required to reproduce. While the amount appears reasonable in this case, we caution TURN of the need to itemize its photocopy costs to facilitate review of future requests for compensation.

### **6. Award**

We award TURN \$9,048, calculated as described above.

We will assess responsibility for payment between Pacific and GTEC, based on each company's respective access lines, as adopted in D.94-09-065.

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 the 75<sup>th</sup> day after TURN filed its compensation request and continuing until the utilities make their full payment of the award.

As in all intervenor compensation decisions, we put TURN on notice that Commission staff 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.

## **7. Comments on Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g) of the Public Utilities Code and Rule 77.1 of the Rules of Practice and Procedure. No comments were received.

## **Findings of Fact**

1. TURN has made a timely request for compensation for its contribution to D. 97-02-049.
2. TURN has previously been found to be eligible for compensation for its participation in this proceeding.
3. TURN contributed substantially to D. 97-02-049.
4. TURN has requested hourly rates for attorney Thomas Long and expert Regina Costa that have already been approved by the Commission.
5. The photocopying 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's request for a 50% enhancement should be denied.
3. TURN should be awarded \$9,048 for its contribution to D. 97-02-049.
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 (TURN) is awarded \$9,048.00 in compensation for its substantial contribution to Decision (D.) 97-02-049.
2. Pacific Bell (Pacific) and GTE California Incorporated (GTEC) shall each pay TURN their share of the \$ 9,048 award in proportion to their respective number of access lines, as noted in D.94-09-065, *mimeo.*, at 163, footnote 38 within 30 days of the effective date of this order. Pacific and GTEC shall also pay

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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 on July 13, 1997 and continuing until full payment is made.

This order is effective today.

Dated March 16, 2000, at San Francisco, California.

RICHARD A. BILAS  
President  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
CARL W. WOOD  
LORETTA M. LYNCH  
Commissioners