

Decision 00-04-049 April 20, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Establish a Simplified Registration Process for Nondominant Telecommunications Firms.

Rulemaking 94-02-003
(Filed February 2, 1994)

Investigation into the Commission's Own Motion to Establish a Simplified Registration Process for Nondominant Telecommunications Firms.

Investigation 94-02-004
(Filed February 2, 1994)

OPINION AWARDING COMPENSATION

This decision grants The Utility Reform Network (TURN) an award of \$56,134.75 in compensation for its contribution to Decision (D.) 98-08-031.

1. Background

In D.98-08-031, we ordered that pursuant to Public Utilities Code Section 495.7,¹ nondominant interexchange carriers (NDIEC) may request as part of their application for certificate of public necessity and convenience, or by advice letter filing, that certain services be exempt from the requirement to file tariffs found in Sections 454, 489, 491, and 495. Services may be provided on a detariffed basis only if they are furnished pursuant to a written contract with the customer. Consumer protection rules were put in place for detariffed services. These appear in Appendix A to D.98-08-031.

¹ All section references are to the Public Utilities Code.

A synopsis of the procedural history follows. The rulemaking and investigation were filed on February 2, 1994. From 1994 to 1998, workshops were conducted, comments were filed by the parties on several occasions, and two oral arguments were held. An interim decision, D.96-09-098, was issued in September 1996. At oral argument on June 20, 1997, a detariffing proposal referred to as the "contract option" was presented by one of the parties. Following oral argument, an interim decision (D.97-06-107) was issued addressing registration and document requirements, but deferring consideration of detariffing. Subsequent to the issuance of D.97-06-107, the parties submitted comments on the contract option proposal. The parties met and discussed the potential for a joint recommendation but were unable to reach agreement. On October 10, 1997, oral argument was held before the assigned Commissioner and the Administrative Law Judge (ALJ). Parties filed reply comments on October 17, 1997. On December 15, 1997, a proposed decision (PD) was issued on the detariffing issue. The parties filed comments on January 8, 1998, and reply comments on January 15, 1998. The issuance of D.98-08-031 followed on August 10, 1998.

By a Request for Award of Compensation (Request) timely filed on October 8, 1998, TURN presents a claim for compensation for substantial contribution to D.98-08-031. The California Association of Competitive Telecommunications Companies (CALTEL) filed a Response to Request (Response). CALTEL does not dispute that TURN made a substantial contribution to the decision. The thrust of the Response is that the statutory framework governing intervenor compensation in California does not support a compensation award funded by NDIECs or trade associations who participate in proceedings. CALTEL also argues that TURN's participation was not necessary

for a fair determination of the issues, and therefore TURN should not be compensated.

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. Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (PHC) or by a date established by the Commission. The NOI must present information regarding the nature and extent of planned participation in the proceeding, and an itemized estimate of compensation that the customer expects to request. The NOI may also request a finding of eligibility.

Other 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 judgement 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 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 Section 1806.

3. NOI to Claim Compensation and Request

TURN was found eligible for compensation in this proceeding by an ALJ ruling dated July 3, 1997. The same ruling found that TURN had demonstrated significant financial hardship in this proceeding. Within the 60 days allowed following issuance of D.98-08-031, TURN filed its Request.

4. Contribution to Resolution of Issues

TURN argues that its contributions to D.98-08-031 were substantial and warrant an award of the full costs of participation, even though it did not prevail on all of its recommendations and contentions. It provides citations to D.98-08-031, and to interim decisions and PDs in this docket to demonstrate its claimed contribution.

A review of the interim decisions and PDs supports TURN's contention. When the Commission issued D.96-09-098, it was TURN's position in comments that the decision did not provide adequate consumer protection because it did not require that adequate information be supplied to consumers regarding the terms of an agreement with the carrier. A PD was issued with revised rules. TURN expressed concerns that the PD did not adequately protect consumers. Parties met several times in an effort to negotiate a joint recommendation. When this effort failed, TURN provided comments on the PD. Another PD was issued on December 15, 1997, that incorporated stricter requirements for written notice to customers. In its comments on this PD, TURN focussed on its concerns that

the PD did not require carriers to meet any minimum standards for consumer protection in contracts with customers. The ultimate decision, D.98-08-031, adopted many of the changes recommended by TURN. It includes provisions that ensure that customers receive adequate written notice of the terms of a deal with a carrier and of changes to the agreement. It also includes rules to prevent unfair dealing by carriers. TURN made a substantial contribution on the issues of consumer protection rules, limitation of liability, and the extent of detariffing that would be permitted. Positions promoted by TURN appear in a number of the consumer protection rules set forth in Appendix A to D.98-08-031.

On the issue of limitation of liability, TURN's primary argument that detariffed carriers should not be permitted to limit their liability was rejected. However, TURN's secondary argument is reflected in D.98-08-031. Consistent with TURN's secondary position, customers will have a remedy in court if carriers include limitation of liability clauses in contracts.

On the issue of the extent of detariffing that would be allowed, TURN was unsuccessful in its opposition to service-by-service detariffing. However, TURN also opposed customer-by-customer detariffing in comments filed October 19, 1997. In D.98-08-031, the Commission rejected customer-by-customer detariffing for reasons argued by TURN in its comments. Therefore, TURN was partially successful on this issue.

TURN's participation in this proceeding merits full compensation. Section 1802(h) provides that a customer may be awarded compensation for all reasonable fees and costs where the customer's recommendations have resulted in a substantial contribution, even if the decision does not adopt the customer's recommendations in full.

5. Customer Interests Represented and Duplication of Effort

D.98-04-059 provides that the NOI shall contain information that enables the presiding officer to make a preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. Additional assessment of this issue is to occur in response to any request for compensation. If the intervenor is a "customer" who represents interests that would otherwise be underrepresented, and who meets the significant financial hardship criteria, it may be eligible for an award of compensation. (D.98-04-059, pp. 27-28, Finding of Fact 13.) TURN argues that it represented the interests of residential and small business customers that would have been underrepresented in this proceeding. We agree. TURN played an important role in bringing consumer protection issues to the attention of the Commission. Without TURN's participation consumer protection issues would not have been as fully considered as they were in the final decision.

The intervenor compensation statutes express an intent that the program be administered in a manner that avoids "unnecessary participation that duplicates the participation of similar interests." (Section 1801.3(f).) The governing statutes envision some participation that is duplicative may still make a substantial contribution and therefore be compensable. (See D.98-04-049, p. 49.) While both Office of Ratepayer Advocates (ORA) and Consumer Services Division (CSD) were participants in this proceeding, TURN's participation was not duplicative of those other parties' efforts. TURN's contribution falls well within the provision of the governing statute that states participation of a customer that materially supplements, complements, or contributes to the presentation of another party may be fully eligible for compensation if the

participation makes a substantial contribution to a Commission order.
(Section 1802.5.)

We disagree with CALTEL's assertion in its Response that TURN's participation was not necessary for a fair determination of the issues. CALTEL is correct in noting that in D.98-04-059 this proceeding was cited as an example of a proceeding where it may not be necessary to have consumer-funded participation. (D.98-04-059, p. 10.) It continues to be our position that there may be such cases, and that the determination must be made on a case-by-case basis. The record in this case convinces us that consumer-funded participation was warranted. When we cited this proceeding in D.98-04-059 we did so because this proceeding deals with an aspect of the telecommunications market that is quite competitive, and consumers may choose a different carrier if unhappy with service quality or cost. (*Id.*) As it turned out, TURN's participation on behalf of consumer interests was valuable in ensuring that adequate consumer protection measures were built into the contract option detarriffing rules at the outset.

6. Benefits to Ratepayers

In D.98-04-059, Finding of Fact 42, we indicated that compensation for a customer's participation should be in proportion to the benefit ratepayers receive as a result of that participation. We recognized that putting a dollar value on the benefits accruing to ratepayers as the result of a customer's substantial contribution may be difficult. However, an assessment of whether the requested compensation is in proportion to the benefits achieved helps ensure that ratepayers receive value from compensated intervention, and that only reasonable costs are compensated. (*Id.*, p. 73.)

It is impossible to quantify precisely the benefits to ratepayers of TURN's participation in this proceeding. TURN's contribution centered on consumer

protection rules and policies on which we cannot place a specific monetary value. The rules and policies that resulted in whole or in part due to TURN's participation will, for example, benefit consumers by ensuring that adequate information about rates, terms and conditions is provided, and ensuring that customers will have an adequate opportunity to reject modifications to contracts. The consumer protection rules and policies we adopted will protect consumers, and may increase consumer confidence that could promote competition in the market. The award we grant TURN is a reasonable investment by ratepayers in long-term consumer benefits.

7. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$57,190.25 as follows:

Attorney's/Advocate's Fees

T. Long, Attorney

1.75 hours @ \$215/hr. (1994)	=	\$ 376.25
8.75 hours @ \$240/hr. (1996)	=	\$ 2,100.00
150.25 hours @ \$250/hr. (1997)	=	\$37,652.50
45 hours @ \$260/hr. (1998)	=	\$11,700.00

P. Stein, Attorney

5 hours @ \$85/hr (1998) (1/2 hourly rate for prep. of comp. request)	=	\$ 425.00
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R. Costa, Analyst

18.50 hours @ \$125/hr (1994) = \$ 665.00

4.75 hours @ \$140/hr. (1996) = \$ 2,312.50

Subtotal = \$55,251.25

Other Costs

Photocopying expenses = \$ 1,228.00

On-line legal research = \$ 695.00

Overnight mail expenses = \$ 15.50

Subtotal = \$ 1,939.00

Total = \$57,190.25

7.1 Hours Claimed

TURN has segregated its hours by issue in accordance with Commission guidelines. The majority of activities are assigned to one of three substantive issues: (1) consumer protection; (2) limitation of liability; (3) extent of detariffing. Hours devoted to preparation of pleadings related to intervenor compensation are separately coded. TURN has clearly identified the instances where activities were related to more than one issue. It has also identified a small percentage of hours that fall into the unallocable category. The hours claimed by TURN are reasonable for the effort that TURN expended in this case and for the contribution made.

The time spent by Stein devoted to the preparation of the intervenor compensation request is charged at one half of his approved hourly rate. This is consistent with our direction in D.98-04-059. However, TURN has billed the time spent by Long for this same activity at his full hourly rate. We reduce the amount of the award to reflect payment at 1/2 of Long's hourly rate (\$130) for eight hours spent on drafting the compensation request on September 29,

October 2, and October 5, 1998. This results in a reduction of attorney fees of \$1,040. With this adjustment the hours billed are reasonable and fully compensable.

7.2 Hourly Rates

TURN is claiming the following hourly rates for work performed by Long: \$215 for work in 1994; \$240 for work in 1996; \$250 for work in 1997; \$260 for work in 1998. The Commission previously approved these rates for the years in question in D.94-09-022, D.98-05-056, D.98-09-032, and D.99-07-045. We apply these rates in this proceeding.

The hourly rate claimed for Stein is \$170 for work performed in 1998.² The Commission previously approved the \$170 hourly rate in D.98-08-016. Because Stein's work was solely related to preparation of the compensation request, TURN has properly reduced the hourly rate sought by 50 percent to \$85 per hour. We apply this rate.

TURN claims an hourly rate of \$125 for work performed by Costa in 1994, and \$140 for work performed in 1996. We previously approved these rates in D.96-06-029 and D.98-05-056. We apply these rates in this proceeding.

7.3 Other Costs

TURN requests \$1,939.00 for miscellaneous expenses. The majority of these expenses are associated with copying and computerized legal research. A detailed breakdown of TURN's miscellaneous costs is provided in Attachment A to the Request. TURN's request for miscellaneous expenses is reasonable with one exception. TURN has included a \$15.50 expense for document delivery to

² TURN notes that it does not waive its right to seek a new 1998 rate for attorney Stein in the future.

the office of Senator Peace on March 25, 1998. No explanation is provided for this expense, which appears unrelated to TURN's contribution to D.98-08-031. This expense is disallowed in our calculation of the compensation award.

8. Award

We award \$56,134.75 to TURN for its contributions to D.98-08-031, calculated as follows:

Attorney/Advocate Fees	\$54,211.25
Other Costs	\$ 1,923.50
<u>Total Compensation Award</u>	\$56,134.75

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 75th day after TURN filed its compensation request and continuing until full payment is made.

As in all intervenor compensation decisions, we put TURN on notice that the Commission's staff may audit TURN records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support its claim 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 is claimed.

9. Allocation of Award Among Utilities

In D.00-01-020, we addressed the issue of the payment of intervenor compensation awards in quasi-legislative rulemaking proceedings affecting an industry or multiple industries. We stated our intent that no later than

July 1, 2001, awards in quasi-legislative rulemaking proceedings where no specific respondents are named will be paid from an intervenor compensation program fund. The details of this funding method are set forth in D.00-01-020. We clarified that in the interim period, prior to implementation of the user fee funding program, we will continue our practice of requiring those larger utilities participating in a rulemaking proceeding to pay any compensation awards. Only those utilities that have entered an appearance in the proceeding will be required to pay. Membership in an association that entered an appearance does not constitute "participation" that obligates a utility to pay compensation awards. (D.00-01-020, p. 11, Ordering Paragraph 2.) We also clarified that our order in D.00-01-020 became effective immediately and is to be applied to future compensation awards in certain pending matters, as well as in future quasi-legislative proceedings. (*Id.*, at p.2.)

In this rulemaking proceeding appearances were filed by trade associations, large utilities, and small utilities. Pursuant to our ruling in D.00-01-020, we do not require the trade associations or the small utilities that participated in this proceeding to pay any portion of the intervenor compensation award. We will order that the larger utilities pay the intervenor compensation award. The larger utilities who filed appearances and to whom this order applies are as follows: AT&T Communications; GTE California Incorporated; MCI Telecommunications Corporation; Pacific Bell (Pacific); and Sprint Communications Company. Consistent with prior Commission decisions, payment of the compensation award shall be allocated among the utilities in proportion to the number of access lines each company served as of August 10, 1998. CALTEL's contention in its Response that the statutory framework does not permit the Commission to require non-rate-regulated utilities (including NDIECs) to pay a compensation award is resolved in D.99-02-039. We concluded

that non-rate regulated utilities may be assessed payment of compensation awards. (D.99-02-039, pp. 6-7.)

10. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g) and Rule 77.1 of the Rules of Practice and Procedure. Comments were timely filed by TURN on April 3, 2000. Pacific filed a Motion To Accept Late-Filed Comments on April 10, 2000, stating that it missed the filing date due to a calendaring error. We will grant Pacific's motion because no party has been prejudiced by the late filing. We will modify the draft decision to insert a new first ordering paragraph granting Pacific's motion, and revise the numbering of the subsequent ordering paragraphs.

TURN's comments focus on its concern that the draft decision may be construed as reviving the "necessity of participation" test as articulated in D.98-04-059. TURN correctly points out that in D.99-02-039, the Commission modified the language in D.98-04-059 on this issue. We have reviewed the relevant language in both decisions, and we do not find it necessary to modify the language of the draft decision. The draft decision states that there may be proceedings where it is not necessary to have consumer-funded participation, and that the determination must be made on a case-by-case basis. (Draft, p. 7.) This is consistent with our conclusion in D.99-02-039 that we expect as a matter of routine to conduct an assessment of the necessity of participation by third-party customers in proceedings which cover those sectors of the telecommunications market that are clearly competitive, but that the presence of a competitive market will not, in and of itself, be sufficient to sustain a ruling that any given party's participation is not necessary. (See D.99-02-039, p. 16.) The language in the draft decision does not conflict with D.99-02-039.

In its comments, Pacific argues that the draft decision erroneously requires Pacific to pay a portion of the compensation award. Pacific refers to the following language in the draft decision: "We will order that the larger utilities pay the intervenor compensation award. The larger utilities who filed appearances and to whom this order applies..." (Draft, p. 12, emphasis added.) Pacific is included in the list of utilities required to pay the award. In its comments, Pacific misconstrues this language and argues that the phrase "this order" refers to the order in the underlying decision, D.98-08-031. Because the order in D.98-08-031 does not apply directly to Pacific, it contends that it should not be required to pay part of the award under the language of the draft decision. We reject Pacific's argument. The phrase "this order" refers to the order to pay the compensation award. It does not refer to D.98-03-031.

Pacific also argues that to require it to pay any part of the award would violate Section 1807 because the subject of this proceeding was limited to detariffing rules for nondominant carriers and thus Pacific was not a subject of the proceeding. We disagree. Section 1807 requires that an intervenor compensation award shall be paid by the public utility which is the subject of the proceeding, as determined by the Commission. There was no one utility that was the subject of this proceeding. This proceeding is a quasi-legislative rulemaking in which we considered issues in the context of restructuring of the telecommunications industry. Pacific filed an appearance in this proceeding, presumably because of its interest in the restructuring of the industry. Requiring Pacific to contribute to payment of the award is consistent with D.00-01-020, where we provided that those larger utilities who file an appearance in a generic rulemaking proceeding will be required to pay the compensation award. No modification of the draft decision is necessary.

Findings of Fact

1. TURN has previously been found eligible for compensation in this proceeding by an ALJ ruling dated July 3, 1997.
2. TURN has made a timely request for compensation for its contribution to D.98-08-031.
3. TURN contributed substantially to D.98-08-031.
4. Any duplication of effort between TURN and ORA or CSD does not warrant a reduction in the amount of the award. TURN represented customer interests that would otherwise have been underrepresented.
5. The benefits to customers of TURN's participation outweigh the costs of funding TURN's participation.
6. The hourly rates requested for work performed by attorneys and analysts are consistent with rates previously approved by the Commission.
7. Time spent by attorney Long on preparation of the intervenor compensation request is erroneously charged at his full hourly rate. This time should be compensated at half of Long's hourly rate. With this adjustment the hours billed are reasonable and fully compensable.
8. The miscellaneous other costs incurred by TURN in this proceeding are reasonable with one exception. TURN has not demonstrated that the expense for document delivery to the office of Senator Peace is related to its contribution to this proceeding. This expense should be disallowed.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code Sections 1801-1812, which govern awards of intervenor compensation.
2. TURN should be awarded \$56,134.75 for contributions to D.98-08-031.
3. This order should be effective today so that TURN may be compensated without undue delay.

O R D E R

IT IS ORDERED that:

1. The Motion of Pacific Bell To Accept Late-Filed Comments on the Draft Decision is granted.

2. The Utility Reform Network (TURN) is awarded \$56,134.75 as set forth herein for substantial contributions to Decision 98-08-031.

3. The award shall be paid by AT&T Communications, GTE California Incorporated, MCI Telecommunications Corporation, Pacific Bell, and Sprint Communications Company. Payment of the compensation award shall be allocated among these utilities in proportion to the number of access lines each company served as of August 10, 1998.

4. AT&T Communications, GTE California Incorporated, MCI Telecommunication Corporation, Pacific Bell, and Sprint Communications Company shall, within 30 days of this order, pay to TURN their respectively allocated shares of \$56,134.75 plus interest at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release G.13, with interest beginning on December 23, 1998, and continuing until the full payment has been made.

5. Rulemaking 94-02-003 and Investigation 94-02-004 are closed.

This order is effective today.

Dated April 20, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners