Decision 00-05-028 May 4, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Intervenor Compensation Program.	Rulemaking 97-01-009 (Filed January 12, 1997)
Order Instituting Investigation on the Commission's Intervenor Compensation Program.	Investigation 97-01-010 (Filed January 13, 1997)

ORDER DENYING REHEARING OF, CLARIFYING, AND MODIFYING DECISION 00-01-020

I. BACKGROUND

In January, 1997, this Commission initiated a rulemaking and investigation into our intervenor compensation program. While this program is governed by Public Utilities Code sections 1801-1812,[1] the Commission has some flexibility to change the rules, regulations and policies that govern the program. We believed comprehensive review was warranted because of the changes in the regulatory environment which had occurred since the inception of the program, and even since the passage of the most recent legislative amendments to the governing statutes.

On April 28, 1998, we issued Decision (D.) 98-04-059, *Interim Opinion Revising the Intervenor Compensation Program and Inviting Legislative Amendment Proposals,* which was subsequently modified after rehearing by D.99-

[1] Unless otherwise specified, statutory references are to the Public Utilities Code.

02-039. In D.98-04-059, we adopted a new approach for funding intervention in quasi-legislative rulemaking proceedings in which no specific respondents are named. Because the changes referred to above were resulting in an increasing number of utilities having a stake in the Commission's proceedings and thus being the "subject of the hearing, investigation, or proceeding . . . " (see section 1807), we determined that the responsibility for the payment of awards of compensation should be more widely shared among regulated industry participants in these kinds of quasi-legislative rulemaking proceedings. Therefore, D.98-04-059 concluded that all energy, water, and telecommunications utilities participating in the proceeding should be required to pay the cost of any compensation awards unless the Commission had named one or more utilities as respondents. This determination left open the question of how to administer this requirement when participation by utilities occurs through associations whose membership may change during the course of the proceeding.

D.98-04-059 proposed a mechanism for determining responsibility for payment by members of associations. Comments to this proposal were filed by the California Association of Competitive Telecommunications Companies (CALTEL) and The Utility Reform Network (TURN). TURN, in the course of requesting clarification of the Commission's proposal, suggested that the association and not its individual members be required to pay the compensation award. CALTEL raised certain constitutional and other objections to the Commission's proposal, and in addition, argued the Commission lacked authority to require an association to foot the bill.

After considering the arguments raised by these parties, we issued D.00-01-020 (the Decision), in which we rejected the entirety of the new program announced by D.98-04-059, including the proposal related to associations. Instead, for quasi-legislative rulemaking proceedings affecting one or multiple industries, we adopted an approach which requires all energy, telecommunications and water utilities in an affected industry to pay any compensation award,

regardless of whether a particular utility participated in the proceeding. We also established an intervenor compensation program fund from which awards will be paid in quasi-legislative rulemaking proceedings where no specific respondents are named. Utilities participating only through an association will not be required to contribute to an award.

We expressed our intent to fund this program through the annual fees collected from regulated energy, telecommunications, and water utilities under our section 401 et seq. authority. Because it will be necessary to obtain authorization from the Legislature and the Governor through the annual State budget process in order to spend the collected fees in this way, this program will not be able to be implemented until July 1, 2001. In the interim, we stated we will continue our practice of requiring those large utilities participating in (i.e., entering an appearance in) a quasi-legislative rulemaking proceeding where no respondents are named, to pay any compensation awards.

We also modified D.98-04-059 to remove the requirement that utilities file annual revenue reports with the Public Advisor. Finally, we made D.00-01-020 effective immediately, and stated it would be applied to future compensation awards in certain pending matters, as well as in future quasi-legislative proceedings.

AT&T Communications of California, Inc. and MCI WorldCom Network Services, Inc. (Joint Applicants) filed a joint application for rehearing of D.00-01-020. TURN and James Weil (TURN/Weil) filed a joint response in opposition. We have considered each and every allegation of legal error raised by Joint Applicants and the responses thereto, and are of the opinion that insufficient grounds for granting rehearing have been presented. Therefore, we deny rehearing of D.00-01-020. We also modify the Decision to provide clarification of our position in several areas.

II. DISCUSSION

Joint Applicants state they are not appealing any aspect of the new program as it is expected to be implemented after July 1, 2001. Rather, they challenge only our interim plans to "continue our practice of requiring those larger utilities participating in a rulemaking proceeding to pay any compensation awards." D.00-01-020, p. 11.

Request for Clarification: Before setting forth their allegations of legal error, discussed below, Joint Applicants seek clarification concerning just which utilities we intend to be responsible for paying compensation awards during the interim period. They contend that historically, only rate-regulated utilities have been required to pay awards. While it appears to Joint Applicants that we are changing that policy even for this interim period, they claim the Decision is unclear as to exactly which utilities will now be obligated to pay. Joint Applicants also seek clarification of how the cost of awards is to be allocated among the utilities that are responsible for their payment, contending the Decision is silent on this question.

Concerning which utilities will be responsible for paying awards during the interim period, Joint Applicants are only partially correct that historically, only rate-regulated utilities have been required to pay awards. That was true until D.98-04-059 was issued. As discussed above, that decision adopted a program of funding intervenor compensation awards in quasi-legislative rulemaking proceedings which required all participating energy, water, and telecommunications utilities to pay the costs of any awards unless a specific utility is named as a respondent. D.98-04-059 expressed our view that section 1807 gives us the authority to order all subject utilities to contribute to awards of compensation. We reaffirmed that view in D.99-02-039, where we denied an application for rehearing of D.98-04-059 which explicitly raised this issue.[2]

[2] This application for rehearing was filed jointly by CALTEL and MCI (prior to its merger with WorldCom).

While non-rate-regulated utilities had not been required to contribute to compensation awards prior to the issuance of D.98-04-059, they certainly were put on notice by that decision, together with D.99-02-039, that they could expect to be included in the future. While D.00-01-020 rejects the program espoused by D.98-04-059 in lieu of the program which will take effect after July 1, 2001, we did not intend by this action to thereby exclude non-rate-regulated utilities from whatever group of utilities we made responsible for such payment in the interim. Such exclusion would inequitably postpone requiring them to assume equal responsibility with rate-regulated utilities, in proceedings where they and rate-regulated utilities are affected equally.

Joint Applicants cite what appear to be somewhat conflicting statements in D.00-01-020, one of which says "we will continue our practice of requiring those larger utilities participating in a rulemaking proceeding to pay any compensation awards" (D.00-01-020, p. 11; emphasis added), and two of which make no reference to "larger" utilities. (*Id.*, Finding of Fact 7; Ordering Paragraph 2.) Because our historical approach in quasi-legislative rulemakings where no respondents are named has consistently required the larger utility participants to pay any compensation awards, we will modify Finding of Fact 7 and Ordering Paragraph 2 accordingly.

Concerning allocation of payments among the relevant large utilities, Joint Applicants are correct that the Decision does not address this issue explicitly. It was our intention that continuation of our historical approach for the interim period would include our historical practice regarding allocation of award costs. This, in fact, is what we have done in decisions issued subsequent to D.98-04-059 which have awarded compensation in quasi-legislative rulemaking proceedings where no specific respondent is named.

For example, D.00-02-044, also issued in the same docket as D.00-01-020 (the Intervenor Compensation Rules Revision Docket), specifically states that it is following D.00-01-020's directive that we apply our traditional payment

responsibility approach for multi-industry proceedings. Thus it requires the eight large utilities that have participated in the proceedings to share the cost of the awards equally. It is appropriate to divide the cost equally in this situation because the eight utilities are both energy and telecommunications companies, and there is no other way to assess the costs to the two groups on a comparable basis. However, when only one industry is involved, allocation has been based on other factors, generally encompassing some measurement of market share. Thus compensation decisions in telecommunications proceedings have typically allocated costs to the large utility participants based on number of access lines served by each company (see, e.g., D.00-04-049 in R.94-02-003/I.94-02-004 (Rulemaking and Investigation into a Simplified Registration Process for Nondominant Telecommunications Firms); D.00-04-033 in R.95-01-020/I.95-01-021 (Universal Service Docket)).

In sum, in the interim, until the new program adopted by D.00-01-020 can be implemented, we affirm our intent to continue our past practice of requiring that in quasi-legislative rulemakings affecting one or more industries, in which no specific respondents are named, that compensation awards be paid by the large utility participants. Allocation of payment among those large utility participants will also follow past practice. There is no exclusion for large non-rate-regulated utilities.

Request for Rehearing: Joint Applicants then seek rehearing on the following issues. First, Joint Applicants contend that requiring non-rate-regulated utilities to pay intervenor awards during the interim period violates section 1807. They argue this section, which governs the payment of intervenor awards by regulated utilities, does not contemplate nor provide for the recovery of such awards from non-rate-regulated utilities such as competitive local exchange carriers and non-dominant interexchange carriers.

Second, if we find we can order the recovery of compensation awards from non-rate-regulated utilities in quasi-legislative proceedings, Joint

Applicants contend we must require recovery of such awards from all regulated utilities and not merely a subset of them. Joint Applicants argue it is contrary to section 1807, as well as unreasonable, arbitrary and capricious to single out specific regulated utilities to carry the burden of paying compensation awards in generic proceedings applicable to all utilities, while excluding others from the same requirement. They argue this is particularly true when the relative size of utilities can be taken into account by allocating the burden to pay on the basis of the utilities' California-jurisdictional revenues.[3] They finally argue that singling out specific regulated utilities in generic proceedings "blatantly contradicts the Commission's own findings" in D.00-01-020 which provide the basis for the user-fee mechanism to fund intervenor compensation awards which is to be implemented starting July 1, 2001. (Application for Rehearing, p. 10, which in turn cites D.00-01-020, pp. 5-6, Conclusions of Law 1, 2, 3, and 6, and Ordering Paragraph 1.)

TURN/Weil argue in response that both of Joint Applicants' rehearing issues have previously been resolved by the Commission; consequently, they are barred by section 1709 and the doctrine of collateral estoppel. These issues were rejected first in D.98-04-059 and then in D.99-02-039, which among other things denied a joint application for rehearing of D.98-04-059 filed by CALTEL and MCI raising these same issues.

Section 1709 provides: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." D.98-04-059 and D.99-02-039 became final when none of the parties that had filed applications for rehearing of D.98-04-059 filed either a subsequent application for rehearing or a petition for writ of review with the California

[3] The application for rehearing, at page 5, footnote 5, states that while AT&T agrees with MCI that clarification needs to be made on allocation of payment among utilities, AT&T does not necessarily agree that such allocation should be based on California-jurisdictional revenues.

Supreme Court. Thus our resolution in these prior decisions of the substantive issues Joint Applicants now raise is conclusive, and cannot be challenged here.

D.99-02-039 addresses these substantive issues exhaustively. We will briefly recap our analysis for purposes of clarity and completeness.

A. Requirement that non-rate-regulated utilities contribute to the award. Joint Applicants argue first that section 1807 does not permit the Commission to order non-rate regulated utilities to pay intervenor compensation. They maintain that the plain language of the statute requires that compensation awards ultimately be paid by ratepayers, and that this obligation cannot be satisfied for utilities which already have complete rate flexibility. They argue in essence that one of the objectives of section 1807, that utilities be reimbursed by ratepayers for compensation awards by a "dollar-for dollar pass-through of an expense imposed on the utility" (App.Rhg., p. 6), is a condition of requiring a utility to pay intervenor compensation which cannot be achieved when the utility in question is not subject to rate regulation by the Commission.

Joint Applicants argue that the legislative history of section 1807 further supports their position that the statute requires the costs of intervenor compensation to be passed through to ratepayers. They cite to a 1983 memorandum from the Commission to the Governor's Office regarding section 1807 (at that time SB 4), an official analysis of SB 4 by the Legislative Analyst, and the Conference Committee's analysis of SB 4, all of which they claim acknowledge the Legislature's intent that the Commission be required to collect the awards from utilities, and then to adjust the utilities' rates to fund the awards. Joint Applicants also cite an assigned Commissioner's ruling in ***Re Rulemaking on the Commission's Own Motion to Establish a Simplified Registration Process for Non-Dominant Telecommunications Firms,*** R.94-02-003, I.94-02-004, issued October 30, 1997, which they claim supports their argument.

We have once again carefully reviewed all of Joint Applicants' arguments on this issue, and find their position to be without merit. Section 1807 provides:

> Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding, as determined by the commission, within 30 days. Notwithstanding any other provision of law, any award paid by a public utility pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility by way of a dollar-for-dollar adjustment to rates imposed by the commission immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within one year from the date of the award.

While section 1807 was written with rate-regulated utilities in mind, it is not by its terms so limited. Nowhere in that section or any other section of the intervenor compensation statutory scheme is there an exception stating that if a utility which is the subject of a proceeding is not rate-regulated, it does not have to pay a compensation award. Clearly, the Legislature meant that rate-regulated utilities should be reimbursed by their customers for the expense of compensation awards, and made that expressly clear through section 1807. However, as we stated in D.98-04-059 and D.99-02-039, utilities under more relaxed regulation are still authorized to include or not include in rates, many kinds of expenses, among them the costs of intervenor compensation awards. These non-rate-regulated utilities can choose to be reimbursed by their customers, or they can choose to have their shareholders absorb this expense. Under competition, this is their choice, and the state of the market will determine the answer.

Section 1807 is clear enough on its face that we do not have to consult legislative history. However, even if the legislative history cited by Joint Applicants is examined, it offers no help to their argument. The memorandum from the Commission to the Governor's Office simply states that the awards "shall

be paid by the affected utility", which expense is "recoverable from the utility's ratepayers". (See App.Rhg., p. 7.) The Legislative Analyst's summary states that the bill "[a]uthorizes the commission . . . to allow the utility to recover the costs of the award". (*Id.*; emphasis added.) The Conference Committee's analysis makes the same point. (*Id.*) Nothing in any of these documents supports the position that assessing utilities with compensation awards is conditional upon their being rate-regulated.

Concerning the assigned Commissioner's ruling, we note that the assigned Commissioner in that proceeding was also the original assigned Commissioner in this proceeding. Moreover, that ruling stated, at page 4: "As the Assigned Commissioner to the proceeding, however, my views are not the final decision on this issue. . . . On a prospective basis, I intend to present my colleagues with a proposed solution to this dilemma in the intervenor compensation rulemaking." This Commissioner voted with the majority in approving the solution adopted by D.98-04-059, later affirmed in D.99-02-039.

Finally, non-rate-regulated entities which are utilities under our jurisdiction are obviously still being regulated by us, albeit not as completely. Thus we are still making decisions affecting these utilities and their customers. Many of those decisions involve consumer protection issues, for the very reason that without some regulatory check, operation of the market does not yet afford customers of those utilities sufficient protection from potential abuse. In order for us to make the best decisions possible with regard to both rate-regulated and non-rate-regulated utilities, it is important that intervenors participate in proceedings involving these utilities. It would be inequitable for non-rate-regulated utilities to receive the benefits of relaxed regulation while at the same time not having to contribute their share to intervenor compensation.

B. Only participating utilities must contribute to the award in quasi-legislative proceedings. Joint Applicants secondly argue that section 1807 only authorizes us to determine which utilities are "subject to a proceeding", and

does not authorize us to exempt certain utilities whom we have found to be "subject to" a particular proceeding from payment of compensation awards. Joint Applicants contend that to the extent a regulated utility is the subject of a hearing, investigation or proceeding, it necessarily must share in the cost of a compensation award.

TURN/Weil argue in response that in D.99-02-039, we rejected exactly that same argument in denying CALTEL/MCI's application for rehearing of D.98-04-059. We agree. While CALTEL/MCI were objecting to the subset of utilities "participating" in a proceeding (as opposed to all utilities affected by that proceeding), and here, Joint Applicants object to the subset of "larger" utilities "participating" in a proceeding (again, as opposed to all utilities affected by that proceeding), the argument Joint Applicants make is exactly the same, down to much of the language used in the two applications for rehearing.

Joint Applicants' argument is without merit. In addition to being precluded by section 1709 and the doctrine of collateral estoppel, Joint Applicants have not shown how our policy determination to continue our long-standing practice in requiring large utility participants to contribute to compensation awards contravenes section 1807. The fact that Joint Applicants disagree with our determination does not make it legal error.

Concerning Joint Applicants' argument that requiring only a subset of utilities to pay compensation awards during the interim period contradicts specific findings made in D.00-01-020 to justify the user fee program, TURN/Weil's position in opposition is also persuasive. They argue that we did not say in D.00-01-020 that section 1807 requires all utilities to contribute to the payment of awards. Rather, we concluded that section 1807 allows this broader interpretation.

D.00-01-020 discusses in detail the factors we took into consideration in making the policy determination to adopt the user fee program. We decided, in furtherance of promoting competitive equity, to change our policy,

as expressed in D.98-04-059, from one of requiring only utilities (including non-rate-regulated utilities) that have made appearances in a quasi-legislative rulemaking proceeding to pay intervenor compensation awards, to one of requiring all affected utilities to pay those awards, whether or not they actually participated in the proceeding. In our view, section 1807 presents no legal bar to such a program. Meanwhile, rather than subject participants in our proceedings to the program adopted by D.98-04-059, which would only remain in place for the very limited time until the user fee program could be implemented, we would return to our historical practice for the interim.

Joint Applicants cite D.00-01-020, pp. 5-6, Conclusions of Law 1, 2, 3 and 6, and Ordering Paragraph 1 to support their argument that we have impermissibly contradicted ourselves. We agree that Conclusion of Law 6 is somewhat ambiguous, and we will modify it and the accompanying discussion to clarify our position.

III. CONCLUSION

As discussed above, we have found that Joint Applicants have failed to state sufficient grounds for granting rehearing. We are also of the opinion that certain clarifications to D.00-01-020 are in order, which we accomplish in the discussion above and in Ordering Paragraph 1 below. Therefore,

IT IS ORDERED that:

1. Decision 00-01-020 is modified as follows:

A. The last sentence in the long paragraph on page 6 (continued from page 5) is modified to read:

> "We adopt these changes for funding participation in quasi-legislative rulemaking proceedings not because we believe they are absolutely required by § 1807 to the exclusion of other approaches, but in recognition of the increasing competitiveness in the industries we regulate, and in order to be more equitable to all service providers and their customers."

B. Finding of Fact 7 is modified to read:

"We expect that a user fee funding approach can reasonably be implemented no later than July 1, 2001. In the interim, it is reasonable to continue to require the larger utilities participating in a rulemaking proceeding where no specific respondent is named to pay any compensation awards, where participation means that the utility entered an appearance in the proceeding."

C. Conclusion of Law 6 is modified to read:

"Because it is unfair to assess the costs of compensation awards on some, but not all, of the subject utilities, for reasons of competitive equity for both service providers and their customers, we should apply our broader interpretation of § 1807 to both pending and future quasi-legislative rulemaking proceedings."

D. Ordering Paragraph 2 is modified to read:

"Until the intervenor compensation program fund is established, we shall continue to require the larger utilities participating in a rulemaking proceeding where no specific respondent is named to pay any compensation awards, where participation means that the utility entered an appearance in the proceeding."

2. Rehearing of Decision 00-01-020, as clarified and modified in the discussion and ordering paragraphs above, is hereby denied.

This order is effective today.

Dated May 5, 2000, at San Francisco, California.

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