L/bwg

MAIL DATE
2/5/99

Decision 99-02-039 February 4, 1999

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

ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION 98-04-059

In January, 1997, we initiated a rulemaking and investigation into our intervenor compensation program. This program is governed by Public Utilities Code sections 1801-1812;[1] within this statutory framework, we retain some flexibility to change the rules, regulations and policies which govern the program. In our opinion, comprehensive review was warranted because of the changes in the regulatory environment which have occurred since the inception of the program, and even since the most recent legislative amendments to the governing statutes.

Our OIR/OII initially called for comments on our current program, and attached a copy of a study of that program prepared by Ms. Margaret Alkon (the Alkon Report), which included recommendations for changes to the program. After comments and reply comments had been filed, the assigned Commissioner issued a ruling establishing the timetable and setting forth the issues to be covered.

---

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

This ruling identified three broad categories of proposed modifications to be considered in the rulemaking: accountability and control mechanisms, funding, and administrative streamlining. The ruling also stated the assigned Commissioner's intent to prepare a decision, publish it for comment, and present it to the full Commission for consideration. Consistent with this, two draft decisions were published, the initial one in November, 1997, and the revised one in April, 1998. Parties were given the opportunity to file comments and reply comments on both of these drafts. Another revision was undertaken in response to the second round of comments prior to adoption of our final decision, D.98-04-059 (Decision). This Decision adopted certain modifications to the intervenor compensation program and invited legislative proposals for certain other changes which are not within the Commission's discretion to accomplish under the present statutory scheme.

Numerous parties participated in this proceeding. After D.98-04-059 was issued, two timely applications for rehearing were filed, one jointly by the California Association of Competitive Telecommunications Companies and MCI Telecommunications Corporation (hereinafter, "CALTEL/MCI"), and the other jointly by the Consumers Alliance for Utility Safety and Education, National Council of La Raza, Oakland Chinese Community Council, Spanish Speaking Citizens' Foundation, Utility Consumers Action Network (UCAN), The Utility Reform Network (TURN), and James Weil (hereinafter, "the Intervenors").

CALTEL/MCI protest our inclusion of non-rate-regulated utilities in the class of utilities which will be responsible for paying intervenor compensation awards. They also protest the limitation of payment responsibility to actual parties in Commission proceedings. Finally, they protest what they believe may be the institution of a pilot program awarding interim compensation.

The Intervenors protest our finding that as competition increases in energy and telecommunications markets (as well as, presumably, in other markets), participation

by consumer representatives in Commission proceedings affecting those markets may not be necessary. They also contest our determination that consequently, in proceedings covering those sectors of the telecommunications market which are clearly competitive, the Commission will undertake an up-front review of whether any given intervenor's participation is necessary for a fair determination of the proceeding, before any participation actually occurs.

Responses to the Intervenors' application for rehearing were filed by CALTEL (this was late-filed, accompanied by a motion to accept it for filing) and the Utility Members.[2] Responses to the CALTEL/MCI application for rehearing were filed by a portion of the Intervenors' group[3] and the Utility Members.

We have reviewed in detail all of the arguments raised in both applications for rehearing, and the responses thereto. We are of the view that limited rehearing should be granted for the purpose of clarifying our intent regarding the more careful up-front scrutinization which we have called for in cases which involve competitive telecommunications markets. We will deny rehearing in all other respects, as no further legal error has been identified. We discuss all of these issues below. Finally, we will also modify the Decision to correct several ambiguities and minor clerical errors.

I. Discussion: CALTEL/MCI.

A. Requirement that Non-rate-regulated Utilities Contribute to the Award.

CALTEL/MCI argue first that section 1807 does not permit the Commission to order non-rate-regulated utilities to pay intervenor compensation. They maintain that

---

[2] GTE California Incorporated, Pacific Bell, Southern California Edison Company, Southern California Gas Company, San Diego Gas & Electric Company, and Pacific Gas and Electric Company.

[3] Spanish Speaking Citizen's Foundation, National Council of La Raza, Oakland Chinese Community Council, and TURN.

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 that one of the objectives of section 1807, that utilities be reimbursed for compensation awards by a "dollar-for-dollar adjustment to rates," 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; they 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 this argument. Finally, CALTEL/MCI argue that the legislative history of section 1807 evidences an intent that ratepayers fund intervenor compensation, which the Commission cannot ignore. They cite to a memorandum from the Commission to the Governor's Office regarding section 1807 (at that time Senate Bill 4 (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. They end this argument by stating that either section 1807 is completely outdated and must be reworked to provide for awards paid by non-rate-regulated utilities, or the Legislature never intended for the program to be administered at all in a competitive environment. In either case, they maintain, the Commission does not have the authority to require non-rate-regulated utilities to pay compensation awards.

The Intervenors argue in response that when the Commission makes an award of compensation, section 1807 requires the utility or utilities who are the subject of the proceeding to pay that award, regardless of whether they are rate-regulated. They point out that the Public Utilities Code does not define "public utility" in terms of rate- versus non-rate-regulated, but includes every "utility" (with the one exception of motor carriers of property). (See section 216.5.) They go on to argue that far from acknowledging this,

CALTEL/MCI focus on the second aspect of section 1807, and make inferences about non-rate-regulated utilities which are not supported by section 1807's language. The Intervenors argue this second aspect of section 1807 confirms that compensation awards are paid by utilities. If they are rate-regulated, they are entitled to dollar-for-dollar reimbursement which must be authorized in rates, should they wish to receive such reimbursement. If they are not rate-regulated, they still will elect whether or not to pass the costs of the award on to their customers. But, Intervenors argue, section 1807 does not make dollar-for-dollar reimbursement a condition of requiring a utility to pay intervenor compensation, as CALTEL/MCI assert. As for legislative history, the Intervenors argue that since the language of the statute clearly permits the Commission to do what it did, it is unnecessary and in fact inappropriate to delve into legislative history. However, even if this type of inquiry were appropriate, all CALTEL/MCI have demonstrated is that the Legislature authorized the Commission to allow reimbursement of awards through adjustments to rates, not that such reimbursement was a necessary condition of requiring utilities to pay for compensation awards in the first place.

The Utility Members also disagree with CALTEL/MCI's arguments.

We have carefully reviewed all of the arguments made on this issue, and find CALTEL/MCI's 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 when rate-regulation was still the order of the day, 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 allowed to be reimbursed by their customers for the expense of compensation awards, and made that expressly clear through section 1807. However, as D.98-04-059 states, 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.

We agree with the Intervenors that in this case, the statute is clear enough on its face that we do not have to consult legislative history. We also agree that if the legislative history cited by CALTEL/MCI is consulted, it offers no help to their argument. The memorandum from the Commission to the Governor's Office simply states that awards "shall be paid by the affected utility", which expense is "recoverable from the utility's ratepayers". (CALTEL/MCI App/Rhg, p. 9 and Exh. A, p. 1.) The Legislative Analyst's summary states that the bill "[a]uthorizes the commission . . . to allow the utility to recover the costs of the award". (Emphasis added.) (*Id.* at pp. 9-10 and Exh. B, p. 2.) The Conference Committee's analysis makes the same point. (*Id.* at p. 10 and Exh. C., p. 1.) Nothing in any of these documents supports the position that assessing utilities with compensation awards is conditional upon their being rate-regulated.[4]

---

[4] Concerning the assigned Commissioner's ruling in R.94-02-003/I.94-02-004, also cited by CALTEL/MCI in support of its position, we note that the assigned Commissioner in that proceeding was also the assigned Commissioner in this proceeding. Moreover, that ruling stated: "As the Assigned Commissioner to this 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." (p. 4.) This Commissioner voted with the majority in approving the solution adopted by D.98-04-059.

Moreover, non-rate-regulated entities which are utilities under our jurisdiction are obviously still being regulated by us, albeit not as comprehensively as are rate-regulated utilities. 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, at least at this point in time, does not afford customers of those utilities sufficient protection from potential abuse. In order that we can 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 not be equitable 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 awards.

B. Only Participating Utilities Must Contribute to the Award in Quasi-legislative Proceedings.

CALTEL/MCI secondly argue that the California Constitution and section 1807 do not permit the Commission to order only a subset of "subject" utilities to pay intervenor compensation. This argument addresses the determination in the Decision that only utilities which elect to participate in the proceedings will be required to contribute to compensation awards in quasi-legislative rulemakings, despite the fact that such proceedings may affect all of a particular class of utilities, or all utilities (as, for example, in the case of a rulemaking on intervenor compensation rules). CALTEL/MCI argue that section 1807 does not authorize the Commission to exempt certain utilities who are "subject to" a particular proceeding. They further argue that creating such an exemption, without a rational basis, contravenes the equal protection clause of the California Constitution.

The Intervenors argue in response that section 1807 confers upon the Commission the discretion to determine which utilities are "subject to the proceeding," and that the Commission has determined that the utilities subject to a quasi-legislative rulemaking proceeding are "all participating energy, water, and telecommunications

utilities . . . unless a specific utility(ies) is named as a respondent". D.98-04-059, p. 58. The Intervenors contend that CALTEL/MCI do not explain why this definition conflicts with section 1807, but instead, have chosen to argue that their equal protection rights under the California Constitution are violated. The Intervenors point out, as they have previously in their reply comments to the Revised Draft Decision, that courts which have considered the constitutionality of statutes like sections 1801 et seq. have upheld them against such a constitutional challenge. The Intervenors also point out that courts and agencies do not order non-parties to pay fee awards.

We once again find CALTEL/MCI's arguments to be without merit. CALTEL/MCI agree that we have the authority to determine just which utilities are "'subject' to a proceeding" in the quasi-legislative context (CALTEL/MCI App/Rhg, p.11.) That CALTEL/MCI disagree with our determination that in a quasi-legislative proceeding, "subject utilities" means those utilities who are participants in that proceeding, does not make our determination unlawful. The Decision discusses in great detail the process we went through in coming to that determination. (D.98-04-059, pp. 54-59.) We will not repeat that discussion here.

C. Interim Compensation is not Approved.

Finally, CALTEL/MCI argue that section 1804 does not permit the Commission to establish and administer any type of interim intervenor compensation program. They state that while the Decision "appears" to recognize that the statute does not permit an interim funding mechanism prior to the conclusion of a proceeding (Ordering Paragraph 2 calls for legislative proposals for such a mechanism), the Decision also "appears" to adopt an experimental pilot interim payment program, which is discussed in some detail in the body of the Decision at pages 67-69. (CALTEL/MCI App/Rhg, p. 14; emphasis in original.)

We clarify that the Decision does not adopt any interim funding mechanism. At page 70, we state:

> "We do not believe the governing statutes support periodic payments and do not wish to use ATF [Advocates Trust Fund] funds. We are convinced by the comments on the revised draft, especially those of the Utility Members, that we need legislative authority to implement this periodic payment experiment. Parties are invited to propose amendment to the governing statute to support periodic payments through the optional track."

There are, however, several statements in the discussion and findings which appear to indicate a contrary result, and those statements will be modified in the Order below.

Intervenors. The Intervenors' application for rehearing focuses specifically on D.98-04-059's finding that as competition increases in energy and telecommunications markets, participation by customer representatives in Commission proceedings may not be necessary. The Intervenors charge that this "necessity of participation" test is contrary to law and is based on policy errors. The Intervenors request that if in fact we meant a narrower interpretation, that we clarify the Decision accordingly.

The Intervenors argue that section 1801.3(f) defines "unproductive and unnecessary participation" as that participation which is duplicative of similar interests otherwise adequately represented, or participation which is not necessary for a fair determination of the proceeding. In other words, the Intervenors take the position that the last clause, "participation which is not necessary for a fair determination of the proceeding," modifies "unproductive and unnecessary participation," and does not stand by itself as a second category of participation which should be avoided. The Intervenors also argue the Public Utilities Code "gives the Commission no discretion to decide that an intervenor's participation is not 'necessary to a fair determination of the proceeding' merely because a choice of providers is available, and in the view of the administrative law judge or assigned commissioner, the 'enhanced level of consumer protection inherent in consumer-funded participation may not be warranted.'" (Intervenors' App/Rhg, p. 5.)

The application for rehearing continues to argue that if we are taking the position that section 1801.3(f)'s necessity of participation test can include a competition component, we are violating the principle of statutory construction that it is improper to insert into a statute what has been omitted from it. The Intervenors argue that nothing in section 1801.3(f) even remotely refers to competition, or the ability of consumers to adequately protect themselves by switching providers. The Intervenors state that section 1801.3(f) gives no indication that the Legislature considered intervenor compensation to provide an "enhanced level of consumer protection" which might not be warranted when the market involved in a given case has become competitive.

In addition to arguing that the language of the statutory provisions does not allow the Commission to tie necessity of participation to competition, the Intervenors charge that there is another tenet of statutory construction which we are violating: namely, that specific provisions of the statute control over more general provisions. They argue that section 1803, which specifically requires the Commission to award compensation if certain requirements are met, takes precedence over the more general provisions in section 1801.3(f).

The Intervenors end by saying that while Finding of Fact 15 specifically addresses the need to assess whether intervenor participation is necessary in proceedings involving competitive markets, other language in the decision appears to suggest that we may have intended a narrower interpretation of section 1801.3(f) which is much more consistent with the rest of the intervenor compensation legislation. Intervenors point to language on page 31 of the Decision which states that the phrase "necessary for a fair determination of the proceeding" means that "the Commission should not award compensation where the customer has argued issues that are, e.g., irrelevant, outside the scope of the proceeding, or beyond the Commission's jurisdiction to resolve." Intervenors then cite an ALJ Ruling in the pending PG&E general rate case which utilizes this language in stating what factors will be considered in determining if parties' participation

is necessary for a fair determination of the proceeding, and referring parties back to the scoping memo in the case, so that they may compare their proposed participation to the issues set forth by the scoping memo.[5] Intervenors urge us to modify the Decision, if our intent is more accurately reflected by the language on page 31 and in the cited ALJ ruling.

The Utility Members respond that the Intervenors have raised no errors of fact or law and consequently, their application should be denied.

CALTEL's response to the Intervenors' application was submitted one day late, with a motion requesting that it be allowed to file despite this tardiness. The reason given was a mistake in calendaring the due date. Our Rules of Practice and Procedure, which set forth the time within which to file a response to an application for rehearing, also provide that the Commission is not bound to wait to act on an application for rehearing until this time period has elapsed. (Rule 86.2.) Thus we have ourselves recognized that responses to applications for rehearing are not essential pleadings. Because responses are not governed by statute, but only by the Commission's rules, the Commission does have the discretion to accept responses which are late, and has done so in the past for good cause stated. We have decided to accept and consider CALTEL's late response, although we caution these parties to observe filing dates more carefully in the future.

We note at the outset, however, that CALTEL's response suffers from a more serious flaw than lateness. Much of this pleading is simply a reargument of its own application for rehearing, in the guise of responding to the Intervenors' arguments. To the extent such is the case, we do not consider such reargument.

---

[5] The ruling states: "In addition to considering whether the interests represented by an intervenor are underrepresented, rulings on eligibility shall carefully consider other standards set forth in Section 1801.3(f). (D.98-04-059, p. 31.) Among other things, a customer's compensable participation must be necessary for a fair determination of the proceeding. The Commission explained that this means that compensation will not be awarded where the customer has argued issues that are irrelevant, outside the scope of the proceeding, or beyond the Commission's jurisdiction. As already noted, revenue allocation and rate design are beyond the scope of this proceeding. Parties should review the scoping memo to ensure that their participation is necessary for a fair determination of the proceeding." (PG&E General Rate Case, A.97-12-020, Ruling of ALJ Wetzell, May 20, 1998, p. 11.)

Returning to the substance of the Intervenors' argument, while we still espouse the concept of a more careful up-front assessment of the necessity of intervention in a proceeding involving a clearly competitive market, we have determined that the way we have formulated it may contravene the intervenor compensation statutes. Therefore, we will grant limited rehearing for the purpose of modifying the Decision to clarify our intent.

We being by looking again at several key provisions of section 1801.3. Section 1801.3(b) states: "The provisions of this article [meaning the intervenor compensation sections together, Article 5] shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process." Section 1801.3(d) states that it is the Legislature's intent that "[i]ntervenors be compensated for making a substantial contribution to proceedings of the [C]ommission." (See also, of course, section 1803 on this requirement.[6]) Finally, section 1801.3(f) provides that "[t]his article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding."

Taking all of these sections together leads to the conclusion that the Legislature intends all groups with a stake in the process to be able to participate and to be compensated for substantial contributions, but in such a way as to encourage maximum effectiveness and efficiency (e.g., reduced or no compensation for duplication, or off-the-track issues). We acknowledge that the statute does not differentiate between proceedings involving competitive markets and those involving traditional monopoly regulation. A much more specific, and thus more helpful, indicator of what issues are important to a case, and thus what parties will have a stake in it, than the presence of a competitive market, is

---

[6] Section 1803 provides that the Commission shall award compensation to any customer who (1) complies with section 1804 (concerning the Notice of Intent to claim compensation) and (2) makes a substantial contribution to the adoption, in whole or in part, of the Commission's order or decision, and demonstrates that without compensation, its participation or intervention imposes a significant financial hardship.

the scoping ruling, as recognized by the ALJ ruling cited above as well as by the Decision itself. (See D.98-04-059, pp. 11-12, 31.) The Decision makes a point of saying that parties to the proceeding tended not to recognize the importance of the scoping ruling, although Intervenors' application for rehearing seems to finally make the connection. We agree with the Intervenors that a "necessity of participation" test based solely on the presence of a competitive market does not appear to be consistent with either the language or spirit of the intervenor compensation legislation.

The statutes do provide for an up-front evaluation of an intervenor's proposed participation. Section 1804 sets forth the requirements for the notice of intent to seek compensation; see especially section 1804(b)(2), which provides that the "ALJ may, in any event, issue a ruling addressing issues raised by the notice of intent . . ." which can include such things as similar positions, potential duplication, unrealistic expectations re: compensation, issues excluded by the scoping memo (see the ALJ 's ruling, cited above) which a party persists in listing, etc.

The Decision provides that such a ruling now must be issued with the scoping memo as guidance (both to the ALJ and to the parties putting a notice of intent together), if an ALJ determines that intervenor participation is unnecessary to a fair determination of the proceeding in a case involving a competitive market. The Decision also provides that this more critical up-front assessment will be made on a routine basis in proceedings covering those sectors of the telecommunications market which are clearly competitive. We will continue these procedures. However, the mere existence of a clearly competitive telecommunications market will not, in and of itself, be sufficient to deem the participation of certain parties unnecessary to a fair determination of the proceeding; it will only be the trigger for a more thorough early review. It may be that in the competitive context, it will turn out that certain issues are always excluded, and that that will eliminate certain parties, who really have no other issues on which to be heard, but at least initially,

this will be a case-by-case process, with elimination coming from other reasons than simply the existence of a competitive market.

CALTEL's response concurs with Intervenors' position that the statutes must be strictly construed. CALTEL argues, however, that doing so for Intervenors with regard to an up-front necessity of participation test means the Commission must also do so for it with regard to its arguments on who must contribute to paying compensation awards. As we have already stated above, to the extent CALTEL reargues the points made in its and MCI's application for rehearing, we will not consider its response. CALTEL has had a full opportunity to develop those points. A response to another party's application for rehearing should not be allowed to be a vehicle to reargue one's own case.

Concerning CALTEL's argument on the equity of applying strict construction to the relevant statutes, we agree that the Commission should not be picking and choosing which sections it will strictly construe and which ones it will construe more generously, at least with regard to the provisions contained in Article 5, which as a group define a particular program and must be read together. However, we are not being strict constructionists regarding either the up-front necessity of participation issue or the who pays issue. With both of these, we have attempted to construe the statutes in a way which will keep the program most workable and most fair, while moving forward into the world of competition.

CALTEL does raise one point in response to Intervenors' application for rehearing that warrants comment. It states that Intervenors' argument is not yet ripe for review, since no intervenor has been denied compensation because the proceeding involves competitive markets. All the Commission has done, according to CALTEL, has been to "announce that it will more carefully scrutinize intervenor participation to ensure compliance with § 1801.3(f) as the nature of its regulation over certain industries changes." (CALTEL Response, p. 5.) We agree, although we also acknowledge the other expressions of legislative intent in Section 1801.3, and our modifications to the Decision as set forth

below clarify this. We further note, in terms of CALTEL's complaints, that the Commission has merely announced "that it will more carefully attempt to achieve equity with regard to paying the costs of intervenor compensation, as the nature of its regulation over certain industries changes."

Therefore, **IT IS ORDERED** that:

1. Limited rehearing of Decision 98-04-059 is granted to clarify our intentions regarding more thorough up-front scrutinization of potential intervenor participation in cases involving competitive telecommunications markets.

2. Decision 98-04-059 is modified as follows:

   a. The second sentence in the first paragraph on page 10 is modified to read:

      "To help us evaluate this, we will begin to more critically assess, at the outset of a proceeding, whether the participation of a customer is necessary for a fair determination of the proceeding, consistent with the legislative intent of § 1801.3(f)."

   b. The last sentence in the first paragraph on page 11 is modified to read:

      "They suggest that if the question directly at issue in the case is the competitiveness of an industry, utility or market segment, compensation should not be allowed."

   c. The first full paragraph on page 15 (which follows the continuation of Principle # 4 from page 14) is modified to read:

      "We not only support this principle, we have acted upon it. We have awarded intervenors efficiency adders for extraordinary efficiencies. See, for example, D.95-02-066. (58 CPUC 2d 676.)"

   d. The three full paragraphs on page 32 are modified to read:

      "Nevertheless, as the telecommunications and energy industries become increasingly competitive, the participation of customers,

separate and apart from their representation through ORA or CSD, may become less necessary. As competition evolves, there may be other factors which serve to protect customers better than direct participation in our proceedings. In order to begin to monitor this, we will begin to more critically assess, at the outset of a proceeding, whether the direct participation of these "third-party" customers is necessary, both in terms of nonduplication and in terms of a fair determination of the proceeding as described in § 1801.3(f)."

"The information filed in the Notice of Intent, pursuant to § 1804(2)(i), should provide a basis for a more critical preliminary assessment of whether the participation of third-party customers is necessary. The nature and extent of the customer's planned participation, in combination with the scope of the proceeding as detailed in the scoping memo ruling, should enable the ALJ to make a preliminary assessment. Where, as a result of an evaluation of the Notice of Intent in the context of the scoping memo ruling, the ALJ preliminarily determines that the participation of third-party customers is not necessary, the ALJ shall issue a ruling (otherwise discretionary under § 1804(b)(1). Such a ruling should take into consideration such factors as the raising of issues which are irrelevant, are outside the scope of the proceeding, or are beyond the Commission's jurisdiction to consider. (See May 20, 1998 Ruling of ALJ Wetzell in A.97-12-020.)"

"We expect that, as a matter of routine, we will conduct this more critical assessment for proceedings which cover those sectors of the telecommunications market that are clearly competitive. We will conduct a more critical assessment of the necessity for participation in proceedings which directly impact such competitors, when such a proceeding is initiated by the Commission, or filed by a party, after the effective date of this order. The presence of a clearly competitive telecommunications market will serve as a trigger for this assessment, but will not, in and of itself, be sufficient to sustain a ruling that any given party's participation is not necessary."

e. The second sentence in the paragraph at the top of page 50 (continued from page 49) is modified to read:

"We will continue our practice of evaluating substantial contribution in light of duplication, and apply a discount, as appropriate."

f. Finding of Fact 15 is modified to read:

"As the telecommunications and energy industries become increasingly competitive, we will more routinely undertake an earlier, more critical assessment of whether participation in proceedings involving markets that are clearly competitive is necessary in terms of duplication and for a fair determination of the proceeding (as described in § 1801.3(f)), by means of evaluating the Notice of Intent in the context of the scoping memo ruling in the proceeding."

g. Finding of Fact 24 is modified to read:

"We will continue our practice of evaluating substantial contribution in light of duplication, and apply a discount, as appropriate."

h. Finding of Fact 37 is modified to read:

"We find compelling the arguments made by CALTEL, DMM, and Weil, but not to the point of abandoning interim funding along the lines offered by the DOI. Instead, we prefer an optional track an intervenor may elect which would increase the likelihood that participation will result in a substantial contribution and provide ratepayers value while lessening the disadvantages these three parties identified."

i. Conclusion of Law 3 is modified to read:

"Where, as the result of an evaluation of the Notice of Intent in the context of the scoping memo, the ALJ preliminarily determines that the participation of third-party customers is not necessary, the ALJ shall issue a ruling (otherwise discretionary under § 1804(b)(1))."

j. Conclusion of Law 13 is modified to read:

"When the proceeding is a rulemaking which affects an industry or industries, and not just a utility or class of utilities (that is, when it is categorized as 'quasi-legislative'), responsibility for the payment of any awards of compensation should be more broadly shared among regulated industry participants to the proceeding."

k. New Conclusion of Law 18A is added to read:

"The present statutes governing our intervenor compensation program do not support an optional track periodic payment experiment."

3. In all other respects, rehearing of Decision 98-04-059 as modified above is denied.

This order is effective today.

Dated February 4, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners