

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



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Order Instituting Investigation on the
Commission's Own Motion Into the Planned
Purchase and Acquisition by AT&T Inc. of
T-Mobile USA, Inc., and its Effect on
California Ratepayers and the California
Economy.

Investigation 11-06-009

**AT&T'S RESPONSE TO THE REFILED REQUESTS FOR INTERVENOR
COMPENSATION OF THE UTILITY REFORM NETWORK
AND CENTER FOR ACCESSIBLE TECHNOLOGY**

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Pursuant to the ALJ's June 10, 2016 Ruling, AT&T¹ hereby submits its response in opposition to the refiled requests for intervenor compensation submitted by The Utility Reform Network ("TURN") and Center for Accessible Technology ("CforAT").

I. Introduction

The Commission should deny TURN's and CforAT's refiled requests for intervenor compensation in their entirety.

The intervenor compensation statute makes plain that an award of intervenor compensation must be tied to a "substantial contribution," which means the intervenor'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 of more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the [intervenor]." Pub. Util. Code. § 1802(i). In *New Cingular Wireless PCS, LLC v. Pub. Utils. Comm'n*, 246 Cal.App.4th 784, 819 (1st Dist. 2016), the Appellate Court agreed with the Commission that the "order or decision" adopting the intervenor's contention or recommendation need not be a final decision on the merits. But the Court did not purport to override the bedrock statutory requirement that the intervenor has substantially assisted the Commission in the making of an order or decision. That order or decision may include interim or procedural determinations, but mere substantial participation in the proceeding is not enough.

The Court made clear that where "awards to TURN and CforAT were made based upon interim 'procedural recommendations' or for adoption of a contention only 'in part,' section 1802, subdivision (i) plainly limited the awardable compensation to 'all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer *in preparing or*

¹ "AT&T" means Petitioners New Cingular Wireless PCS, LLC (U 3060 C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U 3015 C).

presenting that contention or recommendation.” *New Cingular Wireless*, 246 Cal.App.4th at 819 (emphasis added by the Court). The Court also made clear that while the Commission had discretion in determining whether the “substantial contribution” test is met, “that discretion was not unlimited,” but could be “properly exercised only within the confines of Article 5, while respecting the limits of the statutory scheme.” *Id.*

TURN and CforAT ignore the limits of the statutory scheme, as well as the Court’s decision. Rather than attempt to identify particular Commission orders or decisions to which they made a substantial contribution, and then attempt to estimate the costs they incurred in preparing and presenting the recommendation or contention adopted by the Commission, they once again seek an award of *all* their costs on the grounds that they purportedly made a “substantial contribution” to the proceeding as a whole. Their requests cannot be squared with the statute or the Court’s decision, and hence those requests should be denied.

II. TURN’s and CforAT’s Intervenor Compensation Requests Should Be Denied.

A. The Refiled Intervenor Compensation Requests Should Be Denied Because They Are Inconsistent with the Appellate Court’s Decision.

The refiled requests for intervenor compensation submitted by TURN and CforAT are inconsistent with the Court’s decision vacating the Commission’s prior compensation awards, and should be denied in their entirety. TURN and CforAT inappropriately seek an award of *all* their costs, while the Court’s decision makes clear they may recover at most those costs related to their preparation or presentation of some position or contention that was adopted or affirmed by the Commission in its final decision.

As TURN notes, the Court made clear that intervenor compensation can be awarded even where a proceeding ends without a decision on the merits:

As we construe Article 5, so long as the advocacy of an intervenor claiming compensation contributes to a CPUC proceeding by

“assist[ing] the commission in the making of” any “order or decision” (§ 1802, subd. (i)) and that “order or decision” is part of the “final” resolution of the proceeding (§ 1804, subds. (c) & (e))—whether or not the proceeding is resolved on the merits—then the CPUC may “determine[.]” whether in its “judgment” (§§ 1801.3, subd. (d), 1802, subd. (i)), the intervenor’s contribution was “substantial” enough to merit an award of compensation (§ 1803, subd. (a)).

TURN Request at 6 (quoting *New Cingular Wireless PCS, LLC v. Pub. Utils. Comm’n*, 246 Cal.App.4th 784, 819 (1st Dist. 2016)). TURN and CforAT, however, ignore the rest of the same paragraph of the Court’s decision:

In this case, having made a properly supported finding that some position taken by TURN or CforAT was adopted in one or more of the many preliminary “order[s] or decision[s]” it affirmed as part of its final disposition of Docket No. I.11-06-009, it was within the CPUC’s discretion to conclude that the “substantial contribution” test was met. But that discretion was not unlimited. It was properly exercised only within the confines of Article 5, while respecting the limits of the statutory scheme. Here, for example, to the extent the awards to TURN and CforAT were made based upon interim “procedural recommendations” or for adoption of a contention only “in part,” section 1802, subdivision (i) plainly limited the awardable compensation to “all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer *in preparing or presenting that contention or recommendation.*”

New Cingular Wireless, 246 Cal.App.4th at 819 (emphasis added by the Court). In giving the intervenors another opportunity to seek compensation, the Court noted that “because of the breadth of the legal rationale the CPUC relied upon to justify its exercise of discretion, we cannot tell whether the CPUC considered whether the amounts awarded to TURN and CforAT were reasonable approximations of the fees and costs incurred ‘in preparing or presenting [the] contention[s] or recommendation[s]’ for which these intervenors were credited.” *Id.* at 820-821.

In other words, the Commission may award compensation only for the reasonable costs incurred by TURN or CforAT in preparing or presenting whatever contentions or

recommendations the Commission adopted and then affirmed in its final order. The Commission does not have discretion to, for example, find that TURN made a substantial contribution toward the adoption of some procedural decision, and then award TURN *all* its costs of participating in the proceeding, even costs unrelated to the presentation of TURN's procedural recommendation.

But this is precisely what TURN and CforAT seek. In their refiled requests for compensation, they request an award of all of their costs irrespective of whether those costs were related to preparing or presenting some contention or recommendation that was adopted. TURN, for example, seeks to recover costs for hundreds of hours “devoted . . . to the review and analysis of competitive impacts of the proposed merger” and “market definition issues.” TURN Request at 17. The Commission, however, did not adopt any contention or recommendation related to such matters, and TURN does not pretend otherwise. TURN also proffers a number of purported “specific examples” that, it asserts, support a finding of “substantial contribution.” TURN Request at 12-14. But virtually none of these is tied to a substantial contribution *to an order or decision* made by the Commission. Hence, these purported “contributions” are not compensable.

Similarly, CforAT seeks to recover costs associated with its evaluation of “competition serving different types of California customers,” “efforts to ‘maintain or encourage choice and innovation,’” and “efforts to ‘improve wireless service quality.’” CforAT Request at 5. Again, the Commission did not adopt any contention or recommendation regarding such issues. As a result, under Article 5 and the Court's decision, such costs cannot be awarded.

In short, TURN's and CforAT's requests do not comport with the Appellate Court's holding. As a result, those requests should be denied.

B. TURN's Four-Factor Test Is Inconsistent with the Law.

The bulk of TURN's filing is devoted to urging the Commission to adopt a multi-factor test that, according to TURN, would fill a "statutory gap" and lead to the conclusion that TURN made a "substantial contribution" to the proceeding. *See also* CforAT Request at 6 (evaluating CforAT's participation under TURN's four proposed factors). TURN's entire argument is a red herring, and cannot be squared with the Court's decision.

The statutory "gap" addressed by the Court (and in prior Commission decisions) was whether, "to qualify as a 'substantial contribution,' an intervenor's advocacy must contribute to an 'order or decision' *on the merits*." *New Cingular Wireless*, 246 Cal.App.4th at 794 (emphasis in original). The Court concluded that "we are presented with an ambiguity" because the parties' competing readings of the statute were "equally plausible." *Id.* at 795. "On its face," the Court concluded, the statutory "language yields no definitive answer to the statutory construction question presented here," but it found that the Commission offered a "reasonable interpretation" in concluding that the phrase "order or decision" in Article 5 is not limited to a final order on the merits. *Id.* at 796-797. "What is important" is "that the CPUC *decided* to adopt some position TURN advocated." *Id.* at 797 (emphasis in original). Thus, the Court made clear that the Commission may fill the statutory "gap" at issue – whether an "order or decision" adopting an intervenor's recommendation must be one on the merits – by concluding that the proceeding need not be resolved on the merits.

To the extent any other "gap" remains, it is the yawning gap between what the statute permits and what TURN and CforAT seek. No amount of creative interpretation can bridge that gap. TURN's proposed multifactor test – including the circumstances that led to the proceeding's conclusion, the appropriateness and reasonableness of the intervenor's participation, and the intervenor's substantial contributions in prior proceedings –

is impermissibly divorced from an assessment of whether the intervenor made a substantial contribution *to some order or decision*, whether interim, procedural, or on the merits. Instead, it replicates the broad “acknowledgement of participation” test that the Court already rejected.

As the Court concluded, “[t]o begin with, the Final Decision and Order framed its intervenor compensation eligibility determination in terms so broad as to suggest that compensation was due simply as an ‘acknowledgment’ of participation in Docket No. I.11-06-009, without any consideration given to the statutory requisites for awarding compensation.” *New Cingular Wireless*, 246 Cal.App.4th at 819. These statutory requisites include that “the advocacy of an intervenor claiming compensation contributes to a CPUC proceeding by ‘assist[ing] the commission in the making of’ any ‘order or decision’” which “is part of the ‘final’ resolution of the proceeding.” *Id.* at 819 (quoting § 1802(i) and 1804(c), (e)).

TURN’s proposed factors do not comport with the statutory scheme, as construed by the Court, any more than the prior Commission decision the Court vacated, and indeed are indistinguishable from the reasoning the Court already rejected. TURN proposes that the Commission assess whether TURN made a “substantial contribution,” when the statute, the Court confirmed, requires an assessment of whether TURN made a substantial contribution *to some particular order or decision* (even if not on the merits). More particularly, TURN proposes that the Commission examine (1) the circumstances that led to the proceeding’s conclusion, (2) the appropriateness of the intervenor’s participation in the underlying proceeding, (3) the reasonableness of the intervenor’s participation in the underlying proceeding, and (4) the intervenor’s past record of demonstrating a substantial contribution to Commission decisions on similar subjects. TURN Request at 15-16. However, none of these proposed factors and no part of TURN’s analysis of these proposed factors is tied to determining whether an intervenor made

a substantial contribution to assisting the Commission in making a particular order or decision. Whether or not these proposed factors are appropriate considerations in some other context, they are no substitute for the foundational requirement that an intervenor demonstrate that it made a substantial contribution to the Commission’s making of some order or decision, not merely “appropriate” and “reasonable” participation in a proceeding that terminated due to circumstances beyond the intervenor’s control.

While the Commission has some discretion, the Court made clear that the Commission’s discretion is “not unlimited.” *New Cingular Wireless*, 246 Cal.App.4th at 819. Rather, it may be “properly exercised only within the confines of Article 5, while respecting the limits of the statutory scheme.” *Id.* This means, among other things, that “to the extent the awards to TURN and CforAT were made based upon interim ‘procedural recommendations’ or for adoption of a contention only ‘in part’” – which is the best TURN and CforAT could possibly claim here – the statute “*plainly* limited the awardable compensation to ‘all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer *in preparing or presenting that contention of recommendation.*’” *Id.* (first emphasis added). As TURN notes (at 11, 16), the Commission previously declined to adopt TURN’s proposed four-factor test. Because TURN’s proposed test ignores the statutory requisites for an award of compensation, the Commission must once again decline to adopt that test.

C. The Refiled Requests Offer Virtually No Support for an Appropriate Award of Compensation.

As explained above, under Article 5 and the Court’s decision, “having made a properly supported finding that some position taken by TURN or CforAT was adopted in one or more of the many preliminary ‘order[s] or decision[s]’ it affirmed as part of its final disposition,” the Commission nevertheless must limit “the awardable compensation to ‘all reasonable advocate’s

fees, reasonable expert fees, and other reasonable costs incurred by the customer *in preparing or presenting that contention or recommendation.*” *New Cingular Wireless*, 246 Cal.App.4th at 819. TURN and CforAT have failed to provide the information necessary for the Commission to award compensation in compliance with the statute.

As TURN observes, the Court noted that in their prior submissions, TURN and CforAT had generally shown a “clear linkage” between their advocacy and a cross-referenced order or decision. *See New Cingular Wireless*, 246 Cal.App.4th at n.8. That, however, is not the end of the analysis. Under the statute, TURN and CforAT must demonstrate a particular kind of linkage – namely, that their “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 of more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the [intervenor].” Pub. Util. Code. § 1802(i). And, of course, they must prove up their costs “in preparing or presenting that contention of recommendation.” *Id.* TURN and CforAT for the most part do neither.

For example, in Section 9 of the attachment to its submission (describing its purported substantial contributions), CforAT asserts that it made “substantive contributions” in *responding* to questions raised in the August 11, 2011 ALJ Ruling. CforAT’s efforts responding to that Ruling plainly did not “substantially assist[] the commission in the making of” that Ruling, nor does CforAT identify anything in that Ruling where the Commission “adopted in whole or in part one of more factual contentions, legal contentions, or specific policy or procedural recommendations presented by” CforAT. Pub. Util. Code. § 1802(i).

Section 9 of Attachment 1 to TURN's submission, describing TURN's purported substantial contributions, is similarly lacking:

- Purported contribution "1" merely refers to the "time, energy and effort" TURN expended in analyzing the proposed transaction.
- Purported contribution "2. Legal Issues" refers to TURN's briefing on Applicant's appeal of the categorization of the proceeding and to three pages of TURN's Opening Comments regarding the Commission's jurisdictional authority. However, TURN concedes that there was no official ruling on these issues. Moreover, while the final decision (D.12-08-025, at 11) denied all motions filed in the proceeding not previously ruled upon, there is no indication that the Commission denied the categorization appeal because of TURN's advocacy, rather than because that appeal was moot. The mere fact that the Commission "retained the ratesetting categorization" does not mean TURN "substantially assisted" the Commission in its decision to do so.
- Purported contribution "2. Competitive Impacts" refers to TURN's work in developing and presenting evidence regarding the impacts of the proposed transaction, and TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN's contentions or recommendations on such issues.
- Purported contribution "3. Market Definition" similarly refers to TURN's work in developing and presenting evidence regarding market definition issues. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN's contentions or recommendations on such issues.
- Purported contribution "4. Efficiencies" refers to TURN's answer to the OII's question about what efficiencies would be realized by the merger. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN's contentions or recommendations on such issues.
- Purported contribution "5. Innovation Effects" refers to TURN's answer to the OII's question about the impact of the merger on innovation. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN's contentions or recommendations on such issues.
- Purported contribution "6. Special access and backhaul" refers to TURN's answer to the OII's question about the impact of the merger on special access and backhaul services. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN's contentions or recommendations on such issues.

- Purported contribution “7. Quality of Service and Spectrum Issues” refers to TURN’s answer to the OII’s question about the impact of the merger on service quality and the need for spectrum. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN’s contentions or recommendations on such issues.
- Purported contribution “8. Conditions and mitigation measures” refers to TURN’s answer to the OII’s and ALJ’s questions whether the Commission should consider imposing merger conditions. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN’s contentions or recommendations on such issues.
- Purported contribution “9. AT&T Economic and Engineering Models” refers to TURN’s work analyzing AT&T’s models of merger benefits. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN’s contentions or recommendations on such issues. TURN also refers to a “long and protracted battle with AT&T to get full access to these models,” which is addressed further below.
- Purported contribution “10(A). Workshops” refers to TURN’s participation in the three Commission-sponsored workshops and its presentation of reasons the merger should be rejected. TURN makes no attempt to identify any order or decision adopting, in whole or in part, any of TURN’s contentions or recommendations on such issues.
- Purported contribution “10(B). Discovery” addresses various aspects of discovery in the proceeding, including TURN’s “diligent review” of documents that were produced. TURN makes no attempt to demonstrate that this review led to the making of any Commission order or decision adopting, in whole or in part, any of TURN’s contentions or recommendations. TURN also refers to seeking extensions of time and obtaining access to certain materials, which AT&T addresses below.
- Purported contribution “10(C). Procedural Issues” refers to TURN’s response to AT&T’s appeal of the proceeding’s categorization. As explained above, there was no official ruling on that appeal, much less any indication that TURN’s response substantially assisted the Commission in making any decision as the categorization. TURN also refers to its requests for extensions of time and its motion for official notice of the DOJ’s complaint, which AT&T addresses below.

In short, the vast majority of TURN’s submission makes no attempt to demonstrate that TURN made a substantial contribution to any order or decision made by the Commission. TURN’s submission does identify a few particular rulings adopting a TURN position or

recommendation. For example, under purported contributions “10(B). Discovery” and “10(C). Procedural Issues,” TURN notes that the ALJ and Assigned Commission approved one of TURN’s additional data requests, that TURN prevailed on seeking two extensions of time, that TURN prevailed on its efforts to get access to certain materials, and that TURN prevailed on its motion for official notice of the DOJ complaint. But TURN has made no effort to estimate its costs and fees associated with preparing and presenting these particular contentions or recommendations. As a result, there is no basis in the record to award TURN anything.

D. There Is No Basis to Give TURN Another Bite at the Apple.

TURN contends that if the Commission disagrees with its compensation requests, the Commission should engage in an “iterative process” to allow TURN to make more submissions, “rather than reducing the award from the requested amount.” TURN Request at 19. There is no basis for such a process.

TURN suggests that its current request is different from “typical circumstances” because there is no “framework” in the form of “Commission guidance.” TURN Request at 19-20. There is, however, clear *Court* instruction. Among other things, the Court explained that to the extent compensation awards are based on “interim ‘procedural recommendations’” and the like, the statute “*plainly* limited the awardable compensation to ‘all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer *in preparing or presenting that contention of recommendation.*’” *New Cingular Wireless*, 246 Cal.App.4th at 819. The Court also explained, in deciding to permit TURN and CforAT to renew their compensation requests, that “because of the breadth of the legal rationale the CPUC relied upon to justify its exercise of discretion, we cannot tell whether the CPUC considered whether the amounts awarded to TURN and CforAT were reasonable approximations of the fees and costs

