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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ADMINISTRATIVE LAW JUDGE'S RULING REGARDING FURTHER DIRECTION ON THE SECOND REILING OF THE INTERVENOR COMPENSATION REQUESTS OF THE UTILITY REFORM NETWORK AND THE CENTER FOR ACCESSIBLE TECHNOLOGY PURSUANT TO NEW CINGULAR WIRELESS II

Summary

This ruling directs The Utility Reform Network (TURN) and the Center for Accessible Technology (CforAT) to refile their requests for intervenor fees and costs no later than June 15, 2018, consistent with the Court of Appeal decision in *New Cingular Wireless PCS, LLC et al., v. Public Utilities Commission, Respondent; The Utility Reform Network et al., Real Parties in Interest*, 2018 Cal. App. LEXIS 279. (*New Cingular Wireless II*.) This ruling also provides for responses to the refiled requests to be filed no later than June 29, 2018, and replies filed no later than July 6, 2018.

Background

Decision (D.) 12-08-025 closed this investigation without a decision on the merits, because proponents of the merger being investigated withdrew their merger request from the Federal Communications Commission. In that decision, the Commission affirmed all of its prior rulings and also recognized the efforts of

intervenor in the proceeding, stating that “requests for intervenor compensation are appropriate.” (D.12-08-025 at 9-11; *see also* Ordering Paragraph 2.)

After this final decision issued, TURN and CforAT filed for intervenor compensation for their substantial contribution to this proceeding. The California Public Utilities Commission (Commission) initially granted TURN \$255,944.03 and CforAT \$20,286.82 in intervenor compensation for their substantial contributions in Investigation (I.) 11-06-009. (*See* D.13-05-031, as modified by D.13-08-020 and D.14-06-026.) The Commission modified D.13-05-031 and D.14-06-026 and denied rehearing in D.14-12-085.

Petitioners timely petitioned for writ review in the First District Court of Appeal, Division Four.¹ The Court of Appeal denied writ relief but vacated the challenged awards without prejudice for Commission redetermination consistent with the rationale set forth in the Court of Appeal’s decision in *New Cingular Wireless PCS, LLC et al., v. Public Utilities Commission, Respondent; The Utility Reform Network et al., Real Parties in Interest*, 246 Cal. App. 4th 784; 2016 Cal. App. LEXIS 298. (*New Cingular Wireless I.*)

On remand, intervenors were required to refile their requests for intervenor compensation. After the filing of responses and replies, the Commission issued D.17-04-077, which again granted compensation to TURN of \$255,944.03 and to CforAT of \$20,286.42 for their respective contributions to the underlying decision, D.12-08-025. The Commission’s rationale differed from its first decision. The Commission found that TURN and CforAT made analytical

¹ Petitioners are New Cingular Wireless PCS, LLC; AT&T Mobility Wireless Operations Holdings Inc.; Santa Barbara Cellular Systems, Ltd.; and AT&T Mobility Wireless Operations Holdings, LLC.

and procedural contributions that were responsive, well-reasoned, and persuasive, thereby significantly advancing the Commission's stated goals in I.11-06-009.

On May 12, 2017, Petitioners applied for rehearing of D.17-04-007. On July 17, 2017, prior to the Commission's disposition of Petitioners' application for rehearing, Petitioners filed for writ of review to the Court of Appeal, challenging the lawfulness of D.17-04-007. Prior to action by the Court of Appeal on the petition, and in response to Petitioners' request for rehearing, the Commission issued D.17-11-038, which modified D.17-04-007 and denied rehearing of that decision, as modified. (D.17-11-038 and D.17-04-007 are hereafter referred to as the Remand Decisions.)

Upon the Commission's issuance of D.17-11-038, Petitioners filed an amended petition for writ of review with the Court of Appeal on January 5, 2018.

On March 13, 2018, the Court of Appeal issued *New Cingular Wireless II*, 2018 Cal. App. LEXIS 279. That decision reaffirmed the prior decision, *New Cingular Wireless I*, to the extent that it rejected Petitioners' view that intervenors were per se ineligible for compensation in cases ending without a decision on the merits, and that the Commission's interpretation of the intervenor compensation statutes is entitled to "considerable deference," but is not unchecked. (*New Cingular Wireless II*, 2018 Cal. App. LEXIS 279 **3-4.)

New Cingular Wireless II vacated the Remand Decisions, and remanded for further proceedings consistent with its order. The Court explained that:

As we read Article 5 [the intervenor compensation statutes], the CPUC retains ample discretion to assess whether a given type of contribution made by a given intervenor counts as "substantial" within the particular procedural and substantive setting of a given proceeding. And in exercising that discretion, it is perfectly acceptable, in our view, for the

CPUC to recognize that even small victories may have a major impact on the course of a proceeding. At the same time, however, by the plain statutory terms of Article 5, there must still be some objective indication of successful advocacy – hence the need to link a position taken to some “order or decision”. As for the contention by TURN and CforAT that AT&T’s position would lead to an undesirable “outcome,” we are not here concerned with “outcomes.” We are concerned with the meaning of the statutory language the Legislature enacted. If, as a policy matter, the “order or decision” limitation hinders the CPUC’s ability to promote the overall goal of incentivizing intervenor participation in the CPUC proceedings in an optimal way, that issue is for the Legislature to address.

Accordingly, we shall grant AT&T’s petition and vacate the awards made in the Remand Decisions. The Remand Decisions do make an attempt to identify orders or decisions adopted by the CPUC and link them to contentions or recommendations advocated by TURN and CforAT (although in the case of CforAT it specifically identifies only the single order we were able to discern in our review of the awards vacated in *New Cingular*, supra, 246 Cal. App. 4th at 794, fn 8.). What is lacking is an effort to trace the amounts of fees and costs incurred to the specific orders or decisions so identified. If it is not feasible to trace time and costs billed by TURN and CforAT with precision to an “order or decision,” the CPUC must make an effort to discount the claimed amount for that lack of precision - allocating the claimed time and cost in reasonable proportion to the amounts these intervenors claimed for the proceedings as a whole-rather than simply accept 100 percent of what is claimed on the ground all of the work done by TURN and CforAt, in gross, hypothetically “would have” influenced a decision on the merits that was never made. (*New Cingular Wireless II*, 2018 Cal. App. LEXIS 279 **9-10.)

Discussion

No later than June 15, 2018, TURN and CforAt shall each refile their request for intervenor compensation (originally filed on October 29, 2012 and October 12, 2012, respectively) for their substantial contribution to D.12-08-025. These documents shall be entitled “Second Refiled Request for Intervenor Compensation” and shall specify the fees and costs to which intervenors claim they are entitled for their substantial contribution to D.12-08-025. Intervenors’ refiled requests for intervenor compensation, including all justification therefore, shall be consistent with *New Cingular Wireless II*, and this ruling as specified below.

Intervenors shall:

1. Specifically (a) identify each order, decision or ruling adopted by the Commission (by document title, date, and page number) that adopted a contention or recommendation made by intervenors; and (b) shall then identify with specificity the evidence in the record that supports their claim that the order, decision or ruling adopting their contention or recommendation, again citing the evidence by document title (or event such as prehearing conference, workshop, etc.), date, and page number, if applicable. For example, if an answer to a question in the Order Instituting Investigation included recommendations that were adopted in a procedural ruling, intervenors shall identify the procedural ruling and the response containing the recommendation as specified above;
2. Specifically identify all costs and fees associated with their contentions or recommendations that they claim were adopted pursuant to (1) above, including all attorneys fees, expert witness fees, clerical staff fees, and all other costs; and

3. If it is not feasible to trace time and costs billed by TURN and CforAT with precision to an order, decision or ruling, intervenors shall make an effort to discount the claimed amount for that lack of precision - allocating the claimed time and cost in reasonable proportion to the amounts these intervenors claimed for the proceedings as a whole. If Intervenors present any fees and costs based on this section, intervenors shall explain why they cannot meet the standards set forth in Section (1) and (2) above, and fully justify their suggested discount.

Intervenors' refiled intervenor compensation requests shall be consistent with the Court's remand in *New Cingular Wireless II* and this ruling, as specified in sections (1) - (3) above. Intervenors' refiled intervenor compensation requests shall include documentation (attachments) that clearly identify all costs and fees associated with each and every contention or recommendation that intervenors claim were adopted, consistent with sections (1) - (3) above, constituting their substantial contribution to D.12-08-025. Intervenors shall not simply refile their original intervenor compensation requests with original attachments, or their first refiled intervenor compensation requests with attachments, in response to this ruling.

Intervenors are not limited to filing these requests on the Commission's intervenor compensation forms. Rather, they should use the format that provides the most precise information and explanation for their requests to comply with *New Cingular Wireless II*, and this ruling.

Parties may file responses and replies on the dates set forth below.

IT IS RULED that:

1. The Utility Reform Network and the Center for Accessible Technology shall each refile their second refiled request for intervenor compensation for substantial contribution to Decision 12-08-025 consistent with the Court's decision in *New Cingular Wireless II* and this ruling no later than June 15, 2018.

2. Responses to the refiled requests are due no later than June 29, 2018, and replies no later than July 6, 2018.

Dated May 16, 2018, at San Francisco, California.

 /s/ KELLY A. HYMES
Kelly A. Hymes
Administrative Law Judge