

Decision 18-11-044 November 29, 2018

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

**DECISION DISMISSING FOUR INTERVENOR COMPENSATION
REQUESTS FOR LACK OF PROSECUTION**

Summary

This decision dismisses the intervenor compensation requests of Center for Accessible Technology, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), the Greenlining Institute, and the Utility Consumers' Action Network for lack of prosecution, because the above intervenors do not intend to further pursue their requests as a result of two California Court of Appeal decisions concerning intervenor compensation in this investigation.

This decision also directs intervenors to return any monies received previously for the intervenor compensation requests in this investigation for their substantial contributions to Decision 12-08-025 as set forth in the Ordering Paragraphs to this decision.

1. Background

This proceeding has a lengthy procedural background and the issue of whether intervenors are entitled to intervenor compensation in this case has been before the California Court of Appeals twice.

Decision (D.) 12-08-025 closed this investigation into the proposed merger of AT&T Inc.¹ and Deutsche Telekom AG (T-Mobile USA, Inc.'s parent company "T-Mobile") 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 intervenors 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, Center for Accessible Technology (CforAT), the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), the Greenlining Institute (Greenlining), and the Utility Consumers' Action Network (UCAN) filed for intervenor compensation for their substantial contribution to this proceeding. (The Utility Reform Network (TURN) also filed a request for intervenor compensation. Because TURN has refiled its request after the second Court of Appeal decision, we will address TURN's request separately. We do not prejudge any aspect of TURN's request in this decision.)

¹ AT&T is the parent and/or beneficial owners (through various intermediary corporations) of California telecommunications utilities Pacific Bell d/b/a/ AT&T California, and New Cingular Wireless PCS, LLC (New Cingular).

The California Public Utilities Commission (Commission) initially granted CforAT \$20,286.42 in intervenor compensation for its substantial contributions in Investigation (I.) 11-06-009. (See D.14-06-026; TURN's request was also addressed in D.13-05-031, as modified by D.13-08-020.) The Commission modified D.13-05-031 and D.14-06-026 and denied rehearing in D.14-12-085.

In D.15-01-014, the Commission also initially granted the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), \$42,505.15 for their substantial contributions to D.12-08-025. Similarly in D.14-12-061, the Commission initially granted Greenlining \$154,100.50 and in D.14-12-060 the Commission initially granted UCAN \$11,339.75 for their substantial contributions to D.12-08-025. The Commission did not act on the rehearing requests for the intervenor compensation decisions concerning the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining and UCAN, until the appellate process concerning the compensation requests of CforAT and TURN was resolved.

Petitioners timely petitioned for writ review of D.14-12-085 (the rehearing decision concerning the CforAT and TURN award) in the First District Court of Appeal, Division Four.² 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*

² 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.

Reform Network et al., Real Parties in Interest, 246 Cal. App. 4th 784; 2016 Cal. App. LEXIS 298. (*New Cingular Wireless I.*)

On remand, CforAT and TURN were required to refile their requests for intervenor compensation. After the refiling of these requests, responses and replies, the Commission issued D.17-04-077, which again granted compensation to CforAT of \$20,286.42 (and compensation to TURN) for their respective substantial contributions to D.12-08-025. The Commission's rationale differed from its first decision. The Commission found that TURN and CforAT made analytical 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 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 review with the Court of Appeal on January 5, 2018.

On March 13, 2018, the Court of Appeal issued *New Cingular Wireless PCS, LLC et al., v. Public Utilities Commission, Respondent; The Utility Reform Network et al., Real Parties in Interest*, 21 Cal.App.5th 1197, 2018 Cal. App. LEXIS 279 (*New Cingular Wireless II.*) 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.)

In light of *New Cingular Wirelss II*, the Commission granted rehearing of its decisions on the intervenor compensation requests of National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN, and vacated those decisions on the basis of the holding in *New Cingular Wirelss II*.³

³ See D.18-05-052, D.18-05-053 and D.18-05-054.

Because the prior awards for intervenor compensation were vacated, the Administrative Law Judge (ALJ) issued rulings directing CforAT (and TURN), the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN each to refile their requests for intervenor compensation for their substantial contributions to D.12-08-025.⁴

CforAT, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN all informed the Commission in writing that they no longer intend to further pursue their requests for intervenor compensation in this proceeding.⁵

2. Discussion

Because CforAT, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN no longer intend to further pursue their requests for intervenor compensation in this proceeding, these requests are denied for lack of prosecution.

Intervenors shall return any monies received previously for these intervenor compensation requests for their substantial contributions to D.12-08-025 as set for in the Order below.

⁴ See May 16, 2018 ALJ ruling addressing CforAT and TURN's request, and the June 7, 2018 and July 27, 2018 ALJ ruling addressing National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN's request.

⁵ See the filings of June 15, 2018 (for CforAT); July 19, 2018 (for National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly)), July 9, 2018 (for Greenlining), and July 31, 2018 (for UCAN).

3. Comments on Proposed Decision

The proposed decision (PD) of ALJ Kelly A. Hymes in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3. Greenlining filed comments on November 14, 2018, and AT&T filed reply comments on November 19, 2018.⁶

Of the affected intervenors, Greenlining has to repay the largest amount. Greenlining seeks a longer period to repay the intervenor compensation award, presumably because of a cash flow problem. Greenlining lists five of its pending requests for intervenor compensation in other Commission proceedings and asks that it be required to repay the instant award either within 60 days of a final decision, or once the Commission has acted on all of the other pending requests, whichever comes later. Greenlining alleges there will be no harm to AT&T because of the interest provision in the repayment order. Greenlining states that if it must return over \$150,000 without receiving the awards in the other pending matters, that “Greenlining, particularly its telecommunications and technology team, will likely have reduced capacity and resources to devote to regulatory advocacy.” (Greenlining Comments to PD at 3.)

AT&T objects. It does not oppose offering some extra time for Greenlining to repay the award, but believes affording Greenlining an “open ended delay” in repaying the award is inappropriate, as one cannot know exactly when the Commission will rule on all of Greenlining’s other pending intervenor compensation requests. (AT&T Reply Comments at 1-2.) AT&T argues that

⁶ The reply comments state that “‘AT&T’ means New Cingular Wirelss PCS, LLC (U 3060 C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); Santa Barbara Cellualr Systems, Ltd. (U 3015 C); and AT&T Mobility Wirelss Operations Holdings, LLC (U 3014 C). AT&T Mobility Wireless Operations Holdings, LLC’s (U 3014 C) utility identification number was discontinued at the end of 2014.” (AT&T Reply Comments to PD at 1, note 1.)

Greenlining has known since at least March 13, 2018, when the Court of Appeals remanded the case to the Commission, or certainly by July 9, 2018, when Greenlining filed its notice stating it would not be refiling its request for intervenor compensation, that it would need to refund this award. Therefore, AT&T proposes that Greenlining have 45 days after a final decision in this proceeding to repay the award (although the current PD gives intervenors 60 days).

We modify the PD to give all intervenors a date certain, until March 29, 2019, to repay their intervenor compensation awards. This additional time should give Greenlining more time to either receive other intervenor compensation awards or make other arrangements. The interest provisions remain unchanged.

4. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Kelly A. Hymes is the assigned ALJ in this proceeding.

Findings of Fact

1. In D.14-06-026 (as modified by D.14-12-085; rehearing denied), the Commission initially granted CforAT \$20,286.42 in intervenor compensation for its substantial contributions to D.12-08-025.

2. After the Court of Appeal issued *New Cingular Wireless I*, and CforAT refiled its compensation request, the Commission issued D.17-04-077 (as modified by D.17-11-038, rehearing denied) granting CforAT \$20,286.42 in intervenor compensation for its substantial contributions to D.12-08-025.

3. After the Court of Appeal issued *New Cingular Wireless II*, on June 15, 2018, CforAT gave notice to the Commission that it did not intend to further pursue its request for intervenor compensation.

4. In D.15-01-014, the Commission initially granted the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly) \$42,505.15 for their substantial contributions to D.12-08-025. The Commission granted rehearing and vacated this award in D.18-05-052 on the basis of the holding in *New Cingular Wireless II*.

5. After the Court of Appeal issued *New Cingular Wireless II*, and the Commission granted rehearing in D.18-05-052, on July 19, 2018, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly) gave notice to the Commission that it did not intend to further pursue its request for intervenor compensation.

6. In D.14-12-061, the Commission initially granted Greenlining \$154,100.50 for its substantial contributions to D.12-08-025. The Commission granted rehearing and vacated this award in D.18-05-053 on the basis of the holding in *New Cingular Wireless II*.

7. After the Court of Appeal issued *New Cingular Wireless II*, and the Commission granted rehearing in D.18-05-053, on July 9, 2018, Greenlining gave notice to the Commission that it did not intend to further pursue its request for intervenor compensation.

8. In 14-12-060, the Commission initially granted the Utility Consumers' Action Network (UCAN) \$11,339.75 for its substantial contributions to D.12-08-025. The Commission granted rehearing and vacated this award in D.18-05-054 on the basis of the holding in *New Cingular Wireless II*.

9. After the Court of Appeal issued *New Cingular Wireless II*, and the Commission granted rehearing in D.18-05-054, on July 31, 2018, UCAN gave notice to the Commission that it did not intend to further pursue its request for intervenor compensation.

Conclusions of Law

1. Because the prior intervenor compensation awards to CforAT, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN all have been vacated, and these intervenors no longer intend to further pursue their requests for intervenor compensation in this proceeding, the requests of CforAT, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN for intervenor compensation for their substantial contributions to D.12-08-025 should be dismissed for lack of prosecution.

2. CforAT, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), Greenlining, and UCAN should return any monies received for their intervenor compensation requests in this proceeding as set forth in the Ordering Paragraphs to this decision.

O R D E R

IT IS ORDERED that:

1. The request of Center for Accessible Technology (CforAT) for intervenor compensation made on October 12, 2012 and July 11, 2016, is dismissed for lack of prosecution. CforAT shall return any portion of the \$20,286.42 that it received previously for its intervenor compensation request, including any interest received, as set forth in Ordering Paragraph 5 below.

2. The request of the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly) for intervenor compensation made on October 29, 2012, is dismissed for lack of prosecution. The National Asian American Coalition and the Latino Business Chamber of Greater Los

Angeles (jointly) shall return any portion of the \$42,505.15 that it received previously for its intervenor compensation request, including any interest received, as set forth in Ordering Paragraph 5 below.

3. The request of the Greenlining Institute (Greenlining) for intervenor compensation made on October 25, 2012, is dismissed for lack of prosecution. Greenlining shall return any portion of the \$154,100.50 that it received previously for its intervenor compensation request, including any interest received, as set forth in Ordering Paragraph 5 below.

4. The request of the Utility Consumers' Action Network (UCAN) made on September 21, 2012, is dismissed for lack of prosecution. UCAN shall return any portion of the \$11,339.75 that it received previously for its intervenor compensation request, including any interest received, as set forth in Ordering Paragraph 5 below.

5. No later than March 29, 2019, the Center for Accessible Technology, the National Asian American Coalition and the Latino Business Chamber of Greater Los Angeles (jointly), the Greenlining Institute, and the Utility Consumers' Action Network each shall return any portion of the monies received for their intervenor compensation requests, including any interest received (the amounts of the requests are as set forth in Ordering Paragraphs 1-4 above) to T-Mobile West LLC dba T-Mobile (U3056C) (T-Mobile) and New Cingular Wireless PCS, LLC (U3060C), AT&T Mobility Wireless Operations Holdings Inc. (U3021C), Santa Barbara Cellular Systems, Ltd (U3015C) and AT&T Mobility Wireless Operations Holdings, LLC (U3014C) (collectively referred to as "AT&T Mobility") based on the pro rata share these entities paid any such award. Decision 13-08-020 clarified that the above utility entities were to pay any such awards based on the pro rata share of their collective California-jurisdictional

telecommunication revenues for the 2011 calendar year, to reflect the year in which the proceeding was primarily litigated. Repayment of any award received previously, including any interest received previously, shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning on the 75th day after this decision is issued, and continuing until full repayment is made.

6. Investigation 11-06-005 will remain open to consider the Utility Reform Network's renewed request for intervenor compensation.

This order is effective today.

Dated November 29, 2018, at San Francisco, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners