

Decision 10-11-030 November 19, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network (UCAN),

Complainant,

vs.

MPower Communications Corp. dba TelePacific
 Communications fka MPower Communications aka
 TelePacific Holding Corp. and related entities collectively
 TelePacific, U 5859-C,

Defendant.

Case 08-08-008
 (Filed August 12, 2008)

**DECISION AWARDING INTERVENOR COMPENSATION TO UTILITY
 CONSUMERS' ACTION NETWORK FOR SUBSTANTIAL CONTRIBUTION TO
 DECISION 10-06-001**

Claimant: Utility Consumers' Action Network (UCAN)	For contribution to D.10-06-001
Claimed: \$41,644¹	Awarded: \$28,823 (reduced 31%)
Assigned Commissioner: Timothy Alan Simon	Assigned ALJ: A. Kirk McKenzie

PART I: PROCEDURAL ISSUES

A. Brief Description of Decision: Decision granting complaint and finding telephone charges unreasonable under Section 451 of the Public Utilities Code.

B. Claimant must satisfy intervenor compensation requirements set forth in Public Utilities Code §§ 1801-1812: December 3, 2008

	Claimant	CPUC Verified
Timely filing of notice of intent to claim compensation (§ 1804(a)):		
1. Date of Prehearing Conference:	December 3, 2008	Yes

¹ UCAN made some miscalculations in this claim. We correct these errors here, readjusted UCAN's totals and round the amount to the nearest dollar.

2. Other Specified Date for Notice of Intent (NOI):		
3. Date NOI Filed:	December 29, 2008	Yes
4. Was the notice of intent timely filed?		Yes
Showing of customer or customer-related status (§ 1802(b)):		
5. Based on ALJ ruling issued in proceeding number:	C.08-08-008	Yes
6. Date of ALJ ruling:	March 30, 2010	The ruling found UCAN to be a category 2 customer, a representative authorized by a customer to participate in this proceeding pursuant to Pub. Util. Code § 1802(b)(1)(B).
7. Based on another CPUC determination (specify):		N/A
8. Has the claimant demonstrated customer or customer-related status?		Yes
Showing of “significant financial hardship” (§ 1802(g)):		
9. Based on ALJ ruling issued in proceeding number:		C.08-08-008
10. Date of ALJ ruling:		This decision
<p><i>Pursuant to Rule 1804(a)(2)(B), UCAN includes its showing of significant financial hardship here in its request for compensation. UCAN as a category 2 customer, represented Ms. Stepanova. Category 2 customers² must disclose their gross and net monthly income, monthly expenses, and other relevant financial information. UCAN has submitted income and expense statements for Ms. Stepanova for 2009. These documents and UCAN’s showing affirm that Stepanova as a small business owner (of Edelweiss Flower Salon) with a modest income could not afford the cost of UCAN’s participation (estimated at \$41,427.90) without undue hardship. Based on the cost of effective participation as compared to her income and expenses, Stepanova does not have the resources to pay for the costs of effective participation.</i></p>		
11. Based on another CPUC determination (specify):		N/A
12. Has the claimant demonstrated significant financial hardship?		Yes
Timely request for compensation (§ 1804(c)):		

² See D.98-04-059.

13. Identify Final Decision	D.10-06-001	Yes
14. Date of Issuance of Final Decision:	June 3, 2010	Yes
15. File date of compensation request:	July 21, 2010 ³	Yes
16. Was the request for compensation timely?		Yes

PART II: SUBSTANTIAL CONTRIBUTION

A. Claimant’s description of its claimed contribution to the final decision

Contribution	Citation to Decision or Record	Showing Accepted by CPUC
1. On August 12, 2008, UCAN filed a complaint against TelePacific (“MPower”) for imposing direct dialing charges on customer accounts who had been victimized by international computer hackers after providing no notice that international calls could be placed on those accounts.	C.08-08-008	Yes
2. In its decision, the Commission agreed with UCAN that “Mpower’s actions violated Section 451, which requires that the rates charged and the service rules promulgated by public utilities must be just and reasonable.” (D.10-06-001, at 2) The Commission based its decision upon three factors: “(1) the limited warning about toll fraud that Mpower gave to its new customers in 2005, which failed to mention the risks of modem hacking; (2) the measures that Edelweiss Flower Salon took in 2005-6 to secure its computer and telephone facilities, which were reasonable under the circumstances; and (3) the particular language of the parties’ service agreement, which – as interpreted by	D.10-06-001, at 2	Yes

³ UCAN timely filed its initial request for compensation on July 21, 2010. The claim however, lacked the personal information required for Ms. Stepanova to establish the issue of “undue financial hardship” as a Category 2 customer. On September 3, 2010 UCAN submitted the additional information required to complete its request for compensation.

<p>Mpower – unfairly gives the company the unilateral right to determine whether the measures taken by a customer to secure the customer’s telephone and computer systems are adequate.” (D.10-06-001, at 2) UCAN’s investigation gathered information that brought these factors to the Commission’s attention, so the decision was a direct result of UCAN’s investigation.</p>		
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B. Duplication of Effort (§§ 1801.3(f) & 1802.5):

	Claimant	CPUC Verified
a. Was DRA a party to the proceeding?	No	Correct
b. Were there other parties to the proceeding?	No	Correct

PART III: REASONABLENESS OF REQUESTED COMPENSATION

A. General Claim of Reasonableness (§§ 1801 & 1806):

Claimant’s explanation as to how the cost of claimant’s participation bore a reasonable relationship with benefits realized through claimant’s participation	CPUC Verified
<p>UCAN’s participation in this case and final decision the Commission reached, provided a benefit for existing and future Mpower customers who may be victimized by hackers. The Commission found that MPower, a public utility, had charged a rate that was not “just and reasonable” in violation of Section 451 (D.10-06-001, at 2) Item 5 of MPower's Installation Policy and Procedures was held to be unconscionable and “unenforceable...because of the unilateral power it confer[ed] on Mpower to decide whether the measures taken by a customer to safeguard its ‘computer network...’” were adequate (D.10-06-001, at 42) As a result of this decision, future customers will no longer be parties to an “excessive, unreasonable” agreement that allows MPower to define any unauthorized access to MPower's system as the customer’s failure to adequately secure the line. (D.10-06-001, at 42) Since UCAN was the party that filed the complaint, and UCAN engaged with Mpower to extensively investigate the issues presented, the benefits of the proceeding were necessarily a result of UCAN’s efforts.</p>	<p>Despite previous Commission warnings against UCAN’s failure to allocate its time by issue,⁴ UCAN continues to fail to comply with this requirement.⁵ D.10-03-019 issued on March, 11, 2010 disallowed 10% of UCAN’s professional time for failing to allocate and track its time. UCAN also continues to combine</p>

⁴ See D.09-05-036 and D.09-10-053.

⁵ Intervenors are required to allocate their costs by issue as directed in D.98-04-059 at 48.

	<p>tasks on its timesheets, despite repeated Commission requests to stop this practice.⁶</p> <p>After the reductions and disallowances we make to this claim, the remainder of UCAN’s hours and costs are reasonable and should be compensated.</p>
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B. Specific Claim:

CLAIMED						CPUC AWARD			
ATTORNEY AND ADVOCATE FEES									
Item	Year	Hours	Rate \$	Basis for Rate*	Total \$	Year	Hours	Rate \$	Total \$
A. Neill	2008	85.0 ⁷	160	D.08-12-055	13,600.00	2008	65.6	160	10,496
A. Neill	2009	125.6	168	D.08-12-055	21,100.80	2009	77.0	170 ⁸	13,090
A. Neill	2010	8.7	205	D.10-08-018	1,783.50	2010	3.9	205	800
M. Shames	2008	4.1	330	D.09-10-053	1,353.00	2008	3.3	330	1,089
M. Shames	2009	7.8	330	D.09-10-053	2,574.00	2009	6.2	330	2,046
Subtotal: \$40,411.30						Subtotal: \$27,521			
OTHER FEES (Travel)									
Item	Year	Hours	Rate \$	Basis for Rate*	Total \$	Year	Hours	Rate \$	Total \$

⁶ See D.09-04-032, issued on April 16, 2009, D.09-05-036, issued on May 21, 2009, and D.09-10-053 issued on October 29, 2009.

⁷ UCAN fails to reduce by ½ hourly rate the 2.7 hours in 2008 that Neill spent preparing UCAN’s NOI. Here, these hours are billed at full professional rate. To correct UCAN’s error, we remove these hours from Neill’s professional time and reallocate them in the appropriate category under intervenor compensation preparation, and then recalculate UCAN’s claim. UCAN has committed this same error in other claims, most recently in its compensation claims filed in A.06-12-009 (D.09-01-032, issued on January 29, 2009) and in C.08-08-026 (D.10-08-018, issued on August 12, 2010) where the Commission made adjustment to UCAN’s claim for the same mistakes. We will disallow this time entirely in future claim where UCAN fails to properly allocate this time in the correct area of the claim at the correct billing rate.

⁸ In D.10-08-018 in C.08-08-026, UCAN requested the first “step increase” for Neill’s 2009 work. We approved this increase, however we did not round the hourly rate to the nearest \$5 increment, according to our normal practice. We correct this here and adopt a new hourly rate of \$170 for Neill’s 2009 work.

A. Neill	2008	7.8	80	½ of D.08-12-055	624.00	2008	7.8	80	624
Subtotal: \$624						Subtotal: \$624			
INTERVENOR COMPENSATION CLAIM PREPARATION **									
Item	Year	Hours	Rate \$	Basis for Rate*	Total \$	Year	Hours	Rate \$	Total \$
A. Neill	2008	2.7 ⁹	80	½ of 2008 rate	216.00	2008	1.0	80	80
A. Neill	2010	2.0	102.50	½ of 2010 rate	205.00	2010	4.0 ¹⁰	102.50	410
Subtotal: \$421						Subtotal: \$490			
COSTS									
#	Item	Detail			Amount	Amount			
1	Art Neill	Travel to hearing			187.60	187.60			
Subtotal: \$187.60						Subtotal: \$187.60			
TOTAL REQUEST: \$41,644						TOTAL AWARD: \$28,823¹¹			
<p>We remind all intervenors that Commission staff may audit their records related to the award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. Claimant's records should identify specific issues for which it seeks compensation, the actual time spent by each employee or consultant, the applicable hourly rates, fees paid to consultants and any other costs for which compensation was claimed. The records pertaining to an award of compensation shall be retained for at least three years from the date of the final decision making the award.</p> <p>**Reasonable claim preparation time typically compensated at ½ of preparer's normal hourly rate.</p>									

C. CPUC Disallowances & Adjustments:

Item	Reason
2008-Neill hours	We disallow .30 hours of Neill's time spent "filing" UCAN's complaint on 08/12. This is a non-compensable clerical task which is subsumed into the fees paid to attorneys.
2008-Neill compensation preparation hours	We find Neill's time spent preparing UCAN's NOI (2.7 hours) to be excessive. We approve 1.0 hr for this task, which is reasonable given the use of the standardized form. This is equal to the same adjusted time we approved in UCAN's claim filed in C.08-08-026 for substantial contribution to D.10-10-018.
2009 Neill hours related	Neill logs 53.6 hours in 2009 for researching, analyzing and writing UCAN's 26 page opening brief, filed on January 28, 2009. In large part, we find UCAN's efforts in this

⁹ See footnote 7.

¹⁰ In UCAN's September 1, 2010 reply to Mpower's response to UCAN's compensation claim, UCAN requests that its compensation request as filed be supplemented by 2 hours for Neill's 2010 time spent preparing UCAN's reply to Mpower's objections to its claim. We do so here, however we adjust UCAN's time in the compensation preparation area which is compensated at ½ rate. Compensation at full professional rate would be inappropriate as the decision was issued on June 3, 2010 and UCAN's reply is related to compensation matters.

¹¹ Rounded to nearest dollar.

	UCAN filed a reply to Mpower's objections on September 1, 2010. UCAN stands by the reasonableness of its intervenor claim as submitted but argues that: Mpower's assertion that UCAN's claim should be rejected for its failure to allocate its time by issue is without basis; UCAN's claim should be awarded without adjustment; that UCAN properly asserted Rule 1.1 violations in its complaint; and that its work was within the scope of the proceeding as set forth in the Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, issued on April 8, 2009.	
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B. Comment Period: Was the 30-day comment period waived (*see* Rule 14.6(2)(6))?

Yes

FINDINGS OF FACT

1. Claimant has made a substantial contribution to Decision 10-06-001.
2. The claimed fees and costs, as adjusted herein, are comparable to market rates paid to experts and advocates having comparable training and experience and offering similar services.
3. The total of reasonable contribution is \$28,823.

CONCLUSION OF LAW

1. The claim, with any adjustment set forth above, satisfies all requirements of Pub. Util. Code §§ 1801-1812.

ORDER

1. Claimant is awarded \$28,823.
2. Within 30 days of the effective date of this decision, MPower Communications Corp, dba TelePacific Communications fka Mpower Communications aka TelePacific Holding Corp and related entities collectively "TelePacific" shall pay claimant the total award. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning November 17, 2010, the 75th day after the supplemental filing of claimant's request, and continuing until full payment is made.

3. The comment period for today's decision was waived.
4. This decision is effective today.

Dated November 19, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

APPENDIX**Compensation Decision Summary Information**

Compensation Decision:	D1011030	Modifies Decision? No
Contribution Decision(s):	D1006001	
Proceeding(s):	C0808008	
Author:	ALJ A. Kirk McKenzie	
Payer(s):	Mpower Communications Corp, dba TelePacific Communications fka Mpower Communications aka TelePacific Holding Corp and related entities collectively "TelePacific"	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
Utility Consumers' Action Network	7-21-10	\$41,644	\$28,823	No	unproductive effort, failure to allocate time by issue, combining of tasks on timesheets, and excessive hours

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Art	Neill	Attorney	Utility Consumers' Action Network	\$160	2008	\$160
Art	Neill	Attorney	Utility Consumers' Action Network	\$168	2009	\$170
Art	Neill	Attorney	Utility Consumers' Action Network	\$205	2010	\$205
Michael	Shames	Attorney	Utility Consumers' Action Network	\$330	2008	\$330
Michael	Shames	Attorney	Utility Consumers' Action Network	\$330	2009	\$330

(END OF APPENDIX)