

Decision 05-04-044 April 21, 2005

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

Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-024  
(Filed February 21, 2001)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Loops in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-035  
(Filed February 28, 2001)

Application of The Telephone Connection Local Services, LLC (U 5522 C) for the Commission to Reexamine the Recurring Costs and Prices of the DS-3 Entrance Facility Without Equipment in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-031  
(Filed February 28, 2002)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Interoffice Transmission Facilities and Signaling Networks and Call-Related Databases in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-032  
(Filed February 28, 2002)

Application of Pacific Bell Telephone Company (U 1001 C) for the Commission to Reexamine the Costs and Prices of the Expanded Interconnection Service Cross-Connect Network Element in the Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-034  
(Filed February 28, 2002)

Application of XO California, Inc. (U 5553 C) for the Commission to Reexamine the Recurring Costs of DS1 and DS3 Unbundled Network Element Loops in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-03-002  
(Filed March 1, 2002)

**OPINION GRANTING INTERVENOR COMPENSATION TO  
THE UTILITY REFORM NETWORK FOR  
SUBSTANTIAL CONTRIBUTION TO DECISION 04-09-063**

This decision awards The Utility Reform Network (TURN) \$272,898.48 in compensation for its contribution to Decision (D.) 04-09-063.

## 1. Background

Over a decade ago, the Commission initiated a rulemaking and investigation to determine the costs for the basic network functions of Pacific Bell (now SBC-CA) and GTE of California (now Verizon) in order to set “unbundled” prices for competitors to purchase access to these network functions. (See Rulemaking (R.) 93-04-003 and Investigation (I.) 93-04-002 to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, hereinafter “OANAD proceeding.”) After passage of the federal Telecommunications Act of 1996, the terminology shifted from the “basic network functions” defined in the original rulemaking to “network elements” as defined by the Federal Communications Commission (FCC). (47 C.F.R. Section 51.5.) Network elements are now commonly referred to as “unbundled network elements,” or UNEs. By purchasing UNEs, competitors are able to use portions of SBC-CA’s network to offer competitive local exchange services.

As one step in the OANAD proceeding, the Commission issued D.99-11-050, which set prices for UNEs offered by SBC-CA. The prices were based on costs developed using the Total Element Long Run Incremental Cost (TELRIC) methodology, as set forth by the FCC in 1996.<sup>1</sup> In D.99-11-050, the Commission recognized that the TELRIC costs adopted by the Commission in 1998 (D.98-02-106) and used to set prices in D.99-11-050 were, or would soon become, outdated.

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<sup>1</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499, (rel. Aug. 8, 1996) (“First Report and Order”).

Accordingly, the Commission established a process in D.99-11-050 that invited carriers with interconnection agreements with SBC-CA to annually nominate up to two UNEs for cost review. That decision required a party nominating a UNE for review to include a summary of evidence demonstrating a cost change of at least 20% (up or down) from the costs approved in D.98-02-106 for the UNE to be eligible for nomination.

The instant proceeding resulted from nominations for cost review made in 2001 and 2002, which collectively came to be known as the “UNE Reexamination” proceeding. In February 2001, AT&T Communications of California and WorldCom, Inc. (carriers that purchase UNEs from SBC-CA) nominated four UNEs for cost review. The Assigned Commissioner and Administrative Law Judge (ALJ) found sufficient justification to accept two of the four UNE nominations, and directed SBC- CA to file updated cost studies. So long as SBC-CA’s cost studies met three standards,<sup>2</sup> competing cost models from other parties would not be allowed. D.02-05-042 adopted interim rate changes on the two UNE services. The UNE Reexamination proceeding remained open for the Commission to review new cost study filings to set final rates for unbundled loops and switching.

In February and March 2002, the Commission received additional nominations for review of numerous further UNEs, and the Assigned Commissioner and ALJ found sufficient justification for review of four of the nominated UNEs. Review of the 2002 UNEs was consolidated with the ongoing 2001 UNE Reexamination, and a schedule was set for the 2001/2002 UNE

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<sup>2</sup> The models must allow parties to reasonably understand how costs are derived, replicate the calculations, and modify inputs and assumptions.

Reexamination to allow the filing of cost studies for permanent rates for all UNEs under review.

The 2001/2002 UNE Reexamination included extensive litigation and numerous further procedural steps, all discussed in D.04-09-063. In that decision, the Commission revised the rates adopted in the OANAD decision for the six UNE services.

TURN was an active party to the OANAD proceedings and 2001/2002 UNE Reexamination. TURN was found eligible for compensation in the OANAD proceeding in an ALJ ruling issued on February 15, 1995, and was awarded intervenor compensation in D.96-11-040, D.00-07-016, and D.01-08-011.

On November 30, 2004, TURN submitted its request for \$272,898.48 in compensation for its significant contributions to D.04-09-063. TURN contends it significantly contributed to the proceeding because it submitted comprehensive expert reply and rebuttal testimony and that the Commission had adopted TURN's positions on many issues. As one example, TURN pointed to the Commission's citations to TURN's expert's testimony showing that SBC-CA's cost model relied heavily on embedded network costs, rather than the appropriate forward-looking cost data.

Accompanying TURN's request for compensation was a motion requesting permission to late-file its Notice of Intent to Claim compensation. TURN's motion is addressed below. No party opposed TURN's request for compensation or its motion.

## **2. Requirements for Awards of Compensation**

The intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a

substantial contribution to the Commission’s proceedings. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers. (Subsequent statutory references are to the Public Utilities Code unless otherwise indicated.)

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(b)(1).)
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

For discussion here, the procedural issues in Items 1-4 above are combined, followed by separate discussions on Items 5 and 6.

### 3. Procedural Issues

TURN filed its request for compensation on November 30, 2004, within the required 60 days of the issuance of D.04-09-063. TURN states that the following rulings cover the time period of this proceeding and all find that TURN is a customer suffering significant financial hardship, thus creating a rebuttable presumption, as allowed by § 1804(b)(1), of eligibility for compensation:

<b>ALJ</b>	<b>Proceeding</b>	<b>Date of Ruling</b>
Barnett	A.00-09-002	December 29, 2000
Barnett	A.01-09-003	December 19, 2001
Bemesderfer	A.02-07-050	March 25, 2003
Wetzell	R.04-04-003	July 27, 2004

We find the TURN has timely filed its request for compensation and that it meets the customer and significant financial hardship conditions.

Whether TURN's NOI is timely, however, requires further analysis. Section 1804 sets the general requirement that NOIs should be filed and served within 30 days of the prehearing conference.<sup>3</sup> The statute also states "the Commission may determine the procedure to be used in filing" NOI requests where the specific procedural sequence of a proceeding does not neatly fit within the statute. The Commission has further interpreted this section in Rule 76.76 of

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<sup>3</sup> The first prehearing conference in this proceeding was held in 2001. TURN concedes that its NOI was not filed within the required 30 days. TURN states that depleted staffing led to this oversight.

the Commission's Rules of Practice and Procedure (Rules), which holds that customers found eligible for compensation in one phase of a multi-phase proceeding remain eligible for compensation in later phases.

The purpose of the NOI, per § 1804, is to apprise other parties of the intervenor's planned extent of participation, likely costs, and intention to seek reimbursement via the intervenor compensation program. In response to an NOI, the assigned ALJ is required to issue a ruling pointing out any apparent issues that might affect the intervenor's ultimate claim for compensation, see § 1804(b)(2). The NOI thus allows the parties, the ALJ, and the prospective claimant to be aware of the planned intervenor compensation request and to ensure compliance with program requirements.

Here, the OANAD proceeding (initiated in 1993) set UNE prices and provided a mechanism for systematically reviewing and adjusting those prices. TURN was an active participant in OANAD, receiving three awards of intervenor compensation, and continued its participation in the UNE Reexamination. We conclude, consistent with Rule 76.76, TURN should remain eligible for compensation in the later UNE Reexamination. TURN's participation in these closely related proceedings achieved the purposes of the NOI because all other parties, and the assigned ALJ, were aware of TURN's active participation and requests for compensation in the earlier stages, and thus would have expected the pattern to continue. No party objects to TURN's request for compensation or motion to late-file its NOI.

In conclusion, we find that TURN has satisfied all the procedural requirements necessary to make its request for compensation.

#### **4. Substantial Contribution**

In evaluating whether a customer made a substantial contribution to a proceeding, we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See §1802(i).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (See §§1802(i) and 1802.5.) As described in §1802(i), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.<sup>4</sup>

Should the Commission not adopt any of the customer's recommendations, compensation may be awarded if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order. For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the customer made a substantial contribution. With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding.

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<sup>4</sup> D.98-04-059, 79 CPUC2d, 628 at 653.

As discussed above, TURN alleges that its involvement was extensive and included participation in hearings and the various procedural steps in this proceeding. No party opposed TURN's assertions.

TURN set out numerous examples in its request for compensation, and review of D.04-09-063 shows many references to TURN's positions. One significant example is TURN's expert Roycroft's analysis and critique of the various cost models presented by the parties. Roycroft testified that by comparing results from cost models in this proceeding to the results from the cost model used by FCC, this Commission could determine which model should be adopted. In rejecting SBC's model, the Commission agreed with TURN's expert that the model relied too heavily on embedded cost data, rather than forward-looking cost data. The decision specifically relied on TURN's testimony: "We find that taken together, ORA/TURN's analysis using SynMod and JA's own sensitivity analysis varying eight inputs show that HM 5.3 is not structurally biased to produce unrealistically low results. The ORA/TURN analysis also corroborates own findings that it is difficult to change many inputs within the SBC-CA models." (D.04-09-063, at page 107.) The Commission quoted extensively from TURN's testimony and found that "ORA/TURN provided additional insightful criticism that in hindsight we find accurately describes what we have now experienced first-hand" and concluded "with the experience we have gained attempting to modify the SBC-CA models and replicate our won modified work, we concur in the criticisms of JA and ORA/TURN." (D.04-09-063, at page 118.) The Commission also relied on TURN's work in rejecting SBC-CA's amount for "fill factors," which relate to the amount of spare capacity assumed. (D.04-09-063, at page 188.) In addition to the key role played by its expert, TURN points out that this proceeding required an unusual amount of attorney and expert time to resolve procedural issues, monitor the phase setting interim rates, and provide comments on the six different proposed decisions.

We, therefore, conclude that TURN made a substantial contribution as described above. After we have determined the scope of a customer’s substantial contribution, we then look at whether the compensation requested is reasonable.

**5. Reasonableness of Requested Compensation**

TURN requests \$272,898.48 for its participation in this proceeding. The components of this request must constitute reasonable fees and costs of the customer’s preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the customer’s work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation. TURN provided the following summary of its request.

**Advocate’s Fees**

R. Costa	7.75 hours	x	\$180 (2001)	=	\$ 13,635.00
R. Costa	107.75 hours	x	\$200 (2002)	=	\$ 21,550.00
R. Costa	390.50 hours	x	\$215 (2003)	=	\$ 83,957.50
R. Costa	159.75 hours	x	\$230 (2004)	=	\$ 36,742.50
C. Mailloux	24.75 hours	x	\$250 (2001)	=	\$ 6,187.50
C. Mailloux	47.50 hours	x	\$275 (2002)	=	\$ 13,062.50
C. Mailloux	57.50 hours	x	\$300 (2003)	=	\$ 17,250.00
C. Mailloux	16.00 hours	x	\$325 (2004)	=	\$ 5,200.00
C. Mailloux	26.00 hours	x	\$162 (Comp)	=	\$ 4,212.00
J. Anthony	2.25 hours	x	\$190 (2001)	=	\$ 427.50
R. Finkelstein	3.00 hours	x	\$340 (2002)	=	\$ 1,020.00
R. Finkelstein	11.25 hours	x	\$365 (2003)	=	\$ 4,106.25
R. Finkelstein	1.0 hours	x	\$395 (2004)	=	\$ 395.00
R. Finkelstein	5.0 hours	x	\$197 (Comp)	=	\$ 985.00
			<b>SUBTOTAL</b>		<b>\$208,730.75</b>

**Consultant's Fees**

T. Roycroft 375.50 hours x \$150 (2001-2004) = \$ 56,325.00

**Other Reasonable Costs**

Copies = \$3,014.63

Fed Ex = \$ 691.02

Lexis = \$ 78.00

Postage = \$ 650.71

Phone/Fax = \$ 120.60

Travel = \$2,046.00

Parking/Toll = \$ 23.20

Meals/Lodging = \$ 889.34

Miscellaneous = \$ 121.23

**SUBTOTAL** \$ 7,842.73

**TOTAL REQUESTED** **\$272,898.48**

Next, we must assess whether the hours claimed for the customer's efforts that resulted in substantial contributions to Commission decisions are reasonable. To assist us in determining the reasonableness of the requested compensation, D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The requested costs should bear reasonably to the benefits realized. TURN states that in this proceeding it would be extremely difficult to assign a dollar to its participation in light of the numerous elements involved in pricing retail services. UNE pricing has a direct affect on competitive choice and the rates customers pay for telecommunications services. In its compensation request, TURN explains the loop rate proposed by SBC-CA was four times higher than the rate supported by TURN and two and one-half times the current interim rates. The adoption of the TURN supported rates should result in more reasonable cost-based UNE rates, which should then lead to more competitive

choices for consumers at lower prices. We agree with TURN and find its participation to be productive.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. The Commission has previously approved all requested hourly rates for TURN staff, as set forth below, and we see no reason to alter these previous determinations.

TURN Hourly Rates (by year):

Finkelstein:

2002 - \$340 - D0305065  
2003 - \$365 - D0501007  
2004 - \$395 - D0503016

Mailloux:

2001 - \$250 - D0305027  
2002 - \$275 - D0310071  
2003 - \$300 - D0410033  
2004 - \$325 - D0412054

Costa:

2001 - \$180 - D0310071  
2002 - \$200 - D0310071  
2003 - \$215 - D0410033  
2004 - \$230 - D0412054

Anthony:

\$2001 - \$190 - D0204013

We have not, however, previously approved an hourly rate for TURN consultant Roycroft. In its request for compensation, TURN showed that its requested hourly rate of \$150 for Roycroft is no higher than the Commission-approved hourly rates for similarly qualified experts. We, therefore, find TURN's requested hourly rate of \$150 to be reasonable.

The itemized direct expenses submitted by TURN include costs for travel, photocopying, postage, telephone/fax and total \$7,842.73. The cost breakdown included with the request shows the miscellaneous expenses to be commensurate with the work performed. We find these costs reasonable.

## **6. Award**

We award TURN \$272,898.48. This calculation is based on the hourly rates and business expenses described above and we find these rates and expenses to be reasonable.

Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing with February 13, 2005 (the 75th day after TURN filed its compensation request and continuing until full payment of the award is made. The award is to be paid by SBC California as the regulated entity in this proceeding.

We remind all intervenors that Commission staff may audit their records related to this award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requested compensation, the actual time spent by each employee or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

## **7. Waiver of Comment Period**

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of our Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

## **8. Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner and Dorothy Duda is the assigned ALJ in these proceedings.

### **Findings of Fact**

1. TURN actively participated in and received intervenor compensation for its work in the OANAD proceeding, and continued its level of participation in this closely related proceeding.
2. TURN made a substantial contribution to D.04-09-063 as described herein.
3. TURN's requested hourly rates for attorneys and experts are reasonable when compared to the market rates for persons with similar training and experience.
4. TURN requested reasonable compensation for related business expenses.
5. The total of the reasonable compensation is \$272,898.48.

### **Conclusions of Law**

1. TURN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation.
2. TURN's timely filed NOI, active participation, and intervenor compensation awards in the closely related OANAD proceeding, along with its continued active participation in this proceeding, achieve the purposes of § 1804.
3. The unique facts of this case allow us to accept TURN's late-filed NOI.
4. TURN's motion for acceptance of its late-filed NOI should be granted.
5. TURN should be awarded \$272,898.48 for its contribution to D.04-09-063.
6. Per Rule 77.7(f)(6), the comment period for this compensation decision may be waived.

7. This order should be effective today so that TURN may be compensated without further delay.

**O R D E R**

**IT IS ORDERED** that:

1. TURN is awarded \$272,898.48 as compensation for its substantial contributions to Decision 04-09-063.
2. The motion for acceptance of late-filed notice of intent to claim compensation of The Utility Reform Network (TURN) is granted.
3. Within 30 days of the effective date of this decision, SBC California shall pay 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, commencing on February 13, 2005 (beginning the 75<sup>th</sup> day after the filing date of TURN's request for compensation), and continuing until full payment is made.
4. The comment period for today's decision is waived.

This order is effective today.

Dated April 21, 2005, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
DIAN M. GRUENEICH  
Commissioners

### Compensation Decision Summary Information

<b>Compensation Decision:</b>	D0504044	<b>Modifies Decision?</b>
<b>Contribution Decision(s):</b>	D0409063	
<b>Proceeding(s):</b>	A0102024, A0102035, A0202031, A0202032, A0202034, A0203002	
<b>Author:</b>	ALJ Duda	
<b>Payer(s):</b>	SBC – CA	

### Intervenor Information

<b>Intervenor</b>	<b>Claim Date</b>	<b>Amount Requested</b>	<b>Amount Awarded</b>	<b>Multiplier?</b>	<b>Reason Change/Disallowance</b>
The Utility Reform Network	11/30/04	\$272,898.48	\$272,898.48	no	

### Advocate Information

<b>First Name</b>	<b>Last Name</b>	<b>Type</b>	<b>Intervenor</b>	<b>Hourly Fee Requested</b>	<b>Year Hourly Fee Requested</b>	<b>Hourly Fee Adopted</b>
Regina	Costa	E	The Utility Reform Network	\$180	2001	\$180
“	“	“	“	200	2002	200
“	“	“	“	215	2003	215
“	“	“	“	230	2004	230
Christine	Mailloux	A	“	250	2001	250
“	“	“	“	275	2002	275
“	“	“	“	300	2003	300
“	“	“	“	325	2004	325
James	Anthony	“	“	190	2001	190
Robert	Finkelstein	“	“	340	2002	340
“	“	“	“	365	2003	365
“	“	“	“	395	2004	395
Trevor	Roycroft	E	“			