

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

George M. Sawaya,

Complainant,

vs.

MCI Telecommunications Corp. (U-5011-C), a.k.a.
MCI WorldCom and MCI WorldCom, Inc.,

Defendant.

Case 00-04-029
(Filed April 18, 2000)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision awards \$3,148.29 to George M. Sawaya for intervenor compensation based on his substantial contribution to Decision (D.) 01-11-017.

1. Background

Sawaya filed the above-captioned complaint alleging that although the Commission, in D.00-02-044, had ordered Defendant MCI Telecommunications Corp. (MCI) to pay Sawaya intervenor compensation of \$1,036.13, plus interest, by March 17, 2000,¹ Sawaya had not received payment from MCI. Sawaya sought two forms of relief: (1) Commission enforcement of its order in

¹ In D.00-02-044, we ordered MCI to pay seven parties, including Sawaya, intervenor compensation for their participation in R.97-01-009.

D.00-02-044 for the payment of intervenor compensation to Sawaya, and (2) the imposition of a penalty against MCI, based on MCI's failure to comply with the Commission's order. MCI responded that MCI had twice paid Sawaya the amount owed pursuant to D.00-02-044.

At the June 23, 2000 prehearing conference (PHC), Sawaya stated that he had received payment from MCI 67 days late, and MCI subsequently admitted that it had not complied with the Commission order to pay Sawaya intervenor compensation on time. The parties acknowledged at the PHC and throughout the proceeding that the only remaining issues for the Commission to decide were whether to impose a penalty against MCI based on the late payment and the amount of the penalty to be imposed, if any.

On November 22, 2000, MCI filed a motion for summary judgment. The motion argued that MCI was entitled to a judgment in its favor because: 1) MCI had paid Sawaya the intervenor compensation owed; and 2) undisputed facts showed that MCI had taken reasonable steps to comply with the Commission order on time and that upon learning of the delays, MCI took action to ensure that Sawaya and the other intervenors were paid. Sawaya opposed the motion, and on February 1, 2001, the assigned Administrative Law Judge (ALJ) denied the motion on the grounds that factual questions existed, such as whether MCI took all reasonable and necessary steps to avoid the delay in payment to Sawaya. An evidentiary hearing was held on February 6, 2001.

On May 2, 2001, the assigned ALJ mailed her Presiding Officer's decision (POD), which dismissed Sawaya's complaint. The POD declined to impose penalties on MCI, because MCI had attempted to comply with the Commission order, but had encountered unforeseen problems in complying with its first intervenor compensation payment. The POD found that once MCI was informed

of the delay in payment, MCI took reasonable steps to rectify the violation. The POD also reasoned that Sawaya had not suffered economic harm, because MCI paid Sawaya both the intervenor compensation and interest ordered by Commission, plus additional interest to compensate for the delay in payment. However, the POD warned MCI that failure to timely comply with future intervenor compensation orders may result in sanctions.

The POD also addressed a motion for sanctions previously made by Sawaya. The motion asserted that MCI had violated Rule 1 by stating in the answer that MCI had paid him twice, when he had in fact been paid only once. The POD denied the motion, finding that MCI had sent Sawaya two checks due to its belief that the first check had been misdirected and was lost. Sawaya subsequently received and deposited both checks. Therefore, at the time of filing its answer, MCI understood that Sawaya had received two payments. However, the POD noted that MCI could reasonably have assumed, based on normal banking practices, that the bank would honor MCI's stop payment request on the first check and therefore admonished MCI to avoid unclear and misleading statements in future pleadings.²

On May 18, 2001, Sawaya filed an appeal of the POD, which alleged that the POD contained 10 critical errors. Upon review of the appeal, we made minor textual changes to the POD for clarification, but these changes did not result in any substantive revision of the POD. The Commission approved the modified POD on November 8, 2001.

² The first check was later returned to Sawaya by his bank, pursuant to MCI's stop payment order.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812.³ Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within prescribed time periods. The NOI must present information regarding the nature and extent of the customer's planned participation and an itemized estimate of the compensation the customer expects to request.⁴ It may also request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Under § 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" means that,

"in the judgment of the commission, the customer'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 or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees,

³ All statutory citations are to the Public Utilities Code.

⁴ To be eligible for compensation, an intervenor must be a "customer," as defined by § 1802(b). In D.98-04-059 (footnote 14), we affirmed our previously articulated interpretation that compensation shall be proffered only to customers whose participation arises directly from their interests as customers. (*See* D.88-12-034, D.92-04-051, and D.96-09-040.) In today's decision, "customer" and "intervenor" are used interchangeably.

reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.”

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

3. NOI to Claim Compensation

After review of the NOI filed by Sawaya in this proceeding, the assigned ALJ preliminarily found Sawaya eligible to file for intervenor compensation by ruling dated September 1, 2000.⁵

4. Timeliness of Request

Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. D.01-11-07, the decision in response to Sawaya’s appeal, was adopted by the Commission on November 8, 2001, but was not mailed until November 9, 2001. Sixty days thereafter is January 8, 2002, and Sawaya filed his

⁵ In its opposition to Sawaya’s application for an award of intervenor compensation, MCI asks the Commission to reconsider the ALJ’s preliminary ruling that Sawaya is a “customer” pursuant to § 1802(b). MCI contends that Sawaya is not a customer because he did not specifically represent the other six intervenors who also received their payments of intervenor compensation from MCI late. However, since Sawaya’s complaint sought the imposition of penalties to deter MCI from substantially delaying payment to other intervenors in the future, Sawaya qualifies as a “customer”. Sawaya also qualifies as a customer because he represents himself as an individual customer of MCI. D.00-02-044.

request on December 24, 2001. Sawaya's request for an award of compensation is timely.

MCI timely filed its opposition to the request on January 22, 2002.

5. Substantial Contribution to Resolution of Issues

A party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted.⁶ A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.⁷

Here, D.01-11-017 dismissed Sawaya's complaint with prejudice and declined to impose penalties on MCI based on MCI's late payment of intervenor compensation to Sawaya. Sawaya therefore did not attain the result sought in his complaint and is not entitled to the full compensation requested. However, D.01-11-07 did warn MCI that future late payments of intervenor compensation and misleading statements in pleadings could lead to the imposition of penalties

⁶ Section 1802(h).

⁷ The Commission has provided compensation even when the position advanced by the intervenor is rejected. See D.89-03-063 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved). See also D.89-09-103, Order modifying D.89-03-063 (In certain exceptional circumstances, the Commission may find that a party has made a substantial contribution in the absence of the adoption of any of its recommendations. Such a liberalized standard should be utilized only in cases where a strong public policy exists to encourage intervenor participation because of factors not present in the usual Commission proceeding. These factors must include 1) an extraordinarily complex proceeding, and 2) a case of unusual importance.)

pursuant to Section 2107 and 2108. Sawaya brought MCI's late payment and unclear statements in the answer to the attention of the Commission, and he created a record on these issues through his participation in this proceeding. The Commission has a strong policy interest in ensuring that utilities pay intervenor compensation and comply with Commission orders on time. Sawaya therefore made a substantial contribution to the decision but, under these circumstances, and also in light of our concerns discussed below about the hours Sawaya is claiming, we will award him a lesser amount of intervenor compensation than he requests.

6. Reasonableness of Requested Compensation

Sawaya has requested \$16,496.54. We have made adjustments to Sawaya's compensable hours as indicated below. With these adjustments, Sawaya's compensation request is as follows:

Advocate's Fee

George M. Sawaya	23.75 hrs. @ \$114/hr.	\$ 2,707.50
Compensation Request	4 hrs. @ \$57/hr.	228.00
Travel Time	1.25 hrs. @ \$57/hr.	71.25
Subtotal		\$ 2,936.75

Other Costs

Photocopying	\$ 59.90
Postage/Facsimile	132.11
Auto Expense	19.53
Subtotal	\$ 211.54
TOTAL	\$ 3,148.29

6.1 Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer demonstrate that its participation was “productive,” as that term is used in § 1801.3, where the Legislature provided guidance on program administration. (See D.98-04-059, *mimeo.* at 31-33, and Finding of Fact 42.) D.98-04-059 explained that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

Here, the value that Sawaya contributed is not easy to quantify. While ratepayers may, in the future, benefit from the Commission’s admonitions to MCI in D.01-11-017, the amount of compensation requested by Sawaya exceeds this indefinite benefit to ratepayers. Moreover, this proceeding involved few issues of law or fact, and most of the latter were resolved short of hearing. We find that Sawaya could have achieved such positive results as he did obtain for less effort, certainly without going to hearing. Therefore, to make the award commensurate with the benefits realized by ratepayers, we have reduced the compensable hours as explained below.

6.2 Hours Claimed

Sawaya submits time logs to document the 144.71 hours claimed for his participation in this proceeding. The logs include a daily breakdown of hours

for Sawaya by task, but not by substantive issue in the proceeding.⁸ MCI argues that the number of hours claimed by Sawaya is excessive and urges the Commission to reduce the compensable hours.

We find that a reduction of the compensable time is appropriate, based on level of contribution that Sawaya made to D.01-11-017 and the imbalance between the number of hours spent by Sawaya on the proceeding and the future benefit to ratepayers, if any. We therefore reduce Sawaya's compensable hours by 80 percent and find that he is entitled to compensation for 20 percent of his time or 29 hours.⁹

6.3 Hourly Rates

Sawaya requests an hourly advocate's rate of \$114 for his work in this proceeding. We find that \$114 is the hourly advocate's rate that the Commission has most recently awarded to Sawaya,¹⁰ and that half of \$114 or \$57.00 would be the applicable hourly rate for his travel time and preparation of his compensation request. We apply those rates here.

⁸ Intervenors seeking compensation must submit time records that allocate the hours spent by substantive issue, as well as by task performed. D.98-04-059 at p. 45-47. Sawaya is advised to comply with this requirement in any future compensation requests.

⁹ Twenty percent of 144.71 hours is 28.94 hours. We have rounded up to 29 hours for ease in calculation.

¹⁰ See D.00-06-062.

6.4 Other Costs

Sawaya's expenses include a claimed \$211.54 for photocopying, postage, telephone/fax charges, and automobile expense. Sawaya has included detailed supporting documentation. We find these expenses are reasonable.

7. Award to Sawaya

We award Sawaya \$3,148.29,¹¹ which includes the adjustment to compensable hours as described above.

MCI shall pay Sawaya \$3,148.29 for Sawaya's contribution to D.01-11-07. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate) measured from the 75th day after Sawaya's compensation request was filed.

As in all intervenor compensation decisions, we put Sawaya on notice that the Commission Staff may audit records related to this award. Thus, Sawaya must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. The records should identify specific issues for which Sawaya requests compensation, the actual time spent, the applicable hourly rate and any other costs for which compensation may be claimed.

8. Waiver of Comment Period

This is a decision on a request for compensation pursuant to § 1801 et seq.; accordingly under Section 311(g)(3) and Rule 77.7(f)(6) of the Commission's

¹¹ \$2,936.75 for advocate's fees plus \$211.54 for costs equals \$ 3,148.29 total compensation.

Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. Sawaya has made a timely request for compensation for his contribution to D.01-11-017.

2. Although D.01-11-017 dismissed Sawaya's complaint and declined to impose penalties on MCI, Sawaya contributed substantially to D.01-11-017 because the decision admonished MCI to avoid late payments of intervenor compensation and misleading statement in pleadings.

3. In order to find that Sawaya's participation was productive, we must reduce Sawaya's compensable hours.

4. Sawaya has requested an hourly advocate's rate of \$114 that has already been approved by the Commission.

5. Based on the nature of Sawaya's contribution to D.01-11-017 and the imbalance between the number of hours claimed and the future benefit to ratepayers, we adjust Sawaya's compensable hours so that he may receive compensation for 20 percent of his time, or 29 hours.

6. The miscellaneous costs incurred by Sawaya are reasonable.

Conclusions of Law

1. Sawaya has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation.

2. Sawaya should be awarded \$3,148.29 for his contribution to D.01-11-017.

3. Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

4. This order should be effective today so that Sawaya may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. George M. Sawaya (Sawaya) is awarded \$3,148.29 in compensation for his substantial contribution to Decision 01-11-07.
2. MCI Telecommunications Corporation (MCI) shall pay Sawaya the award granted by Ordering Paragraph 1. Payment shall be made within 30 days of the effective date of this order. MCI shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest, beginning with the 75th day after December 24, 2001, the date that Sawaya's request was filed.
3. The comment period for today's decision is waived.

4. Case 00-04-029 is closed.

This order is effective today.

Dated _____, at San Francisco, California.