

Decision \_\_\_\_\_

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

The Utility Consumer's Action Network,

Complainant,

vs.

AOL-Time Warner and Pacific Bell Telephone  
Company (U 1001 C),

Defendants.

Case 02-07-044  
(Filed July 24, 2002)**OPINION AWARDING INTERVENOR COMPENSATION**

This decision grants The Utility Consumers' Action Network (UCAN) an award of \$79,090.95 in compensation for substantial contributions to Decision (D.) 04-07-052. The Commission in D.04-07-052 approved two settlement agreements negotiated by UCAN with SBC California (SBC) and with America Online, Inc. (AOL). The settlement agreements provide early warning to AOL subscribers when their Internet dial-up access number incurs \$50 in toll charges, and the agreements implement a process by which AOL will provide access numbers to subscribers that should in virtually all cases be toll-free. AOL has approximately 3 million subscribers in California.

**1. Background**

UCAN brought this action in July 2002 alleging that through their actions and inactions, SBC and AOL were causing California subscribers to pay millions

of dollars in unintended telephone toll charges when they used AOL dial-up service to connect to the Internet.

The record showed that more than 3,000 customers per month, the vast majority of them AOL customers, were being billed for calls to the Internet because their computers used a dial-up number outside the local calling area. Most of these calls involved new Internet subscribers who inadvertently programmed a dial-up number or back-up numbers outside their free calling areas.

For customers affected, toll charges ranged from \$60 or \$70 dollars to several hundreds of dollars. In several cases, toll charges mounted to \$1,000 or more. UCAN estimated that California customers were being charged more than \$14 million annually for calls to access phone numbers that they thought were toll-free calls.

The case involved spirited motion practice and continuing negotiations as the parties sought to resolve what all acknowledged was an unfortunate byproduct of the computer age. To determine how many subscribers were affected, SBC conducted a trial program in which it offered a one-time credit up to \$500 to a customer who experienced unintended toll charges as a result of getting on the Internet. SBC discontinued the trial after six weeks when it had heard from 2,200 customers and made toll call adjustments of \$325,000.

On March 26, 2004, UCAN and SBC filed their proposed settlement agreement and jointly moved for Commission approval. AOL did not oppose settlement by the two other parties. Assigned Commissioner Geoffrey F. Brown and assigned Administrative Law Judge (ALJ) Glen Walker stayed a scheduled evidentiary hearing and conducted a settlement hearing on April 27, 2004. At the close of the settlement hearing, UCAN and AOL announced that they too had

reached settlement. The executed settlement agreements were delivered to the Commission on May 13, 2004, at which time the case was deemed submitted for Commission decision.

Under the settlements, SBC has agreed to monitor the 500 AOL access numbers in California and immediately notify customers whose toll charges to an AOL number exceed \$50. In this way, customers can change their dial-up number while their toll charges are still relatively modest. In the first month of the program, SBC sent 4,700 letters to customers notifying them that their access charges had exceeded \$50.

As part of its settlement, AOL agreed to reprogram its service so that new subscribers will submit both their area code and first 3 digits of their telephone number instead of just the area code. In this way, AOL access numbers offered to a subscriber are more likely to be within the subscriber's local calling area.

AOL has agreed to implement this program before the end of next year. Meanwhile, it is immediately revising its messages to new subscribers to more explicitly urge them to call their local telephone company to be sure their access numbers are toll free. AOL is making quarterly reports to this Commission on the progress of these efforts.

In commenting on D.04-07-052 at the Commission's meeting on August 19, 2004, Commissioner Brown stated:

I want to commend the parties, and particularly UCAN, for devising a way to protect tens of thousands of Californians from excessive charges when they connect to the Internet. In my mind, UCAN's role here has been in the highest tradition of public service.

I should also point out that this decision concludes that we have limited jurisdiction over AOL under the circumstances of this case. This is the first time that we have claimed

jurisdiction over an internet service provider. Because AOL's reprogramming will be systemwide, this is likely to extend the benefits of this decision to tens of millions of AOL customers nationwide.

D.04-07-052 became a final Commission decision on July 28, 2004.

Consistent with the requirement of Pub. Util. Code § 1804(c), UCAN filed this request for compensation within 60 days of the date of issuance of D.04-07-052.

No party has opposed UCAN's request for compensation.

## **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. Pub. Util. Code § 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference or by a date established by the Commission. UCAN filed a timely NOI in this proceeding.

Section 1804(c) requires an intervenor requesting compensation to 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, 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 or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to individuals with comparable training and experience who offer similar services, consistent with § 1806.

### **3. Contributions to Resolution of Issues**

UCAN's participation in this proceeding met the Commission's criteria for determining whether an intervenor has made a substantial contribution of a Commission decision. UCAN alone developed and filed the complaint on behalf of consumers. UCAN alone successfully responded to several motions to dismiss the action filed by SBC and by AOL. UCAN conducted months of discovery to develop the underlying facts, and UCAN alone negotiated both of the settlements that resolved this matter. The Commission's final decision adopted the settlement agreements without change, noting that they "promise to dramatically reduce unintended telephone toll charges for thousands of Californians." (D.04-07-052, at 2.)

As noted above, the record showed that more than 3,000 customers per month, the vast majority of them AOL customers, were being billed for calls to the Internet because their computers used a dial-up number outside the local calling area. Toll charges ranged from \$60 or \$70 to more than \$1,000. Under the settlement agreements adopted by the Commission, SBC now is monitoring all AOL access lines in California and notifying subscribers when their toll charges exceed \$50, thus allowing them to change access numbers while their toll costs are still manageable. Even more important in the long run may be AOL's commitment to implement a procedure requiring both area code and 3-number

prefix (instead of just the area code alone) before presenting subscribers with a list of AOL access numbers. Under the new procedure, the great majority of such listings will be within a subscriber's local calling area. Monetary savings are substantial. SBC's six-week refund test (implemented because of this proceeding) produced \$325,000 in refunds to more than 2,000 customers who had incurred unintended toll charges in dialing up the Internet.

#### 4. Reasonableness of Requested Compensation

UCAN requests compensation for all of the time and expenses reasonably devoted to its participation in this proceeding, for a total request of \$79,130.70.

##### **Advocate's Fees**

M. Shames	14.7	X	\$220	=	\$ 3,234
	Hours		(2002)		
M. Shames	20.8	X	\$250	=	\$ 5,200
	Hours		(2003)		
M. Shames	34.0	X	\$250	=	\$ 8,500
	Hours		(2004)		
L. Biddle	69.2	X	\$150	=	\$10,380
	Hours		(2002)		
L. Biddle	111.2	X	\$170	=	\$18,904
	Hours		(2003)		
L. Biddle	165.8	X	\$185	=	\$30,673
	Hours		(2004)		

**SUBTOTAL: \$76,891**

<b><u>Other Costs</u></b>	=	
Copies	=	\$ 482.65
Postage	=	\$ 110.00
Travel/Lodging	=	\$1,635.00
Telephone	=	<u>\$ 112.30</u>
<b>SUBTOTAL</b>	=	<b>\$2,239.95</b>
<b>TOTAL REQUESTED</b>	=	<b>\$79,130.95</b>

#### **4.1 Hours Claimed**

UCAN has presented its attorney hourly records in an appendix to the request for compensation. The information reflects the hours devoted to reviewing the records, drafting briefs and responses, conducting discovery and participating in hearings. Consistent with Commission policy, UCAN billed half of its attorney time related to preparation of this compensation request and for out-of-town travel time.

UCAN also used its time efficiently. UCAN delayed depositions of AOL witnesses in Virginia because settlement seemed possible. UCAN also delayed litigation of several discovery disputes and confidentiality issues for the same reason.

The number of hours sought for reimbursement by UCAN is reasonable and should not be subject to reduction. UCAN relied on legal interns to perform much of the time-consuming discovery and research. UCAN benefits from interns from local law schools who perform in exchange for getting class credit. The interns pose no direct cost for UCAN, and UCAN has not charged for their time. UCAN relied heavily upon staff attorney Lee Biddle and legal interns to do most of the investigation, legal drafting and discovery work. Senior attorney Michael Shames served as supervising attorney and Biddle acted as lead attorney. UCAN does not seek compensation for the experts it consulted in connection with this case.

## 4.2 Hourly Rates

Section 1806 requires the Commission to compensate eligible parties at a rate that reflects the “market rate paid to persons of comparable training and experience who offer similar services.”

UCAN historically has requested hourly rates that are below market rates. For the first time in many years, UCAN in this case seeks increases in the rates billed by its attorneys. UCAN requests compensation for Michael Shames at \$220 per hour for work in 2002 and \$250 per hour for work done in 2003 and 2004, as compared to the \$195 rate that has been sought for Shames since 1998. UCAN notes that the Commission awarded senior attorneys for The Utility Reform Network (TURN) rates of \$435, \$385 and \$365 for work performed in 2003 (e.g., D.04-05-050). UCAN asserts that Shames’ experience and expertise is comparable to that of TURN’s senior counsel.

UCAN requests rates of \$150 per hour for 2002, \$170 for 2003 and \$185 for 2004 for staff attorney Lee Biddle. Biddle is a 2001 law school graduate and was admitted to the bar the same year. Prior to and during law school, Biddle spent four years working for the City of San Diego as a city council aide, focusing on utility issues. He interned with a federal judge and a variety of public agencies. Since law school, Biddle has worked exclusively at UCAN and has been involved in cases such as the investigation into SBC California’s DSL service, the investigation of Cingular Wireless, and the Telecommunications Bill of Rights proceeding. Biddle has also been UCAN’s lead attorney in civil lawsuits enforcing consumer protection against telephone utilities. In one of these cases (*Campbell v. Verizon Wireless*), the San Diego Superior Court approved a rate of \$200 per hour for Biddle’s services.



The rates that UCAN requests for Biddle are equal to or below what the Commission has recently awarded attorneys with similar or lesser levels of experience before the Commission. (*See, e.g.*, D.04-05-050 and D.04-02-026, where new attorney rates ranged from \$165 to \$190.) UCAN asserts that it could justify a higher rate for Biddle but, in keeping with its historic practice in Commission proceedings, it simply requests what it believes to be discounted, but reasonable rates.

We find that UCAN has justified the rates that it requests for Shames and Biddle.

#### **4.3 Other Costs**

UCAN claims \$2,239.95 for travel costs, primarily for its attorneys' travel from UCAN's San Diego headquarters to San Francisco for hearings, and copying and miscellaneous expenses incurred in connection with D.04-07-052. We have examined the documentation supporting these requests, and find \$2,199.95 to be reasonable; the difference appears to be the result of an arithmetic error in the travel cost calculation.

### **5. Award**

We award UCAN \$79,090.95 for its substantial contributions to D.04-07-052. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after UCAN filed this compensation request (the 75th day will be October 5, 2004) and continuing until the utility makes full payment of the award.

The award granted today should be paid by SBC pursuant to Pub. Util. Code § 1807.

**6. Waiver of Comment Period**

This is a compensation matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(3), the otherwise applicable 30-day review and comment period is being waived.

**7. Assignment of Proceeding**

Geoffrey F. Brown was the Assigned Commissioner in D.04-07-052, and Glen Walker was the assigned Administrative Law Judge.

**Findings of Fact**

1. UCAN timely requests compensation for contributions to D.04-07-052, as set forth herein.
2. UCAN requests hourly rates for its advocates that are found to be reasonable based on a comparison to market rates for individuals of similar experience and qualifications.
3. The miscellaneous costs incurred by UCAN in this proceeding are reasonable as adjusted herein.

**Conclusions of Law**

1. UCAN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation.
2. UCAN should be awarded \$79,090.95 in compensation for substantial contributions to D.04-07-052.
3. This order should be effective today so that UCAN may be compensated without unnecessary delay.

**O R D E R**

**IT IS ORDERED** that:

1. The Utility Consumers' Action Network (UCAN) is awarded \$97,090.95 as set forth herein for substantial contributions to Decision (D.) 04-07-052.

2. The award should be paid pursuant to Pub. Util. Code § 1807 by SBC California (U 1001 C). Interest shall be paid at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release, G.13, with interest beginning on October 5, 2004, and continuing until the full payment has been made.

3. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**Compensation Decision Summary Information**

<b>Compensation Decision:</b>	
<b>Contribution Decision(s):</b>	D0407052
<b>Proceeding(s):</b>	C0207044
<b>Author:</b>	ALJ Walker
<b>Payer(s):</b>	SBC California

**Intervenor Information**

<b>Intervenor</b>	<b>Claim Date</b>	<b>Amount Requested</b>	<b>Amount Awarded</b>	<b>Multiplier</b>	<b>Reason Disallowance</b>
Utility Consumers' Action Committee	07/22/2004	\$79,130.70	\$79,090.95	No	Arithmetic Error

**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>
Michael	Shames	Attorney	Utility Consumers' Action Network	\$220	2002	\$220
Michael	Shames	Attorney	Utility Consumers' Action Network	\$250	2003	\$250
Michael	Shames	Attorney	Utility Consumers' Action Network	\$250	2004	\$250
Lee	Biddle	Attorney	Utility Consumers' Action Network	\$150	2002	\$150
Lee	Biddle	Attorney	Utility Consumers' Action Network	\$170	2003	\$170
Lee	Biddle	Attorney	Utility Consumers' Action Network	\$185	2004	\$185