Decision 03-07-014 July 10, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Establish an Appropriate Error Rate for Connections Made by an Automatic Dialing Device Pursuant to Section 2875.5 of the Public Utilities Code.	Rulemaking 02-02-020 (Filed February 21, 2002)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants The Utility Reform Network (TURN) and the Utility Consumers' Action Network (UCAN) an award of $31,479.53 in compensation for substantial contributions to Decision (D.) 03-03-038. In that decision, the Commission pursuant to legislative directive set an error rate for abandoned calls dialed by predictive dialer equipment and imposed record-keeping requirements and consumer education obligations.

1. Background

This case was initiated by the Commission pursuant to Assembly Bill 870 (Ch. 696, Stats. 2001). TURN and the Privacy Rights Clearinghouse (a UCAN-sponsored advocacy and education organization) were the main sponsors of the legislation. AB 870 added Section 2875.5 to the Public Utilities Code, prohibiting anyone operating certain automatic dialing equipment from making a call for which "no persons, acting as an agent or telemarketer, is available for the persons called." The bill was designed to eliminate or curtail what are commonly known as abandoned calls. Abandoned calls occur when a telemarketer, using a predictive dialing machine, dials hundreds of numbers at

once knowing that only a fraction of those calls will result in a live person answering the phone. When more than a fraction of calls get answered, the telemarketer abandons some of the calls, resulting in the called parties being greeted by silence and a "click" of disconnection at the other end.

While subsection (a) of AB 870 prohibits abandoned calls, subsection (b) directs the Commission to determine whether there should be an acceptable error rate for abandoned calls and, if so, what that acceptable error rate should be. The Legislature gave the Commission until July 1, 2002, to make this determination. The Commission issued its Order Instituting Rulemaking on February 27, 2002 asking for comment on two main areas:

- What should be the acceptable error rate for automatic dialers that are the subject of AB 870?
- What rules should be adopted regarding the establishment, retention and access to business records for calls covered by AB 870?

This was a paper proceeding, and there were no hearings. Parties filed opening and reply comments. TURN filed joint comments with UCAN and the Office of Ratepayer Advocates (ORA), collectively called the Consumer Coalition. TURN took the lead in drafting both sets of comments. In addition to the issues set out by the Commission, TURN proposed that consumer education issues also be addressed.

On July 1, 2002, in compliance with the legislative deadline, the Commission issued an Interim Opinion, Decision (D.) 02-06-072. The Interim Opinion set an error rate for abandoned calls of 3%, to be reduced to 1% by January 1, 2003. It also imposed preliminary record-keeping requirements on users of predictive dialing equipment and directed the Telecommunications Division to conduct a workshop within 90 days of the date of the Interim Opinion. The Interim Opinion identified

four issues to be addressed at the workshop: (1) feasibility of accomplishing a 1% error rate; (2) whether a revised error rate should be made effective January 1, 2003, or some later date; (3) requirements for record keeping, and (4) methods of consumer education about automatic dialing calls.

The Telecommunications Division conducted the workshop on September 26, 2002 and issued its recommendations on December 20, 2002. TURN participated in the workshop and filed comments on the staff's report on January 17, 2003. The Commission issued a Proposed Decision in February, and TURN filed opening and reply comments. While all of TURN's comments were filed jointly with UCAN, TURN continued to take the lead in researching and drafting the comments. The Commission issued its final decision, D.03-03-038, on March 17, 2003.

Consistent with the requirement of Pub. Util. Code § 1804(c), TURN and UCAN filed this request for compensation within 60 days of the date of issuance of D.03-03-038. No party has opposed the 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. TURN and UCAN filed timely NOIs 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

Participation in this proceeding by TURN and UCAN meets the Commission's criteria for determining whether an intervenor has made a substantial contribution to a Commission decision. The final decision reflects recommendations of TURN and UCAN.

3.1 Consumer Education

In its opening comments on the rulemaking, TURN urged the Commission to broaden the scope of the proceeding to include discussion of a consumer education campaign. The requirements of the final decision addressing consumer education on telemarketing issues and do-not-call programs follow much of TURN's recommendations.

3.2 Monthly Measuring Rate

Before the Commission could adopt an error rate for abandoned calls, it had to define the error rate and determine how to measure it. Industry and consumer groups had different recommendations. Ultimately, the Interim Opinion adopted a definition of the error rate that is a percentage of "live calls" - excluding calls answered by an answering machine or that go unanswered. The Interim Opinion also directed carriers to measure abandoned calls on a monthly basis. The Interim Opinion cites to TURN and UCAN support for both of these criteria. These requirements are maintained in D.03-03-038.

3.3 Record-Keeping Requirements

Record-keeping requirements were a contentious issue in this proceeding. In the end, industry representatives did not raise many objections to the recommendations in the Workshop Report, which ultimately were adopted by the Commission, but they continued to push for a lengthy implementation period. The Commission rejected the industry request, stating, "We agree with TURN and UCAN that the 3% error rate is currently in effect, and has been since July 1, 2002, and that a lengthy deferral of record-keeping requirements is not justified." (D.03-03-038, at 15.)

3.4 Adopted Error Rate

The most critical issue in this proceeding was the adopted error rate. In the Interim Opinion, the Commission ruled that a 3% error rate, reduced to a 1% error rate by January 1, 2003, was reasonable but needed further review. Ultimately, in its Final Decision, the Commission ordered the industry to meet a 3% error rate but directed the Telecommunications Division to "monitor recorded error rates of telemarketers and to make recommendations to us at any

time in the future if a further reduction in the error rate is deemed necessary." (D03-03-038, at 7.)

TURN throughout argued that the error rate should be so low as to result in a *de minimus* level of abandoned calls to consumers. While the Commission did not adopt TURN's position, it nevertheless weighed that position against an industry position that the error rate should be a voluntary 5%. Based on recommendations by the Telecommunications Division, D.03-03-038 maintained a mandatory 3% rate, explaining that this struck a reasonable balance of the concerns of the industry and of the consumer advocates.

4. Did TURN Make a Substantial Contribution?

In addition to the Commission's adoption of their positions on a number of issues, we find that TURN and UCAN have contributed substantially in this proceeding based on the totality of their work. It is clear that the efforts of TURN and UCAN comprised a comprehensive package that directly influenced the outcome of the decision. In D.95-08-051, addressing TURN's request for compensation after the rate design phase of Order Instituting Investigation 87-11-033, we noted that:

> Even where its positions were not adopted, TURN's participation was useful in focusing our decision on potential problems and competing positions. When competently advocated, as TURN's positions were, this participation performs a valuable function and should be encouraged. (D.95-08-051, at 2.)

Given the purpose and scope of the proceeding, the merits of TURN's compensation request should be judged in substantial part on whether its participation helped the Commission carry out its responsibilities. We conclude that TURN contributed to the Commission's decision-making process by

ensuring a full discussion of different substantive positions. The record demonstrates that TURN contributed substantially to the development of a quality record, particularly on the issues of acceptable error rate, record-keeping requirements and consumer education.

We find further that no reduction of compensation for duplication is warranted on this record. While some overlap with other consumer organizations was unavoidable, TURN and UCAN took steps to keep duplication to a minimum and to ensure that when it did happen, the work served to complement and assist the showings of the other party.

TURN and UCAN acknowledge that it is difficult to assign a dollar value to the benefits achieved through its contribution to D.03-03-038. However, they contend, and we agree, that the costs claimed here are outweighed by the value of their contribution to the development of a quality record in this proceeding.

5. Reasonableness of Requested Compensation

TURN and UCAN request compensation for all of the time and expenses reasonably devoted to its participation in this proceeding, for a total request of $32,441.02.

Advocate's Fees

R. Costa	6.50 Hours	X	$200 (2002)	=	$ 1,300.00
C. Mailloux	82.25 Hours	X	$275 (2002-03)	=	$22,618.75
C. Mailloux	4.75 Hours	X	$137.50 (Travel)	=$	653.12
C. Mailloux	17.50 Hours	X	$137.50 (Comp)	=$	2,406.25
R. Finkelstein	2.25 Hours	X	$340 (2003)	=	$ 765.00
B. Givens	16.25 Hours	X	$175 (2002-03)	=	$ 2,843.75
B. Givens	2.50 Hours	X	$87.50 (Comp)	=	$ 218.75
			SUBTOTAL	=	$ 30,805.62

Other Costs

Copies	=	$1,106.00
Lexis	=	$ 46.58

Postage	=	$ 150.55	
Travel	=	$ 163.00	
Parking/Toll	=	$ 60.25	
Meals/Lodging	=	$ 85.12	
Phone	=	$ 23.90	
		SUBTOTAL	**= $ 1,635.40**
		TOTAL REQUESTED	**= $ 32,441.02**

5.1 Hours Claimed

TURN has presented its attorney and advocate hourly records in an appendix to the request for compensation. The information reflects the hours devoted to reviewing the records, drafting comments and responses, and participating in a Telecommunications Division workshop. Consistent with Commission policy, TURN billed half of its attorney rate for time related to preparation of this compensation request and for travel time.

For the most part, the hours TURN claims are reasonable. However, we have eliminated 4.75 travel hours and $308.37 of travel and meal expenses for Christine Mailloux (a total of $961.49) for lack of sufficient supporting data. The supporting documents appear to show travel and travel expenses from San Diego to San Francisco to participate in the Telecommunications Division workshop, but there is no explanation of why this travel was necessary for an attorney whose organization is based in San Francisco. Without an explanation, we have no basis upon which to approve the travel time and expenses.

5.2 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." Most of the hours claimed are for Mailloux, who was TURN's lead attorney on the case, and Beth Givens of the Privacy Rights Clearinghouse, lead advocate for UCAN.

TURN requests an hourly rate for Regina Costa of $200 for her work in 2002. Costa is TURN's telecommunications research director. The $200 rate was previously approved by the Commission in D.03-05-027.

TURN requests an hourly rate of $275 for the work of attorney Mailloux in 2002 and 2003, an increase from the $250 rate we authorized for her for work performed in 2001. (*See* D.03-05-027.) The $275 rate has been approved for years 2002 and 2003 in a recent decision, D.03-06-010. Mailloux earned her law degree in 1993 and worked for the Privacy Rights Clearinghouse immediately thereafter. Mailloux joined Blumenfeld & Cohen in 1996, representing telephone companies in state commission proceedings. In 1999, she became assistant general counsel of regulatory affairs at NorthPoint Communications. Before joining TURN, she consulted with a telecommunications equipment manufacturer on state and federal regulatory issues, intervening on its behalf in several Federal Communications Commission proceedings. TURN states that Mailloux's responsibility at TURN increased substantially in 2002 and she assumed responsibility for more substantial cases. She has served as lead attorney in cases such as the Commission's Telecommunications Bill of Rights proceeding, the pricing of high-frequency line elements and the proceeding that is the subject of this request, the rulemaking on predictive dialers. In view of her experience, TURN asserts that her hourly rate should be commensurate with that of a senior associate or junior partner at a firm. TURN submits an Of Counsel survey of attorney fees showing that a $275 rate is below the low-end rates for partners reported in the 2000/2001 period.

Robert Finkelstein is an experienced supervising attorney, and the $340 rate requested has previously been approved by this Commission for work in the year 2002. (*See* D.03-01-074.) Because of the small number of hours devoted to

supervising TURN's work in the rulemaking proceeding, TURN asserts that it is appropriate to apply the 2002 rate to his work on this matter in 2003. We agree.

UCAN requests an hourly rate of $175 for work that Givens performed in this proceeding. Givens has a previously approved hourly rate of $150 for her work in 1999. (*See* D.02-03-038.) UCAN requests an increase in Givens' hourly rate to reflect the combination of inflation and her increasing experience and influence on consumer issues since 1999. The Commission has previously recognized Givens as a "nationally known expert on privacy issues." (D.02-03-038, at 5.) In the intervening three years, she had remained active in the field of consumer privacy rights. She continues to seek to influence public debate, legislative policy and corporate practice through her advocacy work. Givens was a prime mover of the state legislation that gave rise to the abandoned call issues in this proceeding. UCAN notes that the Commission previously compared Givens' level of experience with that of consultants at JBS Energy, and it notes that the Commission has approved an hourly rate of $175 for a JBS Energy consultant for his work in 2001 and 2002. (*See* D.02-03-038, at 5.) We agree that the rate of $175 requested for Givens is reasonable.

We find that the rates requested by TURN and UCAN for its advocates are reasonable and reflect market rates for individuals of similar experience and qualifications.

5.3 Other Costs

TURN and UCAN claim $1,635.40 in administrative and other miscellaneous expenses associated with the work performed in connection with D.03-03-038. We have examined the documentation supporting these requests. While we disallow $308.37 in travel costs for the reasons stated above, we find that the remaining administrative and miscellaneous costs are reasonable.

6. Award

We award TURN and UCAN $31,479.53 for their substantial contributions to D.03-01-077. 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 TURN and UCAN filed this compensation request (the 75th day will be July 30, 2003) and continuing until full payment of the award is made.

The predictive dialer proceeding affected a broad array of utilities and others in the telemarketing field. As such, we find it appropriate to authorize payment of the compensation award from the intervenor compensation program fund, as described in D.00-01-020. The parties have asked that any award of compensation be paid directly to TURN in order to avoid administrative glitches in making a joint award. UCAN and TURN have agreed that TURN will forward to UCAN its share of the award. We will follow that procedure.

7. 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.

8. Assignment of Proceeding

Geoffrey F. Brown was the Assigned Commissioner and Glen Walker was the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. TURN and UCAN timely requested compensation for contributions to D.03-03-038, as set forth herein.

2. TURN and UCAN request hourly rates for their attorneys and advocates that have either been approved earlier by the Commission or that now are found

to be reasonable based on a comparison to market rates for individuals of similar experience and qualifications.

3. Travel costs totaling $961.49 claimed by TURN are disallowed for lack of supporting information.

Conclusions of Law

1. TURN and UCAN have fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation.

2. TURN and UCAN should be awarded $31,479.53 in compensation for substantial contributions to D.03-03-038.

3. This order should be effective today so that TURN and UCAN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) and the Utility Consumers' Action Network (UCAN) are awarded $31,479.53 as set forth herein for substantial contributions to Decision (D.) 03-03-038.

2. The award should be made payable to TURN which will forward UCAN's share of the award to UCAN from the intervenor compensation program fund, as described in D.00-01-020. Interest shall be paid at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release, H.15, with interest beginning on July 30, 2003, and continuing until the full payment has been made.

3. This proceeding is closed.

This order is effective today.

Dated July 10, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

Compensation Decision Summary Information

Compensation Decision(s):	D0307014
Proceeding(s):	R0202020
Author:	ALJ Walker
Payer(s):	Commission

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network and Utility Consumers' Action Network	5/16/03	$32,441.02	$31,479.53	Unsupported travel expenses.

Advocate Information

First Name	Last Name		Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Regina	Costa	Policy Expert	The Utility Reform Network	$200	2002	$200
Christine	Mailloux	Attorney	The Utility Reform Network	$275	2002	$275
Christine	Mailloux	Attorney	The Utility Reform Network	$275	2003	$275
Robert	Finkelstein	Attorney	The Utility Reform Network	$340	2003	$340
Beth	Givens	Policy Expect	Utility Consumers' Action Network	$175	2002	$175
Beth	Givens	Policy Expert	Utility Consumers' Action Network	$175	2003	$175