



Court of Appeal Sustains CPUC's Discretion to Fill Gaps in Statutory Scheme for Intervenor Compensation but Requires CPUC to Limit Compensation to Fees and Costs Relevant to Intervenor's Contribution

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The California Court of Appeal (1st Dist., Div. 4) issued an important decision on April 19, 2016, in *New Cingular Wireless PCS, LLC v. Public Utilities Commission*, addressing a determination by the California Public Utilities Commission (CPUC) to compensate a pair of intervenors for costs of their participation in a proceeding to consider a proposed merger between two telecommunications carriers, despite the fact that the merger proposal was abandoned and the proceeding terminated prior to a decision on the merits. In a carefully reasoned opinion by Justice Streeter, the Court of Appeal upheld the discretion of the California Public Utilities Commission (CPUC) to award intervenor compensation pursuant to Public Utilities Code §1801 *et seq.* in a proceeding that ends without a decision on the merits and, more broadly, to apply that statute by an incremental gap-filling process when called upon to do so in the course of implementing the overall statutory scheme. The court, however, rejected the CPUC's reasoning in determining the amounts of the awards to the two intervenors, vacating the awards and the CPUC's decision on rehearing, without prejudice to renewal of the intervenors' compensation requests and redetermination of the awards.

The *New Cingular* decision is worthy of attention by CPUC practitioners on two grounds – first, for its substantial deference to the CPUC's delegated authority to fill gaps in the terms of the intervenor compensation statute to achieve statutory goals, but also for its limitation of that deference by an insistence that the CPUC articulate the consistency of its compensation awards with the specific terms of the statute – particularly the statutory definition of substantial contribution. While the Court of Appeal has sustained the

general direction of the CPUC's intervenor compensation program, *New Cingular* also legitimizes objections to compensation awards that fail to provide a careful analysis of the relationship between an intervenor's contribution and the fees and costs for which compensation is sought.

The Court of Appeal decision provides a cogent analysis of the standard of judicial review applicable to CPUC decisions awarding intervenor compensation. While recognizing the strong presumption of validity and permissive abuse of discretion standard that the California Supreme Court has defined for the review of CPUC decisions in cases such as *Greyhound Lines, Inc. v. Public Utilities Com'n* (1968), 68 Cal.2d 406, 410-11, the *New Cingular* decision also notes precedent that Greyhound deference is not appropriate where the statute subject to interpretation is one that defines the very scope of the CPUC's jurisdiction (citing, *San Pablo Bay Pipeline Co., LLC v. Public Utilities Com'n* (2015), 243 Cal.App.4th 295, 310; *PG&E Corp. v. Public Util. Com'n* (2004), 118 Cal.App.4th 1174, 1194).

New Cingular applies a standard for judicial review that the California Supreme Court established in *Yamaha Corp. of America v. State Bd. of Equalization* (1998), 19 Cal.4th 1, by which the court applies independent judgment while giving deference to the agency's determination appropriate to the circumstances of the agency action. This situational deference standard was refined in *Ramirez v. Yosemite Water Co.* (1999), 20 Cal.4th 785, 799, by a recognition that the Legislature may delegate to an agency the task of interpreting key statutory terms, allowing it to fill up the details of a statutory scheme. Applying *Yamaha's* situational approach, *New Cingular* identifies factors including agency expertise and the longevity of the CPUC's interpretive position as cutting in favor of deference to the CPUC's interpretation and concludes, with reference to *Ramirez*, that the Legislature has expressly conferred power on the CPUC to fill up the details of the statutory intervenor compensation scheme.

However, in line with both *Yamaha* and *Ramirez*, the *New Cingular* court defers to the CPUC only to the extent that it accepts the validity of the CPUC's reasoning, and the court finds that reasoning to be deficient in determining the amounts awarded to the two intervenors, The Utility Reform Network (TURN) and the Center for Accessible Technology (CAT). The court notes that Section 1802(i) plainly limits the awardable compensation to fees and costs incurred in preparing or presenting specific contentions or recommendations, but criticizes the CPUC's rehearing decision for relying on a perceived conflict between Section 1801.3(c)'s directive that the CPUC administer the intervenor compensation program to promote wide participation in its regulatory proceedings and the definition of substantial contribution in Section 1802 (i). The court does not discern a genuine conflict between the two referenced provisions, but simply a gap in the statutory language, which limits the CPUC's discretion to operating within the boundaries of the gap to be filled. While not accepting *New Cingular's* contention that the only basis for compensation was for work done on minor matter such as obtaining extensions of time to file pleadings and so the award of compensation should have been far less, the court could not tell whether the CPUC considered the amounts awarded reasonably approximated the fees and costs incurred to provide the substantial contributions for which the intervenors were credited.

Accordingly, *New Cingular* concludes that the CPUC was correct to conclude that TURN and CAT were eligible for intervenor compensation and that the CPUC's award of compensation to these intervenors was consistent with the relevant statute despite the conclusion of the CPUC's proceeding without a decision on the merits. However, because the CPUC failed to apply a sufficient legal rationale for determining the amount of the awards, the court vacated the award decisions and the rehearing decision without prejudice to renewal of the requests for fees and costs and the CPUC's redetermination of the awards consistent with

the court's opinion.