

Decision 88-11-025 November 9, 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
AT&T COMMUNICATIONS OF CALIFORNIA, )  
INC., a corporation, for authority )  
to increase certain intrastate )  
rates and charges applicable to )  
telecommunications services )  
furnished within the State of )  
California (U 5002 C). )

**ORIGINAL**

Application 85-11-029  
(Filed November 18, 1985)

OPINION ON TURN'S SUPPLEMENTAL REQUEST FOR  
COMPENSATION - ON PHASE II ISSUES

I. Summary of Decision

Toward Utility Rate Normalization (TURN) requests compensation of \$34,541.83 plus interest from April 13, 1987, the 75th day following the filing of TURN's Phase I request for compensation on January 28, 1987. In this decision, we find that TURN made a substantial contribution to the record on the subjects of marketing and advertising, and we award compensation of \$33,956.83 plus interest for its work in Phases I and II of this proceeding. ✓

II. Background

TURN filed its request for a finding of eligibility for compensation in this proceeding on January 7, 1986, and by D.86-02-039 dated February 20, 1986, the Commission noted that TURN's request was timely and determined that TURN was eligible to claim compensation under Article 18.7 of our rules for its participation in this proceeding. Then in Phase I of this

application, the Commission by D.87-05-029 awarded TURN compensation in the amount of \$38,047.22 for its efforts in specific subject areas, while deferring to Phase II of this proceeding possible awards on the subjects of "Marketing" and "Advertising", pending the decision on rehearing granted by D.87-04-041.

For its efforts in Phase I and II of this proceeding on the subjects of marketing and advertising, TURN's supplemental request seeks \$34,541.83 plus interest for what it terms as substantial contribution to the Commission's adoption of test year marketing and advertising expenses.

Rule 76.56 of the Commission's Rules of Practice and Procedure governs requests for compensation as follows:

"Following issuance of a final order or decision by the Commission in the hearing or proceeding, a customer who has been found by the Commission...to be eligible for an award of compensation may file within 30 days a request for an award. The request shall include, at a minimum, a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding. . . ."

TURN, in its current request, correctly pointed out that for the marketing expense issue, the Phase II decision (D.88-06-036 issued June 17, 1988) is the final order and that decision resolved the issue(s) for which compensation is now sought. TURN's July 8, 1988 request was made well within the 30-day period following the issuance of D.88-06-036.

### III. TURN'S Claim

TURN asserts that it contributed substantially to the Commission's adoption of test year marketing and advertising expenses in both Phase I and Phase II of this proceeding. For its prior (January 28, 1987) filing for compensation, TURN pointed out

that the Commission held open the part of TURN's request which addressed marketing and advertising issues "pending the review of the marketing baseline in Phase II (D.87-05-029)." This deferral covered the entire area of marketing and advertising, therefore, TURN reaffirmed and renewed its claim for compensation in the areas of marketing and advertising policy at issue in Phase I as well as selection of the appropriate baseline year which was the basic Phase II issue.

A. Phase I Advertising/Marketing Issues

1. Synopsis

In D.86-11-079, the interim opinion covering Phase I of Application (A.) 85-11-029, the Commission awarded AT&T-C the amount of \$126,623,000 for test year advertising and marketing expenses. This amount was contrasted with AT&T-C's requested \$200,956,000, the Commission's Division of Ratepayer Advocates (DRA)<sup>1</sup> recommended \$89,623,000, and TURN's preferred recommendation of \$54,033,000. To arrive at this \$126.6 million award, it should be evident that we developed an independent range based on different components of the separate showings of all three active parties (D.86-11-079, mimeo. pp. 87-91).

2. TURN's Arguments

Despite the fact that its numerical recommendation was not accepted in D.86-11-079, TURN contended that it should be compensated for all the time it spent on the issues of marketing/advertising. In support of its request, TURN cited D.86-11-079's extensive discussion of its position on these issues (mimeo., pp. 83-87). It also cited the Commission's reliance on TURN's analysis in crafting an independent range, as reflected in the following language:

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<sup>1</sup> D.86-11-079 refers to PSD, the Commission's Public Staff Division, the predecessor of the DRA which was renamed DRA in 1987.

"In reviewing the alternatives to AT&T-C's \$200 million request, we also reject the dollar recommendations of [DRA] and TURN, but will use portions of their analyses in adopting a test year figure. . . ." (D.86-11-079, mimeo. pp. 87-89.)

TURN also cited D.86-11-079's description of the mechanics used to develop the Commission's independent range, noting that the base figure for marketing was adjusted for inflation in 1984 and 1985 by consumer price index (CPI) inflation, consistent with TURN's recommendation for use of CPI.

Finally, TURN opines that Footnote 17 of D.86-11-079 was dispositive of the issue of TURN's substantial contribution in this area; the footnote recognized TURN's contribution, as follows:

"At this point, it is appropriate to recognize the contribution of TURN's witness Therrien to this proceeding in injecting into the record valuable input in assessing the level of advertising and marketing expenses from year to year. We have specifically adopted the use of the CPI inflation factor for assessing marketing expenses, and media inflation for assessing advertising expenses in this decision, as noted in the discussion of our adopted range. We believe these are valuable tools for assessing the reasonableness of advertising and marketing budgets presented to this Commission. No other witness, not even AT&T-C's witnesses in this proceeding, brought to this proceeding the level of expertise exemplified by Therrien as a result of his 32 years in this industry." (D.86-11-079, mimeo. p. 91, n. 17.)

### 3. DRA's Response

DRA's Response echoed the importance of Mr. Therrien's contribution to the record, and underscored the differences in Therrien's recommendation and that of DRA in the advertising/marketing area.

4. AT&T-C's Response

AT&T-C urged that the Commission reduce TURN's request by 50% in the advertising/marketing area. AT&T-C believes that Therrien's testimony was derivative in nature, since he performed no independent investigation, but merely relied on DRA's conclusions that AT&T-C's requested expense levels were unjustified. In any event, AT&T-C noted that D.86-11-079 rejected a major premise of Therrien's recommendation when it explicitly refused to look to the so-called "1984 divested amount" as a starting point in gauging the reasonableness of AT&T-C's request. Finally, AT&T-C asserts that the only contribution for which TURN can legitimately take credit is the use of CPI to account for inflationary effects in the marketing budget (noting that the Commission did not actually use "media inflation" to arrive at its adopted figure for advertising). To AT&T-C, TURN's CPI recommendation is "obvious, simplistic and commonly known" (AT&T-C Response, p. 5) - in short, not the sort of significant contribution meriting 100% recognition of TURN's costs.

5. Discussion

It is abundantly clear that TURN's participation in the advertising/marketing area via Therrien's testimony provided the crucial showing enabling the Commission to develop its range to bridge the chasm between AT&T-C's request (\$200 million) and the next highest recommendation in the record (DRA's \$89.6 million). Therrien recommended that the Commission use the 1984 divested amount of \$38 million, and increase that amount by media inflation (for the advertising component) and CPI (for the marketing component) in ensuing years. This resulted in a primary recommendation of \$54 million, although Therrien also prepared alternate figures ranging from \$58.7 million to \$79.5 million (D.86-11-079, mimeo. p. 85).

While D.86-11-079 rejected both Therrien's "1984 divested amount" starting point and his specific dollar recommendations, it used his analysis of the nature of AT&T-C's request as validation of DRA's similar concerns. Although AT&T-C correctly notes that Therrien conducted no independent analysis, we think the more significant consideration is that Therrien's testimony provided an industry expert's reasoned analysis for legitimately rejecting AT&T-C's dollar request. DRA's efforts in this area, while valiant, were of necessity based on a regulatory policy approach, relying heavily on prior Commission advertising expense precedents, which were vigorously challenged by AT&T-C as outmoded in the newly competitive interLATA market. DRA's approach was predictable, given the fact that it generally lacks the in-house capability to present experienced subject matter experts in the specialized area of advertising/marketing. However, we do not intend to disparage DRA's considerable effort in this proceeding, as we undertake the necessary process of examining TURN's efforts in order to reach a judgment on the substantial contribution issue. Indeed, we recognize DRA's broader mandate to cover a wide range of general rate case issues. In contrast, intervenors are always free to choose their issues, and structure their participation accordingly.

In this instance, TURN had the foresight to recognize that AT&T-C would make a strong showing on the advertising/marketing issue, and that a subject matter expert would be required to meet AT&T-C's witnesses on equal footing and refute that showing. TURN also opted to choose an expert with extensive practical experience in the advertising industry, rather than someone more removed from such day-to-day practicalities. Indeed, TURN's chosen expert proved to be an invaluable asset to the record, with a capability of drawing on 32 years of practical industry experience and articulating a cogent and compelling position. In the final analysis, Therrien's testimony served to add sufficient legitimacy to DRA's overall concerns, in the face of

a tremendous challenge by AT&T-C, to justify adoption of a dollar range significantly lower than AT&T-C's \$200 million request. This constituted a substantial contribution to D.86-11-079.

While it is clear that DRA and TURN were both actively involved in the advertising/marketing issue, it is equally clear that D.86-11-079 adopted a figure derived conceptually from both parties' analyses. The decision used portions of DRA's analysis as the starting point of the adopted range, and, in effect, escalated the marketing budget via CPI, borrowing from TURN's analysis. The result was an amalgam of diverse elements culled from the entire evidentiary record.

In addition, Therrien's suggested use of media inflation and CPI to escalate advertising and marketing budgets, in the absence of independent justification for increased allowance in these expense categories, was specifically endorsed in D.86-11-079. This is clearly an independent contribution to the record of this proceeding.

Given that reality, and our assessment of the importance of Therrien's overall contribution and the crucial weight given to his testimony, we do not find TURN's efforts duplicative of DRA's work, and we find no need to reduce TURN's award for its contribution to D.86-11-079 accordingly.

Finally, the fact that Therrien's testimony was "derivative" of DRA's concerns, and not premised on an independent analysis of AT&T-C's operations, does not justify a reduction of TURN's award, given our assessment of the importance of that testimony to the ultimate outcome, as previously discussed.

In short, we will award TURN compensation for 100% of its time on the advertising/marketing issue. However, we will adjust the hourly rate for TURN's counsel for work in Phase I downward from \$150 to \$135 per hour consistent with our prior determination (D.87-05-029, mimeo. pp. 18-21).

B. Phase II Marketing Issues

1. Synopsis

D.86-11-079 had previously established AT&T-C's advertising allowance for its total California operations at \$22,393,000 (50% of AT&T-C's request). This rested the issue of advertising expenses in A.85-11-029. Thereafter, the remaining issue for Phase II was the question of whether 1984 or 1985 was a better base period for the determination of reasonable marketing expenses for AT&T-C in Test Year 1986.

AT&T-C's position remained that the 1985 recorded and unadjusted amount allocated to California of \$138.9 million should be increased for inflation to \$143.9 million and adopted as its marketing allowance for the test year. Conversely, DRA and TURN presented evidence to buttress the 1984 base of \$96.5 million with increases for inflation to maintain what they termed as "a more than adequate marketing allowance of \$104,230,000 [\$44.7 million on an intrastate basis] for 1986."

In D.88-06-036 we agreed with AT&T-C, that 1984 was a start-up year, but we also agreed with DRA and TURN that the 1985 recorded expenses were unrepresentatively high. Therefore, we made an equitable choice to average the 1984 base with the 1985 base, adjusted for carrier selection, to reach our adopted \$51.1 million marketing allowance for AT&T-C's California intrastate operations. (This amount approximates \$119.2 million for AT&T-C's total California operations.) (D.88-06-036, mimeo. pp. 117-120.)

2. TURN's Arguments

TURN argues that it made a substantial contribution to the Phase II record and its claim was timely filed after the Commission rendered its "final" decision on the issue of Test Year 1986 marketing expenses (D.88-06-036). In Phase II, TURN argued in testimony and in its brief against AT&T-C's attempts to update the baseline for marketing expenses from 1984 to 1985. In Phase II, TURN again presented witness Joseph H. Therrien who presented



supplemental testimony supporting the use of 1984 as a base period rather than 1985. Therrien's testimony was received as Exhibit 247.

TURN contends that the Commission quoted extensively from Therrien's testimony in D.88-06-036 at pages 106 through 108, and relied on TURN's Phase I contribution as well as Exhibit 247 in reaching its position in Phase II.

TURN asserts that D.88-06-036 "summarizes the unsuccessful search in Phase [II] for a definitive post-Divestiture baseline for marketing expenses. In making the Solomonic decision to average 1984 and 1985, the Commission again recognizes TURN's continuing contribution:

"While we accept AT&T-C's characterization of 1984 as a start-up year, we also find merit in the contentions of DRA and TURN that equal access activities in 1985 rendered it as something of a peak for marketing expenditures (especially when noting the need for adopted 1986 values to serve for 1987 and 1988 as well)." (D.88-06-036, mimeo. p. 120.)

Because the Commission clearly has relied on the credibility of TURN's witness Therrien, and has adopted TURN's primary contention that 1985 provides no better a base for marketing expenditures than 1984, TURN has contributed substantially to D.88-06-036. The remainder of this Supplemental Request details TURN's requested compensation for this substantial contribution. (TURN Supplemental Request, pp. 6-7.)

### 3. AT&T-C's Response

AT&T-C contends that TURN's request overstates its contribution which AT&T-C suggests was "at best marginal." AT&T-C argues that: "TURN's principal contentions in marketing and advertising issues were rejected in Decisions 86-11-079 and 88-06-036. Moreover, TURN's request must be substantially reduced, because its presentation, especially in Phase [II], was materially duplicative of, and wholly derivative from, positions espoused by

the Division of Ratepayer Advocates (DRA). In addition, TURN's proposed increases in hourly rates for its counsel are unjustified, and its witness' bill for Phase [II] appears to include hours spent on irrelevant research." (AT&T-C Response, p. 2.)

Regarding its contention of irrelevant research, AT&T-C pointed to its cross of Therrien claiming that: "from the record of Mr. Therrien's Phase [II] appearance, it seems likely that his research was concentrated on advertising expense -- an element of AT&T's overall marketing budget that was specifically not at issue in Phase [II].

"Q. Mr. Therrien, you indicated that in comparing AT&T with other industries, IBM and the large industries that you mentioned, that all of these companies have a dominance in their industries.

"I am wondering if you made a comparison of the marketing budgets of AT&T with those of the other companies that you have mentioned and arrived at any conclusion regarding the dollars spent for marketing?

"A. The concise answer is no, I did not in marketing terms.

"I reviewed advertising expenditures. (Tr. 7101)

"Accordingly, AT&T-C recommends that TURN's request for Mr. Therrien's expense be reduced by 3 hours to exclude time apparently spent on irrelevant research." (AT&T-C Response, p. 11).

AT&T-C also recommended that the hourly rate for TURN's counsel, Jon F. Elliott, should be kept at \$135 per hour and the rate for TURN's newly assigned attorney, Mark Barmore, be set at \$90 per hour rather than the \$125 requested by TURN.

AT&T-C argues that:

"In its Phase [I] Request for Compensation, TURN sought to increase the adopted hourly rate for its attorney (Schwartz and Elliott) from \$125

to \$150 -- a 20% increase. AT&T recommended a more reasonable rate of \$135, which the Commission adopted in Decision 87-05-029. In its Supplemental Request, TURN inappropriately seeks to increase Mr. Elliott's hourly rate yet again, for Phase [II] work.

"AT&T does not deny that Mr. Elliott is an attorney with experience in California regulatory practice. However, the fact remains that the Commission reviewed Mr. Elliott's qualifications in Decision 87-05-029, in light of the same or similar precedents as TURN now recites, and reached a determination that Mr. Elliott's rate should be \$135 per hour. The only additional rationale provided by TURN for its proposed 11% rate increase is that Mr. Elliott is now one year more experienced. TURN does not provide any additional information in support of its proposal, such as general economic inflation or increases within attorney salaries. In addition, TURN's own showing demonstrates that Mr. Elliott's Phase [II] participation was limited to some transcript reading, a one-hour drafting of testimony with his client, and a few hours of preparation for Mr. Therrien's brief appearance as a witness. These routine activities do not support TURN's proposed rate increase. Accordingly, no adequate justification is presented that warrants raising Mr. Elliott's adopted hourly rate of \$135 per hour.

"With respect to its new junior attorney Barmore, TURN requests a \$125 hourly rate. AT&T recognizes that Mr. Barmore is an attorney with considerable potential. Yet, he is manifestly inexperienced in Commission matters, and his only role in this proceeding was the drafting and filing of TURN's Supplemental Request for Compensation -- a largely administrative/clerical function. TURN provides no Commission precedent in support of the proposed hourly rate for Mr. Barmore, and that rate appears to be excessive for an entry-level associate attorney. AT&T therefore proposes that Mr. Barmore's compensation in this proceeding be based on a rate of \$90 per hour." (AT&T-C Response, pp. 9-10.)

4. Discussion

It is again clear that TURN made a substantial contribution to the record in Phase II of this proceeding on the marketing issue. That contribution was, as TURN noted, discussed at some length in the discussion on marketing D.88-06-036. With a preference to utilize TURN's methodology and recommended 1984 base period, we were also persuaded by TURN's and DRA's contentions that equal access activities rendered 1985 as something of a peak year for marketing activities. Nonetheless, AT&T-C had incurred the higher recorded marketing expenses and even though we opined that they were unrepresentatively high in 1985, we did reach a compromise by raising the intrastate expenses for the test year by \$6.4 million over the amount adopted in D.86-11-079 using the 1984 base period. This modest increase in our allowance of marketing expenses is a far cry from adopting the 1985 recorded base level adjusted for inflation as had been so vigorously sought by AT&T-C.

There can be no doubt to anyone who has studied the record in this proceeding that Therrien was an extremely credible and knowledgeable witness both in Phase I and Phase II of this proceeding. In addition and expressly to the point, TURN, by providing Mr. Therrien as witness on marketing issues in both phases of this proceeding, filled a void which would otherwise have been left unfilled since DRA did not have expert witnesses available among its staff for assignment to this proceeding in the areas of marketing and advertising.

Therefore, we will award TURN full compensation for Mr. Therrien's efforts in Phase II, as we have done in Phase I of this proceeding.

On the subject of hourly rates for TURN's assigned counsel(s), while there would clearly be some merit to an upward review of Jon F. Elliott's hourly rate based on his increased expertise, we are persuaded by AT&T-C that the work of presenting a witness with Mr. Therrien's experience was not all that difficult,

and Mr. Elliott's other work in this proceeding did not likely require his fullest effort or total talents. We see no need or purpose served by increasing his hourly rate above \$135 for work in this proceeding.

Regarding the hourly rate for Mr. Barmore, we have concluded that AT&T-C's analysis and argument is fair and responsible. Therefore, for this proceeding wherein Mr. Barmore has become acquainted with regulatory work before this Commission, we will grant compensation reflecting an hourly rate of \$90 per hour as recommended by AT&T-C. In doing so, we will likely be seeing further and more difficult work from Mr. Barmore in the future and will revisit the propriety of the hourly rate for that work at that time.

Rule 76.60 sets the bounds for the calculation of compensation:

"The compensation awarded may not, in any case, exceed the market value of services paid by the Commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services."

We believe that the adjustments we have made herein for the work performed by TURN's attorneys fully comply with the spirit and intent of Rule 76.60.

#### IV. Recomputation of Reasonable Compensation

In accordance with the prior discussion, we will recompute TURN's supplemental compensation award in A.85-11-029 as follows:

TURN's Phase I supplemental request of \$29,115 will be granted in full, since it has already been computed using the \$135 per hour rate for its experienced attorneys, and we are allowing the full amount requested for the services of Mr. Therrien, TURN's expert witness on marketing and advertising matters, at the rate of \$150 per hour.

The Phase I request was computed as follows:

<u>Work Activity</u>	<u>Amount</u>
184 hours of Attorney Work @ \$135	\$24,840.00
28.5 hours of Expert Witness Work @ \$150	<u>4,275.00</u>
Subtotal for Phase I	\$29,115.00

For Phase II of A.85-11-029, we adjusted TURN's request of \$5,426.83 as follows:

<u>Work Activity</u>	<u>Amount</u>
Attorney Work:	
Jon Elliott 18 hours @ \$135	\$ 2,430.00
Mark Barmore 9 hours @ \$90	810.00
Expert Witness Work:	
10.5 hours @ \$150	1,575.00
Exhibit Reproduction and Mailing Expenses	<u>26.83</u>
Subtotal for Phase II	<u>\$ 4,841.83</u>
Total for Phases I & II	\$33,956.83

Conclusion

We conclude that TURN's "Supplemental Request for Compensation" on Phase II and held-over Phase I issues as modified and recomputed above is reasonable.

TURN is, therefore, entitled to supplementary compensation in A.85-11-029 in the amount of \$33,956.83.

This order will, consistent with various prior decisions, also provide for interest to accrue commencing on April 13, 1987, on the \$29,115.00 award for TURN's contribution to Phase I of A.85-11-029 and commencing September 21, 1988, on the \$4,841.83 award for its contribution to the record in Phase II of this matter, continuing until full payment of the award is made. These dates represent the 75th day after the filing of TURN's respective requests for compensation for Phase I and Phase II contributions.

TURN is placed on notice it may be subject to audit or review by the Commission Advisory and Compliance Division. Therefore, adequate accounting records and other necessary documentation must be maintained and retained by the organization in support of all claims for intervenor compensation. Such record-keeping systems should identify specific issues for which compensation is being requested, the actual time spent by each employee, the hourly rate paid, fees paid to consultants and any other costs for which compensation may be claimed.

Findings of Fact

1. TURN has requested compensation totaling \$34,541.83 plus interest for its participation in this proceeding.
2. TURN was found eligible for compensation in D.86-02-039.
3. TURN's participation stimulated the recognition of AT&T-C's excessive advertising and marketing expenses and provided the record with reasonable justification to adjust these expenses downward for ratemaking purposes.
4. An hourly rate of \$150 is reasonable for Mr. Therrien, an expert in the fields of advertising and marketing.

5. An hourly rate of \$135 for the TURN attorneys assigned to Phase I of A.85-11-029 is reasonable and is consistent with our prior determination in D.87-05-029.

6. An hourly rate of \$90 for Mr. Barmore, TURN's newly assigned attorney who performed the last 9 hours of TURN's work in Phase II of A.85-11-029, is adequate and reasonable for this initial effort as counsel for TURN, especially in view of his lack of prior regulatory experience.

7. The time claimed for TURN's participation on the marketing and advertising issues in A.85-11-029 is reasonable.

8. The other costs claimed in connection with TURN's participation in A.85-11-029 are reasonable.

Conclusions of Law

1. TURN made a significant and substantial contribution to the record in the areas of advertising and marketing in A.85-11-029 Phase I and Phase II.

2. AT&T-C should be ordered to pay TURN \$29,115.00 plus interest accrued on and after April 13, 1987, for its contribution to Phase I and \$4,841.83 plus any interest accrued on or after September 21, 1988, for TURN's contribution to Phase II of A.85-11-029.



ORDER

IT IS ORDERED that AT&T Communications of California, Inc. (AT&T-C) shall pay Toward Utility Rate Normalization (TURN) \$33,956.83 within 15 days from the effective date of this order. AT&T-C shall also pay TURN interest on \$29,115.00 of this amount, commencing on and after April 13, 1987, and on the remainder (\$4,841.83) commencing on or after September 21, 1988. This interest shall be computed at the average three-month commercial paper rate as published in the Federal Reserve Bulletin until full payment of the award is made.

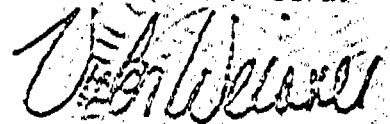
This order is effective today.

Dated NOV 9 1988, at San Francisco, California.

STANLEY W. HULETT  
President

DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.



Victor Weisser, Executive Director

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**ORIGINAL**

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II. Background

TURN filed its request for a finding of eligibility for compensation in this proceeding on January 7, 1986, and by D.86-02-039 dated February 20, 1986, the Commission noted that TURN's request was timely and determined that TURN was eligible to claim compensation under Article 18.7 of our rules for its participation in this proceeding. Then in Phase I of this