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Decision 98-05-014 May 7, 1998

**ORIGINAL**

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

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation for Authority to Increase and Restructure Certain Rates of Its Integrated Services Digital Network Services.

Application 95-12-043  
(Filed December 5, 1995)

Compaq Computer Corporation and Intel Corporation,

Complainants,

vs.

Pacific Bell (U 1001-C),

Defendant.

Case 96-02-002  
(Filed February 1, 1996)

**OPINION AWARDING COMPENSATION**

This decision grants, in part, the Request for Compensation of Dr. Dirk Hughes-Hartogs and Mr. Thomas McWilliams (Intervenors). Intervenors are awarded \$41,176 in compensation for their contributions to Decision (D.) 97-03-021.

**1. Background**

Intervenors seek compensation for their contributions to D. 97-03-021. In that decision, the Commission addressed the December 5, 1995 application by Pacific Bell (Pacific) seeking permanent status and increased rates for its Integrated Services Digital Network (ISDN) services. The decision also considered a complaint against Pacific filed by Compaq/Intel, alleging unreasonable rates, inadequate service, and unreasonable marketing practices. D.97-03-021 granted Pacific's rate increase in part, while imposing service standards designed to address the issues raised by Compaq and other intervenors.

D.97-03-021 was issued following two weeks of hearings in the consolidated proceedings. Prior to the hearings, several parties met to discuss settlement. However, the assigned Administrative Law Judge (ALJ) declined to postpone hearings pursuant to a proposed settlement between Pacific and four other parties because the settlement was protested by other complainants. Nine intervenors were active in the proceeding.

Our decision concluded that ISDN, a service most commonly used to increase the speed of data transmission between computers, has no comparable service and is not offered by competitors. Pacific was nonetheless found eligible for a moderate rate increase in order to recover costs and improve service, subject to alterations in rate design allowing for 200 free hours of off-peak usage to residential ISDN customers. As a result of service quality concerns expressed by intervenors, we directed that Pacific provide credits for missed installation appointments, discount installation charges for delayed installation beyond the initial period following service requests, and provide credits for repair delays.

Intervenors filed a Request for Compensation (Request) seeking \$80,469 in fees and expenses for their participation in Pacific's application.<sup>1</sup> Intervenors claimed to have represented sophisticated users of ISDN and the special interests of the hearing-impaired. Intervenors briefed the Commission on several issues, appeared as expert witnesses, provided technical expertise to other parties, and cross-examined witnesses on several technical issues.

## **2. Requirements for Awards of Compensation**

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to PU Code §§ 1801-1812. Section 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. The NOI must present information regarding the nature and extent of compensation and may request a finding of eligibility. Eligible intervenors are customers for whom participation presents a significant financial hardship.

Other code sections address requests for compensation filed after a Commission decision is issued. 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,

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<sup>1</sup> An Administrative Law Judge's (ALJ) ruling on October 31, 1997 required Intervenors to supplement their Request to provide further support for their claim of substantial contribution. The ruling also solicited additional financial information to enable the ALJ to make a financial hardship determination. In the supplement, Intervenors requested an additional \$1,080 to prepare the supplement, raising their initial \$79,349

*Footnote continued on next page*

"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 on 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 which 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 people with comparable training and experience who offer similar services, consistent with § 1806.

### **3. NOI to Claim Compensation and Financial Hardship**

Intervenors timely filed a NOI on March 22, 1996, and were found to be eligible for compensation in this proceeding by an ALJ's ruling on April 4, 1996. Intervenors also received a finding of significant financial hardship to cover their attorney fees, estimated at \$47,000. At the time, Intervenors indicated that they would not seek compensation for their personal participation. However, Intervenors later submitted a Request which included \$5,400 in compensation for Dr. Hughes Hartogs' personal participation as an expert witness. Intervenors now seek a finding of significant financial hardship for that purpose. For

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Request to a total of \$80,469. Intervenors appear to have made a \$40 error in addition when totaling their costs, which we correct.

individual intervenors that qualify as a "participant representing customers," § 1802 (g) defines "significant financial hardship" to mean:

"... that the customer cannot without undue hardship afford to pay the costs of effective participation, including advocate's fees, expert witness fees, and other reasonable costs of participation..."

Therefore, Intervenor is effectively asking the Commission to find that Dr. Hughes-Hartogs cannot without undue hardship afford the \$5,400 "cost" to participate.<sup>2</sup>

Intervenor submitted documentation of Dr. Hughes-Hartogs' financial condition to demonstrate financial hardship. The documentation, filed under seal and therefore not described in detail here, disclosed Dr. Hughes-Hartogs' annual income, after paying taxes and housing mortgage. It also disclosed other substantial annual expenses and basic living expenses incurred by Dr. Hughes-Hartogs' on behalf of himself and his dependents.

In D.86-05-007, we generally addressed what would constitute sufficient documentation of significant financial hardship. We have not had many occasions to apply that guidance to individual intervenors. In that decision, we concluded that participants seeking a finding of eligibility should provide detailed documentation along the lines of gross and net monthly income, monthly expenses, and cash and assets, including equity in real estate.

Although Hughes-Hartogs did not provide monthly information, he did provide annual information. Dr Hughes-Hartogs did not provide specific cash

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<sup>2</sup> We understand that Dr. Hughes-Hartogs is asking to be reimbursed for his personal participation and would not otherwise tender a bill for his services to Mr. McWilliams. Compensation for personal time is consistent with the Commission's policy of not requiring individuals to voluntarily participate in proceedings to develop regulatory issues, discussed in D. 84-08-034.

and assets information, but did provide us with enough information to understand his 1996 cash flow. Therefore, we find his documentation sufficient. From this documentation, we conclude that the \$5,400 cost would amount to a large portion of Dr. Hughes-Hartogs uncommitted annual compensation. We find, therefore, that Dr. Hughes-Hartogs cannot, without undue hardship, afford the \$5,400 cost to participate.

#### 4. Contributions to Resolution of Issues

Pursuant to § 1804(c), the Request must include a "description of the customer's substantial contribution." Intervenors poorly described the areas in which they substantially contributed to D. 97-03-021, and merely recite areas in the opinion in which their names were mentioned. Intervenors also indicated several areas where they made contributions to the participation of other parties. In most instances, we are inclined to deny outright requests that are so lacking in explanation. However, since this is Intervenors first foray into compensated participation in a Commission proceeding, we instead admonish Intervenors to provide better analysis in future compensation requests. Denying compensation would be an unfairly harsh result.

Intervenors allocate the compensation requested by issue as follows: roughly 60% on attacking Pacific's cost studies for ISDN, 25% on promoting ISDN for voice service, 10% on promoting flat-rate local ISDN rates, and 5% on preventing Pacific from removing ISDN features from their tariffs.<sup>3</sup> With this issue identification, we were able to get past Intervenors' incomplete contribution

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<sup>3</sup> Absent other information, we apply these same percentages to arrive at an hour for issue breakdown for Mr. Kashdan.

analysis to determine several areas where Intervenors made substantial contributions. First, Intervenors played a significant role in obtaining a reduction in Pacific's proposed rate increase. Intervenors devoted a majority of their hours to this issue and made an integral impact when they forced Pacific to admit that it had used old cost figures as the basis for its proposed increase. Several parties addressed different aspects of this issue, but we found substantial duplication and inefficient use of resources by all the parties. See, D. 97-12-012 (reducing intervenor Utility Consumers' Action Network's (UCAN) award by a third).

Second, Intervenors argued that the Commission should recognize ISDN as a basic service. The Commission did not declare ISDN a basic service, so Intervenors failed to make a substantial contribution on this issue.

Third, with respect to rate design Intervenors argued against Pacific's proposed 20-hour cap on free off-peak hours for ISDN. The Commission adopted Intervenors' factual contentions that Pacific could not demonstrate that off-peak use contributed to congestion and raised Pacific's ISDN costs. The Commission ordered a 200-hour cap on free off-peak use, reflecting Intervenors' contribution. Intervenors argued for flat-rate pricing for ISDN service. Intervenors devoted about 10% of their time to advocate their position, and several other parties took similar positions. We did not adopt flat-rate pricing, but Intervenors' policy arguments on this issue were valuable and influenced others of the rate design determinations of our decision. There was substantial duplication with the contributions of other parties on the issue of rate design.

On the last issue of participation, Intervenors argued against an attempt by Pacific to remove several features from its tariff sheet. Intervenors were the only party to address this issue and succeeded in convincing the Commission to adopt its proposal to require Pacific to keep several services on its tariff sheet.

Although not all of Intervenors' proposals were adopted by the Commission in the final decision, we find that Intervenors made a substantial contribution to D. 97-03-021 in some of the areas it identifies.

### 5. The Reasonableness of Requested Compensation

Intervenors request compensation, as supplemented, in the amount of \$80,429 as follows:

#### Attorney Fees

|                   |            |   |           |   |          |
|-------------------|------------|---|-----------|---|----------|
| Richard Kashdan   | 448.5 hrs. | X | \$160/hr. | = | \$71,760 |
| (Prepare Request) | 16.75 hrs. | X | \$160/hr. | = | \$ 2,680 |

#### Expert Witness Fees

|                     |         |   |           |   |          |
|---------------------|---------|---|-----------|---|----------|
| Dirk Hughes-Hartogs | 25 hrs. | X | \$225/hr. | = | \$ 5,400 |
|---------------------|---------|---|-----------|---|----------|

#### Other Reasonable Costs

|  |         |   |          |   |           |
|--|---------|---|----------|---|-----------|
| Law Student                              | 33 hrs. | X | \$10/hr. | = | \$ 330.00 |
| Postage                                  |         |   |          | = | \$ 23.00  |
| Copies                                   |         |   |          | = | \$ 265.66 |
| Messenger charges                        |         |   |          | = | \$ 10.40  |
| subtotal (rounded to the nearest dollar) |         |   |          | = | \$ 629.00 |

|              |  |  |  |   |                  |
|--------------|--|--|--|---|------------------|
| <b>TOTAL</b> |  |  |  | = | <b>\$ 80,469</b> |
|--------------|--|--|--|---|------------------|

#### 5.1. Hours Claimed

Intervenors documented their claimed hours by providing a daily breakdown of hours for Mr. Kashdan, a total hours figure for Dr. Hughes-Hartogs, and an approximation of all hours allocated to each issue. Intervenors include in this Request time spent on preparing and filing an Application for Rehearing (addressed in D.97-08-069) and time spent on protesting a compliance Advice Letter.



Intervenors failed to give a daily breakdown for the hours spent by Dr. Hughes-Hartogs, but instead request 25 hours out of a rough estimate of 100 hours for his time. Intervenors are normally required to provide detailed documentation. Under the circumstances, in which Intervenors did not expect to seek compensation for Dr. Hughes-Hartogs' time, and the obvious time spent by Dr. Hughes-Hartogs at the hearings as an expert witness and cross-examining witnesses, and the substantial self-imposed reduction in claimed hours, the 25 hours requested for Dr. Hughes-Hartogs' time is reasonable.

As a general matter we find the hours spent by Intervenors' attorney to have been excessive, when compared with the impact of this proceeding on the represented interest, and inefficient. Intervenors are claiming nearly 450 hours for the time spent by Mr. Kashdan for hearings that lasted only two weeks. To further illustrate this point, Mr. Kashdan spent roughly 40 hours preparing Intervenors' opening brief which is remarkable given the narrow issues Intervenors were supposed to address. The brief covers many issues of little consequence to the Commission's decision, and substantially overlaps the arguments presented by other parties. We also found many issues incompletely analyzed. In comparing Intervenors' Request with that of other parties, we note that UCAN played a considerably more important role in the proceeding. Although UCAN's attorney's participation was also found to have been excessive, Intervenors' attorney claimed a comparatively high number of hours to address much fewer issues. Such participation should not be awarded at claimed hours. We remind Intervenors that it is ratepayers that must ultimately foot the bill for their participation. Intervenors could have worked more efficiently, and should have avoided duplicating the efforts of other parties.

In § 1801(f), we are directed to award compensation "in a manner that avoids unproductive or unnecessary participation that duplicates the

participation of similar interests otherwise adequately represented." Pursuant to this section, we order reductions in the amount awarded Intervenors' attorney by issue.

The first issue we will address is the cost study. We note that there was considerable overlap between the arguments advanced by Compaq/Intel, UCAN, and Intervenors. The parties claimed to have coordinated their efforts to avoid duplication, but we find that they did not accomplish this feat. Intervenors could have worked much more efficiently as well. More troubling is that it appears Intervenors' attorney spent considerable time helping other parties. While cooperation is encouraged, we note that Compaq/Intel is not eligible to receive intervenor compensation. Time spent assisting entities excluded from eligibility for compensation is not compensable. (See, D. 91-12-045.) Any compensation for such efforts should come from Compaq/Intel, and not the general body of ratepayers. In addition, time spent assisting otherwise eligible parties may amount to a double recovery on the same issue. UCAN's request was reduced by a third for excessive hours and duplication, and we find that it is appropriate to reduce Intervenors' attorney hours spent on this issue by a third for the same reason, as described above.

The second issue is that of promoting ISDN as a telephone service of the future. Intervenors' efforts here constituted promoting ISDN as a basic service and informing the Commission of the benefits ISDN has for the hearing-impaired. In these areas there was substantially less duplication with other parties, but Mr. Kashdan's efforts again suffered from inefficiency. Intervenors simply spent too many hours advancing this issue. The Commission ultimately concluded that the case had not been made for declaring ISDN a basic service and so we did not adopt Intervenors' recommendations and contentions.

For that reason, Intervenors' attorney will not be compensated for participation on this issue.

The third issue Intervenors advocated for was flat-rate local calling as a counter to Pacific's proposed rate design. As above, Intervenors arguments differed only slightly from the arguments advanced by UCAN. Because of some duplication, we reduce the hours in this area by 10%.

The fourth and final issue on which Intervenors participated was to argue that Pacific should be prevented from removing certain services from its tariffs. Intervenors were the only party to address this issue, and the Commission adopted the recommendation in full. As such, we find the time devoted to this important issue to be reasonable and award full compensation for these hours.

Intervenors also seek compensation for the 8.75 hours Mr. Kashdan devoted to preparing the Application for Rehearing. The Commission issued D.97-08-069, denying rehearing, without modification of D.97-03-021. Intervenors contentions and recommendations were wholly rejected. Therefore, the request for compensation for the 8.75 hours spent on the Application for Rehearing is denied.

As a result of D.97-03-021, Pacific made a compliance filing, Advice Letter 18759. Intervenors protested the Advice Letter and largely prevailed. Intervenors request for compensation for the 3.75 hours spent on the advice letter is granted.

In summary, Mr. Kashdan spent 448.5 hours on issues resolved in D.97-03-021 and D.97-08-069. We are not allowing recovery of the 8.75 hours spent on D.97-08-069. Applying the submitted compensation by issue percentage breakdown to the remaining 439.75 hours, we arrive at Mr. Kashdan's requested hours by issue: 263.85 hours requested for the cost study issue, 109.94 hours for

promoting ISDN, 43.97 hours requested for the flat-rate proposal, and 21.99 hours requested for the tariff issue. Applying the percentage reductions described above to reach a reasonable amount of attorney hours claimed, we calculate 235.70 hours, a far more reasonable amount. While the total 260.7 hours is still considerably high for hearings that only lasted two weeks, we note that there were several attempts at settlement, major discovery disputes, and other procedural problems requiring more hours than might be expected.

### 5.2. Hourly Rates

Intervenors request that the Commission grant their attorney, Mr. Kashdan, \$160 an hour. Intervenors argue that these rates are fair given Mr. Kashdan's previous work experience in the computer and telephone industry. The nature of the technology involved in this proceeding was very complex and we note that while Mr. Kashdan is moderately experienced as an attorney, his combined legal and technological experience make \$160 an hour reasonable. Without his experience, Intervenors may have been required to hire another expert witness.

We find the rates charged by Mr. Kashdan to be reasonable, with the exception of the rates charged for preparation of the compensation request. Mr. Kashdan's rates for the preparation of the compensation request and for preparation of the supplemental request are excessive. In past decisions the Commission has ruled that preparation of compensation requests is merely an "administrative function" that does not warrant full hourly compensation. (See, D. 93-04-048, D. 93-10-023, and D. 96-11-040.) We note that Mr. Kashdan spent 6.75 hours preparing the supplement and 10 hours preparing Intervenors' Request. Thus, Intervenors will be compensated at only half the hourly rate for Mr. Kashdan for 16.75 hours. Thus, Intervenors' Request is reduced \$1,340.

The hourly rate requested for Dr. Hughes-Hartogs is \$220 an hour. His resume shows that he has 20 years experience in communications methods, signal processing, and more recently, ISDN development. He has appeared as an expert witness on patent and engineering issues, his area of expertise. In this proceeding, Dr. Hughes-Hartogs appeared as a witness on issues which applied his communications expertise and his practical experience as an ISDN residential customer. Much of his testimony was dependent upon his general engineering experience, but more than a few hours were also devoted to simply appearing as a witness to testify that his wife, who is hearing-impaired, would benefit from ISDN. Taking the important interests of ratepayers into account, we cannot award such high fees when a lower-priced expert will suffice. We note that Mr. Cratty appeared as an expert witness for UCAN at \$125 an hour and he has specific expertise in telecommunications and regulatory matters, as opposed to communications and technology patents. Hence, we find that the hourly rate requested by Dr. Hughes-Hartogs is excessive and instead award him at a more reasonable rate of \$120 an hour, slightly less than Mr. Cratty, but still a substantial amount for ratepayers to pay, and more consistent with the expertise he applied to this proceeding. This amount also recognizes the dual role he played as witness and in ably cross-examining other witnesses.

### 5.3. Other Costs

Intervenors claim \$629 in other costs. Intervenors itemized these costs by indicating the amount they spent in various areas. Given the large number of exhibits, the complexity of the hearings, and the extensive work required to coordinate work in these proceedings, all the costs appear reasonable with the exception of the hours paid to Mr. Buchanan. These hours were acknowledged to have been applied to assist Intervenors and "other parties." Assisting other parties, some of whom are not eligible for such ratepayer-funded

assistance, is not compensable. The award will reflect a reduction of the \$330 paid to Mr. Buchanan to \$165.

**6. Award**

We award Intervenors \$41,176, calculated as described above. 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 July 21, 1997 (the 75<sup>th</sup> day after Intervenors filed its compensation request) and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put Intervenors on notice that the Commission's Telecommunications Division may audit their records related to this award. Thus, Intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. Intervenors' records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

**Findings of Fact**

1. Intervenors made a timely request for compensation for their contributions to D. 97-03-021.
2. Intervenors demonstrated that participation without an award imposes a significant financial hardship.
3. Intervenors made a substantial contribution to D.97-03-021, but did not make a substantial contribution to D.97-08-069, the decision denying Intervenors' Application for Rehearing.
4. Intervenors' participation substantially duplicated the work of other parties in this case.

5. Intervenors have requested hourly rates for attorneys that are no greater than the market rates for individuals with comparable training and experience.

6. Intervenors have requested hourly rates for witnesses that are excessive for the individual given the type of work performed and level of expertise applied in the proceeding. The witness rate should therefore be reduced from a \$220 hourly rate to a reasonable hourly rate of \$120.

7. The costs claimed by Intervenors for paying a law student to perform work for Intervenors and other parties should be reduced since work for other parties is not compensable through this Request.

8. The other costs incurred by Intervenors are reasonable.

#### **Conclusions of Law**

1. Intervenors should be awarded \$41,176 for their contributions to D. 97-03-021.

2. Intervenors request for compensation of time associated with D.97-08-069 should be denied.

3. Intervenors' unnecessarily extensive use of attorney time, including work on behalf of other parties, and duplicative participation warrants reducing the award of attorney fees for 1) the cost study issue by one-third; 2) promoting ISDN by 100%; and 3) the flat rate issue by 10%.

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

### **O R D E R**

#### **IT IS ORDERED that:**

1. Dr. Hughes-Hartogs and Mr. Thomas McWilliams are awarded \$41,176 in compensation for their substantial contribution to Decision 97-03-021.

2. Pacific Bell shall pay Dr. Hughes-Hartogs and Thomas McWilliams \$41,176 within 30 days of the effective date of this order.

3. Pacific Bell shall also pay interest on this award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest, beginning July 21, 1997 and continuing until full payment is made.

This order is effective today.

Dated May 7, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners

Commissioner Jessie J. Knight, Jr., being necessarily absent, did not participate.