

Decision 99-12-001 December 2, 1999

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 Categorize Business Inside Wire Repair, Interexchange Carrier Directory Assistance, Operator Assistance Service and Inmate Call Control Service as Category III Services.

Application 98-02-017
(Filed February 9, 1998)

In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority to Categorize Residential Inside Wire Repair as a Category III Service.

Application 98-04-048
(Filed April 21, 1998)

O P I N I O N

I. Summary of Request and Award

The Utility Reform Network (TURN) is awarded \$37,533 in compensation for its substantial contribution to Decision (D.) 99-06-053 dated June 10, 1999. D.99-06-053 authorized Pacific Bell to re-categorize its Business Interexchange Carrier Directory Assistance (IECDA), certain Business Operator Assistance Service Billing Alternatives (OASBA), Business Inside Wire Repair (BIWR), and Residential Inside Wire Repair (RIWR) services from Category II to Category III.

II. Jurisdiction

TURN filed a \$63,538¹ intervenor compensation request on August 10, 1999 and an amendment to its compensation request on August 12, 1999, pursuant to Pub. Util. Code § 1801 *et. seq.* Pacific Bell filed a response to TURN's intervenor compensation request pursuant to Pub. Util. Code § 1804. In turn, TURN filed a reply to Pacific Bell's response, pursuant to Rule 76.75 of the Commission's Rules of Practice and Procedure.

The applicable code sections set forth the procedure for a party, such as TURN, to seek compensation for reasonable advocate's fees, expert witness fees, and other costs associated with intervention in any proceeding of the Commission. Pub. Util. Code § 1804(e) requires the Commission to issue an order that determines whether the party filing a compensation request has made a substantial contribution to the final order. This order is due within 75 days after the filing of a request for compensation or within 50 days after the filing of an audit report, whichever occurs later.

An audit report on TURN's compensation is not being required in this instance. Therefore, a final order on TURN's compensation request should be issued no later than October 26, 1999, 75 days after the filing of TURN's amendment to its compensation request. To the extent that a decision on TURN's compensation request is not issued by October 26, 1999, consistent with prior decisions, interest should be paid on the award amount (calculated at the three-month commercial paper rate) commencing October 26, 1999 and continuing until the award is paid in full.

¹ Rounded up to the nearest dollar from \$63,537.59.

III. Criteria for Grant of an Award

Pub. Util. Code § 1803 requires a party seeking compensation to comply with Pub. Util. Code § 1804 and satisfy both of the following criteria before it can be awarded any compensation:

- a. The party makes a substantial contribution to the adoption, in whole or in part, of the Commission's orders or decision.
- b. Participation without an award of fees or costs imposes a significant financial hardship.

On June 5, 1998, the assigned Administrative Law Judge (ALJ) issued a ruling in response to TURN's notice of intent to claim compensation. The ALJ ruled TURN is eligible to claim compensation and that a presumption of significant financial hardship did exist for TURN in this proceeding. Our decision affirms the assigned ALJ's ruling that TURN is eligible to claim compensation and that its participation in this proceeding notes a presumption of significant financial hardship. This leaves the substantial contribution criterion to be addressed prior to addressing any award of compensation to TURN.

IV. Substantial Contribution

Pub. Util. Code § 1804(e) requires that the Commission determine whether the customer has made a substantial contribution and what amount of compensation should be paid. Substantial contribution, as set forth in Pub. Util. Code § 1802(h), means that the customer's presentation 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.

In this proceeding, TURN argued for notification to customers about Pacific Bell's plan to increase its maximum prices in conjunction with the reclassification of Category II services to Category III. TURN's advocacy on customer notification contributed to the Commission's requirement that Pacific Bell inform its customers of the proposed increase in maximum prices through an additional notice. (Scoping Memo and Ruling of Assigned Commissioner Including Customer Notification Requirement, dated April 21, 1998.)

TURN's market power evidence and arguments were helpful in issuing a decision on the inside wire issues. For example, we agreed with TURN that the reported decreases in the number of repair visits per access line did not conclusively demonstrate a loss of market share. (D.99-06-053, mimeo., pp. 59-60.)

TURN also argued that Pacific Bell should not be permitted to increase its maximum prices for OASBA services with any re-categorization of OASBA services from Category II to Category III. D.99-06-053 (mimeo., p. 28) acknowledged that cost data supported TURN's contention that Pacific Bell's authorized OASBA ceiling rates were already substantially above its incremental costs except for Person-to-Person service. We also adopted TURN's proposal to keep Pacific Bell's ceiling rates for OASBA services, except for Person-to-Person service, at their currently authorized rates.

Further, TURN argued that customers remain confused about the options available for inside wire repairs, and that certain disclosure requirements should be adopted if inside wire repairs are to be reclassified from Category II to

Category III. Although we did not adopt TURN's specific customer notice recommendation, we concurred with TURN's basic argument that customers could benefit from additional information about their inside wire repair options. Instead, we ordered Pacific Bell to modify its Yellow Pages to direct customers seeking inside wire repair services to the appropriate service categories.

(D.99-06-053, Ordering Paragraph 9, mimeo., at p. 76.)

Although Pacific Bell disputed the extent of TURN's contribution to the decision in this proceeding, it acknowledged that TURN did contribute to the decision in regards to customer notification, OASBA ceiling rates, and marketshare regarding a decline in the number of inside wire repair visits and limitations of Pacific Bell's market studies.

There is no doubt that TURN's active participation in this proceeding assisted the Commission in issuing its decision on Pacific Bell's request to re-categorize its IECDA, OASBA, BIWR, and RIWR services from Category II to Category III. Thus, TURN has satisfied the substantial contribution requirement. This leaves the issue of how much TURN should be compensated for its significant contribution to this proceeding.

V. Requested Award

TURN has requested \$63,538 in compensation for the time its attorneys and consultant spent on this proceeding and for the recovery of associated costs. However, Pacific Bell has recommended that TURN be awarded compensation of no more than \$12,266 for its significant contribution in this proceeding. The following tabulation compares TURN's requested and Pacific Bell's recommended compensation award by activity.

<u>Activity</u>	<u>TURN</u>	<u>Pacific Bell</u>
Attorney Fees	\$25,230	\$ 5,870
Consultant Fees	34,443	2,531
Other Associated Costs	<u>3,865</u>	<u>3,865</u>
Total	<u>\$63,538</u>	<u>\$12,266</u>

A. Attorneys Fees

TURN requests compensation for its attorneys Thomas Long and Paul Stein for their participation in this proceeding as follows.

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Long	34.50	@ \$260	\$8,970
Less 20% ²			1,794
Stein	126.50	@ 170	21,505
Less 20%			4,301
Stein ³	10	@ 85	<u>850</u>
			<u>\$25,230</u>

² TURN further reduced its total attorney hours spent on this proceeding by 20% to reflect the fact that it did not prevail with regard to its primary BIWR and RIWR market power contentions and recommendations.

³ Time spent preparing TURN's compensation request.

TURN maintained a detailed summary of time spent by its attorneys with hours broken down by date, attorney, activity, and description of work. A copy of this summary was attached to its request for an award of compensation.

TURN's time records for its attorneys were further coded by activity or by issue where possible. For example, the code C pertained to time spent on compensation-related matters, W for writing and analysis, and H for hearing time. A portion of TURN's hours were allocated to code B, base, for work that was fundamental to active participation in this case such as time spent to review orders, rulings, initial discovery responses, and filings of other parties.

To facilitate a detailed review of its fee request, TURN provided an estimated amount of time spent by each attorney and consultant on each of the major issues. These major issues consisted of BIWR market power, RIWR market power, OASBA market power, below – versus above-the-line accounting, ancillary issues and compensation request.

<u>Issue</u>	<u>Attorney Hours</u>		<u>Consultant Hours</u>	
	<u>Long</u>	<u>Stein</u>	<u>Terkeurst</u>	<u>Starkey</u>
BIWR/Market Power	13.80	44.27	36.14	7.85
RIWR/Market Power	10.35	44.27	36.14	31.40
OASBA/Market Power		12.65	15.49	
Below-the-Line	3.45	6.33	5.16	
Ancillary Issues	6.90	18.98	10.32	
Compensation Request		10.00		
Subtotal	34.50	136.50	103.25	39.25
Less 20% Deduction	6.90	27.30		
TOTAL HOURS	<u>27.60</u>	<u>109.20</u>	<u>103.25</u>	<u>39.25</u>

Pacific Bell argued that the grant of a compensation award to TURN reflecting a mere 20% reduction in total attorney hours, acquiesced by TURN, is not reasonable. This is because, as acknowledged by TURN, TURN did not prevail in its primary BIWR and RIWR market power contentions. Pacific Bell argues further that Pub. Util. Code § 1802(h) limits the Commission to compensating TURN for its time and costs for only those contentions or recommendations that were adopted in whole or in part by the Commission. Given that TURN made a substantial contribution to other issues, such as customer notification, Pacific Bell recommended that TURN should be granted no more than 20% of Long's hours, 15% of Stein's hours, and 10% of Terkeurst's hours.

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was "productive," as that term is used in Pub. Util. Code § 1801.3, where the Legislature gave the Commission guidance on program administration. (See D.98-04-059, mimeo., at 31-33, and Finding of Fact 42). In that decision we discuss the fact that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

There is no dispute that TURN did not prevail in the BIWR and RIWR major market power issues, which TURN spent approximately 72% of its total time on. TURN attempted to justify its substantial contribution for the time it spent on these inside wire issues by asserting that the ALJ's proposed decision strongly supported TURN's BIWR and RIWR positions. For example, the ALJ

agreed with TURN that Pacific Bell had failed to justify recategorization of BIWR and RIWR service.

Irrespective of the ALJ's adoption of TURN's position on these issues, the Commission did not adopt the ALJ's recommended position. An award of compensation for time spent on issues not adopted in a decision cannot be made, pursuant to Pub. Util. Code § 1802(h). However, TURN did substantially contribute to the BIWR and RIWR ancillary market power issues that enabled us to base a decision on a well-developed record. These issues included recognition that Pacific Bell's market studies of the BIWR market had limitations and that the number of repair visits per residential access lines had declined. Hence, TURN should be entitled to some compensation related to the inside wire issues.

TURN's proposed 20% reduction in total attorney hours is not reasonable. Although TURN spent a majority of its time and effort on the inside wire issues, it prevailed only on ancillary inside wire issues. The proposed reduction would also penalize TURN for the time it spent and prevailed on other issues. Pacific Bell's recommended allowance of time for TURN's attorneys and consultants is also not reasonable. This is because the recommended allowance provides TURN compensation for its substantial contribution to only the category of ancillary issues.

A more reasonable approach to determine the extent of TURN's compensation award is to base the compensation award on TURN's significant contribution to the individual issues identified in the above tabulation. Based on a careful review of work performed by TURN's attorneys on various aspects of the BIWR and RIWR issues in this proceeding and informed judgment, we conclude that TURN should be compensated for 40% of its hours spent on the

BIWR and RIWR issues. TURN should be compensated for 9.66 hours of Long's time and 35.42 hours of Stein's time spent on BIWR and RIWR issues.

Although not addressed in its compensation request, TURN's position on below-the-line accounting was discussed at length on page 25 and 26 to D.99-06-053. TURN's below-the-line position substantially contributed to D.99-06-053. Also, as addressed in the prior substantial contribution discussion, the time TURN spent on the OASBA/Market Power and ancillary (customer notification) issues substantially contributed to D.99-06-053. Hence, TURN should be fully compensated for the hours that its attorneys spent on the OASBA/Market Power, Below-the-Line and ancillary issues.

Pub. Util. Code § 1806 requires the computation of compensation to take into consideration the market rates paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the comparable market rate for 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 set Long's and Stein's hourly rate for work at the same level approved for them in a prior Commission proceeding for work performed in 1998 and 1999. Specifically, the \$260 hourly rate requested for Long and \$170 hourly rate requested for Stein were approved for their work with TURN during the same time period pursuant to D.99-07-045.⁴ Consistent with our direction in D.98-04-059, TURN reduced Stein's hourly rate by half for the time he spent to prepare its compensation request.

⁴ RE Application of Pacific Bell Communications for a Certificate of Public Convenience and Necessity to provide interLATA, intraLATA and Local Exchange Telecommunications Services within the State of California, Application 96-03-007.

TURN did not seek an increase in these hourly rates, as there is no reason to address further the reasonableness of Long and Stein's requested hourly rates. We deem the requested hourly rates reasonable for purposes of this request.

TURN should be compensated \$18,545 in attorney fees for its work, rounded to the nearest quarter hour, as summarized in the following tabulation.

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Long	20.00	@ \$260	\$5,200
Stein	73.50	@ 170	12,495
	10.00	@ 85	<u>850</u>
Total			<u>\$18,545</u>

B. Consultant's Fees

TURN used the consulting services of Competitive Strategies Group, Ltd. (Competitive Strategies) for testimony on the OASBA, RIWR, and BIWR market power issues. Competitive Strategies assigned Charlotte F. Terkeurst and Michael Starkey to work with TURN. Although TURN has requested \$34,443 in compensation for its consultant's work on this proceeding, its detailed claimed hours and costs differ from the summary in its request. We will use TURN's detailed records to determine the total consultant's fees, as follows.

<u>Consultant</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Terkeurst	103.25	@ \$250	\$25,813
Starkey	39.25	@ 200	7,850
Expenses			<u>760</u>
Total			<u>\$34,423</u>

Terkeurst, a vice president of the consulting firm, testified on the OASBA, RIWR, and BIWR market power issues. Terkeurst also made ancillary policy recommendations regarding the need for better customer information and education about inside wire repair services, the accounting treatment of OASBA services, and lack of justification for increasing maximum prices in conjunction with moving Category II services to Category III.

Terkeurst has a Masters Degree in Electrical Engineering and a Bachelor's Degree in Mathematics. She was employed eleven years with this Commission, including six years as an ALJ with emphasis on telecommunications matters related to competitive entry and alternative regulation. Terkeurst also worked as a telecommunications specialist for the Missouri Public Service Commission and Illinois Commerce Commission. Terkeurst has been with Competitive Strategies for the past three years. Her clients include competitive local exchange companies, including AT&T, MCI, state regulatory agencies, and public interest groups.

Starkey, president of the consulting firm, assisted Terkeurst in analyzing the market power issues associated with RIWR and BIWR services. The bulk of Starkey's work concerned Pacific Bell's claims regarding the costs of providing RIWR.

Starkey holds a Bachelor's Degree in Economics from Southwest Missouri State University. He served as Director of Telecommunications for the Maryland Public Service Commission for one year prior to joining the consulting firm in 1996. Prior to joining that commission, Starkey worked as a senior telecommunications policy analyst for the Illinois Commerce Commission and as an analyst for the Missouri Public Service Commission's Telecommunications Division. While at the consulting firm, Starkey worked for a variety of competitive telecommunications carriers, including AT&T and MCI, and

provided testimony on local competition, universal service and cost of service issues before numerous state commissions.

TURN is requesting compensation at an hourly rate of \$250 and \$200, respectively, for Terkeurst and Starkey's work in this proceeding. These hourly rates are the same hourly rates that Competitive Strategies charges other clients for comparable work.

As noted earlier, Pub. Util. Code § 1806 requires the computation of compensation to take into consideration the market rates paid to persons of comparable training and experience who offer similar services. TURN asserted that the hourly rates being requested for its consultants are reasonable and market-based rates when compared with the market-based rate for experts of similar experience and expertise in the area of competitive policy and telecommunications regulation. However, TURN provided no comparison of experts' hourly rates, let alone any comparison, with experience similar to that provided by its consultants in this proceeding. Absent such a comparison, there is no basis to conclude that the requested hourly rates are reasonable.

The consultants did provide a substantial contribution to this proceeding and should be awarded a reasonable hourly rate for their contribution to this proceeding. Therefore, we turn to prior decisions for guidance on rates paid to consultants in similar situations.

An intervenor with similar experience to Terkeurst has been awarded compensation at \$200 per hour for his work in four recent proceedings. The intervenor awarded the \$200 hourly rate was James Weil, who has a Master's Degree and Doctoral Degree in Engineering from the University of California at Berkley and many years of experience in the utility industry. His experience included 14 years with the Commission staff, seven as a Commission ALJ. Weil's \$200 hourly rate was approved in D.99-06-002, D.98-12-037, D.98-11-049,

and D.98-10-007. Hence, given the similarities between Terkeurst's experience and that of Weil, we believe it is reasonable to award Terkeurst compensation at a \$200 hourly rate.

Given that Starkey's participation in this proceeding was limited to analytical work, a reasonable hourly rate for his participation in this proceeding should be lower than the hourly rate being granted for the work product of Terkeurst. Based on our comparison of market rates, Starkey should be granted a \$150 hourly rate for his analytical work in this proceeding.

Consistent with our prior attorney fee discussion, TURN shall be awarded compensation for its significant contribution by major issue. Because 40% of TURN's BIWR and RIWR activities significantly contributed to the decision, we will also award TURN compensation for 40% of its consultant's work on the BIWR and RIWR market power issues. TURN's significant contribution to the remaining issues was 100%. As such, TURN should be awarded compensation for all of its consultants' time spent on the OASBA, market power, below-the-line, and ancillary issues.

TURN also seeks recovery of \$760 in expenses incurred by Terkeurst for travel and meal expenses. Given that the consulting firm is located out-of-state and that it was necessary for Terkeurst to travel to California to testify in this proceeding, these other expenses are reasonable.

TURN should be reimbursed \$15,123 for consultant fees, rounded to the nearest dollar, as summarized in the following tabulation.

<u>Consultant</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Ms. Terkeurst	60.00	@ \$200	\$12,000
Mr. Starkey	18.75	@ 150	2,363
Expenses			<u>760</u>
Total			<u>\$15,123</u>

C. Other Associated Costs

TURN also seeks \$3,865 in compensation for other associated costs incurred as a result of its participation in this proceeding. The other associated costs were for telephone, photocopying, mailing, on-line legal research, fax, and messenger services. TURN maintained detailed records to track its other associated costs. Pacific Bell does not oppose TURN being awarded the full amount of its requested other associated costs. TURN's request for recovery of associated cost appears reasonable and is below its \$5,000 request for such costs in its initial compensation request.

TURN has adequately substantiated its other associated costs and should be compensated for the full \$3,865 of such costs.

D. Summary of Compensation Award

TURN has substantially assisted the Commission in this proceeding. Consistent with Pub. Util. Code § 1802(h), TURN is entitled to reimbursement of \$37,533, as follows:

<u>Activity</u>	<u>Amount</u>
Attorney Fees	\$ 18,545
Consultant Fees	15,123
Other Associated Costs	<u>3,865</u>
Total Compensation	<u>\$37,533</u>

VI. Comments on Draft Decision

The ALJ's draft decision in this matter was mailed to the parties of record in accordance with Pub. Util. Code 311(g) and Rule 77.1 of the Commission's Rules of Practice and Procedure. TURN filed timely comments to the draft decision. These comments were carefully reviewed and considered. However, the comments did not result in any changes to the draft decision.

Findings of Fact

1. TURN filed a timely intervenor compensation request for its contribution to D.99-06-053.

2. Pacific Bell filed a response to TURN's intervenor compensation request.

3. TURN has satisfied the significant financial hardship requirement.

4. Pacific Bell was required to inform customers of its proposed increase in maximum prices through an additional notice because of TURN's advocacy on customer notification.

5. D.99-06-053 adopted TURN's contention that Pacific Bell's authorized OASBA ceiling rates are already substantially above incremental costs, except for Person-to-Person service.

6. D.99-06-053 agreed with TURN's contention that additional disclosure requirements should be imposed as part of our approval of re-classifying inside wire repair service from Category II to Category III.

7. TURN has substantially contributed to D.99-06-053.

8. TURN maintained a detailed summary of time spent by its attorneys in this proceeding.

9. TURN reduced its attorney hours spent on this proceeding by twenty percent to reflect the fact that TURN did not prevail with regard to its primary contentions and recommendations.

10. The respective hourly rates for work performed by TURN attorneys Long and Stein are the same rates approved in a prior Commission proceeding for their work performed in 1998 and 1999.

11. TURN reduced Stein's hourly rate by half for the time he spent to prepare its compensation request.

12. The hourly rates being charged by TURN's consultants are the same hourly rates that Competitive Strategies charges other clients for work as consultant on similar matters.

13. Pub. Util. Code § 1806 requires the computation of compensation to take into consideration the market rates paid to persons of comparable training and experience who offer similar services.

14. An intervenor with similar experience to Terkeurst has been awarded compensation at \$200 per hour.

15. Starkey's participation in this proceeding was limited to analytical work, which justifies a rate slightly lower from that awarded to Terkeurst.

16. Other expenses incurred by TURN's consultants were necessary and reasonable.

17. The associated costs incurred by TURN for telephone, photocopying, mailing, on-line legal research, fax, and messenger services are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code § 1801 et. seq. which govern intervenor compensation.
2. A reasonable hourly rate for the consultant's work product in this proceeding is \$200 per hour for Terkeurst and \$150 per hour for Starkey.
3. TURN should be compensated for 40% of its activities on the BIWR and RIWR market power issues and 100% for its activities on the remaining issues.
4. An award of \$37,533 should be granted to TURN for its substantial contribution to D.99-06-053.
5. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$37,533 for its substantial contribution to Decision 99-06-053.
2. Pacific Bell shall pay TURN \$37,533 within 30 days of the effective date of this order. Pacific Bell shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in the Federal Reserve Statistical Release G.13, beginning October 26, 1999 and continuing until full payment is made.

A.98-02-017, A.98-04-048 ALJ/MFG /epg

3. Application (A.) 98-02-017 and A.98-04-048 are closed.

This order is effective today.

Dated December 2, 1999, at San Francisco, California.

RICHARD A. BILAS

President

HENRY M. DUQUE

JOSIAH L. NEEPER

JOEL Z. HYATT

CARL W. WOOD

Commissioners