

Decision 15-03-041 March 26, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Add Speech
Generating Devices to the Deaf and Disabled
Telecommunications Program.

Rulemaking 13-03-008
(Filed March 21, 2013)

**DECISION GRANTING COMPENSATION TO ASSISTIVE TECHNOLOGY
LAW CENTER FOR SUBSTANTIAL CONTRIBUTION
TO DECISION 13-12-054**

Claimant: Assistive Technology Law Center (ATLC)	For contribution to Decision (D.) D.13-12-054
Claimed: \$89,960.00	Awarded: \$87,048.00 (~3.24% reduction)
Assigned Commissioner: Sandoval	Assigned ALJ: Seaneen M. Wilson

PART I: PROCEDURAL ISSUES

A. Brief Description of Decision:	The CPUC was directed by Public Utilities Code § 2881 to establish a program for the distribution of speech generating devices by the DDTP. A Rulemaking proceeding was conducted to provide relevant information regarding the scope and structure and operating procedures of that program. The decision establishes 2 programs for the distribution of these devices and continues the Rulemaking proceeding to facilitate further development of their operational details.
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B. Claimant must satisfy intervenor compensation requirements set forth in Pub. Util. Code §§ 1801-1812:

	Claimant	CPUC Verified
Timely filing of notice of intent to claim compensation (NOI) (§ 1804(a)):		
1. Date of Prehearing Conference:	None	verified
2. Other Specified Date for NOI:		
3. Date NOI Filed:	May 29, 2013	May 30, 2013
4. Was the NOI timely filed?		Yes
Showing of customer or customer-related status (§ 1802(b)):		
5. Based on ALJ ruling issued in proceeding number:	R.13-03-008	verified
6. Date of ALJ ruling:	July 19, 2013	verified
7. Based on another CPUC determination	N/A	
8. Has the Claimant demonstrated customer or customer-related status?		Yes
Showing of “significant financial hardship” (§ 1802(g)):		
9. Based on ALJ ruling issued in proceeding	R.13-03-008	verified
10. Date of ALJ ruling:	July 19, 2013	verified
11. Based on another CPUC determination	N/A	
12. Has the Claimant demonstrated significant financial hardship?		Yes
Timely request for compensation (§ 1804(c)):		
13. Identify Final Decision:	D.13-12-054	verified
14. Date of Issuance of Final Order or Decision:	December 23, 2013	verified
15. File date of compensation request:	February 19, 2014	verified
16. Was the request for compensation timely?		Yes

PART II: SUBSTANTIAL CONTRIBUTION

A. Description of Claimant’s contribution to the final decision (see § 1802(i), § 1803(a) & D.98-04-059).

Intervenor’s Claimed Contribution(s)	Specific References to Intervenor’s Contributions	CPUC Discussion

<p>1. The ATLC provided information throughout the Rulemaking proceeding in writing, during each working group session, and through informal communication with CPUC staff. The content of its contributions were in response to the Order instituting the Rulemaking; specific requests by CPUC staff; in response to proposed rules drafted by the ALJ; and in response to the proposed CPUC decision.</p> <p>The purpose of the ATLC's participation and contributions were (and remain) to assist the Administrative Law Judge develop a set of rules to govern the DDTP's SGD distribution program.</p> <p>The topics addressed by the ATLC included:</p> <ul style="list-style-type: none"> a) qualifications for speech language pathologists who certify disability b) the role of the SLP in identification of SGD need and recommendation of a specific device c) the importance of incorporating SGD training as part of the distribution program to assure devices provided will be used effectively and efficiently d) the total estimated cost of the program in the Order instituting the rulemaking is a gross exaggeration of expected costs of SGD coverage by the DDTP 	<p>The Rulemaking proceeding was an information gathering and assessment process, leading to a set of proposed rules drafted by the ALJ and thereafter, a proposed (interim) final decision by the CPUC. The ATLC's written submissions to the Rulemaking were dated May 1, May 8, May 28, June 19, July 8, July 19, November 25 and December 2. The ATLC also participated in each of the Working Group meetings, by conference call.</p> <p>A significant portion of the ATLC's contribution to the Rulemaking related to operational procedures of an SGD distribution program. Although this was the focus of the Working Group and is essential to the DDTP's ability to administer an SGD distribution program, the CPUC decision delegated these issues to staff rather than to include in its decision. Those rules and procedures, however, do not yet exist and will be addressed further in the second phase of the rulemaking.</p> <p>The specific reference to a second phase of the rulemaking, at which the operational details related to SGD distribution by the DDTP will be developed, is found in the decision at 49 ¶ 7.</p> <p>The ATLC stated that only 1 SGD distribution program is necessary or appropriate, because all devices that are used as SGDs are functionally the same. Basically, the choice was between a program that requires SLP assessment and cost-sharing, or does not. The CPUC decision does not say it accepts this proposal, but as a practical matter, it did. The text of the decision states 2 SGD distribution programs were created, one for so-called STE and a second for so-called DME SGDs.</p>	<p>Yes.</p>
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<p>e) providing the definition of SGDs used by several funding programs and a proposed definition for use by the DDTP; reporting that the Medicare National Coverage Decision for SGDs does not supply the definition of SGDs that the Medicare program uses</p> <p>f) the role of “coding” in the coverage and funding process for SGDs</p> <p>g) the distribution models and procedures used by other funding programs that the DDTP will have to coordinate with regarding cost-sharing</p> <p>h) that all devices used as SGDs are functionally the same, thus, only 1 distribution program for these devices needs to be designed; and in particular, that off-the-shelf tablet computers are used in ‘brand-name’ SGDs that are funded throughout the country, including by Medi-Cal</p> <p>i) that the statute requires SLP evaluation and recommendation for all devices</p> <p>j) that cost-sharing (payor of last resort) is an obligation that will apply to all devices (based on their ability to be “dedicated” devices) or none at all (based on all devices’ ability to be presented for DDTP payment as “open” or “unlocked” devices)</p> <p>k) how the California sales tax on SGDs presently operates for devices funded by other funding programs</p>	<p>Also, the decision does not adopt the definition of SGDs proposed by the ATLC. Instead, it adopts one of the CPUC’s its own selection.</p> <p>The specific reference to the definition of DME SGD adopted by the CPUC is found in the decision at 34n.13, and A 5.</p> <p>However, the practical effect of the DME SGD definition adopted by the CPUC will be creation of a single SGD distribution program: for STE. That will be the result because no SGD currently in existence can meet the CPUC’s DME SGD definition. That definition excludes any device that is based on a computer and excludes any device that can performs functions other than speech generation. All devices currently used as SGDs – brand name as well as no-name tablets – are computers, and at present, all of the brand name SGDs use either off the shelf or custom designed tablet computers. Also, all devices currently used as SGDs can be configured either as “dedicated” devices or as “open” devices, able to run software other than speech generating programs. Thus, the CPUC decision created a category of DME SGDs that no devices can meet. Thus, the only SGD distribution program that will emerge from the CPUC’s decision will be the STE program.</p> <p>It is expected that this will be revisited in the second phase of the Rulemaking proceeding.</p> <p>In addition, the CPUC decision never addressed its legal authority to allow the distribution of any SGD without an evaluation and recommendation of an SLP. The ATLC stated repeatedly in the rulemaking that no exception was authorized, a conclusion also stated in the proposed ALJ rules. It is expected</p>	
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<p>i) how the DDTP can assist the cost-sharing process through its application and decision process</p> <p>j) providing a set of proposed regulations to govern DDTP SGD distribution;</p> <p>l) providing specific recommendations and comments to the ALJ’s proposed rules</p> <p>m) providing specific responses to the CPUC’s proposed decision</p> <p>n) working with other advocates to cause the CPUC to revise the proposed decision such that so-called “DME SGDs” will be included in the program</p> <p>o) serving as a liaison between the rulemaking proceeding and the SGD manufacturers and SLPs</p>	<p>this will be revisited in the second phase of the rulemaking.</p> <p>A third issue raised by all of the parties but not included in the CPUC decision is training. Because training is a service provided by the DDTP to persons with other disabilities who seek other equipment from the program, the omission of this service for people with speech disability creates an issue of discrimination solely on the basis of disability, and this too, will be raised again in the second phase of the Rulemaking.</p>	
<p>2. The ATLC worked throughout the Rulemaking proceeding, up to the date of the CPUC decision, with advocates who were providing information about the Rulemaking and the CPUCs’ draft final decision to Members of the state Legislature. The purpose of these communications was to keep Members informed of issues that were arising in the Rulemaking proceeding and proposed decision that might be resolved by clarification of the statutory text of § 2881.</p>	<p>The ATLC’s success in this activity is directly reflected in the CPUC decision. That decision was issued for comment as a draft and was then revised twice prior to the vote on December 19. The ATLC’s information served as a catalyst for the CPUC to make these revisions, in particular, the changes between the second draft decision and the final draft, which was adopted on December 19. The intermediate revision would have created only 1 operational program, for STE, and would have offered no access whatever to so-called DME SGDs. Instead, requests for those devices would have been “held” for an indefinite period. The final proposed decision deleted that “hold” provision.</p> <p>While the interim decision ultimately</p>	<p>No. See Part II.C, below.</p>

	<p>adopted has many flaws, it was a vast improvement over the draft that it replaced. It is expected the decision will be revised further, at the conclusion of the second phase of the rulemaking.</p>	
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B. Duplication of Effort (§§ 1801.3(f) & 1802.5):

	Claimant	CPUC Verified
<p>a. Was the Office of Ratepayer Advocates (ORA) a party to the proceeding?¹</p>	<p>Yes</p>	<p>Verified.</p>
<p>b. Were there other parties to the proceeding with positions similar to yours?</p>	<p>Yes</p>	<p>Verified.</p>
<p>c. If so, provide name of other parties: Jennifer Coggiola, Bob Segalman, Office of Ratepayer Advocates</p>	<p>Verified.</p>	

¹ The Division of Ratepayer Advocates was renamed the Office of Ratepayer Advocates effective September 26, 2013, pursuant to Senate Bill No. 96 (Budget Act of 2013: public resources), which was approved by the Governor on September 26, 2013.

<p>d. Describe how you coordinated with ORA and other parties to avoid duplication or how your participation supplemented, complemented, or contributed to that of another party:</p> <p>Duplication was not an issue in this Rulemaking proceeding. CPUC staff presented requests for information to specific parties. The ATLC was the sole source of almost all information presented about the structure and operational characteristics of other funding programs and the source of almost all information regarding the characteristics of SGDs produced by the legacy SGD manufacturers. The ATLC also was the sole source of information regarding the fact that so-called “tablet” based SGDs are covered and paid for by other funding programs.</p> <p>When the ATLC and other participants in the Working Group were asked to respond to a single topic, the ATLC communicated with the other party to develop a joint response. For example, when the ALJ and CPUC staff proposed that SGD manufacturers appear at a Working Group meeting to demonstrate their devices, Jennifer Coggiola and the ATLC coordinated recruitment of manufacturer representatives, identification of the devices to be demonstrated, and refinement of their presentation content.</p> <p>When questions were directed to the ATLC specifically, contact was made with Jennifer Coggiola, Larry Boles, and Bob Segalman on an ongoing basis to reach consensus regarding the information to be provided or statement to be made. The ATLC also reviewed and commented on Jennifer Coggiola’s presentations to the Working Group and comments regarding the ALJ’s proposed rules and CPUC decision.</p> <p>The ATLC did not communicate with ORA regarding any of its submissions to the Rulemaking proceeding. That our views may have overlapped regarding individual issues or recommendations, the conclusion of each was reached independently.</p> <p>There was no duplication between the ATLC and the Center for Accessible Technology. Our positions were most often in conflict. The only coordination that occurred between the two organizations was directed to a report that the Legislature was considering a proposal that would have amended § 2881 to delete the requirement an SGD distribution program be created. That report eventually was demonstrated to be false.</p> <p>Rather than duplication, the ATLC tried to serve as an information clearinghouse for Jennifer Coggiola, Bob Segalman and Larry Boles, and Phil Saines, who each participated in the Working Group; for the SGD manufacturers, who have a direct interest and a direct role in the rules to govern the DDTP SGD distribution program; for California based SLPs who will be referring clients to the program once it becomes operational; and for advocates who were informed of issues arising in the Rulemaking process that might be resolved either through statutory changes or litigation. For the individuals who participated in the Working Group, the discussions related to the statutory text; how other programs work; the</p>	<p>Verified.</p>
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<p>role of an SLP; how all devices that are used as SGDs are the same; and many of the other issues that arose during the Working Group meetings, and in the ALJ’s proposed rules and the CPUC’s proposed decision. The SGD manufacturers, SLPs and advocates relied on the ATLC as their eyes and ears in this Rulemaking. The ATLC, not the CPUC staff was the source of requests for information that can support rulemaking, and the ATLC was the source of information about the proceeding and the practical problems that are readily foreseeable based on the directions the discussion and proposed CPUC decisions were taking.</p>	
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C. CPUC Comments on Part II:

#	CPUC COMMENT
A	<p>Intervenor compensation is awarded when an eligible customer makes a substantial contribution in a Commission proceeding that assists the Commission in making an order or decision. <i>See</i> California Public Utilities Code §§ 1801, 1802(a), 1802(f), 1802(g), 1802(i). Compensation may be awarded for ATLC’s substantial contributions to the draft decision and subsequent revisions leading to D.13-12-054. Compensation is not awarded for work performed outside a Commission proceeding. This non-compensable work includes: (a) communicating with legislators to keep members informed of issues that might be resolved by clarification of, or amendment to, statute; and (b) informing Speech Language Pathologists (SLPs) and Speech Generating Device (SGD) manufacturers regarding how to proceed after January 1, 2014 (relative to ‘informing SLPs and SGD manufacturers’ see Program Structure description in Part IIIA.c below).</p>

PART III: REASONABLENESS OF REQUESTED COMPENSATION

A. General Claim of Reasonableness (§§ 1801 & 1806):

a. Intervenor’s claim of cost reasonableness	CPUC Verified
<p>The ATLC participated in a Rulemaking the purpose of which was to create a program for SGD distribution. The CPUC’s own estimate of the dollar value of this program to subscribers with severe speech impairment is \$ 12 <i>million</i> per year. As described in Part II, that ATLC aided the creation of this program, and prior to this Rulemaking, the ATLC aided the enactment of the statute that creates the authority for this program.</p> <p>Moreover, the ATLC was and will continue to be a unique resource for the DDTP and any other funding program that is interested in designing an SGD distribution program. Its experience in the design and operation of other SGD funding programs, including other telecommunications equipment distribution programs, has no parallel. It participated in the Rulemaking to be a resource, and more specifically, to see the culmination of more than a decade’s advocacy for SGD coverage by the DDTP.</p> <p>Throughout the Rulemaking, the ATLC provided information that responded to requests by the CPUC staff to learn about SGDs and how they are funded and distributed, and responded to the ALJ’s proposed rules and the CPUC’s draft decision. This information will be considered by the CPUC staff in the second phase of the rulemaking, the focus of which will be development of specific administrative or operational guidance related to the SGD distribution program(s). No other party contributed comparable information.</p> <p>The information supplied by the ATLC was necessary for the design of an effective and efficient SGD distribution program, and it was gathered, presented or submitted in the most efficient way possible. Other parties may have been able to gather the same information, but the search would have been extremely time consuming and difficult, if it could be accomplished at all.</p>	<p>Verified.</p>

<p>b. Reasonableness of Hours Claimed.</p> <p>The ATLC expended 268 hours in its participation in this Rulemaking proceeding. As with any human endeavor, perfect efficiency is not possible, and for this reason, it is common practice for a percentage reduction to be made to account for inefficiencies. The ATLC commonly reduces its total time expenditure by 15 %, which reduces to 227.8 the total time devoted to this Rulemaking for which compensation is sought.</p> <p>By comparison, it is noted that in the Notice of Intent to request Intervenor Compensation, the ATLC estimated that it would devote 200 hours to this matter. Approximately 10 percent more time was expended than had been anticipated.</p>	<p>Verified, <i>but see</i> CPUC Disallowances and Adjustments, below.</p>
<p>Only Lewis Golinker, Director of the ATLC seeks compensation for time expended in this proceeding. The tasks he performed are discussed in Part II of this application, in the documents filed in the record of this proceeding, and in the time records attached to this Claim form.</p> <p>The reasonableness of the hourly rate requested is stated in documents attached to this Claim.</p>	

<p>c. Allocation of Hours by Issue</p> <p>Three 3 issues have been identified for the purposes of this Claim: working group matters; program structure; and compensation. The time assigned to each is as follows:</p> <p>Working Group: 236.5 hours less 0.15 = 201.0 hours 88 % Program Structure: 24.7 hours less 0.15 = 21.0 hours 9 % Compensation: 6.8 hours less 0.15 = 5.8 hours 3 %</p> <p>Total hours expended 268.0 hours less 0.15 = 227.8 hours 100 %</p> <p>“Working group” matters included all activities related to participating in the Working Group’s tasks, i.e., aiding the development of rules for operation of the DDTP SGD distribution program. These tasks culminated in the adoption by the CPUC of its decision on December 19, 2013</p> <p>“Program structure” matters included two efforts: informing Members of the Legislature of issues that arose in the Rulemaking proceeding and in the proposed CPUC decision that might be clarified or eliminated through revision of the text of § 2881; and informing SLPs and SGD manufacturers regarding how to proceed after January 1, 2014 when the statute requires a program for SGD distribution to be operational.</p> <p>“Compensation” matters are limited to preparation of the Notice of Intent to Request Intervenor Compensation.</p>	<p>Verified, <i>but see</i> CPUC Disallowances and Adjustments, below.</p>
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B. Specific Claim:*

CLAIMED						CPUC AWARD		
ATTORNEY, EXPERT, AND ADVOCATE FEES								
Item	Year	Hours	Rate \$	Basis for Rate*	Total \$	Hours	Rate \$	Total \$
Golinker	2013	222.0	\$400	Rational attached	\$88,800.00	220.5	\$390	\$85,995.00
Subtotal: \$88,800.00						Subtotal: \$ 85,995.00		
INTERVENOR COMPENSATION CLAIM PREPARATION **								
Item	Year	Hours	Rate \$	Basis for Rate*	Total \$	Hours	Rate	Total \$
Golinker	2013	5.8	\$200	Rational attached	\$1,160.00	5.4	\$195	\$1,053.00
Subtotal: \$1,160.00						Subtotal: \$1,053.00		
TOTAL REQUEST: \$89,960.00						TOTAL AWARD: \$87,048.00		

**We remind all intervenors that Commission staff may audit their records related to the award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. Intervenor’s records should identify specific issues for which it seeks compensation, the actual time spent by each employee or consultant, the applicable hourly rates, fees paid to consultants and any other costs for which compensation was claimed. The records pertaining to an award of compensation shall be retained for at least three years from the date of the final decision making the award.

**Travel and Reasonable Claim preparation time typically compensated at ½ of preparer’s normal hourly rate

ATTORNEY INFORMATION			
Attorney	Date Admitted to CA BAR²	Member Number	Actions Affecting Eligibility (Yes/No?) If “Yes”, attach explanation
Lewis A. Golinker	New York: 1980 District of Columbia: 1980	NY: 1185730 DC: 322503	No; DC Bar status is currently inactive.

C. CPUC Disallowances and Adjustments:

Item	Reason
[1]	All hours claimed by ATLC are for work performed by its Director, and are charged at a very costly hourly rate. ATLC should consider whether its future work before this Commission can be leveraged and made more productive by ATLC’s Director also using less costly expert staff in a team approach to accomplish some tasks while achieving the same results. If so, this might increase the productivity and efficiency of ATLC’s participation here while lowering the total amount awarded in intervenor compensation ultimately paid by California ratepayers. We reach no conclusions now about the merits of ATLC’s future use of a potentially less costly teamwork approach. Nonetheless, we encourage ATLC to address the feasibility of this approach in its next intervenor compensation claim, and explain its reasoning to use or not use that approach.
[2]	We do not adopt the 15% discount for inefficiencies used by ATLC and base our calculations on 268 total hours worked. We reduce ATLC’s total Working Group hours by 14.6 hours for work identified to be clerical (e.g., administrative tasks, collating documents, scheduling meetings, filing and serving comments and other pleadings, sending e-mails and letters). This results in 221.9 hours (236.5 less 14.6). We similarly reduce ATLC’s total Compensation hours by 1.4 hours. This results in 5.4 hours (6.8 less 1.4). We do this because the Commission does not compensate for the work of highly paid intervenors when such work is clerical, as the costs associated with these tasks are built into the established rates. See D.14-07-025, D.13-04-008, D.13-11-017, and D.11-07-024 noting similar clerical disallowances. (Example from ATLC timesheet: on May 8, 2013 ATLC charges 2.4 hours and states its activity as “Finish and send letter to ALJ and other participants as follow up to first working group meeting.” We allow 2.3 hours for finishing the letter (substantive work) but disallow 0.1 hour (sending).)

² This information may be obtained through the State Bar of California’s website at <http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch> .

	We eliminate all hours charged to Program Structure. This is work outside a Commission proceeding that did not lead to a substantial contribution to a Commission decision.
[3]	ATLC requests its Director be awarded a 2013 hourly rate of \$400. We award a 2013 hourly rate of \$390 based on the following factors: Golinker has extensive relevant experience of more than 13 years. However, Golinker’s first appearance before Commission occurred in this proceeding, which necessitated a small reduction to Golinker’s rate.

PART IV: OPPOSITIONS AND COMMENTS

A. Opposition: Did any party oppose the Claim? No.

B. Comment Period: Was the 30-day comment period waived (see Rule 14.6(C)(6))? Yes.

FINDINGS OF FACT

1. Assistive Technology Law Center has made a substantial contribution to D.13-12-054.
2. The requested hourly rates for Assistive Technology Law Center’s representatives, as adjusted herein, are comparable to market rates paid to experts and advocates having comparable training and experience and offering similar services.
3. The claimed costs and expenses are reasonable and commensurate with the work performed.
4. The total of reasonable compensation is \$87,048.00.
5. This rulemaking is a quasi-legislative proceeding with no named respondents. The proceeding broadly impacts communications utilities as well as non-utility communications service providers.

CONCLUSIONS OF LAW

1. The Claim, with any adjustment set forth above, satisfies all requirements of Pub. Util. Code §§ 1801-1812.
2. The claim should be paid from the Intervenor Compensation Fund.
3. Comments on today’s decision should be waived and the decision should be made effective immediately.

ORDER

1. Assistive Technology Law Center is awarded \$87,048.00.
2. Within 30 days of the effective date of this decision, the Commission's Fiscal Office shall disburse the awarded compensation from the Commission's Intervenor Compensation Fund. Payment of the award shall include compound interest at the rate earned on prime, three-month non-financial commercial paper as reported in Federal Reserve Statistical Release H.15, beginning May 5, 2014, the 75th day after the filing of Assistive Technology Law Center's request and continuing until full payment is made.
3. The comment period for today's decision is waived.

This decision is effective today.

Dated March 26, 2015, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE M. RANDOLPH

Commissioners

APPENDIX**Compensation Decision Summary Information**

Compensation Decision:	D1503041	Modifies Decision?	No
Contribution Decision(s):	D1312054		
Proceeding(s):	R1303008		
Author:	ALJ Wilson		
Payer(s):	Intervenor Compensation Fund		

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
Assistive Technology Law Center (ATLC)	February 19, 2014	\$89,960.00	\$87,048.00	N/A	See Part III.C., above.

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Lewis	Golinker	Attorney	ATLC	\$400	2013	\$390.00

(END OF APPENDIX)