

Decision 87 10 078 OCT 28 1987

ORIGINAL

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). )

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

(For appearances see Decision 86-11-079.)

OPINION ON PUBLIC ADVOCATES' REQUEST FOR COMPENSATION

I. Summary

Public Advocates, Inc. (Public Advocates) has requested compensation in the amount of \$109,725.00<sup>1</sup> in connection with Decision (D.) 86-11-079, the Interim Opinion on AT&T-Communications' (AT&T-C) test year 1986 revenue requirement (the Interim Opinion). Based on the underlying record and pleadings, we find that Public Advocates made a substantial contribution and we award compensation in the amount of \$59,320.94.

II. Issues To Be Decided

Rule 76.58 requires us to determine whether Public Advocates made a "substantial contribution" to the Interim Opinion; in addition, we must describe that substantial contribution, and

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<sup>1</sup> Public Advocates subsequently increased this request to \$111,483.50, but we have considered only the amount originally requested, for reasons subsequently stated.

determine the amount of compensation to be paid. The term "substantial contribution" as defined in Article 18.7 requires us to make a judgment that:

"...the customer's presentation has substantially assisted the Commission in the making of its order or decision because the order or decision had adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer." (Rule 76.52(g).) (Emphasis added.)

We proceed to analyze Public Advocates' involvement in the record development of the two issues upon which its compensation request is based.

### III. Procedural Background

In this proceeding, Public Advocates represented the Minority Coalition, comprised of the Sacramento Urban League, the American G.I. Forum, the U.S. Black Chamber of Commerce, the League of United Latin American Citizens, and Chinese For Affirmative Action. On November 14, 1986, we found Public Advocates eligible for an award of compensation in this proceeding (D.86-11-079, mimeo. p. 171).

Public Advocates timely<sup>2</sup> filed its Request for Compensation (Request) on February 2, 1987, seeking an award of \$109,725.00, based on assertions that it had substantially contributed to our determination of Female/Minority Business Enterprise (F/MBE) and bilingual issues in the AT&T-C proceeding.

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<sup>2</sup> After consulting with the assigned ALJ, the parties entered into stipulations extending the filing deadlines otherwise applicable under Rule 76.56.

On February 10, 1987, Public Staff Division (PSD) filed a Response. On March 18, 1987 AT&T-C timely filed its Response to Public Advocates' Request.

Finally, on April 20, 1987, Public Advocates filed a Reply to AT&T-C's Response, as allowed by Rule 76.56.

#### IV. Public Advocates' Involvement in the F/MBE Issue

##### A. The Interim Opinion's Treatment of the Issue

Prior to issuing the Interim Opinion, we had never reviewed the adequacy of AT&T-C's F/MBE program. In this proceeding, we found that the time had come to clarify the applicability of standard ratemaking criteria for gauging F/MBE progress to AT&T-C, despite our previous unwillingness to extend these criteria to AT&T-C and the interexchange carriers immediately following divestiture. This determination was consistent with arguments advanced by PSD and Public Advocates in this proceeding.

Based on AT&T-C's showing and our analysis of the criticisms leveled at the program by PSD and Public Advocates, we concluded that there were "significant problems" with AT&T-C's current plan. We ordered AT&T-C to make changes in several areas.

First, in the reporting area, we required AT&T-C to modify its tracking procedures to create a separate category for Filipino-Americans. We felt this action was appropriate due to the large Filipino-American population in California, and the fact that other utilities and California government agencies separately identify this group (D.86-11-079, mimeo. p. 151).

We also discussed the fact that Minority/Women Business Procurement Legislation (AB 3678) had been signed into law by the Governor after submission of the record, and we analyzed the disposition of certain disputed issues in the light of the new legislation. For example, we mandated adoption of a 51% eligibility criteria for AT&T-C's program, based on consistency

with the provisions of AB 3678, and our finding that AT&T-C had failed to demonstrate that such a change would be cost-prohibitive.

We made the following findings of fact in connection with AB 3678:

"58. AB 3678, enacted into law subsequent to submission of this record, requires submission to this Commission by subject utilities of detailed and verifiable annual plans to include short- and long-term goals and timetables (but not quotas) in the F/MBE area.

"59. AT&T-C is a utility subject to the provisions of AB 3678.

"60. It will be necessary for this Commission establish an appropriate procedural vehicle to implement AB 3678, including those provisions relating to verification and goal-setting, for all utilities subject to its provisions. The parameters of AT&T-C's verification and goalsetting mechanism will be established in this upcoming proceeding."

We also indicated our inclination, based on this record, to mandate verification and a system of goals consistent with AT&T-C's \$100,000 F/MBE budget. We noted however that administratively it now seemed more sensible to wait for implementation of AB 3678, since we expected to take action to establish a forum for such implementation shortly. We emphasized that a verification mechanism and goals would be integral features of AT&T-C's F/MBE program, consistent with the developments associated with AB 3678 in 1987. Nonetheless, we declined specifically to hold back a portion of AT&T-C's rate request, as Public Advocates had requested, noting that verification and goal setting are now recognized state goals and we expect AT&T-C will comply with the new statute as a matter of course.

B. The Basis for Public Advocates' Claim

Public Advocates asserts that it has made a substantial impact on both California legislation and Commission decisions in

the F/MBE area. Public Advocates initiated the legislative inquiry which led to AB 3678, providing for Commission oversight and substantive requirements for utilities in the F/MBE area. Through extensive and unique research and the provision of expert witnesses at the legislative hearings, as well as professional assistance to the author of the bill and her staff, Public Advocates claims a crucial role in passage of AB 3678. Public Advocates also produced substantial evidence in this record, including the expert testimony of sixteen witnesses (some of this testimony was public witness testimony). The main thrust of Public Advocates' presentation was its urging that we place AT&T-C under the same scrutiny relative to FMBE contracts applicable to other major regulated utilities in this state.

Public Advocates also urged substantive improvements in AT&T-C's FMBE program, including the adoption of short- and long-term goals, independent verification, and 51% eligibility criteria. Public Advocates believes that, through official recognition of AB 3678, we formally accepted these recommendations. Furthermore, we adopted Public Advocates' suggestion that AT&T-C's tracking procedure be modified to include a separate category for Filipino-Americans.

C. AT&T-C's Response

AT&T-C argues Public Advocates' claim is greatly exaggerated, in that we rejected its primary recommendation for denial of 20% of the rate increase. In addition, AT&T-C asserts that Public Advocates made no substantial contribution on five of six issues covered in the Interim Opinion, prevailing only on the Filipino-American reporting issue. AT&T-C believes we adopted the 51% eligibility criteria based on PSD's arguments. It also argues that our Interim Opinion reflected no involvement by Public Advocates on the 51% criteria, and goals and verification, since we opted to proceed with statewide implementation of AB 3678, rather than to require remedial steps of AT&T-C alone.

While Public Advocates highlights its role in passage of AB 3678, AT&T-C views that involvement as irrelevant to a substantial contribution finding under the compensation rules. AT&T-C also argues that we would have rejected Public Advocates' position on goals, had we not deferred to AB 3678, since such rejection would have been consistent with our treatment of the issue in the PG&E general rate case, where we determined public agency and utility F/MBE statistics to be not directly comparable. (D.86-12-095, mimeo. pp. 132-133). Finally, AT&T-C believes that we resolved the issue of whether AT&T-C was subject to FMBE reporting requirements based on reliance on PSD's brief of the legal issue (which Public Advocates did not brief) and passage of AB 3678, since the issue was ultimately resolved by the legislation. AT&T-C also argues that we drew far more heavily on PSD (and not Public Advocates) in assessing the effectiveness of AT&T's program.

In sum, AT&T-C believes that only our adoption of the Filipino-American reporting category is traceable to a factual, legal, or policy/procedural recommendation by Public Advocates.

D. Public Advocates' Reply to AT&T-C's Response

In reply, Public Advocates stresses the importance of its contributions in four areas:

1. The finding that AT&T-C is subject to the F/MBE criteria;
2. The requirement for independent verification;
3. The requirement for substantial long-term goals; and
4. The 51% ownership criteria for F/MBE qualification.

It asserts it made this contribution by a unique combination of extensive investigation, hearing, and briefing, and pressure for legislation, which obviated time-consuming legal

appeals, and reduced the need for future Commission hearings. Public Advocates believes that this unique generic resolution will enable AT&T-C and other California utilities to operate in a more efficient and predictable fashion in the future.

Public Advocates has included in its compensation filings a statement by the Chair of the Assembly Committee on Utilities and Commerce, indicating that Public Advocates made key contributions to the passage of AB 3678 (Declaration of Assemblywoman Gwen Moore, Exhibit A to Public Advocates' Reply).

In countering AT&T-C's argument that there was no substantial contribution, because passage of AB 3678 effectively determined the outcome of the key issues, Public Advocates asserts that it is settled case law that fees may be awarded when there is a causal connection between a plaintiff's action and the result obtained, even if that result comes about through legislative action. (See e.g., Folsom v Butte County Assn. of Governments (1982) 32 Cal 3d 668, 686-687; State of California v County of Santa Clara (1983) 142 Cal App 3d 608; Wallace v Consumer's Co-op of Berkeley (1985) 170 Cal App 3d 836, 845; Bank of America v Cory (1985) 164 Cal App 3d 66; Coalition for Economic Survival v Deukmejian (1985) 171 Cal App 3d 954.) The essence of this argument is that the inter-relationship of administrative and legislative arenas created the impetus for passage of AB 3678. Further, the case for compensation is stronger than in any of the cases cited, where the prevailing party usually played little or no role in the passage of legislation. In contrast, Public Advocates claims direct responsibility for actual passage of AB 3678.

#### E. Discussion

In certain areas (applicability of FMBE criteria to AT&T-C; the separable Filipino-American reporting category; the 51% eligibility criteria; and effectiveness of AT&T-C's FMBE program) it is clear that Public Advocates position was adopted--independent of AB 3678 (although the 51% issue is also addressed in the

legislation), and that it made a substantial contribution. We also believe there was some duplication with PSD,<sup>3</sup> notwithstanding PSD's general observation to the contrary, on some of these issues.

The more difficult substantial contribution question is whether Public Advocates' recommendations on verification and goals were actually adopted, within the meaning of Rule 76.52, given passage of AB 3678.

Should Public Advocates be compensated for its efforts in this forum, when its related efforts before the legislature

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3 For example we were persuaded by the arguments of both PSD and Public Advocates that AT&T-C should be treated no differently in the area of FMBE compliance than the other major regulated utilities in this state (D.86-11-079, mimeo. p. 145). Both parties argued eloquently, and we found PSD's brief very persuasive on point.

Our resolution of reporting issues (51% eligibility requirement and the Filipino-American reporting category) also drew upon the recommendations of both PSD, and Public Advocates. We relied entirely on Public Advocates' arguments to resolve the Filipino-American reporting issue. Our disposition of the 51% definitional issue, though impacted by passage of AB 3678, also drew heavily on PSD's recommendation, although this was an area developed by both PSD and Public Advocates during evidentiary hearings. Quite simply, PSD's brief was very strong, and we placed equivalent reliance on its arguments and Public Advocates' evidentiary showing.

Clearly, we listened to both PSD and Public Advocates in weighing the effectiveness of AT&T-C's program, and in determining that AT&T-C must undertake a better effort as a prelude to making meaningful progress in the areas now impacted by passage of AB 3678 (D.86-11-079, mimeo. pp. 149-150).



resulted in the passage of legislation which effectively resolved the issues being litigated at the Commission?<sup>4</sup>

The authorities<sup>5</sup> cited by Public Advocates indicate that the prevailing party in a lawsuit may recover attorney's fees on a demonstration that there is a causal connection between lawsuit and relief obtained.

First, it is unclear that these cases are dispositive of the present controversy, since a good argument can be made for the absence of a causal connection, given the fact that the AT&T-C rate case was not itself the catalyst for passage of AB 3678. Clearly

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4 Public Advocates has now withdrawn from its fee request approximately 8 hours of Mr. Gnaizda's time spent before the legislature but this does not eliminate the controversy, because we still must decide whether Public Advocates' presentation substantially assisted us in the making of our order, due to adoption in whole or in part of its factual contentions, legal contentions or specific policy recommendations.

5 In Folsom v the Butte County Assn. of Governments supra, the California Supreme Court upheld the trial court's determination that litigation instituted by plaintiffs was demonstrably influential in defendant's decision to institute four public transit systems, and hence plaintiffs were successful, and entitled to fees. The question was whether plaintiffs' actions actually contributed to the result achieved or whether local politicians would have acted absent the pressure of the lawsuit. Wallace v Consumer's Co-op of Berkeley, Inc., supra, applies the same test: Existence of causal connection between the lawsuit and suspension of retail milk prices. In Coalition for Economic Survival v Deukmejian, supra, plaintiff's suit was dismissed without a determination of the merits, but the lawsuit accomplished the goal for which it was brought--public assistance checks were not delayed. The plaintiff could be termed a "prevailing party" when the court decision had the practical effect of giving the plaintiff a substantial amount of the relief sought. Indeed, in Sagaser v McCarthy (1986) 221 Cal Rptr 746, 176 Cal App 3d 228, an appellate court indicated that "if the persistence of appellants affected the legislator's decision to prohibit the use of ground water under Section 34, then, based on the above authorities, appellants are entitled to attorneys fees under Code of Civil Procedure Section 1021.5 attributable to those efforts."

the passage of the legislation is not attributable to the actions or inactions of any one utility, but due to the interaction of many events over a number of years.

A second, and more significant point, is that these cases arise in the context of disputes over attorneys' fees awarded under the codification of the private attorney general doctrine, which provides:

"Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor." (Code of Civil Procedure Section 1021.5.) (Emphasis added.)

The Commission's compensation rules include a somewhat different standard as a prelude for an attorney fee award. In contrast to the private attorney general inquiry, which may be invoked by a prevailing party who succeeds in enforcing an important right affecting the public interest, the Commission's intervenor compensation rules define a substantial contribution as a customer presentation which substantially assists the Commission in making its order or decision "because the order or decision had adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer." (PU Code Section 1801 et seq; Rule 76.52(g).)

Thus it is clear that the focus before this Commission is not so much on the question of "enforcing a right affecting the public interest" or "prevailing", but rather "assisting the Commission" in reaching a decision on the merits of issues before it. This is an important distinction, and is especially evident when contrasting the terms of the present intervenor compensation statute with the earlier (now superseded) OII 100 rules, which defined a substantial contribution as "that contribution which, in the judgment of the Commission, greatly assists the Commission to promote a public purpose in a matter relating to an issue by the adoption, at least in part, of the participants' position..." (Rule 76.26). The current rules, implementing PU Code Section 1801 et seq, are much more restrictive in the sense that they are tied to the enhancement of the Commission's decision-making process in a very specific manner, as opposed to broader public policy considerations. Obviously the cases Public Advocates cites lead us back to an older, no longer applicable "substantial contribution" standard, and we therefore decline to find a substantial contribution based on these arguments.

What essentially occurred in this case was a preemption of our consideration of the merits due to passage of the legislation. We do not mean this in any pejorative sense, but clearly the passage of the legislation made the task of "adopting" Public Advocates positions much more perfunctory. However, this was a situation where Public Advocates fully participated in the record development of certain key issues (goals, verification, and the 51st reporting issue). Further, we indicated in the Interim Opinion that Public Advocates' position would have been adopted in some fashion had our consideration of the merits not been impacted by

passage of AB 3678.<sup>6</sup> Therefore, using the applicable Rule 76.52 standard, it is reasonable to find that Public Advocates made a substantial contribution given this acknowledgement of its contribution to the record. Accordingly, we find a significant contribution due to the fact that Public Advocates' position on goals and verification, were effectively adopted based on its participation in the AT&T-C proceeding--although the ultimate outcome was determined by passage of AB 3678.

In sum we have found substantial contributions in six areas: Goals, verification, Filipino-American reporting, 51% criteria, applicability of FMBE criteria to AT&T-C, and AT&T-C program effectiveness. Nonetheless, given PSD's strong impact on the last three issues (as previously discussed) we will reduce the award to reflect our determination that there was some degree of duplication. A 25% reduction of claimed hours is appropriate.

#### V. Public Advocates' Involvement in Bilingual Issues

##### A. The Interim Opinion's Treatment of The Issue

As a result of the Commission's direction in the generic bilingual telephone services proceeding, C.9976, the parties to this proceeding met over a four-month period, and developed a joint recommendation, presented as Exhibit 1. This exhibit details AT&T-C's current bilingual services program and outlines future plans. The Commission made the following findings:

- "3. The Joint Exhibit Concerning Bilingual Services, which outlines AT&T-C's test year

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<sup>6</sup> "We were disposed as well to mandate verification and a system of goals consistent with AT&T-C's \$100,000 F/MBE budget as a result of our review of this record. Now it seems more administratively sensible to wait for implementation of AB 3678..." (D.86-11-079, mimeo. p. 156.)

plan to open its own Spanish Translation Bureau and subsequently reassign its contract for ESLAB to Pacific Bell, to fund an ongoing audit of this translation service, to continue its participation in the operation of ECLAB, and to open an international Calling Center at San Francisco International Airport are commendable responses to this Commission's concerns, expressed most recently in D.85-11-020, about the adequacy of bilingual operator services.

- "4. AT&T-C's special plans for parallel operator assistance in the 1989-1990 time frame are not before us in this proceeding, and we have no evidence in this record regarding questions of the need or cost-effectiveness of these proposals."

In the Interim Opinion, the Commission approved the joint exhibit without modification.

B. The Basis For Public Advocates' Claim

Public Advocates claims a substantial contribution given our approval of the joint plan. It maintains that its expertise and persistence were crucial to this cooperative effort. It maintains that the joint exhibit represents the culmination of a long history of litigation, particularly 30 days of Commission hearings between 1981 and 1983. Public Advocates indicates that it spent its time researching this issue, consulting with experts, gathering demographic data, consulting with clients, and meeting with AT&T-C experts, as well as actually developing jointly with AT&T-C the settlement agreement and subsequent monitoring procedures. AT&T-C counters that the subject of bilingual services was a non-issue in this proceeding, due to the stipulation which resulted in the submission of joint Exhibit 1, and that Public Advocates' role in the matter was minor and peripheral. AT&T-C maintains that Public Advocates' contribution was primarily a role in the mechanics leading up to the submission of the joint exhibit;

even this role was limited to reviewing the draft joint exhibit prepared by AT&T-C.

AT&T-C also maintains that each of the major activities described in the joint exhibit was undertaken independently of this rate case. The only items included in Exhibit 1 at Public Advocates' suggestion were the provision for an audit to inspect AT&T-C's bilingual facilities and AT&T-C's plan to conduct market research after the installation of OSPS (a new generation of operator services technology) to identify the predominant Asian language within California and to study the viability of offering bilingual service in more than one major language (Appendix B to AT&T-C's Response). Further, although Public Advocates' earlier activities in Commission proceedings dating back to 1970 may be laudable, AT&T-C argues that they are not a part of this rate case and that Public Advocates should not be permitted to bootstrap prior uncompensated work efforts.

C. Public Advocates' Reply

Public Advocates counters that its bilingual contributions were by no means insignificant. It argues based on the record in Pacific Bell's ongoing Application (A.) 85-01-034, that the potential future revenue from bilingual services could be in the hundreds of millions of dollars (Public Advocates' Reply, p. 29). Public Advocates also disagrees vehemently with AT&T-C's contention that its decision to reach an agreement with Public Advocates was independent of any pending rate case or Public Advocates' December 1985 data request and hiring of experts. According to Public Advocates, the history of most litigation demonstrates that subsequent "voluntary" actions are less voluntary than most litigants would like to think. In short, Public Advocates believes that it made a substantial contribution to this record on the bilingual issue.

D. Discussion

The record is clear that Public Advocates' persistence in pressing the bilingual services issue resulted in the issue being addressed in this forum. There also is no doubt that Public Advocates played an active role in reviewing the stipulation which became Joint Exhibit 1 and pressing for methods to monitor its future effectiveness. We therefore find that it made a substantial contribution on the bilingual services issue, and will compensate it for all claimed hours.

VI. Itemization of Costs

A. Public Advocates' Request

Public Advocates' \$109,725.00 Request is detailed as follows:

MINORITY/WOMEN CONTRACTS:

|   |              |
|---|--------------|
| R. Gnaizda (attorney)<br>206.5 hours x \$225 per hour                                       | \$ 46,462.50 |
| M. Russell (attorney)<br>120 hours x \$90 per hour  | 10,800.00    |
| R. Marcantonio (law student clerk)<br>255.5 hours x \$50 per hour                           | 12,775.00    |
| B. Zimmerman, R. Greenwald and<br>Y. Vera (law student clerks)<br>112 hours x \$50 per hour | 5,600.00     |
| Total Attorney/Law Student Clerk Time:  | \$ 75,637.50 |
| <u>Experts:</u>   |              |
| Dr. Joseph James<br>8.5 days x \$400 per day  | 3,400.00     |
| Kevin Williams<br>6.5 days x \$300 per day  | 1,950.00     |
| Michael Phillips<br>.75 day x \$1,000 per day   | 750.00       |
| Total Expert Time:  | \$ 6,100.00  |
| TOTAL MINORITY/WOMEN CONTRACTS TIME:  | \$ 81,737.50 |

BILINGUAL

|  |              |
|--|--------------|
| R. Gnaizda (attorney)                  |              |
| 31.0 hours x \$225                     | \$ 6,975.00  |
| M. Kumin (law student clerk)           |              |
| 27.1 hours x \$50                      | 1,355.00     |
| Total Attorney/Law Student Clerk Time: | \$ 8,330.00  |
| <u>Experts:</u>                        |              |
| John Gamboa                            |              |
| 2.5 days x \$400 per day               | \$ 1,000.00  |
| Maria Navarro                          |              |
| 3.5 days x \$300 per day               | 1,050.00     |
| Total Expert Time:                     | \$ 2,050.00  |
| TOTAL BILINGUAL TIME:                  | \$ 10,380.00 |

FEES

|  |              |
|--|--------------|
| R. Gnaizda (attorney)                      |              |
| 50.7 hours x \$225 per hour                | \$ 11,407.50 |
| S. Campbell (attorney)                     |              |
| 50 hours x \$80                            | 4,000.00     |
| Y. Vera, B. Zimmerman (law student clerks) |              |
| 35 hours x \$50                            | 1,750.00     |
| TOTAL FEES TIME:                           | \$ 17,157.50 |

COSTS

|  |              |
|--|--------------|
| Minority/Women Contracts, Bilingual and Fees<br>(reasonable costs include copying, telephone,<br>postage and attorney travel and expenses) | 450.00       |
| <u>TOTAL:</u>  | \$109,725.00 |



In its Reply to AT&T-C's Response, Public Advocates amended its dollar request to delete 7.2 hours of Gnaizda's time associated with legislative efforts (resulting in a \$1,620 downward adjustment); to correct an arithmetical error in the number of law clerk hours claimed for bilingual services (the amended request decreased the hours claimed for law clerk Kumin by \$335.00); and to increase the request by \$3,713.50 for additional time spent by attorneys Gnaizda and Campbell preparing the Reply to AT&T-C's Response (Public Advocates' Reply, p. 42).

We will accept the first and second modification, but not the third. While Rule 76.56 specifies that additional costs, incurred as a result of application for rehearing on the issue of compensation, may be allowable if the customer files an amended request in compliance with the Commission's rules, our rules do not allow for augmentation of the initial compensation request to account for additional time spent buttressing the case for compensation. We expect that intervenors will include in their initial requests all time reasonably incurred in putting forth the best possible case in support of fees. We see no reason in this instance why Public Advocates could not have done so. The Rules provide an abbreviated time for Replies, because they contemplate a targetted Response by the intervenors. We do not understand why Public Advocates waited until the Reply stage to make its extensive argument on the issue of market rates, especially given our admonition on this point in the eligibility decision.

B. Allocation of Hours

Public Advocates has presented several different types of documentation in support of its allocation procedures in this proceeding. It has provided a typical timesheet containing information by date, functional task, explanation, and time increment. From these raw data timesheets, Public Advocates has prepared monthly listings of specific tasks performed in connection with each issue. Finally, it has presented a chronological legal

summary file, apparently kept on a daily basis, which details most correspondence, memorandum research and legal filings in the proceeding.

Public Advocates notes that allocation by issue is fairly simple in this proceeding because the issues of minority contracts, bilingual telephone services, and fees required entirely different work at different times and often by different people. The record Public Advocates has provided in its Request supports this contention. Thus, in general terms, the Request presents no allocation problem. There may be minor disputes over particular entries in Public Advocates' records, but these are discussed subsequently in our determination of the award. In general, Public Advocates' Request presents us with no allocation problem.

C. Efficiency/Duplication Issues

Public Advocates contends that, while its fee request is limited to the precise hours spent on the issues in this proceeding, Mr. Gnaizda's past experience in the areas of minority contracts and bilingual telephone service, as well as in the general area of utility regulation, has led to an extremely efficient number of hours claimed. Mr. Gnaizda cites his experience litigating bilingual issues for 17 years and his involvement with minority and woman contract issues since 1971.

Public Advocates also claims that the hours it spent in two similar FMBE hearings involving Pacific Bell and PG&E contemporaneously, resulted in a minimization of efforts in the AT&T-C proceeding. In addition, Public Advocates notes that it expended more than 2,000 hours in the 1981 and 1983 Pacific Bell bilingual case, but is not claiming compensation for any of those hours despite the fact that they were closely related to, and assisted in, the current settlement (Public Advocates' Request, Appendix 1).

Further, Public Advocates claims that it handled each issue in this proceeding efficiently. It cites the avoidance of

time-consuming hearings on the bilingual issue due to its concerted settlement efforts.

Public Advocates argues that it made every effort to avoid hearings on the minority contracts issue, by attempting prior to the hearings to settle the contentious verification issue. Public Advocates also claims that it spent a relatively modest amount of time preparing and examining witnesses in the FMBE portion of the proceeding, although it was required to produce many witnesses in anticipation of a wide range of technical points.

Finally, Public Advocates claims that its efficiency was enhanced by the policy of delegating, where appropriate, substantial amounts of work to qualified law students and young attorneys. In sum, Public Advocates notes that it spent a mere 357 attorney hours on minority contracts and bilingual issues taken as a whole. It claims that the final economic gain to ratepayers is in the "multimillions" and that the practical gains are immeasurable.

AT&T-C takes the opposite view. It believes Public Advocates produced very little original work either during discovery or at hearings. It points to a data request served on AT&T-C on April 4, 1986, which was a boilerplate request similar to one served on PG&E on March 21, 1986 in the latter's rate case. In one instance, Public Advocates data request to AT&T-C sought information about PG&E. At the hearings themselves, AT&T-C argues that the Public Advocates presented a series of witnesses who had recently given strikingly similar testimony in the Pacific Bell rate case (A.85-01-034). A comparison of the written testimony of Public Advocates witnesses Cordero, Williams, James, Zimmerman, and Jefferson, with their earlier Pacific Bell testimony reveals "another mark-up effort", in AT&T-C's view. These witnesses criticized AT&T-C's FMBE program in nearly identical terms to their earlier criticisms of Pacific Bell's program.

In addition, AT&T-C asserts that Public Advocates' witnesses displayed little or no knowledge of AT&T-C, its FMBE program or the communications industry.

AT&T-C maintains that Public Advocates' contribution to the FMBE issue was negligible, and that the Commission should reduce the award for inefficiency. As a case in point, AT&T-C cites Public Advocates "11th Hour" effort to compel AT&T-C to conduct an audit of its major FMBE vendors. AT&T-C believes this flurry of activity was unnecessary and unproductive, since there simply was insufficient time to reach an agreement or conduct any kind of a professional audit. The time spent in this futile undertaking is not itemized in Public Advocates' Request (AT&T-C Reply, pp. 16-17).

Based on the argument that Public Advocates hindered the efficient disposition of the FMBE matter, AT&T-C recommends that billed hours for FMBE compensation, (except for law student clerk hours) be reduced by 80%. AT&T-C recommends that the \$5,600.00 for 112 hours of "law student clerk" expense claimed for three law clerks be totally disallowed. One of these law clerks testified on the basis of independent research, and these hours are included in the expense claim. AT&T-C argues that Public Advocates is entitled to claim compensation for time and bill by expert witnesses under Rule 76.52(b), but not compensation for time spent by ordinary witnesses such as the law clerk in question.

In the bilingual services area AT&T-C recommends an allowance of 50% of billed hours be applied to attorney and law student time claimed, but that the \$2,050 in claims for expert time be totally disallowed. First AT&T-C is unaware of any work done by expert John Gamboa in this proceeding. Second, expert Maria Navarro has been serving as auditor of AT&T-C's bilingual services pursuant to the agreement embodied in Joint Exhibit 1. While the Request seeks a \$300 hourly rate for Ms. Navarro, the rate agreed upon as set forth on page 2 of Joint Exhibit 1 is \$200 per day.

Further, AT&T-C indicates that Ms. Navarro has been sending her bills for auditing work directly to AT&T-C, and that all such bills have been paid. Therefore, AT&T-C assumes that Public Advocates' current request duplicates the auditing bills already paid.

In its Reply, Public Advocates argues that its efforts in this proceeding were never duplicative and were always efficient. First, Public Advocates maintains that it did not duplicate PSD efforts, citing the PSD Response to the Request for Compensation dated February 10, 1987 as indication that staff itself believes there was no duplication of effort. (We have previously concluded that there was some duplication in our analysis of the substantial contribution issue.)

Public Advocates further argues that it did not duplicate its efforts in other utility proceedings. Indeed it argues that its broad focus, and its involvement in several major utility rate cases results in economies, rather than duplication, of work effort. It also asserts that original work was required in the AT&T-C case. Each brief, three of four discovery requests, and most of the expert testimony, required evidence factually unique to AT&T-C.

Public Advocates also argues that it did not duplicate in-house work on this application. Each Public Advocates staff member was responsible for particular work. For example, attorney Gnaizda, the only partner participating in the case, was the only lawyer at the hearings. Due to the large number of witnesses and documents, the short time frame in which to present testimony, the need for cross-referencing, the inadequate data and the lack of AT&T-C cooperation, a law student, Mr. Marcantonio, attended the hearings as an assistant to Mr. Gnaizda. This student's presence was also essential to his taking primary responsibility for preparation of Public Advocates' brief in opposition to AT&T-C's rate increase.

Public Advocates takes issue with AT&T-C's contention that Public Advocates was inefficient because it used a "staff of 13..." (AT&T-C Response p. 4). According to Public Advocates, this staff consisted of just one attorney in the bilingual case (Gnaizda) and largely one attorney in the FMBE case (Gnaizda). In contrast, Public Advocates notes that AT&T-C has had at least four attorneys working on this case. Public Advocates supplemented Gnaizda's time with other experienced attorneys who did not appear during the hearings. Thus, there was no overlap and certainly no duplication of Public Advocates small legal staff. Regarding the remainder of the "staff of 13", Public Advocates notes that five were not staff, but acknowledged experts on bilingual issues. The remaining "staff of 13" consisted of law students who performed analytical roles and/or handled preparation of witnesses, data gathering, and wrote pleadings.

We too share the concerns expressed by AT&T-C as to the dubious value of Public Advocates' last-minute effort to audit AT&T-C's FMBE vendors. Had this effort been commenced earlier in the proceeding, it might have been more fruitful. Instead the effort was wasted, for the reasons cited by AT&T-C.

We also find some duplication in discovery work and the prepared testimony presented by Public Advocates' witnesses in this proceeding and the concurrent PG&E rate case (e.g. witnesses Der, Cordero, and Yee) which raises concern over the number of attorney hours claimed. Additionally, the ALJ determined that the prepared testimony of seven other Public Advocates' witnesses was essentially non-expert testimony (Reference Items A through G), and we gave this testimony no evidentiary weight. Nothing is gained by expending attorney efforts to prepare and/or review written testimony that is essentially "public witness" testimony.

Accordingly, we will reduce by 25% the compensable hours of attorneys Gnaizda and Russell who worked on these pre-trial and pleading matters.

No similar adjustment will be made to the bilingual or fees hours.

D. The Appropriateness of Market Rates

1. Background

In its eligibility filings, Public Advocates indicated it would base its compensation filing on use of a composite hourly rate (\$125.00) for work performed by its entire legal staff. The ALJ issued a Ruling on June 16, 1986, which required, among other things, that Public Advocates specify hourly rates for each attorney/law clerk working on this case. Public Advocates subsequently did so, indicating it would seek rates ranging from \$50/hr for law clerks to \$225/hr for Mr. Gnaizda.

Given Public Advocates' stated intention, we specifically highlighted the hourly rate issue in the Interim Opinion, noting that the requested hourly rate was substantially in excess of rates (maximum \$150) approved in prior compensation decisions; we asked Public Advocates to address that issue (and to justify use of more than one attorney) at the time it filed for compensation.

2. Public Advocates' Request

In its Request, Public Advocates has presented extensive arguments for the hourly rates it seeks for each of its attorneys and law clerks.

These hourly rates are premised on each attorney/clerk's level of experience and prevailing rates in the San Francisco legal community for such experience levels. Public Advocates has included two independent surveys (a November 1986 National Law Journal survey and a February 1986 Of Counsel survey) and the declaration of a managing partner of a San Francisco law firm in support of the requested ranges.

AT&T-C argues that the hourly rates Public Advocates seeks are excessive.

In response to AT&T-C's general criticisms, Public Advocates' lengthy Reply included a detailed legal analysis of the

market rate issue. Much of the analysis centers on the appropriateness of the \$225 hourly rate requested for Mr. Gnaizda.

In general terms, Public Advocates believes there is no justification either for AT&T-C's reduction arguments or for Commission imposition of so-called "informal cap" of \$150 that is in conflict with market rates. It suggests that the underlying philosophy behind the Commission's compensation rates was to provide market rates, and argues there is no contrary regulatory or legislative history.

In addition to the injustice of such an informal cap on senior partners' efforts, Public Advocates argues that the highest rate it seeks is reasonable in comparison to other factors. For example, it argues that all of the major utilities, including AT&T-C, that use outside counsel pay between \$200 and \$275 for the services of attorneys with Gnaizda's experience and qualifications. Also, California state agencies that use outside counsel pay at rates up to \$275 per hour, or more, for experienced counsel.<sup>7</sup>

It also argues that any fee awarded by the Commission is automatically below market rates, which assume payment, win or lose, within sixty days of rendition of service. In the present case there are two contingencies: (1) the right to a fee based on a finding of substantial contribution and (2) substantial delay from the time services were rendered to the ultimate time payment is received.

According to Public Advocates, the U.S. and California Supreme Courts have held, as does the California Attorney General's

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7 In the "Report by the Auditor General of California on Attorney's Fees Paid or Collected by State and Local Agencies, 1980-1982," December 1983, it is documented that the State of California hired private attorneys to assist it when the Attorney General could not provide the special services required at a rate of up to \$275 per hour. (Appendix 1 to Public Advocates' Request).



Attorneys' Fees Guidelines, that the market rate is determinative of what constitutes a reasonable rate (Serrano v Unruh 32 Cal 3d 621, 643 (1982); Blum v Stenson 465 US 886-895 (1984)).

To quote from Public Advocates:

"In Blum v Stenson ... the court said that 'to inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation...A rate determined in this way is normally deemed to be reasonable...'

"Once the party claiming fees has presented evidence as to the market rate, the burden shifts to the party opposing fees to present equally specific countervailing evidence. National Association of Concerned Veterans v Secretary of Defense, 675 F. 2d 1319, 1326 (D.C. Cir 1982). AT&T-C has clearly not done this. It offers no specific contrary evidence.

"In their submission of past rates awarded to staff and comprehensive rate surveys, Public Advocates has submitted information relevant to formulation of reasonable market rates for their attorneys and clerks. In Margolin v Regional Planning Commission, 134 Cal App 3d 999, 1005 (1982), the Court held that the submission of rates that had been awarded in previous actions was relevant to a determination of the reasonable hourly rate. The rates awarded attorneys of comparable experience in other cases in the same locality also are often persuasive evidence of reasonable market value. Margolin, supra, 134 Cal App 3d at 1003...Other means for justifying rates include surveys conducted by various groups [citation omitted]...

"In summary, given the California Attorney General's Fee Guidelines, the state and federal case law, the statutes and rules providing for attorneys' fees herein (P.U.C. Sections 1801-06), the \$100,000-plus salaries of utility

attorneys, and the need to encourage effective contingent litigation on behalf of the ratepayer, it would be poor public policy to arbitrarily deny market rates to experienced attorneys. And, of course, AT&T-C has failed to submit any authority on even policy to the contrary." (Public Advocates Reply, pp. 35-36.)

### 3. Discussion

We agree that there is little if any question that fee awards should consider market rate information. In fact, this has been our past practice. For example, in D.86-04-020, we increased the hourly rate awarded to TURN's counsel from \$100 to \$125 per hour based partially on the Of Counsel survey.<sup>8</sup> (See also D.87-05-029.)

The real issue here is not whether market rates should be considered. The issue is the steepness of the hourly rate requested by Mr. Gnaizda. But this should not deter us from analyzing the merits of whether or not market rates are the appropriate standard. If indeed we feel that Public Advocates' fee request is excessive, there are other, legitimate, methods to determine reasonable compensation aside from artificially capping the hourly fee and departing from our previous policy of including a consideration of market conditions in our assessment.

We find Public Advocates' citation of the Attorney General's guidelines for handling claims under federal attorneys fees statutes, especially enlightening:

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<sup>8</sup> "While we do not wish to be artificially bound to a survey such as the one in Of Counsel, we find it a useful comparison in this case against which to test our award... Surveys are one indication of prevailing market rates for advocates skilled and effective in their special area of expertise. We reserve for our discretion judgment of individual advocates skill and effectiveness." (D.86-04-020, mimeo. p. 8).

- "6. In determining the appropriate hourly rate to be utilized in the calculation of an attorney's fees award, this Office...will not argue that a private attorney's reasonable hourly rate must be linked to the rate which we charge our special fund state agency clients, but will recognize that the fee award must be calculated according to the pertinent prevailing private practice market rates in the relevant community, regardless whether the plaintiff is represented by private or non-profit counsel;" (California Attorney's Fees Award Practice, California Continuing Education of the Bar, January 1987 Supplement, Appendix C, page 157.)

Indeed, the Attorney General has noted that extensive litigation over the amount of fees is "one of the least socially productive types of litigation imaginable," and that fee litigation should therefore be simplified and expedited where possible. We wholeheartedly concur.

E. Hourly Rate Justifications For Each Attorney/Law Clerk

1. Attorney Gnaizda

The \$225 per hour rate is based upon Mr. Gnaizda's experience in the area of utility reform and minority issues. A 1960 graduate of Yale Law School, Mr. Gnaizda has been involved in class action lawsuits since 1966 when he was Director of Litigation for California Rural Legal Assistance's nine offices. He has practiced before this Commission since 1970. During those 17 years, he has been involved in many efforts on the FMBE front, culminating in D.82-12-101, D.84-06-011 (Pacific Bell), D.84-12-008 (Southern California Edison), as well as bilingual issues (D.85-11-020).

In addition Mr. Gnaizda cites a wide range of cases relating to employment discrimination, including a major negotiated settlement with Pacific Telephone in 1973, insuring both bilingual telephone service and greater employment and promotional opportunities for Hispanics. Gnaizda has also been involved in a

wide range of state and federal class action lawsuits on behalf of minorities, women, and low-income persons. Three major pieces of litigation in which he has been recently involved are: the successful litigation in the Levi Strauss case before the California Supreme Court, the Buck Trust Case, and National Association of Radiation Survivors v. Harry N. Walters, recently decided by the U.S. Supreme Court. Gnaizda has also been the chief counsel in successful litigation or settlement of class actions involving the nine largest savings and loans in the U.S. and five of the then-seven largest banks in the State of California. Public Advocates claims that Mr. Gnaizda clearly stands above all others in his field and that his requested rate is "modest".

Public Advocates compares the rate requested for Mr. Gnaizda with the \$150 hourly rate we have awarded to TURN attorney Florio. Public Advocates regards Mr. Florio as "A highly qualified attorney, [who] has practiced for eight years and has acquired great expertise, particularly in the natural gas area, over these years. Mr. Florio is a 1978 Bar Admittee and has been classified by TURN as a 'Junior Partner' (Application No. 85-09-062 p. 10)." (Public Advocates' Request for Compensation, page 17.) In comparable terms, Public Advocates argues that attorney Gnaizda would be classified as a "Senior Partner", given his longer experience.

Public Advocates has presented the declaration of a past managing partner of the law firm of Howard, Rice, Nemerovski, Canady, Robertson, and Falk, to support its argument that prevailing rates in the San Francisco legal community for an attorney with Mr. Gnaizda's experience are from \$200 to \$250 per hour, depending upon the matter and particular expertise of the attorney. It also argues that the requested rate falls squarely within the National Law Journal and Of Counsel surveys of billing rates.

Public Advocates also cites other hourly rates awards. For example, Mr. Gnaizda's law partner Sidney M. Wolinsky was awarded \$205 for his work performed in 1983 to 1985 in prison litigation.

Another Public Advocates partner, Mr. Armando Menocal, was awarded \$215 per hour for his 1986 work in Larry P. v Riles, No. C-71-2270 RFP (N.D. Cal.). Public Advocates argues that these rates are still lower than what other courts have been awarding, citing the Buck litigation, where attorneys with less experience than Mr. Gnaizda billed at hourly rates of \$235 per hour, \$260 per hour and \$275 per hour. Public Advocates argues that the Buck litigation is indeed a good indicator of prevailing rates, since the Attorney General and the Court scrutinized and approved the billed hours and rates and found them to be market rates.

Independent of these considerations, Public Advocates argues that the requested rate is presumptively valid, given the fact that in 1986 the San Francisco law firm of Sideman and Bancroft requested Mr. Gnaizda's private advice regarding pending litigation and compensated him at the rate of \$225 per hour. Unlike the present matter, such compensation was guaranteed and did not require Gnaizda's participation in ongoing litigation.

Finally, Public Advocates asserts that Mr. Gnaizda's rate becomes even more reasonable when risk factors are considered. There was a serious possibility in this instance of denial of eligibility for compensation. Indeed, Public Advocates pursued this case after a negative ruling on its eligibility for compensation had been rendered in the 976 proceeding (D.86-05-007). It believes that such contingencies reduce the value of \$225 to no more than half this amount.

AT&T-C argues that Public Advocates has failed to support the hourly rate it requests for Mr. Gnaizda. This rate departs substantially from Commission precedents authorizing attorneys rates no higher than \$125 or \$150 per hour, "and then only in cases

where there was no mention of the kind of wasteful or erroneous pursuits that characterized the advocacy in this case." (AT&T-C Response, page 31). AT&T-C considers Public Advocates' numerous references to "huge" attorney fee awards in private litigation as being only "peripherally relevant" to requests for fees in the regulated environment. Moreover, it believes the examples Public Advocates has presented do not represent community standards. According to AT&T-C, the "reference to a record-setting fee award in the Buck Trust litigation is simply ludicrous, so far afield is such a suit from a Commission rate case." AT&T-C recommends that Public Advocates receive a \$135 per hourly rate for Mr. Gnaizda's efforts in this proceeding.

We have previously stated that it has been our practice to take account of market rates in deciding compensation matters. What makes this case most difficult is that the \$225 per hour request for Mr. Gnaizda is far in excess of what this Commission has previously awarded based on this standard (\$150 for TURN's Florio). What also makes this case different is the substantial justification presented in support of the request. As noted previously, Public Advocates has presented a Managing Partners' Declaration affirming that rates in his firm for persons who graduated from law school before 1966 are from \$200 to \$250 per hour, depending upon the matter and the particular expertise involved.

We have also reviewed the rates shown in the Of Counsel and National Law Journal surveys. The rates shown in those two 1986 surveys for partners in the San Francisco legal community range from \$105 to \$250 per hour (e.g., Brobeck Phleger & Harrison, \$150 to \$250 per hour; Bronson, Bronson & McKinnon, \$130 to \$250; Cooley, Godward, Castro, et al., \$150 to \$225; Crosby, Heafey Roach & May, \$120 to \$225; Graham and James, \$150 to \$250; Heller, Ehrman White & McAuliffe, \$140 to \$240; McCutchen, Doyle, Brown & Enerson, \$150 to \$230; Orrick, Herrington & Sutcliffe, \$195 to

\$225; Pettit and Martin, \$150 to \$215, Sedgwick, Detert, Moran & Arnold, \$105 to \$175). The \$225 per hour request is clearly at the high end of this wide range.

Within this range, which we use as a rough guidepost, we believe we have discretion to employ a high or low range figure, based on the experience of the attorney involved, the complexity of the subject matter and the particular expertise required. We might opt, for example to compensate an attorney with 8 years' experience at a higher level than an attorney with 20 years' experience, based on the quality of the performance and the complexity of the subject matter. Each situation must be separately analyzed, based on the facts presented. In the case of Mr. Gnaizda, we assess the efforts of a highly regarded attorney who has been practicing law for 21 years, in a very specialized area. Nonetheless, in our judgment, the subject matters involved in this aspect of the proceeding were not unduly complex. In no sense do we intend to denigrate the importance of FMBE or bilingual issues, but they certainly require much less technical analysis in the presentation than, for example, complex rate design issues, or difficult regulatory accounting issues. Therefore, we will adopt a rate at the low end of the range shown in the two surveys that we have reviewed, and award Mr. Gnaizda an hourly rate of \$150.

2. Attorney Russell

Ms. Russell, a 1984 graduate of Stanford Law School, had attorney-level responsibilities in this proceeding, including preparation of testimony, preparation of witnesses, and full responsibility for actual investigations. Public Advocates requests a rate of \$90 per hour for her work.

Public Advocates states that Russell received \$80 per hour for routine work in early 1985. (Order Re Motion for Attorneys Fees and Back Pay, City and County of San Francisco v San Francisco Police Officers' Association, January 10, 1986.) The work performed in the AT&T-C proceeding was performed in early and

mid-1986. Public Advocates also argues that the requested rate falls significantly below prevailing market rates; in San Francisco, persons who graduated in 1984 from law school, receive an hourly rate of \$105 to \$115 (Public Advocates Request, Appendix 6).

AT&T-C believes that 120 hours is an "incredible" amount of time for work on testimony, considering that so much of the testimony was obviously a mark-up of testimony previously submitted in the Pacific Bell rate case. AT&T-C also objects to the \$90 hourly rate, since at least as of the time of this proceeding, Ms. Russell was not admitted to the California Bar. AT&T-C proposes a \$50 hourly rate for Ms. Russell.

Public Advocates believes that the Bar membership is not an appropriate criteria, since billing rates in the Bay Area are based on the number of years since graduation (Public Advocates Reply to AT&T-C Response, page 32). Further, given the nature of Ms. Russell's work (she performed no trial work), there would seem to be no reason to reduce the rate. Public Advocates notes that Ms. Russell is presently a member of the State Bar.

We will not reduce the number of hours included in Ms. Russell's claim, although we have earlier applied a 25% reduction on duplication/inefficiency grounds.

The surveys show a range for Bay Area law firms associate billing from \$70 to \$150 per hour; (Brobeck, et al., \$80 to \$140 per hour; Bronson, et al., \$90 to \$125 per hour; Cooley, et al., \$75 to \$145 per hour; Crosby, Heafey, et al., \$75 to \$120; Graham & James, \$75 to \$145; Heller Ehrman, et al., \$80 to \$140; McCutchen, et al., \$80 to \$150; Orrick, Herrington, et al., \$70 to n/a; Pettit & Martin, \$80 to \$155; and Sedgwick, et al., \$70 to \$105 per hour). When viewed against the firms listed in the National Law Journal Survey, we believe the \$90 per hour rate is somewhat high, given the relative simplicity of the issues involved, and we will award a rate of \$75 per hour for Ms. Russell.



3. Attorney Campbell

Ms. Campbell, a first year attorney at Public Advocates, confined her work in this proceeding to the fee request. She is a 1986 graduate of the University of San Francisco Law School, and was admitted to the California Bar in December 1986. She has previously worked on attorneys fees issues for Public Advocates as well as for her past employers. Public Advocates request an hourly rate of \$80, which it believes falls below the market billing rates for first year lawyers which are \$85 to \$100 per hour (Public Advocates Request, Appendix 5).

Public Advocates also notes that when Ms. Campbell was a paralegal at the San Francisco Law Firm of Brobeck, Phleger & Harrison in 1983, the firm billed for her time at \$55 per hour.

AT&T-C believes that the \$80 per hour request is excessive, given the fact that Campbell is a new attorney who worked only on the attorneys fee issue and there is a "learning curve" involved. It recommends a \$50 hourly rate for Ms. Campbell, which is the same rate Public Advocates requests for its law student clerks.

Public Advocates counters that there is no "learning curve" involved in the project that Ms. Campbell worked on, since she has had significant past experience in attorneys fees matters.

Based on our analysis of the surveys presented for associate rates in the San Francisco area, the relative complexity of the issues Campbell addressed in the attorneys' fees filings (including the thorny issues of market rates, and substantial contribution in the context of AB 3678), the excellent legal analysis and well documented and very detailed filings, we will award compensation for Campbell's work on the basis requested, that is, \$80 per hour.

4. Law Clerk Marcantonio

Mr. Marcantonio, a summer extern, spent almost all of his time focused on the AT&T-C and PG&E minority/women contract issues. He attends New York University School of Law, and has been employed in the legal profession since 1982 as a Research Assistant and Intern. Public Advocates requests a rate of \$50 per hour for his time, arguing that this rate is well below the prevailing market rates for paralegals, which range from \$35 to \$60 per hour (Declaration, Attached to Public Advocates Request, Appendix 5). As a Law Student Clerk, Public Advocates believes that Mr. Marcantonio deserves at least paralegal rates, if not more.

Public Advocates argues that its law clerks perform many of the same functions performed by new attorneys, including witness preparation, factual investigations, and legal research and writing. Public Advocates relies upon these law clerks in the same manner as a large firm would rely upon its associates. In addition, Public Advocates argues that its reliance on law clerks immensely lessens attorney time required in cases.

AT&T-C believes that the claim of 255.5 hours for Mr. Marcantonio is unjustified. Mr. Marcantonio, according to AT&T-C, was present throughout the hearings normally as a silent observer, though occasionally with Mr. Gnaizda's supervision, examining witnesses. Also, Mr. Marcantonio spent 112 hours writing Public Advocates' brief, while Mr. Gnaizda's spent 38.5 hours on the same task. In short, AT&T-C believes that the claim is excessive. It states: "While Public Advocates' employment of law students may provide them with useful experience, Public Advocates has no right to do so at the expense of AT&T-C's customers--who ultimately foot the bill for these compensation claims." (AT&T-C Response page 31.)

We believe that Public Advocates has adequately justified the \$50 per hour rate for Law Clerk Marcantonio, and, after reviewing his hourly description of work performed (Public

Advocates Request, Appendix 2), we are not inclined to reduce the 255.5 hour total, given our observation of Mr. Marcantonio's efforts in this proceeding. It is clear that Mr. Gnaizda placed a great deal of reliance on Mr. Marcantonio and delegated major responsibility for brief writing to him. The vast majority of the hours listed for Mr. Marcantonio relate to this effort. We also note that while Mr. Marcantonio did conduct limited examination of witnesses in the hearings, in no way did these effort prolong the proceeding or burden the other participants. The efforts were always of the highest professional calibre.

5. Other Law Clerks

Four other law student externs assisted Public Advocates, though to a lesser degree than Mr. Marcantonio. Public Advocates is requesting a \$50 per hour billing rate for each, again on the rationale that their efforts required a greater degree of professional expertise and responsibility than those of a paralegal, and the hourly rate is, given that standard, reasonable. We agree, based on the same analysis undertaken in reviewing Mr. Marcantonio's hours. However, there are some reductions of hours to be made.

AT&T-C objects to the 47.5 hours claimed by Law Clerk Zimmerman, who testified about the results of independent research he performed for Public Advocates (Exhibit 178). AT&T-C argues that Public Advocates may be entitled to claim compensation for Zimmerman's time under Rule 76.52(b), pertaining to expert witnesses, but that Zimmerman was not an expert. It notes that Zimmerman was not offered as an expert or found to be such. Moreover, in AT&T-C's view, his nearly identical non-expert testimony in the PG&E case purporting to compare Commission-regulated companies with government entities was held to be uninformative in D.86-12-095, at 132-33.

Likewise, AT&T-C objects to Public Advocates' claim for compensation for the rejected testimony of Robert Greenwald (or any

underlying vendor survey work done by him which provided the basis of the rejected testimony). As to Law Clerk Vera, Public Advocates Request (Appendix 2) shows only that this law clerk spent 4 hours in "court/hearing" and 2 miscellaneous hours in November, 1986 (months after the submission of this case).

In its Reply to AT&T-C's Response, Public Advocates did not address these criticisms.

We will not reduce the claim for Law Clerk Zimmerman's time, regardless of whether he appeared as an expert witness or merely recited the results of his survey. We do not intend to get embroiled in that dispute. We believe the hours expended for the effort that was performed are reasonable. We will disallow the hours claimed for Law Clerk Greenwald (55.5), on the basis that this material did not make its way into the record. Similarly, we will disallow the 6.0 hours claimed for Law Clerk Vera during November, since these hours could not have related to this particular proceeding, which was submitted in August of 1986.

F. Experts

Public Advocates maintains that the amount submitted for each of its experts is well within reasonable market rate ranges. In the FMBE area, Public Advocates is requesting compensation for Dr. Joseph James (\$3,400), Kevin Williams (\$1,950), and Michael Phillips (\$750). In the bilingual area, it is requesting fees for John Gamboa (\$1,000) and Maria Navarro (\$1,050).

It maintains that Dr. James, the President of Utility Contract Procurement, an Oakland-based consulting firm, has advised Minority and Female businesses for 12 years; Dr. James was the Commission's expert witness and chief consultant in 1981 in C.10308 on Minority and Female business records of the Public Utilities. He was also an expert witness in the Commission's December 1985 hearings on Pacific Bell's FMBE record, and has been hired since by Pacific Bell as consultant on these issues. Dr. James participated in 3-1/2 days of hearings as an observer, and he assisted in

preparation of discovery, work on verification, development of goals, and analysis of areas for improvement in the AT&T-C program. Public Advocates is requesting a rate of \$400 per day, which it believes is reasonable in light of his recent 1986 compensation of \$14,000 for 15 days of work, or an average of \$933 per day in two contracts he had with Pacific Bell.

Kevin Williams is presently a contract compliance representative with the San Francisco Human Rights Commission; he has nearly 10 years' experience working with minority businesses and female businesses in contract procurement. He has also testified several times before the Legislature on these issues. Mr. Williams was involved in 3 days of hearings, as an observer; he also assisted in actual verification, development of the new AT&T-C plan, and analysis of AT&T-C contracts. Public Advocates is requesting \$1,950 for his work spanning 6-1/2 days.

Michael Phillips is an economist and business expert with extensive experience in analyzing statistical data pertaining to corporate programs. His present market rate as a consultant is \$2,000 per day, given payment at this rate by Scandinavian Airlines, W. B. S. Department Stores, and Jergesen Lehl Corporation. He was recently paid the equivalent of \$1,000 per day by Pacific Bell in connection with the marketing abuse matter. Mr. Phillips' requested expert fee for this case as half his usual rate, \$1,000 per day for a total of \$750.

In the bilingual area, compensation is requested for John Gamboa and Maria Navarro. These people have previously provided expertise to Pacific Bell in the area of bilingual services and both testified in the prior Pacific Bell bilingual case hearings between 1981 and 1983. Mr. Gamboa was employed by Pacific Bell and its predecessor from 1970 through 1981, with a wide range of duties relating to the Hispanic Community. Ms. Navarro was a telephone company on-line employee for about 32 years. She is fully bilingual in Spanish and has been extremely active both within and

outside Pacific Bell in regard to bilingual telephone issues. She has held executive positions with Los Padrinos and has been a member of the so-called "Telephone Advisory Task Force" set up by Pacific Bell as a result of the Commission's November, 1985 bilingual decision. Ms. Navarro has recently been hired by AT&T-C to perform audits of the quality of the bilingual service. Public Advocates maintains that both of these experts' provided substantial analysis of areas for improvement in AT&T-C's program, and that the requested rates are reasonable.

AT&T-C has generally recommended that the proposed hourly rates for Public Advocates' experts be reduced as excessive. Since Public Advocates proposes rates for experts on a per-day rather than an hourly basis, AT&T-C has recommended a reduced rate for all Public Advocates experts of \$200, which is the rate Public Advocates agreed upon for its own expert Navarro who was designated as auditor of AT&T-C's bilingual services pursuant to Joint Exhibit 1.

AT&T-C also expresses concern about the requested compensation for 2.5 days of work by Mr. Gamboa. The Public Advocates Request does not state what work, if any, Mr. Gamboa performed, and AT&T-C professes to be unaware of any work done by him in this proceeding. The only reference to Mr. Gamboa it recalls is a comment by Ms. Navarro that Mr. Gamboa was working on the Pacific Bell bilingual proceeding. AT&T-C also believes that the 3.5 days of work claimed by Ms. Navarro in her capacity as auditor of the bilingual services agreement set forth in Joint Exhibit 1, is duplicative, in that Ms. Navarro has been sending her bills for auditing work directly to AT&T-C and all such bills have been paid.

In its reply to AT&T-C's response, Public Advocates argues that AT&T-C has proposed that the experts in this case be compensated at less than 8% of their already reduced rates (\$630 of \$8,150 sought). This would result in Public Advocates view, in a

fee of \$5 per hour for world bank expert Phillips and approximately \$5 an hour for former PUC FMBE expert Dr. James. Public Advocates believes these recommendations are unfair and, if upheld, would provide a windfall to a utility that regularly pays \$1,000 a day and up for its experts.

Public Advocates also explains that Ms. Navarro provided 3-1/2 days of assistance in the development of the bilingual agreement and the audit mechanism solely related to AT&T-C. AT&T-C's agreement to pay her for future auditing is unrelated to this claim. Similarly, for the services of John Gamboa, Public Advocates claims that the hours billed are solely related to time spent on the AT&T-C case.

We have reviewed the itemization of costs submitted by Public Advocates, the underlying arguments of the parties, and are of the view that the amounts claimed for experts in both categories (FMBE and bilingual issues) are reasonable. We will make no reduction.

G. Other Costs

Public Advocates has presented in its itemization of costs a request for \$450 covering such items as copying, telephone, postage, and attorney travel and expenses. This amount does not appear to be in dispute, and will be adopted as reasonable given its relatively minor significance in relation to the totality of the claim.

H. Fees on Fees

Public Advocates has requested a total of \$17,157.50 for time expended in preparing its fee request.

In AT&T-C's view, there is nothing in either Public Utilities Code Section 1801 to 1808 or Article 18.7 of the Rules of Practice and Procedure which exempts time spent in preparing fee requests from the "overarching requirement" of a showing of substantial contribution to a decision reached by the Commission. Applied to fee request, the "substantial contribution" requirement

surely means, at a minimum, that there be a nexus or overall relationship between the amount of "fees on fees" claimed and the amount of other compensation claimed on a substantive matter for which the substantial contribution requirement has been clearly satisfied. According to AT&T-C, there is no such nexus here. AT&T-C believes the "huge" amount of "fees on fees" requested is disproportionately high in relation to the amount requested in FMBE and bilingual compensation, which are themselves grossly excessive.

In its Reply, Public Advocates reiterates that the time spent represents 15% of total requested time, and would have been substantially less but for prior eligibility denials. In Public Advocates' view, 15% is impressively little given the comprehensive briefing required for this "clearly unsettled area of Commission Law".

As Public Advocates has pointed out, this Commission has routinely included "fees on fees" in orders issued since mid-1986 (D.86-04-047, and D.86-07-009). Therefore, entitlement to compensation for this effort based on our prior decisions is not an issue.

AT&T-C raises an interesting nexus argument, but does not support it with any case authorities. Ultimately, we are persuaded that the amount of time expended in this effort was reasonable given the complexity of the issues and the hurdles Public Advocates faced in establishing eligibility. As Public Advocates has pointed out, it was required to file a supplemental eligibility pleading to address issues raised by the denial of eligibility in the 976 proceeding. On the basis of these extensive briefs, the Commission ultimately determined that Public Advocates was eligible for compensation (D.86-11-079, pages 157-171).

We will compensate Public Advocates for these activities, while denying its request for an additional \$2,713.50 related to the Reply.



VII. The Award

This award is calculated as follows:

F/MBE Contracts

|                  |  |                   |
|------------------|--|-------------------|
| R. Gnaizda       | 199.3 hrs @ \$150 @ 75% =                    | \$22,421.25       |
| M. Russell       | 120 hrs @ 75 @ 75% =                         | 6,750.00          |
| R. Marcantonio   | 255.5 hrs @ 50 =                             | 12,775.00         |
| B. Zimmerman     | 47.5 hrs @ 50 =                              | 2,375.00          |
| Dr. Joseph James | 8.5 days @ \$400 =                           | 3,400.00          |
| Kevin Williams   | 6.5 days @ 300 =                             | 1,950.00          |
| Michael Phillips | .75 day @ 1000 =                             | 750.00            |
|                  |  | <u>50,421.25</u>  |
|                  | less 25% adjustment for duplication with PSD | <u>-12,605.31</u> |
|                  | TOTAL FMBE AWARD                             | \$37,815.94       |

Bilingual Telephone

|               |                                 |                 |
|---------------|---------------------------------|-----------------|
| R. Gnaizda    | 31 hrs @ \$150                  | \$ 4,650.00     |
| M. Kumin      | 20 hrs @ 50                     | 1,000.00        |
| John Gamboa   | 2.5 days @ 400                  | 1,000.00        |
| Maria Navarro | 3.5 days @ 300                  | <u>1,050.00</u> |
|               | TOTAL BILINGUAL TELEPHONE AWARD | \$ 7,700.00     |

Fees

|              |                  |                 |
|--------------|------------------|-----------------|
| R. Gnaizda   | 50.7 hrs @ \$150 | \$ 7,605.00     |
| S. Campbell  | 50 hrs @ 80      | 4,000.00        |
| Y. Vera      | 13 hrs @ 50      | 650.00          |
| B. Zimmerman | 22 hrs @ 50      | <u>1,100.00</u> |
|              | TOTAL FEES AWARD | \$13,355.00     |

Costs

|             |                    |
|-------------|--------------------|
|             | \$ 450.00          |
| TOTAL AWARD | <u>\$59,320.94</u> |

VIII. Interest

Public Advocates has requested that interest be added to its award in accordance with Commission precedents (D.86-07-009).

This order will provide for interest commencing on July 4, 1987 (the 75th day following the filing of Public Advocates' Reply to AT&T-C's Response), and continuing until payment of the award is made. In previous awards we have keyed the

running of interest to the 75th day following filing of the initial request, but both AT&T-C and Public Advocates requested extensions of time for their response and reply, in order to fully address the issues raised in these compensation filings. Thus, the compensation issue was not really submitted for our consideration until Public Advocates filed its Reply, and our award of interest recognizes this fact. To allow for interest dating from an earlier period would penalize the ratepayers (who ultimately pay the additional interest) whenever the parties request additional time to prepare these responses and replies.

Findings of Fact

1. Public Advocates has requested compensation totalling \$109,725.00 in connection with its participation in this proceeding, citing substantial contributions in the areas of Female/Minority Business Enterprises (F/MBE) and bilingual issues.
2. Public Advocates subsequently adjusted its Request to delete certain hours spent in legislative endeavors, to correct a minor mathematical error, and to claim additional attorney hours spent in its Reply to AT&T-Communications' (AT&T-C's) Response; as a result of these changes, its revised Request is \$111,483.50.
3. The Rules of Practice and Procedure allow augmentation of a fee request in very limited circumstances, as previously discussed, but there is no basis for entertaining the incremental increase associated with the Reply and, further, there is no reason why the bulk of the analysis contained in the Reply could not have been included in the initial request.
4. After the submission of the record, minority/women business procurement legislation (AB 3678) was signed into law by the Governor (Chap. 1259, 1986 Stats.); this legislation was determinative of several disputed F/MBE issues, including verification and goal setting, and D.86-11-079 (the Interim Opinion), so found.

5. Public Advocates claims a substantial contribution on the issues of verification and goal setting, based on its active legislative efforts and the existence of a causal connection between its involvement in this proceeding and passage of AB 3678.

6. The authorities Public Advocates cites in support of its substantial contribution on issues impacted by AB 3678, interpret the private attorney general theory, as codified in Code of Civil Procedure (CCP) Section 1021.5, where the award of attorneys fees is predicated on "the enforcement of an important right affecting the public interest."

7. The applicable standard for awarding attorneys' fees under Public Utilities (PU) Code Section 1802(g) is that the "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 one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented..."

8. Based on the applicable standard, Public Advocates made a substantial contribution to our consideration of the F/MBE issue, since its arguments on (1) the applicability of Commission F/MBE requirements, (2) AT&T-C program non-effectiveness, (3) the need for a separate Filipino-American reporting category, and (4) the appropriateness of the 51% eligibility criteria, were adopted; moreover, but for the impact of passage of AB 3678 on our consideration of the merits, we would have adopted Public Advocates' arguments on verification and goalsetting in some fashion, as demonstrated by our explicit acknowledgement of Public Advocates' contributions in the Interim Opinion .

9. Public Staff Division also contributed to our resolution of several F/MBE issues, including (1) applicability of Commission F/MBE requirements to AT&T-C, (2) AT&T-C program effectiveness, and (3) the 51% eligibility criteria. PSD's contributions are evident from the discussion of the issues in the Interim Opinion; therefore

we will reduce Public Advocates' compensation attributable to the F/MBE issue by 25% to account for this duplication with PSD.

10. Public Advocates made a substantial contribution to the bilingual telephone issue, given its persistence in raising the issue in this forum, and its active role in preparation of Joint Exhibit 1; it should be compensated fully for the hours claimed.

11. An adjustment of 25% to the F/MBE portion of the fee award, applicable to the hours claimed by attorneys Gnaizda and Russell, will be made to account for certain efficiency/duplication issues highlighted in AT&T-C's Response, as more fully detailed in this opinion.

12. In accordance with prior Commission precedents, Public Advocates will be compensated for its work on this fee request; no adjustment to this portion of the claim is merited, given the complexity of the issues addressed, the careful legal analysis undertaken, the careful documentation of the claim, and the difficulties inherent in overcoming the eligibility question.

13. Given the nature of Public Advocates' involvement in this proceeding, its cost figure of \$450 appears reasonable, and should be allowed in its entirety.

14. Based on the information presented by Public Advocates detailing market rates for attorneys in the San Francisco Bay Area and the declarations appended to its compensation filings, as well as the expertise of the particular attorneys, and our judgment of the complexity of the matters involved, we have computed the fee award on the basis of the following hourly rates:

Mr. Gnaizda, \$150 per hour; Ms. Russell, \$75 per hour; Ms. Campbell, \$80 per hour; law student clerks, \$50 per hour.

15. Based on the itemization of costs and our analysis of the parties' arguments, we believe the amounts Public Advocates seeks for its experts in the bilingual and F/MBE areas are fully justified, and allowable in their entirety.

16. Consistent with the preceding Findings of Fact, we will award \$37,815.94 for F/MBE issues, \$7,700.00 for bilingual issues, \$13,355.00 for fees, and \$450.00 for costs. The total award is \$59,320.94.

Conclusion of Law

1. The applicable standard for awarding compensation based on a substantial contribution finding is that the customer's presentation has substantially assisted the Commission's decisionmaking process via adoption in whole or in part of the customer's position; the Code of Civil Procedure Section 1021.5 standard, i.e., the "successful enforcement of an important right affecting the public interest," is not the standard used by this Commission under P.U. Code § 1801 et seq.

2. Public Advocates should be compensated for its substantial contribution to D.86-11-079 in the F/MBE and bilingual telephone areas, consistent with the preceding discussion and Findings.

3. AT&T-C should be ordered to pay Public Advocates the sum of \$59,320.94 as compensation for Public Advocates' substantial contribution to D.86-11-079.

O R D E R

IT IS ORDERED that:

1. AT&T Communications of California, Inc. (AT&T-C) shall pay Public Advocates \$59,320.94 within 15 days from today, as compensation for Public Advocates' substantial contribution to D.86-11-079; AT&T-C shall also pay Public Advocates interest on the principal amount of \$59,320.94, calculated at the three-month commercial paper rate, commencing on July 4, 1987, and continuing until payment of the award is made. Under Rule 76.61 AT&T-C may include the expense of such payment in its calculation of results of operations for Phase 2 of this proceeding.

2. Public Advocates is placed on notice that it may be subject to audit or review by the Commission's Evaluation and Compliance Division pursuant to Rule 76.57; therefore it shall maintain and retain adequate accounting records and other necessary documentation supporting all claims for intervenor compensation. It shall maintain such records in a manner that identifies specific issues for which compensation will be requested, the actual time spent by each employee, fees paid to consultants and any other compensable costs incurred.

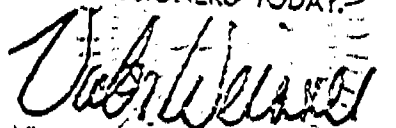
This order is effective today.

Dated OCT 28 1987, at San Francisco, California.

STANLEY W. HULETT  
President

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

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

  
Victor Weiss, Executive Director

JB

underlying vendor survey work done by him which provided the basis of the rejected testimony). As to Law Clerk Vera, Public Advocates Request (Appendix 2) shows only that this law clerk spent 4 hours in "court/hearing" and 2 miscellaneous hours in November, 1986 (months after the submission of this case).

In its Reply to AT&T-C's Response, Public Advocates did not address these criticisms.

We will not reduce the claim for Law Clerk Zimmerman's time since, regardless of whether he appeared as an expert witness or merely recited the results of his survey. We do not intend to get embroiled in that dispute. We believe the hours expended for the effort that was performed are reasonable. We will disallow the hours claimed for Law Clerk Greenwald (55.5), on the basis that this material did not make its way into the record. Similarly, we will disallow the 6.0 hours claimed for Law Clerk Vera during November, since these hours could not have related to this particular proceeding, which was submitted in August of 1986.

F. Experts

Public Advocates maintains that the amount submitted for each of its experts is well within reasonable market rate ranges. In the FMBE area, Public Advocates is requesting compensation for Dr. Joseph James (\$3,400), Kevin Williams (\$1,950), and Michael Phillips (\$750). In the bilingual area, it is requesting fees for John Gamboa (\$1,000) and Maria Navarro (\$1,050).

It maintains that Dr. James, the President of Utility Contract Procurement, an Oakland-based consulting firm, has advised Minority and Female businesses for 12 years; Dr. James was the Commission's expert witness and chief consultant in 1981 in C.10308 on Minority and Female business records of the Public Utilities. He was also an expert witness in the Commission's December 1985 hearings on Pacific Bell's FMBE record, and has been hired since by Pacific Bell as consultant on these issues. Dr. James participated in 3-1/2 days of hearings as an observer, and he assisted in

preparation of discovery, work on verification, development of goals, and analysis of areas for improvement in the AT&T-C program. Public Advocates is requesting a rate of \$400 per day, which it believes is reasonable in light of his recent 1986 compensation of \$14,000 for 15 days of work, or an average of \$933 per day in two contracts he had with Pacific Bell.

Kevin Williams is presently a contract compliance representative with the San Francisco Human Rights Commission; he has nearly 10 years' experience working with minority businesses and female businesses in contract procurement. He has also testified several times before the Legislature on these issues. Mr. Williams was involved in 3 days of hearings, as an observer; he also assisted in actual verification, development of the new AT&T-C plan, and analysis of AT&T-C contracts. Public Advocates is requesting \$1,950 for his work spanning 6-1/2 days.

Michael Williams is an economist and business expert with extensive experience in analyzing statistical data pertaining to corporate programs. His present market rate as a consultant is \$2,000 per day, given payment at this rate by Scandinavian Airlines, W. B. S. Department Stores, and Jergesen Lehl Corporation. He was recently paid the equivalent of \$1,000 per day by Pacific Bell in connection with the marketing abuse matter. Mr. Phillips' requested expert fee for this case as half his usual rate, \$1,000 per day for a total of \$750.

In the bilingual area, compensation is requested for John Gamboa and Maria Navarro. These people have previously provided expertise to Pacific Bell in the area of bilingual services and both testified in the prior Pacific Bell bilingual case hearings between 1981 and 1983. Mr. Gamboa was employed by Pacific Bell and its predecessor from 1970 through 1981, with a wide range of duties relating to the Hispanic Community. Ms. Navarro was a telephone company on-line employee for about 32 years. She is fully bilingual in Spanish and has been extremely active both within and