

APR 27 1988

Decision 88 04 058 APR 27 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND
ELECTRIC COMPANY for authority,
among other things, to increase its
rates and charges for electric and
gas service.

Application 85-12-050
(Filed December 27, 1985)

(Electric and Gas) (U 39 M)

Order Instituting Investigation into
the rates, charges, and practices of
Pacific Gas and Electric Company.

I.86-07-032
(Filed July 16, 1986)

(Electric and Gas) (U 39 M)

(See Decision 86-12-095 for appearances.)

OPINION ON REQUEST FOR COMPENSATION

Summary

This decision awards Public Advocates, Inc. (Public Advocates) \$40,133.75 for its contribution to Decision (D.) 86-12-095 in Pacific Gas and Electric Company's (PG&E) general rate case proceeding.

Procedural Background

On February 24, 1987, Public Advocates filed its request for an award of \$82,203.50 as compensation for its efforts on Female/Minority Business Enterprise (F/MBE) issues in PG&E's 1987 test year general rate proceeding. On April 2, 1987, PG&E filed its response to Public Advocates' request. On April 27, 1987, Public Advocates filed its reply to PG&E's response. Also, it requested an additional \$4,135.00 in fees for filing its reply.

Public Advocates Fee Request

Public Advocates states that in order to fully appreciate the significance of its contribution in the F/MBE area, the Commission should take into account its:

- o Unique and solitary advocacy of the complex F/MBE issues before this Commission since 1977.
- o Major role in bringing this Commission to a position where utility rate hearings must address the F/MBE rate issue.
- o Efforts in requiring utilities to break down their reporting and goals separately stated for all major minorities and women.
- o Efforts in requiring utilities to specifically break down and report their annual F/MBE performance by subcategories of products and services.
- o Efforts which were opposed by PG&E to secure utilitywide or generic resolution of the issues presented in this case.
- o Disputing the accuracy of PG&E's F/MBE statistics reported to this Commission and urging, at all relevant times from at least 1984, an independent audit and verification system.
- o Urging since 1980, short- and long-term numerical goals, such as mandated by the newly enacted Assembly Bill (AB) 3678.
- o Urging 51% ownership and control for qualification as an F/MBE.
- o Continuously, over the last five years, providing to both the Legislature and this Commission a wide range of unique and unduplicated expertise and advocacy on F/MBE matters that this Commission now urges and PG&E has reluctantly acquiesced to, including independent verification, 51% control to qualify as an F/MBE, and long-term numerical goals.

- o Providing the impetus, consulting, and expertise to the Legislature in regard to the uniquely successful passage of AB 3678.
- o Providing unparalleled expertise to this Commission and PG&E in regard to the management and technical aspects of how to improve the dollar and percentage amount of contracts to minorities and women.
- o Major role that resulted in the Order Instituting Rulemaking (R.) 87-02-026 which addresses long-range goals, verification, and many other F/MBE issues raised by Public Advocates.

The following is a summary of Public Advocates' request:

Minority/Women Contracts

R. Gnaizda (Attorney) 208.4 hours x \$225 per hour	\$46,890.00
M. Russell (Attorney) 165.5 hours x \$90 per hour [\$14,895.00]*	11,916.00
R. Marcantonio (Law Student Clerk) 234.5 hours x \$50 per hour [\$11,725.00]*	9,380.00
B. Zimmerman and Y. Vera (Law Student Clerks) 146 hours x \$50 per hour [\$7,300.00]*	5,840.00
Total Attorney/Law Student Clerk Time	74,026.00

Experts

Dr. Joseph James 7 days x \$400 per day	2,800.00
Kevin Williams 6.5 days x \$300 per day	1,950.00
Total Expert Time	4,750.00
Total F/MBE Issues Time	78,776.00

* Discounted 20% to ensure that "rate and hours are fair and to avoid duplication."

Attorney Fees Time

R. Gnaizda (Attorney) 7.9 hours x \$225 per hour	1,777.50
S. Campbell (Attorney) 15 hours x \$80 per hour	1,200.00
B. Zimmerman (Law Student Clerk) 20 hours x \$50 per hour [\$1,000.00]*	800.00
Total Fees Time	3,777.50

Costs

Minority/Women Contracts and Fees (reasonable costs include copying, telephone, postage, and attorney travel and expenses)	650.00
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Additional

Preparation of Reply	4,135.00
Total	87,338.50

* Discounted 20% to ensure that "rate and hours are fair and to avoid duplication."

With regard to the above headings in its fee request, Public Advocates explains that the issue of "minority/women contracts" represents time spent in pursuit of achieving substantial contract gains for women and racial minority owned businesses, culminating in AB 3678 and D.86-12-095. And "fees" represents Public Advocates' briefs filed regarding eligibility for compensation and to substantiate requested fees in this application. According to Public Advocates, allocation by issue is simple because the areas of minority contracts and fees required entirely different work, at different times, and often by different people.

Public Advocates states that it handled the key issues in an efficient manner. The substantial contributions were made with utmost speed and economy such as the expedited examination of PG&E verification data which was provided late.

Public Advocates notes that its attorneys and law student clerks maintained time sheets indicating the number of hours devoted directly to each PG&E issue. Public Advocates believes that its efficiency was enhanced by a policy of delegating, where appropriate, substantial amounts of work to qualified law students and young attorneys. Public Advocates' filing sets forth the qualifications and basis for the requested hourly rates for its team members and expert witnesses.

According to Public Advocates, many of the hours requested were necessitated by PG&E's failure to produce adequate and timely documentation of its statistics and failure to secure an independent audit. Public Advocates notes PG&E's numerous delays in deciding to have an independent audit of its statistics, its failure to complete the audit on time, and the lateness of the submission of its figures. Due to lack of a timely independent audit, Public Advocates contends that it was compelled to personally examine and testify in regard to PG&E's voluminous records. This occurred solely due to PG&E's late filing of the independent audit and its refusal to provide to anyone but Mr. Gnaizda the opportunity to examine the underlying data upon which the independent audit was based.

Lastly, Public Advocates argues that despite vigorous opposition, it has spent a little under 375 attorney hours on the minority/contracts issue. In comparison, according to Public Advocates, the final economic gain to ratepayers is in the multimillions and the practical gains are immeasurable.

Response of PG&E

PG&E disputes Public Advocates' assertions that it made the substantial contributions, within the meaning of Commission Rule 76.52(g), that it claims. PG&E contends that Public Advocates contributed only unproductive arguments and did not make a substantial contribution to the decision. Furthermore, PG&E argues that even if Public Advocates is found to have made a substantial contribution on one or more issues, its request completely lacks the detailed description of its participation necessary to substantiate its claim for compensation. For these reasons, PG&E contends that Public Advocates' claim, after adjustments for excessive hourly rates and unnecessary time allocations, should be reduced by 75% to a total amount of no more than \$11,866.25.

PG&E notes that Public Advocates claims that it substantially contributed to the resolution of the F/MBE issues in the areas of (a) independent verification, (b) percent of ownership to qualify as an F/MBE, and (c) long-term numerical goals. PG&E's evaluation of Public Advocates' contribution on these issues is set forth below:

Independent Verification

PG&E takes exception to Public Advocates' claims for credit for "prompting" PG&E to conduct a verification study.

PG&E states that this is simply not the case. PG&E, on its own initiative and without regard to Public Advocates, concluded that it needed to evaluate the effectiveness of its F/MBE certification program. PG&E directed the firm of Doyle, Williams and Company (Doyle-Williams), certified public accountants, to review the ownership/control status of 200 F/MBE firms listed in PG&E's F/MBE directory. Verification reports from the study submitted shortly before the beginning of the F/MBE phase of the hearings caused PG&E to revise its F/MBE statistics downward.

PG&E does not dispute the fact that the issue of verification of F/MBE eligibility received a great deal of

attention. PG&E submits that the Commission, however, does not consider the amount of time that is spent on an issue to be an indicator of substantial contributions. To do so would be to place form over substance and would allow parties to receive compensation simply based on the amount of disruption they created. And PG&E notes that the Commission appears to recognize this distinction:

"As stated previously an inordinate amount of hearing time was spent arguing about PG&E's dollar statistics for contracts awarded to F/MBEs. (Dec., p. 124, emphasis added.)

"Thinking ahead to PG&E's next general rate case, we wish to avoid another unproductive round of argument on how PG&E's pre-1987 statistics should be adjusted for the 51% standard. (Dec., p. 131, emphasis added.)

"We agree that, at least in this rate case cycle, there has to be an independent verification of F/MBE status because we do intend to avoid a repeat of the seemingly endless argument that occurred in this proceeding with regard to statistics." (Dec., p. 123; emphasis added.)

PG&E argues that this is hardly the language commending Public Advocates for its claimed substantial contribution on the verification issue that Public Advocates would have the Commission believe exists.

Percent of Ownership to Qualify as an F/MBE

PG&E contends that the Commission's decision to require PG&E to use a 51% standard was not due to Public Advocates' efforts.

PG&E argues that Public Advocates vigorously disputed PG&E's use of a 50% ownership F/MBE qualifying standard and contended that a 51% ownership standard was appropriate. Public Advocates, however, was simply unable to show that the 50% standard used by PG&E was "universally rejected" in light of the fact that the 50% standard is used by a number of federal agencies and was

upheld by the U.S. Supreme Court in Fullilove v Klutznich (1980) 448 U.S. 448. In fact, PG&E believes that the Commission decision tacitly acknowledged that PG&E's 50% ownership standard was logical. Notwithstanding these considerations, the Commission's decision to order PG&E to use a 51% ownership standard was the desire for uniformity in data collection verification and the fact that AB 3678 independently mandated the use of 51%. In short, PG&E contends that the Commission did not, as Public Advocates suggests, base its decision on Public Advocates' efforts.

Statistics

PG&E acknowledges that Public Advocates' participation was helpful in highlighting the difficulties associated with accumulating reliable statistics. However, the company rejects Public Advocates argument that PG&E's statistics did not demonstrate steady progress in F/MBE usage. Rather, PG&E submits that the Commission endorsed PG&E's efforts to increase its F/MBE vendor base and agreed that steady progress would be indicated by growth in vendor numbers rather than just an increase in the dollar amounts spent at the top 20 F/MBE firms. Further, PG&E notes that the Commission rejected Public Advocates' argument that there had been a drop in the dollar amount that PG&E awarded to F/MBEs between 1984 and 1985 and stated that "Public Advocates is basing its argument on an improper comparison."

Goals

PG&E notes that Public Advocates argued strongly that F/MBE goals of between 30% and 40% were appropriate. Public Advocates based its arguments largely on the purported experience of public agencies.

PG&E further argues that the Commission rejected Public Advocates' position that goals for PG&E should require between a 30-40% F/MBE procurement within five years. The Commission determined that public agency goals were not applicable to regulated utilities, for various reasons.

Substantial Contribution

PG&E contends that Public Advocates' failure to make substantial contributions in this rate case is evident from its request. According to PG&E, Public Advocates' request for compensation is simply a generalized "laundry list" of its activities in the area of F/MBE programs since 1977 and is completely devoid of the specificity required by Rule 72.76:

"Rule 72.76 also requires the request to describe how the participant has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of an issue. [Application of Environmental Defense Fund (July 2, 1986) D.86-07-009, p. 6.]

PG&E submits that included in the list, for example, is a recitation of Public Advocates' legislative activities supporting the adoption of AB 3678. PG&E points out that the Commission has no authority under Article 18.6 to compensate intervenors for their legislative activity. Nor does the article contemplate that PG&E ratepayers should be asked to compensate intervenors for their activities in other proceedings. However, according to PG&E, this is what Public Advocates apparently believes since it has listed as a significant accomplishment in this case its "efforts in requiring utilities to break down their reporting and goals separately stated for all major minorities and women." (Request, p. 4.)

PG&E agrees that Public Advocates' particular efforts described above occurred as a result of various Commission cases between 1980 and 1984 including one involving Southern California Edison Company. However, PG&E points out that those efforts are not compensable in this proceeding.

Although vocal and active on a number of issues dealing with the F/MBE issue, PG&E contends that Public Advocates failed to contribute substantially to the Commission's decision within the meaning of Rule 76.52(g). Therefore, PG&E argues that Public

Advocates' request should be reduced by at least 75% with additional reductions to be discussed.

Hourly Rates

Noting that fee requests must be reasonable (Rule 76.22(a)), PG&E argues that Public Advocates has not justified why Attorney Gnaizda should receive \$225 per hour. PG&E points out that this rate is much more than other qualified attorneys receive for practicing before the Commission. PG&E recommends that Attorney Gnaizda be awarded an hourly rate of \$140.00.

PG&E does not dispute Attorney Russell's hourly rate, but believes that Public Advocates should receive no compensation for Attorney Campbell's time since she did not participate in the hearings. If, however, the Commission awards Public Advocates compensation for Attorney Campbell's input on attorneys' fees, PG&E recommends that her hourly rate be reduced to \$30. PG&E also disputes the \$50 hourly rate Public Advocates requests for the three law student clerks. According to PG&E, law student clerk salaries are generally "rolled into" attorneys fees as are salaries of the support staff. Consequently, PG&E recommends that no compensation be awarded for the three law student clerks in this case.

Expert Witness Fees

PG&E notes that the Commission may award reasonable expert witness fees. (Rule 76.53.) PG&E points out that the Commission has said, "[t]ypically, expert witnesses are compensated at a lower rate than attorneys." (D.86-07-009, p. 6.) Consequently, PG&E recommends that Public Advocates' request for \$400 per day for Dr. James and \$300 per day for Mr. Williams be reduced to \$200 per day for each witness.

Hours

PG&E also takes exception to what it alleges are excessive hours. PG&E notes that Public Advocates is claiming that over 373 attorney-hours or over 46 8-hour workdays were spent on

the F/MBE issue. This does not include time spent on attorney fees, law student clerk time, or expert witness time. Furthermore, PG&E notes that Attorney Gnaizda apparently spent nearly 20 hours in "meetings"; Attorney Russell, responsible in large part for witness preparation (Request, p. 19) spent over 118 hours in "meetings." Public Advocates' request, however, only seeks compensation for 108 hours of expert witness time. PG&E wonders with whom Attorney Russell and Attorney Gnaizda were meeting and why ratepayers should be expected to pay for excessive hours.

Detailed Description of Services

PG&E argues that Public Advocates has failed to provide the detailed description of their services to support their request as required. (Rules 76.26 and 76.56.) Although intervenors are required to support their requests for compensation with adequate original time sheets (D.86-07-009, p. 4), PG&E points out that Public Advocates has chosen not to do so but instead has provided the following categories along with total hours spent: court/hearing, pleading/research, meeting, telephone, miscellaneous, case administration, and correspondence.

PG&E submits that these categories are so generalized that it is impossible to determine how much time was spent on constructive activities regarding those issues where Public Advocates may be found to have made a substantial contribution or if there was a duplication of effort. Further, PG&E contends that hours under "miscellaneous" and "case administration" should be totally discounted. According to PG&E, these categories do not even approach the detailed description of services required by Rules 76.26 and 76.56.

Lastly, PG&E argues that Public Advocates has not substantiated its claim of \$650 for expenses. (Rule 76.26.) PG&E recommends that this amount also be reduced by 75%.

Preparation of Fee Request

PG&E notes that Public Advocates seeks \$3,775.50 in compensation in preparing its request.

PG&E points out that the Commission allows intervenors compensation only for time spent on those issues resulting in a "substantial contribution." (D.86-07-009, p. 6.) Logically, therefore, reimbursable time spent in preparing requests for attorneys' fees is only that time which pertains to the intervenor's substantial contribution. Consistent with its other recommended reductions, PG&E recommends that Public Advocates' request for this item be reduced by 75%.

PG&E's Recommendation

Taking into account the various recommended reductions, PG&E's recommendation is set forth:

1. F/MBE Issue

Legal

Attorney Gnaizda	\$140 per hour x 202.1 hours	=	\$28,294.00
Attorney Russell	\$90 per hour x 163.5 hours	=	14,715.00
3 law student clerks			0

Expert Witnesses

Dr. J. James	\$200 per day x 7 days	=	1,400.00
Mr. K. Williams	\$200 per day x 6.5 days	=	<u>1,300.00</u>
			45,709.00

2. Attorneys Fees

Attorney Gnaizda	\$140 per hour x 7.9 days	=	1,106.00
Attorney Campbell			0
Law student clerk			0
Expenses			<u>650.00</u>

Total \$47,465.00

47,465 x .25 = \$11,866.25

Public Advocates Reply

Public Advocates takes strong exception to PG&E's proposed hourly rates of pay for its attorneys, law student clerks, and expert witnesses. Public Advocates sets forth in detail the basis for its requested rates in its filings. Public Advocates argues that PG&E's position is deliberately out of touch with reality and may have no purpose other than to seek to prevent effective and fair advocacy on behalf of ratepayers.

Further, Public Advocates argues that the rules should be the same for all parties. According to Public Advocates, unless this Commission is prepared to conclude that intervenors must operate under different and far more unfavorable rules than it has implicitly approved for PG&E, it must and should uphold in full Public Advocates modest compensation request.

Public Advocates asks: How can such poorly paid intervenors effectively or fairly litigate issues of multimillion dollar consequence to the ratepayers when confronted with a huge army of \$100,000 per year attorneys and experts, all of whom are paid for by the ratepayers?

Public Advocates points out that all of its records were available to PG&E. Yet PG&E refused, despite Public Advocates' unrestricted written offer, to examine any of Public Advocates' voluminous underlying time sheet records.

Also, Public Advocates requests that the Commission should note that the Division of Ratepayer Advocates (DRA) specifically commended Public Advocates for its efforts.

Public Advocates finds PG&E's recommendation to cut Public Advocates' compensation by 86% (that is, allow only 14%) is perplexing since there was absolutely no duplication with DRA staff. Public Advocates notes that staff counsel rarely, and then only briefly, examined witnesses, had no investigative work performed, and offered only one in-house expert who only briefly addressed some of the issues. All of the key investigative work,

prepared testimony (18 witnesses), expert witnesses, and briefing of the issues were accomplished by Public Advocates. Further, it was Public Advocates alone that initiated the issue and brought it to a successful generic conclusion through its efforts to help secure passage of AB 3678.

Further, Public Advocates finds PG&E's recommendation that Public Advocates' fee should be cut by 86% is also surprising in light of the fact that Public Advocates, in order to avoid even the appearance of duplication, voluntarily reduced its claim for Attorney Russell and all of its law students by 20%.

Public Advocates argues that the case law, as well as public policy, requires that Public Advocates be compensated for this substantial contribution even though part of its success was achieved through related legislation. Although the case law also supports compensation for actual time spent in securing legislation, Public Advocates seeks no compensation for any time it has expended on this successful legislation (AB 3678); it only seeks compensation for its Commission work.

Public Advocates submits that it was the intervenor's efforts that propelled the Commission to effectively address the F/MBE issue. Public Advocates' substantial contributions to this case are best exemplified by the fact that the Commission effectively addressed the F/MBE problem after eight years of effort by Public Advocates and its clients. Public Advocates was the first party to bring this issue to Commission attention and successfully persuaded the Commission to take a comprehensive generic look at the problem.

Public Advocates further submits that PG&E, in seeking to both deprecate the importance of the F/MBE issue and Public Advocates' unique role, also ignores the fact that Public Advocates was, in effect, due to the extraordinarily limited role of the Commission staff, the only adversarial party in the proceeding. Public Advocates contends that PG&E has also ignored the fact that

the entire investigation, presentation, cross-examination, and briefing of the issues was performed by Public Advocates.

As set forth in its Request for Compensation, it is Public Advocates' position that its contributions were unique and key to each and every decision by this Commission relating to:

- a. Disclosing the inadequacy of PG&E's records and statistics.
- b. Requiring independent and generic verification programs.
- c. Requiring generic long-term goals for all utilities.
- d. Requiring 51% ownership as the precondition for qualification as a minority or woman-owned business.

According to Public Advocates, this has been achieved in the most effective and efficient form by a unique combination of investigation, hearing, briefing, and successful legislation (AB 3678) that, combined, ensured a greater opportunity for minority and women-owned businesses:

- a. Without need for rehearings.
- b. Without a time-consuming appeal.
- c. In a fashion, that is likely, through its generic solution, to reduce the need for future hearings and to enable PG&E to operate its \$1.5 billion per year contract program in a far more accurate, efficient, and predictable manner.

Public Advocates argues that the crucial F/MBE sub-issue that occupied the vast majority of time was PG&E's inadequate and inflated F/MBE statistics and the related need for an independent audit to ensure that present and future Commission actions would be based on reality rather than inaccurate PG&E propaganda. Public Advocates notes that since July 1984, it sought a mechanism that would ensure accurate data. Public Advocates pursued this systemic

change through meetings, letters, and data requests to PG&E; through meetings with all affected utilities and staff; and via legislation. Throughout most of the proceedings herein, PG&E opposed these verification suggestions and recommendations. And it was PG&E that was responsible for prolonging the proceeding by refusing to stipulate to the inaccuracy of its statistics.

Public Advocates submits that both California and federal law on attorney's fees is clear - a substantial contribution is made if a remedy occurs through subsequent legislation, or other proceedings, so long as the petitioner or plaintiff was the catalyst or initiator behind the legislation. Notwithstanding the law, as to the verification issue, Public Advocates contends that this Commission need not reach this conclusion since Public Advocates made a substantial contribution within the proceedings, as it did in regard to the 51% minority/women ownership issue. Public Advocates submits that although it did not directly prevail on the long-term goal issue within the proceedings, it did prevail as a result of the legislation it helped initiate, draft, and for which it provided expert material.

Public Advocates states that although the law is also clear that attorneys are entitled to be compensated for time expended on efforts ancillary to the legal arena, Public Advocates has claimed no time for any of its legislative efforts; it seeks compensation only for its Commission time.

Lastly, Public Advocates argues as to the extraordinary monetary value of its contribution. Public Advocates notes that over the last three years, PG&E has awarded an aggregate of \$4 billion in outside contracts. Over a similar three-year time period the seven largest utilities affected by AB 3678's generic solution have awarded contracts of almost \$20 billion. As the factual findings incorporated in the legislation set forth, and as PG&E's F/MBE manager Heilmann readily acknowledged under cross-examination, accurate data and the achievement of substantial

increases in minority and women contracts will promote competition. Public Advocates contends that such increased competition will increase efficiency, which will, in turn, reduce costs to the utilities and eventually to the ratepayers. In this context, the attorney's and expert fees sought by Public Advocates represent less than one-tenth of 1% (.001%) of PG&E's F/MBE contracts in any one year and substantially less than one-hundredth of 1% (.0001%) of PG&E's overall outside contracts in any one year.

Discussion

Rule 76.58 requires us to determine whether Public Advocates made a "substantial contribution" to the decision in this proceeding; in addition, we must describe that substantial contribution, and 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 has 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.)

Accordingly, we proceed to analyze Public Advocates' involvement in the development of the issues upon which its compensation request is based.

It should be noted that at the time of PG&E's general rate case, Public Advocates was participating in an AT&T Communications of California (AT&T-C) proceeding which contained many of the same issues. Public Advocates testimony and witnesses were mostly the same in both proceedings. However, notwithstanding that many of the issues were the same in both proceedings, there were differences. These differences, which are categorized as PG&E specific issues, will be addressed after we deal with the areas common to both proceedings.

Turning to the issues that were common in both proceedings, we note that in its opinion on Public Advocates' request for compensation in the AT&T-C proceeding the Commission concluded:

"Findings of Fact

- "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." (D.87-10-078, p. 42.)

We note that, except for Finding of Fact 8.(1) through (3), above, these findings of fact are applicable to PG&E since the issues are the same. And since the issues are fully explained in the AT&T-C decision (D.87-10-078), we will adopt these findings without further discussion. Accordingly, we conclude that Public Advocates did provide substantial contribution to the Commission's decision in PG&E's general rate case on the following issues: (1) independent verification, (2) percent of ownership to qualify as an F/MBE, and (3) long-term numerical goals.

PG&E Specific Issues

Aside from the generic F/MBE issues discussed above, for purposes of this fee request it is important to note that a significant portion of the time was spent on PG&E specific issues. The following excerpts from the opening statements of counsel provides the background:

"Mr. Peters: . . .

"PG&E's program is not based on set-asides or bid preferences but on providing female and minority businesses with information necessary to compete and a reasonable opportunity to compete with other vendors for our business.

"PG&E is increasingly facing competition from a variety of sectors. That competition is emerging in both its gas and electric business.

"As with any business, we must adhere to programs and policies which have as their objective lowering costs, not those which will add costs by creating additional administrative burdens or not allowing PG&E to accept the lowest responsive bid.

"PG&E is aware that some participants in this proceeding will attempt to suggest that the company's results are suspect. Those parties will suggest that additional efforts must be put into verification of vendor status and to cleaning up statistics.

"Those same parties will be awkwardly silent on how the cost of the additional programs should be shouldered. They will be equally silent on the issue of whether the benefits which might result will justify the costs.

"Those parties will also tout the fact that PG&E's results pale in comparison to those of the public sector.

"What they won't say is that the commodities that those governmental agencies purchased are different than the electric and gas equipment PG&E purchases.

"They won't say that those agencies have set-asides and bid preferences which increase the cost of those purchases.

"And, finally, they won't say that the results of those agencies include the subcontract dollars which go to females and minorities, while those of PG&E are only the prime contract dollars." (TR. 3272-3274.)

"Mr. Gnaizda: . . .

"What Mr. Peters has stated is not true.

"PG&E has not been able to demonstrate significant much less any progress in regard to either the dollars or percentages, in fact, as we will demonstrate, their percentage of contracts to minorities and women has decreased from 1981.

"All they can demonstrate is that they have the best statistical record, this is not true, of any of the regulated utilities. That is all they can show.

"They have used that record to deceive this Commission, to deceive the Legislature, and to prevent any action.

"This week is the showdown.

"This week we will demonstrate that PG&E is unreliable and has knowingly accepted incorrect statistics to bolster its poor record.

"But let's examine the statistics they claim are accurate, for a moment, and let's compare them, first, with public agencies.

"They claim they are different than public agencies. In fact, Mr. Cordero, who will testify from the Office of Public Works in Oakland, they offer no preferences, yet their record is 23 percent minority versus PG&E's pitiful record which we contend is only 2 percent.

"All of the public agencies have on an average of 23 percent for minorities, as opposed to record of 2 percent." (TR. 3275-3276.)

Based on the above, the PG&E specific issues raised by Public Advocates are: (1) the F/MBE statistics of public agencies are directly applicable to PG&E, (2) PG&E has not demonstrated significant progress with regard to F/MBE contracts awarded, and (3) PG&E's statistics are unreliable and it has knowingly accepted incorrect statistics to bolster a poor record.

Turning to the question of applicability of public agency statistics to PG&E, we note that the cross-examination of Public Advocates witnesses Cordero and Oliver established that public agencies have an eight-step exemptive process whereby subcontract dollars of non-F/MBE prime contractors are counted as F/MBE achievement (TR. 3746). In comparison, PG&E takes credit only for

contracts awarded to F/MBE prime contractors. This is a significant difference. Therefore, the Commission quite correctly determined that "no direct comparison of public agency and utility F/MBE statistics is possible" and "public agency goals of 20% and 30% are not applicable to regulated utilities." (D.86-12-095, p. 133.)

With regard to the alleged lack of significant progress and incorrect statistics employed by PG&E, the Commission concluded:

"In summary, while we find that the F/MBE statistics we have to work with in this proceeding leave much to be desired, we reject Public Advocates' argument that there has been a drop in the dollar amount awarded to F/MBE contractors between 1984 and 1985. The reason, as mentioned before, is that PG&E's 1985 statistics are adjusted downward for the Doyle-Williams' study, the 1984 statistics are not, and Public Advocates is basing its argument on an improper comparison." (D.86-12-095, p. 128.)

But the point is that Public Advocates raised these issues, devoted a vast amount of time on preparation, took up a considerable amount of hearing time, but did not prevail. While all the blame for the "inordinate amount of hearing time" and "the seemingly endless argument that occurred in this proceeding with regard to the statistics" is not entirely Public Advocates fault, nevertheless, it was responsible for the major portion of nonproductive time because it, knowingly or unknowingly, resorted to an "improper comparison." (D.86-12-095, p. 128.)

Also, we note that PG&E shares some responsibility in this matter. While we acknowledge that PG&E was one of the first utilities to submit an independently audited verification study, nevertheless, it had plenty of notice that Public Advocates intended to raise these issues. Accordingly, the Commission noted:

". . . PG&E's verification study by Doyle-Williams was issued late. PG&E is not without

blame for not commissioning the study earlier. Doyle-Williams was not at fault. Because of the lateness of the study, Public Advocates did not have all the time it would have liked to have had to analyze the report." (D.86-12-095, p. 124.)

We will take the lateness of PG&E's verification study into account in determining Public Advocates fee award.

Moving on to efficiency/duplication issues, we note that in the AT&T-C decision the Commission stated:

"C. Efficiency/Duplication Issues"

* * *

"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. . . .

"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 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."

* * *

"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." (D.87-10-078, pp. 18-22.)

We find that the above comments apply to the PG&E proceeding too. Public Advocates consumed an enormous amount of preparation time and hearing time, recycling its testimony and witnesses from one utility proceeding to another.

With regard to allocation of its time, Public Advocates did not provide an allocation by issue. Instead, under the heading Minority/Women Contracts, Public Advocates indicated the time spent by its team on all F/MBE issues for a total of \$78,776.00. In such cases, in the past, the Commission has divided the total number of hours by the number of issues and payment was made for the number of issues on which the intervenor prevailed. Using this simple formula approach, based on the preceding discussion, Public Advocates did prevail on three "generic F/MBE issues" (that were common to the AT&T-C proceeding), but did not prevail on the three PG&E specific issues. Therefore using the above formula approach, Public Advocates should be compensated for 50% of its time.

Setting aside the formula for the moment, and reviewing the total scope of PG&E's F/MBE proceeding, we conclude that the time spent on the generic F/MBE issues was about the same as for PG&E specific issues. The opening statements of counsel, set forth previously, summarizes where the emphasis was in the PG&E

proceeding. And Public Advocates did not prevail on any of these issues.

Therefore, taking into account that Public Advocates did not prevail on the statistics controversy, which was the cornerstone of its showing in the PG&E proceeding, and taking into account all the testimony of limited evidentiary weight that it submitted in both proceedings, we conclude that on the F/MBE issues portion of the fee request the compensable hours of attorneys' and law clerks' time should be reduced by 50%.

With regard to hourly rates, the Commission in the AT&T-C decision stated:

"Findings of Fact

- "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." (D.87-10-078.)

We will apply these rates to Public Advocates' fee request in this proceeding.

For its work on this fee request, in accordance with prior Commission precedents, Public Advocates will be fully compensated. However, we will deny its request for an additional \$4,135 related to its Reply since replies are not required and since this particular reply added nothing to Public Advocates' contribution. (D.87-10-078, Finding of Fact 12.)

Given the nature of Public Advocates' involvement in this proceeding, its out-of-pocket costs of \$650 appears reasonable, and should be allowed in its entirety.

Accordingly, we calculate Public Advocates award as follows:

F/MBE Award

R. Gnaizda (Attorney) 208.4 hours x \$150 per hour x .50	\$15,630.00
M. Russell (Attorney) 165.5 hours x \$75 per hour x .50	6,206.25
R. Marcantonio (Law Student Clerk) 234.5 hours x \$50 per hour x .50	5,862.50
B. Zimmerman and Y. Vera (Law Student Clerks) 146 hours x \$50 per hour x .50	3,650.00
Total Attorney/Law Student Clerk Time	31,348.75

Experts

Dr. Joseph James 7 days x \$400 per day	2,800.00
Kevin Williams 6.5 days x \$300 per day	1,950.00
Total Expert Time	4,750.00
Total F/MBE Issues	36,098.75

Preparation of Request

R. Gnaizda (Attorney) 7.9 hours x \$150 per hour	1,185.00
S. Campbell (Attorney) 15 hours x \$80 per hour	1,200.00
B. Zimmerman (Law Student Clerk) 20 hours x \$50 per hour	1,000.00
Total	3,385.00

Costs

Minority/Women Contracts and Fees
(reasonable costs include copying,
telephone, postage, and attorney
travel and expenses) 650.00

Additional

Preparation of Reply 0
Total \$40,133.75

This order will provide for interest commencing on the 75th day following the filing on February 24, 1987 of Public Advocates' Request for Consideration, and continuing until payment of the award is made. (D.87-10-078.)

Findings of Fact

1. Public Advocates has requested compensation totaling \$86,338.50 in connection with its participation in this proceeding, citing substantial contributions in the areas of F/MBE issues.
2. Based on the applicable standard, Public Advocates made a substantial contribution to our consideration of the F/MBE issues, since its arguments on (1) independent verification, (2) percent of ownership to qualify as an F/MBE, and (3) long-term numerical goals, were adopted.
3. With regard to PG&E specific issues, (a) the F/MBE statistics of public agencies are directly applicable to PG&E, (b) PG&E has not demonstrated significant progress with regard to F/MBE contracts awarded, and (c) PG&E's statistics are unreliable and it has knowingly accepted incorrect statistics to bolster a poor record, Public Advocates did not prevail on any of these issues.
4. The PG&E specific issues accounted for a vast amount of Public Advocates' time and these issues were the cornerstone of its showing in this proceeding.

5. Public Advocates did not separately account for time spent on the PG&E specific issues.

6. Public Advocates recycled its testimony and witnesses between the AT&T-C proceeding and the PG&E proceeding.

7. An adjustment of 50% to the F/MBE portion of the fee award, applicable to the hours claimed for attorneys' and law clerks' time, is appropriate to account for not prevailing on the PG&E specific issues, and for efficiency/duplication issues as more fully detailed in this opinion.

8. 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. (D.87-10-078.)

9. Given the nature of Public Advocates' involvement in this proceeding, its cost figure of \$650 appears reasonable, and should be allowed in its entirety.

10. A 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 is reasonable (D.87-10-078).

11. Based on the preceding Findings of Fact, a total award of \$40,133.75 is reasonable.

Conclusions 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 decision-making 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 PU Code §§ 1801 et seq.

2. Public Advocates should be compensated for its substantial contribution to D.86-12-095, consistent with the preceding discussion and Findings of Fact.

3. PG&E should be ordered to pay Public Advocates the sum of \$40,133.75 as compensation plus interest for Public Advocates' substantial contribution to D.86-12-095.

ORDER

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) shall pay Public Advocates, Inc. (Public Advocates) \$40,133.75 within 15 days from today, as compensation for Public Advocates' substantial contribution to D.86-12-095; PG&E shall also pay Public Advocates interest on the principal amount of \$40,133.75 calculated at the three-month commercial paper rate, commencing on the 76th day after February 24, 1987, and continuing until payment of the award is made. Under Rule 76.61 PG&E may include the expense of such payment in its calculation of results of operations in its next rate proceeding adjusting base rates.

2. Public Advocates is placed on notice that it may be subject to audit or review by the Commission Advisory 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 APR 27 1988, at San Francisco, California.

STANLEY W. HULETT
President

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

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

Victor Weiszer
Victor Weiszer, Executive Director