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Decision 90-09-080 September 25, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
own motion into 976 Information)
Access Service.)

I.85-04-047
(Filed April 17, 1985)

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O P I N I O N

I. Summary

Public Advocates, Inc. (Public Advocates) has requested compensation in the amount of \$495,790 in connection with its participation in three proceedings, I.85-04-047, A.87-05-049, and A.88-04-004.

We find that Public Advocates made a substantial contribution to I.85-04-047, and we award Public Advocates compensation in the amount of \$130,048. Public Advocates has not filed a request for finding of eligibility in A.87-05-049 or A.88-04-004. Therefore, we are unable to award compensation in A.87-05-049 or A.88-04-004.

II. Eligibility Request

On June 20, 1985, in I.85-04-047, Public Advocates filed a Request for Finding of Eligibility pursuant to Rule 76.54 on behalf of 5 organizations and 18 individuals.¹ The projected budget for Public Advocates' participation in the proceeding was \$132,000; (\$125,000 for attorneys, law students and paralegals; \$3,000 for expert witness fees; and \$4,000 for miscellaneous expenses). In D.86-05-007, we held that Public Advocates had not met the requirements of Rule 76.54 for a finding of eligibility. We denied Public Advocates' request without prejudice.

¹ All references to Rules, refer to the Commission's Rules of Practice and Procedure, as set forth in Title 20 of the California Administrative Code.

Public Advocates filed an amended request for a finding of eligibility on September 4, 1986. The amended request notes "that the original estimate of costs and attorneys fees filed June 20, 1985, is an underestimate since it was predicted on the assumption of seven to ten days of hearings." (Amended Request, p. 17, fn. 5.) Despite its belief that the original request was an underestimate of its anticipated costs, Public Advocates did not update the request with a more accurate estimate.

In D.88-05-028, issued in I.85-04-047, we found that Public Advocates is eligible for an award of compensation in that proceeding.

Public Advocates has not filed a request for eligibility in either A.87-05-049² or A.88-04-004.³

III. Positions of the Parties

A. The Request for Compensation

On April 21, 1989, Public Advocates filed a request for compensation pursuant to Rule 76.56 regarding its participation in three proceedings, I.85-04-047, A.87-05-049, and A.88-04-004. Public Advocates refers to these proceedings collectively as the "900/976 proceedings".

2 I.85-04-047 was a general investigation into 976 information access services. A.87-05-049, in contrast, focused on a limited aspect of 976 services, specifically relating to the manner which Pacific Bell charged back to information providers certain billing and transport charges.

3 A.88-04-004 involved a new intralata transport and billing service, called "900 service." Although 900 and 976 services are similar in some respects, the Commission specifically reviewed the request for 900 service as a new, separate application for service, rather than as an extension or amendment or extension of 976 service.

The request for compensation is made on behalf of twelve minority and low-income organizations, only two of which were listed in Public Advocates' request for eligibility.

The request for compensation asserts that Public Advocates has made a unique and extraordinary contribution. Public Advocates states that almost all of the numerous consumer protections embraced by the phone companies or ordered by the Commission were first requested by Public Advocates on April 10, 1985. According to Public Advocates, it alone initially sought a refund for dissatisfied customers, and that as a result of its efforts, more than \$20 million in refunds has been distributed by Pacific Bell and General Telephone of California (GTEC).

Public Advocates' request for compensation lists "Twelve Specific, Substantial and Unique Contributions by Public Advocates" under the following headings:

1. Right to a Refund
2. Being Fully Informed of the Right to a Refund
3. The Right to Blocking
4. Understanding of Blocking
5. Termination of Service for Nonpayment of 976 Bills
6. Notification of Cost on Recorded Messages
7. Multi-lingual notices
8. Separate Notice of 976 Charges on Bills
9. Dial-A-Porn
10. Protecting Customers from Thousand Dollar Bills
11. Opposition to \$300 an Hour 900 bills
12. A fully informed Commission and Ratepayer

Public Advocates states that it operated in an efficient and nonduplicative fashion. It believes that there was little, if any, duplication between itself and DRA. Public Advocates emphasizes that it staffed these proceedings with only one attorney, thereby reducing the "learning curve" and increasing efficiency.

The following is a summary of Public Advocates request:

Robert L. Gnaizda (attorney)	
834.9 hours x \$245/hr.	\$449,450
Law Student/extern/paralegal	
at \$55 per hour	29,856
Expert Time	11,500
Costs	<u>4,984</u>
Total Compensation	\$495,790

Attached to the request for compensation are samples of Gnaizda's time sheets from September 1988 to January 1989, a sample of Public Advocates' work index files of written materials, and various declarations.

The expert time was itemized by the expert, the total days and compensation per day. The law student time was itemized by student, total hours, and compensation per hour. Gnaizda's hours were itemized on a monthly basis among six general, functional categories.⁴ None of Gnaizda's time was specifically allocated among the three proceedings or among the issues on which Public Advocates participated.

On August 22, 1989, Administrative Law Judge Wheatland issued a Ruling which requested that Public Advocates provide

⁴ Gnaizda's time, as set forth in Exhibit C to the Request for Compensation, is organized into these six categories: Telephone, Correspondence, Research/Pleadings, Party/Client meetings, Hearings, and Misc. Gnaizda's timesheets to July 1985 contained only 5 categories. After July 1985 the timesheets contained seven categories. It is not clear how the time recorded on these timesheets was translated to six categories in Exhibit C.

additional information, including: (1) identifying the particular proceedings for which compensation is requested, (2) reconciling differences between the request for eligibility and the request for compensation, (3) identifying the particular proceedings which adopted Public Advocates' contentions in the proceedings, and (4) documenting expert fees, attorney time, and paralegal costs.

Public Advocates filed a written response to the ALJ Ruling nine months later on May 15, 1990.

B. Pacific Bell

Pacific Bell filed a Response to Public Advocates' initial request for compensation. Pacific Bell contends that Public Advocates should not receive compensation, or in the alternative, that the amount it receives should be reduced drastically from its request. Pacific Bell argues that Public Advocates did not make a substantial contribution to the Commission's decisions. Pacific Bell also believes that Public Advocates' involvement in the proceedings duplicated the contribution of many other parties. In addition, Pacific Bell states that Public Advocates has failed to provide a detailed description of its services, as required by Rule 76.56.

Pacific Bell also filed a reply memorandum in response to Public Advocates' response to the ALJ's request for additional information. Pacific Bell points to various deficiencies in Public Advocates' response to the ALJ Ruling. Pacific Bell reiterates its view that Public Advocates' documentation is insufficient to justify the scope of the relief sought.

To the extent that Public Advocates is entitled to compensation, Pacific Bell urges that the costs be divided equally between Pacific Bell and General Telephone of California (GTEC).

C. General Telephone of California

Although GTEC does not oppose the compensation request in its entirety, GTEC asserts that "any award of compensation based on this request should not be levied against GTEC.

"...and, if any award is levied against GTEC, that the hourly rate employed in determining the award should take into account rates previously awarded by the Commission only, and not look to outside attorneys fees nor to courtroom proceedings in order to make a determination in this case in compliance with Rule 76.60." (Response of GTEC, (6-5-89) pp. 3-4.)

D. Information Providers Association (IPA)

IPA did not file comments on Public Advocates' request for compensation, but IPA did file a Motion to Strike Public Advocates' Reply Brief, based on alleged misrepresentations in the Reply Brief. On October 26, 1989, IPA withdrew its prior observations regarding Public Advocates' request. IPA neither supports nor contests Public Advocates' claims regarding work done or hours expended. Its official position is now complete neutrality.

E. Information Providers Action Committee

Information Providers Action Committee (IPAC) filed a response to Public Advocates' request for compensation. IPAC expressed concerns in three areas:

- IPAC believes the claims made by Public Advocates in its request are exaggerated and not in accord with the record.
- IPAC questions the 'operating efficiency' claimed by Public Advocates.
- IPAC objects to the 20 hours claimed by Public Advocates to prepare a Reply Brief to comments on the request for compensation.

IV. Discussion

A. Eligibility for Compensation

1. Who is eligible for compensation?

As noted above, Public Advocates filed a request for eligibility on behalf of 5 organizations and 18 individuals.⁵ In D.88-05-028, we held that the "entities represented by Public Advocates have met the burden of showing significant financial hardship. This determination will carry over to Public Advocates' participation on behalf of these particular clients in other proceedings in calendar year 1988. Public Advocates is put on notice that it must be prepared to meet the significant financial hardship test on behalf of clients not included in this determination." (D.88-05-028, mimeo. p. 7, emphasis added.)

Public Advocates' request for compensation (April 21, 1989) was filed "on behalf of a coalition of minority, low-income and consumer groups." Public Advocates identifies 13 members of the coalition.⁶ Only two of the 13 members (American G.I. Forum

5 Public Advocates states, in its initial request for eligibility, that it represents Parents Opposed to Pacific Bell Exploitation of Children, Glide Memorial United Methodist Church, American G.I. Forum, the League of United Latin American Citizens, Fairness in Business Standards and 18 individually named children. In its amended request for eligibility, Public Advocates states that it, in fact, represents the twelve parents of these children, in the parents' capacity as guardians of the children and customers of Pacific Bell.

6 The members of the coalition are American G.I. Forum, Center for Southeast Asian Refugee Resettlement, Chinese for Affirmative Action, Consumer Action, Filipino-American Political Association, Instituto Familiar de La Raza, Latino Issues Forum, League of United Latin American Citizens, Mexican American Political

(Footnote continues on next page)

and League of Latin American Citizens) were found to be eligible by D.88-05-028. The other organizations and individuals found to be eligible in D.88-05-028 were not included in Public Advocates' request for compensation. Despite our admonition that Public Advocates must meet the significant financial hardship test for clients not included in our earlier determination, Public Advocates added 11 new clients to its request for compensation without making any effort to show how these clients met the test. In the absence of such a showing, we cannot find that the 11 new clients are eligible for compensation. Only the American GI Forum and the League of United Latin American Citizens are eligible to receive the compensation awarded by this decision.

2. In which proceedings is Public Advocates eligible to receive compensation?

Public Advocates has properly filed a request for a finding of eligibility, pursuant to Rule 76.54, in the Commission's investigation (I.85-04-047) of 976 Information Access Service. In D.88-05-028 (I.85-04-047), we found that "Public Advocates is eligible for an award of compensation in this proceeding."

Public Advocates has not filed a request for finding of eligibility in either A.87-05-049 and A.88-04-004. Public Advocates contends that these three cases (I.85-04-047, A.87-05-049, and A.88-0-004),

"are interrelated matters which the Commission and the parties have always viewed as essentially part of the same proceeding. See, e.g., D.89-03-061 at p. 8, 3/22/89 (decisions

(Footnote continued from previous page)

Association, North Peninsula Neighborhood Services, Oakland Citizens Committee for Urban Renewal (OCCUR), Yellow Ribbon Task Force.

assumes prior rulings on adjustments relating to 976 service apply to 900 service, too)." (Memorandum on Response to ALJ's Request for Additional Information, (5-15-90), p. 4.)

Public Advocates states that it did not file a request in A.87-05-049 or A.88-04-004,

"because its request for eligibility had already been granted for I.85-04-047...[A]ll three of these proceedings were being treated as interrelated by the Commission, the DRA and the presiding ALJ at that time. Because these cases are interrelated, Public Advocates contends that subsequent requests for eligibility were not necessary. Historically, the Commission has not required new requests for eligibility, once eligibility has been determined for a particular proceedings or related proceedings. Moreover, the Commission has used eligibility as a time-related as well as a proceeding-related concept--granting eligibility for a period of time and not just for a specific proceeding." (Id. at pp. 6-7.)

Public Advocates' contention that the Commission has always viewed these three proceedings "as essentially part of the same proceeding" is incorrect. Only one aspect of I.85-04-047, the question of business blocking of 976 services, was consolidated with A.88-04-004, wherein we considered the need for a business blocking option for 900 services. Similarly, only one aspect of A.87-05-049, review of the 976 adjustment policy, was consolidated with A.88-04-004, wherein we considered the adjustment policy for 900 services. Except as expressly consolidated on these specific points, the three proceedings remain distinct and separable. The consolidation of the proceedings on specific, limited issues did not automatically extend the finding of eligibility in I.85-04-047 to all issues raised in A.87-05-049 or A.88-04-004.

Public Advocates' assertion that the Commission has granted eligibility for a "period of time" is also incorrect. The statute requires that a request for eligibility be filed in each

hearing or proceeding. (Cal. PU Code § 1804(a).) The rules require that each request include a showing of financial hardship, a statement of issues, an estimate of compensation and a budget. (Rule 76.54.) If a customer has met its burden of showing financial hardship in the same calendar year, the customer may satisfy this financial hardship requirement in subsequent requests for compensation by simply citing the decision which finds financial hardship. However, a finding of financial hardship is only one element of a finding of eligibility. A finding of financial hardship does not relieve a party from filing a request for eligibility in other proceedings in the same calendar year. The necessity of filing requests for eligibility in each and every case has been well settled since D.86-08-023, issued in 1986:

"TURN also asks whether it must file a request for eligibility in each and every case, given that it has already been found eligible for this year. We recognize that this condition may impose some hardship on TURN, but we are unwilling to modify the rule at this time. We have provided for an annual hardship determination but the remainder of the eligibility requirements are case specific." (D.86-08-023, mimeo. at 4.)

Given Public Advocates' failure to file a request for eligibility in either A.87-05-049 or A.88-04-004, we cannot award compensation to Public Advocates for its participation in these proceedings except to the extent that A.88-04-004 was expressly consolidated with I.85-04-047. We regret the financial consequences which result from Public Advocates' failure to conform to the basic requirements for obtaining compensation. However, in compliance with the law and in fairness to all the intervenors who have faithfully complied with these requirements over the years, Public Advocates' failure cannot be overlooked or excused.

B. Substantial Contribution

Rule 76.58 requires the Commission to determine whether or not Public Advocates has made a substantial contribution to the

final order or decision in the hearing or proceeding in which it is eligible for compensation.

Substantial contribution means that, in the judgment of the Commission, the customers' 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).)

To determine whether Public Advocates has made a substantial contribution to the orders or decisions in I.85-04-047, we must determine whether these decisions have adopted, in whole or in part, one or more contentions presented by Public Advocates in the proceeding. This requires a careful comparison of Public Advocates' contentions in the proceeding with the adopted decisions.

At the outset, we note that Public Advocates' initial request for compensation did not undertake this careful comparison. There have been several decisions on substantive issues in I.85-04-047. Although Public Advocates' request for compensation contains a wide ranging discussion of alleged "contributions", it fails to directly address which of its contentions have been adopted in whole or in part in these particular decisions. Instead of satisfying the statutory test for showing a "substantial contribution", Public Advocates attempts to show how the contentions it may have raised inside or outside of this proceeding may have been "conceded by all parties", eventually accepted by most parties, implemented by a utility or enacted by the legislature.

We are very concerned and frustrated by Public Advocates' initial inability or unwillingness to describe its contribution to this proceeding in the context of contentions raised in the proceeding and to demonstrate how these contentions have been

adopted in Commission decisions. Public Advocates' initial request for compensation failed to meet its burden of proof on this issue and we could well have dismissed the request for compensation in its entirety.

Given these failures, ALJ Wheatland offered Public Advocates' a second opportunity to make the necessary showing. Unfortunately, Public Advocates' response, submitted nine months after the ruling, was only marginally more responsive. Public Advocates' response cites specific portions of various decisions. However, Public Advocates' list generally does not explain why or how the cited actions were based on contentions raised by Public Advocates in the proceeding.

Public Advocates' response to the ALJ ruling cites various decisions which resolve issues for which compensation is sought.⁷ We have reviewed these decisions, as well as the underlying record and pleadings in each of the proceedings which lead to these decisions. We conclude that several of these decisions have adopted, in whole or in part, the factual contentions, legal contentions, or specific policy or procedural recommendations presented by Public Advocates in the proceeding. Public Advocates' contributions to three decisions in I.85-04-047 are summarized here.

7 The ALJ Ruling asked Public Advocates to identify with particularity the decisions or orders in I.85-04-047 which resolve the issues for which Public Advocates requests compensation. In response, Public Advocates listed only five decisions: D.87-01-042, D.87-08-064, D.87-12-038, D.89-02-066, and D.89-03-061. The ruling next asked, with respect to each ruling listed above, that Public Advocates identify where the decision has adopted the recommendations presented by Public Advocates in the proceeding. In response, Public Advocates cites passages from the five decisions listed above, as well as three other decisions: D.85-11-028, D.87-04-015, and D.88-03-042.

1. In D.85-11-028, we granted a motion for immediate interim relief, approving interim policies and tariff revisions to Pacific Bell's and GTEC's information access service (976) tariffs. Several of the tariff revisions were based, at least in part, upon recommendations presented by Public Advocates. For example:

- Public Advocates had proposed that 976 calls should be separately set forth in the bill. The interim revisions adopted this proposal.
- Public Advocates had proposed that all customers have the right to disaffirm the bill, at least as to calls made by minors. The interim revisions allow for adjustments where it is established that a minor child made the call without parental consent.
- Public Advocates proposed that all 976 numbers should have a clear statement as to costs both in the advertising and on the recorded message. The interim revisions allow for clear and conspicuous price disclosure on all advertising.
- Public Advocates proposed that all 976 numbers directed to children shall be allowed only if clear oral and written messages as to cost and parental consent is contained within each advertising message. This recommendation was adopted in the interim revisions.

2. D.87-01-042 made permanent the interim revisions set forth in D.85-11-028. This decision also addressed the question of blocking. Public Advocates supported the need for blocking and Public Advocates urged the Commission to require blocking devices on the customers' premises. Although we adopted a form of blocking different from that proposed by Public Advocates, D.87-01-042 has adopted at least in part the recommendations of Public Advocates insofar as it ordered that blocking be implemented. We conclude that Public Advocates made a substantial contribution to D.87-01-042.

3. As noted in D.87-01-042, Public Advocates urged that blocking be accompanied by multilingual advertising and bill inserts to announce the availability of blocking. In D.87-12-038, we adopted this recommendation. Therefore, Public Advocates made a substantial contribution to D.87-12-038.

Public Advocates cites five other decisions to which it claims it made a substantial contribution.

D.87-04-015, issued in I.85-04-047, granted a Petition for Modification filed by Pacific Bell to maintain the adjustment policy, as adopted in D.85-11-028, through July 1, 1988. Public Advocates did not file a formal response to Pacific Bell's petition. Public Advocates does not explain how it otherwise made a contribution to this decision. In the absence of such an explanation, we cannot find that Public Advocates made a contribution to this decision.

Public Advocates also claims it made a contribution to D.88-03-042, issued in I.85-04-047, which reduced the charge for residential blocking from \$2.00 to \$.01, and suspended billing for this amount. While this decision was consistent with Public Advocates' position that residential blocking should be free, the decision was issued in response to a Petition for Modification filed by TURN, not Public Advocates. Public Advocates cites no evidence that it incurred costs which contributed to D.88-03-042.

D.87-08-064, issued in A.87-05-049, is also cited by Public Advocates. As we explain earlier in this decision, Public Advocates is not eligible to receive compensation in A.87-05-049, because it never filed a request for eligibility in this proceeding. Moreover, even if Public Advocates were eligible for compensation, we would find that it did not make a substantial contribution to D.87-08-064. Public Advocates' participation in A.87-05-049 was limited to two filings. The first filing, dated July 16, 1987 and consisting of ten pages is entitled "Consumer Opposition to Emergency Motion for Immediate Stay of Commission

resolution T-12015 and Partial Suspension of Pacific Bell Advice Letter No. 15224B by Omniphone, Inc." The lead caption of the pleading was I.85-04-047, but it was filed in A.87-05-049. The reply by Omniphone to Public Advocates' Opposition, accurately characterizes this pleading:

"Perhaps because the "Opposition" was filed in the wrong case....it contains nothing which pertains to the issues raised in Omniphone's Application for Rehearing....It simply does not address Omniphone's claims that commission Resolution T-12015 constituted an unlawful rate increase and illegal retroactive ratemaking." (Reply by Omniphone, Inc. to Public Advocates Opposition to Emergency Motion, (7-23-87), p. 1.)

D.87-06-084 granted rehearing of Resolution T-12015. The decision gave no consideration to the extraneous matters raised in Public Advocates' Opposition. Therefore, we cannot conclude that D.87-08-064 adopted contentions raised by Public Advocates in the proceeding.

Finally, Public Advocates cites D.89-02-066 and D.89-03-061, issued in A.88-04-004. As we explain earlier in this decision, Public Advocates is not eligible to receive compensation in this proceeding (except for the limited issues in I.85-04-047 expressly consolidated with A.88-04-004), because Public Advocates never filed a request for eligibility in A.88-04-004. On the limited issue which was consolidated, the need for business blocking, Public Advocates did not participate.

In conclusion, we find that the contentions raised by Public Advocates in I.85-04-047 have substantially assisted the Commission in making the decisions in this proceeding because we have adopted, in whole or in part, one or more contentions presented by Public Advocates in the proceeding.

C. Amount of Compensation

Public Utilities Code § 1803 authorizes the Commission to award reasonable advocates fees, reasonable witness fees and other

reasonable costs of participation in a decision. These costs of participation are collectively referred to as "compensation." Compensation is defined by section 1801(a) as "payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees and other reasonable costs of participation..."

Our task is to determine what costs are reasonable.

The analytical process that this Commission has used since 1983 to determine the reasonable costs of participation under our particular regulatory and statutory scheme, is very similar to process followed by the federal courts in awarding reasonable attorney's fees in federal civil rights actions.

As the U.S. Supreme Court explained in Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983):

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly." (Id. at 433.)

We follow a similar course. Public Advocates' requests compensation for a total of 1,835 of attorney's hours expended on litigating the "900/976" proceedings, at an hourly rate of \$245. In section IV.C.2 of this decision, *infra*, we determine the total number of hours reasonably expended in I.85-04-047. In section IV.C.3 of this decision, *infra*, we determine the reasonable rate of compensation.

However, as the Supreme Court further explains:

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or

downward, including the important factor of the 'results obtained.' This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" (Id. at 434.)

* * *

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." (Id. at 435.)

* * *

"If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claim were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." (Id. at 436.)

The Commission utilizes a similar process. Where a party has achieved excellent results, that is, where a party has prevailed on all, or nearly all, issues it raised, we have allowed compensation for all hours reasonably incurred. (See D.87-07-042.) On the other hand, where a party has achieved only partial success, by prevailing on only some of the issues it raised, we have allowed compensation for hours in relation to the degree of success obtained. (See D.88-02-056.)

Public Advocates argues vigorously that it is entitled to full compensation, even if it does not prevail on all issues. To

support this proposition, Public Advocates relies primarily on two U.S. Supreme Court cases, Hensley and Texas State Teachers Association v. Garland, 489 US _____, 103 L Ed 2d 866 (1989).

Citing Hensley, Public Advocates argues that parties may raise alternative grounds to reach the same outcome, and the decisionmakers' failure to reach certain grounds is not a sufficient reason for reducing a fee. We readily agree that if a party prevails on an issue on one of several alternative grounds, our failure to find in favor of that party on all grounds, is not a basis for reducing the fee. "For example, a plaintiff who failed to recover damages, but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." (461 US 424, 436 for 11.) On the other hand, if intervenors "prevailed on only one of their six general claims...a fee award based on the claimed hours would clearly have been excessive." (Id. at 436.)

Public Advocates also cites Texas State Teachers Assoc. v. Garland for the proposition that a party may be considered a "prevailing party" if it succeeds on any significant issue in litigation which achieves some of the benefits sought in bringing the suit. If Public Advocates means to imply that it is entitled to full compensation because it prevailed on any significant issue, Public Advocates has failed to recognize that the standards for determining whether a party is a "prevailing party" are different than the standards for determining the amount of compensation. The question of "prevailing party" status in federal civil rights litigation is a threshold determination. The provision that a party is a "prevailing party" if it prevails on any issue, "is a generous formulation that brings the plaintiffs only across the statutory threshold. It remains for the district court to determine what fee is reasonable." (Id. at 433.) "That the plaintiff is a prevailing party therefore may say little about

whether the expenditure of counsel's time was reasonable in relation to the success achieved." (Id. at 436.) Similarly, under the rules for compensation in Commission proceedings, a finding that Public Advocates has made a "substantial contribution" is only the threshold determination, and says little about whether Public Advocates' expenditure of time was reasonable in relation to success achieved.

In section IV.C.4 of this decision, *infra*, we will determine to what degree the expenditure of Gnaizda's time was reasonable in relation to the success achieved.

1. Expert Witnesses

Public Advocates requests \$11,500 for five expert witnesses. We disallow this request in its entirety because Public Advocates has not produced any contract, bill or written record reflecting the costs of the witnesses.

Expert witnesses are defined by Rule 76.52(b) as recorded or billed costs incurred by a customer for an expert witness. The ALJ's ruling requested that Public Advocates provide evidence in the form of a contract, bill or written record, to substantiate the \$11,500 which Public Advocates claims it incurred for expert witnesses. Public Advocates has provided no written record of these alleged costs. In response to the ALJ's ruling, Public Advocates replied:

"There is no written contract with the witnesses, since compensation was viewed as problematical, due to the original PUC decision not permitting eligibility for compensation. Each witness agreed to a specific daily amount of compensation subject to such being awarded. Each witness was informed that Public Advocates would submit for them their hourly or daily rate times the period for which they performed expert witness time." (Memorandum in Response to ALJ's Request, (5-15-90), p. 19.)

We find this explanation unconvincing. Since the inception of intervenor compensation, the Commission has stressed

the necessity of maintaining complete and accurate records. While a written contract is not required, these costs must be recorded or billed. The fact that Public Advocates' initial request for eligibility was denied does not excuse Public Advocates' failure to maintain adequate records. Our denial of eligibility was expressly made without prejudice and Public Advocates was allowed to refile. Public Advocates did refile and its amended request for eligibility was approved. Moreover, our initial denial of eligibility does not explain Public Advocates' failure to maintain proper records prior to the initial decision denying eligibility, nor does it excuse Public Advocates' failure to maintain such records after its request for eligibility was approved.

2. Costs Incurred in I.85-04-047

Public Advocates requests compensation for 1755.80 of hours of Gnaizda's time devoted to "900/976" proceedings between January 1985 and March 1989.⁸

Of the 1755.80 hours requested, we find that no more than 932.25 hours were reasonably incurred for participation in I.85-04-047. We will disallow those hours which were incurred prior to April 27, 1985 when I.85-04-047 was issued by the Commission. We will also disallow those hours incurred after the issuance of D.87-12-038 on December 9, 1987. D.87-12-038 is the last decision in I.85-04-047 to which Public Advocates made a substantial contribution.

Public Advocates states that compensation is sought for time incurred prior to the initiation of I.85-04-047 because this investigation was launched in large measure as a result of

⁸ Public Advocates also requests 79.10 hours related to the preparation of the request for compensation and a reply brief on the compensation issue. These hours are discussed in Section IV.C.5 of this decision, *infra*.

correspondence and meetings by Public Advocates with then Commissioner Don Vial and his staff commencing in March 1985.

"Because Public Advocates was demonstrably instrumental in causing this investigation to be started, it is entitled to compensation for its time in this regard." (Memorandum in Response to ALJ's Request, C5-15-90), p. 8.)

Despite Public Advocates avowal that it is entitled to compensation prior to the commencement of the proceeding, the law is quite clear. Intervenor fees are allowed for participation in a proceeding. (Cal. PU Code § 1801.) We have previously held that compensation is not permitted for costs incurred prior to the commencement of the proceeding. (D.90-07-066, mimeo. p. 6.) We will disallow compensation for time incurred by Gnaizda and the paralegals prior to the commencement of I.85-04-047.

While we find that up to 932.25 hours may have been reasonably incurred for participation in I.85-04-047, the timesheets are not sufficiently detailed to allow a precise determination. Because the time is recorded under the category of "Santa" or "Santa Fraud" or "976", without reference to specific proceedings, we cannot determine how many hours were devoted to A.87-05-049. Furthermore, we note that some of the recorded hours refer to matters unrelated to participation in the proceeding, such as a lawsuit against Pacific Bell, legislation, and press releases. While Public Advocates states that these hours are not included in its request for compensation, our review of the timesheets could not confirm that all of the hours devoted to these activities were excluded.

3. Hourly Rates

Public Advocates requests a rate of \$55.00 per hour for paralegals. This exceeds the stated rate in Public Advocates' amended request for eligibility by \$5.00. However, Public Advocates has also discounted all paralegal hours by 10%, which produces the same result as if it had requested a \$50 hourly rate.

Since a rate of \$50 to \$55 is consistent with similar awards for paralegals for work performed during 1985 through 1989, we will authorize a rate of \$55 with the 10% reduction in time.

Public Advocates requests a rate of \$245.00 per hour for its attorney, Robert Gnaizda. This rate exceeds the rate of \$225.00 requested in its amended request for eligibility.⁹

Public Advocates offers extensive argument in support of its requested rate of \$245.00 per hour. These arguments are nearly identical to arguments raised by Public Advocates in support of its requested rate of \$225.00 per hour in A.85-11-029. In D.87-10-078, we carefully reviewed each of Public Advocates' arguments at great length. We will not revisit these arguments in this decision. Based on our careful consideration of all pertinent facts in A.85-11-029, D.87-10-078 awarded an hourly rate of \$150.00 for Gnaizda's time incurred in A.85-11-029 during 1986 and 1987. We have also reviewed requests for compensation by Public Advocates in D.88-04-058, D.89-07-046 and D.89-08-030. These decisions uniformly awarded Gnaizda compensation at an hourly rate of \$150, for his participation in these proceedings between 1986 and 1988. Public Advocates has not offered any persuasive reason why we

9 Public Advocates explains that rates in the request for compensation exceed the request for eligibility because "attorney rates have risen during the time between the filing of these two documents." Without citation to any authority, Public Advocates asserts that "It is accepted practice to apply current market rates to past work as a convenient method for taking inflation into account." This is not the accepted practice before this Commission. Moreover, Public Advocates was entitled to file requests for compensation in May 1988, following our finding of eligibility in D.88-05-028. Because Public Advocates waited until April 1989 to file a request for compensation and waited nearly nine additional months before responding to the ALJ Ruling requesting supplemental information, it has itself contributed to the delays in receiving compensation since May 1988.

should now award Gnaizda a higher hourly rate for work done during the same 1985-1988 time period.

In support of its request of \$245 per hour, Public Advocates offers declarations of nine outside attorneys. These declarants state that they are aware of the quality of Gnaizda's work and his experience. Based on their knowledge, they state that the market rate for his services would be \$225 to \$350 per hour. While we do not doubt the sincerity of the declarants, we do not find their statements to provide much useful information. None of the declarants defines the time period for which they estimate the market value of Gnaizda's services. In the absence of any indication to the contrary, we assume these estimates are based upon rates in effect in 1989. This sheds little light on the applicable rate in 1985 through 1988, the primary period for which compensation is requested.

Most of the declarations also fail to recognize that there may be differences in rates depending upon the type of matter litigated and the particular experience of counsel. Only one of the declarants, James Squeri, expresses an opinion based upon actual observation of Gnaizda's performance before this Commission. His opinion is that for persons of Gnaizda's experience and ability, the market rate would be at least \$245. However, Squeri does not indicate the time period in which this rate is applicable.

Given our observation of Gnaizda's performance in these proceedings, we find that the hourly rate of \$150 fairly reflects the level of skill and ability he has demonstrated in these cases during 1985 through 1987. For 1988 and 1989, we will authorize a rate of \$160, which is the maximum we have authorized for participation during this time period.

4. Allocation of Costs Based on Results

As we explained earlier in this decision, the award of compensation must be reasonable in light of the results achieved.

While the Commission has adopted some of the factual contentions and recommendations advanced by Public Advocates in these proceedings, the Commission has also rejected some of Public Advocates' contentions. The following discussion describes some of the claims on which Public Advocates did not prevail.

Although the interim revisions to the 976 service, as adopted by D.85-11-028, contained several of the safeguards proposed by Public Advocates, Public Advocates vigorously opposed the motion for interim relief. Public Advocates argued that the appropriate interim relief was to suspend 976 services. We rejected Public Advocates' contention that 976 services should be suspended.

D.87-01-042 addressed the issue of blocking.

"PA questions the wisdom of central office blocking because of the cost and the potential lack of protection it would provide should children call from one area code to another. It states blocking devices are available that would provide the necessary protection for such children's calls." (D.87-01-042, mimeo. p. 15.)

While we agreed with Public Advocates on the need for blocking, we did not accept Public Advocates' contentions regarding the appropriate form of blocking.¹⁰ Instead, we agreed with the position of the Public Staff Division (now Division of Ratepayer Advocates) in support of central office blocking. We found that there was a lack of evidence as to the availability of a device to attach to a subscriber's telephone and that further hearings on the feasibility of customer premises blocking are necessary.

D.87-01-042 also notes Public Advocates' continued opposition to 976 services. Public Advocates had continued to

¹⁰ By the end of 1987, Public Advocates had abandoned its opposition to central office blocking.

argue throughout 1985 and 1986 that 976 services should be terminated or offered as an optional service similar to call-waiting. As in D.85-11-028, D.87-01-042 did not adopt Public Advocates' contention that 976 service should be terminated.

We note Public Advocates' argument that its "primary objective" was effective safeguards and that its opposition to 976/900 services and its request for mandatory blocking (presubscription) was subordinate to its request for safeguards.

"Commencing in September of 1985, Public Advocates, as part of this general legal arguments, raised the issue to this Commission that if Pacific Bell and General Telephone were unable or unwilling to implement effective consumer safeguards...that presubscription might be a more appropriate safeguard." (Public Advocates' Reply Brief, (7-14-89), p. 9.)

This explanation of Public Advocates' posture in I.85-04-047 is incorrect. A careful reading of the record and of prior decisions indicates that Public Advocates' primary objective was suspension or termination of 976 service. Public Advocates' secondary objective was to obtain mandatory blocking or presubscription. Continued operation of 976 service with specific consumer safeguards was only Public Advocates' third, and least favored objective.

In summary, Public Advocates' participation in these proceedings has produced mixed results. Some contentions raised by Public Advocates have been adopted in Commission decisions. Some contentions have been rejected by the Commission. A few contentions have been raised and rejected more than once.

Based upon our review of each of the Commission decisions and the record as a whole, we conclude that a reduced fee award is appropriate because the contribution made by Public Advocates is limited in comparison to the scope of Public Advocates' litigation

as a whole. We will apportion compensation in relation to the actual results achieved.

Because Public Advocates has obtained only limited success, in I.85-04-047 we will award only that amount of compensation which is reasonable in relation to the results obtained. Given that Public Advocates was unsuccessful in obtaining presubscription of 976 services, but that it was successful in the implementation of many important consumer safeguards, we will allow compensation for 70% of the attorney and paralegal hours between April 27, 1985 and December 9, 1987.

Public Advocates may claim that this allocation of time is too low, and that more time was devoted to the successful issues than the unsuccessful issues. However, Public Advocates' time sheets simply do not provide enough detail to allow a more precise allocation. Despite our repeated advice, Public Advocates has failed to allocate its time by issue. Because Public Advocates' timesheets do not provide a proper basis for determining either how much time was devoted to this particular proceeding or how much time was devoted to particular issues within this proceeding, we believe that an award of 70% is a reasonable, if not generous, proxy for the time reasonably devoted to the matters in this proceeding on which Public Advocates prevailed.

From the day we first adopted rules regarding the procedures for awarding reasonable fees and costs to participants in proceedings before this Commission, we have required that requests for compensation "include a detailed description of hourly services and expenditures or invoices for which compensation is sought. This breakdown of services and expenses shall be related to specific issues." (See Rule 76.26, as filed 5-5-83.)

In successive decisions over the years, we have insisted that requests for compensation provide a breakdown of costs by issue. In D.85-03-062 (17 CPUC 2d 454), we were faced with a request in which TURN did not itemize its costs by issue.

"Our options, given these circumstances, are essentially to:

- "1. Deny TURN's request for noncompliance with our Rule 76.26 (except for its expert witness' fee and costs);
- "2. Seek a detailed breakdown from TURN, allowing, of course, another response from General; or
- "3. Make an allocation of costs among the issues based on the information before us.

"The last alternative is the most constructive and logical in our view, because it will bring this matter to a close without more time and expense incurred by both TURN and General. Further, if TURN does not like our breakdown or allocation of expense it has only itself to blame--TURN should have complied with our Rule 76.26." (D.85-03-062, mimeo. pp. 7-8.)

In D.85-05-066 (17 CPUC 2d 754) we again

"underscore[d] the point that issue-by-issue allocation of intervenor time greatly facilitates the decisionmaking process by providing the detail necessary to key compensation award levels to the issue(s) wherein a substantial contribution is found. Absent such allocation in cases meriting compensation awards, we, as decisionmakers, are required to construct proxies which may or may not fairly compensate the intervenor, especially in those cases where a substantial contribution is found in a minority of the issues presented." (D.85-05-066, mimeo. p. 12a.)

We have recognized that allocation of time by issue is not always easy, but we have required that parties make a good faith effort to comply. In some instances "Allocation by issue is straightforward - [this] includes testimony, briefs, applications for rehearing and petitions for modification. These activities are

usually organized by issue and thus intervenors are expected to keep track of the time spent on each issue." In other cases, "Allocation by issue is almost impossible. If substantial contribution is found in all or most issues, participant will receive full compensation for preparation time. If participant is less successful, initial preparation time will be compensated on a pro rata basis."

In response to the enactment of Article SB 4, which codified the rules for intervenor funding, we adopted Article 18.7 to the Rules, applicable to requests for compensation in proceedings initiated after January 1, 1985. Although Article 18.7 did not expressly restate the requirement of Rule 76.26 in Article 18.6 that requests for compensation include a breakdown of costs by issue, we have continued to consistently require this information in all requests for compensation filed under Article 18.7.

Our requirement that an intervenor must, to the extent feasible, allocate its time by issue, is consistent with the federal scheme:

"We recognize that there is no certain method of determining when claims are "related" or "unrelated." Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures. See Nadeau v. Helgemoe, 581 F.2d 275, 279 (CA1 1978) ("As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims"). (Hensly v. Eckerhart, 461 US 424, 437 fn 12 (1983).)

Despite our express instructions that requests for compensation include a detailed description of hourly services,

organized by issue, Public Advocates has repeatedly failed to allocate its time by issue.

Public Advocates' instant request for compensation once again fails to provide the necessary detail. Gnaizda's timesheets do not itemize his time by issue. Instead, it is allocated into broad functional categories. These broad categories provide no clue as to how much time was devoted to any particular issue.

5. Cost of Preparing Request
for Compensation

As in past decisions, we will fully compensate Public Advocates for the costs of preparing the request for compensation. However, we allow full compensation for the 59 hours with some reservations. First, the request for compensation includes two proceedings for which Public Advocates is not eligible for compensation. Second, as we explain earlier in this decision, the request for compensation was incomplete and poorly prepared. Fifty-nine hours should have produced a better work product. Even if the request had been properly prepared, 59 hours seems to be excessive.¹¹ In contrast to the hours claimed by Public Advocates, a party recently requesting compensation in another case, devoted only 27 hours to preparing a much better organized request. (See Request for Compensation, filed February 8, 1990, in A.88-12-005.) Finally, we question why so much of the time of Public Advocates' "senior counsel" was devoted to this request. While his attention should be devoted to the legal arguments, the

¹¹ See D.87-05-029, in which we approved 49 hours claimed for preparing a request for compensation. We stated that in the future, we expected to see the number of hours claimed for work on compensation requests to decrease rather than increase. See also D.89-05-072, at p. 9, where we found that 15.3 hours claimed for work on a compensation request comes close to being excessive.

task of sifting through the time records, adding the numbers and organizing exhibits should be delegated to subordinate employees.

We do not authorize compensation for the 20 hours claimed for preparing a reply to comments on the request for compensation. A reply is not required by Commission rules. Moreover, despite its length, it largely reiterates Public Advocates' prior filings and provided very little new information or argument.

6. Other Costs

Public Advocates seeks \$4,984 for other costs including travel to Los Angeles for hearings, telephone, postage, photocopying and costs paid to Consumer Action for preparation of an exhibit. As with other costs presented in the request for compensation, these costs are not allocated by proceeding, although it should have been an easy matter to do so. Nevertheless, these costs are reasonably low in relation to the overall award of compensation set forth in this decision. Notwithstanding Public Advocates' failure to allocate these costs by proceeding, we will adopt the entire amount of \$4,984.

7. Payment of the Award

GTEC asserts that it should not be required to "foot the bill" in whole or in part for Public Advocates' compensation, because GTEC was not the moving party in A.88-04-004, because GTEC does not have a 900 tariff on file and because GTE participated in only a very limited aspect of A.88-04-004. Since we do not find Public Advocates eligible for compensation in A.88-04-004, it is not necessary to address GTEC's argument regarding its share of costs in A.88-04-004.

We do make an award of compensation in I.85-04-047. GTEC does not address its share of the award in this proceeding. In contrast to A.88-04-004 (where GTEC was not the moving party), GTEC was a named respondent in I.85-04-047, GTEC has a 976 tariff on file, and GTEC was an active participant in this investigation. Therefore, we find that is quite reasonable to require that the

award of compensation for Public Advocates' participation in I.85-04-047 be divided equally between Pacific Bell and GTEC.

V. Conclusion

In accordance with the preceding discussion, Public Advocates is entitled to compensation of \$130,048.00. The components of this award are set forth in the following time:

Gnaizda compensation

932.25 hours ('85-'87) x \$150/hr. x 70% \$ 97,886

59.00 hours ('89) X \$160/hr. 9,440

Paralegal compensation

\$25,340¹² x 70% 17,738

Other costs 4,984

TOTAL \$130,048

As in previous Commission decisions, this order will provide for interest commencing on the 75th day after Public Advocates filed its request and continuing until full payment of the award is made.

Public Advocates is placed on notice it may be subject to audit or review by the Commission Advisory and Compliance Division. Therefore, adequate accounting records and other necessary documentation must be maintained and retained by the organization in support of all claims for intervenor compensation. Such recordkeeping systems should identify the specific proceeding in

12 Of the total \$29,856 requested for paralegal services between 1985 and 1988, we have deducted \$4,516 associated with the services of V. Papalardo in 1988, because Papalardo's time was incurred for participation in A.88-04-004, not I.85-04-047.

which costs are incurred, specific issues for which compensation is being requested, the actual time spent by each employee, the hourly rate paid, fees paid to consultants, and any other costs for which compensation may be claimed. Such records shall be complete and legible.

Findings of Fact

1. Public Advocates requests \$495,790 in compensation for its participation in three proceedings, I.85-04-047, A.87-05-049, and A.88-04-004.

2. Public Advocates filed a request for finding of eligibility in I.85-04-047 on June 20, 1985, and filed an amended request on September 4, 1986.

3. Public Advocates did not file a request for a finding of eligibility in A.87-05-049 or A.88-04-004.

4. Public Advocates was found eligible for compensation in I.85-04-047 by D.88-05-028.

5. Public Advocates has not been found eligible for compensation in A.87-05-049 or A.88-04-004.

6. Only two of the groups for which Public Advocates requests compensation were found eligible for compensation by D.88-05-028.

7. Only as expressly consolidated on specific points, I.85-04-047, A.87-05-049, and A.88-04-004 remain distinct and separable proceedings.

8. Public Advocates has made a substantial contribution to D.85-11-028, D.87-01-042, and D.87-12-038 because these decisions have adopted, at least in part, one or more of the contentions presented by Public Advocates in the proceeding.

9. Public Advocates failed to allocate its attorney's time by proceeding or by issue.

10. Public Advocates achieved mixed results in this proceeding because some of its primary contentions were not adopted by the Commission.

11. Public Advocates has provided no evidence, in the form of a contract, bill or written record, to substantiate the claimed costs of expert witnesses.

12. Of the 1834.9 hours recorded for Gnaizda, only 932.25 were incurred between the commencement of I.85-04-047 on April 27, 1985 and the issuance of D.87-12-038 on December 9, 1987.

13. Public Advocates has been awarded, by prior Commission decisions, an hourly rate of \$150.00 for Gnaizda's participation in Commission proceedings between 1985 and 1987.

Conclusions of Law

1. Public Advocates' request for an hourly attorney fee rate of \$245 for Robert Gnaizda between 1985 and 1989 is unreasonable and should not be adopted.

2. As previously determined by the Commission, an hourly rate of \$150.00 for Robert Gnaizda between 1985 and 1987 is reasonable and should be adopted. For 1988 and 1989, an hourly rate of \$160.00 is reasonable and should be approved.

3. In the absence of a specific allocation of Robert Gnaizda's time by proceeding or by issue, it is reasonable to award compensation for 70% of the attorney and paralegal hours reasonably incurred in I.85-04-047.

4. Public Advocates' request for \$4,984 in postage, copying, and other costs is reasonable and should be granted.

5. Only time recorded by Gnaizda and paralegals between April 27, 1985 and December 9, 1987, and time recorded for preparation of the compensation request was reasonably incurred in connection with Public Advocates' participation in I.85-04-047.

6. The award of compensation should be divided equally between Pacific Bell and GTE, California.

O R D E R

IT IS ORDERED that:

1. Public Advocates, Inc.'s request for compensation for its participation on behalf of American GI Forum and League of United Latin American Citizens is granted in the amount of \$130,048.00.

2. Pacific Bell and GTE shall, within 15 days of the effective date of this order, each remit to Public Advocates \$65,024, plus interest calculated at the three-month commercial paper rate, from June 25, 1989 until full payment is made.

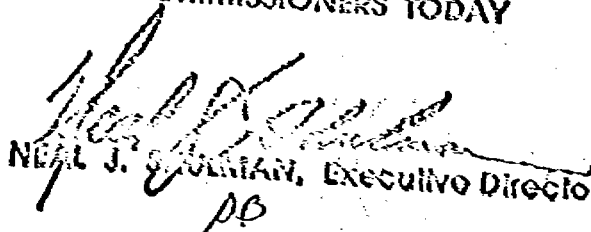
This order is effective today.

Dated September 25, 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
PATRICIA M. ECKERT
Commissioners

Commissioner John B. Ohanian,
being necessarily absent, did not
participate.

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


NEAL J. OHANIAN, Executive Director
PB