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Decision 91-07-001 July 2, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of PACIFIC BELL (U 1001 C), a corporation, for authority to increase intrastate rates and charges applicable to telephone services furnished within the State of California.

ORIGINAL

Application 85-01-034 (Filed April 11, 1988)

And Related Proceedings.

L.85-03-078 OII 84 Case 86-11-028

OPINION

1. Summary

Public Advocates, Inc. (Public Advocates) has requested compensation in connection with its participation in this proceeding. We find that Public Advocates made a substantial contribution to this proceeding, and we award Public Advocates compensation in the amount of \$155,728.

2. Procedural Background

2.1 Request for Eligibility

On April 8, 1985, Public Advocates filed a Request for Finding of Eligibility pursuant to Rule 76.54.¹ The request stated that Public Advocates sought compensation in connection with the issue of Pacific Bell's (Pacific) practices in contracting for goods and services with women- and minority-owned businesses (the Women and Minority Business Enterprises (WMBE) issue).

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.

In Decision (D.) 87-05-085 and D.86-01-006 we found that Public Advocates is eligible for an award of compensation in connection with WMBE issues in this proceeding.

On May 11, 1986, Public Advocates filed a supplement to its initial request for a finding of eligibility. In this supplement, Public Advocates requested that it be found eligible for compensation in connection with marketing abuse issues.

Based on the eligibility finding in D.86-01-006 and the supplemental request by Public Advocates, in D.87-12-067 we found that Public Advocates is also eligible for an award of compensation in this proceeding for its involvement in the marketing abuse question.

2.2 Request for Compensation

On February 25, 1988, Public Advocates filed a request for compensation pursuant to Rule 76.56. Public Advocates seeks \$260,722 in compensation for its participation on three issues in Application (A.) 85-01-034. The work was performed between 1985 and 1987. Public Advocates asserts that it made substantial contributions to Commission orders regarding three issues: (1) marketing abuse, (2) contracting with WMBE, and (3) bilingual telephone services.

On March 23, 1988, U.S. English filed an opposition to Public Advocates' request for compensation. U.S. English asserts that Public Advocates should not receive compensation for its participation on the issue of bilingual services.

On April 11, 1988, Pacific filed a Response to Public Advocates' Request for Compensation. Pacific contends that Public Advocates should receive less than the amount it requests, because Public Advocates' efforts were substantially duplicated by other parties. In addition, Pacific believes that Public Advocates has inadequately documented its costs. Pacific asserts that Public Advocates should receive no more than half of the total amount it now requests.

Public Advocates filed a reply to Pacific's response on April 21, 1988.

3. Discussion

3.1 Eligibility for Compensation

Public Advocates has been found eligible for compensation on the issues of WMBE and marketing abuse. Although Public Advocates has not requested a finding of eligibility on the bilingual issue², we will consider its request for compensation on this issue. As we explained in D.88-11-057, the rationale for filing a budget and a list of issues is to provide the Commission with an opportunity to notify the intervenor if there are elements of duplication or if the budget appears unrealistic. If an intervenor fails to provide the Commission with complete or accurate information in its request for eligibility, the intervenor proceeds at its own risk that participation on unreported issues and costs may be disallowed as duplicative or excessive.

3.2 Public Advocates' 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

² We observe that Public Advocates' motion (May 6, 1986), to set hearings on the adequacy of Pacific's bilingual services, was filed just five days before Public Advocates filed a supplemental request for eligibility on the issue of marketing abuse. Therefore, we are puzzled by Public Advocates' failure to include the bilingual issue in this supplemental request for eligibility.

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 this proceeding, 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.

Once we have found that a party has made a substantial contribution, the next step is to determine the appropriate amount of compensation. Public Utilities (PU) 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..."

3.2.1 The Marketing Abuse Issue

The marketing abuse issue arose when Division of Ratepayer Advocates (DRA) released prepared testimony in this proceeding in April 1986. This testimony detailed marketing activities which were subsequently found to violate PU Code 532, General Order 153, and Tariff Rules 6 and 12. In D.87-12-067 the Commission ordered implementation of a notification and refund mechanism to correct these marketing abuses. In D.87-12-067 we reviewed the overall effectiveness of this remedial approach, we considered whether the remedial mechanisms should remain in effect, and we adopted other appropriate remedies.

Public Advocates made a substantial contribution to D.87-12-067 on the issue of marketing abuse because the Commission has adopted several of Public Advocates' recommendations:

"Of all the options presented to us, we believe that Public Advocates has come the closest to recommending a specific penalty designed to address the fact that the restitutionary remedy will not reach all affected ratepayers." (D.87-12-067, 27 CPUC 2d 1, 48.)

We also adopted Public Advocates recommendation that Pacific develop, test, and implement further informational and corrective measures. (27 CPUC 2d 47.) We also found merit in Public Advocates proposed "red circle" campaign. (Id.)

As Pacific notes, in D.87-07-033, the Commission reduced Toward Utility Rate Normalization's (TURN) award of compensation for its contribution to D.86-06-026 by 50%. Likewise, Pacific argues, any award for Public Advocates on the marketing abuse issue should be reduced by at least 50% to account for duplication between DRA and Public Advocates.

Although we reduced the compensation requested by TURN for its contribution to D.86-08-026, we find that the circumstances surrounding Public Advocates' participation in this proceeding do not warrant a similar reduction. D.86-08-026 adopted customer notification and refund plans, filed in compliance with D.86-05-072, the cease and desist order relating to certain Pacific marketing practices. As we explained in D.87-07-033, our decision to reduce TURN's award is in recognition of the fact that it was the Public Staff Division (now DRA) which was on the cutting edge of this issue and is due the lion's share of credit for a superb investigatory effort in the proceedings which led to D.86-08-026.

In contrast to the earlier proceedings where DRA is due the primary credit and other intervenors playing a supporting role, Public Advocates has played a primary role in this portion of the proceeding on the penalty aspects of the marketing abuse issue. As stated above, Public Advocates came to the closest to proposing a penalty in the form we ultimately adopted. In this sense, Public Advocates was the major moving force toward development of the

adopted penalty, just as DRA was the major moving force in the first phase of the investigation. Therefore, we will award Public Advocates compensation for all hours which it devoted to participation on this issue in this proceeding.

3.2.2 The WMBE Issue

We similarly find that Public Advocates made a substantial contribution on the issue of WMBE in this proceeding. D.87-12-067 adopted Public Advocates' argument that more is needed to be done to improve the effectiveness of Pacific's system of verifying eligibility of WMBE status. (27 CPUC 2d 1, 62.)

Pacific urges us to reduce Public Advocates' compensation request by at least 25% due to duplication of effort between Public Advocates and DRA.

In D.87-10-078 we reduced Public Advocates request for compensation by 25%.

"We also find some duplication in discovery work and the prepared testimony presented by Public Advocates' witnesses in this proceeding and the concurrent PC&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." (D.87-10-078, mimeo. p. 22.)

The rationale of D.87-10-078 for a 25% reduction in Public Advocates' compensation request is equally applicable to this proceeding. In this proceeding, as in A.85-11-029, much of the prepared testimony on WMBE issues was not received in evidence. In response, Public Advocates argues that, at most, this should result in a reduction of 5% of its request. However, Public Advocates has not explained how it arrives at a reduction of 5%.

Unfortunately, the summary of attorney hours on the WMBE issue is not helpful in determining the amount of time devoted to preparing testimony. The broad categories used by Public Advocates (Pleading/Research, Meeting, Telephone) are too general to provide meaningful insight into the services rendered by Counsel. In the absence of a clear explanation of how much time was actually devoted to preparation of testimony by the attorneys, we find that a 25% reduction in attorney hours is appropriate.

3.2.3 The Bilingual Issue

We also find that Public Advocates made a substantial contribution on the bilingual issue. In D.87-12-067 we approved the Language Assistance Plan and Hispanic Marketing Plan proposed by Pacific. These plans were supported by all parties in this proceeding, including Public Advocates. We also adopted the position, as advanced by Public Advocates and DRA, that the Commission should retain continuing oversight over these programs, and we adopted some of the reporting requirements suggested by DRA and Public Advocates.

While we find that Public Advocates has made a substantial contribution to our decision, we do not agree with Public Advocates' characterization of its contribution. According to Public Advocates, "more important in considering Public Advocates' contribution.... is its extraordinary success in neutralizing opposition [to Pacific's bilingual plan] by the organization U.S. English." Public Advocates asserts that it was "exclusively responsible for the defeat of U.S. English."

Pacific argues that Public Advocates' assertion that it was "exclusively responsible" for the withdrawal of U.S. English is not supported by the record. We agree with Pacific. As U.S. English indicated in its opening brief, it withdrew its opposition to the bilingual plans as a result of responses given by Pacific. Public Advocates' opposition to U.S. English substantially duplicated the efforts of DRA and Pacific.

Concerning the bilingual issue, we find that Public Advocates has exaggerated its contribution to this proceeding and has engaged in extensive duplicative efforts. However, the time sheets provided by Public Advocates do not indicate how much time was actually devoted to the matters for which it made a contribution. In the absence of accurate and informative time records, it is necessary for us to estimate these hours. We will reduce the hours requested for the attorney and law student on the bilingual issue by 50%; however, we make no reduction of the \$4,000 amount claimed for expert witnesses, whose testimony we find not to be duplicative.

3.3 Expert Witnesses

Public Advocates requests \$4,400 for 3 experts on the issue of marketing abuse, \$8,400 for 2 experts on the WMBE issue, and \$4,000 for three witnesses on the bilingual issue. Expert witness costs are defined by Rule 76.52(b) as recorded or billed costs incurred by a customer for an expert witness.

Pacific notes that Public Advocates' request for compensation does not even allege that expert costs were incurred by Public Advocates.

Public Advocates responds that it had agreements or understandings with James, Williams, Phillips, Gamboa, and Navarro as to their rates of compensation. Although Public Advocates has not produced written evidence of such agreements or other bills or records of these costs, we will accept its representation that such agreements existed. For all future proceedings we place Public Advocates on notice that it must provide evidence in the form of a contract, bill or written record, to substantiate the costs which it incurs for expert witnesses.

For the expert costs requested by Public Advocates, we find the requested time and rates to be reasonable and we will award compensation for experts in the amount of \$16,800.

3.4 Law Students

Public Advocates requests a rate of \$50 per hour for paralegals. Since a rate of \$50 is consistent with similar awards for paralegals for work performed during 1985 through 1989, we will authorize a rate of \$50.

3.5 Attorney Compensation

Public Advocates requests a rate of \$295.00 per hour for its attorney, Robert Gnaizda. In its initial request for compensation, filed in February 1988, Public Advocates offers extensive argument in support of a requested rate of \$225.00 per hour. In a supplement to its request for compensation, filed March 4, 1991, Public Advocates increased its requested hourly rate to \$295 per hour.³

Many of the arguments in Public Advocates' initial request for compensation in this proceeding are nearly identical to arguments raised by Public Advocates in support of its requested rate of \$225.00 per hour in A.85-11-029.⁴ In D.87-10-078, we carefully reviewed each of Public Advocates' arguments at great length. Despite the detailed discussion of the question of attorney compensation in D.87-10-078, and despite the fact that Public Advocates' request for compensation was filed four months after D.87-10-078, Public Advocates simply repeats much of its prior argument.

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.

³ The supplement did not recalculate the total requested compensation as set forth on pp. 28-32 of the initial request.

⁴ Compare Request for Compensation, dated February 2, 1987, in A.85-11-029 (pp. 14-21) with Public Advocates' Request for Compensation on Behalf of Minority Coalition, dated February 25, 1988 in A.85-01-034 (pp. 41-48).

Public Advocates' request in this proceeding fails to address our reasons, as set forth in D.87-10-078, for adopting a rate of \$150 per hour for Gnaizda. Nor does Public Advocates' request offer any persuasive new reason why we should now award Gnaizda a rate of at least \$225 per hour for work done during 1985-1987.

Subsequent to the filing of Public Advocates' request for compensation in this proceeding, we have also reviewed requests for compensation by Public Advocates in D.88-04-058, D.89-07-046, and in 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' initial request for compensation included declarations from ten attorneys. These declarants generally 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 \$300 per hour. As we stated in D.90-09-080, while we do not doubt the sincerity of the declarants, we do not find their statements to provide much useful information. D.90-09-080 addresses the limitations of these types of declarations. These problems are underscored by the new declarations filed with the 1991 supplement. Six of the eight supplemental declarations are by the same individuals who filed their earlier declarations. Five of these supplemental declarations are nearly verbatim to the original declarations except that they are executed three years later and contain a higher estimate of the value of Gnaizda's services.⁵

⁵ Given the explicit direction in D.90-09-080 regarding the necessary contents of declarations regarding market value, we can only wonder why Public Advocates chose simply to reexecute the older, deficient declarations, rather than attempt to comply with the guidance of D.90-09-008.

We find that the hourly rate of \$150 fairly reflects the complexity of issues, and the level of skill and ability he has demonstrated in these cases during 1985 through 1987. The hourly rates of \$75/hour for Russell and \$80/hour for Campbell were previously approved by D.87-10-078 and are similarly appropriate in this proceeding.

3.6 Cost of Preparing Request for Compensation

Public Advocates requests \$10,375 for preparing the request for compensation.

Public Advocates states that it devoted 90.9 hours of attorney time to preparing its request for attorney fees. A portion of this time was devoted to preparing the request for eligibility. Approximately 60 hours were devoted to preparing the request for compensation. Public Advocates has reduced the 90.9 hours requested by one-third, to avoid any possible duplication between Campbell and Gnaizda. (to 59 hours.)

Despite the voluntary reduction of time by Public Advocates, we find 59 hours to be an excessive amount of time to be devoted by attorneys to the task of preparing the request for eligibility and the fee request. In particular, when we note the 25 hours billed by Campbell to preparing the fee request, we question why an additional 35 hours were devoted by Public Advocates' "senior counsel" to the same task. The poor organization of the fee request simply does not justify the excessive number of hours billed by Gnaizda and Campbell for preparing this document.

In D.89-05-072, at p. 9, we found that 15.3 hours claimed for work on a compensation request came close to being excessive. In this case, we find that ten hours by each attorney is a sufficient, if not generous, amount of attorney time to award for the preparation of the eligibility and compensation requests.

In D.87-05-029, we noted: "that TURN has used a standardized compensation pleading format for several years; indeed we welcome this because it greatly facilitates the decision making process. However, the use of a standardized pleading format should, over time, reduce the number of hours spent (and claimed) for these pleadings, except in those cases which present highly complex substantial contribution questions. For the future, we fully expect to see the number of hours claimed by TURN for its work on compensation requests decrease rather than increase." (D.87-05-029, p. 16.)

It has been four years since we stated our expectation that the hours claimed for fees on fees should decrease. Despite our statement, we have been presented in many subsequent cases with substantial claims for fees on fees. We find no justification for attorneys to present ratepayers with a bill for the costs of preparing a bill. Because most intervenors keep accurate and detailed time records and use standardized compensation pleadings, the cost of calculating the fee request should be minimal. Therefore, in the future, we will not authorize compensation for the cost of calculating and submitting a fee request.

3.7 Other Costs

Public Advocates seeks \$2,175 for other costs such as travel, telephone, postage, and photocopying. We will approve these costs.

4. Conclusion

In accordance with the proceeding discussion, Public Advocates is entitled to compensation of \$161,878. The components of this award are set forth in the following table:

TABLE

Marketing Abuse

Gnaizda 59,100
 394 hrs x \$150/hr

Law Students 9,000
 180 hrs x \$50/hr

Experts 4,400

WMBE

Gnaizda 30,375
 270 hrs x .75 x \$150/hr

Russell 14,681
 261 hrs x .75 x \$75/hr

Law Students 4,850
 97 hrs x \$50/hr

Experts 8,400

Bilingual

Gnaizda 14,385
 191.8 hrs x .50 x \$150/hr

Law Student 3,062
 122.5 hrs x .50 x \$50/hr

Experts 4,000

Attorney Fee Preparation

Gnaizda 1,500
 10 hrs x \$150/hr

Campbell 800
 10 hrs x \$80/hr

Costs

Marketing Abuse 1,150

WMBE 650

Bilingual 300

Fees 75

TOTAL 155,728

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 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 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 \$260,722 in compensation for its participation in this proceeding, A.85-01-034.
2. Public Advocates filed a request for finding of eligibility in A.85-01-034 on April 8, 1985, and filed a supplemental request on May 11, 1986.
3. In D.87-05-085 and D.86-01-006 we found that Public Advocates is eligible for an award of compensation in connection with WMBE issues in this proceeding.
4. In D.87-12-067 we found that Public Advocates is eligible for an award of compensation in this proceeding for its involvement in the marketing abuse question.
5. Public Advocates has made a substantial contribution to D.87-12-067 because this decision has adopted, at least in part, one or more of the contentions presented by Public Advocates in the proceeding.
6. In this proceeding, as in A.85-11-029, much of the prepared testimony on WMBE issues was not received in evidence.

7. Of all the options presented to us on proposed penalties, Public Advocates came the closest to recommending a specific penalty designed to address the fact that the restitutionary remedy will not reach all affected ratepayers.

8. The requested time and rates are reasonable for the expert costs requested by Public Advocates on the issues of marketing abuse and WMBE.

9. 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 \$225 for Gnaizda between 1985 and 1987 is unreasonable and should not be adopted.

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

ORDER

IT IS ORDERED that:

1. Public Advocates, Inc.'s (Public Advocates) request for compensation is granted in the amount of \$155,728.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

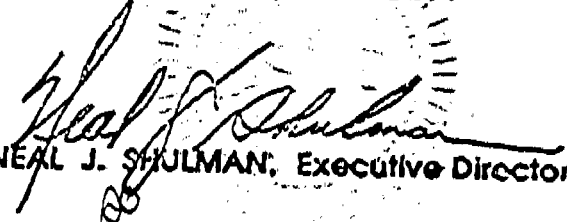
2. Pacific Bell shall, within 15 days of the effective date of this order, remit to Public Advocates \$155,728, plus interest, not calculated at the 3-month commercial paper rate, from May 10, 1988, until full payment is made.

This order is effective today.

Dated July 2, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
C. MITCHELL WILK
JOHN B. OHANIAN
DANIEL W. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SHULMAN, Executive Director