STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 20, 2003

TO: ALL PARTIES OF RECORD IN ORDER INSTITUTING INVESTIGATION 00-11-052

Decision 03-10-062 is being mailed without the written Concurrence of Commissioner Lynch. The Concurrence will be mailed separately.

Very truly yours,

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:acb

Attachment

COM/MP1/SK1/paj **Mailed 10/20/03**

Decision **03-10-062** October 16, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Qwest Communications Corporation (Qwest), U-5335-C and its wholly owned subsidiary, LCI International Telecommunications Corporation, doing business as Qwest Communications Services (LCIT), U-5270-C to determine whether Qwest and LCIT have violated the laws, rules and regulations governing the manner in which California consumers are switched from one long distance carrier to another and billed for long distance telephone services.	Investigation 00-11-052 (Filed November 21, 2000)

OPINION GRANTING PETITION TO MODIFY DECISION 03-04-050

SUMMARY

Decision (D.) 03-04-050 awarded the Greenlining Institute and Latino Issues Forum (G/LIF) $202,517.47 in compensation for substantial contributions to D.02-10-059. On May 13, 2003, the Greenlining Institute (Greenlining) filed a petition for modification of D.03-04-050 granting G/LIF intervenor compensation for their substantial contribution to D.02-10-059. Greenlining believes that its attorney and expert rates should be reconsidered in light of the rates awarded to attorneys for Disability Rights Advocates (DRA) in D.03-01-075. This decision grants the petition to modify, and increases our award to G/LIF by $15,313.78 based on comparable training and experience for the attorneys and experts involved in the two different matters.

In addition, we direct the Administrative Law Judge Division to develop an annual process to set intervenor fees on a prospective basis for attorneys and experts on a comprehensive peer comparison in order to avoid the type of inequitable fee award outcomes that we address in this order, and to propose a fair and feasible approach for handling similar pending requests from Greenlining for adjustment of prior and pending awards to conform to this decision.

BACKGROUND

D.03-01-075 (DRA decision) awarded rates for 2001 and 2002 for the following attorneys and expert on behalf of Disability Rights Advocates:[1]

Attorneys	Requested	Adopted
Sid Wolinsky	$535	$435[2]
Lawrence Paradis[3]	$405	$310[4]

D.03-04-050 awarded rates for 2001 and 2002 for the following attorneys and experts on behalf of G/LIF:

Attorneys	Requested	Adopted
Robert Gnaizda (2002)	$365	$365
Susan Brown (2002)	$325	$325

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[1] This list includes only those advocates for Disability Rights Advocates cited by Greenlining in its petition.

[2] Rate adopted for 2001 and 2002.

[3] Larry Paradis is also the Executive Director of DRA. Thus, he testified not only as an attorney on behalf of DRA, but also as an expert, for which he received the same hourly rate of $310 per hour.

[4] Rate adopted for 2001.

Susan Brown (2001)	$300	$300
Itzel Berrío (2002)	$255	$235
Itzel Berrío (2001)	$230	$220
Enrique Gallardo (2002)	$255	$235

Experts	Requested	Adopted
John Gamboa (2001)	$300	$160
Luis Arteaga (2001)	$250	$140

In its petition, Greenlining argues that its attorneys and experts have comparable training and experience to Sid Wolinsky and Larry Paradis, and should receive the same hourly rates as those adopted for Sid Wolinsky and Larry Paradis in the DRA decision.

Section 1804 (e) of the Public Utilities Code[5] requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. Section 1806 provides that the level of compensation must take into consideration the market rates paid to persons of comparable training and experience that offer similar services.

Greenlining supports its petition for modification with the following information: Robert Gnaizda of the Greenlining Institute graduated from Yale Law School one year prior to Sid Wolinksy, who also graduated from Yale Law School, has one more year of litigation experience than Sid Wolinsky, and 30 more years practicing before the Commission than Sid Wolinsky. In fact, Robert Gnaizda and Sid Wolinsky, along with Justice Anthony Kline, founded the Public Advocates in 1971. Robert Gnaizda's first case before the Commission

[5] All section references are to the Public Utilities Code, unless otherwise indicated.

was in 1970, and, in 1987, he was selected as the leading public interest attorney in the Bay Area. Yet, Sid Wolinksy was awarded $435 per hour in the DRA decision, while Robert Gnaizda was awarded $365 per hour in D.03-04-050. Thus, Greenlining argues that Robert Gnaizda should be awarded the same hourly rate of $435 per hour as Sid Wolinksy.

Susan Brown is the Director of the Latino Issues Forum's Legal Department, and the former director of the Mexican American Legal Defense and Education Fund (MALDEF). She graduated from law school in 1978, seven years before Larry Paradis, and has approximately seven more years of litigation experience. Yet, Larry Paradis was awarded $310 per hour, while Susan Brown was awarded $300 per hour for 2001 and $325 per hour for 2002. Given the fact that Ms. Brown has considerably more experience than Mr. Paradis, Greenlining argues that she should be awarded a rate that is half way between Larry Paradis's rate of $310 per hour and Sid Wolinski's rate of $435 per hour, or $380 per hour.[6]

Itzel Berrio of Greenlining and Enrique Gallardo of Latino Issues Forum both graduated from law school in 1997. In D.03-04-050, the Commission noted that it had recently awarded $220 per hour to another 1997 law school graduate, Osa Armi, in D.02-05-005. Therefore, the Commission awarded $220 per hour to Itzel Berrio for 2001, and awarded both Itzel Berrio and Enrique Gallardo $235 per hour for 2002.

Greenlining argues that the Commission failed to acknowledge that Ms. Berrio has far more experience before the Commission than Ms. Armi. Ms.

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[6] Note that Susan Brown has 10 more years of experience than TURN's Robert Finkelstein, who was awarded an hourly rate of $310 for work performed in 2001 (D.02-03-033). (See Petition of the Greenlining Institute for Modification of D.03-04-050, p. 3, fn. 4.)

Berrio first appeared before the Commission four months after graduating law school in 1997 to cross examine an ORA witness in the SDG&E/So Cal Gas merger proceeding (A.96-10-038). In July 1998, Ms. Berrio successfully argued a motion to compel discovery from GTE against attorneys O'Melveny & Meyers in the GTE Marketing Abuse Case (I.98-02-025). Since March 2001, Ms. Berrio has participated extensively in several Commission cases, including the Pacific Bell 271 proceeding (R.93-04-003), the GTE/Bell Atlantic Merger proceedings (A.98-12-005) the Edison General Rate Cases (A.02-12-027/A), and the Qwest Marketing Abuse Case (I.00-11-052).

Mr. Gallardo first appeared before the Commission in 2001, filing briefs in the residential baseline proceeding (R.01-05-047). Since then, Mr. Gallardo has appeared in a number of proceedings involving utilities and telecommunications, gaining experience before the Commission. Greenlining argues that an attorney with more experience before the Commission is entitled to a higher rate than an attorney with less experience – even if the two attorneys otherwise have the same qualifications.[7] (See D.00-09-068).

Thus, Greenlining argues that both Ms. Berrio and Mr. Gallardo should be awarded an hourly rate of $255 per hour for work done in 2001, and $265 per hour for work done in 2002.

Greenlining asserts that in the DRA decision, Larry Paradis, who is not only an attorney, but the Executive Director of DRA, was awarded an hourly rate of $310 per hour for his participation as an expert. Greenlining argues that each of its experts has significantly more experience than Mr. Paradis. Although Mr. Paradis was compensated for his legal services, which is distinct from expert

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[7] See D.00-09-068 (Application No. 97-12-020), in which the Commission awarded a 20% higher hourly rate to the expert that had more experience appearing before the Commission, all other qualifications being equal.

witness services, there are other factors which persuade us to grant Greenlining's experts a higher rate.

Greenlining's Executive Director John Gamboa is a graduate of the University of California at Berkeley, a former Pacific Bell Manager of Latino and Asian American markets, and has 32 years of experience in this field. Mr. Gamboa, in his capacity as an expert, was awarded $160 per hour for his work in 2001. According to G/LIF, the California Department of Insurance in September 2002 awarded Mr. Gamboa an effective rate of $290.50 per hour for his work in 2001, when it awarded G/LIF 83% of its requested compensation.[8] Thus, Greenlining argues that Mr. Gamboa should be awarded a rate of $310 per hour.

Latino Issues Forum's expert Luis Arteaga holds a B.A. in Politics with a concentration in Latin American Studies from Princeton (1991) and an M.A. in Public Policy from the Kennedy School at Harvard University (1995). Mr. Arteaga has worked for Latino Issues Forum since 1995, and was the Associate Director from April 1998 to November 2002. Mr. Arteaga was appointed to serve on the California Assembly Speaker's Commission on State and Local Government Finance. Mr. Arteaga also serves on the Regional Planning Committee of the Association of Bay Area Governments. In the past, he has served on community advisory boards for GTE, PG&E, and AT&T. Currently, he is the Interim Executive Director at Latino Issues Forum. Thus, Greenlining argues that Mr. Arteaga should be awarded an hourly rate of $310 per hour.

Based on the experience, training and education of Mr. Gamboa and Mr. Arteaga, we find that a rate of $310 per hour is reasonable for these two experts.

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[8] Amended Request For Intervenor Compensation On Behalf Of The Greenlining Institute and Latino Issues Forum, p. 18, citing In the Matter of Request for Award of Fees, File No. 1C 02019862.

In addition, this rate is in line with the rate commanded by Mr. Gamboa in his capacity as an expert at the California Department of Insurance.

DISCUSSION

Greenlining argues that despite the fact that it requested certain rates when it filed its request for compensation, the Commission should adjust the rates for 2001 and 2002 now. We agree. Many parties eligible for intervenor compensation appear before the Commission. Each intervenor requests hourly rates for its advocates based on many factors, resulting in a range of rates awarded to advocates with similar training and experience. Each intervenor must make a showing regarding the hourly rates requested to justify an award and must do so on a timely basis. Although it is not our responsibility to award rates higher than requested simply because another intervenor may have been awarded a higher rate, we believe it appropriate to look to other rates adopted as a check that the rates requested are in the range of those adopted for other advocates with similar training and experience.

In this case, the DRA Decision was issued on January 30, 2003, almost two months before the Commission issued D.03-04-050. Greenlining wrote the Commission on three occasions prior to the issuance of D.03-04-050 regarding the discrepancy between the market rates awarded to DRA in the DRA Decision and what it believes were below market rates awarded to G/LIF in the past.[9] It

[9] See Exh's. A, B, and C, attached to the Petition For Modification of D.03-04-050, filed by G/LIF on May 13, 2003, in response to the Draft Decision of ALJ Econome dated April 17, 2003. Exh's. A, B, and C are comprised of letters from G/LIF to all Commissioners, to President Peevey, and from President Peevey to G/LIF dated between February 25, 2003, and April 2, 2003. We acknowledge that Commission Rule of Practice and Procedure 77.3 prohibits new factual information, untested by cross examination, from being included in Comments or from being relied upon in post

appears that the Commission did not look to the DRA decision when deciding upon the hourly rates to be awarded in D.03-04-050.

We should strive to ensure that there are not major discrepancies in awards to attorneys and experts with substantially similar backgrounds and experience. In this case, both Greenlining and LIF's attorneys and experts have substantially similar experience to the attorneys and experts in the DRA decision.

The ALJ's Proposed Decision denies relief to Greenlining on the basis of a general observation that "(i)t is up to each intervenor to justify their request for hourly rates, not the Commission's responsibility to award rates higher than requested simply because another intervenor may have been awarded a higher rate." While we generally agree with this position, the denial of relief in the instant case elevates form over substance. G/LIF learned of the intervenor award, including the relatively high attorney rates and expert fees awarded to DRA in January of this year, and subsequently received its own award in March. On May 13, the instant Petition was filed, seeking an equitable adjustment to align their award with the rates and fees authorized to DRA. The ALJ has not cited any statutory bar or rule of procedure which would preclude us from granting the requested relief. G/LIF acted promptly to inform us of an apparent inequity in hourly rates and fees, and provided ample justification for increasing

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publication comments. However, Commission Rule of Practice and Procedure 87 provides for exceptions to these rules stating that the rules shall be construed liberally, and, in special cases, for good cause shown, the Commission may permit deviations from the rules. In this case, we refer to the exhibits for the sole purpose of showing that G/LIF brought the issue of the discrepancy between the rates DRA was paid and the rates G/LIF was paid for intervenor compensation to the attention of the Commission shortly after the DRA decision was issued (January 30, 2003) and before this decision was rendered. We do not use the exhibits for the purpose of adding new factual information to the record. Therefore, we are of the opinion that this reference does not violate Rule 77.3 and falls easily under the exception created by Rule 87.

their awards for intervention in earlier cases. To leave the disparity in awards as between DRA and G/LIF unaddressed is unfair, and does not comport with the maxim of jurisprudence that "…for every wrong there is a remedy". (Ca. Civil Code § 3523)

In light of these facts and our desire to ensure equitable treatment of substantially similar intervenors, we agree with Greenlining and LIF's request that the hourly rates for attorneys and experts be modified as follows:

ATTORNEYS		
Robert Gnaizda	(2002)	$435
Susan Brown	(2002)	$380
Susan Brown	(2001)	$380
Itzel Berrio	(2002)	$265
Itzel Berrio	(2001)	$255
Enrique Gallardo	(2002)	$265

EXPERTS		
John Gamboa	(2001)	$310
Luis Arteaga	(2001)	$310

In granting increased attorney and expert hourly rates in this matter, we are aware that Greenlining has filed similar petitions for modification to obtain upward adjustment of rates and fees awarded in other cases occurring in the same timeframe as Investigation 00-11-052, and has raised the issue of hourly rates in pending proceedings, including UCAN v. Pacific Bell (C.98-04-004 and related matters). We note that the adjudication of these requests is somewhat unprecedented, and therefore follows no clear set of rules nor procedural path.

The effort required to obtain a fair result has already served to impose a substantial administrative burden on both G/LIF and the Commission.

In addition, a review of the decision setting hourly rates for DRA attorneys Wolinsky and Paradis shows the weakness of our current "case-by-case" rate determination approach. In this rulemaking docket, DRA sought hourly rates of $535 for Sid Wolinsky and $405 for Lawrence Paradis, requests significantly exceeding the highest hourly rate ever awarded to an attorney by the Commission. The Administrative Law Judge made comparisons of skill, expertise, and years of experience as between Wolinsky and Michael Florio of The Utility Reform Network (TURN), who received an award of $350 per hour for work in 2001. (See D.02-06-070). The award to Michael Florio was, at the time, the highest hourly rate allowed by the Commission.

Even though Wolinsky was found to have less expertise than Florio, he was awarded a substantially higher rate than Florio due to (1) his longer tenure as an attorney, (2) a DRA survey of 2001 attorney rates ranging from $375 to $1,000 per hour submitted by declaration, and (3) a comparison of the rate award to Lawrence Paradis. While this type of rate calculation may be defensible within the confines of an individual proceeding, it is not at all surprising that the result has engendered a cry of "foul" from experienced attorneys representing intervenors before us.

We wish to avoid repetition or continuation of problem-solving arising from claims of inconsistent awards of hourly rates and fees as among intervenors, as well as to reduce the amount of time consumed in individual intervenor fee requests on the issues of appropriate rate and fee levels.

Therefore, we direct the Executive Director and Chief Administrative Law Judge to develop a comprehensive process for the Commission to annually set

rates for intervenor attorney, expert, and paralegal fees pursuant to Section 1806. The rates could be set on a peer group basis, individual intervenor basis, or combination of the two approaches. We envision the proposed fees, upon adoption, to be applied in individual proceedings unless parties to the proceeding make a convincing case for doing otherwise based on unique circumstances. One possible procedural approach would utilize public workshops to develop consensus on appropriate rates, and submit such rates to the Commission by formal resolution for ratification. The twin goals of this exercise are (1) to promote fairness in awards, both in absolute and relative terms, and (2) to increase the administrative efficiency in making these awards, allowing intervenors to actually receive payment for their services to the Commission and utility consumers on a more expedited basis.

Finally, we realize by providing equitable relief to Greenlining in this particular docket, we will establish a precedent for possibly affording similar rate and fee adjustments to this intervenor in prior proceedings where we have awarded intervenor compensation under similar circumstances to the instant proceeding. Indeed, several petitions from G/LIF are currently pending before us. We prefer to address the issue of where other equitable fee and rate increases may be warranted due to the DRA award in an integrated fashion. Thus, we will ask the ALJ Division to provide us with both procedural and substantive options for responding to similar requests from G/LIF, and defer any further consideration of these requests until we have reviewed the response from the ALJ Division.

We would like to receive this proposal for both prospective and retrospective establishment of rates and fees no later than December 30th, 2003 at which time we will consider the appropriate means for allowing comment on it.

Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Janet Econome is the assigned ALJ in this proceeding.

Comments on Alternate Draft Decision

The alternate draft decision of Commissioner Peevey and Commissioner Kennedy in this matter was mailed to the parties in accordance with Section 311(d) of the Public Utilities Code and Rule 77.1 of the Rules of Practice and Procedure.

Comments were filed by Qwest Communications Corporation on September 19, 2003 in opposition to the proposed alternate decision, arguing that no record evidence exists to support Greenlining's request, and that adoption of the alternate would set "unsound policy". Reply comments were filed by G/LIF on September 24, 2003 in support of the alternate decision.

With regard to the procedural concerns expressed by Qwest, we note that Greenlining properly filed a Petition for Modification pursuant to Rule 47 of our Rules of Practice and Procedure, including a detailed statement of factual information in support of its requested modifications to D.03-04-050. Qwest had an opportunity to respond to this filing, but chose not to do so. Given the unique circumstances arising from the fee awards to DRA in a recent case, Qwest does not raise a credible procedural challenge to granting Greenlining's Petition. Qwest also raises a policy concern about upsetting the finality of Commission decisions and opening up intervenor compensation awards to "never ending gamesmanship". Our policy concerns are centered on adherence to the statutory mandate in Public Utilities Code Section 1806 to assure fair awards among intervenors. While we share Qwest's concern regarding decisional finality of our intervernor compensation awards, it does not override our obligation toward fairness. Indeed, we are hopeful the annual intervenor rate determination

process initiated by this order will significantly improve our ability to balance both of these objectives.

Findings of Fact

1. Intervenor requests for hourly rates are based on many factors, resulting in a range of rates awarded to advocates with similar training and experience.

2. Each intervenor must justify its request for hourly rates in its request for compensation.

3. The hourly rates requested by Greenlining for work performed by attorneys and experts are consistent with the intent of Pub. Util. Code § 1806 that intervenor compensation awards shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services.

4. Based upon their experience and qualifications, a $435 per hour rate for Robert Gnaizda, a $380 per hour rate for Susan Brown, a $255 per hour rate for Itzel Berrio for 2001, a $265 per hour rate for Itzel Berrio for 2002, and a $265 per hour rate for Enrique Gallardo for 2002, is reasonable. Moreover, a rate of $310 per hour for work performed by experts John Gamboa and Luis Arteaga in 2001 is reasonable.[10]

5. The relief requested by Greenlining is unopposed.

Conclusions of Law

1. The Commission should ensure that there are not major discrepancies in awards to attorneys and experts with substantially similar backgrounds and experience.

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[10] See Exh. D, attached to the Petition of the Greenlining Institute for Modification of D.03-0-050, for an hourly breakdown of the award.

2. The changes to G/LIF's rates adopted herein are justified by a comparison to rates awarded to G/LIF's peers practicing before the Commission, as well as by the experience, training and education of GLIF's attorneys and experts.

3. D.03-04-050 should be modified to increase the attorney and expert rates requested by Greenlining.

4. Greenlining should be awarded $217,831.25 for its substantial contributions to D.02-10-059.

O R D E R

IT IS ORDERED that:

1. The petition to modify Decision 03-04-050 by Greenlining is granted.

2. G/LIF are awarded $217,831.25 for its substantial contribution to D.02-10-059.

3. The Executive Director and Chief Administrative Law Judge, in conjunction with the Administrative Law Judge Division, shall develop an annual process to set intervenor fees for attorneys, experts, and paralegals on a peer basis in order to avoid the type of inequitable fee award outcomes that we address in this order, and to consider whether additional rate and fee adjustments are appropriate on a retrospective basis. This proposal shall be prepared and submitted to the Commission no later than December 30, 2003, at which time the Commission shall consider the appropriate means for allowing comment on it.

4. This proceeding is closed.

This order is effective today.

Dated October 16, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I will file a concurrence.

/s/ LORETTA M. LYNCH

Commissioner