

Decision 03-12-019

December 4, 2003

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own  
Motion to Comply with the Mandates of  
Senate Bill 1712.

Rulemaking 01-05-046  
(Filed May 24, 2001)

**ORDER DENYING THE REHEARING OF**  
**DECISION 03-08-012**

**I. SUMMARY**

This decision denies the application by the Greenlining Institute and the Latino Issues Form (“Greenlining/LIF”) for the rehearing of D.03-08-012 (hereinafter, “the Decision”) which awarded intervenor compensation to the National Council of La Raza, the Southern Christian Leadership Conference and the California Rural Indian Health Board (jointly, “La Raza”). Greenlining/LIF was not awarded intervenor compensation. The Decision also corrects a typographical error regarding decision number.

**II. BACKGROUND/FACTS**

This proceeding was initiated pursuant to Senate Bill (SB) 1712, which required the Commission to open an investigation into the feasibility of redefining universal telephone service to include high-speed Internet access, and to report its findings to the Legislature.<sup>1</sup> Public Participation Hearings (PPH) were held throughout the state. The formal parties, including La Raza and Greenlining/LIF, submitted two rounds of comments. Based on the comments and Commission staff input, on August 14, 2002, the Commission prepared and submitted the “Broadband Services as a Component

---

<sup>1</sup> SB 1712 is codified as Pub. Util. Code §871.7 and §883.

of Basic Telephone Service” (hereinafter, the “Broadband Report”) to the Legislature, as required by statute.

On August 26, 2002, the Administrative Law Judge’s (ALJ) draft decision adopting the Broadband Report was mailed to parties for comment. Comments were filed by La Raza, and reply comments by Greenlining/LIF. On October 24, 2002, the Commission issued D.02-10-060, summarizing the Broadband Report, which concluded that it would not be feasible, as defined in SB 1712, to expand the definition of basic telephone service to include broadband services. Such an expansion would produce extremely high costs to consumers in the form of higher prices for the expanded scope of basic service and in the form of significantly higher surcharges on customer bills. The Report also found that basic dial-up service provides adequate Internet access and concluded that the Commission should maintain its commitment to keeping basic telephone service as affordable as possible.

On August 21, 2003, the Commission issued the Decision, awarding intervenor compensation to La Raza. The Decision denied intervenor compensation to Greenlining/LIF.

Greenlining/LIF filed an application for rehearing of the Decision on September 19, 2003. Greenlining/LIF contended that the Decision: 1) ignores the Public Utilities (PU) Code and Commission precedent and applies an incorrect standard to Greenlining/LIF’s contributions; 2) ignores the PU Code and Commission precedent in categorically denying Greenlining/LIF’s contributions; and 3) fails to address many of Greenlining/LIF’s contributions, which demonstrated a unique perspective and argument. Greenlining/LIF further argued that governing statutes and authority support an award of compensation.

### **III. DISCUSSION**

Throughout Greenlining/LIF’s rehearing application, reference is made to “the Draft Decision.” Rehearings apply only to decisions or orders that have been adopted by the Commission. Greenlining/LIF’s rehearing application must “set forth specifically the ground or grounds on which the applicant considers the *decision or order*

to be unlawful.”<sup>2</sup> It is not clear that the decision being addressed in Greenlining/LIF’s rehearing application is D.03-08-012. For example, page 5, subsection B, paragraph 1, of Greenlining/LIF’s rehearing application quotes that “the Commission did not act on Greenlining/LIF’s proposals for a blue ribbon panel and the \$10/month subsidy for dial-up internet access” and cites page 13 of the Draft Decision. The quote appears on page 13 of the Draft Decision of ALJ Bushey. It does not appear on page 13 of D.03-08-012. The Commission is entitled to rely on the parties accurately citing the record on which they base their case. Quoting from the wrong document detracts from that reliance and could affect the outcome. Therefore, to the extent that Greenlining/LIF’s arguments address subject matter that appear in the Draft Decision, and not in D.03-08-012, they are summarily denied on procedural grounds.

**A. The Commission Applied the Correct Standards in Evaluating Greenlining/LIF’s Contributions to D.02-10-060**

Greenlining/LIF contend that the Commission applied an incorrect standard to their contributions to D.02-10-060 by denying compensation for contributions that did not originate with Greenlining/LIF, or which were duplicative of others’ contributions. We disagree. Nothing in the Decision indicates that the Commission requires a proposal to have originated with the party requesting compensation in order for that party to be granted an award of compensation. In the past, the Commission has awarded intervenor compensation to parties whose contributions were not original.<sup>3</sup> Indeed, Greenlining/LIF provided examples of cases where the Commission awarded intervenor compensation to parties whose contributions were very similar to, or duplicative of, those of other parties. (See Greenlining Rhg. App., p. 4.)

---

<sup>2</sup> PU Code §1732; emphasis added. Unless otherwise indicated, all references are to the Public Utilities Code.

<sup>3</sup> *Re Commission’s Intervenor Compensation Program* (1998) 79 CPUC2d 628. In such cases, the award is generally discounted because of duplication.

PU Code §§1801-1812 govern requests for intervenor compensation. Section 1804(c) requires that an intervenor seeking compensation provide “a detailed description of services and expenditures and a description of the customer’s substantial contribution to the hearing or proceeding.”<sup>4</sup> The intervenor must show that the contributions substantially contributed to a Commission decision or order (§1804 (c)). Presentations that materially supplement, complement, or contribute to the presentation of another party may be compensated if the presenter is found to have made a substantial contribution (§1802.5). “Substantial contribution,” as defined by §1802(h), means that:

...in the judgment of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation. (Amended by Stats. 1993, Ch. 589, Sec. 135. Effective 1/1/94.)

Even if the Commission does not adopt a party’s position in total, that party may be compensated if the Commission determines that the contribution was substantial.<sup>5</sup> Regarding the level of compensation, the Commission “shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services.” (§1806)

---

<sup>4</sup> A “customer” is any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation subject to the jurisdiction of the Commission. (§1802(b).)

<sup>5</sup> See D.01-11-047, where compensation was awarded without adopting the intervenor’s position, but the intervenor’s involvement resulted in a better understanding of the issues in the proceeding.

Greenlining/LIF base their request for compensation on the following proposals that they allege were adopted by the Commission in D.02-10-060: 1) they substantially contributed to Commission's plan to make Internet service widely available through basic ("dial-up") telecommunications connections, without overwhelming the Universal Lifeline Telephone Service (ULTS) Fund; 2) they suggested reliance on Community-Based Organizations (CBOs) to provide outreach to low-income customers to access the Internet; and 3) they advocated that the Commission should increase the discounts for the California Teleconnect Fund (CTF) because a higher CTF discount for CBOs would increase their participation in the CTF program.<sup>6</sup> The Commission was unable to find any support for Greenlining/LIF's assertions that they presented those recommendations, or materially supplemented, complemented, or contributed to the presentation of another party. (See Decision, *mimeo*, pp. 11-15.)

A fresh look at the record affirms that the Commission did not adopt the proposals claimed by Greenlining/LIF. First, contrary to Greenlining/LIF's suggestion regarding the continued use of basic telecommunications service to access the Internet, the Commission did not include any type of Internet access in the definition of basic service; rather, it decided to keep basic telephone service as affordable as possible. Secondly, Greenlining/LIF's claim of having advocated for increased reliance on CBOs for outreach to low-income families is not borne out in the record. As noted in the Decision, Greenlining/LIF made a cursory reference to "non-profits" in their reply comments to the OIR.<sup>7</sup> However, the Commission took no action in this proceeding to increase reliance on CBOs for outreach to low-income families. Nor was the topic addressed other than in the Broadband Report, which noted an existing initiative that relies on CBOs for outreach to low-income customers.

Finally, Greenlining/LIF claim that the Commission adopted their suggestion that a higher CTF discount for CBOs would increase their participation in the

---

<sup>6</sup> Greenlining/LIF's Request for Intervenor Compensation, pp. 4-7.

<sup>7</sup> Greenlining/LIF's Reply Comments to OIR, pp. 3-4; Decision, *mimeo*, p. 14.

CTF program. The Commission did direct the Telecommunications Division to increase the CTF discount for CBOs to 50 percent; however, the record does not reflect that Greenlining/LIF made any presentation on this issue, as required by §1802(h).<sup>8</sup> The Broadband Report attributed the proposal to other parties and PPH participants. (See Broadband Report, p. 22.)

Greenlining/LIF also take credit for having proposed an expansion of the CTF. However, the proposal had already been presented in the Broadband Report, and it was not until Greenlining/LIF submitted their reply comments to the draft decision adopting the Broadband Report that Greenlining/LIF addressed it for the first time.<sup>9</sup> Nevertheless, Greenlining/LIF could have qualified for intervenor compensation had the Commission found that their participation “materially supplements, complements or contributes to the presentation of another party” and “if the participation makes a substantial contribution to a commission order or decision, consistent with Section 1801.3.” (§1802.5.) Greenlining/LIF did not meet these statutory criteria and therefore the Decision correctly concluded that: “Greenlining/LIF’s one-sentence presentation of belated support for adopting the Broadband Report’s recommendation, with no additional substantive elaboration, did not substantially assist the Commission in adopting the CTF modifications.” (Decision, *mimeo*, p. 13.)

The Decision thoroughly addressed the proposals to which Greenlining/LIF lay claim, but which were in fact properly attributed to other parties. Regarding the proposals that Greenlining/LIF did present, the Commission did not adopt Greenlining/LIF’s suggestion to provide a \$10 subsidy to ULTS customers for dial-up Internet access or their suggestion to create a blue ribbon panel to conduct further studies

---

<sup>8</sup> A search of the comments and reply comments to the OIR failed to turn up any reference to the CTF by Greenlining/LIF. (See D.03-08-012, *mimeo*, p. 12.)

<sup>9</sup> In those reply comments, Greenlining/LIF recommended further expansion of the CTF for CBOs, and advocated that the Commission appoint a blue-ribbon panel of experts in advanced telecommunications and representatives of low-income communities to formulate a long-term plan for implementing SB 1712.

on the issues raised by SB 1712. Therefore, Greenlining/LIF is not eligible for intervenor compensation.

Greenlining/LIF's reading of PU Code §1801.3(b) suggests that the Commission is required to award reasonable fees where a party has met all the statutory requirements. (Greenlining/LIF Rhg. App., p. 13.) Section 1801.3(b) provides that the intervenor compensation statute "shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility process." This statutory provision cannot reasonably be interpreted as requiring that an intervenor award must be made in all cases, even where a party, as here, has not met the statutory requirements.

The fundamental issue is whether Greenlining/LIF met the statutory requirements for intervenor compensation. We find that it has not. Greenlining/LIF cites *Ketchum III v. Moses* (2001) 24 Cal.4<sup>th</sup> 1122 for the proposition that awards are mandatory for private attorneys general if statutory requirements are met. They further assert that California's private attorney general statutes are very analogous to the Commission's intervenor compensation system. (Greenlining/LIF Rhg. App., pp. 13-14.) The Commission should not rely on private attorney general statutes when the Legislature has enacted specific statutes in the PU Code that apply to proceedings at this Commission. It is these statutes that are controlling, and they provide for compensation only if, in the judgment of the Commission, the requirements are met. That is not the case here.

**1. Greenlining/LIF Were Not Denied Compensation  
Because their Contributions Were Duplicative**

Greenlining/LIF allege they were denied compensation because some contributions did not originate with them, and were duplicative. (Greenlining/LIF Rhg. App., pp. 4-5.) This is not so. There is a line of cases where the Commission has awarded intervenor compensation for contributions that have been similar, or nearly

identical, to those of others, as Greenlining/LIF notes.<sup>10</sup> The Commission did not deny Greenlining/LIF's request for compensation merely because their participation was duplicative. The dispositive factor in D.03-08-012 was the Commission's determination that Greenlining/LIF did not make a substantial contribution to D.02-10-060; therefore, an award could not be made in contravention of §1803(a).

Greenlining/LIF suggest that governing statutes mandate an award of compensation if requirements are met. We agree. As previously discussed, however, Greenlining/LIF did not meet the requirements. Moreover, an essential element in intervenor compensation cases is the Commission's judgment. A party may not be deemed to have met the requirements without that element. The Commission, in its judgment, must decide whether the applicant for intervenor compensation has met the statutory requirements. The Commission exercised that judgment in a number of cases where intervenor compensation was denied. Among them are D.00-03-044 in A.98-07-058 (TURN); D.00-04-026 in R.92-03-050/A.91-06-016 (Utility Design, Inc.); and D.01-07-034 in C.95-03-057 (Paula Karrison).

In sum, the Commission did not deny compensation for Greenlining/LIF's presentation because it was not original. Compensation was not awarded because Greenlining/LIF's participation did not substantially contribute to the outcome of the decision, consistent with the requirements of §1801.3(d), nor did it materially supplement, complement, or contribute to the presentation of another party, in the judgment of the Commission.

## **2. Greenlining/LIF Did Not Qualify for An Award of Compensation**

Greenlining/LIF claim that the Commission denied them compensation merely because some of their contentions were rejected. They urge that they be compensated at least for the contentions that the Commission did adopt.

---

<sup>10</sup> Among them were D.97-12-076; D.96-08-040; D.00-04-033; and D.00-07-048.

(Greenlining/LIF Rhg. App., p. 5.) As previously demonstrated, Greenlining/LIF failed to establish that the Commission adopted any of their proposals.

For an intervenor to be awarded compensation, the Commission must have determined that the party made a substantial contribution that was adopted in whole or in part in a Commission decision:

To meet the substantial contribution standard, the statute requires that a customer's recommendation(s) be adopted in whole or in part. In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.<sup>11</sup>

The Commission did not adopt any of Greenlining/LIF's proposals. Even where the Commission does not adopt any of the intervenor's recommendations, compensation may be awarded if, in the judgment of the Commission, the intervenor's participation substantially contributed to the decision or order.<sup>12</sup> For example, in this proceeding, the Commission awarded La Raza's request for compensation although it did not adopt La Raza's position. La Raza was awarded fees because it provided a unique perspective that enriched the Commission's deliberations and the record. The Commission found that La Raza contributed substantially to the development of the record. (D.03-08-012, Finding of Fact No. 3) In contrast, compensation was not awarded to Greenlining/LIF because, in the Commission's judgment, they failed to make a substantial contribution to D.02-10-060.

---

<sup>11</sup> 79 CPUC2d, *supra* at 653.

<sup>12</sup> See D.89-03-063 (31 CPUC2d 402) (awarding San Luis Obispo Mothers for Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, although ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

**B. The Commission Fully Considered Greenlining/LIF's Presentation and Determined that It Was Neither Substantial Nor Uniquely Persuasive**

Greenlining/LIF allege that the Commission committed two errors in “categorically” denying Greenlining/LIF’s request for compensation: 1) the Commission mischaracterizes Greenlining/LIF’s contributions as only consisting of two proposals; and 2) it fails to apply the applicable Commission standard for situations where the Commission adopts some, but not all, of a party’s proposals. (Greenlining/LIF Rhg. App., p. 5.) The record does not support these allegations. Moreover, Greenlining/LIF appear to be confusing the Draft Decision of ALJ Bushey with D.03-08-012. For instance, Greenlining/LIF assert that: “The Draft Decision on page 9 lists proposals that it will not attribute to LIF/Greenlining as they did not originate with LIF/Greenlining.” (Greenlining/LIF Rhg. App., p. 8.) No such proposals are listed on page 9 of D.03-08-012. Again, incorrect citations undermine the persuasiveness of Greenlining/LIF’s argument.

In their request for compensation, Greenlining/LIF contend that their contributions were unique and substantial. Yet, they did not provide any example of a unique or substantial contribution. (See Greenlining/LIF’s Request for Intervenor Compensation, pp. 6-7.) Moreover, the question is not whether a contribution is unique, but whether it is uniquely persuasive: “The party requesting compensation must show that notwithstanding any duplication, its position is distinguishable from others, and its argument was uniquely persuasive in the Commission’s adoption of the joint position of the parties.” (D.00-03-005, *mimeo*, p. 16.) The Commission did not find Greenlining/LIF’s contributions to be uniquely persuasive or substantial in the case at hand.

Greenlining/LIF admit that they may have advocated some measures supported by other groups; however, they maintain that they made unique contributions on behalf of low-income and language minority customers. They argue that notwithstanding the “duplication of advocacy,” the statute calls for a full award as long as

a party makes a substantial contribution. (Greenlining/LIF's Request for Intervenor Compensation, p. 6.) We agree with Greenlining/LIF that the "controlling question is whether a party makes a substantial contribution to the Commission's decision, irrespective of any duplication." (*Id.*, p. 7.) However, in the Commission's judgment, Greenlining/LIF did not make a substantial contribution to D.02-10-060, and therefore are not entitled to receive an award of compensation.

#### IV. CONCLUSION

We have reviewed all of the allegations in Greenlining/LIF's rehearing application and are of the opinion that good cause does not exist to grant rehearing. However, we correct a typographical error to accurately reflect decision number.

**THEREFORE, IT IS ORDERED that:**

1. On page 5, last paragraph, second sentence should read as follows:  
As a specific example, nearly half of the text of D.02-10-060 is devoted to responding to La Raza's substantive and procedural issues.
2. The rehearing of D.03-08-012 is denied.
3. This proceeding is closed.
4. This order is effective today.

Dated December 4, 2003 at San Francisco, California.

MICHAEL R. PEEVEY  
President  
CARL W. WOOD  
LORETTA M. LYNCH  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners