ALJ/KLM/jt2

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Decision 06-05-030 May 25, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Comply with the Mandates of Senate Bill 1563 regarding deployment of Advanced Telecommunications Technologies.	Rulemaking 03-04-003 (Filed April 3, 2003)

OPINION GRANTING INTERVENOR COMPENSATION TO DISABILITY RIGHTS ADVOCATES FOR SUBSTANTIAL CONTRIBUTIONS TO DECISION 05-05-013

This decision awards Disability Rights Advocates (DRA) $35,461.17 in compensation for its substantial contributions to Decision (D.) 05-05-013. Today's award is approximately 65% of the amount DRA requested to reflect reduced attorney rates and a disallowance of costs incurred prior to the date DRA sought party status.

1. Background

The Commission opened Rulemaking (R.) 03-04-003 to satisfy the requirements of Senate Bill (SB) 1563 (Ch. 674, Stats. 2002). SB 1563 required the Commission to convene a proceeding to develop a plan for encouraging the widespread availability and use of advanced communications infrastructure. It required us to encourage participation from a broad cross section of the communications industries, as well as users and community representatives. The bill required the Commission to encourage participation in the proceeding

by community-based organizations, including nonprofit community technology programs and libraries. As described in the opening rulemaking, the ensuing report was required to identify factors preventing the ubiquitous availability and use of advanced communications services, and assess the consequences of and develop strategies for addressing this inadequacy while encouraging the deployment of adequate investment.

We solicited written comments, held workshops and community meetings, and conducted independent research on a number of issues affecting the deployment of broadband in California. Parties discussed the scope of issues and schedule in this proceeding at a prehearing conference (PHC) on September 15, 2003. The Commission also conducted a full panel hearing on February 8, 2005, where parties and members of the community addressed the draft report in this proceeding released on February 1, 2005. D.05-05-013 adopted a report, entitled *Broadband Deployment in California,* to satisfy the requirements of SB 1563.

The report generally finds that advanced telecommunications technologies are increasingly central to the needs of families, the state's economy, and the vitality of local communities. California leads the nation in deployment of broadband services and usage, but must continue to advance forward-looking public policies and programs that will ensure the state's continued leadership in deploying new advanced telecommunications technologies. The report identified several key areas; among them improving access to rights-of-way, modifying the role of Commission approval of new networks and new providers of telecommunications services, and encouraging the examination of broadband deployment over existing power lines. The report also found that widespread adoption of Voice over Internet Protocol services and other innovative services is

likely to spur the deployment of broadband networks in California. Finally, the report discusses several ways to promote availability of broadband services to lower-income Californians, residents of rural areas, and the disabled community.

2. Requirements for Awards of Compensation

The intervenor compensation program, enacted in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers. (Subsequent statutory references are to the Public Utilities Code unless otherwise indicated.)

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)
5. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a).)

6. The claimed fees and costs are reasonable (§ 1801), necessary for and related to the substantial contribution (D.98-04-059), comparable to the market rates paid to others with comparable training, experience (§ 1806), and productivity (D.98-04-059).

3. Procedural Issues

The PHC in this matter was held on September 15, 2003. DRA filed its NOI on November 1, 2004, more than a year late. In its NOI, DRA explained that it had not been aware of the proceeding until shortly before its filing. On November 22, 2004, Administrative Law Judge (ALJ) Malcolm accepted the late filing and found that DRA is a customer, pursuant to § 1802(b)(1), and meets the financial hardship condition pursuant to §§ 1802(g) and 1803(b). DRA filed its request for compensation on July 18, 2005, within 60 days of D.05-05-013 being issued.[1] DRA amended its pleading on January 9, 2006 to reflect the findings of D.05-11-031 with regard to the appropriate rates for intervenors for work during 2004 and 2005. DRA's request divides its work between that conducted before October 25, 2004, and that conducted on and after October 25, 2004, the date DRA filed for intervenor status in the proceeding.

We find that DRA has satisfied all the procedural requirements necessary to make its request for compensation.[2]

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[1] No party opposes the request.

[2] Section 1802(b)(1) defines a "customer" as: A) a participant representing consumers, customers or subscribers of a utility; B) a representative who has been authorized by a customer; or C) a representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential or small business customers.

4. Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding, we look at several things. First, we consider whether the ALJ or Commission adopted one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer. (See § 1802(i).) Second, if the customer's contentions or recommendations paralleled those of another party, we consider whether the customer's participation materially supplemented, complemented, or contributed to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision. (See §§ 1802(i) and 1802.5.) As described in § 1802(i), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

Should the Commission not adopt any of the customer's recommendations, it may still award compensation if the customer's participation substantially contributed to the decision or order in other ways.

We evaluate whether a substantial contribution was made recognizing that this was not a typical Commission proceeding. As required by SB 1563, the Commission consulted with a broad cross-section of industry, users, and affected communities rather than relying exclusively on a formal process. The result of this process was the preparation of a report for submission to the Legislature, rather than a decision that adopted specific outcomes. For this reason, it is difficult to say that a particular party's position was adopted by the Commission. However, the ideas and analysis of many parties are reflected in the report and were necessary to the Commission's analysis of the issues, even if the plan laid out in the report does not adopt each and every recommendation.

With this context in mind, we consider DRA's contributions.

DRA filed comments in this proceeding, which emphasized the special needs and circumstances of disabled customers. DRA's request for compensation asserts that virtually all of the information included in the Commission's report about disabled telecommunications users was based on information DRA put into the record. For example, the Commission used statistics provided by DRA relating to computer and internet use, and income levels of the disabled. The report cited the benefits of internet access for people with disabilities that DRA raised in its comments, DRA's comments relating to the usefulness of an internet connection for people with sensory disabilities, and DRA's analysis of the barriers to internet access for people with disabilities. Finally, it adopted DRA's recommendations for addressing the digital divide.

In this proceeding, we solicited the input of many parties and members of various user communities. DRA's representation of the disabled community was essential and unique. We value DRA's expertise in this area and also its representation of a group that experiences specific and in many ways unique difficulties in taking advantage of emerging communication technologies. As DRA observes, its efforts did not duplicate those of other parties, largely because of the often unique circumstances of its clients with regard to access to communication technologies. We agree and find that DRA made a substantial contribution in this proceeding.

5. Reasonableness of Requested Compensation

After we have determined the scope of a customer's substantial contribution, we look at whether the compensation requested is reasonable.

DRA requests $54,070.17 for its participation in this proceeding, as follows, which it breaks down according to the work conducted before and after filing for party status on October 25, 2004:

Advocate	Year	Hours	Rate	Amount
Melissa Kasnitz	2004 Pre-10/25/04	4.8	325	$ 1560.00
	2004 Post-10/25/04	11.1	325	3607.50
Melissa Kasnitz	2005 Post-10/25/04	54	425	22,950.00
Kasnitz (fee request)	2004	6.7	212.50	
	2005	2.5	212.50	1620.00
Alexius Markwalder	2004 Pre-10/25/04	45.6	190	8664.00
	2004 Post-10/25/04	20.3	190	3857.00
Alexius Markwalder	2005 Post-10/25/04	19.7	190	3743.00
Markwalder (fee request)	2004	1.7	95	
	2005	13.8	95	1472.50
Law Clerk	2004 Pre-10/25/04	28.5	85	2422.00
	2004 Post-10/25/04	12.2	85	1037.00
Law Clerk	2005 Post-10/25/04	4.3	90	387.00
Law Clerk (fee request)	2004	38.3	45	
	2005	.3	45	1641.25
Expenses				1,108.42
			Total	$54,070.17

In general, the components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. The issues we consider to determine reasonableness are discussed below.

5.1 Hours and Costs Related to and Necessary for Substantial Contribution

We assess whether the hours claimed for the customer's efforts that resulted in substantial contributions to Commission decisions are reasonable by

determining to what degree the hours and costs are related to the work performed and necessary for the substantial contribution.

DRA documented its claimed hours by presenting a daily breakdown of the hours of its attorneys, accompanied by a brief description of each activity. DRA represents that it coordinated its efforts with other intervenors to minimize duplication of effort. Generally, the hourly breakdown reasonably supports the claim for total hours. The number of hours DRA claims for drafting the compensation request, however, is excessive. DRA requests more than 63 hours for that task. This is substantially more time for drafting a compensation request than sought in the requests of other parties, especially considering the amount of time DRA spent in the proceeding. We approve compensation for half of the hours requested for work on the request. Pursuant to our policy, the hourly rates for attorneys and experts for time spent preparing the compensation request is reduced by half, while law clerks are compensated at their full rate.

Although we find that most of DRA's hours are reasonable from the standpoint of the amount of time spent to accomplish various tasks, and that DRA seeks compensation for appropriate activities, we disallow a substantial portion of the hours that would otherwise qualify for reimbursement. DRA seeks compensation for work begun in February 2004. In its NOI dated November 1, 2004, DRA stated that its delay in filing the NOI occurred because it only recently became aware of the proceeding. This discrepancy between DRA's NOI and its request for compensation concerns us. We acknowledge that Commission proceedings are complex and sometimes difficult to navigate. For that reason, we give parties the benefit of the doubt on procedural matters wherever possible and where doing so would not compromise the rights of others. In this case, the ALJ accepted DRA's late-filed NOI late believing that it

had been unaware of the proceeding when in fact it had been working in the proceeding for at least nine months prior to the NOI. Presenting false or misleading statements in a pleading filed with the Commission is unethical.[3] Overlooking the issue would undermine the integrity of our proceedings. In view of the above, it follows that arguably we should decline to fund any of DRA's work in this proceeding. Unfortunately, doing so would penalize an underrepresented constituency and discourage DRA from participating in future proceedings here. Because we wish to recognize DRA's contributions and encourage future participation by an organization that has otherwise ably represented disabled members of the community, we disallow only that work conducted before the date DRA filed for party status on October 25, 2004. We order compensation for reasonable work conducted after that date.

5.2 Market Rate Standard

We next take into consideration whether the claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services.

Melissa Kasnitz. DRA seeks 2004 and 2005 hourly rates of $325 and $425 respectively for Kasnitz. Kasnitz is a managing attorney who has been practicing

[3] DRA's request for compensation also contains an assertion that might be considered misleading. In arguing that its intervenor hourly rates are reasonable, it states "This Commission, federal courts and state courts have all approved DRA's rates in previous proceedings…" A review of relevant Commission decisions and court orders discloses that neither the Commission nor the courts have set rates for the attorneys who participated in this proceeding. DRA's managing attorney knows or should know that the Commission does not set attorney rates for an organization but rather for the attorneys who try the case. We trust future DRA pleadings will present more forthright arguments.

law since l992. DRA explains the 2004 rate is within the range of rates for attorneys with 12 years of experience adopted in D.05-11-031 and the 2005 rate is within the range of rates for attorneys with 13 or more years of experience. In D.06-04-021, we set rates for Kasnitz of $300/hour for 2004, and $350 for 2005, and we adopt these rates here.

Alexius Markwalder. DRA seeks a rate of $190 for Markwalder's work in 2004 and 2005. Markwalder graduated from law school in 2003 and conducted paralegal services for the Department of Justice for several years prior. The range of rates for attorneys with Markwalder's years practicing law is $135-190 for 2005. We adopt a rate of $190 for Markwalder.

Law Clerks. DRA seeks $85 an hour for the work of its law clerks conducted in 2004 and $90 an hour for 2005. These are reasonable rates and we adopt them here for the time spent preparing the compensation request.

5.3 Productivity

D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of a customer's participation should bear a reasonable relationship to the benefits realized through their participation. This showing assists us in determining the overall reasonableness of the request.

Because this proceeding did not direct utilities to take specific action and did not directly and immediately affect utility rates, it is difficult to determine a dollar value to the work undertaken by intervenors. In this proceeding, it is sufficient to find that DRA contributed materially to the report we issued by providing important perspectives, analyses and proposals on subjects of concern to its disabled constituents and the state. Consequently, DRA significantly

advanced our thinking on the important public policy questions we addressed in the report.

5.4 Direct Expenses

The itemized direct expenses submitted by DRA include costs for travel, photocopying, postage, telephone, Lexis services and messenger services. DRA's request for $1108.42 is reasonable and commensurate with the work performed.

6. Total Awards

As set forth in the tables below, we award intervenor compensation to DRA as follows:

Advocate	Year	Hours	Rate	Amount
Melissa Kasnitz	2004 Post-10/25/04	11.1	300	$3,330.00
Melissa Kasnitz	2005	54	350	18,900.00
Kasnitz (fee request)	2004 2005	3.35 1.25	150 175	502.50 218.75
Alexius Markwalder	2004 Post-10/25/04	20.3	190	3,857.00
Alexius Markwalder	2005	19.7	190	3,743.00
Markwalder (fee request)	2004 2005	.85 6.9	95 95	80.75 655.50
Law Clerk	2004 Post-10/25/04	12.2	85	1,037.00
Law Clerk	2005 Post-10/25/04	4.3	90	387.00
Law Clerk (fee request)	2004 2005	19.15 .15	85.00 90	1,627.75 13.50
Expenses				1,108.42
			Total	$35,461.17

Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing on October 1, 2005, the 75th day after each filed its compensation request and continuing until full payment of the award is made.

This rulemaking proceeding affected a broad array of utilities and others in the telecommunications field. As such, we find it appropriate to authorize

payment of the compensation award from the intervenor compensation program fund, as described in D.00-01-020.

We remind all intervenors that Commission staff may audit records relevant to this award, and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. DRA's records should identify specific issues for which each requested compensation, the actual time spent by each employee or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

7. Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of our Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

8. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Kim Malcolm is the assigned ALJ in this proceeding.

Findings of Fact

1. DRA has met all of the procedural requirements necessary to claim compensation in this proceeding.
2. DRA made a substantial contribution to D.05-05-013 as described herein.
3. The total reasonable compensation for DRA is $35,461.17
4. DRA's assertion in its NOI that it had only recently learned of the Commission's work in this proceeding as of November 2004 was misleading if, as DRA states, it had by that time been working in the proceeding for nine months.
5. The appendix to this decision summarizes today's award.

Conclusions of Law

1. DRA has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation, as set forth herein, incurred in making substantial contributions to D.05-05-013.

2. The Commission should not order compensation for any of the work DRA conducted before it requested intervenor status on October 25, 2004.

3. DRA should be awarded $35,461.17 in compensation.

4. Per Rule 77.7(f)(6), the comment period for this compensation decision may be waived.

5. This order should be effective today so that DRA may be compensated without further delay.

6. This rulemaking should be closed.

O R D E R

IT IS ORDERED that:

1. Disability Rights Advocates (DRA) is awarded $35,461.17 in compensation for its contributions to Decision 05-05-013.

2. Within 30 days of the effective date of this decision, the three awards described herein shall be paid from the intervenor compensation program fund, as described in D.00-01-020. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning on October 1, 2007, the 75th day after the respective filing dates of DRA's requests for compensation, and continuing until full payment is made.

3. Rulemaking 03-04-003 is closed.

This order is effective today.

Dated May 25, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Appendix
Compensation Decision Summary Information

Compensation Decision:	D0605030	**Modifies Decision? No**
Contribution Decision(s):	D0505013	
Proceeding(s):	R0304003	
Author:	ALJ Malcolm	
Payer(s):	Intervenor Compensation Program Fund	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
Disability Rights Advocates	July 17, 2005	$54,070.17	$35,461.17	No	Work prior to granting of party status. Hourly rates.

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Melissa	Kasnitz	Attorney	Disability Rights Advocates	$325	2004	$300
Melissa	Kasnitz	Attorney	Disability Rights Advocates	$425	2005	$350
Alexius	Markwalder	Attorney	Disability Rights Advocates	$190	2004	$190
Alexius	Markwalder	Attorney	Disability Rights Advocates	$190	2005	$190
		Law Clerk	Disability Rights Advocates	$85	2004	$85
		Law Clerk	Disability Rights Advocates	$90	2005	$90

(End of Appendix)