

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



June 24, 2003

Agenda ID #2389

TO: PARTIES OF RECORD IN RULEMAKING 01-05-046

This is the draft decision of Administrative Law Judge (ALJ) Bushey, which was identified as Item CA-35 on the June 5, 2003 agenda. However, this decision has been changed to invite comments by the parties and will be included in the agenda for the regular meeting scheduled for August 21, 2003. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

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

ANG:jva

Attachment

Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 6/24/03)

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)

**OPINION ON REQUEST FOR INTERVENOR COMPENSATION
BY THE NATIONAL COUNCIL OF LA RAZA, SOUTHERN
LEADERSHIP CONFERENCE AND THE CALIFORNIA
RURAL INDIAN HEALTH BOARD, AND GREENLINING
INSTITUTE AND LATINO ISSUES FORUM**

This decision awards the National Council of La Raza, Southern Christian Leadership Conference and the California Rural Indian Health Board (jointly, "La Raza") \$28,510.77 in compensation for their contribution to Decision (D.) 02-10-060. This decision denies the request of Greenlining Institute and Latino Issues Forum (Greenlining/LIF) for compensation in this proceeding.

I. Background

D.02-10-060 resolved issues raised by Senate Bill (SB) 1712, which directed the Commission to consider ways to improve the deployment of advanced telecommunications technologies, such as broadband, to assure access to Internet. D.02-10-060 summarized the Commission's report on matters raised by SB 1712, stating that the cost of making broadband technology available to all would be prohibitive. It found that Internet access is available to all customers who have basic telephone services.

II. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812. Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference or by a date established by the Commission. The NOI must present information regarding the nature and extent of the customer's planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility.

The assigned Administrative Law Judge (ALJ) issued a ruling dated January 8, 2002, finding La Raza to be eligible for compensation in this proceeding. The same ruling also found that La Raza had demonstrated that its participation, unless compensated, would impose a significant financial hardship. (See §§ 1802(g), 1804(b)(1).) The ALJ issued a similar ruling on January 2, 2002, finding that Greenlining/LIF was eligible for compensation in this proceeding.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. La Raza timely filed a request for an award of compensation on December 30, 2002. Greenlining/LIF timely filed a request on December 23, 2002.

Pub. Util. Code § 1804(c) requires that an intervenor requesting compensation provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" 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.”

Pub. Util. Code § 1802(h) provides that a party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision, or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted. A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party’s position in total.

Section 1804(e) requires the Commission to issue a decision that resolves whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

III. La Raza’s Contribution to Resolution of Issues

In this case, La Raza proposed that the Commission redefine “Universal Service” to incorporate two-way voice, video and data service using broadband technology. It argued that the cost of broadband, about \$20 per month (\$10 a month for lifeline customers), was substantially less than the benefits of the

service to consumers and society. La Raza also proposed that all California customers should have access to the Internet as a matter of equity and to secure the state's economic future. La Raza filed comments and reply comments on the initial OIR, filed motions, filed comments on the ALJ's draft decision and the Commission's report to the Legislature, and presented a declaration with analysis by an expert witness.

In typical proceedings, an intervenor seeks to establish "substantial contribution" by linking a specific outcome adopted by the Commission to a position the intervenor took in prepared testimony or in a brief. La Raza acknowledges that the Commission did not adopt its positions in this proceeding, but seeks compensation under the theory that the Commission may award compensation in certain circumstances even if the Commission does not adopt the intervenor's position. D.95-08-051 and previous orders have found that the Commission may make such an award where the case is complex, requires uncommon skill and the proceeding is unusually important.

We believe some compensation in this case is warranted even though La Raza did not prevail. This proceeding, as La Raza observes, was important because it raised vital issues of equity and economic development. We also note that the state Legislature directed the Commission undertake this proceeding. Although the Commission did not agree with La Raza to expand the definition of universal service to include broadband services, it did explicitly recognize the vital role of information technology in the state's economy and in spreading the benefits of those technologies to all Californians.

The issues in this proceeding were complex in that they involved changing technologies and markets for them, the cost of technology and ratemaking treatment for those costs, legislative intent and jurisdictional issues. In addition, La Raza is correct that it contributed to some procedural issues raised in the

course of the proceeding, some of which influenced the development of a complete record.

Most significantly, La Raza provided a unique and unpopular perspective, which enriched the Commission's deliberations and the proceeding record. Indeed, La Raza was the only party to advocate for the kinds of changes suggested in the statute. Without its participation, the Commission would have had no proposal to change the status quo.

For the foregoing reasons, we find that La Raza made a significant contribution to this proceeding. We grant La Raza 50% of its requested attorney and expert hours, consistent with D.01-11-047.¹

IV. Reasonableness of La Raza's Requested Compensation

La Raza requests \$90,731.37² as follows:

Attorney Fees

Mark Savage	129.6 hours x \$390.00	= \$50,544.00
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Jenny Huang	52.1 hours x \$295.00	= \$15,369.50
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Law Clerk

Elisa Laird	37.9 hours x \$130.00	= \$ 4,927.00
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Subtotal		\$70,840.50
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Attorney Expenses

		\$ 2,015.87
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Expert Witness Fees and Expenses

¹ In D.01-11-047, we agreed with Aglet Consumers Alliance that a 50% reduction in the request for compensation was appropriate given that Aglet's positions were not adopted, because Aglet's involvement resulted in a better understanding of the issues in the proceeding. (See generally, D.01-11-047, pp. 7-8.)

² La Raza also provided an alternative request that reduced the hours worked on the intervenor compensation request by 50% and made the rate for law clerks consistent with Commission decisions setting rates for that category of professional. Applying these policies reduces the total request to \$80,514.47.

Tom Hargadon	71.50 hours x \$250.00	\$17,875.00
	Total	\$90,731.37

La Raza asserts that its 223.90 hours of work were reasonable over the course of a 20-month proceeding, and during which La Raza filed several formal documents and analysis.

A. Hours Claimed

We find that the hours claimed for La Raza's attorneys and law clerk are appropriate. We reduce Hargadon's compensable hours because his testimony was vague and did not provide specific analysis. For example, the testimony proposes that customers and their broadband providers enter into contracts for service to overcome problems presented by existing state and federal law, but it does not explain what those legal barriers might be and how a contractual arrangement would solve them. The testimony proposes that basic service for business include broadband because "there is little distinction between residential and business in digital services," an observation that is vague and seemingly irrelevant to scope of the proceeding. A substantial portion of the testimony addresses the cost of ubiquitous broadband access by assuming those costs rather than analyzing what they might be or reporting what they are. Hargadon's testimony touched on many complex subjects but little of his testimony was useful for addressing the threshold issues in this rulemaking. For these reasons, we cannot agree with La Raza that more than 70 hours of work to draft less than seven pages on matters of substance was required. Thus, we reduce to 20 the number of hours for which we compensate Hargadon.

As stated previously, we will award compensation for the reasonable hours of attorneys and experts but apply 50% reduction in recognition that La Raza did not prevail on substantive issues.

B. Hourly Rates

La Raza provided an analysis of San Francisco attorney fees to justify its proposed rates. It sets the rates by comparing the rates of large San Francisco area law firms and then (apparently) adding a premium for “contingency work” and adding a multiplier. La Raza’s expert, Richard Pearl, argues that firms typically require premium rates for contingency work because they assume a risk that they will not recover their fees.

We do not adopt La Raza's proposed fee levels because they are significantly higher than the rates for other attorneys we have compensated in Commission proceedings. Those fees are set according to our assessment of market rates. Specifically, Michel Florio of TURN has more than 20 years of experience in utility law and received \$315 an hour for the period 2000-01 (D.01-11-014). Robert Finkelstein, who has slightly more experience than Savage, received \$280 in 2000, \$310 in 2001, and \$340 in 2002. Like Savage, Christopher Hilen was admitted to the California state bar in 1989. Hilen received \$285 for work in 2001. Accordingly, we adopt an hourly fee for Savage of \$285 for 2001 and increase it to \$300 for 2002.

Setting the fee for Jenny Huang is somewhat more complicated. Huang was not licensed to practice law in California during the period in question. In a supplemental filing, La Raza clarified that she provided legal research under the supervision of an attorney in this proceeding. Under the circumstances, Huang’s market rate would not be the same as the rate for a member of the California bar conducting independent legal representation. Rather, her work is comparable to that of an accomplished law clerk. We add a premium to the legal fees we adopt here for law clerks to recognize Huang’s legal practice experience in another state. This approach is consistent with D.02-11-024, where we adopted a rate of \$125 an hour in 2001 for a highly

experienced paralegal who also had a juris doctorate degree but was not a member of the California bar. We adopt that rate for Huang today for 2001 and increase it to \$135 an hour for 2002.

For Laird, we adopt a rate of \$85 an hour, which is the rate we awarded to law clerks in D.03-01-075. Consistent with past practice, we do not discount the rate for time spent by law clerks on intervenor compensation requests.

La Raza claims \$250 an hour for the work of Hargadon, which is consistent with our past awards to Hargadon and we will adopt it.

V. La Raza's Award

We award La Raza \$28,510.77 as follows:

Savage

2001	\$285 x 67.28	= \$19,174.80
2002	\$300 x 62.32	= \$18,696.00
Total		\$37,870.80

Huang

2001	\$125 x 13.6	= \$ 1,700.00
2002	\$135 x 38.5	= \$ 5,197.50
Total		\$ 6,897.50

Laird

\$ 85 x 37.9	= \$ 3,221.50
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Hargadon

\$250 x 20	= \$ 5,000.00
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Subtotal \$52,989.80

Reduced by 50% ($\$52,989.80 \div 2$) = \$26,494.90

Expenses \$ 2,015.87

Grand Total \$28,510.77

Consistent with previous Commission decisions, we will order that interest be paid on the award amount, calculated at the three-month commercial paper rate and commencing the 75th day after La Raza filed its compensation request and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put La Raza on notice that the Commission Staff may audit its records related to this award. Thus, La Raza must make and retain adequate accounting and other documentation to support all claims for intervenor compensation.

VI. Greenlining/LIF's Contribution to Resolution of Issues

Greenlining/LIF's request for compensation³ states that the Commission adopted its positions because it proposed that (1) customers should continue to access Internet using basic ("dial up") telecommunications services "without overwhelming the Universal Lifeline Telephone Service (ULTS) fund"; (2) widespread internet use should be facilitated through the ULTS program; and (3) the Commission should increase the discounts for the California Teleconnect Fund (CTF). Greenlining/LIF concluded that because the Commission adopted its proposals, it had made a significant contribution to D.02-10-060.

We have carefully reviewed the record and we are unable to find any support for Greenlining/LIF's assertions that the proposals originated with Greenlining/LIF. In fact, Greenlining/LIF's proposals in this proceeding were mainly twofold: (1) to provide a \$10 subsidy to ULTS customers so they could purchase dial-up internet services and (2) to create a blue ribbon panel to conduct further studies of the issues raised by SB 1712. The Commission did not adopt Greenlining/LIF's suggestion to provide a subsidy for dial-up Internet

³ Greenlining requested \$31,345.06 in compensation for its work in this proceeding, which consisted of filing initial comments (11 pages), reply comments (8 pages), and reply comments on the draft decision (6 pages).

access, and explicitly rejected any such subsidies as imposing too great a burden on the ULTS program and customer rates. The Commission also rejected Greenlining/LIF's suggestion that "the least prudent course for the Commission would be to conclude that advanced technologies are not within the current definition of 'essential' and do no more." Contrary to Greenlining/LIF's suggestion, the Commission did not include any type of Internet access in the definition of basic service. Greenlining/LIF is correct that a need to protect the ULTS fund is implicit in the Commission's decision to exclude broadband from the package of basic services. However, Greenlining/LIF did not advocate for that protection but, as noted above, proposed creating a new subsidy for dial-up Internet access to be funded by the ULTS fund.

Nor did the Commission agree with Greenlining/LIF's suggestion to create a blue ribbon panel. Although it agreed some of the issues would be the subjects of other proceedings, it did not convene a group of experts to study the matter as repeatedly suggested by Greenlining/LIF.

Greenlining/LIF also claimed that "[t]he Commission adopted Greenlining/LIF's suggestion that a higher CTF discount for CBO's⁴ would increase their participation in the CTF program. The Commission directed the Telecommunications Division to increase the CTF discount for CBO's to 50%, as Greenlining/LIF suggested." Greenlining/LIF request for compensation at p.6. To evaluate this assertion, we have carefully reviewed Greenlining/LIF's comments and reply comments. We are unable to locate a single reference to the CTF, much less a suggestion that the Commission increase the discount in these comments or reply comments.

⁴ Community Based Organization

Greenlining/LIF did address the CTF in its reply comments on the Commission decision on the report. Greenlining's reply comments, however, were filed after the Commission staff issued its report supporting the proposal and attributing it other parties. On August 14, 2002, the Commission staff issued the broadband report, which included a specific conclusion that "enhancement of CTF promotes internet use among low-income households." In that report, the assigned Commissioner also announced his intention to propose to increase the discounts available and expand the services included in the CTF. The genesis of such a proposal was attributed to "Pacific Bell and other parties" as well as Public Participation Hearing speakers. See Report at page 22. Neither the report nor the filings that preceded it, support Greenlining/LIF's assertions that it was the source of these proposals.

Subsequent to releasing the report, the Commission mailed for comment a draft decision adopting the report. Thereafter, on September 23, 2002, Greenlining/LIF filed its reply comments on the Commission's draft decision on the report. In the final decision, the Commission summarized Greenlining/LIF's reply comments on the draft decision: "[Greenlining/LIF] recommended that the Commission appoint a blue-ribbon panel of experts in advanced telecommunications technologies and representatives of low-income communities to formulate a long-term plan for implementing SB 1712 including deployment of advanced technologies to universal service customers. These groups also recommended further expansion of the CTF for community based organizations." D.02-10-060 at page 4 -5. In those reply comments for the first time Greenlining supported, with one sentence on page 3,⁵ the staff report's

⁵ The first two and a half pages of the reply comments are devoted to the "blue ribbon" panel proposal. The next page and half advocate for increasing the CTF discount to

proposed expansion of the CTF. The Commission decision adopted the CTF proposal in the report and directed the Telecommunications Division to prepare a resolution modifying the CTF program. Thus, Greenlining/LIF's reply comments did nothing more than support the staff report recommendation, with no additional substantive elaboration.

As the above discussion demonstrates, Greenlining/LIF's assertion that it is the source of the adopted CTF modifications is pointedly at odds with the record. Consequently, we cannot rely on this assertion to support the conclusion that Greenlining/LIF made a significant contribution to the record.

A similar result, but for different reasons, occurs with regard to Greenlining/LIF's statement that it advocated for increased reliance on CBOs for outreach to low-income families. While Greenlining/LIF did make a vague reference to "non profits,"⁶ the Commission took no action in this proceeding that increased reliance on CBOs for outreach to low-income families. On the page of the report cited by Greenlining/LIF, page 33, the Commission described an extant initiative relying on CBOs where contracts were under review by the Department of General Services with approval expected soon thereafter. Other than to note the existence of this already approved and then nearly implemented program, the Commission did not address the topic at all. Greenlining/LIF's advocacy in this proceeding did not substantially contribute to the outcome.

75% to 80% for CBOs and the final page and a half recommend expanding the definition of CBOs and an outreach campaign. The final decision did not adopt these proposals.

⁶ "Leveraged technology partnerships between non-profits, various levels of government, and private enterprises can and should be fostered by the Commission in its overarching blueprint for long-term technology deployment for ULTS customers." Greenlining/LIF Reply Comments at 3-4.

Therefore, Greenlining/LIF has failed to show that it made a substantial contribution on this topic.

We are, therefore, compelled to conclude that, in the particulars, Greenlining/LIF's request for compensation does not demonstrate that Greenlining/LIF has met the statutory standards for compensation. The request also fails to address or attribute any time to Greenlining/LIF's blue ribbon panel or \$10/month subsidy proposals. These problems and inconsistencies make it impossible for us to decide the substantial contribution question in Greenlining/LIF's favor.

As discussed above with regards to La Raza's request, the Commission can award compensation where the Commission does not adopt the intervenor's position. Such an award, however, requires that the participation enhance the record in the proceeding or be otherwise useful to the Commission, see D.01-11-047. Here, 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. Thus, Greenlining/LIF's proposals were not useful to the Commission, nor did the proposals enhance the record in the proceeding.

In short, Greenlining/LIF has failed to meet its burden of proving that it made a substantial contribution to this proceeding. For that reason, we are constrained by § 1803(a) to decline to award Greenlining/LIF intervenor compensation.

VII. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

VIII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. La Raza made a timely request for compensation for its contribution to D.02-10-060.
2. La Raza made a showing of significant financial hardship by demonstrating the economic interests of its individual members would be extremely small compared to the costs of participating in this proceeding.
3. La Raza contributed substantially to the development of the record in this proceeding although the Commission did not adopt its proposals.
4. Greenlining/LIF made a timely request for compensation for its contribution to D.02-10-060.
5. Greenlining/LIF's request for compensation is not consistent with the record in this proceeding.
6. Greenlining/LIF did not contribute substantially to the development of the record in this proceeding.
7. As adjusted above, La Raza's hourly rates are comparable to rates applied to professionals with comparable experience and skills.

Conclusions of Law

1. La Raza fulfilled the requirements of §§ 1801-1812 that govern awards of intervenor compensation.
2. Consistent with D.01-11-047, the Commission should award La Raza 50% of its otherwise reasonable billed hours because it made a substantial contribution to the understanding of key issues addressed in D.02-10-060.
3. Greenlining/LIF failed to meet its burden to demonstrate that it contributed substantially to the development of the record in this proceeding

because it requested compensation for developing issues that it did not address in the proceeding.

4. La Raza should be awarded \$28,510.77 for its contribution to D.02-10-060.

5. The Commission should set hourly rates that are comparable to those adopted for professionals with comparable experience and skills, adjusted for inflation.

6. Consistent with Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

7. This order should be effective today so that La Raza can be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. National Council of La Raza is awarded \$28,510.77 in compensation for substantial contribution to Decision (D.) 02-10-060, which the Commission will reimburse to La Raza, including interest at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, beginning 2003.

2. The request for compensation by Greenlining Institute and Latino Issues Forum is denied.

3. The comment period for today's decision is waived.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

**APPENDIX
(Page 1)**

Compensation Decision(s):	
Contribution Decision(s):	D0210060
Proceeding(s):	R0105046
Author:	ALJ Bushey
Payer(s):	Commission

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	12/30/02	\$90,731.37	\$28,510.77	Failure to prevail/excessive rates
Greenlining Institute/Latino Issues Forum	12/23/02	\$31,345.06	0	Failure to make substantial contribution

APPENDIX**(Page 2)****Advocate Information**

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Mark	Savage	Attorney	National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	\$390	2001	\$285
Mark	Savage	Attorney	National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	\$390	2002	\$300
Jenny	Huang	Law Clerk	National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	\$295	2001	\$125
Jenny	Huang	Law Clerk	National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	\$295	2002	\$135
Elisa	Laird	Law Clerk	National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	\$130	2001	\$85
Thomas	Hargadon	Policy Expert	National Council of La Raza/Southern Christian Leadership Conference/California Rural Indian Health Board	\$250	2001	\$250

(End of Appendix)