

BEFORE THE
DEPARTMENT OF MANAGED HEALTH CARE
STATE OF CALIFORNIA

In the Matter of the Application for an
Advocacy Award of:

Consumer Reports,
Applicant.

**DECISION GRANTING AWARD OF
ADVOCACY FEES TO CONSUMER
REPORTS, FOR SUBSTANTIAL
CONTRIBUTION TO APPROVAL OF
CVS'S ACQUISITION OF AETNA.**

I. SUMMARY

Consumer Reports ("APPLICANT") submitted an Application for an Advocacy Award for its participation in the Department of Managed Health Care's ("Department") consideration and approval of CVS Health Corporation's ("CVS") acquisition of Aetna, Inc. ("Aetna"). The Department designated Anna Pifer-Foote as the Hearing Officer. The Department finds that APPLICANT made a substantial contribution to the Decision and awards APPLICANT \$9,325.00.

II. BACKGROUND OF CONSUMER PARTICIPATION PROGRAM

The Consumer Participation Program ("CPP") allows for the award of reasonable advocacy and witness fees to any person or organization that (1) represents the interests of consumers in a proceeding and (2) makes a substantial contribution to the Department in its deliberations regarding the proceeding.¹

III. REQUIREMENTS FOR AWARDS OF ADVOCACY AND WITNESS FEES

A. Petition to Participate

¹ Cal. Code Regs., tit. 28, § 1010, subd. (a).

On March 3, 2016, APPLICANT submitted to the Department its Petition to Participate (“Petition”), under APPLICANT’s former name, Consumers Union of United States, Inc. On March 22, 2016, the Department approved APPLICANT’s Petition. APPLICANT certified that the information in its approved Petition remains true and accurate and it is therefore not required to submit an additional Petition for this Proceeding.²

B. Application for Award of Advocacy Fees

An Application for an Advocacy Award must be submitted no later than sixty (60) days following the effective date of a regulation; the effective date of an order or decision by the Director, or the Director’s decision not to issue an order or decision; or the date of legislatively authorized guidance.³

On November 15, 2018, the Department issued its Decision, approving CVS’s acquisition of Aetna. On January 4, 2019, APPLICANT submitted its Application for an Award of Advocacy Fees for its contributions to the Decision; this was within the sixty (60) day filing deadline. APPLICANT requested \$9,325.00 for work performed.

IV. SUBSTANTIAL CONTRIBUTION

During the Department’s consideration of CVS’s acquisition of Aetna, APPLICANT raised concerns regarding the merger. APPLICANT provided oral testimony on May 2, 2018, regarding the impact of the proposed merger on consumers. Applicant submitted written comments to the Department on May 7, 2018. The written comments addressed, among other things, concerns about (1) competition, (2), the

² See Cal. Code Regs., tit. 28, § 1010, subd. (c)(1).

³ Cal. Code Regs., tit. 28, § 1010, subd. (d)(1).

value of the merger to consumers, and (3) patient care and privacy. APPLICANT recommended various actions the Department should take to protect the interests of consumers, if the Department approved the merger.

The Hearing Officer finds APPLICANT's participation: (1) significantly assisted the Department in its deliberations by presenting relevant issues, evidence, and arguments the Department investigated and seriously considered; and (2) resulted in more relevant, credible, and non-frivolous information being available to the Department, which helped inform the Department in making the Decision. The Hearing Officer finds APPLICANT made a substantial contribution, pursuant to California Code of Regulations, title 28, section 1010, subdivision (b)(14), to the Decision. The award for advocacy fees is based on the time spent for the activities and work that substantially contributed to the Decision.

V. REASONABLENESS OF HOURS AND COSTS AND MARKET RATE

A. Fees Requested

APPLICANT billed the following times, hourly rates, and fees for its representatives:

BETSY IMHOLZ
SPECIAL PROJECTS DIRECTOR
TIME: 3 hours
RATE: \$425.00/hour
TOTAL: \$1,275.00

DENA MENDELSON
SENIOR POLICY COUNSEL, ATTORNEY
TIME: 23 hours
RATE: \$350.00/hour
TOTAL: \$8,050.00

B. Market Rate

APPLICANT is entitled to compensation for Advocacy and Witness Fees at hourly rates reflecting the market rates for services. The “Market Rate” is “the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas.”⁴

To determine the appropriate Market Rate, the Department relies on the market rates used by the California Public Utilities Commission’s (“PUC”) Intervenor Compensation Program. Reference to the PUC’s rates is appropriate because the Intervenor Compensation Program is similar to the Department’s CPP⁵ and has an extensive history of awarding intervenor compensation and updating hourly rates used in computing awards of compensation to intervenors. Therefore, the many PUC written decisions granting intervenor compensation provide valuable guidelines for determining reasonableness and market value.

C. Hourly Rates that Reflect the “Market Rate”

The Hearing Officer finds that hourly rates for services provided in a statewide proceeding (such as PUC proceedings) are essentially equivalent to hourly rates for “comparable services in the private sector in the Los Angeles and San Francisco Bay Areas.” Therefore, in determining whether Advocacy and Witness fees are consistent with the Market Rate, the Hearing Officer relies on the PUC’s adopted ranges for work intervenor representatives performed in 2018.⁶

⁴ Cal. Code Regs., tit. 28, § 1010, subd. (b)(8).

⁵ The Legislative history behind the Department’s CPP specifically referred to the PUC’s program. See Stats 2002 C. 792 §1 (SB 1092).

⁶ PUC Resolution ALJ-352 (Apr. 4, 2018).

D. Determination of the Hourly Market Rate for APPLICANT

The Hearing Officer finds that the hourly rates APPLICANT claimed are consistent with the applicable Market Rate. For work Betsy Imholz performed, APPLICANT claims advocacy and witness fees at the hourly rate of \$425.00. APPLICANT justified this rate by reference to Ms. Imholz's background and experience. Ms. Imholz has a J.D. from Rutgers University School of Law and more than 13 years of experience relating to health care policy. The PUC's adopted hourly rate range for attorneys with 13 or more years of experience is \$340-\$600. The Hearing Officer finds that the hourly rate of \$425.00 is consistent with the Market Rate.

For work Dena Mendelsohn performed, APPLICANT claims advocacy and witness fees at the hourly rate of \$350.00. Ms. Mendelsohn has a J.D. from Washington University School of Law and a M.P.H. in Health Policy from Saint Louis University School of Public Health. Ms. Mendelsohn has approximately 13 years of legal experience, including experience in health policy and advocacy. The PUC's adopted hourly rate range for attorneys with 13 or more years of experience is \$340-\$600. The Hearing Officer finds that the hourly rate of \$350.00 is consistent with the Market Rate.

VI. AWARD

APPLICANT is awarded Advocacy and Witness Fees for work related to preparing written comments and proving oral testimony that significantly assisted the Department in its deliberations. The total award to APPLICANT is \$9,325.00 as follows:

Director of Special Projects

Hours: 3.00

Rates: \$425.00

Fees: \$1,275.00

Senior Policy Counsel Attorney:

Hours: 23.00

Rates: \$350.00

Fees: \$8,050.00

Total Fees: \$9,325.00

FINDINGS OF FACT

1. APPLICANT satisfied all the procedural requirements necessary to claim compensation in this Proceeding.
2. APPLICANT made a substantial contribution to the Department's review of CVS's acquisition of Aetna.
3. APPLICANT requested an hourly rate that is reasonable when compared to market rates for persons with similar training and experience.
4. The total reasonable compensation for APPLICANT is \$9,325.00.

CONCLUSIONS OF LAW

1. APPLICANT fulfilled the requirements of California Code of Regulations, title 28, section 1010, and is entitled to compensation regarding the Department's consideration and approval of CVS's acquisition of Aetna.
2. APPLICANT should be awarded \$9,325.00.

AWARD ORDER

1. Consumer Reports is hereby awarded \$9,325.00 as compensation for its Substantial Contribution regarding the Department's consideration and approval of CVS's acquisition of Aetna.
2. Payment shall be made within thirty (30) days of the effective date of this decision.

3. This decision is effective thirty (30) days after posting this decision on the Department's website.⁷

Dated: February 14, 2019

Original Signed By:



ANNA C. PIFER-FOOTE
Hearing Officer
Department of Managed Health Care

⁷ Cal. Code Regs., tit. 28, § 1010 subd. (e)(5), (6).