

BEFORE THE
DEPARTMENT OF MANAGED HEALTH CARE
STATE OF CALIFORNIA

In the Matter of the Application for an Award
of Advocacy and Witness Fees of:

California Pan-Ethnic Health Network, a
California corporation,

Applicant.

Application Received Date: April 20, 2007

Proceeding Control No. 2004-0115

For 28 CCR § 1300.67.04

and 28 CCR § 1300.67.8(f)

(Re: Language Assistance Programs)

**OPINION GRANTING AWARD OF ADVOCACY AND WITNESS FEES
TO CALIFORNIA PAN-ETHNIC HEALTH NETWORK FOR
SUBSTANTIAL CONTRIBUTION TO PROCEEDING NO. 2004-0115**

1. SUMMARY

This decision awards California Pan-Ethnic Health Network, a California corporation (“CPEHN” or “APPLICANT”) Advocacy and Witness Fees for its substantial contribution to Proceeding No. 2004-0115 of the Department of Managed Health Care (Department) regarding Language Assistance Programs (“proposed regulation”), which became final as set forth at 28 CCR §1300.67.04 and deleted subsection (f) of 28 CCR § 1300.68.8. The award represents a decrease from the amount requested in order to not exceed Market Rate, for the reasons stated herein.

2. BACKGROUND OF CONSUMER PARTICIPATION PROGRAM

The Consumer Participation Program, enacted in Health and Safety Code § 1348.9 (the Statute), required the Director (the Director) of the Department of Managed Health Care (the

Department) to adopt regulations to establish the Consumer Participation Program to allow for the award of reasonable advocacy and witness fees to any person or organization that (1) demonstrates that the person or organization represents the interests of consumers and (2) has made a substantial contribution on behalf of consumers to the adoption of any regulation or to an order or decision made by the Director if the order or decision has the potential to impact a significant number of enrollees.

The statute requires the regulations adopted by the Director to include specifications for: (1) eligibility of participation, (2) rates of compensation, and (3) procedures for seeking compensation. The statute specified that the regulations shall require that the person or organization demonstrate a record of advocacy on behalf of health care consumers in administrative or legislative proceedings in order to determine whether the person or organization represents the interests of consumers.

Pursuant to the Statute, Consumer Participation Program (the Program) regulations were adopted as section 1010 of Title 28 of the California Code of Regulations (the Regulations). The Regulations specified:

- a. Definitions for the Program, including: “Advocacy Fee,” “Compensation,” “Market Rate,” “Represents the Interests of Consumers,” “Substantial Contribution,” and “Witness Fees.” (§ 1010, subsection (b)).
- b. Procedure for a Request for Finding of Eligibility to Participate and Seek Compensation. (§ 1010, subsection (c)).
- c. Procedure for Petition to Participate. (§ 1010, subsection (d)).
- d. Procedure for Applying For An Award of Fees. (§ 1010, subsection (e)).

3. REQUIREMENTS FOR AWARDS OF ADVOCACY AND WITNESS FEES

3.1. PROCEDURAL REQUIREMENTS

All of the following procedures must be followed and criteria satisfied for a person or organization that represents the interests of consumers to obtain a compensation award:

- a. To become a “Participant,” the person or organization must satisfy the requirements of either or both of the following by:

(1) Submitting to the Director a Request for Finding of Eligibility to Participate and Seek Compensation in accordance with 28 CCR §1010(c), at any time independent of the pendency of a proceeding in which the person seeks to participate, or by having such a finding in effect by having a prior finding of eligibility in effect for the two-year period specified in 28 CCR § 1010(c)(3).

(2) Submitting to the Director a Petition to Participate in accordance with 28 CCR §1010(d), no later than the end of the public comment period or the date of the first public hearing in the proceeding in which the proposed Participant seeks to become involved, whichever is later (for orders or decisions, the request must be submitted within ten working days after the order or decision becomes final).

b. The Participant must submit an “application for an award of advocacy and witness fees” in accordance with 28 CCR §1010(e), within 60 days after the issuance of a final regulation, order or decision in the proceeding.

c. The Participant must have made a Substantial Contribution to the proceeding. (Health & Safety Code § 1348.9(a); 28 CCR § 1010(b)(8)).

d. The claimed fees and costs must be reasonable (Health & Safety Code § 1348.9(a)) and not exceed market rates as defined in 28 CCR § 1010.

3.2. APPLICANT’S APPLICATION TO PARTICIPATE

On July 30, 2004, APPLICANT submitted its Request for Finding of Eligibility to Participate and Seek Compensation with the Department giving notice that it represents the interests of consumers and of its intent to claim compensation.

On August 27, 2004, the Department Director (Director) ruled that APPLICANT was eligible to participate and to seek an award of compensation.

On November 2, 2004, APPLICANT submitted its Petition to Participate (Petition) with the Department in the Language Assistance Programs rulemaking proceeding. In its Petition, APPLICANT estimated its fees to be \$ 215,000.

In its Petition, APPLICANT stated that, with respect to language assistance issues that:

CPEHN is a leader in California on issues related to multicultural health and language access. We were one of the primary sponsors of SB 853 and have been providing the Department with input on the implementation of this regulation since the bill was signed into law in October 2003. ... We have worked on issues related to multicultural health and language access advocating with DHS, MRMIB, and DMHC, and have sponsored legislation, including SB 853.

On December 2, 2004, the Director approved APPLICANT's Petition to Participate in the Language Assistance Programs rulemaking proceeding.

3.3. APPLICATION FOR AWARD OF ADVOCACY AND WITNESS FEES

The regulation (28 CCR § 1300.67.04) became final and effective on February 23, 2007.

Within 60 days thereafter (on April 20, 2007), APPLICANT timely submitted its Application for an Award of Advocacy and Witness Fees (Application). 28 CCR § 1010(e)(1).

After the Application was publicly noticed, no objections to the Application were received.

The application for an award of compensation must include (as required by 28 CCR § 1010(e)(2) and (3)):

- a. A detailed, itemized description of the advocacy and witness services for which the Participant seeks compensation;
- b. Legible time and/or billing records, created contemporaneously when the work was performed, which show the date and the exact amount of time spent¹ on each specific task²; and
- c. A description of the ways in which the Participant's involvement made a Substantial Contribution to the proceeding as defined in subpart (b)(8), supported by specific citations to the record, Participant's testimony, cross-examination, arguments, briefs, letters, motions, discovery, or any other appropriate evidence." 28 CCR §1010 (e)(2).

¹ "...the phrase 'exact amount of time spent' refers either to quarters (15 minutes) of an hour for attorneys, or to thirty (30) minute increments for non-attorney advocates." 22 CCR § 1010(e)(3).

² "The phrase 'each specific task,' refers to activities including, but not limited to:

- a. Telephone calls or meetings/conferences, identifying the parties participating in the telephone call, meeting or conference and the subject matter discussed;
- b. Legal pleadings or research, or other research, identifying the pleading or research and the subject matter;
- c. Letters, correspondence or memoranda, identifying the parties and the subject matter; and
- d. Attendance at hearings, specifying when the hearing occurred, subject matter of the hearing and the names of witnesses who appeared at the hearing, if any." 28 CCR § 1010(e)(3)a, b, c, and d.

With its request for fees, APPLICANT submitted a billing specifying the dates of services, a description of each specific task or each activity of advocacy and witness service, identification of the person providing each service, the elapsed time (exact amount of time spent) for each service in 30 minute increments for non-attorney advocates, the hourly rate requested,³ and the total dollar amount billed for each task. The total fees requested for work performed by APPLICANT is \$65,275.00.

However, the Application did not contain a description of how Market Rate was determined for the fees claimed.

The Hearing Officer finds that the application of APPLICANT substantially complies with the technical requirements of 28 CCR § 1010(e)(2) and (3).

4. PROCEDURAL HISTORY

Beginning in September of 2005, the Department invited parties who would be the subject of the proposed regulation to public discussions (“stakeholder meetings”) in order to increase public participation and improve the quality of the proposed regulation. Gov’t Code § 11346.45.

On December 23, 2005, the Department issued a Notice of Proposed Rulemaking (Notice) proposing to adopt 28 CCR section 1300.67.04 and to delete subsection (f) of 28 CCR § 1300.67.8, and establishing a 60-day comment period from December 23, 2005 to February 21, 2006.

In the Informative Digest/Policy Statement Overview contained within the Notice, the Department stated that:

Proposed adoption of section 1300.67.04

SB 853 (2004) added Chapter 2.2, section 1367.04 of the Health and Safety Code (section 1367.04) expressly instructing the Department to develop and adopt regulations by January 1, 2006. The statute also contained specific requirements for the content of the regulations, including requirements that the regulations establish the standards and requirements for plans’ provision of translation and interpretation services. Accordingly, the regulation establishes standards and requirements related to: assessing the linguistic needs of enrollees; arranging for

³ Under the PUC Intervenor Compensation Program, the intervenors submit time logs to support the hours claimed by their professionals. Those logs typically note the dates, the number of hours charged, and the issues and/or activities in which each was engaged. D.06-11-009 (November 9, 2006), p. 26.

and providing translation and interpretation services; training plan staff; and monitoring compliance with the regulation.

Proposed deletion of subsection (f) of section 1300.67.8

The Department has determined that it is necessary to rescind subsection (f) of Rule 1300.67.8. Subsection (f) has been suspended since it was promulgated in November 2003, in response to additional information obtained by the Department regarding unintended consequences that may result from application of subsection (f), and the identified potential for a more workable approach through the language assistance regulation. The Department has determined that the workable aspects of subsection (f) can be appropriately incorporated into the proposed language assistance program regulation, rendering the existing suspended subsection (f) unnecessary.

Two Public Hearings on the proposed regulation were scheduled and noticed for February 14, 2006, in Los Angeles, and February 16, 2006, in Oakland, California. The notice of public hearings extended the written comment period to March 3, 2006.

On July 26, 2006, the Department issued a notice of a second public comment period for 30 days from July 26, 2006 through August 25, 2006. By notice dated August 15, 2006, the Department extended the second comment period for 30 days ending September 25, 2006.

On November 17, 2006, the Department issued a notice of a third public comment period for 16 days from November 17, 2006 through December 3, 2006.

On December 22, 2006, the final regulation package was submitted to the Office of Administrative Law (OAL). The regulation was approved by OAL and filed with the Secretary of State on January 24, 2007. The regulation was effective on February 23, 2007.

5. SUBSTANTIAL CONTRIBUTION

Health and Safety Code section 1348.9, subdivision (a) provides that:

“[T]he director shall adopt regulations to establish the Consumer Participation Program, which shall allow for the director to award reasonable advocacy and witness fees to any person or organization that demonstrates that the person or organization represents the interests of consumers and has made a substantial contribution on behalf of consumers to the adoption of any regulation....”
(Emphasis added).

28 CCR § 1010(b)(8) defines “Substantial Contribution” as follows:

“‘Substantial Contribution’ means that the Participant significantly

assisted the Department in its deliberations by presenting relevant issues, evidence, or arguments which were helpful, and seriously considered, and the Participant's involvement resulted in more relevant, credible, and non-frivolous information being available to the Director."

The definition of "Substantial Contribution" provides the criteria for evaluating whether the consumer participant has made a substantial contribution.⁴

5.1 APPLICATION MUST INCLUDE DESCRIPTION OF CONTRIBUTION

The application for an award of compensation must include "a description of the ways in which the Participant's involvement made a Substantial Contribution to the proceeding⁵ ..., supported by specific citations to the record, Participant's testimony, cross-examination, arguments, briefs, letters, motions, discovery, or any other appropriate evidence." 28 CCR § 1010(e)(2)c.

5.2. APPLICANT'S DESCRIPTION OF ITS CONTRIBUTION

APPLICANT described the following documents and testimony in support of its substantial contribution to proposed adoption of 28 CCR § 1300.67.24:

⁴ Further guidance is provided in PUC Decisions awarding intervenor compensation – for example:

"In evaluating whether ... [an intervenor] made a substantial contribution to a proceeding, we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the ... [intervenor]? ... Second, if the ... [intervenor's] contentions or recommendations paralleled those of another party, did the ... [intervenor's] participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? ... [T]he assessment of whether the ... [intervenor] made a substantial contribution requires the exercise of judgment.

"In assessing whether the ... [intervenor] meets this standard, the Commission typically reviews the record, ... and compares it to the findings, conclusions, and orders in the decision to which the ... [intervenor] asserts it contributed. It is then a matter of judgment as to whether the .. [intervenor's] presentation substantially assisted the Commission. [citing D.98-04-059, 79 CPUC2d 628, 653 (1998)].

Should the Commission 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. For example, if ... [an intervenor] provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the ... [intervenor] made a substantial contribution." PUC Decision D.06-11-031 (November 30, 2006), PP. 5 - 6; similarly, D.06-11-009 (November 9, 2006), pp. 7 - 8.

⁵ Decisions under the PUC's Intervenor Compensation Program go further and require intervenor's to assign a reasonable dollar value to the benefits of the intervenor's participation.

"D.98-04-059 directed ... [intervenors] to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of ... [an intervenor'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." D.06-11-031 (November 30, 2006), p. 11; D.06-11-009 (November 9, 2006), pp. 31 - 32.

a. APPLICANT's personnel provided information, recommended regulations, and best practices to, and answered questions posed by, the Department. APPLICANT's personnel prepared and presented preliminary comments and proposed regulations to the Department in efforts to seek initiation of the regulation-making process. The proposed regulations included suggestions for translations of materials, provision of oral interpretation, quality assurance, monitoring and reporting. Beginning in September 2005, APPLICANT assisted the Department with outreach for stakeholder meetings, and APPLICANT's senior personnel participated in a series of stakeholder discussions regarding the development of the Language Assistance Programs regulation and submitted written comments on the draft regulations.

b. APPLICANT assisted the Department on outreach for the public hearings, including significant outreach to Limited English Proficient (LEP) communities and provided information to the Department to help with the provision of interpreters for the hearings, resulting in LEP persons providing testimony in-person and researchers such as Richard Brown of UCLA providing testimony on the need for appropriate collection of race data. Testimony of APPLICANT's Policy Director at the February 14, 2006, Public Hearing, and testimony of APPLICANT's Executive Director at the February 16, 2006, Public Hearing. In addition APPLICANT's Senior Program Manager worked with other consumer advocates to identify limited English speaking enrollees and to arrange for their testimony at the Public Hearings held in Oakland and Los Angeles.

c. Analysis of draft regulations, comparison of draft regulations to existing requirements and best practices, requesting feedback from experts in the consumer community, and development of detailed written comments by APPLICANT's staff in response to the first comment period that closed on March 3, 2006. In addition, APPLICANT's staff worked

diligently to answer follow-up questions and clarify APPLICANT's suggestions with Department staff.

d. Written comments by APPLICANT's staff in response to the second comment period that closed on September 25, 2006.

e. Written comments by APPLICANT's staff in response to the third comment period that closed on December 3, 2006.

5.3. PROCEDURAL VERIFICATION OF SUBSTANTIAL CONTRIBUTION

At the February 14, 2006, Public Hearing on the proposed adoption of the regulation, the Policy Director of APPLICANT presented oral comments on the record.

At the February 16, 2006, Public Hearing on the proposed adoption of the regulation, the Executive Director of APPLICANT was present to assist with outreach witnesses.

On March 3, 2006, the Policy Director representing APPLICANT presented written comments on the proposed regulation. That submission contained five comments and recommendations (some of the comments contained multiple recommendations) all of which requested changes, requesting:

- (1) that the needs assessment be adjusted to conform to the requirements of the statute that plans survey their enrollee population and the regulations should define the "demographic profile" that must be compiled on enrollees;
- (2) that the regulations appropriately address the way the statute interacts with the Medi-Cal program;
- (3) that the regulations should appropriately create standards for quality for interpretation and translation;
- (4) that the regulations should not allow hospitals to meet an alternative standard because the statute does not allow any contract provider to be exempt from the standards established for interpretation services; and

(5) that the regulations should be more sufficiently detailed and more clearly state that plans must follow to the letter the specified requirements instead of merely requiring plans to have in place internal policies.

Of the five March 3, 2006, comments requesting changes, two were accepted, one was declined, five were accepted in part, and five were declined or rejected in part.

On September 25, 2006, the APPLICANT presented written comments on the proposed regulation. That submission contained four comments and recommendations requesting changes:

(1) that the regulations are vague as to whether plans must collect information on race and ethnicity from each enrollee, and this should be clarified so that it is clear that race, ethnicity, and primary language (written and spoken) should be collected o each enrollee;

(2) that the regulation should require plans to notify enrollees in multiple languages of the availability of interpreter services;

(3) that the regulation should provide additional clarity to plans regarding ensuring the quality of interpreters, more explicit requirements should be developed to ensure that in every medical encounter with an LEP individual that a trained interpreter is present, the regulations should specify that face to face interpretation is desirable unless it is unfeasible, and the use of minors as interpreters should be banned; and

(4) that the regulations misinterpret the statute's intent that DMHC establish a process to determine if the regulations provide more access to a greater number of enrollees than do the current Medi-Cal requirements, and if they do, then Medi-Cal enrollees should have access to those higher standards.

Of the four September 25, 2006, comments requesting changes, two were rejected with explanation, one was accepted in part and one was declined in part.

On December 2, 2006, APPLICANT presented written comments on the proposed regulation. That submission contained seven comments including recommendations requesting changes:

- (1) that language be retained regarding the obligation to effectively disclose the availability of language assistance services at no charge to enrollees and how to access those services, and a notice of the availability of language services needs to be sent out to all enrollees, with notices translated into the defined threshold languages;
- (2) that language be retained to require plans to implement procedures to promote effective identification of LEP enrollee language assistance needs at points of contact and facilitate enrollee access to language assistance services;
- (3) that language be retained to require plans to ensure that grievance forms and procedures in threshold languages be available in contacting providers' offices;
- (4) that the regulations should not treat language information different from other elements of the demographic profile, i.e., race and ethnicity, and plans should be required to take assertive and proactive steps to increase the response rate of enrollees surveyed for demographic data, and the collection of that data should be explicitly linked to quality;
- (5) that language of the regulation should not limit the requirement for understanding the cultural diversity of the plan's enrollee population to language interpretation services;
- (6) that the term "vital information" should be retained in the regulation, and there is insufficient clarity on the meaning of "matrix;" and
- (7) the regulations should contain more explicit language on how the Department will monitor and enforce the regulations, and plans should be obligated to ensure that their contracting providers are providing the language services they say they are offering, including offering an interpreter even if a provider claims to be bilingual.

Five of the seven December 2, 2006, comments requesting changes were rejected with explanation in the record.

5.4. FINDING OF SUBSTANTIAL CONTRIBUTION

The Hearing Officer finds that participation by APPLICANT: (1) significantly assisted the Department in its deliberations by presenting relevant issues, evidence, and arguments that were helpful and seriously considered, and (2) resulted in more relevant, credible, and non-frivolous information being available to the Director to make her decision regarding the proposed adoption of 28 CCR §1300.67.24 than would have been available to the Director had APPLICANT not participated.

The Hearing Officer hereby determines that by its participation APPLICANT made a substantial contribution on behalf of consumers to the proceedings, to the Department in its deliberations, and as a whole, to the adoption of 28 CCR §1300.67.24.

The Hearing Officer finds that APPLICANT has made a Substantial Contribution, pursuant to 28 CCR section 1010(b)(8), to the Language Assistance Programs rulemaking proceeding.

6. REASONABLENESS OF HOURS AND COSTS AND MARKET RATE

Health and Safety Code section 1348.9 allows the Director to award reasonable advocacy and witness fees to any person or organization that demonstrates that the person or organization represents the interests of consumers and has made a substantial contribution on behalf of consumers to the adoption of a regulation. “The hearing officer shall issue a written decision that ... shall determine the amount of compensation to be paid, which may be all or part of the amount claimed.” 28 CCR § 1010(e)(7).

6.1. FEES REQUESTED

APPLICANT billed the following time, hourly rates, and fees for its representatives.

| Staff / Title | Hours | Rates | Fees |
|--|----------|----------|--------------------|
| Executive Director and Health Care Policy Expert | 63.00 | \$300.00 | \$18,900.00 |
| Policy Director and Health Care Policy Expert | 185.5 | \$250.00 | \$46,375.00 |
| TOTAL FEES | → | | \$65,275.00 |

6.2. CONSIDERATIONS USED IN PUC'S INTERVENOR COMPENSATION PROGRAM

Reference to the intervenor compensation program of the California Public Utility Commission ("PUC") seems appropriate because it is similar to the Department's Consumer Participation Program⁶ and has an extensive history of awarding intervenor compensation and updating hourly rates used in computing awards of compensation to intervenors who make substantial contributions to PUC decisions.

In each proceeding before the PUC in which intervenors participate, the PUC issues a written opinion setting forth the decision regarding award of intervenor compensation. Therefore, the many PUC written decisions granting intervenor compensation provide a valuable source of guidelines to determine reasonableness and market value. Some of the common threads of the PUC decisions are summarized as follows.

In considering an intervenor organization's request for compensation, the PUC opinions:

a. Separately consider and approve the individual hourly rate of compensation for each of the intervenor's experts and advocates.⁷

⁶ The Legislative history behind the Department's Consumer Participation Program specifically referred to the PUC's program.

"The Legislature finds and declares that consumer participation programs at the Public Utilities Commission and the Department of Insurance have been a cost-effective and successful means of encouraging consumer protection, expertise, and participation...." Stats 2002 C. 792 § 1 (SB 1092).

⁷ PUC Decision (D.) 06-11-031 (November 30, 2006).

b. Have awarded the same rate for an individual expert that was approved in a prior proceeding in the same year,⁸ and have declined to approve a requested increase in hourly rate for an expert over the rate approved in a prior proceeding in the same year.⁹

c. Have awarded increases of three percent (3%) rounded to the nearest \$5 over the prior year when increase in hourly rates is requested by the intervenor organization or where the hourly rate for an individual expert or advocate was approved in the prior year and an increase is considered warranted for the current year.¹⁰ The PUC has consistently rejected requests for increase over 3%.¹¹

d. Have stated that documentation of claimed hours by presenting a daily breakdown of hours accompanied by a brief description of each activity, reasonably supported the claim for total hours.¹²

e. Have approved compensation for travel time at one-half the normal hourly rate.¹³

f. Have approved compensation for preparation of the intervenor organization's compensation request or compensation claim at one-half the normal hourly rate.¹⁴ However, administrative costs are considered non-compensable overheads, and therefore, the PUC has disallowed time charged by an intervenor's office manager for gathering expense data for the compensation claim.¹⁵

g. Have approved compensation for efforts that made a substantial contribution even where the PUC did not wholly adopt the intervenor's recommendations.¹⁶

⁸ D.06-11-031 (November 30, 2006).

⁹ D.06-11-032 (November 30, 2006), pp. 10 – 11.

¹⁰ D.06-11-031 (November 30, 2006), p. 11.

¹¹ D.06-11-031 (November 30, 2006), p. 11.

¹² D.06-11-031 (November 30, 2006), p. 10.

¹³ D.06-11-031 (November 30, 2006); D.06-11-032 (November 30, 2006), p. 8, fn. 4.

¹⁴ D.06-11-031 (November 30, 2006), p. 9, fn. 2; D.06-11-032 (November 30, 2006), p. 8, fn. 4.

¹⁵ D.06-11-009 (November 9, 2006), p. 27.

¹⁶ D.06-11-031 (November 30, 2006), p. 10.

h. Have approved payment of itemized direct expenses where the request shows “the miscellaneous expenses to be commensurate with the work performed,” including costs for photocopying, FAX, Lexis research, postage, courier, overnight delivery, travel, and parking.¹⁷

i. Have reminded intervenors of the requirements for records and claim support, and that PUC staff may audit the records – for example:

“We remind all intervenors that Commission staff may audit their records related to the award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. [Intervenor’s]... records should identify specific issues for which it 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.”¹⁸

j. Have disallowed time where the “hours seem excessive” or the “proposal is not persuasive,”¹⁹ and have changed or disallowed compensation amounts requested for the following reasons:²⁰ “Excessive hourly rate; arithmetic errors; failure to discount comp prep time [and travel time]; hours claimed after decision issued; ...administrative time not compensable; unproductive effort.”

6.3. REASONABLENESS OF TIME BILLED

We must assess whether the hours claimed for the consumers’ efforts that resulted in substantial contributions to the proceedings are reasonable by determining to what degree the hours and costs (if any costs are claimed) are related to the work performed and necessary for the substantial contribution.²¹

APPLICANT billed for five activities summarized as follows:

¹⁷ D.06-11-031 (November 30, 2006), p. 12; D.06-11-032 (November 30, 2006), pp. 14 – 15; D.06-11-009 (November 9, 2006), p. 32.

¹⁸ D.06-11-031 (November 30, 2006), pp. 14 -15.

¹⁹ D.06-11-032 (November 30, 2006), pp. 9 - 10.

²⁰ D.06-11-009 (November 9, 2006), Appendix p. 1.

²¹ See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 9; D.06-11-009 (November 9, 2006), p. 26.

1. Communications and conferences with Department representatives to discuss and explain concerns and issues to address in the regulations and strategies for implementation; answering questions posed by Department personnel; development and delivery to the Department of a needs assessment; development and sending to the Department sample recommended regulations; input on why race/ethnicity data needs to be collected and used; provision of written comments to the Department on the unofficial draft of the regulations; comments to the Department regarding establishing a literacy level in the regulations; review of informal drafts of the proposed regulations and provision of informal input prior to formal regulatory proceedings; and preparation for and participation at informal stakeholder discussions in September of 2005, for a total of 151.5 hours, including 7.0 hours of supervision and work product review by APPLICANT's Executive Director.

2. Coordination with the Department regarding outreach strategies for public hearings and press conferences; preparation for and attendance and providing testimony at the Public Hearings held on February 14, 2006, and February 16, 2006, for a total of 32.0 hours, including 2.0 hours of supervision and work product review by APPLICANT's Executive Director.

3. Preparation of written comments submitted in the first written comment period ending March 3, 2006, for a total of 12.0 hours, including 2.0 hours of supervision and work product review by APPLICANT's Executive Director.

4. Preparation of written comments submitted in the second written comment period ending September 25, 2006, for a total of 25.0 hours, including 4.0 hours of supervision and work product review by APPLICANT's Executive Director.

5. Preparation of written comments submitted in the third written comment period ending December 3, 2006, including preparation for and conference call with the Department regarding ongoing concerns and Office of Administrative Law requirements, for a total of 22.0 hours,

including 5.0 hours of supervision and work product review by APPLICANT's Executive Director.

The Hearing Officer hereby finds that the time billed is related to the work performed, necessary for the substantial contributions made, and reasonable for the advocacy and witness services performed and work product produced.

6.4. MARKET RATE

Public interest attorneys are entitled to request the prevailing market rates of private attorneys of comparable skill, qualifications and experience. (*Serrano v. Unruh* (“*Serrano IV*”) (1982) 32 Cal.3d 621.). APPLICANT is entitled to be compensated for Advocacy Fees and Witness Fees at hourly rates that reflect Market Rate for services. Advocacy Fees and Witness Fees cannot exceed Market Rate, as defined in the Regulation. 28 CCR §§ 1010(b)(1), (3) and (10). “Market Rate” is defined at 28 CCR section 1010(b)(3) as follows:

“Market Rate” means, with respect to advocacy and witness fees, the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas at the time of the Director’s decision awarding compensation for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability.”

6.5. HOURLY RATES THAT REFLECT “MARKET RATE”

The Hearing Officer finds that hourly rates for services provided in a statewide proceeding or proceeding of a state agency having statewide jurisdiction and effect (such as proceedings of the California Public Utilities Commission, see *infra*) are essentially equivalent to “comparable services in the private sector in the Los Angeles and San Francisco Bay Areas,” as required by 28 CCR § 1010, subsection (b)(3).

Accordingly, we must take into consideration whether the claimed fees and costs (if any) are comparable to the market rates paid to experts and advocates having comparable training and

experience and offering similar services.²² In order to determine Market Rate, we must look to available data inside and outside the Department.

6.6. HOURLY RATE DETERMINATIONS UNDER THE PUC PROGRAM

A recent PUC Decision²³ approved and adopted hourly rates within the following ranges for 2006:

For attorneys: \$170, \$175, \$190, \$210, \$250, \$260, \$285, \$310, \$325, \$335, \$360, \$375, \$400, \$405, \$425, \$435, and \$505.

For non-attorney, policy experts: \$110, \$150, \$340, and \$360.

Another PUC Decision²⁴ provided the following examples of “recently adopted non-attorney rates and years of professional experience” (as provided by an expert seeking a rate increase).

Non-attorney Hourly Rates

| <u>Experience (years)</u> | <u>Year Work Performed</u> | <u>Hourly Rate</u> |
|---------------------------|----------------------------|--------------------|
| 16 | 2003 | \$215 |
| 12 | 2005 | \$130 |
| 12 | 2003-2005 | \$180 |
| 5 | 2005 | \$120 |
| 7 | 2005 | \$120 |
| 12 | 2005 | \$150 |
| 8 | 2005-2006 | \$150 |

Until PUC Decision R.04-10-010 in 2004, the PUC set hourly rates for intervenors in a piecemeal manner –i.e., for each proceeding, the PUC might revisit the reasonableness of the hourly rate for each intervenor and each appearance by a particular representative of an intervenor. The PUC recognized the need for coordination by establishing, through periodic rulemakings, the

²² See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 10.

²³ Id. at pp. 30-31.

²⁴ D.06-11-032 (November 30, 2006), pp. 11 – 12.

rates to be paid to all intervenors' representatives for work done in specified time periods.²⁵ The first such rulemaking was R.04-10-010, D.05-11-031, which set certain guidelines, recognized that hourly rates had stabilized, and determined that the PUC would not authorize a general increase to intervenor hourly rates for work performed in 2005.²⁶

In an Interim Opinion on Updating Hourly Rates,²⁷ the PUC adopted a three percent (3%) cost-of-living adjustment (COLA) for work performed in calendar year 2006, adopted an additional 3% COLA for work performed in 2007, and established effective with 2007 work three rate ranges for non-attorney experts based on levels of experience, similar to the five levels already established for attorneys.²⁸ The three levels for non-attorney experts are: 0-6 years; 7-12 years; and 13-plus years. In so doing, the PUC found that:

“...basing expert rates on levels of experience, similar to the levels established for attorneys, will better ensure that an expert's given rate is within the market rates paid to persons of comparable training and experience. However, in no event should the rate requested by an intervenor exceed the rate billed to that intervenor by any outside consultant it hires, even if the consultant's billed rate is below the floor for a given experience level. ...[I]ntervenors must disclose the credentials of their representatives in order to justify the requested rates.²⁹ (Emphasis added).

The following table shows the PUC's adopted ranges for work performed by intervenor representatives in 2006 and 2007. The rate ranges for attorneys and non-attorney experts are based on levels of applicable experience.

²⁵ PUC Order Instituting Rulemaking R.06-08-019 (August 24, 2006), p. 2.

²⁶ Id. at pp. 2-3.

²⁷ D.07-01-009 (January 11, 2007)(part of Rulemaking R.06-08-019).

²⁸ Id. at pp. 1, 3-4.

²⁹ Id. at p. 5.

Hourly Intervenor Rate Ranges for 2006 and 2007³⁰

(For 2006, rates adopted in D.05-11-031 x 3%, rounded to nearest \$5)

(For 2007, rates adopted for 2006 x 3%, rounded to nearest \$5)

| Years of Experience | 2006 Range | 2007 Range |
|---------------------|---------------|---------------|
| Attorneys: | | |
| 0 - 2 | \$140 - \$195 | \$145 - \$200 |
| 3 - 4 | \$190 - \$225 | \$195 - \$230 |
| 5 - 7 | \$260 - \$280 | \$270 - \$290 |
| 8 - 12 | \$280 - \$335 | \$290 - \$345 |
| 13+ | \$280 - \$505 | \$290 - \$520 |

| Years of Experience | 2006 Range | 2007 Range |
|---------------------|---------------|---------------|
| Experts: | | |
| All | \$115 - \$370 | |
| 0 - 6 | | \$120 - \$180 |
| 7 - 12 | | \$150 - \$260 |
| 13+ | | \$150 - \$380 |

Note: The rates intervenors request for the use of outside consultants may not exceed the rates billed to the intervenors by the consultants, even if the consultants' rates are below the floor for any given experience level.

The PUC decided to continue to update hourly rates annually on a calendar year basis.³¹

The PUC based its 3% COLA adjustments on the Social Security Administration's COLA, which is released annually in late fall, and reliance thereon would be consistent with a calendar year adjustment of hourly rates.³²

6.7. APPLICANT'S JUSTIFICATION FOR RATES BILLED

APPLICANT claims advocacy and witness fees for two non-attorney health care policy experts. In support of the hourly fee rates requested, APPLICANT submitted

³⁰ Id. at pp. 8 - 9.

³¹ Id. at p. 9.

justification that included the following biographical, experience and other information regarding the persons providing services.

The first non-attorney health care policy expert is identified as the Executive Director of CPEHN with responsibility for overall management, including fiscal oversight, supervision of staff, implementation of programmatic goals, fundraising, relationship building with government and private sector policy making institutions, and maintaining and expanding a statewide multicultural health constituency. The resume provided with APPLICANT's application indicates a Bachelor of Arts degree in Communications from the University of California at San Diego, a Masters Degree in Public Health from the University of California at Los Angeles, and approximately fifteen years of relevant experience. APPLICANT claims advocacy and witness fees for this health care policy expert at the hourly rate of \$300.00 for services provided in 2004, 2005, and 2006. However, APPLICANT did not submit evidence of rates for comparable services nor any justification for the rates claimed other than experience and biographical information regarding the person providing services.

The second non-attorney health care policy expert is identified as the Policy Director of CPHEN with responsibility for setting the overall policy agenda of CPHEN and managing the Policy Advocacy Program including issues of cultural and linguistic access, racial and ethnic health disparities, obesity in communities of color, the need for more and better data and research, access to care, and the Medi-Cal Managed Care and Healthy Families Program. The resume provided with APPLICANT's application indicates a Bachelor of Arts degree from Swarthmore College, a Masters Degree in Public Policy from the University of California at Berkeley, a Fellowship at the Woodrow Wilson School of Public Policy and International Affairs at Princeton University, and approximately eleven years of relevant experience. APPLICANT claims advocacy and witness fees for this health care policy expert at the hourly rate of \$250.00 for services

³² Id. at pp. 4 and 11.

provided in 2004, 2005 and 2006. However, APPLICANT did not submit evidence of rates for comparable services nor any justification for the rate claimed other than experience and biographical information regarding the person providing services.

6.8. DETERMINATION OF MARKET VALUE HOURLY RATE

Fees claimed may be adjusted to reflect Market Rate. “The hearing officer shall issue a written decision that ... shall determine the amount of compensation to be paid, which may be all or part of the amount claimed.” 28 CCR § 1010(e)(7). APPLICANT claims advocacy and witness fees for two non-attorney policy analyst/experts.

The PUC’s adopted non-attorney rates for 2004 appear from examples such as \$120 for up to 7 years of experience and up to \$215 for up to 16 years of experience.³³ The PUC’s adopted non-attorney rates for 2005 are \$120 for 5 – 7 years of experience, \$150 for 8 years of experience, and \$130 - \$215 for 12 – 16 years of experience (see ¶ 6.6, supra). The PUC’s adopted hourly intervenor rate range for non-attorney policy experts for 2006 is \$115 - \$370 without breakdown by years of experience. For 2007, the PUC’s adopted hourly intervenor rate ranges for non-attorney policy analyst/experts are: \$120 - \$180 for 0 – 6 years of experience; \$150 - \$260 for 7 – 12 years of experience; and \$150 - \$380 for 13 and more years of experience.

For work performed by APPLICANT’s Executive Director, APPLICANT claims advocacy and witness fees at the hourly rate of \$300.00 (for 2004, 2005 and 2006). At the time of the work for which claim is made, APPLICANT’s Executive Director had approximately 15 years of experience, a BA degree, and a Masters Degree. The highest of the PUC’s rates for 2004, 2005 and 2006 for non-attorney policy analyst/experts appear to be: \$215 for up to 16 years of experience for 2004; \$370 for such experience for 2006; and \$380 for 13 and more years of experience for 2007. Therefore, it appears that the \$300.00 hourly rate claimed for 2004 exceeds “Market Rate” as defined in 28 CCR § 1010(b). The Hearing Officer finds that the hourly rate

³³ See D.06-11-032 (November 30, 2006) and see ¶ 6.6, supra.

claimed for 2004 for APPLICANT's Executive Director exceeds Market Rate and therefore will be adjusted. Regarding services provided by APPLICANT's Executive Director in 2004, the Hearing Officer finds that \$260.00 per hour is consistent with Market Rate. Regarding services provided by APPLICANT's Executive Director in 2005 and 2006, the Hearing Officer finds that \$300.00 per hour is consistent with Market Rate.

For work performed by APPLICANT's Policy Director, APPLICANT claims advocacy and witness fees at an hourly rate of \$250.00 (for services performed in 2004, 2005, and 2006). At the time of the work for which claim is made, APPLICANT's Policy Director had approximately 11 years of experience, a BA Degree, and a Masters Degree. The highest of the PUC's rates for 2004, 2005 and 2006 for non-attorney policy analyst/experts appear to be: \$215 for up to 16 years of experience for 2004; \$370 for such experience for 2006; and \$380 for 13 and more years of experience for 2007. Therefore, it appears that the \$250.00 hourly rate claimed by APPLICANT for services performed in 2004 and 2005 exceeds "Market Rate" as defined in 28 CCR § 1010(b). The Hearing Officer finds that the hourly rate claimed for APPLICANT's Policy Director for services performed in 2004 and 2005 exceeds Market Rate and therefore will be adjusted. Regarding services provided by APPLICANT's Policy Director, the Hearing Officer finds that: \$200.00 per hour is consistent with Market Rate for the services provided in 2004; \$230.00 per hour is consistent with Market Rate for the services provided in 2005; and \$250.00 per hour is consistent with Market Rate for the services provided in 2006.

Based on the information and documentation provided by APPLICANT, the Hearing Officer did not consider it necessary to audit the records and books of the APPLICANT to verify the basis for the amounts claimed in seeking the award. 28 CCR § 1010(e)(6).

7. AWARD

APPLICANT is awarded Advocacy and Witness Fees as follows:

| Staff / Title | Hours | Rates | Fees |
|---|--------------|--------------|--------------------|
| Executive Director & Health Care Policy Expert -- Work in 2004 | 29.0 | \$260.00 | \$7,540.00 |
| -- Work in 2005 | 12.0 | \$300.00 | \$3,600.00 |
| -- Work in 2006 | 22.0 | \$300.00 | \$6,600.00 |
| Policy Director & Health Care Policy Expert -- Work in 2004 | 52.5 | \$200.00 | \$10,500.00 |
| -- Work in 2005 | 58.0 | \$230.00 | \$13,340.00 |
| -- Work in 2006 | 75.0 | \$250.00 | \$18,750.00 |
| | | | |
| TOTAL FEES | → | | \$60,330.00 |

8. ASSIGNMENT OF PROCEEDING

This proceeding was and is assigned to Stephen A. Hansen, Staff Counsel III, as Hearing Officer.

FINDINGS OF FACT

1. APPLICANT has satisfied all the procedural requirements necessary to claim compensation in this proceeding.
2. APPLICANT made substantial contributions to Proceeding No. 2004-0115 as described herein.
3. APPLICANT requested hourly rates for its representatives that, as adjusted herein, are reasonable when compared to market rates for persons with similar training and experience.
4. The total reasonable compensation for APPLICANT is \$60,330.00.

CONCLUSIONS OF LAW

1. APPLICANT has fulfilled the requirements of Health and Safety Code § 1348.9 and 28 CCR § 1010, which govern awards of advocacy and witness compensation, and is entitled to such

compensation [, as adjusted herein,] incurred in making substantial contributions to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.

2. APPLICANT should be awarded \$60,330.00 for its contribution to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.

AWARD ORDER

1. California Pan-Ethnic Health Network is hereby awarded \$60,330.00 as compensation for its substantial contribution to the Language Assistance Programs regulatory Proceeding No. 2004-0115, 28 CCR § 1300.67.04.

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 of this decision on the Department's website. 28 CCR § 1010(e)(7) and (8).

Dated: June 29, 2007.

Original Signed by:

STEPHEN A. HANSEN
Hearing Officer
Department of Managed Health Care