

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:

Consumers Union of United States, Inc., a
New York Corporation

Applicant.

DMHC Decision 12-01-02 January 27, 2012

Proceeding Control No. 2011-4100
(Re: Director's Letter No. 8-K – Implementation of SB
1163)

**DECISION GRANTING AWARD OF ADVOCACY AND WITNESS FEES
TO CONSUMERS UNION OF THE UNITED STATES, INC., A NEW YORK
CORPORATION, FOR SUBSTANTIAL CONTRIBUTION TO
PROCEEDING CONTROL NO. 2011-4100**

1. SUMMARY

This decision awards Consumers Union of United States, Inc., a New York corporation (“Consumers Union” or “APPLICANT”), Advocacy and Witness Fees for its substantial contribution to Proceeding No. 2011-4100 of the Department of Managed Health Care (“Department” or “DMHC”) regarding Director’s Letter No. 8-K – Implementation of SB 1163 (“Letter No. 8-K”).

2. BACKGROUND OF CONSUMER PARTICIPATION PROGRAM

The Consumer Participation Program (“Program” or “CPP”), enacted in Health and Safety Code § 1348.9 (“Statute”), required the Director (“Director”) of the Department to adopt regulations to establish the 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 specifies that the regulations shall require that the person or organization demonstrates 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, the Program regulations were adopted as section 1010 of Title 28 of the California Code of Regulations (the "Regulations"). The Regulations specify:

- 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)), which is required to be eligible to participate in the Program.
- c. Procedure for Petition to Participate (§ 1010, subsection (d)), which is required to participate in each specific proceeding.
- 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 & Saf. Code § 1348.9(a); 28 CCR § 1010(b)(8).)

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

3.2. APPLICANT'S APPLICATION FOR FINDING OF ELIGIBILITY TO PARTICIPATE

On May 26, 2011, APPLICANT submitted its Request for Finding of Eligibility to Participate and Seek Compensation in the CPP, giving notice that it represents the interests of consumers and of its intent to claim compensation.

By letter dated May 27, 2011, APPLICANT was given notice of ruling and finding that APPLICANT'S Request for Finding of Eligibility to Participate and Seek Compensation was approved.

3.3. APPLICANT'S PETITION TO PARTICIPATE IN THE LETTER 8-K PROCEEDING

On June 6, 2011, APPLICANT submitted its Petition to Participate (Petition) with the Department in the Letter No. 8-K proceeding. In its Petition, APPLICANT estimated its fees to be \$8,650.00.

In its Petition, APPLICANT stated, with respect to Letter No. 8-K issues:

“Consumers Union drafted the comments on DMHC Guidance related to SB 1163 and the accompanying forms which several other nonprofit groups also signed on to (Health Access, CALPIRG, CPEHN, AARP). These letters are attached below. Elizabeth Imholtz and Sondra Roberto reviewed the draft Guidance, and later the draft forms, issued by DMHC; did a detailed comparison between the draft Guidance and SB 1163 text and drafted an analysis; compared the draft Guidance to the Guidance on SB 1163 by the California Department of Insurance and the joint comments Consumers Union submitted to CDI previously; reconciled different suggestions from signatories and finalized the submission.”

By letter dated June 8, 2011, APPLICANT was given notice of approval of APPLICANT'S Petition to Participate in the Letter No. 8-K proceeding.

3.4. APPLICATION FOR AWARD OF ADVOCACY AND WITNESS FEES

The Letter No. 8-K became effective on May 24, 2011. APPLICANT timely submitted its Application for an Award of Advocacy and Witness Fees (Application) in the Letter No. 8-K proceeding, on June 22, 2011. See 28 CCR § 1010(e)(1).

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 task;² 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).

With its Application, 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, the hourly rate requested,³ and the total dollar amount billed for each task. The total fee requested for work performed by APPLICANT is \$8,252.35.

It should be noted that APPLICANT chose to identify the elapsed time for each specific task of advocacy and witness service in units smaller than quarters (15 minutes) of an hour, or in units other than in quarters of an hour (where applicable) for attorney advocates (the application did not include billing for non-attorney advocates). Regulations section 1010(e)(2) specifies that an application for award of compensation include “the exact amount of time spent on each specific task.” Section 1010(e)(3) defines the phrase “exact amount of time spent” to refer to quarters (15 minutes) of an hour increments for attorney advocates. APPLICANT’S method of identifying elapsed time results in a lesser request than that for which APPLICANT would otherwise be eligible.

Although APPLICANT’S method of identifying elapsed time results in a lesser request for which APPLICANT would otherwise be eligible, the Hearing Officer finds that APPLICANT’S Application substantially complies with the technical requirements of 28 CCR § 1010(e)(2) and (3).

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.” 28 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.

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.

4. PROCEDURAL HISTORY

Beginning in January 2011, the Department invited parties who would be the subject of the Director's proposed decision to submit written comments regarding the draft Letter No. 8-K. The signed Letter No. 8-K was posted on the Department's website on or about May 24, 2011.

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 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.” (Emphasis added).

The definition of “Substantial Contribution” provides the criteria for evaluating whether the Participant has made a Substantial Contribution.⁴ 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.”

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 proceeding ..., 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.)

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

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.

5.2. APPLICANT'S DESCRIPTION OF ITS CONTRIBUTION

APPLICANT submitted the following information and documents in support of its position regarding the adoption of the proposed Letter No. 8-K:

“Consumers Union made a substantial contribution to the Department’s Guidance implementing SB 1163 by providing detailed and concise comments addressing rate filing and rate review issues on behalf of consumers. We were the primary drafters of two comment letters on the Guidance submitted by CU, Health Access, AARP, CALPIRG and CPEHN. Our comment letters significantly assisted the Department in developing the final Guidance, as evidenced by the Department’s adoption of some of our proposed changes. Consumers Union has studied health insurance rate filings and rate review processes in several states and has participated in rate hearings. We have worked with actuaries and regulators to understand the issues relative to how health plans set premiums. We bring a unique expertise to this complex area, in which consumers traditionally have been underrepresented. With respect to the Director’s Letter 8-k, CU staff members Betsy Imholz and Sondra Roberto coordinated other advocacy groups to submit joint comment letters. We drafted the April 29, 2011 comment letter on the Guidance, and incorporated comments from the other advocates. We also drafted a follow-up letter providing comments on the Department’s draft rate filing forms. We closely examined each line of the Guidance and compared it to the California Department of Insurance (CDI) Guidance on SB 1163. We brought our experience with rate filings and rate review to try to influence the Guidance so that the maximum amount of information about rate increases would be available to consumers, advocates and independent experts. We also made suggestions designed to bring a high level of accountability to health plans when setting rates by, for example, suggesting criteria for determining the reasonableness of a rate increase. While not all of our suggestions were adopted, the Department did incorporate some of them. For example, the Department adopted our suggestion to change the definition of actuarial soundness in paragraph 4.B.ii to require rates be sound "in aggregate for the particular market segment," rather than just "in aggregate" in the draft version. Also based on our suggestion, this paragraph also now references “the cost of capital reserves required by Knox-Keene,” rather than just "the cost of required capital" in the previous version. The final Guidance also adopts some language from the Guidance issued by the California Department of Insurance that was originally suggested by CU and the other advocate groups in our comments to CDI. For example, we urged CDI to consider “how rates are distributed across enrollees and the minimum and maximum increase for any policyholder.” This language taken from the CDI Guidance was used in the Department’s Guidance as well. Please see the attached staff biographies, time records, and comment letters in support of our application.”

APPLICANT provided written comments, dated April 29, 2011, and May 6, 2011, in regard to the draft Letter No. 8-K, by a Special Projects Director representing APPLICANT.

5.3 PROCEDURAL VERIFICATION OF SUBSTANTIAL CONTRIBUTION

By letters dated April 29, 2011, and May 6, 2011 (from APPLICANT, and representatives of AARP, California Pan-Ethnic Health Network, CALPIRG and Health Access California), APPLICANT'S staff presented written comments on the proposed Letter No. 8-K.

The April 29, 2011 letter contained approximately five comments, including recommendations requesting changes to the proposed letter. APPLICANT stated in summary:

(1) The Letter No. 8-K guidance should require that plans submit filings for new product rates as well as for rate changes for existing products. The final guidance should require filing by large groups. The guidance should state the effective date of SB 1163 to ensure that rates implemented on or after January 1, 2011 comply with SB 1163. DMHC should reverse its decision to exempt from the provisions of SB 1163 those 2011 rate increases that were filed on or before January 1, 2011. DMHC should adopt the California Department of Insurance ("CDI") approach on the notice to consumers and should adopt CDI's provision for demonstrating compliance with the notice requirement.

(2) The Letter No. 8-K guidance should maintain consistency between DMHC and CDI, the two regulators, certainty for the regulated industry, and thoroughness for the consumer and public interest, by stating in the final Guidance that DMHC *shall* include all of the factors identified by CDI in its reviews for unreasonableness. The guidance should also adopt the proposed specific suggested changes to these factors.

(3) The Letter No. 8-K guidance should clarify the level at which the definition of actuarial soundness will be applied, i.e., by including a statement of opinion that the proposed premium rates in the filing are actuarially sound in aggregate for a particular market segment (i.e., small group or individual). The actuarial opinion should be based on the full range of factors suggested in CDI's guidance. Additionally, the actuarial certification should provide a breakdown of how the rating factors have been applied (e.g. geographic areas, age) and the expected effect on various populations.

(4) The Letter No. 8-K guidance should specify that the rate filing form clearly display APPLICANT'S suggested specific items, including those specified in the CDI guidance as well as additional items from the National Association for Insurance Commissioners' model.

(5) The Letter No. 8-K guidance should state explicitly the intent to translate the complex rate filings into plain language, to provide a plain language summary in languages other than English, and to place a burden on the insurers to provide this document in non-English languages. Information on administrative costs and profit should be specified both in the aggregate as a percent of premium and as per member per month costs for the standard administrative costs (salaries, commissions, legal and consulting fees, lobbying expenses etc.). Additionally, the plain language filing should report two sets of contrasting numbers to convey the impact of any proposed increase. The first would include the projected total premiums collected, total claims paid, total administrative costs, and total profit, as dollars and percentages. The second set would illustrate the difference the rate increase will make by stating the same numbers (by dollars and percentages) under the proposed rate increase.

The May 6, 2011 letter contained approximately two comments regarding the draft rate filing forms, including recommendations requesting changes to the proposed guidance. APPLICANT stated in summary:

(1) The Letter No. 8-K guidance should require that the rate filing forms include a clear display of relevant data for the experience period, the future rating period projected at current rates, and the rating period with the proposed increases. In addition, carriers should report on the rate filing form the expected change in enrollment for each product due to rate increases. Reserves, investment income, and the expected return on surplus should be reported. Plans should be required to report, as in the NAIC model form, the insufficiency of prior rates, and the annual average rate changes requested and implemented over the past three calendar years. The comparison of claims cost and rate of changes over time should include a longer period for providing historical claims data. For closed blocks, DMHC should require a description of how the plan complied with statutory requirements regarding notice or blending of blocks. For the “annual rate increase” plans should be required to provide a breakdown of their calculations, showing minimum and maximum increases and grouping to show how many people will be getting these rates.

(2) The Letter No. 8-K guidance should include more descriptions in the plain-language form to make it easier for consumers to understand how the reported data is relevant and useful. The form should remove the word “unreasonable” from the requirement to justify “unreasonable” rate increases, to avoid suggesting that a determination has already been made by DMHC that the rate is unreasonable. The breakdown of premium attributed to medical costs, administrative expenses, and profit/margin prior to the rate increase and after the rate increase should be presented as actual costs

from total premium, actual costs on an average per member per month basis, and on a percentage basis. The data element “cost containment and quality improvement efforts,” along with an estimate of cost savings due to such efforts, should be on both the plain language and rate filing forms.

Of the April 29, 2011, and May 6, 2011, comments requesting changes, all were reviewed, some were accepted, and some were declined.

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 decide the proposed adoption of Letter No. 8-K 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 Letter No. 8-K.

The Hearing Officer finds that APPLICANT has made a Substantial Contribution, pursuant to 28 CCR § 1010(b)(8), to the Letter No. 8-K 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 proceeding.

6.1. FEES REQUESTED

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

SONDRA ROBERTO, STAFF ATTORNEY

TIME: 10.38 hours

RATE: \$355/hour*

TOTAL: \$3,432.85⁵

BETSY IMHOLZ, SPECIAL PROJECTS DIRECTOR

TIME: 11.34 hours

RATE - \$425/hour*

TOTAL: \$4,819.50

Total for Sondra Roberto and Betsy Imholz: \$8,252.35

*(APPLICANT’S note: “Hourly rates were determined based on the California Public Utility Commission adopted ranges for attorneys.”)

⁵ See discussion at Paragraph 7 below.

APPLICANT did not claim or bill for any expenses or recoverable costs.

6.2. 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 are necessary for the Substantial Contribution.⁶

a. Billed Activities. APPLICANT billed for two primary activities, summarized as follows:

- (1) Analysis of the text of the proposed Letter No. 8-K.
- (2) Preparation of written comments.

APPLICANT'S Staff Attorney billed a total of 10.38 hours. APPLICANT'S Special Projects Director, also an attorney, billed a total of 11.34 hours.

b. Adjustments. The time billed appears reasonable.

c. Finding. 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.

6.3. 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."

Reference to the Intervenor Compensation Program of the California Public Utilities Commission ("PUC") is appropriate because it is similar to the Department's Consumer Participation Program⁷ and has an extensive history of awarding intervenor compensation and updating hourly

⁶ 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.

⁷ The Legislative history behind the Department's Consumer Participation Program specifically referred to the PUC's program:

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.

6.4. 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 PUC, see *infra*) are essentially equivalent to hourly rates for “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.⁸ In order to determine Market Rate, we must look to available data inside and outside the Department.

6.5. APPLICANT’S JUSTIFICATION FOR RATES BILLED

In support of the hourly fee rates requested, APPLICANT did not submit any justification other than the experience and biographical information regarding the persons providing services.

6.6. HOURLY RATE DETERMINATIONS UNDER THE PUC PROGRAM

Until PUC Decision R.04-10-010 in 2004, the PUC “set hourly rates piecemeal”⁹ for intervenors – i.e., “... for each proceeding, each intervenor, and indeed, each appearance by a particular representative of an intervenor, ... [the PUC] might revisit the reasonableness of that representative’s hourly rate.”¹⁰ The PUC recognized the need for coordination by establishing, through periodic rulemakings, the rates to be paid to all intervenors’ representatives for work done in specified time periods.¹¹ 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 2005.¹²

“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).

⁸ See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 10.

⁹ PUC Order Instituting Rulemaking R.06-08-019 (August 24, 2006), p. 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at pp. 2-3.

In an Interim Opinion on Updating Hourly Rates,¹³ 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 for 2007 work, three rate ranges for non-attorney experts based on levels of experience, similar to the five levels already established for attorneys.¹⁴ 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.”¹⁵ (Emphasis added).

The PUC decided to continue to update hourly rates annually on a calendar year basis.¹⁶ The PUC based its 3% COLA adjustments on the Social Security Administration’s COLA, which is released annually in late fall, and upon which reliance would be consistent with a calendar year adjustment of hourly rates.¹⁷

In 2008, the PUC found it reasonable to adopt another 3% COLA for intervenor rates for work performed in 2008.¹⁸ That increase is primarily based on various federal inflation indexes, such as the Social Security Administration’s COLA and Bureau of Labor Statistics data for consumer prices and wages.¹⁹ In its 2008 Decision and for future reference, the PUC found that a COLA adjustment should be authorized, by future PUC Resolution, for work performed in 2009, and in subsequent years in the absence of a market rate study, to be effective on January 1 of each year.²⁰ However, a COLA would not necessarily be authorized. By Resolution ALJ-235 (March 12, 2009), the PUC ordered that intervenors are not authorized an hourly rate COLA for work performed in 2009, and hourly rate ranges adopted for 2008 would remain in effect. By Resolutions ALJ-247 (April 8, 2010) and ALJ-267 (March 24, 2011), the PUC ordered that intervenors are not authorized

¹³ D.07-01-009 (January 11, 2007) (part of Rulemaking R.06-08-019).

¹⁴ *Id.* at pp. 1, 3-4.

¹⁵ *Id.* at p. 5.

¹⁶ *Id.* at p. 9.

¹⁷ *Id.* at pp. 4 and 11.

¹⁸ D.08-04-010 (April 10, 2008) at pp. 4 and 24.

¹⁹ *Id.* In reviewing available data, the PUC found no index that specifically targets rates for services by regulatory professionals (attorneys, engineers, economists, scientists, etc.), and the PUC’s “findings are weighted heavily to SSA COLA and similar data.” *Id.* at p. 4.

²⁰ D.08-04-010 (April 10, 2008) at pp. 24 -25.

an hourly rate COLA for work performed in 2010 and 2011, and hourly rate ranges adopted for 2008 would remain in effect.

The following table shows the PUC’s adopted ranges for work performed by intervenor representatives in 2006, 2007, 2008, 2009, 2010 and 2011. The rate ranges for attorneys and non-attorney experts are based on levels of applicable experience.

Hourly Intervenor Rate Ranges for 2006, 2007, 2008,²¹ 2009,²² 2010²³ and 2011²⁴

Years of Experience	2006 Range	2007 Range	2008, 2009, ²⁵ 2010 & 2011 Range
Attorneys:			
0 - 2	\$140 - \$195	\$145 - \$200	\$150 - \$205
3 - 4	\$190 - \$225	\$195 - \$230	\$200 - \$235
5 - 7	\$260 - \$280	\$270 - \$290	\$280 - \$300
8 - 12	\$280 - \$335	\$290 - \$345	\$300 - \$355
13+	\$280 - \$505	\$290 - \$520	\$300 - \$535
Experts:			
0 - 6		\$120 - \$180	\$125 - \$185
7 - 12		\$150 - \$260	\$155 - \$270
13+		\$150 - \$380	\$155 - \$390
All years	\$115 - \$370		

6.7. 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 one Staff Attorney and one Special Projects Director, also an attorney.

For work performed by APPLICANT’S Staff Attorney, APPLICANT claims Advocacy and Witness Fees at the hourly rate of \$355.00 for 2011. APPLICANT submitted justification for the rate claimed by reference to biographical information and the number of years of experience for the

²¹ D.08-04-010 (April 10, 2008) (part of Rulemaking 06-08-019) at p. 5 (2008 rates = 2007 rates + 3%).

²² PUC Resolution ALJ-235 (March 12, 2009) (2009 rates = 2008 rates adopted for 2009).

²³ PUC Resolution ALJ-247 (April 8, 2010) (2010 rates = 2008 rates adopted for 2010).

²⁴ PUC Resolution ALJ-267 (March 24, 2011) (2011 rates = 2008 rates adopted for 2011).

²⁵ For work performed in 2009, the PUC ordered that intervenors are not authorized an hourly rate COLA, and hourly rate ranges adopted for 2008 remain in effect. Resolution ALJ-235 (March 12, 2009) at pp. 2-4.

attorney for whom fees are claimed (see ¶ 6.5, *supra*). At the time of the work for which the claim is made and according to the biographical information submitted, APPLICANT’S Staff Attorney had a J.D. from Brooklyn Law School and approximately 11 years of experience working as an attorney for various employers including APPLICANT. The PUC’s adopted hourly rate range for 2008-2011 for attorneys of 8 – 12 years’ experience is \$300-355.00. Thus it appears that the \$355.00 hourly rate claimed by APPLICANT for services provided by APPLICANT’S Staff Attorney for 2011 does not exceed “Market Rate” as defined in 28 CCR § 1010(b) and as construed and found here in accordance with the PUC rate ranges. The Hearing Officer finds that the hourly rate of \$355.00 is consistent with Market Rate.

For work performed by APPLICANT’S Special Projects Director, also an attorney, APPLICANT claims Advocacy and Witness Fees at the hourly rate of \$425.00 for 2011. APPLICANT submitted justification for the rate claimed by reference to biographical information and the number of years of experience for the attorney for whom fees are claimed (see ¶ 6.5, *supra*). At the time of the work for which the claim is made and according to the biographical information submitted, APPLICANT’S Special Projects Director had a J.D. from Rutgers University and more than 30 years’ experience working as an attorney for various employers including APPLICANT. The PUC’s adopted hourly rate range for 2008-2011 for attorneys of 13 or more years’ experience is \$300-535.00. Thus it appears that the \$425.00 hourly rate claimed by APPLICANT for services provided by APPLICANT’S Special Projects Director for 2011 does not exceed “Market Rate” as defined in 28 CCR § 1010(b) and as construed and found here in accordance with the PUC rate ranges. The Hearing Officer finds that the hourly rate of \$425.00 is consistent with Market Rate.

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
Staff Attorney	10.38	\$355.00	\$3,684.90*
Special Projects Director	11.34	\$425.00	\$4,819.50
TOTAL FEES			\$8,504.40
TOTAL DIRECT EXPENSES			\$00.00
TOTAL AWARD			\$8,504.40

*Although the hours and the hourly rate claimed for APPLICANT'S Staff Attorney have been found to be reasonable and consistent with Market Rate, an arithmetic error in APPLICANT'S Staff Attorney's fee request (see ¶ 6.1, *supra*) caused the total request to amount to \$252.05 less than the correctly added total of fees. The award has been adjusted to reflect the correct amount based on the hours and hourly rate claimed.

8. ASSIGNMENT OF PROCEEDING

This proceeding was and is assigned to Mark B. Sumner, 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 Control No. 2011-4100 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 \$8,504.40.

CONCLUSIONS OF LAW

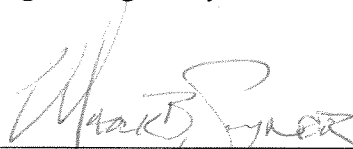
1. APPLICANT has fulfilled the requirements of Health and Safety Code § 1348.9 and 28 CCR § 1010, which govern awards of Advocacy and Witness compensation, and is entitled to such compensation incurred in making Substantial Contributions to Proceeding Control No. 2011-4100.
2. APPLICANT should be awarded \$8,504.40 for its contribution to Proceeding Control No. 2011-4100.

AWARD ORDER

1. Consumers Union of United States, Inc., a New York corporation, is hereby awarded \$8,504.40 as compensation for its Substantial Contribution to the Letter No. 8-K Regulatory Proceeding Control No. 2011-4100.
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. (28 CCR § 1010(e)(7) and (8).)

Dated: January 27, 2012

Original Signed by:



MARK B. SUMNER

Hearing Officer

Department of Managed Health Care