

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:

HEALTH ACCESS OF CALIFORNIA,  
  
Applicant.

**DMHC Decision 07-07-01 July 12, 2007**  
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 HEALTH ACCESS OF CALIFORNIA FOR  
SUBSTANTIAL CONTRIBUTION TO PROCEEDING NO. 2004-0115**

**1. SUMMARY**

This decision awards Health Access of California, a California corporation (“Health Access or “APPLICANT”), sometimes referred to as Health Access California, 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, 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 August 11, 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 September 10, 2004, the Department Director (Director) ruled that APPLICANT was eligible to participate and to seek an award of compensation.

On October 1, 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 \$1,000.00.

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

Health Access has been involved in numerous issues related to language assistance and currently operates a pilot project on video medical interpretation. On October 29, 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 spent<sup>1</sup> on each specific task<sup>2</sup>; 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).

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<sup>1</sup> "...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).

<sup>2</sup> "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 0.5 hour or 30 minute increments for non-attorney advocates, the hourly rate requested,<sup>3</sup> and the total dollar amount billed for each task. The total fees requested for work performed by APPLICANT is \$25,365.00.

However, the Application contained biographies or resumes of the persons who provided the services for which the fee award is sought but did not contain a description of how Market Rate was determined for the fees claimed .

The Hearing Officer finds that the application of APPLICANT, as supplemented, 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.

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<sup>3</sup> 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.

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 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 became 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.<sup>4</sup>

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<sup>4</sup> 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.

## **5.1 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<sup>5</sup> . . . , 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:

a. At the February 14, 2006, Public Hearing: Testimony of APPLICANT’s Project Director/Health Care Policy Expert, coordination of consumers to testify by APPLICANT’s Executive Director, and attendance and fact-finding of a Community Organizer of APPLICANT.

b. At the February 16, 2006, Public Hearing: Testimony of APPLICANT’s Project Director for the Video Medical Interpretation Pilot Project, and attendance and fact-finding of a Community Organizer of APPLICANT.

c. APPLICANT provided detailed written comments on the proposed regulations. Some but not all of the comments resulted in changes being made to the proposed regulations.

APPLICANT provided recommendations concerning the following sections of the proposed regulations:

That §1300.67.04(b) lacks clarity or statutory authority in the requirement for plans to survey the language needs of the plan’s enrollees by using state demographic data rather than population data specific to the plan’s own enrollees;

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<sup>5</sup> 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



That § 1300.67.04(a) and (f) do not contain enough specificity to demonstrate how plans will gauge compliance at the provider level;

That § 1300.67.8(f) should be retained regarding notices, appeals, and other communication provisions;

That § 1300.67.04(a) should not preclude the regulations from applying to Medicare enrollees;

That the regulations should not contain “deemed compliance” provisions for Medi-Cal patients; and

That the significant retrenchment of the third revision of the regulations from the requirements imposed on plans, including translation of vital documents in § 1300.67.04(c)(F)(11) giving the plans more permissive language in developing a demographic profile of its enrollees, objecting to special provisions for specialized plans for which no statutory authority exists, and urging strong Department compliance monitoring and stronger language on provider cooperation.

d. Analysis of draft regulations, comparison of draft regulations to statutory requirements, and development of detailed written comments by APPLICANT’s staff in response to the first comment period that closed on March 3, 2006.

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

f. 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, a Health Care Policy Expert representing the APPLICANT presented oral comments on the record.

At the February 16, 2006, Public Hearing on the proposed adoption of the regulation, an expert on medical interpretation representing the APPLICANT presented oral comments on the record.

On March 3, 2006, the Executive Director representing APPLICANT presented written comments on the proposed regulation. That submission contained seven comments and several 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 own enrollee population and the regulations should not allow use of broad population data (instead of data specific to a plan's own enrollees;
- (2) that the regulations should require timely access to linguistically appropriate services from contracting providers and plans must be able to demonstrate that enrollees can actually obtain these services from providers;
- (3) that the regulations should provide for cost effective video medical interpretation service such as has been tested and used with APPLICANT's Videoconferencing Medical Interpretation project;
- (4) that the regulations should require that interpretation services be available at no cost to enrollees;
- (5) that section 1300.67.8(f) should not be deleted in its entirety regarding posting of enrollees rights, and APPLICANT offered alternative language regarding posting notice;

(6) that the regulation should apply to Medicare enrollees and the exclusionary language of § 1300.67.04(a)(1) should be revised to preclude exclusion of Medicare enrollees; and

(7) that the language of the regulation regarding Medi-Cal deemed status is either unclear or inconsistent with the statute, and should be revised to require the same level of language access for Medi-Cal enrollees as for non-Medi-Cal enrollees.

Of the seven March 3, 2006, comments requesting changes, one was declined with explanation, four were accepted in part, and four were declined or rejected in part with explanation.

On September 25, 2006, the Executive Director representing APPLICANT presented written comments on the proposed regulation. That submission contained two comments without suggested changes and urged conclusion of the regulatory process and energetic enforcement of the regulation.

On December 1, 2006, the Executive Director of APPLICANT presented written comments on the proposed regulation. That submission contained five comments including recommendations requesting changes:

(1) that the revised version of the regulation contains more limited definition of “vital documents,” and language regarding grievances, appeals and independent medical review should be retained, including the requirement for plans to translate the grievance form;

(2) that the revised version of the regulation contains more permissive language allowing plans to develop a demographic profile of its enrollees (using a variety of methods) instead of a plan-specific linguistic needs assessment of enrollees, and the language requiring an individual plan-specific enrollee assessment should be restored;

(3) that the provisions of the regulation that establish special, more lenient standards for specialized plans should be deleted because they have no basis in the law;

- (4) that subsection (d) of the proposed regulations be revised to include a specific consumer measurement for analysis of complaints and satisfaction survey results; and
- (5) that subsection (e) of the proposed regulations be strengthened to include stronger language on provider cooperation, to clarify providers' responsibilities and obligation to comply with those responsibilities.

Five of the five December 1, 2006, comments requesting changes were declined 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 if 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.

<b>Staff / Title</b>	<b>Hours</b>	<b>Rates</b>	<b>Fees</b>
Policy Consultant and Health Care Policy Expert	4.5	\$370.00	\$1,665.00
Project Director and Health Care Policy Expert	37.0	\$370.00	\$13,690.00
Executive Director and Health Care Consumer Advocate	21.0	\$250.00	\$5,250.00
Project Director, Video Medical Interpretation Pilot Project	8.0	\$370.00	\$2,960.00
Health Care Policy Coordinator	11.0	\$100.00	\$1,100.00
Community Organizer	6.0	\$100.00	\$600.00
Community Organizer	1.0	\$100.00	\$100.00
<b>TOTAL FEES</b>	<b>→</b>		<b>\$25,365.00</b>

**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 Program<sup>6</sup> 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.

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<sup>6</sup> 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).

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.<sup>7</sup>

b. Have awarded the same rate for an individual expert that was approved in a prior proceeding in the same year,<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> The PUC has consistently rejected requests for increase over 3%.<sup>11</sup>

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.<sup>12</sup>

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

f. Have approved compensation for preparation of the intervenor organization's compensation request or compensation claim at one-half the normal hourly rate.<sup>14</sup> However,

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<sup>7</sup> PUC Decision (D.) 06-11-031 (November 30, 2006).

<sup>8</sup> D.06-11-031 (November 30, 2006).

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

<sup>10</sup> D.06-11-031 (November 30, 2006), p. 11.

<sup>11</sup> D.06-11-031 (November 30, 2006), p. 11.

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.<sup>15</sup>

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

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.<sup>17</sup>

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.”<sup>18</sup>

j. Have disallowed time where the “hours seem excessive” or the “proposal is not persuasive,”<sup>19</sup> and have changed or disallowed compensation amounts requested for the following reasons:<sup>20</sup> “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.”

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<sup>12</sup> D.06-11-031 (November 30, 2006), p. 10.

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

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

<sup>15</sup> D.06-11-009 (November 9, 2006), p. 27.

<sup>16</sup> D.06-11-031 (November 30, 2006), p. 10.

<sup>17</sup> 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.

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

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

### **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.<sup>21</sup>

APPLICANT billed for five activities summarized as follows:

1. Preparation for, attendance and providing testimony at, and preparing significant witnesses to testify at the Public Hearings held on February 14 and February 16, 2006, for a total of 32.0 hours.

2. Analysis of the text of the proposed regulation, and preparation of written comments submitted in the first written comment period ending March 3, 2006, for a total of 10.5 hours.

3. Attendance at a Department-sponsored tour of the Video Medical Interpretation system at San Joaquin Hospital in Stockton on March 14, 2006, for a total of 18.0 hours.

4. Analysis of revised text of the proposed regulation, and preparation of written comments submitted in the second written comment period ending September 25, 2006, for a total of 5.0 hours.

5. Analysis of revised text of the proposed regulation, and preparation of written comments submitted in the third written comment period ending December 3, 2006, for a total of 22.0 hours.

The time billed appears reasonable except for: (1) travel time which should be billed at no more than one-half the normal hourly rate or one-half of the travel time spent; and (2) time for

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

<sup>21</sup> 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.



services after the proposed regulation was adopted.<sup>22</sup> Accordingly, the travel time billed shall be reduced by one-half of each of the following estimated travel times: 4.0 hours (on 2/14/06) and 2.0 hours (on 3/14/06) by APPLICANT's Project Director and Health Care Policy Expert; 2.0 hours (on 3/14/06) by APPLICANT's Executive Director; and 2.0 hours (on 2/16/06) and 2.0 hours (on 3/14/06) by APPLICANT's Health Care Policy Coordinator. Compensation may be awarded "... for advocacy fees and witness fees in any proceeding relating to the adoption of any regulation ...." (28 CCR § 1010(b)(2), (5) and (8)) (Emphasis added). The final regulation was submitted to the OAL on December 22, 2006, and became effective on February 23, 2007. One hour billed for services of APPLICANT's Project Director/Health Care Policy Expert is disallowed because it was billed for services to speak at a press briefing on March 1, 2007, which was after the regulation was adopted and became effective.

The Hearing Officer hereby finds that, as adjusted, 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."

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<sup>22</sup> See, e.g., PUC D.06-11-009 (November 9, 2006), pp. 26-27 (billed hours disallowed that came *after* the decision was decided).

## **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.<sup>23</sup> In order to determine Market Rate, we must look to available data inside and outside the Department.

## **6.6. 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.

## **6.7. HOURLY RATE DETERMINATIONS UNDER THE PUC PROGRAM**

A recent PUC Decision<sup>24</sup> 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 Decision<sup>25</sup> provided the following examples of “recently adopted non-attorney rates and years of professional experience (as provided by an expert seeking a rate increase).

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<sup>23</sup> See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 10.

<sup>24</sup> Id. at pp. 30-31.

### 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 rates to be paid to all intervenors’ representatives for work done in specified time periods.<sup>26</sup> 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.<sup>27</sup>

In an Interim Opinion on Updating Hourly Rates,<sup>28</sup> 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.<sup>29</sup> 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

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<sup>25</sup> D.06-11-032 (November 30, 2006), pp. 11 – 12.

<sup>26</sup> PUC Order Instituting Rulemaking R.06-08-019 (August 24, 2006), p. 2.

<sup>27</sup> Id. at pp. 2-3.

<sup>28</sup> D.07-01-009 (January 11, 2007)(part of Rulemaking R.06-08-019).

<sup>29</sup> Id. at pp. 1, 3-4.

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.<sup>30</sup> (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.

**Hourly Intervenor Rate Ranges for 2006 and 2007<sup>31</sup>**

(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)

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

<sup>30</sup> Id. at p. 5.

<sup>31</sup> Id. at pp. 8 - 9.

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.<sup>32</sup> 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.<sup>33</sup>

### **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 seven non-attorney staff: two policy analyst/experts; one Executive Director and health care consumer advocate; one project director for a video medical interpretation pilot project; a health care policy coordinator; and two community organizer support staff.

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.

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<sup>32</sup> Id. at p. 9.

<sup>33</sup> Id. at pp. 4 and 11.

Two of the experts for which fees are claimed are described by APPLICANT as “Health Care Policy Experts.” The credentials provided by APPLICANT indicate that: one expert has a Ph.D. in political science from the University of California at Berkeley and has approximately 30 years of experience working in the California Legislature, California Administrations, and for various interest groups; and the other expert has a B.A. from the University of Redlands, has approximately 10 years (7/22/93 – 1/3/06) of experience with the Centers for Medicare and Medicaid Services (CMS), including 8 years (8/20/95 – 1/3/03) as the Region IX Administrator for CMS, has approximately 8 years of administrative experience with the Social Security Administration, including 4 years as a District Manager for the Social Security Administration, and one year (1/13/06 – present) of experience representing consumers as Project Director with APPLICANT. For work performed by both experts, APPLICANT claims advocacy and witness fees at the hourly rate of \$370.00. Regarding services performed by both of these experts, the Hearing Officer finds that the hourly rate of \$370.00 is consistent with Market Rate. That finding is consistent with an award in a previous Decision in 2007 in which APPLICANT was awarded advocacy and witness fees at the hourly rate of \$370.00 for these two experts.

For work performed by APPLICANT’s Executive Director, APPLICANT claims advocacy and witness fees at the hourly rate of \$250.00 (for 2006). The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT’s Executive Director had: approximately 4 years of experience as Executive Director and Director of Organizing of APPLICANT, plus an additional year as Director of Organizing; approximately five years of experience as Program Director and Main Organizer of New Jersey Citizen Action, plus an additional year as Main Organizer; and approximately two years of experience as a project coordinator for the Center for Media Education in Washington, DC; for a total of approximately 12 years of relevant experience; and a BA degree in English and Sociology from Amherst College in Amherst, MA. The PUC rates for 2006 for non-attorney policy analyst/experts range from

\$115 to \$370 (without breakdown by years of experience); and for 2007 the rate ranges are \$120 - \$180 for 0 to 6 years of experience, \$150 - \$260 for 7 to 12 years of experience, and \$150 - \$380 for 13 or more years of experience. Regarding services provided by APPLICANT's Executive Director, the Hearing Officer finds that the claimed hourly rate of \$250.00 does not exceed "Market Rate" as defined in 28 CCR § 1010(b) for the services provided in 2006.

For work performed by APPLICANT's Project Director, Video Medical Interpretation Pilot Project, APPLICANT claims advocacy and witness fees at an hourly rate of \$370.00 (for services performed in 2006). The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT's Policy Director had: approximately three years of experience providing planning, direction, oversight, and implementation of APPLICANT's Video Medical Interpretation Pilot Project; approximately three years of experience as a director of a Substance Abuse Assessment and Placement unit of the Department of Public Health of the City and County of San Francisco; approximately eleven years of experience in providing consulting services to the City of Vallejo Community Partnership Board; approximately three years of experience as an outreach coordinator for the Shanti Project/Crossings Program in San Francisco; for a total of approximately 20 years of relevant experience; and a BA Degree in Public Policy/Interdisciplinary Studies from the University of California at Berkeley, a Masters Degree in Public Health from the University of Hawaii at Honolulu, and a Masters of Business Administration Degree from the University of Hawaii at Honolulu. The PUC rates for 2006 for non-attorney policy analyst/experts range from \$115 to \$370 (without breakdown by years of experience); and for 2007 the rate ranges are \$120 - \$180 for 0 to 6 years of experience, \$150 - \$260 for 7 to 12 years of experience, and \$150 - \$380 for 13 or more years of experience. Regarding services provided by APPLICANT's Project Director, Video Medical Interpretation Pilot Project, the Hearing Officer finds that the claimed hourly rate of \$370.00 does not exceed "Market Rate" as defined in 28 CCR § 1010(b) for the services

provided in 2006.

One of the experts for which fees are claimed is described by APPLICANT as a “Health Care Policy Coordinator,” and APPLICANT claims advocacy and witness fees at the hourly rate of \$100.00 (for 2006). The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT’s Health Care Policy Coordinator had approximately 9 years of experience as a journalist, six years of which were spent in Sacramento as a Capitol reporter for the Orange County Register. The PUC rates for 2006 for non-attorney policy analyst/experts range from \$115 to \$370 (without breakdown by years of experience); and for 2007 the relevant rate ranges are \$120 - \$180 for 0 to 6 years of experience, and \$150 - \$260 for 7 to 12 years of experience. Regarding services provided by APPLICANT’s Health Care Policy Coordinator, the Hearing Officer finds that the claimed hourly rate of \$100.00 does not exceed “Market Rate” for the services provided in 2006.

Two of the experts/staff persons for which fees are claimed are described by APPLICANT as a “Community Organizers” (one as “Southern California Regional Organizer” and the other as “Northern California Regional Organizer”). APPLICANT claims advocacy and witness fees for both Community Organizers at the hourly rate of \$100.00 (for 2006). The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT’s Southern California Regional Organizer had approximately 10 years of experience as a community and labor organizer in the Los Angeles region, and APPLICANT’s Northern California Regional Organizer had approximately 20 years of experience as a lobbyist, policy advocate and community. The PUC rates for 2006 for non-attorney policy analyst/experts range from \$115 to \$370 (without breakdown by years of experience); and for 2007 the relevant rate ranges are \$120 - \$180 for 0 to 6 years of experience, and \$150 - \$260 for 7 to 12 years of experience. Regarding services provided by APPLICANT’s Community Organizers, the Hearing Officer finds that the claimed hourly rate of \$100.00 does not exceed “Market Rate” for the



services provided in 2006.

Additional information and documentation was considered necessary by the Hearing Officer. The additional information and documentation was provided by APPLICANT, and therefore, the Hearing Officer did not consider it necessary to audit the records and books of the APPLICANT to verify the basis for the amount claimed in seeking the award. 28 CCR § 1010(e)(6).

## 7. AWARD

APPLICANT is awarded Advocacy and Witness Fees as follows:

<b>Staff / Title</b>	<b>Hours</b>	<b>Rates</b>	<b>Fees</b>
Policy Consultant and Health Care Policy Expert	4.5	\$370.00	\$1,665.00
Project Director and Health Care Policy Expert	33.0 <sup>34</sup>	\$370.00	\$12,210.00
Executive Director and Health Care Consumer Advocate	20.0 <sup>35</sup>	\$250.00	\$5,000.00
Project Director, Video Medical Interpretation Pilot Project	8.0	\$370.00	\$2,960.00
Health Care Policy Coordinator	9.0 <sup>36</sup>	\$100.00	\$900.00
Community Organizer	6.0	\$100.00	\$600.00
Community Organizer	1.0	\$100.00	\$100.00
<b>TOTAL FEES</b>	<b>→</b>		<b>\$23,435.00</b>

## 8. ASSIGNMENT OF PROCEEDING

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

## FINDINGS OF FACT

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<sup>34</sup> Adjusted as specified in Paragraph 6.3, *supra*.

<sup>35</sup> *Id.*

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 \$23,435.00.

## **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 \$23,435.00 for its contribution to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.

## **AWARD ORDER**

1. Health Access of California, a California corporation, is hereby awarded \$23,435.00 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.

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<sup>36</sup> Id.

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: July 12, 2007.

Original Signed by:

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STEPHEN A. HANSEN  
Hearing Officer  
Department of Managed Health Care