

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:

Legal Services of Northern California, a  
California corporation dba Health Rights  
Hotline

Applicant.

Application Received Date: April 9, 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 RIGHTS HOTLINE FOR  
SUBSTANTIAL CONTRIBUTION TO PROCEEDING NO. 2004-0115**

**1. SUMMARY**

This decision awards Legal Services of Northern California, a California corporation doing business as Health Rights Hotline (“Health Rights Hotline” 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 January 8, 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 January 30, 2004, the Department Director (Director) ruled that APPLICANT was eligible to participate and to seek an award of compensation.

On May 13, 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 \$10,000.00.

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

The Health Rights Hotline collects data on the sorts of problems people experience with the health care system. One of the barriers to obtaining care for people with limited-English proficiency is their inability to communicate with a health plan, a provider, or a provider's office staff in the consumer's primary language. The Hotline often hears from people who do not understand what they were told by their providers or who received inadequate or inappropriate care because of their limited ability to speak or understand English. As part of its mission to make the health care system work better for all consumers, we are interested in seeing that health plans develop appropriate programs to ensure that their LEP members receive important medical information in their primary language.

On June 10, 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 9, 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).

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

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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.

by initials of the person providing each service, the elapsed time (exact amount of time spent) for each service in quarters (15 minutes) of an hour for attorney advocates and 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 \$19,916.25.

However, the Application did not contain: (1) Biographies or resumes of the persons who provided the services for which the fee award is sought; and (2) a description of how Market Rate was determined for the fees claimed .

By letter dated May 21, 2007, the Department requested additional information from APPLICANT, including a description of how APPLICANT determined the market rate for each person for whom fees were claimed.

By letter dated June 4, 2007, APPLICANT provided: (1) biographies and resumes for each staff member for whom fees were claimed; and (2) a summary of the data gathering and methodology followed in determining the hourly rates 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 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.<sup>4</sup>

### 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>...,”

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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.

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 the proposed adoption of 28 CCR § 1300.67.24:

- a. Beginning in September 2005, APPLICANT's Program Director and Staff Attorney participated in a series of stakeholder discussions regarding the development of the Language Assistance Programs regulation and submitted written comments on the draft regulation on September 23, 2005. APPLICANT's comments focused on the definition of "vital" documents, notices of availability of interpretation services, timeliness of providing interpretation services, using family or friends as interpreters and notices of where consumers can go for help with language assistance. APPLICANT based its comments on data gathered from limited-English proficient (LEP) consumers who contacted APPLICANT for assistance with navigating the managed care system.
- b. Testimony of APPLICANT's staff attorney at the February 16, 2006, Public Hearing.
- c. Written comments by APPLICANT's staff policy analyst in response to the first comment period that closed on March 3, 2006. APPLICANT's comments focused on individual access to free interpretation services and health plans' responsibility to notify LEP consumers of the availability of language assistance. Included in the comments were examples of such notices and samples of APPLICANT's "I Speak" cards which health plans could modify for their LEP members to inform them of their right to interpretation services and comments on the need for high quality translations of written documents and ways in which health plans could reduce the cost complying with the proposed regulation. In addition, APPLICANT suggested that health

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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 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.



plans be required to collect data on the language needs of their members and be required to train their staff on the availability of language assistance and establish timelines for conducting such training. APPLICANT strongly encouraged a prohibition of the use of minors as interpreters and the importance of having trained medical interpreters available for LEP consumers. Comments requesting changes were accepted in part and addressed by revisions.

d. Written comments by APPLICANT's staff on August 27, 2006, in response to the second comment period that closed on September 25, 2006. APPLICANT's comments focused on translation of vital information and dental plan compliance, and those comments were based on the experience of consumers who had contacted APPLICANT for assistance with health-related problems. Comments requesting changes were accepted in part and addressed by revisions.

e. Written comments by APPLICANT's staff on December 1, 2006, in response to the third comment period that closed on December 3, 2006. APPLICANT's comments focused on the definitions of vital documents to be translated, language assistance in dental plans, assessing the linguistic needs of plan enrollees, identification of enrollees' preferred language and outreach and marketing materials.

### **5.3. PROCEDURAL VERIFICATION OF SUBSTANTIAL CONTRIBUTION**

At the February 16, 2006, Public Hearing on the proposed adoption of the regulation, APPLICANT's Staff Attorney/Policy Analyst presented oral comments on the record, and recommended: (1) that the regulation require health plan staff training to be timely and require more health plan staff to be trained; and (2) the Department develop and standardize one form, one piece of paper, in the form of a notice in ten languages beyond the threshold languages that plans can use to include in their mailings, specifying that a certain telephone number is available to communicate in other languages.

On March 3, 2006, APPLICANT's Staff Attorney/Policy Analyst presented written comments on the proposed regulation. That submission contained fifteen comments, all of which requested changes, requesting:

(1) that specified categories of vital documents should be judiciously construed to support the Legislature's goal of inclusiveness;

- (2) that notices of free language assistance program availability translated into threshold languages should be provided to all enrollees with services targeted at each enrollee;
- (3) that it is imperative that the Department develop a standard against which to assess compliance that will give plans a concrete means of determining whether their advice complies with the mandate that plans advise all limited-English-proficient (LEP) enrollees of the availability of interpreter services and not merely those enrollees who speak threshold languages and receive translated materials;
- (4) that the regulations affirmatively require notification about language assistance services even to LEP enrollees whose languages may be insufficiently concentrated in a specific plan's service area to qualify as threshold languages;
- 5) that the regulations require plans to distribute to all enrollees a one-page notice advising enrollees of the availability of interpretive services along with contact information appropriate to each language, for the threshold languages and the most common languages statewide; and the Department should design a model form for the plans to customize;
- (6) that the regulations should require plans to print an LEP enrollee's primary language on his or her ID card or furnish enrollees with language-appropriate "I speak" cards, to facilitate communication at providers' offices;
- (7) that the regulations establish a standard for reading-level appropriateness of translated materials that requires materials to be published at a suitably basic level such as at or below a sixth grade reading level;
- (8) that the Department maintain an archive of best practices to be used in offering technical assistance to plans and providers that are uncertain how to comply with the requirements of the statute and the regulation;
- (9) that needs assessments should state that the measure to be assessed is enrollees' LEP status, not the language spoken at home, and the regulation should require updating the needs assessment, language translation requirements, and demographic profile of enrollees every three years;

- (10) that the regulations require plans to collect demographic data and to supply health care providers with assistance strategies and data related to the ethnic diversity of their enrollees;
- (11) that the Department consider facilitating “deeming” compliance by means other than a deemed compliance mechanism for Medi-Cal standards, such as regulatory compliance via NCQA or other standards compliance;
- (12) that the regulation establish timelines for the provision of diversity training for plan staff and that training be “timely” defined as during the new employee’s orientation and training period; and
- (13) that the regulations prohibit, not merely discourage, the use of minors as interpreters unless absolutely necessary.

Two of the March 3, 2006, comments requesting changes were accepted and resulted in changes or additions to the proposed regulations, one was declined, four were accepted in part and four were declined in part.

By letter dated August 25, 2006, APPLICANT’s Program Director presented written comments in response to the second comment period that closed on September 25, 2006. That submission contained two comments which requested changes regarding the following:

- (1) That the regulations require information regarding individual enrollee’s eligibility for continuation coverage under COBRA and HIPAA be specifically listed as vital information requiring translation; and
- (2) That in regard to dental plans, the regulations (a) contain more specificity in regard to compliance, (b) include a requirement that, at a minimum, dental plans will make language line interpretation services available to all dental offices within the dental plan network, (c) require that dental plans make information and materials available in other languages, and (d) the vital documents listed in the proposed regulations should apply to dental plans.

Both of the two August 25, 2006, comments requesting changes were rejected with explanation.

On December 1, 2006, APPLICANT's Program Director presented written comments in response to the third comment period that closed on December 3, 2006. That submission contained two comments which requested changes regarding the following:

(1) That the regulations should include in vital documents that require translation the information that relates to consumers' rights to health care and information on the plans' policies and procedures for authorizing services, specifically including information identified in:

§ 1363(a)(11) regarding the plan's process for authorizing, modifying or denying health care services;

§ 1363(a)(12) regarding limitations on enrollee choice of physicians and other providers;

§ 1363(a)(13) regarding authorization requirements for referral to specialists;

§ 1363(a)(15) regarding the right to request continuity of care and a second opinion; and

§ 1363(a)(16) regarding the right to request an independent medical review;

(2) That the regulations require information regarding individual enrollee's eligibility for continuation coverage under COBRA and HIPAA be specifically listed as vital information requiring translation including the disclosure as required under § 1366.24(a);

(3) That the regulations require dental plans to meet the full requirements for availability of information and materials in other languages to ensure that enrollees understand how to access care and receive critically needed dental services, require dental plans to comply with the entire language assistance program regulation, and delete the reference to specialized dental plans in section (c)(4)(d)(9) of the proposed regulation;

(4) That the regulations require all plans to conduct a statistically valid enrollee survey and delete the language in section (c)(1)(B) allowing plans to demonstrate compliance with the survey by distributing a notice to enrollees;

(5) That the regulations require health and dental plan cards to identify the preferred language of the enrollee on the enrollee's ID card; and

(6) That the regulations maintain the top 10 language standard for providing information to enrollees.

Six of the six December 1, 2006, comments requesting changes were rejected with explanation.

**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 and finds that by its participation APPLICANT made a substantial contribution pursuant to 28 CCR § 1010(b)(8) on behalf of consumers to the Language Assistance Program rulemaking proceedings, to the Department in its deliberations, and as a whole, to the adoption of 28 CCR §1300.67.24.

**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
Staff Attorney/Policy Analyst	64.25	\$225.00	\$14,456.25
Staff Policy Analyst/Program Director	26.00	\$210.00	\$5,460.00
<b>TOTAL FEES</b>	<b>→90.25</b>		<b>\$19,916.25</b>

## **6.2. CONSIDERATIONS USED IN PUC'S INTERVENOR COMPENSATION PROGRAM**

Reference to the intervenor compensation program of the California Public Utilities 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.

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

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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).

<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.

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, 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

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

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

<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.

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.”

### **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 and participation at informal stakeholder discussions in September of 2005 for a total of 36.5 hours.
2. Preparation for and attendance and providing testimony at the Public Hearing held on February 16, 2006, for a total of 24.5 hours.
3. Preparation of written comments submitted in the first written comment period ending March 3, 2006, for a total of 18.0 hours.
4. Preparation of written comments submitted in the second written comment period ending September 25, 2006, for a total of 4.75 hours.
5. Preparation of written comments submitted in the third written comment period ending December 3, 2006, for a total of 6.25 hours.

The time billed appears reasonable except for two items billed by APPLICANT’s staff attorney: (1) Time of 0.25 hours claimed on 2/3/06 for “restoring notes lost by computer” which

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<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.

<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.



is administrative time;<sup>22</sup> and (2) travel time which should be billed at no more than one-half the normal hourly rate<sup>23</sup> or one-half the time spent (one-half of 4.25 hours on 2/16/06). Accordingly, the total time billed by APPLICANT's staff attorney shall be reduced as follows: 0.25 hours (on 2/3/06) and 2.125 hours (on 2/16/06), for adjusted total time of 61.875 hours.

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.”

#### **6.5. HOURLY RATES THAT REFLECT “MARKET RATE”**

In order to award compensation pursuant to the Statute and 28 CCR § 1010, it is necessary to determine whether the claimed advocacy fees and witness fees are consistent with and do not exceed Market Rate as defined. 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>24</sup> In order to determine Market Rate, we must look to available data inside and outside the Department.

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<sup>22</sup> D 06-03-013 (November 9, 2006), p.27 (“Administrative costs are considered non-compensable overheads.”).

<sup>23</sup> D.06-11-031 (November 30, 2006); D.06-11-032 (November 30, 2006), p. 8, fn. 4.

<sup>24</sup> See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 10.

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).

#### 6.6. HOURLY RATE DETERMINATIONS UNDER THE PUC PROGRAM

A recent PUC Decision<sup>25</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>26</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).

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

<sup>25</sup> Id. at pp. 30-31.

<sup>26</sup> 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.<sup>27</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>28</sup>

In an Interim Opinion on Updating Hourly Rates,<sup>29</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>30</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 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>31</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>32</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

<sup>27</sup> PUC Order Instituting Rulemaking R.06-08-019 (August 24, 2006), p. 2.

<sup>28</sup> Id. at pp. 2-3.

<sup>29</sup> D.07-01-009 (January 11, 2007)(part of Rulemaking R.06-08-019).

<sup>30</sup> Id. at pp. 1, 3-4.

<sup>31</sup> Id. at p. 5.

<sup>32</sup> Id. at pp. 8 - 9.

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

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>33</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>34</sup>

#### **6.7. 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.

#### **6.8. 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 one non-attorney policy analyst/expert and one staff attorney/policy analyst.

For work performed by APPLICANT's Staff Attorney/Policy Analyst, APPLICANT claims advocacy and witness fees at the hourly rate of \$225.00 (for 2005 and 2006). The PUC's adopted attorney rate for 2005 ranges from \$170 - \$505 (see ¶ 6.6, supra). The PUC's adopted hourly intervenor rate range for 2006 for attorneys with 0 – 2 years of experience is \$140 - \$195.

<sup>33</sup> Id. at p. 9.

For 2007, the PUC's adopted hourly intervenor rate range for attorneys with 0 – 2 years of experience is \$145 - \$200. At the time of the work for which claim is made, APPLICANT's Staff Attorney had approximately 0 - 2 years of experience as an attorney who was admitted to the California State Bar Association on November 23, 2005. Prior to being admitted to the State Bar, APPLICANT's Staff Attorney/Policy Analyst had approximately nine months of experience as a law clerk or legal intern in three positions. The highest of the PUC's rates for 2007 for attorneys with 0 - 2 years of experience is \$200.00. Therefore, it appears that the \$225.00 hourly rate claimed for 2005 and 2006 by APPLICANT exceeds "Market Rate" as defined in 28 CCR § 1010(b). The Hearing Officer finds that the hourly rate requested by APPLICANT exceeds Market Rate and therefore will be adjusted. Regarding services provided by APPLICANT's Staff Attorney/Policy Analyst, the Hearing Officer finds that \$180.00 per hour is consistent with Market Rate for the services provided in 2005 and \$200.00 per hour is consistent with Market Rate for the services provided in 2006.

For work performed by APPLICANT's Program Director, APPLICANT claims advocacy and witness fees at an hourly rate of \$210.00 (for 2005 and 2006). The PUC's adopted non-attorney rates for 2005 relative to 8 – 16 years of experience range from \$130 to \$215 (see ¶ 6.6, supra). The PUC's adopted hourly non-attorney intervenor rate range 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: \$150 - \$260 for 7 – 12 years of experience; and \$150 - \$380 for 13 or more years of experience. At the time of the work for which claim is made, APPLICANT's Associate Director had approximately 25 years of experience and a BA degree. The highest of the PUC's rates for 2007 for non-attorney policy analyst/experts with 13 or more years of experience is \$380. Therefore, it appears that the \$210.00 hourly rate claimed by APPLICANT does not exceed "Market Rate" as defined in 28 CCR § 1010(b). Regarding services provided by APPLICANT's Program Director, the Hearing Officer finds that \$210.00 per hour does not exceed Market Rate for the services provided in 2005 and 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).

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<sup>34</sup> Id. at pp. 4 and 11.

## 7. AWARD

APPLICANT is awarded Advocacy and Witness Fees as follows:

Staff / Title	Hours	Rates	Fees
Staff Attorney/Policy Analyst:			
Work in 2005	30.0	\$180.00	\$5,400.00
Work in 2006	31.875 <sup>35</sup>	\$200.00	6,375.00
Program Director/Policy Analyst	26.00	\$210.00	\$5,460.00
<b>TOTAL FEES</b>	<b>→</b>		<b>\$17,235.00</b>

## 8. ASSIGNMENT OF PROCEEDING

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

## FINDINGS OF FACT

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 \$17,235.00.

## 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 incurred in making substantial contributions to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.
2. APPLICANT should be awarded \$17,235.00 for its contribution to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.

<sup>35</sup> Adjusted as specified in paragraph 6.3, *supra*.

## AWARD ORDER

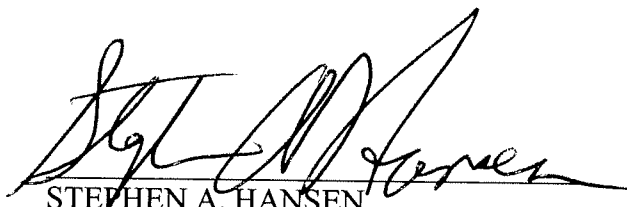
1. Legal Services of Northern California, a California corporation dba Health Rights Hotline is hereby awarded \$17,235.00 as compensation for its substantial contribution to the Language Assistance Programs regulatory Proceeding No. 2004-0115, 28 CCR § 1300.67.04.

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 6, 2007.

Original Signed by:

A handwritten signature in black ink, appearing to read 'Stephen A. Hansen', is written over a horizontal line.

STEPHEN A. HANSEN

Hearing Officer

Department of Managed Health Care