

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, a California
corporation,

Applicant.

DMHC Decision 09-05-01 May 22, 2009

Application Received Date: December 12, 2008

Proceeding Control Nos. 2006-0777, 2006-
0782, 2007-1253 and 2008-1536

For 28 CCR § 1300.71.39

(Re: Definition of Unfair Billing Patterns)

**OPINION GRANTING AWARD OF ADVOCACY AND WITNESS FEES
TO HEALTH ACCESS OF CALIFORNIA, A CALIFORNIA
CORPORATION, FOR SUBSTANTIAL CONTRIBUTION TO
PROCEEDING CONTROL NOS. 2006-0777, 2006-0782, 2007-1253 and
2008-1536**

1. SUMMARY

This decision awards Health Access of California, a California corporation (“Health Access” or “APPLICANT”), Advocacy and Witness Fees for its substantial contribution to Proceeding Control Nos. 2006-0777, 2006-0782, 2007-1253 and 2008-1536 of the Department of Managed Health Care (“Department”) regarding Unfair Billing Patterns (“proposed regulation”), which became final as set forth at 28 CCR §1300.71.39 (the “regulation”). 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 (the “Program”), enacted in Health and Safety Code § 1348.9 (the “Statute”), required the Director (the “Director”) of the Department to adopt regulations to establish the Program to allow for the award of reasonable advocacy and witness fees to any

person or organization that (1) demonstrates that the person or organization represents the interests of consumers and (2) has made a substantial contribution on behalf of consumers to the adoption of any regulation or to an order or decision made by the Director if the order or decision has the potential to impact a significant number of enrollees.

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

Pursuant to the Statute, the Program regulations were adopted as section 1010 of Title 28 of the California Code of Regulations (the "Regulations"). The Regulations 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 & Saf. Code § 1348.9(a); 28 CCR § 1010(b)(8)).

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

3.2. APPLICANT’S APPLICATION TO PARTICIPATE

On August 29, 2006, 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 21, 2006, the Director ruled that APPLICANT was eligible to participate and to seek an award of compensation.

On September 27, 2006, APPLICANT submitted its Petition to Participate (Petition) with the Department in the Unfair Billing Patterns rulemaking proceeding. In its Petition, APPLICANT estimated its fees to be \$50,000.00.

In its Petition, APPLICANT stated that, with respect to the Unfair Billing Patterns issues that:

Consumers are directly affected because consumers are caught in the middle of payment disputes between providers and health plans when providers balance bill patients. Consumers and purchasers are also affected when rates paid by health plans to providers increase health coverage premiums.

On October 5, 2006, the Director approved APPLICANT’s Petition to participate in the Unfair Billing Patterns rulemaking proceeding.

3.3. APPLICATION FOR AWARD OF ADVOCACY AND WITNESS FEES

The regulation became final and effective on October 15, 2008. Within 60 days thereafter (on December 12, 2008), APPLICANT timely submitted its Application for an Award of Advocacy and Witness Fees (Application). 28 CCR § 1010(e)(1).

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

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

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

With its Application, APPLICANT submitted a billing specifying the dates of services, a description of each specific task or each activity of advocacy and witness service, identification of the person providing each service, the elapsed time (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,³ and the total dollar amount billed for each task. The application did not include billing for attorney advocates. The total fees requested for work performed by APPLICANT is \$ 30,567.87.

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.

The Department requested additional information from APPLICANT, including: (1) biographies or resumes of the persons who provided the services for which the fee award is sought; and (2) a description of how APPLICANT determined the Market Rate for each person for whom fees were claimed.

By facsimile received December 15, 2008, APPLICANT provided a biography of each staff member for whom fees are claimed stating the name, job description, experience and skills of the staff member, but did not provide data or methodology followed in determining the hourly rates for the fees claimed or a description of how Market Rate was determined for the fees claimed.

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

² “The phrase ‘each specific task,’ refers to activities including, but not limited to:

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

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

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

The evolution of the Definition of Unfair Billing Patterns proceeding consisted of four noticed proceedings and four proceeding control numbers identified as follows.

4.1. PROCEEDING CONTROL NO. 2006-0777 -- Unfair Billing Patterns; Prohibition Against Billing Enrollees For Emergency Services; Independent Dispute Resolution Process

And

PROCEEDING CONTROL NO. 2006-0782 -- Claims Settlement Practices; Customary & Reasonable Criteria, revising section 1300.71 in title 28, California Code of Regulations

On August 18, 2006, the Department issued a Notice of Proposed Rulemaking Action (in “Proceeding Control No. 2006-0777”) proposing to adopt 28 CCR section 1300.71.39 (relating to Unfair Billing Patterns), proposing to revise 28 CCR section 1300.71.38 (relating to a new Independent Dispute Resolution Process for non-contracting providers), and establishing a 46-day written comment period from August 18, 2006 to October 2, 2006.

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

California Health and Safety Code section 1344 authorizes the Director to adopt, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of the Knox-Keene Act, including rules governing applications and reports, and defining any terms, whether or not used in the Knox-Keene Act, insofar as the definitions are not inconsistent with the provisions of the Knox-Keene Act. Furthermore, the Director has the discretion to waive any requirement of any rule or form in situations where, such requirement is not necessary in the public interest or for the protection of the public, subscribers, enrollees, or persons or plans subject to the Knox-Keene Act.

These regulations are intended to implement, interpret, and/or make specific Health and Safety Code sections 1367(h), 1371, 1371.1, 1371.35, 1371.36, 1371.38, 1371.39, 1371.4 and 1379. This rulemaking action is intended to clarify unfair billing practices by non-contracting providers who provide emergency services to health plan enrollees, to prohibit balance billing of health plan enrollees by non-contracting emergency services providers, and to implement an independent claims payment dispute resolution process to provide non-contracting providers with a fast, fair and cost-effective process to resolve claims payment disputes with health plans, and to provide specific determinations for claims

payment amounts, and to ensure that non-contracting providers are paid fairly and consistent with the health plans obligations to pay for covered services pursuant to Sections 1371, 1371.35 and 1371.4.

On August 18, 2006, the Department issued a Notice of Proposed Rulemaking Action (in "Proceeding Control No. 0782") proposing to revise 28 CCR section 1300.71 (relating to Claims Settlement Practices), and establishing a 46-day written comment period from August 18, 2006 to October 2, 2006.

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

California Health and Safety Code sections 1341.9, 1344, and 1346 vest the Director with the power to administer and enforce the provisions of the Knox-Keene Act.

California Health and Safety Code section 1344 authorizes the Director to adopt, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this chapter, including rules governing applications and reports, and defining any terms, whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of the Knox-Keene Act. Furthermore, the Director may waive any requirement of any rule or form in situations where in the Director's discretion, such requirement is not necessary in the public interest, or for the protection of the public, subscribers, enrollees, persons or plans subject to this chapter.

Existing law, enacted in 2000, through adoption of Assembly Bill 1455 (Stats. 2000, c. 827, §1 (AB 1455)) the California State Legislature enacted a comprehensive set of statutes intended to reform the claims submission and payment systems of California's health care industry. AB 1455 was enacted to refine the dispute resolution process between health plans and health care providers. The bill prohibited health care service plans from engaging in unfair payment patterns, and increased the penalties for doing so. The AB 1455 amendments to the Knox-Keene Act expressly authorize the Department to adopt regulations to implement and clarify the new statutes.

This proposed rulemaking action is intended to further implement, interpret, and/or make specific Health and Safety Code sections 1367(h), 1371, 1371.1, 1371.35, 1371.36, 1371.38, and 1371.39. The proposed revisions to section 1300.71 are to provide clarification regarding the requirements affecting claims settlement practices.

The subject matter of Proceeding Control No. 2006-0777 was related to the subject matter of Proceeding Control No. 2006-0782. Although a separate record was kept for each Proceeding, the written comment periods were established for identical time periods and the public hearings

were held at the same times. The following reflects the combined comment periods and hearing dates.

Initially, no public hearing was scheduled on the proposed revisions and the proposed new regulation.

On August 23, 2006, the Department issued Notices of Public Hearings which scheduled and noticed two public hearings to be held on September 13, 2006 and on October 2, 2006.

On August 31, 2006, the Department issued Second Amended Notices of Proposed Rulemaking which extended the public written comment period for two days through October 4, 2006, re-noticed the public hearing to be held on September 13, 2006, and rescheduled the second public hearing to be held on October 4, 2006.

On September 15, 2006, the Department issued Third Amended Notices of Proposed Rulemaking which scheduled and noticed a third public hearing for September 25, 2006.

On October 5, 2006, the Department issued Fourth Amended Notices of Proposed Rulemaking extending the public written comment period for nine days through October 13, 2006.

On August 7, 2007, the Department issued a Notice of Decision Not To Proceed and Intent to Refile, whereby the Department gave notice of its decision to withdraw the proposed adoption of Title 28 Section 1300.71.39 and the proposed amendment of Title 28 Section 1300.71.38, California Code of Regulations, and the Department gave notice of its intent to initiate, with the required notice, a new proposal to adopt and amend regulations pertaining to the same subject matter.

On August 7, 2007, the Department issued a Notice of Decision Not To Proceed and Intent to Refile, whereby the Department gave notice of its decision to withdraw the proposed revision of Title 28 Section 1300.71 regarding Claims Settlement Practices, Reasonable and Customary Criteria, and the Department gave notice of its intent to initiate, with the required notice, a new proposal to adopt and amend regulations pertaining to the same subject matter.

4.2. PROCEEDING CONTROL NO. 2007-1253 -- Plan and Provider Claims Settlement: Criteria for Determining Reasonable and Customary Value of Health Care Services; Expedited Payment Pending Claims Dispute Resolution; Definition of Unfair Billing Patterns; Independent Dispute Resolution Process

On August 17, 2007, the Department issued a Notice of Proposed Rulemaking (in "Proceeding Control No. 2007-1253") proposing to revise 28 CCR section 1300.71 (relating to Unfair Billing Patterns), proposing to revise 28 CCR section 1300.71.38 (relating to a new Independent Dispute Resolution Process for non-contracting providers), proposing to adopt a new

28 CCR section 1300.71.39, and establishing a 46-day written comment period from August 17, 2007 to October 1, 2007.

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

California Health and Safety Code sections 1341.9, 1344, and 1346 vest the Director with the power to administer and enforce the provisions of the Act. California Health and Safety Code section 1344 authorizes the Director to adopt, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of the Knox-Keene Act, including rules governing applications and reports, and defining any terms, whether or not used in the Knox-Keene Act, insofar as the definitions are not inconsistent with the provisions of the Knox-Keene Act. Furthermore, the Director has the discretion to waive any requirement of any rule or form in situations where, such requirement is not necessary in the public interest or for the protection of the public, subscribers, enrollees, or persons or plans subject to the Knox-Keene Act.

These regulations are intended to implement, interpret, and/or make specific Health and Safety Code sections 1367(h), 1371, 1371.1, 1371.35, 1371.36, 1371.38, 1371.39, 1371.4 and 1379. More specifically, this rulemaking action will clarify the requirements for fair provider billing practices and fair health plan payment practices by: clarifying the criteria for health plans to consider in determining the reasonable and customary value of health care services rendered by providers who lack written contracts with the health plans; clarifying the nature of activities that constitute unfair billing practices by health care providers who render services to enrollees of health plans but lack written contracts with the health plans; establishing a fair and balanced approach to payment of providers pending resolution of a disputed provider claim; and implementing an independent claims payment dispute resolution process to provide health care providers with a fast, fair and cost-effective process to resolve claims payment disputes with health plans, which will provide specific determinations for claims payment amounts.

Initially, no public hearing was scheduled on the proposed revisions and the proposed new regulation. However, an interested stakeholder requested that a public hearing be held.

On September 20, 2007, the Department issued an Amended Notice of Rulemaking Action extending the public written comment period for forty-five additional days through November 15, 2007.

On October 12, 2007, the Department issued a Second Amended Notice of Rulemaking Action and Public Hearing Agenda scheduling and noticing a public hearing for October 24, 2007.

On October 31, 2007, the Department issued a Third Amended Notice of Rulemaking Action and Public Hearing Agenda scheduling and noticing a second public hearing for November 13, 2007, and a third public hearing for November 14, 2007, and extending the public written comment period for 15 days through November 30, 2007.

On March 12, 2008, the Department issued (and published on March 28, 2008) a Notice of Decision Not To Proceed and Intent to Refile, whereby the Department gave notice of its decision not to proceed with the rulemaking action entitled Plan and Provider Claims Settlement: Criteria for Determining Reasonable and Customary Value of Health Care Services; Expedited Payment Pending Claims Dispute Resolution; Definition of Unfair Billing Patterns; Independent Dispute Resolution Process (proposing the addition of Title 28, California Code of Regulations Section 1300.71.39 and the amendment of Title 28, California Code of Regulations Sections 1300.71 and 1300.71.38); and the Department gave notice of its intent to initiate, with the required notice, a new proposal to adopt and amend regulations pertaining to the same subject matter.

4.3. PROCEEDING CONTROL NO. 2008-1536 -- Definition of Unfair Billing Patterns, Adopting Section 1300.71.39 in title 28, California Code of Regulations

On March 28, 2008, the Department issued a Notice of Proposed Rulemaking (in “Proceeding Control No. 2008-1536”) proposing to adopt 28 CCR section 1300.71.39, and establishing a 46-day written comment period from March 28, 2008 to May 12, 2008.

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

Proposed adoption of section 1300.71.39

California Health and Safety Code sections 1341.9, 1344, and 1346 vest the Director with the power to administer and enforce the provisions of the Act. California Health and Safety Code section 1344 authorizes the Director to adopt, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of the Knox-Keene Act, including rules governing applications and reports, and defining any terms, whether or not used in the Knox-Keene Act, insofar as the definitions are not inconsistent with the provisions of the Knox-Keene Act. Furthermore, the Director has the discretion to waive any requirement of any rule or form in situations where, such requirement is not necessary in the public interest or for the protection of the public, subscribers, enrollees, or persons or plans subject to the Knox-Keene Act.

These regulations are intended to implement, interpret, and/or make specific Health and Safety Code sections 1367(h), 1371, 1371.35, 1371.39 and 1371.4. More specifically, this rulemaking action will protect enrollees from the harms of balance billing by providers by clarifying the nature of activities that constitute unfair billing practices by health care providers who render services to enrollees of health plans but lack written contracts with the health plans.

Initially, no public hearing was scheduled on the proposed regulation. However, a representative of the California Medical Association requested that a public hearing be held.

On May 2, 2008, the Department issued an Amended Notice of Rulemaking Action and Public Hearing Agenda scheduling and noticing a public hearing for May 14, 2008, and extending the public written comment period for two days through May 14, 2008.

On May 8, 2008, the Department issued a Second Amended Notice of Rulemaking Action and Public Hearing Agenda scheduling and noticing a second public hearing for May 19, 2008, and extending the public written comment period six days through May 20, 2008.

On May 9, 2008, the Department issued a Third Amended Notice of Rulemaking Action and Public Hearing Agenda scheduling and noticing a third public hearing for May 20, 2008.

On May 21, 2008, the Department issued a Fourth Amended Notice of Rulemaking Action extending the public written comment period 14 days through June 3, 2008.

On August 1, 2008, the final regulation package was submitted to the Office of Administrative Law (OAL). The regulation was approved by OAL on September 15, 2008⁴ and filed with the Secretary of State. The regulation was effective on October 15, 2008.⁵

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).

The definition of “Substantial Contribution” provides the criteria for evaluating whether the consumer participant has made a substantial contribution.⁶ 28 CCR § 1010(b)(8) defines “Substantial Contribution” as follows:

⁴ Office of Administrative Law, Notice of Approval of Regulatory Action. OAL File No. 2008-0801-01 S, September 15, 2008.

⁵ *Id.*

⁶ 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

“‘Substantial Contribution’ means that the Participant significantly assisted the Department in its deliberations by presenting relevant issues, evidence, or arguments which were helpful, and seriously considered, and the Participant’s involvement resulted in more relevant, credible, and non-frivolous information being available to the Director.”

5.1 APPLICATION MUST INCLUDE DESCRIPTION OF CONTRIBUTION

The application for an award of compensation must include “a description of the ways in which the Participant’s involvement made a Substantial Contribution to the proceeding ⁷ ..., 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 submitted the following information, documents and testimony in support of its position regarding the proposed adoption of the regulation and regulation changes:

Proceeding Control Nos. 2006-0777 and 2006-0782

Regarding the September 13, 2006, Public Hearing held in Burbank, California, APPLICANT’s time records for APPLICANT’s Project Director and Health Care Policy Expert indicate “gave testimony at the DMHC Public Hearing ... in Burbank.”

APPLICANT provided written comments dated October 4, 2006, in response to the first comment period which closed on October 13, 2006.

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.

⁷ 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 ...[intervenor] 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.

Proceeding Control No. 2007-1253

Regarding the October 24, 2007, Public Hearing held in Burbank, California, APPLICANT's time records for APPLICANT's Project Director and Health Care Policy Expert indicate "attended the DMHC Public Hearing ... in Burbank."

APPLICANT provided written comments dated November 30, 2007, in response to the written comment period which closed on November 30, 2007.

Proceeding Control No. 2008-1536

Regarding the May 14, 2008, Public Hearing held in Irvine, California, APPLICANT's time records indicate that APPLICANT's Project Director and Health Care Policy Expert "gave testimony on behalf of consumers."

Regarding the May 20, 2008, Public Hearing held in Sacramento, California, APPLICANT's time records indicate that APPLICANT's Project Director and Health Care Policy Expert "gave testimony on behalf of consumers."

APPLICANT provided written comments dated May 20, 2008, in response to the written comment period which closed on June 3, 2008.

5.3 PROCEDURAL VERIFICATION OF SUBSTANTIAL CONTRIBUTION

Proceeding Control Nos. 2006-0777 and 2006-0782

At the September 13, 2006, Public Hearing held in Burbank, California, APPLICANT's Project Director and Health Care Policy Expert presented oral comments on the record.

Regarding the October 4, 2006, Public Hearing held in Sacramento, California, the transcript of the Hearing does not indicate an appearance or testimony of a representative of APPLICANT. However, the time records of APPLICANT's Project Director and Health Care Policy Expert indicate preparation of written testimony for the Public Hearing and attendance at the Hearing.

By letter dated October 4, 2006, APPLICANT presented written comments on the proposed regulation, over the signature of the Executive Director of APPLICANT, in response to the first comment period which closed on October 13, 2006, after extensions, including three categories of comments and some requesting changes. The letter contained comments and recommendations requesting changes or additions to the proposed regulation, including:

- (1) that the underlying statutory does not authorize the Department to set up its own dispute resolution process because such a request would amount to private rate-setting regulation where there is no role for consumers or purchasers in the determination of disputed payments;

- (2) that it is essential that the Department increase its oversight of the plans in this important area, including interjection of consequences for the plans that do not have an effective dispute resolution mechanism, and such oversight would enable the Department to concentrate on “outliers” or disputes involving amounts beyond certain agreed-upon monetary parameters or below established benchmarks;
- (3) that the Department should re-establish the DMHC Advisory Commission because in its absence there has been no role for consumers or purchasers who receive and pay for health care services;
- (4) that the proposed regulation should not use the term “Baseball Arbitration” because it is unclear and is an inappropriate title or description for a regulation because of its informality;
- (5) that the language in subsection (n)(3)(ii) of the proposed regulation is incomplete or unclear and should be amended to add “to whom they have delegated” after the words “the plan’s capitated providers;”
- (6) that amounts which Medicare and Medi-Cal paid should be taken into account to determine “reasonable and customary value,” in regard to subsection (vii) of the proposed regulation; and
- (7) that subsections (iii) and (iv) of the proposed regulation should reflect payments instead of charges, so as to reflect fees paid to the provider and prevailing rates paid in the general geographic area in which the services were rendered.

Of the seven October 4, 2006, comments requesting changes, all were reviewed, but none were accepted or rejected because the Department withdrew the proposed regulation by issuing a Notice of Decision Not To Proceed (with the rulemaking action of Proceeding Control Nos. 2006-0777 and 2006-0782) and Intent to Refile.

Proceeding Control No. 2007-1253

At the October 24, 2007, Public Hearing held in Burbank, California, APPLICANT’s Project Director and Health Care Policy Expert presented oral comments on the record.

By letter dated November 30, 2007, APPLICANT presented written comments on the proposed regulation, over the signature of the Executive Director of APPLICANT, in response to the written comment period which closed on November 30, 2007, after extensions, including eight categories of comments and some requesting changes. The letter contained comments and recommendations requesting changes or additions to the proposed regulation, including:

- (1) that the proposed regulation require that health plan contracts with providers preclude balance billing if the provider accepts any payment for any service from any health plan;

- (2) that there should be an expedited payment to providers that is based on a multiplier of Medicare, requiring that acceptance of such payment is payment in full and balance billing any patient is precluded;
- (3) that it is essential that the Department increase its oversight of the plans in this important area, including interjection of consequences for the plans that do not have an effective dispute resolution mechanism, and such oversight would enable the Department to concentrate on “outliers” or disputes involving amounts beyond certain agreed-upon monetary parameters or below established benchmarks;
- (4) that the proposed regulation and Department action should address health plan dispute resolution mechanisms that fail to meet the standards of being “fair, fast and cost-effective, and Section 1300.71, subdivision (m) of the proposed regulation should be retained and result in enforcement actions against health plans that fail to set up and maintain meaningful dispute resolution mechanisms;
- (5) that the proposed regulation should not contain provisions establishing an independent dispute resolution process due to lack of statutory authority for such process, and instead, a prohibition on balance billing would be sufficient to address the problem from the perspective of consumers;
- (6) that physicians and other providers should be encouraged to follow practices similar to those used by (and required of) California hospitals to resolve and avoid billing disputes with consumers; and
- (7) that the Department should re-establish the DMHC Advisory Commission because in its absence there has been no role for consumers or purchasers who receive and pay for health care services.

Of the eight categories of comments submitted by date of November 26, 2007, all were reviewed, but all were neither accepted nor declined because the Department issued notice of its decision not to proceed with the rulemaking action of Proceeding Control No. 2007-1253.

Proceeding Control No. 2008-1536

At the May 14, 2008, Public Hearing held in Irvine, California, APPLICANT’s Health Care Policy Expert presented oral comments on the record.

At the May 20, 2008, Public Hearing held in Sacramento, California, APPLICANT’s Health Care Policy Expert presented oral comments on the record.

By letter dated May 20, 2008, APPLICANT presented written comments on the proposed regulation, over the signature of the Executive Director of APPLICANT, in response to the written comment period which closed on June 3, 2008, after extensions, including six categories of

comments. The letter contained recommendations requesting changes or additions to the proposed regulation, including:

- (1) that the proposed regulation contain an absolute prohibition on balance billing;
- (2) that the Department should undertake policies and remedies that promote adequate reimbursement for doctors and help stabilize emergency departments and trauma centers;
- (3) that the Department (and the proposed regulation) should require health plan contracts with providers preclude balance billing if the provider accepts any payment for any service from any health plan;
- (4) that the Department should reduce the incidence of balance billing by increasing oversight of the health plans' own dispute resolution processes, and make the results of the Department's reviews publicly available on the Department's website in order to promote public scrutiny;
- (5) that the language of the proposed regulation should be strengthened to make clear that the balance billing ban applies to medical groups as well as health plans and to both contracting and non-contracting providers.

Of the five May 20, 2008, comments requesting changes, all were declined with explanation in the record as follows: (1) "The suggested expansion of the applicable scope of the regulation, to make the regulation applicable to all non-contacted providers, is not consistent with the intended scope of this rulemaking action"; and (2) "The issues raised in this comment regarding access, fair and timely claims payment, expedited payment, and claims dispute resolution processes are outside the intended scope of this rulemaking action, and are already addressed by other provisions of existing law."

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 §1300.71.39 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 §1300.71.39.

The Hearing Officer finds that APPLICANT has made a Substantial Contribution, pursuant to 28 CCR § 1010(b)(8), to the Unfair Billing Patterns 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.

6.1. FEES AND COSTS REQUESTED

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

Staff / Title	Hours	Rates	Fees
Policy Consultant and Health Care Policy Expert			
-- Work in 2006	1.0	\$350.00	\$350.00
-- Work in 2007	1.75	\$350.00	\$612.50
-- Work in 2008	0.0	---	\$0.00
Project Director and Health Care Policy Expert			
-- Work in 2006	35.75	\$350.00	\$12,512.50
-- Work in 2007	16.5	\$350.00	\$5,775.00
-- Work in 2008	20.75	\$350.00	\$7,262.50
Executive Director & Health Care Consumer Advocate			
-- Work in 2006	5.0	\$200.00	\$1,000.00
-- Work in 2007	6.5	\$200.00	\$1,300.00
-- Work in 2008	5.5	\$200.00	\$1,100.00
TOTAL FEES	→		\$29,912.50

APPLICANT billed for the following expenses.

Itemized Expenses	Expenses	Subtotal
9/13/2006 Hearing in Burbank:		
Airfare, roundtrip from Sacramento to Burbank	\$98.60	
Sacramento Airport Parking	\$12.00	
Mileage, roundtrip residence to Sacramento Airport (42 miles @\$.445/mile)	\$18.69	
Meal @ Hilton. Burbank	\$14.94	
		\$144.23
10/24/2007 Hearing in Burbank:		
Airfare, roundtrip from Sacramento to Burbank	\$258.80	
Sacramento Airport Parking	\$12.00	
Mileage, roundtrip residence-Sacramento Airport	\$20.37	
Meal @ Marriott Burbank	\$19.13	
		\$310.30
5/14/2008 Hearing in Irvine:		
Airfare, roundtrip from Sacramento to Irvine	\$190.00	
Sacramento Airport Parking	\$12.00	
Mileage, roundtrip residence-Sacramento Airport	\$21.12	
Meal @ Marriott Irvine	\$27.72	
		\$250.84

TOTAL EXPENSES -- \$705.37

Total Fees Claimed\$29,912.50⁸
Total Expenses Claimed \$ 705.37
Total Compensation Claimed**\$30,617.87**

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 Program⁹ 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.¹⁰
- b. Have awarded the same rate for an individual expert that was approved in a prior proceeding in the same year,¹¹ 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.¹²
- 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

⁸ APPLICANT’s Application contained a computation error resulting in a claim of \$50.00 less than the hours multiplied by the hourly rate – i.e., 2.5 hours x \$200.00 = \$450.00, which should be \$500.00 (which is the amount used herein).

⁹ 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).

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

¹¹ D.06-11-031 (November 30, 2006).

¹² D.06-11-032 (November 30, 2006), pp. 10 – 11.

considered warranted for the current year.¹³ The PUC has consistently rejected requests for increase over 3%.¹⁴

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.¹⁵

e. Have approved compensation for travel time at one-half the normal hourly rate.¹⁶

f. Have approved compensation for preparation of the intervenor organization's compensation request or compensation claim at one-half the normal hourly rate.¹⁷ 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.¹⁸

g. Have approved compensation for efforts that made a substantial contribution even where the PUC did not wholly adopt the intervenor's recommendations.¹⁹

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.²⁰

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."²¹

j. Have disallowed time where the "hours seem excessive" or the "proposal is not persuasive,"²² and have changed or disallowed compensation amounts requested for the following

¹³ D.06-11-031 (November 30, 2006), p. 11.

¹⁴ D.06-11-031 (November 30, 2006), p. 11.

¹⁵ D.06-11-031 (November 30, 2006), p. 10.

¹⁶ D.06-11-031 (November 30, 2006); D.06-11-032 (November 30, 2006), p. 8, fn. 4.

¹⁷ D.06-11-031 (November 30, 2006), p. 9, fn. 2; D.06-11-032 (November 30, 2006), p. 8, fn. 4.

¹⁸ D.06-11-009 (November 9, 2006), p. 27.

¹⁹ D.06-11-031 (November 30, 2006), p. 10.

²⁰ 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.

²¹ D.06-11-031 (November 30, 2006), pp. 14 -15.

²² D.06-11-032 (November 30, 2006), pp. 9 - 10.

reasons:²³ “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.²⁴

a. Billed Activities. APPLICANT billed for nine activities summarized as follows:

(1) Review and analysis of the text of the proposed regulation and regulation modifications; research, prepare and edit written comments for submission in the first written comment period ending October 13, 2006, in Proceeding Control Nos. 2006-0777 and 2006-0782, for a total of 9.0 hours.

(2) Research and prepare testimony for Public Hearing to be held in Burbank, California, on September 13, 2006; review and edit testimony for the Public Hearing; Executive Director direction and feedback on prepared testimony; and attend and provide testimony at the Public Hearing held on September 13, 2006, in Proceeding Control Nos. 2006-0777 and 2006-0782, for a total of 20.75 hours.

(3) Research and prepare testimony for Public Hearing to be held in Sacramento, California, on October 4, 2006; review and edit testimony for the Public Hearing; Executive Director direction and feedback on prepared testimony; and attend and provide testimony at the Public Hearing held on October 4, 2006, in Proceeding Control Nos. 2006-0777 and 2006-0782, for a total of 12.0 hours.

(4) Review and analysis of the text of the proposed regulation and regulation modifications; research and prepare written comments on the proposed regulation; research regarding how other states deal with the balance billing issue; internal conferences regarding policy options; Executive Director direction and feedback on prepared comments; Health Care Policy Expert consultant’s review and input regarding written comments; and edited and finalized written comments for submission in the written comment period ending November 30, 2007, in Proceeding Control No. 2007-1253, for a total of 14.5 hours.

²³ D.06-11-009 (November 9, 2006), Appendix p. 1.

²⁴ 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.

(5) Research and prepare testimony for Public Hearing to be held in Burbank, California, on October 24, 2007; review and edit testimony for the Public Hearing; Executive Director direction and feedback on prepared testimony; and attend and provide testimony at the Public Hearing held on October 24, 2007, in Proceeding Control No. 2007-1253, for a total of 10.25 hours.

(6) Review and analysis of the text of the proposed regulation and regulation modifications; prepare written comments on the proposed regulation; internal conferences regarding policy options; Executive Director direction and feedback on prepared comments; and edit and finalize written comments for submission in the written comment period ending June 3, 2008, in Proceeding Control No. 2008-1536, for a total of 7.25 hours.

(7) Research and prepare testimony for Public Hearing to be held in Irvine, California, on May 14, 2008; review and edit testimony for the Public Hearing; Executive Director direction and feedback regarding proposed testimony; and attend and provide testimony at the Public Hearing held on May 14, 2008, in Proceeding Control No. 2008-1536, for a total of 12.0 hours.

(8) Research and prepare testimony for Public Hearing to be held in Sacramento, California, on May 20, 2008; review and edit testimony for the Public Hearing; internal conferences regarding testimony options; Executive Director direction and feedback on prepared testimony; and attend and provide testimony at the Public Hearing held on May 20, 2008, in Proceeding Control No. 2008-1536, for a total of 5.75 hours.

(9) On June 20, 2008, APPLICANT's representative met with senior representatives of the Department to discuss balance billing issues including plan grievance processes; however, any comments received may be considered, used or disregarded in the Department's discretion because the receipt of such comments was after the June 3, 2008, end of the noticed and extended comment period, in Proceeding No. 2008-1536, for a total of 1.25 hours.

b. Adjustments. The time billed and costs billed appear reasonable except for the following:

(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. Accordingly, the travel time billed shall be reduced by one-half of each of the following estimated travel times: 4.0 hours (on 9/13/2006), 2.0 hours (on 10/4/2006), 4.0 hours (on 10/24/2007), and 4.0 hours (on 5/14/2008) by APPLICANT's Project Director and Health Care Policy Expert.

(2) Reimbursement for direct expenses was claimed for travel, parking and meals.

The PUC has approved payment of itemized direct expenses where the request shows “the miscellaneous expenses to be commensurate with the work performed,” including costs for travel and parking.²⁵ However, it does not appear that the PUC has approved payment of meal expenses, and it appears that neither Health and Safety Code § 1348.9 nor 28 CCR § 1010 expressly authorize reimbursement of meal expenses. Accordingly, the claims for meal expenses are disallowed, and the amount of APPLICANT’s claim is reduced by the amount of meal expenses.

c. Finding. The Hearing Officer hereby finds that, as adjusted, the time billed and expenses billed are related to the work performed, necessary for the substantial contributions made, and reasonable for the advocacy and witness services performed and work product produced.

6.4. MARKET RATE

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

“Market Rate” is defined at 28 CCR section 1010(b)(3) as follows:

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

6.5. HOURLY RATES THAT REFLECT “MARKET RATE”

The Hearing Officer finds that hourly rates for services provided in a statewide proceeding or proceeding of a state agency having statewide jurisdiction and effect (such as proceedings of the PUC, 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.²⁶ In order to determine Market Rate, we must look to available data inside and outside the Department.

²⁵ 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.

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

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

Until PUC Decision R.04-10-010 in 2004, the PUC “set hourly rates piecemeal”²⁷ for intervenors – i.e., “... for each proceeding, each intervenor, and indeed each appearance by a particular representative of an intervenor, ... [the PUC] might revisit the reasonableness of that representative’s hourly rate.”²⁸ 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.²⁹ 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 2005.³⁰

In an Interim Opinion on Updating Hourly Rates,³¹ 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.³² 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.”³³ (Emphasis added).

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

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

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at pp. 2-3.

³¹ D.07-01-009 (January 11, 2007) (part of Rulemaking R.06-08-019).

³² *Id.* at pp. 1, 3-4.

³³ *Id.* at p. 5.

Hourly Intervenor Rate Ranges for 2006, 2007 and 2008³⁴

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

(2007 rates = rates adopted for 2006 in D.07-01-009 x 3%, rounded to nearest \$5)

(2008 rates = rates adopted for 2007 x 3%, rounded to nearest \$5)

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

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.³⁵

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.³⁶

In 2008, the PUC found it reasonable to adopt another 3% COLA for intervenor rates for work performed in 2008.³⁷ That increase is primarily based on various federal inflation indexes, such as the Social Security Administration's COLA and Bureau of Labor Statistics data for consumer prices and wages.³⁸ In its 2008 Decision and for future reference, the PUC found that a COLA adjustment should be authorized, by future PUC Resolution, for work performed in 2009,

³⁴ D.08-04-010 (April 10, 2008) (part of Rulemaking 06-08-019) at p. 5.

³⁵ D.07-01-009 (January 11, 2007) at p. 9.

³⁶ *Id.* at pp. 4 and 11.

³⁷ D.08-04-010 (April 10, 2008) at pp. 4 and 24.

³⁸ *Id.* In reviewing available data, the PUC found no index that specifically targets rates for services by regulatory professionals (attorneys, engineers, economists, scientists, etc.), and the PUC's "findings are weighted heavily to SSA COLA and similar data." *Id.* at p. 4.

and in subsequent years in the absence of a market rate study, to be effective on January 1 of each year.³⁹

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 Policy Consultant and Health Care Policy Expert; one Project Director and Health Care Policy Expert; and one Executive Director and Health Care Consumer Advocate.

For work performed by APPLICANT’s Policy Consultant and Health Care Policy Expert (“Policy Consultant”), APPLICANT claims advocacy and witness fees at an hourly rate of \$350.00 for services in 2006 and 2007 (no fees were claimed for services in 2008). At the time of the work for which the claim is made and according to the biographical information submitted, APPLICANT’s Policy Consultant 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, including APPLICANT and a collaborative of consumer groups. The PUC’s adopted hourly non-attorney intervenor rate range: for 2006, is \$115 - \$370 without breakdown by years of experience; and for 2007, is \$150 - \$380 for 13 or more years of experience. Therefore, it appears that the \$350.00 hourly rate⁴⁰ claimed by APPLICANT for services provided by APPLICANT’s Policy Consultant in 2006 and 2007 does not exceed “Market Rate” as defined in 28 CCR § 1010(b). Regarding services provided by APPLICANT’s Policy Consultant & Health Care Policy Expert, the Hearing Officer finds that \$350.00 per hour does not exceed Market Rate for the services provided in 2006 and 2007.

For work performed by APPLICANT’s Project Director and Health Care Policy Expert (“Project Director”), APPLICANT claims advocacy and witness fees at an hourly rate of \$350.00 for services in 2006, 2007, and 2008. At the time of the work for which the claim is made and according to the biographical information submitted, APPLICANT’s Project Director had a B.A. degree in psychology from the University of Redlands, has approximately 12 years (1993 – 2005) of experience with the Centers for Medicare and Medicaid Services (CMS), including several years as the Region IX Administrator for CMS, has several years of administrative experience with the

³⁹ D.08-04-010 (April 10, 2008) at pp. 24 -25.

⁴⁰ In two previous Decisions (DMHC Decision 07-07-01 and Decision in Proceeding Control No. 2002-0019), APPLICANT was awarded advocacy and witness fees at the hourly rate of \$370 for services in 2006 provided by APPLICANT’s Policy Consultant. In the instant matter, the hourly rate claimed by APPLICANT is \$350 for 2006 and 2007 without escalation for 2007. Compensation cannot be awarded at an hourly rate higher than the rate(s) claimed by APPLICANT.

Social Security Administration, and three years (1/13/06 – present) of experience representing consumers as Project Director with APPLICANT. The PUC's adopted hourly non-attorney intervenor rate range: for 2006, is \$115 - \$370 without breakdown by years of experience; for 2007, is \$150 - \$380 for 13 or more years of experience; and for 2008, is \$155 - \$390 for 13 or more years of experience. Therefore, it appears that the \$350.00 hourly rate⁴¹ claimed by APPLICANT for services provided by APPLICANT's Project Director in 2006, 2007, and 2008 does not exceed "Market Rate" as defined in 28 CCR § 1010(b). Regarding services provided by APPLICANT's Project Director & Health Care Policy Expert, the Hearing Officer finds that \$350.00 per hour does not exceed Market Rate for the services provided in 2006, 2007, and 2008.

For work performed by APPLICANT's Executive Director & Health Care Consumer Advocate ("Executive Director"), APPLICANT claims advocacy and witness fees at an hourly rate of \$200.00, for services in 2006, 2007, and 2008. At the time of the work for which the claim is made and according to the biographical information submitted, APPLICANT's Executive Director had : approximately 4 years of experience (2002 – 2006) as Executive Director of APPLICANT; several years of experience as Program Director of New Jersey Citizen Action; and experience as a project coordinator for the Center for Media Education in Washington, DC; for a total of approximately 7 to 12 years⁴² of relevant experience; and a BA degree in English and Sociology from Amherst College in Amherst, MA. The PUC's adopted hourly non-attorney intervenor rate range: for 2006, is \$115 - \$370 without breakdown by years of experience; for 2007, is \$150 - \$260 for 7 through 12 years of experience and \$150 - \$380 for 13 or more years of experience; and for 2008, is \$155 - \$270 for 7 through 12 years of experience and \$155 - \$390 for 13 or more years of experience. Therefore, it appears that the \$200.00 hourly rate⁴³ claimed by APPLICANT for services provided by APPLICANT's Executive Director in 2006, 2007, and 2008 does not exceed "Market Rate" as defined in 28 CCR § 1010(b). Regarding services provided by APPLICANT's Executive Director & Health Care Consumer Advocate, the Hearing Officer finds that \$200.00 per hour does not exceed Market Rate for the services provided in 2006, 2007, and 2008.

⁴¹ In two previous Decisions (DMHC Decision 07-07-01 01 and Decision in Proceeding Control No. 2002-0019), APPLICANT was awarded advocacy and witness fees at the hourly rate of \$370 for services in 2006 provided by APPLICANT's Project Director. In the instant matter, the hourly rate claimed by APPLICANT is \$350 for 2006, 2007 and 2008 without escalation for 2007 and 2008. Compensation cannot be awarded at an hourly rate higher than the rate(s) claimed by APPLICANT.

⁴² The biographical information provided by APPLICANT does not specify the length term for each of the employment experiences.

⁴³ In a previous Decision (DMHC Decision 07-07-01), APPLICANT was awarded advocacy and witness fees at the hourly rate of \$250.00 for services in 2006 provided by APPLICANT's Executive Director. In the instant matter, the hourly rate claimed by APPLICANT is \$200 for 2006, 2007 and 2008 without escalation for 2007 and 2008. Compensation cannot be awarded at an hourly rate higher than the rate(s) claimed by APPLICANT.

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:

Staff / Title	Hours	Rates	Fees
Policy Consultant and Health Care Policy Expert			
-- Work in 2006	1.0	\$350.00	\$350.00
-- Work in 2007	1.75	\$350.00	\$612.50
-- Work in 2008	0.0	---	\$0.00
Project Director and Health Care Policy Expert			
-- Work in 2006	32.75 ⁴⁴	\$350.00	\$11,462.50
-- Work in 2007	14.5 ⁴⁵	\$350.00	\$5,075.00
-- Work in 2008	18.75 ⁴⁶	\$350.00	\$6,562.50
Executive Director & Health Care Consumer Advocate			
-- Work in 2006	5.0	\$200.00	\$1,000.00
-- Work in 2007	6.5	\$200.00	\$1,300.00
-- Work in 2008	5.5	\$200.00	\$1,100.00
TOTAL FEES		→	\$27,462.50
TOTAL DIRECT EXPENSES⁴⁷		--	\$643.58
TOTAL AWARD			\$28,106.08

8. ASSIGNMENT OF PROCEEDING

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

⁴⁴ Six hours of travel time was reduced by one-half for a reduction of 3.0 in hours claimed, per Paragraph 6.3, b, (1) *supra*.

⁴⁵ Four hours of travel time was reduced by one-half for a reduction of 2.0 in hours claimed, per Paragraph 6.3, b, (1) *supra*.

⁴⁶ Four hours of travel time was reduced by one-half for a reduction of 2.0 in hours claimed, per Paragraph 6.3, b, (1) *supra*.

⁴⁷ As adjusted per Paragraph 6.3, b, (2), *supra*.

FINDINGS OF FACT

1. APPLICANT has satisfied all the procedural requirements necessary to claim compensation in this proceeding.
2. APPLICANT made substantial contributions to Proceeding Control Nos. 2006-0777, 2006-0782, 2007-1253 and 2008-1536 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 \$28,106.08.

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 Control Nos. 2006-0777, 2006-0782, 2007-1253 and 2008-1536 and 28 CCR § 1300. 71.39.
2. APPLICANT should be awarded \$28,106.08 for its contribution to Proceeding Control Nos. 2006-0777, 2006-0782, 2007-1253 and 2008-1536, and 28 CCR § 1300. 71.39.

AWARD ORDER

1. Health Access of California, a California corporation, is hereby awarded \$28,106.08 as compensation for its substantial contribution to the Unfair Billing Patterns regulatory Proceeding Control Nos. 2006-0777, 2006-0782, 2007-1253 and 2008-1536, and 28 CCR § 1300. 71.39.
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: May 22, 2009

Original Signed by:



STEPHEN A. HANSEN

Hearing Officer

Department of Managed Health Care