

BEFORE THE
DEPARTMENT OF MANAGED HEALTH CARE
STATE OF CALIFORNIA

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

Consumers Union of United States, Inc.

Applicant.

**DECISION GRANTING AWARD OF
ADVOCACY AND WITNESS FEES TO
CONSUMERS UNION OF UNITED
STATES, INC., FOR SUBSTANTIAL
CONTRIBUTION TO APPROVAL OF
MATERIAL MODIFICATIONS NUMBERS
20151947 AND 20151948, AND
AMENDMENT NUMBERS 20151984,
20151985, AND 20151986**

I. SUMMARY

Consumers Union of United States, Inc. (“APPLICANT”) submitted an application for an award of advocacy and witness fees for its substantial contribution to the Department of Managed Health Care’s (“Department”) consideration and approval of Material Modifications numbers 20151947 and 20151948, and Amendment Numbers 20151984, 20151985, and 20151986 (“Decision”) regarding Aetna, Inc.’s (“Aetna”) acquisition of Humana, Inc. (“Humana”). The Department designated Joy Han as the Hearing Officer. The Department awards APPLICANT \$6,687.50 for its contribution to the Decision.

II. BACKGROUND OF CONSUMER PARTICIPATION PROGRAM

The Consumer Participation Program (“CPP”) allows for the award of reasonable advocacy and witness fees to any person or organization that (1) demonstrates 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 of the Department if the order or decision has the potential to impact a significant number of enrollees.¹

III. REQUIREMENTS FOR AWARDS OF ADVOCACY AND WITNESS FEES

A. Petition to Participate in the Decision

On January 5, 2016, APPLICANT submitted to the Department its Petition to Participate (“Petition”) in the Decision. In its Petition, APPLICANT estimated its fees to be \$20,000.00. Applicants may revise fee estimates based on actual services performed.

By letter dated January 29, 2016, the Department notified APPLICANT that the Department approved its Petition to Participate in the Decision.

B. Application for Award of Advocacy and Witness Fees

On June 20, 2016, the Department publicly announced that the Director of the Department signed the order approving Aetna’s \$37 billion acquisition of Humana. The Department held a public meeting on January 4, 2016, regarding the transaction. On June 20, 2016, the Department issued an order approving Aetna’s acquisition of Humana.

APPLICANT submitted its Application for an Award of Advocacy and Witness Fees in the Decision on August 17, 2016. The total fee requested for work APPLICANT performed is \$6,687.50.

IV. SUBSTANTIAL CONTRIBUTION

Throughout the Department’s consideration of Aetna’s proposed purchase of Humana, APPLICANT raised concerns regarding, among other things, quality issues for both health plans. Specifically, APPLICANT presented an oral statement to the Department on January 4, 2016, and a detailed written testimony. This written testimony also included seven recommended undertakings.

The Hearing Officer finds APPLICANT’s participation: (1) significantly assisted the Department in its deliberations by presenting relevant issues, evidence, and arguments the

¹ Health and Safety Code section 1348.9.

Department investigated and seriously considered; and (2) resulted in more relevant, credible, and non-frivolous information being available to the Department, which helped inform the Department in making the Decision. The Hearing Officer finds APPLICANT made a substantial contribution, pursuant to California Code of Regulations, title 28, section 1010, subdivision (b)(14), to the Decision. The award for advocacy fees is based on the time spent for the activities and work that substantially contributed to the Decision.

V. REASONABLENESS OF HOURS AND COSTS AND MARKET RATE

A. Fees Requested

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

DENA MENDELSON
STAFF ATTORNEY
TIME: 14.25 hours
RATE: \$350/hour
TOTAL: \$4,987.50

ELIZABETH IMHOLZ
SPECIAL PROJECTS DIRECTOR
TIME: 4 hours
RATE: \$425/hour
TOTAL: \$1,700.00

B. Market Rate

APPLICANT is entitled to be compensated for Advocacy Fees and Witness Fees at hourly rates reflecting the market rates for services. The "Market Rate" is "the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas." (Cal. Code Regs., tit. 28, §1010(b)(8).) Advocacy Fees and Witness Fees cannot exceed the market rate, as defined in the California Code of Regulations, title 28, section 1010, subdivision (b)(8).

To determine the appropriate Market Rate, the Department relies on the market rates used by the California Public Utilities Commission's ("PUC") Intervenor Compensation Program. Reference to the PUC's rates is appropriate because the Intervenor Compensation Program

is similar to the Department's CPP² and has an extensive history of awarding intervenor compensation and updating hourly rates used in computing awards of compensation to intervenors. Therefore, the many PUC written decisions granting intervenor compensation provide valuable guidelines for determining reasonableness and market value.

C. Hourly Rates that Reflect the “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 PUC proceedings, see *infra*) are essentially equivalent to hourly rates for “comparable services in the private sector in the Los Angeles and San Francisco Bay Areas,” as required by the California Code of Regulations, title 28, section 1010, subdivision (b)(8). The following table shows the PUC’s adopted ranges for work intervenor representatives performed in 2016.³

Years of Experience	2016 Range
Attorneys	
0 - 2	\$165-\$225
3 - 4	\$220-\$255
5 - 7	\$305-\$325
8 - 12	\$325-\$380
13+	\$325-\$575
Experts	
0 - 6	\$140-\$205
7 - 12	\$170-\$290

² The Legislative history behind the Department’s CPP 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).

³ PUC Resolution ALJ-329 (May 12, 2016).

13+	\$170-\$425
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D. DETERMINATION OF THE MARKET VALUE HOURLY RATE FOR APPLICANT

The Hearing Officer finds that the hourly rates claimed by APPLICANT are consistent with the applicable “market rates.” Specifically, for work Dena Mendelsohn performed, APPLICANT claims advocacy and witness fees at the hourly rate of \$350.00. APPLICANT justified this rate by reference to Ms. Mendelsohn’s biographical information and her number of years of experience. Ms. Mendelsohn has a B.A. in English/Writing from Emory University, a J.D. from Washington University School of Law, an M.P.H. in Health Policy from Saint Louis University School of Public Health, and approximately 11 years of experience relating to consumer advocacy, legal analysis and research, and other work on healthcare issues. The PUC’s adopted hourly rate range for attorneys with eight to 12 years of experience is \$320-\$380. The Hearing Officer finds that the hourly rate of \$350.00 is consistent with the “market rate.”

For work Elizabeth Imholz performed, APPLICANT claims advocacy and witness fees at the hourly rate of \$425.00. APPLICANT justified this rate by reference to Ms. Imholz’s biographical information and her number of years of experience. Ms. Imholz has a B.A. in Political Science and Urban Studies from Columbia University, a J.D. from Rutgers University School of Law, and more than 13 years of experience with legal research and writing, consumer advocacy, and health policy work. The PUC’s adopted hourly rate range for attorneys of 13 or more years of experience is \$320-\$575. The Hearing Officer finds that the hourly rate of \$425.00 is consistent with the “market rate.”

VI. AWARD

APPLICANT is awarded Advocacy and Witness Fees based on the comments APPLICANT submitted that significantly assisted the Department in its deliberations. The award to APPLICANT is as follows:

Staff / Title	Hours	Rates	Fees
Staff Attorney	14.25	\$350.00	\$4,987.50
Special Projects Director	4	\$425.00	\$1700.00
TOTAL FEES			\$6,687.50
TOTAL DIRECT EXPENSES			\$00.00
TOTAL AWARD			\$6,687.50

FINDINGS OF FACT

1. APPLICANT satisfied all the procedural requirements necessary to claim compensation in this proceeding.
2. APPLICANT made substantial contributions to the approval of Material Modifications numbers 20151947 and 20151948, and Amendment Numbers 20151984, 20151985, and 20151986 as described herein.
3. APPLICANT requested hourly rates that are reasonable when compared to market rates for persons with similar training and experience.
4. The total reasonable compensation for APPLICANT is \$6,687.50.

CONCLUSIONS OF LAW

1. APPLICANT fulfilled the requirements of Health and Safety Code section 1348.9 and California Code of Regulations, title 28, section 1010, and is entitled to compensation for making substantial contributions regarding the Department's consideration and approval of Material Modifications numbers 20151947 and 20151948, and Amendment Numbers 20151984, 20151985, and 20151986.
2. APPLICANT should be awarded \$6,687.50 for its contribution.

AWARD ORDER

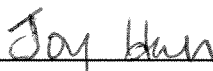
1. Consumers Union of United States, Inc. is hereby awarded \$6,687.50 as compensation for its substantial contribution regarding the Department's consideration and approval of Material Modifications numbers 20151947 and 20151948, and Amendment Numbers 20151984, 20151985, and 20151986.

2. Payment shall be made within thirty (30) days of the effective date of this decision.

3. This decision is effective thirty (30) days after posting this decision on the Department's website. (Cal. Code Regs., tit. 28, § 1010(e)(5) and (6).)

Dated: December 16, 2016

Original Signed by:



JOY HAN
Hearing Officer
Department of Managed Health Care