No. B208402

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA, AND THE AMERICAN INSURANCE ASSOCIATION

Petitioners/Plaintiffs and Appellants,

v.

STEVEN POIZNER, COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, ET AL.

Respondents/Defendants and Respondents,

Appeal from the Los Angeles County Superior Court
Honorable James C. Chalfant
Case No. BS109154

RESPONDENT'S BRIEF OF INTERVENOR THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS[1]

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[1] The Foundation for Taxpayer and Consumer Rights (FTCR) changed its name to Consumer Watchdog in 2008. For consistency in the record, FTCR is used to refer to Intervenor throughout.

Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B208402

Case Name: ACIC, et al. v. Poizner

Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208 and 8.490(i).

☒ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Consumer Watchdog (formerly The Foundation for Taxpayer and Consumer Rights)	Intervenor
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Pamela Pressley

Signature of Attorney/Party Submitting Form

Printed Name: Pamela Pressley
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Party Represented: Consumer Watchdog (formerly The Foundation for Taxpayer and Consumer Rights)
Intervenor

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INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 103 established a regulatory system under which insurance companies must apply for prior approval of their rates by the Insurance Commissioner (Ins. Code §§ 1861.01(c), 1861.05) and provides for full public scrutiny and participation in rate and other administrative and court proceedings to enforce the initiative's provisions (Ins. Code §§ 1861.05(c); 1861.10(a)). To guarantee the public an opportunity to participate in these often technical proceedings, the statute mandates compensation of reasonable advocacy and expert witness fees and expenses in proceedings in which consumers make a "substantial contribution" to the outcome. (Ins. Code § 1861.10(b).)

Proposition 103 vested in the Commissioner the authority to "tak[e] whatever steps are necessary to reduce the job [of rate review and approval] to manageable size." (*20th Century Insurance Company v. Garamendi* (1994) 8 Cal.4th 216, 245.) Pursuant to that inherent authority, and consistent with the initiative's rate approval requirements, the Commissioner has fleshed out by regulation the procedures that govern the rate review and approval process, including proceedings that are resolved short of a formal hearing. In these proceedings, after an insurer files an application for a rate change and a consumer representative requests a hearing, the California Department of Insurance ("Department") legal and rate review staff and the consumer representative assess the rate application, additional data is exchanged among the applicant, the Department, and the consumer representative, and discussions among the parties regarding an acceptable resolution often ensue. As a result of these discussions, which can be time-consuming, insurers often agree to a modified rate change or to withdraw their application altogether. When an informal resolution is reached, the Commissioner issues a final decision

approving the agreed-upon rate. If no informal resolution is reached, the Commissioner may notice a formal evidentiary hearing conducted by an administrative law judge. As in judicial proceedings, however, only a small minority of rate proceedings go to hearing. Whatever the result, consumer representatives' attorneys and advocates, and their actuaries and other experts who participate in the proceeding, often expend considerable time and resources before a hearing ever takes place.

To protect the ability of the public to effectively participate in the rate-setting process pursuant to Insurance Code sections 1861.05 and 1861.10,[1] the Commissioner promulgated amendments to the consumer participation and compensation regulations, which became effective in January 2007 (hereafter "the 2007 Amendments"). The principal amendment clarifies that a "rate proceeding" is initiated upon the filing of a petition for hearing. (Cal. Code Regs., tit. 10 ("10 CCR") §§ 2651.1(h), 2661.1(h).)[2] Additional amendments make clear, consistent with section 1861.10 and its underlying "goal of fostering consumer participation in the rate-setting process" (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045), that consumer representatives who have been granted intervention in a rate proceeding that is concluded without a formal hearing may be awarded compensation if they can demonstrate a "substantial contribution" to the Commissioner's decision. (10 CCR §§ 2661.1(k), 2662.3(b)(3).)

By their petition for writ of mandate, Appellants, insurance industry trade associations, sought to invalidate the Commissioner's duly-adopted

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[1] All statutory references are to the Insurance Code unless otherwise indicated.

[2] The final text of the 2007 Amendments as adopted, in strike-through and underline format, is appended as Attachment 1. (CT 554-563.) Note that section 2653.6 was ultimately withdrawn. (Cal. Reg. Notice Register 2007, No. 2-Z, Jan. 12, 2007, page 48.)

2007 Amendments. Appellants do not challenge the Commissioner's general rulemaking authority to adopt or amend the intervenor regulations pursuant to sections 1861.05, 1861.055, and 1861.10, or the "broad discretion...to promote the public welfare" accorded to him by Proposition 103. (See *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824; *20th Century, supra*, 8 Cal.4th 216, 245.) Indeed, Appellants acknowledge that the Commissioner has established "a process" for review and approval of rate applications that is consistent with his statutory authority and argue in favor of maintaining the former intervenor regulations. (See, e.g., OB 27, 32, 37 [acknowledging rate review process]; 17-20 [discussing former regulations].) Instead, they allege that the 2007 Amendments somehow conflict with the governing statutes and undermine the goal of promoting public participation in rate proceedings.

Appellants' assertions have no basis in statute or case law. The 2007 Amendments are wholly consistent with Proposition 103 for four separate reasons:

First, the rate review and approval process that occurs prior to any determination to hold a formal hearing is part of a "proceeding" under section 1861.10(a) under the plain and commonsense meaning of that term and as "***liberally construed and applied in order to fully promote its underlying purposes***." (Prop. 103, § 8; CT 446; FTCR Motion for Judicial Notice ("MJN") Exh. 10.) Appellants, ignoring the plain language of Proposition 103, equate "proceeding" with "hearing," a word that does not appear anywhere in section 1861.10. (See Argument sec., I.A.)

Second, the plain language of section 1861.10(b) ***requires*** the Commissioner to award reasonable advocacy and witness fees and expenses for a consumer representative's "substantial contribution" to "the adoption of ***any*** regulation, order, or decision by the commissioner or a court." (Emphasis added.) ***Any*** "order" or "decision" of the Commissioner

includes an order or decision to approve or deny a rate application without holding a hearing. (See Argument, sec. I.B.)

Third, while the industry purports to defend the initiative's broad requirements of public participation, its argument arbitrarily ***limits*** consumer participation to formal hearings and denies participation in other equally important stages of the rate proceeding. Indeed, they seek a system that would allow insurers to unilaterally advocate their interests to the Department and exclude consumer representatives from the process altogether. The initiative, however, requires an interpretation that "best facilitates compensation" so as to encourage consumer participation in the rate-setting process. (*Economic Empowerment Foundation v. Quackenbush* ("*EEF*") (1997) 57 Cal.App.4th 677, 686.) (See Argument, sec. I.C.)

Finally, the Commissioner's authority to provide for intervenor participation and compensation follows from his authority – which Appellants implicitly acknowledge (see, e.g., OB 27, 32, 37) – to establish a rate review and approval process that implements the provisions of sections 1861.01(c) and 1861.05. "It is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." (*Calfarm, supra*, 48 Cal.3d 805, 824-825, italics in original; *20th Century, supra*, 8 Cal.4th 216, 245.) Since, as Appellants acknowledge, the Commissioner is authorized to establish a rate review process pursuant to powers expressly granted by or fairly implied from section 1861.05, he necessarily has the authority to allow, and indeed, must allow, the public to participate in that process and be compensated for their substantial contributions to his decisions in such a process. (See Argument, sec. I.D.)

BACKGROUND AND SUMMARY OF PROCEEDINGS BELOW

A. Proposition 103 Established a Framework for the Review and Approval of Rates Imbued with Public Participation and Oversight.

Proposition 103 "made numerous fundamental changes in the regulation of automobile and other forms of insurance in California." (*20th Century, supra*, 8 Cal.4th 216, 240.) Declaring that "the existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates" (Prop. 103, § 1; CT 439; MJN Exh. 10), the initiative "replace[d] the former system for regulating insurance rates (which relied primarily upon competition between insurance companies) with a system in which the commissioner must approve such rates prior to their use." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1259.)

1. Proposition 103 requires rates to be approved by the Commissioner prior to their use.

Proposition 103 requires that "insurance rates subject to this chapter must be approved by the commissioner prior to their use." (§ 1861.01(c).) Section 1861.05(a) provides that "[n]o rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter."[3] Section 1861.05(b), in turn, requires that "[e]very insurer which desires to change any rate shall file a complete rate application with the commissioner."

In December 1988, pursuant to sections 1861.01 and 1861.05 and his inherent authority to "tak[e] whatever steps are necessary to reduce the job [of rate review and approval] to manageable size" (*20th Century, supra*, 8 Cal.4th 216, 245), the Commissioner established a Rate Regulation Branch within the Department that conducts review and analysis of rate

[3] "[T]his chapter" refers to chapter 9 of part 2 of division 1 of the Insurance Code (hereafter "chapter 9").

applications. (See MJN, Exh. 9; 10 CCR § 2648.2.) Thus, pursuant to his statutory duty under section 1861.05(a), the Commissioner, through the Rate Regulation Branch, determines whether a proposed rate meets the requirements of that provision. (*Ibid.*) The Commissioner's rate review regulations require him to use one consistent methodology to review rates. (10 CCR § 2643.1.) That methodology is set forth in regulations setting forth the ratemaking formulae that is used to determine whether a rate is excessive or inadequate:

> No rate shall be approved or remain in effect that is above the maximum permitted earned premium, as defined in section 2644.2, or is below the minimum permitted earned premium, as defined in section 2644.3. Where the Commissioner finds that a rate or proposed rate is excessive or inadequate, the rate or proposed rate shall not be used nor remain in effect. If the rate or proposed rate is excessive, the Commissioner shall indicate the highest rate that would not be excessive, which the insurer may adopt by amendment to its application, or the Commissioner shall reject the rate in its entirety. ...

(10 CCR § 2644.1; see also 10 CCR § 2644.2 et seq.)

If the Commissioner decides to approve a rate application without a hearing, the Rate Regulation Branch issues an "Approval of Application." (CT 600; MJN, Exh. 2.) In this "Approval of Application," the Commissioner often approves rate changes for amounts that are *lower* than originally requested by the applicant (MJN, Exh. 8 [Rate Filings Closed List]), and the applicant amends its application to comport with the approved rate. (See 10 CCR § 2644.1.) Thus, even when no hearing is requested or held, the Rate Regulation Branch often receives additional data and evidence from the rate applicant, and decisions to approve a rate that complies with the statute and regulations are issued, rather than the application just being "deemed approved" 60 days after public notice pursuant to section 1861.05(c). (See MJN, Exhs. 2, 8.)

2. To ensure accountability in the regulatory process, Proposition 103 afforded consumers rights of participation and oversight.

Proposition 103 ensured the accountability of the Commissioner in carrying out his duties by providing the public with the same rights of access to data and ability to participate in regulatory proceedings as the insurance industry. For example, Proposition 103 provides for public notice of all rate applications (§ 1861.05(c)), public access to all information provided to the Commissioner by the industry (§ 1861.07; see generally *State Farm, supra*, 32 Cal.4th 1029), and broad rights of standing and intervention on behalf of the public in administrative and judicial proceedings to enforce Proposition 103 (§ 1861.10; see generally *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968).

These public standing and intervention rights are codified in section 1861.10, subdivision (a), which provides:

> Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

By its plain language, subdivision (a) permits one to initiate or intervene in "***any*** proceeding permitted ***or*** established pursuant to this chapter." Consistent with the initiative's broad protection of public participation rights, subdivision (a) is not limited to the portion of a proceeding that comprises a formal "hearing."

Section 1861.10(b) requires, *without any limitation*, that:

> The commissioner or a court ***shall*** award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of ***any order, regulation or decision*** by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant. (Emphasis added.)

B. Public Participation in Rate Proceedings Includes Advocacy Prior to A Hearing, and the Commissioner Renders a "Decision" Even if No Hearing is Held.

Rate applications are required to be publicly noticed, and consumers and their representative may request a hearing on an insurer's rate application within forty-five days of public notice. (§ 1861.05(c).) The Department may file a response, and the insurer may file an answer to the petition for hearing. (10 CCR §§ 2653.3, 2653.4.) The petition, any Department response, and any insurer answer are considered "pleadings," which become part of the record in the rate proceeding. (10 CCR § 2653.5 ["The petition for hearing, any response, any answer, and the Commissioner's determination whether to grant or deny a hearing shall be part of the record in the proceeding..."].)

If a hearing is timely requested on an application that seeks a rate change greater than 7% for personal lines of insurance or 15% for commercial lines, the Commissioner "***must*** hold a hearing"; otherwise, the decision to hold a hearing is within the Commissioner's discretion. (§ 1861.05(c).)[4]

During the portion of the rate proceeding that occurs from the time a petition for hearing is filed and prior to any decision to grant or deny a hearing, "it has been the Department's practice to encourage consumer representatives and applicants to resolve rate challenges informally so as to

[4] If a hearing is ordered either in response to a petition or on the Commissioner's own motion, an Administrative Law Judge (ALJ) presides over discovery, an evidentiary hearing, and briefing, and the proceeding results in a proposed decision by the ALJ that is submitted to the Commissioner for approval, rejection, or modification. (Gov. Code § 11517.) If the proposed rate is found excessive or inadequate, the Commissioner's decision adopting, rejecting or modifying the administrative law judge's proposed decision (§ 1861.08(c)) must either reject the filing or indicate the appropriate rate (10 CCR § 2644.1).

avoid engaging in lengthy formal hearings." (CT 344; see also *id.* 309:19-20.)

This pre-hearing phase can be very time-intensive. The Department "initiate[s] joint discussions that include the consumer representative and the applicant regarding the rate application," and requires the applicant to send to the consumer representative "any written or electronic data or correspondence regarding the application" so that the consumer representative and his expert can analyze it and respond. (CT 626; FTCR MJN, Exh. 7.)

These informal negotiations can continue for months at substantial expense to the consumer representative's attorneys and experts.[5] (CT 309:28-310:5; 344; 530-34.) During this pre-hearing phase of the rate proceeding,

> [c]onsumer representatives will typically hire experts, analyze rate applications, and negotiate with insurers, often engaging in multiple rounds of negotiation. In addition, they and their experts also analyze additional and/or updated information submitted by the insurer applicant in response to requests from either the Department or the consumer representative. Additionally, consumer representatives will review additional public information relevant to a rate application, such as an insurer's quarterly/annual financial statement and annual reports.

(CT 309:28-310:5.)

These three-way discussions can result in one of three outcomes – settlement, withdrawal of the application, or a formal hearing:

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[5] While section 1861.05(c) provides that the application is "deemed approved" if certain actions are not taken in 60 days, the Department often permits applicants to waive that provision at the Department's request. (CT 531:10-14; 533:19-21; 534:10-11.) Exceptions to the "deemed approved" provision include the Commissioner's determinations to grant a hearing or "not to grant the hearing and issue[] written findings in support of that decision." (§ 1861.05(c)(1).)

> If the applicant, consumer representative and Department agree to a specific rate change the applicant may amend its rate application to request the agreed rate change. However, if the applicant, consumer representative and Department do not all agree to a specific rate change the applicant will have two options: the applicant may pursue the rate increase in a public hearing pursuant to CIC Sections 1861.05 and 1861.08 before the Department's Administrative Hearing Bureau, or the applicant may withdraw the rate application.

(CT 626; MJN, Exh. 7; see also CT 310:16-310:21; 344; 530:24-534:28; 539:11-540:16; MJN, Exhs. 3-6.)

In two of these three scenarios – settlement or withdrawal – the Commissioner must nonetheless "issue written findings in support of [his] decision" determining not to hold a hearing (§ 1861.05(c)(1)), and that decision is considered "final" for purposes of seeking judicial review (§ 1861.09).[6] Frequently, in this final written decision denying the petition for hearing and approving a rate application without a hearing, the issues and arguments presented by the consumer representative are explicitly taken into account. (CT 310:16-22; 530:24-534:28; 539:11-540:16; MJN, Exhs. 3-6.) As noted above (sec. A.1), the Commissioner's decision to approve a rate application without a hearing is also set forth in an official "Approval of Application" issued by the Rate Regulation Branch. (See, e.g., CT 600; MJN, Exh. 2.)

Accordingly, once a petition for hearing is filed, consumer representatives engage in "advocacy" regarding the rate application, and the Commissioner issues a final decision indicating the rate approved (10 CCR § 2644.1), whether or not the application is subjected to a formal hearing.

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[6] As noted in footnote 5, *supra*, this is one of the statutory exceptions to the "deemed approved" provision in section 1861.05(c)(1).

C. The Commissioner Adopted the 2007 Amendments Clarifying the Scope of a "Rate Proceeding" to Ensure Compensation for Consumer Representatives' Substantial Contribution.

Consistent with section 1861.10 and its underlying purpose and his inherent authority to "reduce the job to manageable size," the Commissioner's 2007 Amendments were aimed at ensuring that consumers would continue to be represented in rate proceedings on an equal footing with insurers regardless of whether there is a negotiated resolution or a full-blown hearing. The Commissioner summarized the necessity of the 2007 Amendments as follows:

> It has been the Department's practice to encourage consumer representatives and applicants to resolve rate challenges informally so as to avoid engaging in lengthy formal hearings that benefit no one. Often during negotiations, insurers seek to withdraw their applications. In some instances, applicants have withdrawn their applications after a petition for hearing has been filed and after the petitioner has expended substantial time and effort advocating its position through its advocates and experts. In these instances, the result of the informal process has been either no rate change, or a substantial alteration in the rate ultimately approved by the Commissioner. Such results benefit the public without the necessity of conducting a formal hearing.

(CT 344 [Statement of Reasons].)

The Commissioner determined that the 2007 Amendments were necessary "to make clear that ***advocacy performed by a consumer representative...prior to a decision by the Commissioner to grant or deny a petition for hearing pursuant to Section 1861.05(c) is to be compensated so long as a consumer has made a 'substantial contribution' to a decision or order ending the proceeding***." (CT 343.) The Foundation for Taxpayer and Consumer Rights ("FTCR") and other consumer organizations, including Public Advocates and the Center for Public Interest Law, submitted written comments and testified in support of the Commissioner's

proposed regulations. (CT 361-366; 392; 394-95; 397; 385-389; 401-405; 488-502.) The industry, including Appellants, also participated in the rulemaking proceeding by providing written and oral comments. (*Id.* at 352-360; 383-385; 389-97; 406-433.)

The amendments became effective on January 28, 2007. (Cal. Reg. Notice Register 2007, No. 2-Z, Jan. 12, 2007, page 48.) The principle provisions of the 2007 Amendments that Appellants challenge by their writ petition provide as follows:[7]

- "Rate proceeding" is defined as "any proceeding conducted pursuant to Insurance Code sections 1861.01 and 1861.05." (10 CCR §2661.1(h).)
- "For purposes of section 1861.05, a 'rate proceeding' is established upon the submission of a petition for hearing...." (10 CCR § 2661.1(h); see also § 2651.1(h) [adding a clause to the definition of "proceeding" to include "a rate proceeding established upon submission of a petition for hearing..."].)
- "A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied." (10 CCR § 2661.1(k).)[8]

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[7] See Attachment 1 (Final Text of 2007 Amendments). Appellants do not seriously contest many of the 2007 Amendments that merely make minor procedural changes to the timelines and requirements for petitions to intervene, requests for awards, and decisions awarding compensation. (See, e.g., 10 CCR §§ 2661.3(a), (e)-(g) [shortening the timelines for responses, replies and decisions on a petition to intervene]; and 2661.1(d), 2662.3(a) and (b)(3) [making clear that the provisions apply equally to persons who initiate proceedings, i.e., "petitioners", as well as "intervenors" and "participants" in Departmental proceedings].)

[8] This sentence was added to the definition of "substantial contribution" first adopted by the Commissioner in 1995. Moreover, contrary to Appellant's implication (OB 18), the 2007 Amendments leave unchanged the definition of "advocacy fees" as "costs, incurred or billed, by a party for

- The documentation to support a "substantial contribution" showing may include "declarations by advocates and/or witnesses, written or oral comments of the petitioners or intervenor or its witnesses regarding a rate application..., correspondence with the parties, stipulations or settlement agreements regarding the outcome or material issues in the proceeding, and decision or order by the Department or Commissioner concerning a petition for hearing or rate or class plan application issued without a formal hearing,... ." (10 CCR §§ 2662.3(b)(3) and 2662.5(a)(1).)

In sum, the challenged amendments clarify that a petition for hearing initiates a rate proceeding, which is entirely consistent with section 1861.10(a) ("any person may initiate or intervene in any proceeding") and the unamended regulation providing that the petition for hearing is the first pleading in the record of the proceeding. (See 10 CCR § 2653.5 ["The petition for hearing, any response, any answer, and the Commissioner's determination whether to grant or deny a hearing shall be part of the record in the proceeding..."].) Consistent with section 1861.10(b) and its purpose of promoting public participation in rate proceedings by awarding advocacy fees for their substantial contribution, these amendments also expressly recognize the advocacy role that public intervenors play in "presenting relevant issues, evidence, or arguments" in response to a rate application even when no formal hearing is held.

Indeed, the Commissioner recognized that to deny compensation under these circumstances would contravene the statute's underlying purpose:

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the services of an advocate in the proceeding." (10 CCR § 2661.1(a).) A "party" includes "any person whose petition to intervene in the proceeding has been granted." (10 CCR § 2651.1(f).)

> Denying compensation for advocacy performed by a petitioner prior to an insurer's withdrawal of its application would ***thwart the statute's plain language and its underlying purpose of encouraging consumers to enforce Proposition 103, and disrupt the framework of public participation*** established by the Department through its regulations, in the following ways:
>
> - It would discourage consumer representatives from challenging rate applications... .
> - ...discourage efficient resolution of challenges.
> - It could effectively place the determination of whether intervenors are compensated within the sole control of an insurer, who may unilaterally withdraw, rather than with the Commissioner.

(CT 345, emphasis added.)

D. The Trial Court Properly Upheld the Commissioner's Amendments and Awarded FTCR its Reasonable Attorney Fees and Expenses.

After their arguments were rejected by the Commissioner in the rulemaking proceeding (CT 383-85; 389-397), insurance trade associations petitioned for a writ of mandate seeking to invalidate the 2007 Amendments. (CT 6-70.) FTCR sought and was granted leave to intervene, and filed a complaint in intervention in support of the Commissioner's defense of the regulations. (CT 102-180.) FTCR also filed a comprehensive brief in opposition to the writ petition and presented oral argument. (CT 507-27; 550-628.)

After considering the briefing and oral argument of the parties and the entire administrative rulemaking record, the trial court held that the 2007 Amendments are consistent with Proposition 103 and its underlying purposes, rejecting Appellants' arguments. The trial court's decision upholding the 2007 Amendments was grounded in the plain language of the statute:

> Petitioners argue that "proceeding" refers only to a formal hearing under 1861.05. First, this narrow interpretation of "proceeding" is contrary to the broad scope of review

> expressly provided for under Proposition 103, which states, "[t]his act shall be liberally construed and applied in order to fully promote its underlying purposes." Prop. 103 §8. Second, a central purpose of Proposition 103 is to foster consumer participation in the rate review process. State Farm Mut. Auto Ins. Co. v. Garamendi, (2004) 32 Cal.4th 1029, 1045. Any interpretation of the statute that cuts short this purpose is contrary to the desired effect of the statute. Third, had the Legislature intended this narrow scope, it easily could have drawn the statute to limit consumer participation to "formal hearings." It chose instead the broad term "proceeding" to define the setting in which consumers can participate.

(CT 703-04.)[9]

The trial court further ruled that "[t]he Commissioner reasonably interpreted this statutory mandate by adopting the Amended Regulations to aid the objective of Proposition 103 by encouraging consumer participation in the rate review process, and not just in formal hearings," citing Proposition 103's stated purposes "to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians" (Prop. 103 §2) and the centrality of "[c]onsumer participation in the rate review process . . . to this objective." (*Id.* at 704, citing *State Farm*, *supra*, 32 Cal.4th 1029, 1045.)

Finally, the trial court explicitly ruled that the 2007 Amendments are consistent with section 1861.10(b), "because they permit consumer representatives to collect advocacy fees for work performed during the rate review process, specifically during pre-hearing negotiations, as long as the consumer or representative made a 'substantial contribution' to the adoption of any order, regulation or decision." (*Id.* at 704.) The court

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[9] The trial judge stated on the record that "[t]he tentative is adopted as order of the court." (3/7/08 RT 19.)

expressly rejected Appellants' argument that no "final" order or decision results from informal discussions during the rate review process, explaining that:

> When a settlement is reached during pre-hearing negotiations, insurers will withdraw their rate applications. Thereafter, the Commissioner will issue a decision denying the petition for hearing as moot. This decision nevertheless constitutes an "order" or "decision" for purposes of section 1861.10(b). An advocacy award for consumer advocates is appropriate for their work performed to achieve the settlement and resulting order denying petition for hearing.

(*Ibid.*)

On April 2, 2008, the trial court entered judgment in favor of the Commissioner and FTCR and against insurance trade association petitioners. (CT 714-718.) FTCR filed a motion for attorney fees and expenses, which was granted pursuant to section 1861.10(b). (CT (fees appeal) 208-209; 7/25/08 RT 22:26-27.) Insurance trade association petitioners appealed both the judgment and the fee award. (CT 719-730; CT (fees appeal) 210-214.)

STANDARD OF REVIEW

The California Supreme Court has specifically set forth the standards for reviewing regulations adopted pursuant to Proposition 103. "[W]hether Proposition 103 authorizes the Insurance Commissioner to adopt [] regulations to implement the initiative is...examined independently." (*20th Century, supra*, 8 Cal.4th 216, 271.) "Whether the [] regulations actually adopted . . . are consistent with Proposition 103--and with the law generally--is also examined independently." (*Id.* at 271-72.) "[W]hether the [] regulations actually adopted...are necessary and proper for the

implementation of Proposition 103 is scrutinized for arbitrariness and/or capriciousness." (*Id.* at 272.)[10]

"In general, the courts will give presumptive value to an agency's interpretation of statutes within its administrative jurisdiction, as a consequence of the agency's special familiarity and presumed expertise with satellite legal and regulatory issues." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.) Where regulatory details predominate, agency construction is entitled to "considerable deference" and "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (*SCE Co. v. Pub. Util. Comm.* (2004) 117 Cal.App.4th 1039, 1050 [upholding PUC's interpretation of intervenor compensation statute], quoting *SCE Co. v. Peevey* (2003) 31 Cal.4th 781, 796.)

Appellants cite to two appellate court decisions, *Communities for a Better Environment ("CBE") v. Ca. Resources Agency* (2002) 103 Cal.App.4th 98 and *Aguiar v. Superior Court* (2009) 170 Cal.App.4th 313, for their contention that a court reviews the question of whether a regulation conflicts with the statute de novo "without deference to the technical expertise of the agency." (OB 8.) Those cases, however, rely on Supreme Court authority that holds that "[a]n administrative agency's view of its governing legal authority is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized" (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668, cited in *CBE, supra*, 103 Cal.App.4th 98, 109), and that while an agency's construction

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[10] Appellants' opening brief omits any discussion of the regulations' reasonable necessity to effectuate the purposes of the statute. The Commissioner's official rulemaking file (CT 343-46; 380-81) manifestly establishes the reasonable necessity of the regulations, and his determination must not be disturbed unless wholly arbitrary or capricious. (See *20th Century, supra*, 8 Cal.4th 216, 272.)

"is not binding," it is "***entitled to consideration and respect.***" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1106, fn. 7, cited in *Aguiar, supra*, 170 Cal.App.4th at 323.) And in *Yamaha*, also cited by the *Aguiar* and *CBE* courts, the California Supreme Court recognized "the presumptive value of the agency's views" that stems from its "special familiarity with satellite legal and regulatory issues." (*Yamaha, supra*, 19 Cal.4th 1, 11.)

Here, the Commissioner's "special familiarity" with the procedures and practices that govern the conduct of the number of individual rate proceedings that come before him each year is not disputed. The Supreme Court has expressly recognized the Commissioner's authority to "tak[e] whatever steps are necessary to reduce the job [of rate review and approval] to manageable size" (*20th Century, supra*, 8 Cal.4th 216, 245), provided that it be done in a manner consistent with Proposition 103's broad mandate for public participation.

This Court may not ignore the Commissioner's "special familiarity" with these detailed issues of process, and thus should recognize the "presumptive value" of his views (see *Yamaha, supra*, 19 Cal.4th 1, 11) and afford "considerable deference" to his interpretation of the Insurance Code "unless it fails to bear a reasonable relation to the statutory purposes and language." (*SCE v. Peevey, supra*, 31 Cal.4th 781, 796.)

ARGUMENT

I. THE COMMISSIONER'S REGULATIONS ARE CONSISTENT WITH THE PLAIN LANGUAGE OF PROPOSITION 103 AND ITS UNDERLYING PURPOSE.

"Our first step in determining the [voters'] intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." (*Ca. Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, internal brackets omitted.) "If there is no

ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Even if the plain meaning of the statutes were not clear, a court "must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy." (*Escobedo v. Estate of Snider* (1997) 14 Cal.4th 1214, 1223.) Proposition 103 itself requires that its provisions be "***liberally construed and applied in order to fully promote its underlying purposes***." (Prop. 103, § 8, *supra.*)

As the trial court recognized, the stated purposes of Proposition 103 are "to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." (Prop. 103, § 2; CT 439; MJN, Exh. 10.) To achieve these purposes, Proposition 103 is aimed at encouraging consumer participation in Department and court proceedings to enforce its provisions. (See *State Farm, supra*, 32 Cal.4th 1029, 1045; *Donabedian, supra,* 116 Cal.App.4th 968, 982.) One of the primary provisions to effectuate this goal is section 1861.10, which allows any person to "initiate or intervene" in "any proceeding permitted or established" pursuant to chapter 9 and to be compensated for substantially contributing to "the adoption of any order, regulation or decision by the commissioner or a court."

In the years following the passage of Proposition 103, pursuant to sections 1861.01, 1861.05, and 1861.10 and his inherent authority to "reduce the job [of rate regulation] to manageable size," the Commissioner established by regulation a rate review and approval process and procedures governing the conduct of rate proceedings once a petition for hearing is filed. A rate "proceeding" consists of much more than just an evidentiary

hearing presided over by an ALJ. As discussed above (Background, sec. B), a "proceeding" on a rate application also includes significant steps that precede any hearing that may be ordered, such as:

- the filing of a petition, any answer by the applicant, and any response by the Department, which become part of the record in the proceeding (see 10 CCR §§ 2653.1-2653.5);
- the exchange of additional data and documentation, and the analysis of that data by counsel and experts (CT 626; 309:28-310:5; 530-34); and
- discussions among the parties regarding the rate application and issues raised by the petition prior to any determination to hold a formal hearing (*ibid.*).

This pre-hearing stage, in turn, may result a range of possible dispositions that occur without a hearing, including:

- a stipulated resolution among the parties or the withdrawal of the application by the insurer (CT 310:16-22; 344; 626; 530:24-534:28; MJN Exhs. 3, 7); and
- a decision of the Commissioner (§ 1861.05(c)(1)), considered final for purposes of judicial review (§ 1861.09), indicating the rate approved and discussing each of the issues raised by the person who initiated the proceeding by filing a petition for hearing (CT 310:16-22; 344; 530:18-23; 533:2-9; 533:23-534:2; 534:15-23; MJN, Exhs. 4-7).

By allowing consumer participation at each stage of the "proceeding" on a rate application as described above, and not just at the formal hearing stage, the Commissioner's 2007 Amendments not only bear a reasonable relation to the purposes and language of section 1861.10, subdivision (a), they are compelled by it.

The 2007 Amendments are also consistent with section 1861.10, subdivision (b)'s provision requiring consumer representatives to be awarded compensation when they perform "advocacy in response to a rate application" and make a "substantial contribution" to the Commissioner's final decision. The 2007 Amendments recognize that a substantial contribution may occur when no hearing is held. (10 CCR § 2661.1(k); 2662.3(b)(3).) Thus, they are consistent with the plain language of subdivision (b), which nowhere limits compensation to "advocacy in a hearing." They also promote the initiative's purpose of ensuring full public participation in the rate-setting process because they recognize that a consumer may, and often does, make a "substantial contribution" to the decision issued by the Commissioner on a rate application without a formal hearing ever being ordered, such as when the parties agree to a rate lower than originally requested or the application is withdrawn.

Appellants' primary argument is that the Commissioner's 2007 Amendments somehow conflict with and enlarge the scope of sections 1861.10 and 1861.05. In support of their argument, Appellants advance three erroneous claims: (1) "any proceeding permitted or established" within the meaning of section 1861.10(a) only includes "hearings" ordered by the Commissioner and certain court actions; (2) the terms "advocacy" and "order, regulation or decision" as used in section 1861.10(b) are restricted to advocacy performed during a formal hearing and a decision issued after such a hearing; and (3) allowing consumers to participate and be compensated in rate proceedings when no hearing is ordered will somehow defeat the system of public scrutiny and oversight afforded by Proposition 103. Each of these assertions was correctly rejected by the trial court as being contrary to the plain meaning and underlying purposes of the statute.

A. The Commissioner's Regulations Are Consistent with the Plain Meaning of Section 1861.10(a).

The 2007 Amendments to sections 2651.1(h) and 2661.1(h) defining "proceeding" and "rate proceeding" are entirely consistent with section 1861.10(a), which governs, inter alia, the initiation of and intervention in "any proceeding permitted or established pursuant to [chapter 9]." (§ 1861.10(a).)

1. The Commissioner's regulations have long recognized that a rate "proceeding" comprises more than just a "hearing."

Since their adoption in 1995, the Commissioner's regulations have consistently defined "proceeding" broadly to mean "any action conducted pursuant article 10" (10 CCR § 2651.1(h) and to include "those proceedings set forth in Insurance Code Section 1861.10(a)" (10 CCR § 2661.1(e)). The industry has never challenged these regulations. The 2007 Amendments retain these definitions and, as stated above, clarify that such a proceeding includes "a rate proceeding established upon the submission of a petition for hearing." (10 CCR § 2651.1(h); see also § 2661.1(h).) In other words, the Commissioner's 2007 Amendments define when a "rate proceeding" begins: upon the submission of a petition for hearing. Since Proposition 103 itself does not specify the point at which a "rate proceeding" begins, it necessarily does not specify a point different from that established by regulation.[11]

[11] Proposition 103, however, is by no means neutral on the question of whether public participation is desirable at every stage of the rate application approval process. It expressly provides for public notice of all rate applications (§ 1861.05(c)), public access to all information provided to the Commissioner by the industry (§ 1861.07; see generally *State Farm, supra*, 32 Cal.4th 1029), and broad rights of standing and intervention on behalf of the public in administrative and judicial proceedings to enforce Proposition 103 (§1861.10; see generally *Donabedian, supra*, 116 Cal.App.4th 968). The import of the Commissioner's definition is to

Moreover, the Commissioner's 2007 Amendments defining when a rate proceeding begins are entirely consistent with other longstanding provisions of the regulations that remain unchanged and that the industry has never challenged. For example, since 1995, a petition to intervene must be granted before a person becomes a "party" to a proceeding. (10 CCR § 2651.1(f) [a "party" includes "any person whose petition to intervene in the ***proceeding*** has been granted pursuant to section 2661.3(g)"].) Thus, "party" has consistently been defined in terms of whether a petition to intervene in a ***proceeding*** has been granted and not in terms of whether a ***hearing*** has been granted.

Another longstanding provision of the Commissioner's regulations, never challenged by the industry, states that "[t]he petition for hearing, any response, any answer, and ***the Commissioner's determination whether to grant or deny a hearing shall be part of the record in the proceeding***... ." (10 CCR § 2653.5, emphasis added.) These provisions, which have been in the regulations for nearly fifteen years, are in accord with section 1861.09, which provides that "***a decision not to hold a hearing is final***" for purposes of seeking judicial review. (Ins. Code § 1861.09, emphasis added.) The new regulation, like these longstanding provisions, is consistent with section 1861.09 in recognizing that a the petition is the first pleading of the "proceeding," regardless of whether the Commissioner ultimately grants or denies a hearing, and that any decision by the Commissioner to deny a hearing is also part of the record in the proceeding and is subject to judicial review.

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implement the initiative's broad purpose of promoting full public participation in the rate-setting process. (See sec. I.C., *infra*.)

2. Appellants' counter-textual argument that the term "proceeding" in section 1861.10(a) means "hearings ordered by the commissioner" must be rejected.

Citing *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842 ("*Farmers*"), Appellants construe section 1861.10(a) as allowing persons to *initiate* only (1) certain court actions; and (2) proceedings to review an insurer's rate, rating plan, rating system or underwriting rule pursuant to section 1858. (OB 14, 25.) Appellants also claim that the only proceedings in which a person may *intervene* are "(1) certain court actions and (2) public hearings ordered by the commissioner." (OB 15-16, 25-26.) From this, they conclude without explanation that a "rate proceeding" as defined by the Commissioner's 2007 Amendments "does not fall into either category." (OB 26.)

As a threshhold matter, the plain language of subdivision (a) makes no distinction between proceedings that persons may initiate and those in which they may intervene. ("Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter,... .") Moreover, nowhere did the court in the *Farmers* case distinguish the types of proceedings in which a person may "initiate" from those in which a person may "intervene," and nowhere did it limit such proceedings to "public hearings ordered by the commissioner." The passage in *Farmers* cited by Appellants simply listed illustrative proceedings "permitted or established" pursuant to chapter 9, and included "proceedings to review rate applications" in that list. (*Farmers*, *supra*, 137 Cal.App.4th at 854.)

Appellants also narrowly construe "proceeding" as used in section 1861.10(a) by referring to a case construing "administrative proceeding" as used in Government Code section 800 to mean "an administrative process which presents an issue for hearing and disposition..." and Evidence Code section 901 [defining "proceeding" in the context of the types of

proceedings in which the rules of privilege apply as "all proceedings of whatever kind in which testimony can be compelled by law be to given"].) (OB 26-27.) Appellants never explain in any detail, however, how the Commissioner's 2007 Amendments conflict with these definitions or more importantly, why they should apply to section 1861.10(a). Indeed, Government Code section 800 is nowhere referenced in Proposition 103 and section 1861.10(a) does not use the phrase "administrative proceeding."

The definition of "proceeding" in Evidence Code 901 defines the scope of proceedings in which evidentiary privileges apply, and explicitly "do[es] not govern the construction of any other division" of the Code. (See Evid. Code § 900 ["Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division. They do not govern the construction of any other division"].) Nor would it make sense to extend a definition in the context of privilege rules to other contexts, since by their nature they apply only to proceedings in which testimony can be compelled. (See Law Revision Committee Comment to Evid. Code § 910 ["the policy underlying the privilege rules requires their recognition in all proceedings of any nature in which testimony can be compelled by law to be given. Section 910 makes the privilege rules applicable to all such proceedings"].) Accordingly, the Evidence Code actually recognizes that there may be other types of "proceedings" in which the rules of privilege do not apply.

Indeed, "the word 'proceeding' necessarily has different meanings according to the context and subject to which it relates." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1370.) Ignoring Proposition 103's mandate that its terms be "liberally construed," Appellants fail to mention the broader definitions of "proceeding," such as in the Commissioner's regulations at sections 2651.1(h) and 2661.1(e) (regulations they do not

challenge), the plain and commonsense dictionary definition of "proceeding", and California case law defining the term broadly.[12] They also fail to give due deference to the Commissioner's long experience and practice in resolving rate proceedings.

Instead, Appellants rely on *Farmers* to assert that an "administrative proceeding" means "a *hearing* conducted pursuant to sections 1861.05 and 1861.08." (OB 27.) It provides no such support. In fact, the court stated:

> Section 1861.10, subdivision (a)...***expressly encompasses not only a proceeding concerning an application to increase rates, but also any other proceeding permitted or established pursuant to chapter 9.***
>
> ...
>
> Chapter 9 authorizes, and therefore "establish[es]" within the meaning of the first clause of section 1861.01, subdivision (a), an administrative proceeding to challenge a rate charged, rating plan, rating system, or underwriting rule (§ 1858, subd. (a)); ***an administrative proceeding to review an application for a rate increase*** (§§ 1861.05, 1861.08); judicial proceedings to review those administrative decisions (§§ 1858.6, 1861.09); and a judicial proceeding by the Commissioner to enforce collection of a monetary penalty (§ 1859.1)

(*Farmers*, *supra*, 137 Cal.App.4th at 854, emphasis added.) Thus, contrary to Appellants' conclusion, the *Farmers* court nowhere used the word

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[12] The plain and commonsense meaning of the term "proceeding" includes the synonyms "process," "procedure," and "transaction." (Webster's Online Dict. (2007).) In the legal context, a proceeding has been defined broadly as "an act or step that is part of a larger action." (Black's Law Dict. (8th ed. 2004).) Indeed, the California Supreme Court has stated that "[t]he term 'proceeding' may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding." (*Rooney v. Vt. Investment Corp.* (1973) 10 Cal.3d 351, 367.) Under any of these definitions, the portion of the rate review and approval process that occurs after the filing of a petition for hearing and before any hearing notice is clearly a "proceeding," as it is both a "process" for the determination of whether a rate is in compliance with section 1861.05(a) and is also "a procedural step that is part of a larger action."

"hearing," but rather, referred broadly to "a proceeding concerning an application to increase rates" and a "proceeding to review an application for a rate increase." (*Ibid.*)

Based on their erroneous reading of *Farmers*, Appellants summarily conclude that "the 'rate proceeding' defined in the amended regulations is not an administrative 'proceeding' at all" but is "simply a label for the commissioner's internal nonpublic review of a rate application before any hearing has been ordered." (OB 27.) Appellants have turned Proposition 103 on its head. Far from establishing or permitting any "***nonpublic*** review of a rate application," Proposition 103 requires, and the Commissioner's 2007 Amendments ensure, that every stage of the rate proceeding be open to the public. (See, e.g., § 1861.07 ["All information provided to the commissioner pursuant to this article shall be available for public inspection"].)

B. The Commissioner's Regulations Are Consistent with the Plain Meaning of Section 1861.10(b) and Case Law Interpreting It.

To promote the voters' overriding interest in ensuring the public's full participation in rate-setting proceedings on an equal footing with the industry, Proposition 103 ensures that consumers will have the benefit of the professional services of lawyers, actuaries and other experts so that their interests will be meaningfully represented in those proceedings. Accordingly, section 1861.10(b) requires payment of "reasonable advocacy and witness fees and expenses to any person" who (1) "represents the interests of consumers" and (2) makes "a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court." (§ 1861.10(b).) When such advocacy occurs "in response to a rate application," the insurer applicant must pay the award. (*Ibid.*)

The Commissioner's 2007 Amendments make clear that a "substantial contribution" to a Commissioner's decision on a rate

application, based on "advocacy [that] occurs in response to a rate application," can be compensated whether or not the proceeding is resolved with a hearing. (See 10 CCR § 2661.1(k) ["A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied"]; 2662.3(b)(3) [adding to list of documentation to support a substantial contribution to include declarations, written or oral comments, correspondence, stipulations or settlement agreements, and a decision by the Commissioner on a petition for hearing].)

Appellants argue that the 2007 Amendments conflict with subdivision (b) because, they claim, it only applies to advocacy during the hearing stage. (OB at 30.) It is Appellants' argument, however, not the Commissioner's construction, that is in conflict with the plain language of the statute. Subdivision (b) expressly entitles consumer representatives to compensation "[w]here such advocacy occurs in response to a rate application." Appellants would rewrite subdivision (b) to only allow compensation "[w]here such advocacy occurs in response to a rate application ***in the formal the hearing stage of the proceeding***."

The implausible reading of the plain text that Appellants urge would also conflict with the initiative's purposes. As discussed below, advocacy on behalf of consumers occurs throughout a rate proceeding. Since far more rate applications are resolved before any hearing than after, consumer advocacy at the pre-hearing stage is often essential to ensuring that the public voice is heard. (See sect. B.1, *infra.*)

Appellants also argue that, absent a hearing, there is no "order, regulation or decision" to which consumer advocacy can make a "substantial contribution." That, too, is incorrect, as virtually every proceeding on a rate application ends in a final decision of the Commissioner. (See sect. B.2, *infra.*)

1. Critical "advocacy" on behalf of the public occurs during the pre-hearing phase of a rate proceeding.

Though the plain language of subdivision (b) specifically contemplates advocacy and expert compensation where a "substantial contribution" is made to the Commissioner's decisions and specifically refers to "advocacy in response to a rate application" (§ 1861.10(b)), Appellants assert as a factual matter that "until the consumer intervenes in the hearing under section 1861.10, subdivision (a), there is no occasion for the consumer to engage in 'advocacy' concerning the rate application." (OB 30.) Thus, they claim that "the amended regulations conflict with and enlarge the scope of [this provision] by allowing a consumer to seek 'advocacy and witness fees' incurred in a 'rate proceeding,' even though no hearing has been held." (*Ibid.*)[13] Appellants' conclusion that the amended

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[13] Appellants also erroneously conclude that "since the commissioner's decision to disapprove a rate application must be based on the record of the hearing (§ 1861.08, subd. (c)), the statutory scheme does not contemplate that the commissioner will entertain evidence or arguments against a rate application except in a public hearing" (OB 12). Section 1861.08(c), however, concerns the actions that a commissioner may take to "adopt, amend, or reject" an administrative law judge's ***proposed decision*** after a hearing is held. The obvious fact that such a decision can solely be made on the hearing record says nothing about the actions that the Commissioner can and does take in determining to approve or disapprove a ***proposed rate*** when no hearing is held. *English v. City of Long Beach* (1950) 35 Cal.2d 155, cited by Appellants, is inapposite. *English* discusses the Long Beach city charter and the rules and regulations of the civil service board, which require that a discharged employee be accorded a hearing. By contrast, under Proposition 103, the Commissioner is authorized to make determinations on rate applications without holding a public hearing. Appellants admit as much when they state that "a rate application can and will be approved if no hearing is held." (OB 12.) Appellants also discuss a superior court decision, but as Appellants acknowledge (OB 19, fn. 9), that case cannot be relied upon as precedent. (See *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 738 [stating that "a written trial court ruling has no precedential value"].) Moreover, that case did not determine the issue here – whether the Commissioner's duly adopted regulations defining

regulations subject insurers to "expanded liability for 'advocacy and witness fees' beyond the liability contemplated or permitted by section 1861.10, subdivision (b)" (*ibid.*) does not follow since subdivision (b) itself provides for compensation "[w]here such advocacy occurs in response to a rate application." (*Ibid.*)

Subdivision (b) uses a very broad term, "advocacy," which encompasses any "active support; especially the act of pleading or arguing for something." (Webster's Online Dictionary (2007).) Notably, Appellants cannot deny that insurers themselves advocate in support of their rate applications by submitting evidence and arguments to the Department prior to any hearing being ordered. Indeed, regardless of whether a hearing is held, "[t]he applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of [Proposition 103]." (§ 1861.05(b).) Section 1861.10(b) is clear in granting consumers an equal opportunity to advocate for their interests. Just as applicants advocate during the pre-hearing phase of the proceeding, so do consumer representatives (see Background, sec. B, *supra*), and section 1861.10(b) expressly provides for the opportunity to be compensated for that advocacy performed in response to a rate application.

Appellants never explain how, in their view, the Commissioner is authorized to receive additional data and documents from the rate applicant in support of a rate application during the pre-hearing rate review stage of the proceeding, but is not allowed to "entertain evidence or arguments ***against*** a rate application ***except in a public hearing***." (OB 12, emphasis added.) Such a one-sided process as urged by Appellants would undermine the express language of section 1861.10 and its underlying purposes.

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when a rate proceeding begins are consistent with Proposition 103. Thus, the trial court correctly rejected Appellants' reliance on this case. (CT 702, fn. 1.)

2. The Commissioner issues "decisions" on rate applications even when no formal hearing is held.

Appellants also claim that the 2007 Amendments conflict with section 1861.10(b) because "[a] consumer who merely 'intervenes' in a 'rate proceeding' as defined in the amended regulations, where no hearing is held, does not contribute to the adoption of any order, regulation or decision." (OB 30.) Appellants rely upon an out-of-context quote from *EEF*, *supra*, 57 Cal.App.4th 677 to support this argument, and incorrectly claim that the amended regulations allow "compensation for a consumer who merely files a petition for hearing, even if the commissioner denies the petition, holds no hearing, and ***never issues a decision or order on the merits of the insurer's rate application.***" (OB 31, emphasis added.)

"Decision" means "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." (Gov. Code § 11405.20(a);[14] see also Webster's Online Dictionary (2007) ["a position or opinion or judgment reached after consideration"].) Even if no hearing is held on a rate application, the Commissioner does indeed take action to determine a legal right: he "approves" a final rate after consideration by the Department Rate Regulation staff. As explained in above (Background, sec. A.1), this decision typically takes the form of an "Approval of Application," which is clearly a determination of an applicant's legal right or interest in having its rates approved. (CT 600; MJN, Exh. 2.) This is plainly a decision "on the merits," since it determines the substantive rights of the applicant to a rate change.[15]

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[14] This section makes no reference to a formal adjudicatory hearing, and indeed Government Code section 11415.50 allows agencies to determine the appropriate process for rendering such a decision outside the formal hearing context.

[15] See Black's Law Dictionary (8th ed. 2004) (defining "merits" as "the

As is required by section 1861.05(c)(1), the Commissioner also sets forth his reasoning for approving a rate in a final "decision" denying a petition for hearing after the parties have settled the matter, which includes references to arguments and positions taken by intervenors and their substantial contribution. (See Background, sec. B, *supra*; MJN, Exhs. 3-6.) Such a "decision" becomes part of the record in the proceeding (10 CCR § 2653.5) and is considered "final" for purposes of judicial review (§ 1861.09).

As the trial court correctly held (CT 704, fn. 2), the *EEF* case does not support Appellants' position that there can be no "decision" unless a hearing is held. The sole issue before that court was which forum should determine an intervenor's request for fees. (*EEF*, *supra*, 57 Cal.App.4th at 680.) The *EEF* court held that "fees must be sought in the forum in which the case or proceeding originated." (*Id.* at 689.) In reaching this conclusion, the court remarked that

> if "order" or "decision" means any order or decision along the way in a proceeding, then there could be proceedings,..., which would result in orders and decisions by both the Commissioner and a court. In the Commissioner's view, the intervener would be required in such a proceeding to seek separate awards in each forum for the portion of fees it incurred in obtaining orders or decisions from that forum. A more "sensibl[e]" result [citation] would obtain if the words "order" and "decision" in section 1861.10 are seen as referring only to final orders or decisions on the merits.

(*Id.* at 689.)

The court went on to reason:

> Under this interpretation, accepting again that the statute grants separate and not overlapping powers to the Commissioner and the courts, the Commissioner would have exclusive original jurisdiction to award all fees incurred in any

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substantive considerations to be taken into account..., as opposed to extraneous or technical points, esp. of procedure").

> proceeding in which he renders ***the final order or decision, even if some of the fees are incurred in an ancillary court action***. The court, on the other hand, would have sole jurisdiction over fees in any case in which it renders ***the final order or decision***.

(*Ibid.*, emphasis added.)

Significantly, the court confirmed that one can seek fees for a substantial contribution made "***at each stage of this process***" (*id.* at 688) and for fees that were incurred in ancillary actions (*id.* at 689), even though the award must be sought in the forum that renders the "***final order or decision***" (*ibid.*). Contrary to Appellants' logic, therefore, the *EEF* decision confirms that the Commissioner has the authority to award fees in any proceeding in which he renders ***a final order or decision*** approving or rejecting a rate application for a consumer representative's substantial contribution at each stage of the rate-setting process.

Appellants are therefore mistaken in arguing that intervenors may only seek fees for their substantial contribution to a "decision on the merits" after a hearing. Moreover, Appellants entirely fail to explain why, as they contended below, "a rate approval or disapproval by the Department staff outside the context of a rate hearing is not a 'decision on the merits.'" (CT 206:18-20.) Undeniably, the rate review process conducted without a hearing necessarily involves a determination of the "merits" of an insurer's rate application, i.e., whether it complies with the relevant substantive statutes and regulations.[16] And even when an insurer withdraws a rate application or the parties reach a negotiated resolution, the Commissioner issues a decision on the petition for hearing. (See § 1861.05(c)(1).)

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[16] See fn. 15, *supra*.

C. The Commissioner's 2007 Amendments Are Consistent with the Purpose Underlying Section 1861.10 to Encourage Consumer Participation in the Rate-Setting Process.

The California Supreme Court has aptly summarized the vital role of consumer intervenors in the ratemaking process:

> It is true that public interest interveners...speak for a substantial segment of the population that otherwise may go unheard....the commission staff cannot fully and adequately represent all facets of the public interest, and in some instances...it may fail to discern the ratepayers' rights. Public interest interveners therefore fill a gap in the ratemaking process. [¶]...participation of the general public in ratemaking proceedings 'is to be commended, and even encouraged.' Effective participation in complex commission hearings, however, requires technical expertise and continuous scrutiny of various proposals and rulings. [Consumer] [g]roups...provide that expertise and scrutiny as a counterweight to the views expressed by the [industry].

(*Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 911; see also *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 88; *EEF*, *supra*, 57 Cal.App.4th 677, 686, fn. 6.)

Under Proposition 103, "[t]he purpose of intervenor fees is evidently to encourage consumers to participate in insurance ***rate proceedings*** by compensating them for their contribution" and courts "should seek an interpretation of [§ 1861.10] ***which best facilitates compensation.***" (*EEF*, *supra*, 57 Cal.App.4th 677, 686, emphasis added; see also *State Farm*, *supra*, 32 Cal.4th 1029, 1045 [interpreting section 1861.07 in a manner "consistent with Proposition 103's goal of ***fostering consumer participation in the rate-setting process***," emphasis added]; *Donabedian*, *supra*, 116 Cal.App.4th 968, 982 ["[t]he statutes and regulations provide for ***consumer participation in the administrative ratesetting process***," emphasis added].)

In enacting section 1861.10(b), the voters sought to ensure that insurance ratepayers would be represented in matters before the Department

and the courts on an equal basis with insurers by allowing consumer representatives to be compensated for their reasonable advocacy fees. (See *Donabedian, supra*, 116 Cal.App.4th 968, 983 [quoting with approval from Department's amicus brief stating that, "[i]n adopting Insurance Code sections 1861.03 and 1861.10, the voters envisioned that the Commissioner's ability to enforce the [specified] provisions of the Insurance Code would be supplemented by the use of private attorneys general"].) That is the purpose of any private attorney general statute, and is especially crucial in the rate-setting context. (See *Consumers Lobby Against Monopolies v. Public Utilities Commission, supra*, 25 Cal.3d 891, 911; see also *City of Santa Monica v. Stewart, supra*, 126 Cal.App.4th 43, 88; *EEF, supra*, 57 Cal.App.4th 677, 686, fn. 6.)

The Commissioner's amendments are entirely consistent with and seek to promote section 1861.10(b)'s underlying purpose. As stated by the Commissioner:

> ...as the voters intended, the scrutiny of consumer representatives is an important tool to ensure that applicants comply with the statutory and regulatory prohibition on "excessive, inadequate, and unfairly discriminatory" rates, or rates that otherwise violate the law, and that if consumer representatives are denied the ability to seek compensation when they make a substantial contribution in pre-hearing proceedings, such scrutiny would be discouraged and curtailed.
>
> Such a result contravenes the public policy underlying section 1861.10 and analogous intervenor compensation statutes of encouraging consumer participation in administrative and court proceedings, and thereby aiding regulators and courts in their decisions.

(CT 345 [Statement of Reasons].)

Thus, the Commissioner's construction of section 1861.10(b) is consistent with Proposition 103's underlying purposes by upholding the framework of public participation in rate proceedings. His construction is

entitled to "considerable deference," and "should not be disturbed unless it fails to bear a reasonable relation to [the] statutory purposes and language" of section 1861.10(b). (See *SCE Co. v. Pub. Util. Comm.*, *supra*, 117 Cal.App.4th 1039, 1050 [upholding PUC's interpretation of intervenor compensation statute as consistent with the legislative mandate "to encourage effective intervenor compensation"], quoting *SCE Co. v. Peevey*, *supra*, 31 Cal.4th 781, 796; see also *Yamaha*, *supra*, 19 Cal.4th 1, 11.)

The interpretation the industry proposes, by contrast, would undermine the statutory purposes. Rather than seeking a reading that promotes Proposition 103's policy of encouraging consumer participation in the rate-setting process, Appellants admittedly seek to promote a system where consumers – but not the industry – would be excluded from what they refer to as "***the commissioner's internal nonpublic review of a rate application***." (OB 27.) They then claim, inconsistently, that the Commissioner's 2007 Amendments, which provide for consumer participation in the administrative rate-setting process, will somehow "defeat [Prop. 103's] system of public scrutiny." (*Id.* at 28.) Appellants never explain how their preferred system – one where the public is excluded from participation in the rate-setting process and insurers are unilaterally able to advance their arguments, as they put it, "off the record and outside the public view" (OB 29) is consistent with the goals underlying Proposition 103. Indeed, Appellants admittedly wish to shield the review of their member insurers' rates from public scrutiny and make the rate review process "private." (OB 32 ["...consumer representatives may intervene in public hearings, not in ***private, prehearing reviews***"]; see also *id.* at 37 [wrongly asserting that "[n]o authority holds that Proposition 103 was intended to foster consumer participation in every aspect of the rate review process, including ***the commissioner's internal prehearing review of a rate application***"].)

It is Appellants' construction, not the Commissioner's, that would defeat the statutory goals of public scrutiny and oversight. The Commissioner's regulations ensure that all portions of the rate review process are open to public scrutiny.

D. The Intervenor Regulations Are Consistent With Section 1861.05.

Appellants sprinkle references to section 1861.05 into their discussion of the "proceeding" language in section 1861.10(a), but never point to any specific provision of section 1861.05 with which they claim the Commissioner's regulations are in conflict.[17] Instead, their argument seems to begin and end with the assertion that section 1861.10(a) is limited to a "hearing" ordered by the Commissioner pursuant to section 1861.05(c). (OB 27.) Contrary to Appellants' logic, however, while section 1861.05(c) sets forth the process by which consumer representatives may request and the Commissioner may order a hearing on a rate application, that section does not state that public participation is limited ***only*** to the hearing stage of the rate review process.

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[17] Section 1861.05(a) provides that "[n]o rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." Section 1861.05(b), in turn, requires that "[e]very insurer which desires to change any rate shall file a complete rate application with the commissioner." Finally, Section 1861.05(c) provides that "the rate application shall be deemed approved sixty days after public notice ***unless*** (1) a consumer or his or her representative requests a hearing within forty-five days of public notice and the commissioner grants the hearing, ***or determines not to grant the hearing and issues written findings in support of that decision***, or (2) the commissioner on his or her own motion determines to hold a hearing, or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the commissioner must hold a hearing upon a timely request." (Emphasis added.)

Appellants imply that under section 1861.05, the Commissioner either orders a public hearing or the rate application is deemed approved. (OB 12 ["If *no* hearing is held, the rate application is deemed approved 60 days after the public is notified of the application. (§ 1861.05, subd. (c).)"]) Elsewhere in their brief, however, Appellants acknowledge that the Commissioner is authorized to review and approve rate applications outside of the formal hearing process set forth in section 1861.05, even though as discussed above, they claim that this process is "nonpublic" and "private." (OB 27, 32, and 37.) Thus, Appellants cannot deny that rate applications are reviewed by the Rate Regulation Branch for compliance with the rate statutes and regulations and often are approved by the Commissioner for a different amount, rather than simply being "deemed" approved when no hearing is ordered.[18] Notably, for instance, they do not contest the validity of the Commissioner's decisions ***approving*** their members' rates without holding a hearing.

In other words, Appellants paradoxically assert ***both*** that the Department takes valid administrative action in response to a rate application without any hearing ***and*** that the Commissioner is not authorized to allow consumers to participate in that process. There is no paradox, however, because the Commissioner is not only authorized but is ***required*** to open the rate-setting process to consumer participation. His "powers are not limited to those expressly conferred by statute," but extend also to "such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as ***may fairly be***

[18] As noted fn. 5, *supra*, section 1861.05(c)(1) expressly provides that the 60-day "deemed approved" does not apply when the Insurance Commissioner "determines not to grant [a] hearing and issues written findings in support of that decision."

implied from the statute granting the powers." (See *20th Century*, *supra*, 8 Cal.4th 216, 245, italics in original.)

While sections 1861.01(c) and 1861.05 provide a general framework for the Commissioner's review and approval of rate applications, the California Supreme Court has recognized that:

> [m]uch is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare. ...Thus there is nothing here which prevents the commissioner from taking whatever steps are necessary to reduce the job to manageable size.

(*20th Century Insurance Company v. Garamendi, supra*, 8 Cal.4th 216, 245, italics in original, quoting *Calfarm, supra*, 48 Cal.3d 805, 824-25.) Appellants themselves concede the Commissioner has the authority to "take whatever steps are necessary to reduce the job [of rate application review and approval] to manageable size." This same reasoning demonstrates that the portion of a rate proceeding that is conducted without a hearing is properly "permitted" or "established" pursuant to the Commissioner's "powers as are necessary for the due and efficient administration" of his rate approval power "or as may fairly be implied from the statute[s] granting [that] power"). (See *ibid.*) It necessarily follows, therefore, that the 2007 Amendments affording consumer participation and compensation in all aspects of this "proceeding permitted or established pursuant to [Proposition 103]" are valid, and indeed necessary, to comport with the initiative's statutory language and underlying purpose.

II. THE AWARD OF ATTORNEY FEES AND EXPENSES UNDER INSURANCE CODE SECTION 1861.10 IS LEGALLY REQUIRED BECAUSE FTCR MADE A SUBSTANTIAL CONTRIBUTION TO THE COURT'S DECISION.

The court below correctly awarded FTCR compensation under section 1861.10(b) because FTCR made a substantial contribution to the court's decision. The trial court found that:

> FTCR actively participated in the case, met with the Attorney General to discuss issues, the history of Prop. 103, and strategies, prepared an opposition and objections to evidence, and participated in oral argument. The court's decision cited an argument made by FTCR that the regulations merely define when a "rate proceeding" begins, and that is when a petition for hearing is submitted. FTCR actively participated in the success of defeating the petition.

(CT (Fees Appeal) 207; see 7/25/08 RT 15:4-24 [the court referenced the above-quoted paragraph of the tentative ruling to conclude that FTCR "did make a contribution" under section 1861.10].)[19]

Absent a showing of an abuse of discretion, this court must uphold the trial court's award of attorney fees. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578.)

Appellants advance two flawed arguments against FTCR's entitlement to that fee award: (1) they assert that "the court's reversal of the judgment would eliminate the basis for the fee award"; and (2) they contend that section 1861.10(b) does not allow consumer representatives to be awarded their fees and expenses when they substantially contribute to a court decision upholding the Commissioner's regulations adopted pursuant to Proposition 103. In the alternative, Appellants claim that if this Court upholds the fee award, they should not be required to pay it. All three of

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[19] The court's 7/25/08 tentative ruling was adopted as the final ruling of the court, as orally modified. (CT (fees appeal) 209.)

these arguments are contrary to the plain language of the statute and case law applying it and other similar fee-shifting statutes.

A. FTCR is Entitled to Its Reasonable Attorney Fees and Expenses Under the Applicable "Substantial Contribution" Standard.

Appellants claim that if the judgment is reversed, the fee award must also be reversed. This argument assumes that the relevant standard under section 1861.10(b) permits only a prevailing party to be compensated. That, however, is not the case. Instead, section 1861.10 (b) applies a "substantial contribution" standard.

The Department's regulation defines "substantial contribution" in proceedings before the Commissioner as follows:

> "Substantial Contribution" means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more credible, and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated.

(10 CCR § 2661.1(k).) Thus, the standard requires the intervenor's contribution to be viewed "as a whole" in relation to the decision, and such a contribution may be demonstrated by the presentation of "relevant issues, evidence, or arguments" that "resulted in more credible, non-frivolous information being available" for the court to make its decision. Here, as set forth in its ruling quoted above, the trial court made those findings by referring to the issues, arguments, and evidence presented by FTCR. (CT 207.) The same would be true even if FTCR had not prevailed on all issues.

Thus, even if this Court were to reverse the underlying merits decision in whole or in part, it should uphold the trial court's award to

FTCR of its reasonable advocacy fees and expenses under section 1861.10(b). At the very least, if the trial court judgment is reversed, this court should remand the issue of entitlement to attorney's fees back to the superior court. (See, e.g., *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179, 1240 ["Whether and to what extent Petitioner's are entitled to attorney fees for making a 'substantial contribution' within the meaning of section 1861.10, subdivision (b), to the decision in this case must be reassessed in light of the result of this appeal"].)

B. FTCR is Entitled to Reasonable Attorney Fees and Expenses in this Proceeding Seeking to Challenge Regulations Adopted by the Commissioner to Enforce Insurance Code Section 1861.10(a).

Appellants confusingly argue that FTCR cannot recoup its fees under section 1861.10(b) in this action because this proceeding is somehow not a "proceeding permitted or established pursuant to this chapter" for purposes of subdivision (a). (OB 41-43.) As the trial court correctly found, this argument is wrong on its face because it conflicts with the plain language of Proposition 103. (CT (fees appeal) 207.) Section 1861.10(a) states: "[a]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner, and enforce any provision of this article." Any rulemaking proceeding in which a regulation is adopted by the Commissioner to implement a provision of Proposition 103, here section 1861.10, and a court challenge to that regulation, is necessarily a proceeding that is "established" and is certainly "permitted" pursuant to section 1861.10, the statute that the regulation seeks to implement.

FTCR was granted leave to participate in the underlying rulemaking proceeding pursuant to section 1861.10(a). (MJN, Exh. 11.) FTCR also invoked section 1861.10(a) as a basis for intervention in this court

proceeding seeking to challenge the Commissioner's regulations adopted to enforce section 1861.10. (CT 125:11.) FTCR and other consumer groups have successfully intervened under this provision in numerous other court actions seeking to challenge or uphold the Commissioner's regulations adopted pursuant to Proposition 103 or to challenge illegal amendments to the initiative statute that failed to further its purposes.[20] Moreover, subdivision (a) also authorizes FTCR to "enforce any provision of this article," and Appellants do not dispute the trial court's finding that this action resulted in the enforcement of the consumer participation provisions of section 1861.10 (CT (fees appeal) 207).

Furthermore, section 1861.10(b) states that "***a court shall*** award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, ***regulation*** or ***decision*** by the commissioner or ***a court.***" (§ 1861.10(b), emphasis added.) Thus, on its face, section 1861.10(b) applies both to judicial proceedings and administrative proceedings, ***and*** applies to a substantial contribution by any person to a court's decision as to a regulation. (*Ibid.*; see *EEF, supra*, 57 Cal.App.4th 677, 689-690.)

Appellants rely on *Farmers, supra*, 137 Cal.App.4th 842 to support their argument, claiming that the court there enumerated types of actions that are "permitted or established" by chapter 9 and did not mention a court action to challenge a regulation adopted by the Commissioner. (OB 42.)

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[20] See, e.g., footnote 23, *infra*; see also *Calfarm, supra*, 48 Cal.3d 805; *20th* Century, *supra*, 8 Cal.4th 216; *Amwest, supra*, 11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473; *Spanish Speaking Citizens' Foundation, supra*, 85 Cal.App.4th 1179; *State Farm, supra*, 32 Cal.4th 1029; *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

Not surprisingly, that case did not purport to provide an exhaustive list of the types of proceedings in which a person must be awarded fees under section 1861.10(b).[21] Thus, it did not mention a proceeding in which a person makes a substantial contribution to a ***regulation*** as provided in subdivision (b). The *Farmers* court did state that the "permitted or established" proceedings include court proceedings to review decisions of the Commissioner in the enumerated administrative proceeding. (*Farmers*, *supra*, 137 Cal.App. 4th 842, 854.) Thus, by analogy, any court proceeding to review a regulation adopted by the Commissioner would also be "permitted or established" pursuant to chapter 9. It would make little sense if persons were permitted to intervene and be compensated in a rulemaking proceeding that led to the adoption of a regulation to which they substantially contributed, but were not allowed to participate and be compensated in the court action to review that same regulation.

Moreover, section 1861.10(b) should be applied in a manner "which best facilitates compensation." (*EEF*, *supra*, 57 Cal.App.4th 677, 686.) Courts have routinely awarded intervenors reasonable attorneys' fees and expenses under section 1861.10(b) in proceedings brought either to challenge or uphold regulations adopted by the Commissioner pursuant to Proposition 103.[22] Indeed, Appellants have failed to cite any court decision that has adopted their novel argument.

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[21] The only issue before the court in *Farmers* was whether section 1861.10(a) grants a private right of action to enforce provisions of Proposition 103 in court in the first instance. (*Farmers*, *supra*, 137 Cal.App.4th 842, 849.) The court did not interpret the right to fee awards under subdivision (b) or discuss any issues related to proceedings to adopt, enforce or challenge regulations.

[22] CT (fees appeal) 180-208.

C. Appellants Are Responsible for Paying the Fee Award.

Appellants argue, in the alternative, that they are not responsible for paying the fee award to FTCR as the trial court ruled. They ask this Court to modify the award to require the Department to pay the award out of the fund established from "filing fees...paid by insurers to cover any ***administrative and operational*** costs arising from the provisions of" Proposition 103 (Ins. Code § 12979, emphasis added) ("the Fund"). (OB 43-45.) According to Appellants, because the last sentence of section 1861.10(b) specifies that where an intervenor's advocacy "occurs in response to a rate application, the award must be paid by the applicant," this necessarily means that in all instances ***other than*** one arising from a rate application, fees must be awarded from the Fund. (See OB 44.) Their position is wrong and was soundly rejected by the trial court. (7/25/08 RT 9:7-13:20.)

Section 1861.10(b) applies by its own terms to both administrative and court proceedings ("[t]he Commissioner ***or a court*** shall award reasonable advocacy and witness fees and expenses . . ."). Contrary to Appellants' implication, the statute does ***not*** say that insurers pay ***only*** in rate application proceedings. Nor does the statute say that intervenor fees are to be paid from the Fund in all proceedings other than those arising from rate applications. Neither of those propositions is either stated or implied in the language of the statute. Rather, the statute simply does not specify who shall be required to pay the fee award in proceedings other than rate proceedings. The necessary implication is ***not***, as Appellants argue, that insurers can only be required to pay in rate proceedings, but rather, that in all other proceedings, the decision is committed to the discretion of the Commissioner or to the court, as applicable.

There is an obvious reason for this – in the many different types of administrative and court proceedings that could potentially arise under

Proposition 103, the party that should be responsible for payment of intervenor fees will depend on the circumstances of the case or proceeding. In an administrative or court proceeding challenging the unlawful conduct of an insurance company or in a proceeding brought by insurer trade associations challenging regulations of the Commissioner that have been upheld as valid, as here, the Commissioner or a court clearly has the authority and the discretion under section 1861.10(b) to award fees payable by the insurer trade associations.

It is worth noting that in failing to specify the responsible party for a fee award, section 1861.10(b) is just like any number of other fee-shifting statutes. (See, e.g., Civil Code § 1780(d) (the Consumers Legal Remedies Act) ["The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section"]); Civil Code § 1811.1 (the Unruh Act) ["Reasonable attorneys' fees and costs shall be awarded to the prevailing party in any action on a contract or installment account subject to the provisions of this chapter"]; Civil Code § 2983.4 (the Rees-Levering Act) ["Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of this chapter"].) These statutes all authorize an award of fees, but do not expressly state who pays the award. Indeed, the wording of section 1861.10(b) in this regard ("[t]he commissioner or a court shall award reasonable advocacy fees and expenses to any person who . . . .") is very similar to fee-shifting provisions in other consumer protection statutes. It is a standard formulation when courts are vested with discretion to determine an appropriate award and the responsible party.

Thus, while section 1861.10(b) is silent as to who should pay in circumstances other than rate applications, such as in court proceedings, it clearly does not preclude liability of insurer trade associations for paying the fees of consumer representatives in actions, such as here, challenging

the Commissioner's regulations. In such proceedings, Appellants are in an analogous position to the "opposing" party in civil litigation, and just as an "opposing" party may be ordered to pay fees under any of the fee-shifting provisions quoted above (even though the applicable statutes do not specify that opposing party shall pay the fees), so too Appellants here may be ordered to pay fees under section 1861.10(b).[23]

Appellants' liability for intervenor fees in this proceeding is also proper as a matter of public policy. This proceeding was brought by insurer trade associations to challenge regulations that have been upheld as valid. It would be wholly unfair for any entity who was not a party to this proceeding (all other individual property-casualty insurers in California who pay into the Fund) to pay the award. The voters did not intend to create perverse incentives for insurance trade associations to resist efforts by the Commissioner and intervenors to enforce Proposition 103's provisions by allowing those trade groups to shift liability for any fee award to all insurers (and therefore to their policyholders).

CONCLUSION

For all the foregoing reasons, the Commissioner's 2007 Amendments are consistent with the language and underlying purposes of Proposition 103. FTCR respectfully requests that the Court affirm the judgment below and the award of FTCR's reasonable advocacy and witness fees.

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[23] These same insurance trade associations have been ordered to pay intervenors' fees in other unsuccessful challenges to regulations of the Commissioner. (See, e.g., CT 186-193.)

Dated: May 6, 2009

Respectfully Submitted,

Harvey Rosenfield
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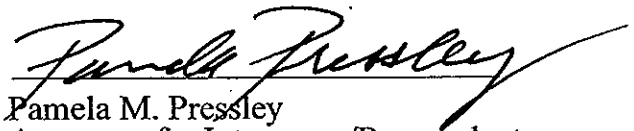
Todd M. Foreman
CONSUMER WATCHDOG

PUBLIC ADVOCATES, INC.
Richard A. Marcantonio

BY: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief, including footnotes, consists of 13,796 words as counted by the word-processing program used to generate the document.

Dated: May 6, 2009

Pamela M. Pressley

Attachment 1

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
300 Capitol Mall, 17th Floor
Sacramento, California 95814

RH06092874 November 8, 2006

FINAL TEXT OF REGULATON

Title 10. Investment
Chapter 5. Insurance Commissioner

§ 2651.1. Definitions

The following definitions shall apply to Subchapter 4.9.

(a) "Administrative Hearing Bureau" means that office within the office of the Commissioner at 45 Fremont Street, 22nd Floor, San Francisco, CA 94105 and, except where otherwise specified in this subchapter, designated for receipt of all pleadings filed pursuant to this subchapter.

(b) "Applicant" means the insurer presenting, on the form prescribed by the Commissioner and specified in section 2648.4, an application to

change any rate pursuant to California Insurance Code section 1861.05(b).

(c) "Application" means the form prescribed by the Commissioner and specified in section 2648.4, together with all supporting information included with that form, which every insurer seeking to change any rate pursuant to California Insurance Code section 1861.05(b) must provide.

(d) "Day", unless otherwise specified in these regulations, means a calendar day. "Business days" include all days except Saturdays, Sundays, and any holiday set forth in California Government Code section 6700.

The time within which any pleading may be filed or served shall exclude the first day and include the last day; however, when the last day falls on a; Saturday, Sunday or holiday the time computation shall exclude that day and include the next business day.

(e) "Filing" means the act of delivery of a paper pleading to the Administrative Hearing Bureau. An original and four copies of each pleading shall be filed with the Administrative Hearing Bureau. A specific pleading may be filed by facsimile or electronic transmission only when authorized by the administrative law judge.

(f) "Party" means the insurer whose rates are the subject of the proceeding, any person whose petition to intervene in the proceeding has been granted pursuant to section 2661.3(g), and the Department.

(g) "Pleading" means any petition, notice of hearing, notice of defense, answer, motion, request, response, brief, or other formal document filed with the Administrative Hearing Bureau pursuant to this subchapter. The original of each pleading shall be signed by each party or the party's attorney or representative.

(h) "Proceeding" means any action conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California Insurance Code, entitled "Reduction and Control of Insurance Rates," including a rate proceeding established upon the submission of a petition for hearing pursuant to California Insurance Code section 1861.05 and section 2653.1 of this subchapter.

(i) "Service" means to provide a copy of a pleading to every other party in the proceeding in conformity with California Code of Civil Procedure sections 1011 and 1013. When a party files a pleading, the party shall concurrently serve that pleading on all other parties in the proceeding.

All filed pleadings shall be accompanied by an original declaration of service in conformity with California Code of Civil Procedure sections 1011 and 1013. All served pleadings shall be accompanied by a copy of the declaration of service. An employee of a party may sign a declaration of service.

A specific pleading may be served by facsimile or electronic transmission when authorized by the receiving party.

A sample declaration of service form can be found in section 2623.9.

(j) "Settlement" means an agreement among some or all of the parties to a proceeding on a mutually acceptable outcome to the proceeding.

(k) "Stipulation" means an agreement among some or all of the parties to a proceeding on the resolution of any issue of fact or the applicability of any provision of law material to the proceeding.

(l) "Submit" means the act of delivery of a pleading to the Rate Enforcement Bureau.

AUTHORITY:

Note: Authority cited: Sections 1861.05 and 1861.055, Insurance Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994). Reference: Sections 1861.05(c), 1861.055 and 1861.08, Insurance Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989),

20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994).

§ 2653.6. Withdrawal of Application

(a) After a petition for hearing has been submitted or after a hearing has been noticed, an insurer may not withdraw its rate or class plan application without the Commissioner's approval.

(b) An insurer desiring to withdraw an application shall submit a request to withdraw its rate or class plan application. When a request to withdraw is submitted, the insurer shall serve a copy on each petitioner named in the petition.

(c) A petition for a hearing may, within five (5) days of submission of the request to withdraw, submit a response to a request to withdraw.

(d) If the Commissioner determines that a withdrawal of the insurer's application is justified, the Commissioner shall issue an order of withdrawal.

AUTHORITY:

Note: Authority cited: Sections 1861.05, 1861.055, and 1861.10, Insurance Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994). Reference: Sections 1861.05(a), 1861.055 and 1861.10(a) and (b), Insurance Code, CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal.Rptr.2d 807, 847 (1994).

§ 2661.1. Definitions

The following definitions shall apply to Articles 13 and 14 of this subchapter.

(a) "Advocacy Fees" means costs, incurred or billed, by a party for the services of an advocate in the proceeding. An advocate need not be an attorney. Advocacy fees shall not exceed market rates as defined in this section.

(b) "Compensation" means payment for all or part of advocacy fees, witness fees, and other expenses of participation and intervention in any rate hearing or proceeding other than a rate hearing.

(c) "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 Commissioner's decision awarding compensation for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability. Billing rates shall not exceed the market rate.

(d) "Other Expenses" means reasonable, actual out-of-pocket costs of an intervenor or petitioner. Out-of-pocket costs include but are not limited to expenses such as travel costs, transcript charges, postage charges, overnight delivery charges, telephone charges and copying expenses. Out-of-pocket costs also includes the costs incurred in preparing a request or amended request for award, defined in sections 2662.3 and 2662.4. The intervenor or petitioner has the burden of substantiating any costs incurred, including providing supporting documentation as requested by the Public Advisor.

(e) "Proceeding" includes those proceedings set forth in Insurance Code Section 1861.10(a).

(f) "Proceeding Other Than a Rate ~~Hearing~~Proceeding" means any proceeding, including those described in subdivision (e) above, conducted pursuant to Chapter 9 of Part 2 of Division 1 of the Insurance Code which is not a rate ~~hearing~~proceeding as defined in this section.

(g) "Public Advisor" means that official of the Department of Insurance who monitors and assists participation by members of the public in the Department of Insurance's proceedings. The Public Advisor shall not represent any member of the public and shall not advocate any substantive position on behalf of the public on any issues before the Commissioner.

(h) "Rate ~~Hearing~~Proceeding" means any proceeding conducted pursuant to Insurance Code Sections 1861.01 and 1861.05. For purposes of section 1861.05, a "rate proceeding" is established upon the submission of a petition for hearing in accordance with section 2653.1 of this subchapter, or if no petition for hearing is filed, upon notice of hearing.

(i) "Rate Hearing" means a hearing noticed by the Commissioner on his own motion or in response to a petition for hearing pursuant to Insurance Code section 1861.05, which is conducted pursuant to the applicable procedural requirements of Insurance Code section 1861.08, and subchapters 4.8 and 4.9 of this chapter.

(~~i~~j) "Represents the Interests of Consumers" means that the intervenor represents the interests of individual insurance consumer[s], or the intervenor is a group organized for the purpose of consumer protection as demonstrated by, but is not limited to, a history of representing consumers in administrative, legislative or judicial proceedings.

A party which represents, in whole or in part, any entity regulated by the Commissioner shall not be eligible for compensation. However, nothing in this subsection shall be construed to prohibit any person from intervening or participating if that person is not seeking compensation.

(~~j~~k) "Substantial Contribution" means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting

relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more relevant, credible, and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated. A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied.

(~~k~~l) "Witness Fees" means recorded or billed costs for a witness, together with associated expenses. Costs and expenses for a witness shall not exceed market rate as defined in this section.

AUTHORITY:

Note: Authority cited: Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

§ 2661.3. Procedure for Intervention in a Rate ~~Hearing~~ or Class Plan Proceeding

(a) A person desiring to intervene and become a party to a rate ~~hearing~~or class plan proceeding shall file a petition to intervene which shall be drafted in compliance with sections 2652.1-2652.4 of this subchapter. A person who petitions for a hearing may combine a petition to intervene with a petition for hearing in one pleading.

(b) The Petition shall cite the law authorizing the proposed intervention and shall contain the petitioner's interest in the proceeding, the specific issues to be raised and the positions to be taken on each issue to the extent then known, and the name, address, and telephone number of the petitioner. The verified petition shall include a statement that the intervenor or advocate will be able to attend and participate in the proceeding without delaying the proceeding or any other proceedings before the Commissioner.

(c) The Petition shall also state whether the petitioner intends to seek compensation in the proceeding, and, if so, contain an itemized estimated budget for the participation in the proceeding, which shall set forth the following:

(1) separate listings of the rates for each attorney advocate or non-attorney advocate, including:

(A) the names of each attorney advocate or non-attorney advocate,

(B) the rates to be claimed for each attorney advocate or non-attorney advocate,

(C) a description of the work to be performed by each attorney advocate or non-attorney advocate, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work; and,

(2) separate listings of the rates for each witness, including:

(A) the names of each witness and their areas of expertise,

(B) the rates to be claimed for each witness,

(C) a description of the work to be performed by each witness, an estimate of the time to be spent to perform that work and the rates, fees and costs associated with that work;

Rates contained in the estimated budget shall not exceed market rates. Submission of the budget shall not guarantee the payment of the dollar amounts set forth in the budget. The lack of objection to any item in the budget shall not imply approval of the budget.

(d) An amended budget shall be submitted as soon as possible when the intervenor learns that the total estimated budget amount increases by $ 10,000 or more.

(e) A Petition to Intervene ~~shall be~~ in a rate or class plan proceeding may be submitted to the Rate Enforcement Bureau concurrently with a petition for hearing submitted pursuant to section 2653.1 of this subchapter or filed with the Administrative Hearing Bureau after a hearing is granted, and shall be considered an "additional pleading" within the meaning of Government Code Section 11507.6. A copy of the Petition to Intervene shall be served on the Public Advisor and all of the parties to the proceeding. A Petition to Participate shall be submitted to the contact person for the proceeding, and served on the Public Advisor.

(f) Within ~~ten~~five (~~10~~5) days after filing of the Petition to Intervene, any other party may file a response to the Petition to Intervene. Any party claiming that the petitioner does not represent the interests of consumers shall so state in the response, which shall include any supporting documentation. The petitioner may reply to any allegation in the response and may reply to the allegation that it does not represent the interests of consumers within ~~eight~~three (~~8~~3) days of filing of the response.

(g) If a person who petitions for a hearing meets the requirements of this section, represents the interests of consumers and is otherwise eligible to seek compensation in proceedings before the Department pursuant to Insurance Code section 1861.10(b) and section 2662.2 of this subchapter, that person's Petition to Intervene shall be granted within fifteen (15) days of its submission. If a petition for a hearing is granted, ~~T~~the administrative law judge shall rule on ~~the~~ any Petition to Intervene subsequently filed by any person within 20 days of its filing with the Administrative Hearing Bureau.

(h) No person whose petition has been granted shall be permitted to reopen matters decided before the petition is granted without a showing of good cause.

AUTHORITY:

Note: Authority cited: Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

§ 2662.1. Purpose

The purpose of this Article is to establish procedures for awarding advocacy fees, witness fees and other expenses to petitioners, intervenors and participants in proceedings, including proceedings other than rate ~~hearings~~proceedings, before the Insurance Commissioner in accordance with Section 1861.10(b) of the Insurance Code. The definitions set forth in section 2666.1 apply to Article 14 of this subchapter.

AUTHORITY:

Note: Authority cited: Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

§ 2662.3. Request for Award

(a) A~~n~~ petitioner, intervenor or participant whose Petition to Intervene or Participate has been granted and who has been found eligible to seek compensation may submit to the Public Advisor, within 30 days after the service of the order, decision, regulation or other action of the Commissioner in the proceeding for which intervention was sought, or at the requesting petitioner's, intervenor's or participant's option, within 30 days after the conclusion of the entire proceeding, a request for an award of compensation. A~~n~~ petitioner, intervenor or participant requesting that any award ordered be made payable to a specific person or entity, other than the petitioner, intervenor or participant, that represented or advocated on behalf of the intervenor or participant during the proceeding shall include verified authorization to that effect in the request.

(b) The request shall be verified and shall be in compliance with sections 2652.1-2652.4 of this subchapter and shall include, at a minimum:

(1) a detailed description of services and expenditures;

(2) legible time and/or billing records, created as soon as possible after the work was performed, which show the date and the exact amount of time spent on each specific task; and

(3) a description of the petitioner's, intervenor's or participant's substantial contribution citing to the record, including, but not limited to, documents such as: declarations by advocates and/or witnesses, written or oral comments of the petitioner or intervenor or its witnesses regarding a rate application provided to the Department, correspondence with the parties, stipulations or settlement agreements regarding the outcome or material issues in the proceeding, and decision or order by the Department or Commissioner concerning a petition for hearing or rate or class plan application issued without a formal hearing, transcripts, proposed decisions of the Administrative Law Judge and orders demonstrating that a substantial contribution was made for the purpose of complying with section 2661.1(j). Notwithstanding section 2656.4, any confidential correspondence, documents, or declarations referencing confidential information, including but not limited to confidential settlement communications, may be submitted to the Public Advisor with a request for an award of compensation. Any such confidential material submitted to the Public Advisor will retain its confidential status. Nothing in this subsection shall require disclosure of privileged information.

The phrase "exact amount of time spent" as used in this subdivision refers either to five (5) minute or tenth (10th) of an hour increments.

(c) While parties may stipulate to a person's status as an intervenor who is eligible to seek compensation, nothing herein is intended to allow parties to enter into a stipulation regarding whether a person has made a substantial contribution for the purpose of complying with section 2661 of this subchapter.

(ed) The phrase "each specific task," as used in this subdivision refers to activities including, but is 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, 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, the subject matter of the hearing and the names of witnesses who appeared at the hearing, if any.

~~Nothing in this subsection shall require disclosure of privileged information.~~

(de) Within 15 days after service of the request, any other party may submit a response to the request. The response shall be submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding. The intervenor or participant may reply to any such response within 15 days after service of the response. The reply shall be

submitted to the Public Advisor and a copy shall also be provided to all parties to the proceeding.

(ef) The Public Advisor shall require an audit and/or may inspect the books and records of the intervenor or participant to the extent necessary to verify the basis for the award. The Public Advisor shall maintain the confidentiality of the intervenor's books and records to the extent allowed by law.

(fg) Any party questioning the market rate or reasonableness of any amount set forth in the request shall, at the time of questioning the market rate or reasonableness of that amount, provide a statement setting forth the fees, rates, and costs it expects to expend in the proceeding.

AUTHORITY:

Note: Authority cited: Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

§ 2662.5. Requirements for Awards

(a) Subject to subdivision (b) herein, advocacy fees, witness fees, and other expenses of participation in a proceeding shall be awarded to any petitioner, intervenor or participant who complies with section 2662.3 and satisfies both of the following requirements:

(1) The petitioner, intervenor or participant's presentation makes a substantial contribution as evidenced by specific citations to the petitioner's, intervenor's or participant's direct testimony, cross-examination, legal arguments, briefs, motions, discovery, declarations by advocates and/or witnesses, written or oral comments of the intervenor or its witnesses regarding a rate application provided to the Department, correspondence with the parties, stipulations or settlement agreements, and decision or order by the Department or the Commissioner on a petition for hearing or rate or class plan application issued without a formal hearing, or any other appropriate evidence; and,

(2) The petitioner, intervenor or participant represents the interests of consumers.

(b) To the extent the substantial contribution claimed by an petitioner, intervenor or participant duplicates the substantial contribution of another party to the proceeding and was not authorized in the ruling on the Petition to Intervene or Participate, the petitioner's, intervenor's or participant's compensation may be reduced. Participation by the Department of Insurance staff does not preclude an award of compensation, so long

as the petitioner's, intervenor's, or participant's substantial contribution to the proceeding does not merely duplicate the participation by the Department of Insurance's staff. In assessing whether there was duplication, the Commissioner will consider whether or not the petitioner, intervenor or participant presented relevant issues, evidence, or arguments which were separate and distinct from those presented by any party or the Department of Insurance staff.

AUTHORITY:

Note: Authority cited: Section 1861.10, Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805, 824 (1989), 20th Century Insurance Company v. John Garamendi, 8 Cal.4th 216, 281, 32 Cal. Rptr. 2d 807, 847 (1994). Reference: Sections 1861.10(a) and 1861.10(b), Insurance Code; and CalFarm Insurance Company, et al. v. George Deukmejian, et al., 48 Cal.3d 805 (1989), 20th Century Insurance Company et al. v. John Garamendi 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994).

PROOF OF SERVICE
[BY OVERNIGHT, U.S. OR INTRA-AGENCY MAIL, FAX TRANSMISSION AND/OR PERSONAL SERVICE]

State of California, City Santa Monica, County of Los Angeles

I am employed in the City of Santa Monica and County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1750 Ocean Park Blvd., Suite #200, Santa Monica, California 90405, and I am employed in the city and county where this service is occurring.

On May 6, 2009, I caused service of true and correct copies of the following document:

RESPONDENT'S BRIEF OF INTERVENOR

upon the persons named in the attached service list, in the following manner:

1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.

2. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed. I am readily familiar with the regular practice of collection and processing of correspondence for mailing of U.S. Mail and for sending of Overnight mail. If mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a box or other facility regularly maintained by the express service carrier, or delivered this day to an authorized courier or driver authorized by the express service carrier to receive documents, in the ordinary course of business, fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 6, 2009, at Santa Monica, California.

Carmen Aguado

SERVICE LIST

Person Served	**Method of Service**
Mark Richelson Christine Zarifian Deputy Attorneys General OFFICE OF THE ATTORNEY GENERAL 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Tel: (213) 897-2478 Fax: (213) 897-5775 (Counsel for Respondents Insurance Commissioner, Steve Poizner and California Department of Insurance)	_____ FAX ____X__ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Robert Hogeboom Michael A.S. Newman Suh Choi BARGER & WOLEN LLP 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 Tel: (213) 680-2800 Fax: (213) 614-7399 (Counsel for Appellants ACIC, PIFC, AIA and PADIC)	_____ FAX ____X__ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
David M. Axelrad Mitchell C. Tilner HORVITZ & LEVY LLP 15760 Ventura Blvd., 18th Floor Encino, CA 91436 Tel: (818) 995-0800 Fax: (818) 995-3157 (Counsel for Appellants ACIC, PIFC, AIA and PADIC)	_____ FAX ____X__ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL
Honorable James C. Chalfant Los Angeles Superior Court 111 North Hill Street, Dept. 85 Los Angeles, CA 90012	_____ FAX ____X__ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED _____ EMAIL

Clerk of the Court
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

_____ FAX
____X__ U.S. MAIL [4 copies]
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_____ HAND DELIVERED
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