

HARVEY ROSENFELD (SBN 123082)
PAMELA M. PRESSLEY (SBN 180362)
TODD FOREMAN (SBN 229536)
THE FOUNDATION FOR TAXPAYER
AND CONSUMER RIGHTS
1750 Ocean Park Boulevard, Suite 200
Santa Monica, California 90405
Tel. (310) 392-0522
Fax (310) 392-8874

Attorneys for
The Foundation for Taxpayer and Consumer Rights

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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

Petitioners and Plaintiffs,

v.

STEVE POIZNER, in his capacity as Insurance
Commissioner of the State of California; and
CALIFORNIA DEPARTMENT OF INSURANCE,

Respondents and Defendants.

Case No. BS109154

**EX PARTE APPLICATION FOR
LEAVE TO INTERVENE;
MEMORANDUM OF POINTS AND
AUTHORITIES AND
DECLARATION OF PAMELA
PRESSLEY IN SUPPORT THEREOF**

Date Action Filed: May 25, 2007

Date: June 27, 2007

Time: 8:30 a.m.

Dept.: 85

Judge: Dzintra Janavs

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

The Foundation for Taxpayer and Consumer Rights ("FTCR") applies for an ex parte order granting it leave to intervene in the above-entitled action as authorized by section 1861.10(a) of the California Insurance Code and section 387(b) of the California Code of Civil Procedure. FTCR makes this application ex parte in order to minimize delay and allow for filing an opposition memorandum at the same time as Respondents. Alternatively, FTCR applies for an ex parte order shortening time for filing a Notice of Motion and Motion for Leave to Intervene.

1 This application for leave to intervene is based on the grounds that (1) FTCR has an
2 unconditional statutory right to intervene under section 1861.10(a) of the Insurance Code; (2)
3 independently, as a participant in the rulemaking proceeding that is the subject of this action and a
4 frequent petitioner and intervenor before the Department of Insurance, FTCR also meets the
5 requirements for mandatory and permissive intervention pursuant to section 387(b) and (a) of the Code
6 of Civil Procedure. FTCR has the requisite interests in this litigation and in the preservation of the
7 amended regulations Petitioners/Plaintiffs challenge, namely sections 2651.1, 2661.1, 2661.3, 2662.1,
8 2662.3 and 2662.5, which set forth the procedural requirements for intervention in administrative
9 proceedings before the Department of Insurance and for requests and awards of compensation therein.

10 Notice of this ex parte application has been duly given to all parties in conformance with the
11 requirements of California Rules of Court, rules 3.1203(a) and 3.1204(a). Counsel for
12 Petitioners/Plaintiffs have declined to stipulate to FTCR's intervention except on the condition that
13 FTCR waive certain of its rights and arguments in opposition to the petition for writ of mandate in this
14 proceeding, which FTCR is not willing to do. (Declaration of Pamela Pressley ["Pressley Decl."], ¶5.)
15 Respondents, Steve Poizner, Insurance Commissioner of the State of California, and the California
16 Department of Insurance, through their counsel, have affirmed that they support FTCR's intervention.
17 (*Id.* at ¶6.)

18 This application is based on the accompanying memorandum of points and authorities and
19 supporting declaration of Pamela Pressley, which set forth the statutory authority for intervention and
20 summarize Intervenor's compliance with the notice requirements for ex parte applications found in
21 Rule 3.1203(a) and 3.1204(a) of the California Rules of Court, and upon such further argument and
22 evidence as may be presented to this court. Intervenor's proposed complaint in intervention is filed
23 concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

The Foundation for Taxpayer and Consumer Rights (hereafter "FTCR") seeks leave to intervene in this matter in order to uphold the rights of consumer participants to be awarded their reasonable advocacy fees and expenses for making a substantial contribution to decisions of the Insurance Commissioner in insurance rate proceedings. In their Petition for Writ of Mandate and Complaint for Declaratory Relief, Petitioners/Plaintiffs The Association of California Insurance Companies, The Personal Insurance Federation of California, The American Insurance Association, and The Pacific Association Of Domestic Insurance Companies (collectively "Petitioners") seek to invalidate amendments duly adopted by the Insurance Commissioner to the procedural regulations governing rate proceedings and consumer intervention in such proceedings pursuant to Insurance Code sections 1861.05 and 1861.10 and his inherent rulemaking authority (*CalFarm Insurance Company, et al. v. George Deukmejian, et al.* (1989) 48 Cal.3d 805; 824, *20th Century Insurance Company v. Garamendi* (1994) 8 Cal.4th 216, 245). Contrary to Petitioners' contentions, the Commissioner's regulatory amendments conform to the statutory requirements of section 1861.10, which allow for consumer intervention in all proceedings before the Department of Insurance and the courts and require compensation for their substantial contribution to decisions and orders therein. FTCR seeks leave to intervene in support of the Commissioner's defense of the regulations from FTCR's perspective as a frequent petitioner and intervenor representing the interests of consumers in Department of Insurance proceedings.

As set forth below, FTCR has an unconditional right to intervene in this action pursuant to Insurance Code section 1861.10(a);¹ and, it also meets the requisite criteria for intervention as of right pursuant to Code of Civil Procedure section 387(b), and permissive intervention pursuant to Code of Civil Procedure section 387(a).

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

BACKGROUND AND STATEMENT OF FACTS

A. Proposition 103's Prior Approval and Public Participation Requirements.

Proposition 103 requires that all property-casualty insurers obtain the prior approval of the Insurance Commissioner for proposed rate changes. (Ins. Code §§ 1861.01(c) and 1861.05(b).) The Commissioner is required to reject rates that are "excessive, inadequate, unfairly discriminatory, or otherwise in violation of [Proposition 103]." (Ins. Code §§ 1861.01(c); 1861.05(a) and (b).) The "prior approval" provision of Proposition 103, section 1861.05 reads, in relevant part, as follows:

(a) No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter. In considering whether a rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income.

(b) Every insurer which desires to change any rate shall file a complete rate application with the commissioner. A complete rate application shall include all data referred to in Sections 1857.7, 1857.9, 1857.15, and 1864 and such other information as the commissioner may require. The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article.

(c) The commissioner shall notify the public of any application by an insurer for a rate change. The 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.

(Ins. Code § 1861.05(a)-(c).)

Consumer participation in the review and approval of rates is central to the reforms enacted by the voters. (See *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045, emphasis added [interpreting section 1861.07 in a manner "consistent with Proposition 103's goal of fostering consumer participation in the rate-setting process"].)

To ensure consumers' participation in Proposition 103 matters, the voters added section 1861.10 to the Insurance Code. Subdivision (a) of that section provides as follows:

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.

(Ins. Code § 1861.10(a).) By its plain language, subdivision (a) refers to "any proceeding permitted or established pursuant to this chapter", and not "an adjudicative proceeding" or "hearing".

Insurance Code section 1861.10(a) thus accords members of the public broad concurrent standing rights in the judicial branch and before the Department. Relevant to the administrative context here is the standing granted to any person to "initiate or intervene" in a "proceeding," including by filing a petition requesting a hearing on a rate application pursuant sections 1861.05(c) and 1861.10(a) and by filing a petition to intervene in a rate proceeding pursuant to section 1861.10(a).

Section 1861.10(b) establishes, *without any limitation*, the right to compensation for "any person" who "represents the interests of consumers" and who makes a "substantial contribution" to the adoption of an order or decision by the commissioner or a court. Section 1861.10(b) reads:

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.

(Ins. Code 1861.10(b), emphasis added.) Taken together, sections 1861.05 – 1861.09. and 1861.10 set forth a comprehensive statutory scheme to encourage effective and professional public participation in the implementation and enforcement of the provisions of the Insurance Code enacted by Proposition 103 relating to the approval of rates.

B. The Issues Sought to be Addressed by Amendments to the Intervenor Regulations.

The Intervenor Regulations (sections 2661.1 - 2662.8 of Title 10 of the California Code of Regulations), adopted in 1995 and amended by the Commissioner in 1996 and most recently in 2006, set forth the regulations implementing the provisions of Insurance Code section 1861.10 with respect to administrative challenges to an insurer's present or proposed rates or practices and other administrative proceedings. These regulations implement the statutory process and criteria for (1) allowing persons to initiate and intervene in rate and other administrative proceedings; (2) seeking an award of

1 compensation; and (3) determining whether a person representing the interests of consumers has made
2 a substantial contribution to a decision, order or regulation.

3 As the Commissioner stated in proposing the amendments to the Intevenor Regulations at issue
4 in this case, "[i]t has been the Department's practice to encourage consumer representatives and
5 applicants to resolve rate challenges informally so as to avoid engaging in lengthy formal hearings that
6 benefit no one." (Initial Statement of Reasons, RH06092874, Sept. 22, 2006, page 2 [attached as
7 Exhibit C to Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, filed May 25,
8 2007.]) The Commissioner further explained that "[o]ften during negotiations, insurers seek to
9 withdraw their applications. In some instances, applicants have withdrawn their applications after a
10 petition for hearing has been filed and after the petitioner has expended substantial time and effort
11 advocating its position through its advocates and experts. In these instances, the result of the informal
12 process has been either no rate change, or a substantial alteration in the rate ultimately approved by the
13 Commissioner. Such results benefit the public without the necessity of conducting a formal hearing. [¶]
14 In several of these instances, either the challenge was settled by the parties or the case was dismissed as
15 moot when the applicant chose to withdraw rather than proceed with its application and potentially be
16 subject to a hearing." (*Ibid.*)

17 These Departmental practices were summarized in an Advisory Notice issued by the
18 Commissioner to insurance companies subject to Proposition 103 on February 18, 2005. It stated in
19 pertinent part as follows:

20 The purpose of this advisory notice is to explain how the Department handles
21 applications for rate increases when the following two conditions exist: first, the rate
22 increase sought in the original rate application (the "proposed rate adjustment") exceeds
23 the applicable threshold set forth in California Insurance Code ("CIC") Section
1861.05(c)(3). Second, a consumer or his or her representative ("consumer
representative") has requested a hearing on the rate application.

24 When these two conditions are met, the Department will initiate joint discussions that
25 include the consumer representative and the applicant regarding the rate application. If
26 the applicant submits any written or electronic data or correspondence regarding the
application to the Department, the applicant must also send a copy to the consumer
representative.

27 If the applicant, consumer representative and Department agree to a specific rate change
28 the applicant may amend its rate application to request the agreed rate change. However,

1 if the applicant, consumer representative and Department do not all agree to a specific
2 rate change the applicant will have two options: the applicant may pursue the rate
3 increase in a public hearing pursuant to CIC Sections 1861.05 and 1861.08 before the
4 Department's Administrative Hearing Bureau, or the applicant may withdraw the rate
5 application.

6 An applicant may withdraw an unapproved rate application at any time prior to issuance
7 of a notice of hearing on the application. When a notice of hearing is issued the matter is
8 referred to the Administrative Hearing Bureau. After the matter is referred to
9 Administrative Hearing Bureau withdrawal may be permitted under certain
10 circumstances. After an applicant withdraws a rate application, the applicant may file a
11 new rate application at any time. The new rate application will be considered
12 independently and will not be prejudiced by the existence of the prior rate application or
13 any prior request for hearing.

14 (Advisory Notice, Cal. Ins. Comm'r, Feb. 18, 2005.)

15 In one case (*In the Matter of the Rate Applications of SCPIE*, PA02025379 (Cal. Ins. Comm'r,
16 2004)), the Commissioner awarded FTCR advocacy fees for its substantial contribution after the
17 proceeding ended in the withdrawal of the rate application and a decision by the Commissioner prior to
18 a determination of FTCR's right to intervene. The insurer sought review, and this Court overturned the
19 Commissioner's decision "[d]espite the statutory requirement of Proposition 103 that the Commissioner
20 shall award compensation to any person representing the interests of consumers who make a substantial
21 contribution to his orders of decision." (Initial Statement, RH06092874, Sept. 22, 2006, page 2.) That
22 decision, however, was limited to the factual situation before it, relying in part upon the fact that no
23 petition to intervene was granted on the rate application challenged, to hold that FTCR, the petitioner
24 there, was not entitled to compensation. (Judgment Granting Petition for Writ of Mandamus [adopting
25 interlineated Tentative Ruling attached thereto], *American Healthcare Indemnity Company and SCPIE*
26 *Indemnity Company v. Garamendi*, Super. Ct. L.A. County, 2005, No. BS094515, page 4.) That case
27 did not determine the issues here, i.e., whether the Commissioner's duly adopted amendments to the
28 Intervenor Regulations, as described below, are consistent with and reasonably necessary to effectuate
the purposes of Proposition 103.

29 C. The Rulemaking Proceeding to Amend the Intervenor Regulations.

30 To address the practical problems that had been occurring in the intervenor process, on or about
31 September 22, 2006, the Commissioner issued a Notice of Proposed Action and Notice of Public
32

1 Hearing together with proposed amendments to certain portions of the Intervenor Regulations. The
2 Commissioner set forth the purpose of the proposed amendments as follows:

3 Proposition 103, approved by California voters in 1988, established the requirement that
4 all property-casualty insurers obtain the prior approval of the Insurance Commissioner
5 for proposed rate changes. (Insurance Code §1861.05). Proposition 103 permits consumer
6 participation in the approval process. (Insurance Code §1861.10(a)). It further requires
7 the Commissioner to award reasonable advocacy and witness fees to a consumer when
8 the consumer makes a "substantial contribution" to the adoption of any order, regulation,
9 or decision by the Commissioner or a court. (Insurance Code §1861.10(b)).

10 As required by Insurance Code §1861.055, the Department has promulgated regulations
11 under Title 10, Chapter 5 of the Code of Regulations (CCR) governing the prior approval
12 process, including regulations governing consumer participation. *The Department wishes
13 to amend Subchapter 4.9 (Rules of Practice and Procedure for Rate Proceedings) to
14 clarify that consumers, who participate in the approval process after having filed a
15 petition for a hearing, may seek an award of reasonable advocacy fees.*

16 (Initial Statement of Reasons, RH06092874, Sept. 22, 2006, page 1, bold/italics added.)

17 The Commissioner's Initial Statement of Reasons (as incorporated by reference in his final
18 statement of reasons) further explained the necessity of the amendments to the Intervenor Regulations
19 to conform to the underlying statutes as follows:

20 The Commissioner has determined that amendment of certain regulations in Subchapter
21 4.9 is necessary in order to properly implement the requirements, purposes and intent of
22 the statutes. Specifically, the regulations must be amended to make clear that *advocacy
23 performed by a consumer representative (whether a "petitioner," "intervenor," or
24 "participant") prior to a decision by the Commissioner to grant or deny a petition for
25 hearing pursuant to Section 1861.05(c) is to be compensated so long as a consumer has
26 made a "substantial contribution" to a decision or order ending the proceeding.*

27 ...
28 The Commissioner believes that the proposed adoption and amendments are not only
authorized by, but also necessitated by Proposition 103. Section 1861.10(b) contains only
two prerequisites: (1) that the person seeking advocacy and witness fees "represents the
interests of consumers"; and (2) that the person has "made a substantial contribution to
the adoption of any order, regulation, or decision by the commissioner or a court."
(Insurance Code §1861.10(b).) Subsection (b) further provides that "where advocacy
occurs in response to a rate application, the award shall be paid by the applicant." (Ibid.)
When these two statutory conditions are met, the Commissioner "shall award reasonable
advocacy and witness fees and expenses." (Ibid..)

1 The Commissioner's view is that the statute plainly mandates that "any person" who
2 "represents the interests of consumers" and who "made a substantial contribution to the
3 adoption of any order, regulation, or decision by the commissioner" is entitled to an
4 award of compensation for reasonable advocacy fees and expenses.

5 ...
6 In summary, *the Commissioner believes that, as the voters intended, the scrutiny of*
7 *consumer representatives is an important tool to ensure that applicants comply with the*
8 *statutory and regulatory prohibition on "excessive, inadequate, and unfairly*
9 *discriminatory" rates, or rates that otherwise violate the law, and that if consumer*
10 *representatives are denied the ability to seek compensation when they make a*
11 *substantial contribution in pre-hearing proceedings, such scrutiny would be*
12 *discouraged and curtailed.*

13 Such a result contravenes the public policy underlying section 1861.10 and analogous
14 intervenor compensation statutes of encouraging consumer participation in administrative
15 and court proceedings, and thereby aiding regulators and courts in their decisions. (See
16 *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 836 [voters for Prop. 103 "favored
17 a measure that provides for public regulatory hearings with consumer participation"];
18 *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 686
19 [courts "should seek an interpretation of the statute which best facilitates compensation"];
20 *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045 [interpreting
21 section 1861.07 in a manner consistent with Proposition 103's goal of fostering consumer
22 participation in the rate-setting process"].)

23 (*Id.*, pages 1-4.)

24 In their final form, the regulatory amendments to Subchapter 4.9 of Chapter 5 of Title 10 of the
25 California Code of Regulations as adopted by the Commissioner and filed with the Secretary of State
26 were narrowly tailored to achieve the important purposes of Proposition 103. As enacted, the
27 amendments primarily do the following:

28 (a) clarify that a "proceeding" on a rate application is not limited to a "hearing" (10 CCR §§
2651.1(h) and 2661.1(f), (h), (i), and (k));

(b) provide that petitions to intervene may be submitted at the same time as a petition for
hearing or after a hearing is granted, shorten the timelines for responses to and replies in support of
petitions to intervene, and provide that the Commissioner as well as an administrative law judge may
rule on a petition to intervene (10 CCR § 2661.3(a), (e)-(g));

(c) specify additional documentation that may support a "substantial contribution" showing in
seeking an award of compensation (10 CCR §§ 2662.3(b) and 2662.5(a)(1)); and

DISCUSSION

I. The Foundation for Taxpayer and Consumer Rights has an Unconditional Right to Intervene in this Action Pursuant to Insurance Code Section 1861.10(a).

Section 1861.10(a), confers an unconditional right on FTCR to intervene in this matter as follows:

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*.

(Ins. Code § 1861.10(a), italics added.)

This action is a "proceeding permitted or established" pursuant to Proposition 103, as Plaintiffs have "initiate[d]" it to "challenge [an] action of the commissioner under" Proposition 103. (Ins. Code § 1861.10(a).) More specifically, Plaintiffs complaint and petition for writ of mandate seeks to invalidate duly enacted regulations of the Insurance Commissioner that implement the consumer participation provisions of section 1861.10(a). Moreover, FTCR seeks to enforce sections 1861.05 and 1861.10.² Courts have granted consumer groups leave to intervene pursuant to section 1861.10(a) in a number of cases involving the enforcement of Proposition 103. (See, e.g., *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1038; *Amwest Surety Ins. v. Wilson* (1989) 11 Cal.4th 1243, 1250; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241.)

Accordingly, FTCR has invoked section 1861.10(a) on numerous occasions to both commence and intervene in judicial proceedings before the courts of California and administrative proceedings before the CDI to protect its and the public's interests in the construction and enforcement of the provisions of Proposition 103, and specifically including the statute at issue here, section 1861.10, which is contained within article 10, as referenced in section 1861.10(a).

² The "article" [article 10 of chapter 9 of Division 1 of the Insurance Code] referenced in section 1861.10(a) contains Insurance Code sections 1861.01-1861.16.

1 FTCR thus has the unconditional right to intervene in this action pursuant to section
2 1861.10(a).

3 **II. The Foundation for Taxpayer and Consumer Rights is Entitled to Intervene As A Matter of**
4 **Right Under Code of Civil Procedure Section 387(b).**

5 In addition to the unconditional right to intervene in this action conferred by section
6 1861.10(a), section 387(b) of the California Code of Civil Procedure also provides for intervention as
7 of right,

8 ...if the person seeking intervention claims an interest relating to the property or
9 transaction which is the subject of the action and that person is so situated that the
10 disposition of the action may as a practical matter impair or impede that person's ability
11 to protect that interest, unless that person's interest is adequately represented by existing
12 parties,

13 (Civ. Proc. Code § 387(b).) If these conditions are met, "the court *shall*, upon timely application,
14 permit that person to intervene." (*Ibid.*, italics added.)

15 FTCR satisfies the four conditions for intervention as of right under Code of Civil Procedure
16 section 387(b) as follows:

17 **A. This Application To Intervene Is Timely.**

18 There is no question that FTCR's application to intervene in this action is timely. FTCR was
19 served with the petition on June 5, 2007. Respondents, pursuant to a stipulated extension of time, filed
20 and served their Answer on July 20. As of this date, to FTCR's knowledge, no motion has been filed
21 by Petitioners setting a hearing on their petition for writ of mandate. It is FTCR's intention to not delay
22 the action, but rather to file its opposition papers at the same time that Respondents file a response.
(Pressley Decl., ¶3.)

23 **B. Intervenor Has the Requisite Interest in the Subject Matter of this Action.**

24 This action involves a challenge to regulatory amendments promulgated by the Commissioner to
25 the procedural regulations governing rate proceedings and consumer intervention and rights to
26 compensation therein pursuant to sections 1861.05 and 1861.10. FTCR is a frequent intervenor in
27 Departmental proceedings, whose right to compensation Petitioners seek to curtail by this action. Thus
28 FTCR has a direct pecuniary interest in the subject matter of the litigation and clearly satisfies this
second prong of Code of Civil Procedure section 387(b).

Moreover, FTCR has an overarching interest in upholding the rights of all consumer participants in Departmental rate proceedings to be awarded reasonable advocacy fees and expenses pursuant to section 1861.10(b). Apart from FTCR's direct financial interest, such an interest in enforcing Proposition 103's consumer participation provisions is itself sufficient to warrant intervention. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 500 [organization seeking to defend statewide initiative on term limits and legislative spending, which it had sponsored, had sufficient interest]; see also *Simac Design, Inc. v. Alciatl* (1979) 92 Cal. App. 3d 146, 153 [organization of residents and voters seeking to implement an enacted initiative in its community had sufficient interest]; see also *Bustop v. Superior Court*, 69 Cal. App. 3d 66, 70 [organization representing parents in proceeding to determine whether desegregation plan complied with Supreme Court's decision had sufficient interest].)

C. Without Intervention, Disposition of This Proceeding May Impair or Impede the Interests of the Foundation for Taxpayer and Consumer Rights.

Section 387(b) requires, thirdly, that disposition of the proceeding may, as a practical matter, impair or impede the interests of those seeking intervention in order to protect them. If insurers' petition is successful, FTCR stands to receive no compensation for the considerable time spent by its attorneys and experts for its participation in rate proceedings that conclude without a formal hearing. Thus, an unfavorable disposition of this matter will impair and impede FTCR's interests in being compensated for its advocacy work as required by the relevant statutes. A decision that invalidates the Commissioner's regulatory amendments will also negatively impact FTCR's interest in protecting the broad rights of consumer standing and intervention in rate proceedings conferred by that provision. A judgment for Petitioners in this action will affect the pocketbooks of the numerous members and constituents of FTCR, who will not have their interests adequately represented if FTCR and other consumer intervenors are discouraged from participating in rate proceedings by not being compensated for their substantial contribution. Indeed, the interests of the California voters and the general public in ensuring that insurance rates are not excessive are at stake.

D. FTCR's Interests are Not Adequately Represented by an Existing Party.

Though the Commissioner is adequately represented by the Attorney General in this matter, FTCR has a direct financial interest in the denial of the instant writ petition to uphold the amendments

1 to the Intervenor Regulations as stated above. Moreover, FTCR has a broader organizational interest in
2 protecting the rights of all consumer representatives to participate in insurance regulatory and
3 enforcement actions on an equal footing with insurers, including the right of consumer representatives
4 to be compensated for their advocacy and witness fees and expenses pursuant to the mandate of section
5 1861.10(b). It is possible that FTCR's interests may at some point conflict with the separate interests of
6 the Commissioner's in resolving this litigation. Additionally, the Commissioner may have a different
7 interpretation of the requirements under section 1861.05 or his Advisory Notice.

8 Because FTCR's interests in this litigation can only be fully protected by FTCR itself, and for
9 all of the reasons stated above, this court is required to permit FTCR to intervene pursuant to Code of
10 Civil Procedure section 387(b).

11 **III. The Grounds for Permissive Intervention are Satisfied.**

12 Intervention is not only required as a result of the "unconditional right" conferred by section
13 1861.10(a), but also on the grounds that govern permissive intervention. California's broad standard
14 for permissive intervention extends to any party who makes "timely application" and "who has an
15 interest in the matter in litigation, or in the success of either of the parties, or an interest against both."
16 (Code Civ. Proc. § 387(a).) "The purposes of [permissive] intervention are to protect the interests of
17 those who *may* be affected by the judgment" (*Timberidge Enterprises, Inc. v. City of Santa*
18 *Rosa* (1978) 86 Cal. App. 3d 873, 881-82, quoting *County of San Bernardino v. Harsh California*
19 *Corp.* (1959) 52 Cal. 2d 341, 346, emphasis in original.)

20 Here, both of the alternative standards for permissive intervention are met. As set forth above,
21 FTCR's application is timely, and FTCR clearly has "an interest in the matter in litigation,"
22 specifically, the validity of the challenged regulatory amendments that provide for intervenors to seek
23 compensation in rate proceedings that do not proceed to a formal hearing when they otherwise meet
24 the statutory requirements. FTCR has established its interest by its participation in the proceedings
25 that led to the Commissioner's adoption of the amendments now challenged by the Petitioners
26 through the submission of oral and written comments. FTCR also expends substantial resources to
27 participate in rate proceedings in which it has substantially contributed to the Commissioner's
28

1 decisions to deny or greatly reduce insurers' requested rate hikes. Were Petitioners to succeed in
2 overturning the Commissioner's amendments, FTCR would stand to not be compensated for its
3 substantial contribution in rate proceedings that conclude without a formal hearing. As a result,
4 FTCR would not be able to represent the interests of consumers in rate proceedings on an equal
5 footing with insurers and aid the Commissioner in making his final decisions, as Proposition 103
6 intended. For the same reasons, FTCR also claims an interest in the success of the Commissioner in
7 preserving the amended regulations.

8 **IV. In the Alternative, the Court Should Shorten Time For Hearing a Noticed Motion For**
9 **Leave To Intervene.**

10 Because FTCR does not wish to delay any schedule that may be set for briefing and a hearing
11 on the writ petition, FTCR makes this application ex parte. Courts regularly grant intervention on ex
12 parte application. (See, e.g., *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys.*, 95 Cal. App.
13 4th 709, 714 (2002).) In the event, however, that the Court deems it preferable to hear this matter as a
14 noticed motion, FTCR respectfully requests an order shortening the time for hearing that motion, so
15 that it can be heard on or before August 13, with FTCR's reply brief due on August 8.

16 **CONCLUSION**

17 For all the foregoing reasons, FTCR respectfully requests the Court to grant FTCR's application
18 for leave to intervene, or in the alternative, issue an order shortening time for hearing on FTCR's
19 motion.

20 Dated: July 26, 2007

Respectfully Submitted,

21 THE FOUNDATION FOR TAXPAYER AND
22 CONSUMER RIGHTS
23 Harvey Rosenfield
24 Pamela Pressley
25 Todd Foreman

26 BY:

27 
28 Pamela Pressley
Attorneys for the FOUNDATION FOR
TAXPAYER AND CONSUMER RIGHTS

DECLARATION OF PAMELA PRESSLEY

The undersigned certifies and declares as follows:

1. I am a member of the Bar of the State of California and an attorney for The Foundation for Taxpayer and Consumer Rights (FTCR). I have personal knowledge of the facts stated in this Declaration and, if called upon, could and would testify competently thereto.

2. FTCR was served with the petition for writ of mandate filed in the above-captioned matter on June 5, 2007, over 10 days after it was filed.

3. FTCR seeks leave to intervene by ex parte application in order to preserve its rights to file opposition papers without delaying any briefing schedule that may be set by the Court on the petition for writ of mandate and to participate in any briefing and argument that may occur regarding a request for a preliminary injunction. FTCR has made this ex parte application as soon as practicable after receiving notice of the action, and just one week after Respondents filed their Answer.

4. I was lead counsel for FTCR in the rulemaking proceeding before the Department of Insurance captioned *In the Matter of the Rulemaking Proceeding to Amend Sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5 of Subchapter 4.9, Title 10, of the California Code of Regulations*, RH06092874, Cal. Ins. Comm'r., Sept. 22, 2006, which led to the adoption of the amendments at issue in this case. As such, I am familiar with the procedural history and record in that matter.

5. On June 6, 2007, my colleague, Todd Foreman spoke by telephone with Suh Choi of Barger & Wolen, counsel for Petitioners. Mr. Foreman informed Ms. Choi that FTCR intended to intervene in this action and sought a stipulation from Petitioners to FTCR's intervention. Ms. Choi indicated that Petitioners did not generally oppose FTCR's intervention and would agree to it, but only on the condition that FTCR waive certain of its substantive rights, which FTCR was not willing to do. FTCR's letter to Petitioners' counsel dated June 7, 2007 requested that Petitioners reconsider a stipulation to FTCR's intervention. On June 18, FTCR received a letter from counsel for Petitioners reiterating that it would not stipulate to FTCR's intervention unless it waived certain of its rights and arguments opposing the petition.

6. On July 24, 2007, I contacted Christine Zarifian, the Deputy Attorney General representing Respondents Insurance Commissioner and the California Department of Insurance, to

1 notify her that FTCR would appear ex parte in Department 85 on either Thursday, July 26 or Friday,
2 July 27 to seek leave to intervene. On July 26, at approximately 9:30 a.m., I again called Ms. Zarifian
3 and informed her that FTCR would appear ex parte on Friday, July 27, 2007 at 8:30 a.m. in Department
4 85 to seek leave to intervene. She affirmed that Respondents would support this request and that she
5 would appear at the ex parte hearing.

6 7. My colleague Todd Foreman also called Suh Choi, counsel for Petitioners, on July 24 to
7 notify her of FTCR's intention to appear ex parte in Department 85 on either Thursday, July 26 or
8 Friday, July 27 to seek leave to intervene. On July 26, 2007 at approximately 9:20 a.m., I personally
9 called Ms. Choi and left a voicemail message informing her that FTCR would appear ex parte on
10 Friday, July 27 at 8:30 a.m. in Department 85 to seek leave of the court to intervene.

11 7. On July 26, at approximately 9:55 a.m., I personally notified counsel for Petitioners and
12 Respondents in writing by facsimile transmission that FTCR would, on Friday, July 27 at 8:30 a.m.,
13 appear ex parte before Judge Dzintra Janavs in Department 85, to seek leave to intervene. That letter
14 also included an offer to stipulate to FTCR's intervention to avoid a hearing on FTCR's request.

15 8. On Thursday, July 26, the following documents were served on Petitioners' and
16 Respondents' counsel by facsimile transmission:

- 17 (a) Ex Parte Application for Leave to Intervene; Memorandum of Points and Authorities
18 and Declaration of Pamela Pressley in Support Thereof, dated July 26, 2007;
19 (b) Proposed Order; and
20 (c) Proposed Complaint in Intervention.

21 9. A proof of such services is filed concurrently herewith.

22 10. Attorneys for Petitioners and Plaintiffs are:

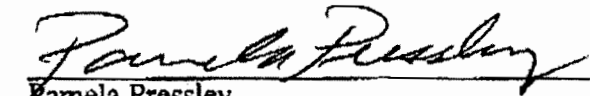
23 Robert W. Hogeboom
24 Suh H. Choi
25 Michael A. S. Newman
26 BARGER & WOLEN LLP
27 633 West Fifth Street, 47th Floor
28 Los Angeles, CA 90071
Phone: (213) 680-2800
Fax: (213) 614-7399

11. Attorneys for Respondents and Defendants are:

Edmund G. Brown, Jr.
Attorney General
W. Dean Freeman
Felix E. Leatherwood
Supervising Deputy Attorneys General
Mark P. Richelson
Christine Zefarian
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
300 South Spring Street, Suite 1702
Los Angeles, California 90013
(213) 897-2479
(213) 897-5775

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed On: July 26, 2007


Pamela Pressley

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 July 26, 2007, I caused service of true and correct copies of these documents,

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' EX PARTE APPLICATION FOR LEAVE TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF PAMELA PRESSLEY IN SUPPORT THEREOF

PROOF OF SERVICE

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 July 26, 2007, at Santa Monica, California


Mark Reback

SERVICE LIST

Person ServedMethod of Service

Natasha Ray
 Lizbeth Landsman-Smith
 California Department of Insurance
 300 Capitol Mall
 17th Floor
 Sacramento, California 95814
 Tel: (916) 492-3559
 Fax: (916) 324-1883

☒ FAX
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ HAND DELIVERED

(Counsel for Respondents Insurance
 Commissioner, Steve Poizner and California
 Department of Insurance)

Mark Richelson
 Christine Zefarian
 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

☒ FAX
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ HAND DELIVERED

(Counsel for Respondents Insurance
 Commissioner, Steve Poizner and California
 Department of Insurance)

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

☒ FAX
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ HAND DELIVERED

(Counsel for Petitioners ACIC, PIFC, AIA and
 PADIC)

1 HARVEY ROSENFELD (SBN 123082)
2 PAMELA M. PRESSLEY (SBN 180362)
3 TODD FOREMAN (SBN 229536)
4 THE FOUNDATION FOR TAXPAYER
5 AND CONSUMER RIGHTS
6 1750 Ocean Park Boulevard, Suite 200
7 Santa Monica, California 90405
8 Tel. (310) 392-0522
9 Fax (310) 392-8874

10 Attorneys for
11 The Foundation for Taxpayer and Consumer Rights

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

11 THE ASSOCIATION OF CALIFORNIA
12 INSURANCE COMPANIES, THE PERSONAL
13 INSURANCE FEDERATION OF CALIFORNIA,
14 THE AMERICAN INSURANCE ASSOCIATION,
15 AND THE PACIFIC ASSOCIATION OF
16 DOMESTIC INSURANCE COMPANIES

17 Petitioners and Plaintiffs,

18 v.

19 STEVE POIZNER, in his capacity as Insurance
20 Commissioner of the State of California; and
21 CALIFORNIA DEPARTMENT OF INSURANCE,

22 Respondents and Defendants.

Case No. BS109154

[PROPOSED] ORDER

Date Action Filed: May 25, 2007

Date: June 27, 2007

Time: 8:30 a.m.

Dept.: 85

Judge: Dzintra Janavs

23 On July 27, 2007, Petitioners The Association of California Insurance Companies, The Personal
24 Insurance Federation Of California, The American Insurance Association, and The Pacific Association
25 Of Domestic Insurance Companies, Respondents Insurance Commissioner John Garamendi and The
26 California Department of Insurance, and The Foundation for Taxpayer and Consumer Rights (FTCR),
27 appeared in Department 85 at 8:30 a.m. in the above-captioned court. FTCR applied ex parte to file a
28 complaint in intervention in the above-captioned action.

1 The Court, having considered the papers and oral statements of counsel, and good cause
2 appearing therefore,

3
4 IT IS HEREBY ORDERED that The Foundation for Taxpayer and Consumer Rights is granted
5 leave to intervene, and leave to file its Complaint in Intervention.

6
7 [or in the alternative]

8
9 IT IS HEREBY ORDERED that the time for hearing on The Foundation for Taxpayer and
10 Consumer Rights request to intervene shall be shortened. The ex parte application for leave to
11 intervene and supporting papers served on the parties on July 26, 2007 and filed with the Court on July
12 27, 2007 shall be deemed the noticed motion. Any opposition by Petitioners is due on or before
13 _____. Any reply is due on or before _____. The hearing shall be held on
14 _____ at _____ in Department 85.

15
16 Dated: July __ 2007

17 _____
The Honorable Dzintra Janavs

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 July 26, 2007, I caused service of true and correct copies of these documents,

[PROPOSED] ORDER

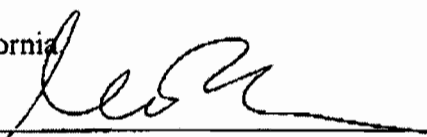
PROOF OF SERVICE

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 July 26, 2007, at Santa Monica, California


Mark Reback

SERVICE LIST

Person ServedMethod of Service

1		
2	<u>Person Served</u>	<u>Method of Service</u>
3	Natasha Ray	<input checked="" type="checkbox"/> FAX
4	Lizbeth Landsman-Smith	<input type="checkbox"/> U.S. MAIL
5	California Department of Insurance	<input type="checkbox"/> OVERNIGHT MAIL
6	300 Capitol Mall	<input type="checkbox"/> HAND DELIVERED
7	17th Floor	
8	Sacramento, California 95814	
9	Tel: (916) 492-3559	
10	Fax: (916) 324-1883	
11	(Counsel for Respondents Insurance	
12	Commissioner, Steve Poizner and California	
13	Department of Insurance)	
14	Mark Richelson	<input checked="" type="checkbox"/> FAX
15	Christine Zefarian	<input type="checkbox"/> U.S. MAIL
16	Deputy Attorneys General	<input type="checkbox"/> OVERNIGHT MAIL
17	OFFICE OF THE ATTORNEY GENERAL	<input type="checkbox"/> HAND DELIVERED
18	300 South Spring Street, Suite 1702	
19	Los Angeles, CA 90013	
20	Tel: (213) 897-2478	
21	Fax: (213) 897-5775	
22	(Counsel for Respondents Insurance	
23	Commissioner, Steve Poizner and California	
24	Department of Insurance)	
25	Robert Hogeboom	<input checked="" type="checkbox"/> FAX
26	Michael A.S. Newman	<input type="checkbox"/> U.S. MAIL
27	Suh Choi	<input type="checkbox"/> OVERNIGHT MAIL
28	BARGER & WOLEN LLP	<input type="checkbox"/> HAND DELIVERED
29	633 West Fifth Street, 47 th Floor	
30	Los Angeles, CA 90071	
31	Tel: (213) 680-2800	
32	Fax: (213) 614-7399	
33	(Counsel for Petitioners ACIC, PIFC, AIA and	
34	PADIC)	